

Managing Legal Liability in Agritourism & Direct Marketing Operations

The Managing Legal Liability publications were designed as part of the 2011 Extension Risk Management Education Grant Program a program of the Southern Risk Management Education Center. Project partners include:
Danville Community Market
Harrisonburg Farmers' Market
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Virginia Department of Agriculture and Consumer Services
Virginia Farm Bureau
Virginia FAIRS
Virginia Tourism Inc.
Williamsburg Farmers' Market

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Not legal advice *Contact your legal counsel*

- ❑ This presentation is based on research of the presenter and is intended for educational purposes only.
- ❑ You are encouraged to seek the advice of your tax or legal advisor, or other authoritative sources, regarding the application of these general tax principles to your individual circumstances.

Agritourism activity . . .

Code of Virginia § 3.2-6400. (Effective October 1, 2008) Definitions.

- *“any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, wineries, ranching, historical, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity.*

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.2-6400>

Direct Marketing

- On-farm sales
- Farmers' Markets
- Web-based sales
- Farm stands
- Roadside markets
- Value added Products



New Adventures = Increased Exposure

What to do with Risk

- Avoid
- Minimize – make the operation safe
- Transfer the risk to someone else
- Live with it

What if . . .

- What if someone on your farm/farmers' market is injured?
- What if someone becomes ill (or worse) after eating your produce?
- What if a woman alleges that she became ill after being on farm because of pesticides (a recent case in Virginia)?

What would you do . . .

- ❑ Attorneys' fees in minor case could easily be \$10,000
- ❑ In a major case, attorneys' fees could be \$50,000; \$100,000 or more
- ❑ Can your operation pay for the attorneys' fees and continue to operate? What if you lose and have to pay a judgment in addition?

Opening the Can of Worms

- ❑ In the United States, each party pays their own attorneys' fees unless:
 - statute (law) says otherwise
 - contract says otherwise
 - frivolous lawsuit
- ❑ No statute applies to agriculture/agritourism in general
- ❑ Frivolous lawsuit provision not often applied

Opening the Can of Worms

- First and foremost, take preventive measures to minimize the chances of an accident or lawsuit
- Secondly, be prepared if/when an accident or lawsuit occurs
- PROTECT your operation so it may continue into the future

Opening the Can of Worms

- **Business Practices and Safety Procedures**
- **Liability Assessments**
- **Liability Insurance**

The Issue of Farm Legal Risk

Visit <http://virginiafarmtable.org/liability-and-risk-management/>

or

<http://pubs.ext.vt.edu/index.html> and search for *liability*

Potential Liability

- People on your property
- Employees
- Neighbors
- Customers
- Other third parties

Types of Liability

- General Liability
 - *Financial loss because of bodily injury or property damage to employees or customers.*
- Personal Injury
- Property Damage
- Products Liability
- Professional liability
 - *Services to customers that cause personal harm.*

A Lawsuit: Understand Your Legal Obligation

- ❖ **Four elements the plaintiff must generally prove:**
 - A **duty of care** existed.
 - The defendant **breached** the duty of care.
 - **Damages** were sustained by the plaintiff.
 - The damages were **caused** by the defendant's breach of duty of care.

Duty of Care

- Landowners have a duty of care to visitors that depends on the type of visitor . . .
 - **Trespassers** . . . Duty of care is not to intentionally harm (no booby traps) and warn of dangers that are not obvious.
 - **Licenses** . . . Must warn of known dangers that are not obvious.
 - **Invitee** . . . Must inspect for dangers and correct or give adequate warning.

Breach of Duty

- Breach may be by action or failure to act.
 - **Negligence** . . . Usually determined by what a reasonable, prudent person would have done under similar circumstances.
 - **Gross negligence** . . . A willful, intentional act or an act of reckless disregard.
 - **Negligence per se** . . . considered negligent because of violation of law.

Damages

- Damages is the value of injuries suffered.
 - **Actual damages** . . . cost of repair, doctor bill, loss of value to property, pain and suffering, lost wages, etc.
 - **Nominal damages** . . . an amount awarded when a wrong occurs, but damages are not substantial.
 - **Punitive damages** . . . An amount awarded to the plaintiff to punish or make an example of the defendant. Awarded only for outrageous conduct.

Causation

- Causation must be proven indicating . . .
 - Damages appear to have resulted from the defendants actions because of
 - Proximity
 - Foreseeability (predictability)
 - Likelihood

Grounds for Liability

- Intentional acts
- Negligent acts
- Strict liability
 - Holds the defendant liable for damages caused by their actions regardless of fault, negligence, or duty of care.
- Contract

Business Practices and Safety Procedures

What you should do . . .

- **Business Structure and Practices**
 - Use best organizational structure
 - Train employees
- **Liability Insurance**
 - Review insurance coverage
- **Liability Audits = *Liability Risk Assessment***
 - Review property and employee written procedures and practices
 - Design and complete appropriate documentation

Legal Structure

- Review your farm legal structure with your attorney.
 - Use an appropriate business entity (Sole Proprietorship, Partnerships, Corporations, Limited Liability Corporations, Cooperatives).
 - Maintain separate records and checking accounts.

Download the Virginia FAIRS publication on
Legal Structure located at <http://www.vafairs.com/publications.shtml>

Farm Liability Insurance

- ❑ Transfers a portion of the risk to the insurance company.
- ❑ Covers damages caused to another individual for which you are legally responsible.
- ❑ Covers cost to defend against a lawsuit.

Farm Liability Insurance . . . The Policies

- ❑ Farmers Comprehensive Personal Liability Policy
- ❑ General liability insurance
- ❑ Farm Umbrella coverage
- ❑ Professional liability insurance
- ❑ Workers' compensation insurance
- ❑ Equine liability insurance
- ❑ Event liability insurance
- ❑ Cyber liability insurance

Managing Legal Liability Series: Insurance Checkpoints factsheet is available at <http://pubs.ext.vt.edu/CV/CV-16/CV-16-PDF.pdf>

Liability Insurance

Things to remember . . .

- ❑ Essential for all producers, particularly those with limited resources.
- ❑ General Farm Policy- Beware!
- ❑ Disclose all activities to insurance agent.
- ❑ How much insurance is enough?
- ❑ Higher risk activities demand higher premiums and larger coverage amounts.
- ❑ Read Policy Exclusions . . . *What the large print giveth, the small print taketh away.*
- ❑ Pay for legal expertise . . . Attorneys' fees!

Liability Assessments

What has more risk?

- Hay rides?
- Corn mazes?
- Horseback riding?

What has more risk?

Scale 1 to 5 (5 is the highest risk)

- Hay rides – *Risk Level 3*
- Corn mazes – *Risk Level 2*
- Horseback riding – *Risk Level 5*

Proactive Safety Management


Liability Assessment Programs

- Develop a **proactive liability assessment program** watching for possible problems.
- Develop a facility safety routine.
- Complete daily checklists to ensure that areas are clear & meet safety standards.
- Make *safety* a key word every day and part of every employee's job.
- Use contracts.
- Use release of liability forms.

Grounds, Equipment & Safety

- Use safety latches and locks to secure areas not open to the public.
- Remove keys from tractors and other equipment.
- Keep dangerous items out of reach of the public.
- Keep walkways, aisles, driveways, etc. clean and free clear of obstacles, snow, ice, etc.

- Use equipment appropriate to your activity.
- Set up your facility specifically for your activity (*avoid comingling your businesses*).
- Post signs (with pictures) to warn customers of potential risks and hazards.
- Secure specific areas from public.
- Minimize or eliminate contact between animals and customers.



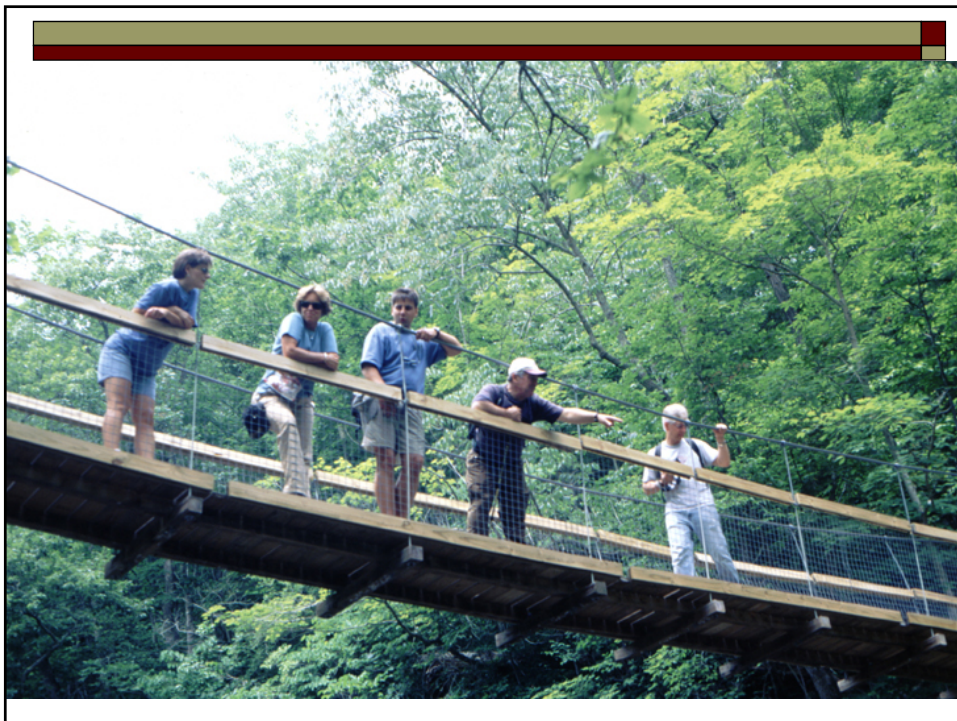
Integrating Safety into Agritourism



National Children's Center for Rural and Agricultural Health and Safety
Marshfield, Wisconsin
<http://www.safeagritourism.com/>

Home Walkthroughs Communicating with Guests Resources SafePlay About Us Feedback

Animal Safety	Emergency Prep & Plan	Food Safety
Handwashing & Restrooms	Traffic and Parking	Water & Attractive Nuisances
Corn Maze	Hayride Safety	Machine Safety
Barriers & Fencing	Walkways & Structures	

Check E...
Our website is always growing... We will continue to add content, including new walkthroughs and resources



 **WARNING** 

Under Virginia law, there is no liability for an injury to or death of a participant in an agritourism activity conducted at this agritourism location if such injury or death results from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this agritourism activity.



Direct Marketing: Products Liability



- The legal liability for personal injuries and property damage caused by defective products.
- Either the user of the product or others affected by the use of the product may file suit.
- Potential liability attaches to every enterprise in the chain of supplying a product to market, including the producer, wholesaler and retailer.

Products Liability

- **Grounds for liability**
 - **Strict Liability** – responsible for damages their actions/products cause regardless of any “fault” on their part
 - **Negligence**
 - **Implied warranty**

Virginia Products Liability

- Virginia does not impose strict liability. The majority of states impose strict liability in tort (liability without fault).

- Negligence is the grounds of liability.

Concerns about Products Liability

- The **number of claims and lawsuits** in products liability generally **has grown** significantly in recent years.
- Injured parties **increasingly receive large amounts of compensation** in these cases, through either court judgments or settlements.
- **Farm markets and other direct sales of farm products exposes producers to higher risk**, whether the food products provided are produced on the farm or are purchased from suppliers.
- **Processing and packaging products for direct sale further increases potential liability.**

What's available . . .



Food safety guidelines

- ❑ http://www.foodsafety.gov/blog/farmers_market.html
- ❑ Purdue:
 - <http://www.extension.purdue.edu/extmedia/EC/EC-740.pdf>
- ❑ VDACS:
 - <http://www.vdacs.virginia.gov/fdsafety/index.shtml>
- ❑ Virginia Cooperative Extension:
 - <http://pubs.ext.vt.edu/FST/FST-72/FST-72-PDF.pdf>
 - <http://pubs.ext.vt.edu/FST/FST-45/FST-45NP.html>
(checklist)

Liability Insurance

Farm Liability Insurance . . . The Policies

- ❑ Farmers Comprehensive Personal Liability Policy
- ❑ General liability insurance
- ❑ Farm Umbrella coverage
- ❑ Professional liability insurance
- ❑ Workers' compensation insurance
- ❑ Equine liability insurance
- ❑ Event liability insurance

Farmowner Policy Coverages

A Base policy provides:

- ❑ **Premises and operations liability protection**
- ❑ **Products liability coverage. Products liability provides coverage for “raw” products only.**
 - If the raw product is altered by you there is no products coverage under the base farmowner policy.
 - Coverage can be obtained by adding an endorsement to the Farmowner or writing a separate policy.

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Farmowner Liability Exclusion

**"Bodily injury" or "property damage"
which results from activities related to the
"business" of an "insured".**

- On a Farmowner policy, business is considered anything other than farming (i.e. agritourism activities)
- Sometimes "incidental" business pursuits within a certain receipts limit are covered (or can be endorsed) to the policy - such as roadside stands or custom farming activities.

Obtainability will depend on the wording in the policy & your insurance carrier's available endorsements

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Activities/Exposures and Insurance Solutions

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Activity/Exposure:

Farming -crops or livestock

Insurance Solution:

**Farmowner policy or Homeowner policy
with a Farm endorsement**

*(depends on the insurance company
that carries your policy)*

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Activity/Exposure:

**Agribusiness or agritourism – ordinarily
conducted on your premises or on another
premises by you other than crop or
livestock farming.**

Insurance Solution:

**General Liability policy; or other specialty
liability policy (like Equine)**

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General Liability Policy Insuring Agreement

“We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.”

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**Your insurance company’s responsibility  
is to protect YOU!**

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### ***Activity/Exposure:***

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**Special event - such as a fair, carnival, exhibition, fundraising activity, Halloween maze or other event of short duration.**

### **Insurance Solution:**

**Special Event Policy**

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### ***Activity/Exposure:***

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You have a website and sell produce from your farm over the web. You take on-line orders and accept credit card payments over the internet through a third party payment service (*i.e.* PayPal®)

### **Insurance Solution:**

Cyber Liability policy; or endorsement on General Liability or Farmowner policy if available

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## **Cyber Liability**

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**Common causes for lawsuits are copyright infringement, invasion of privacy or other types of issues that arise when operating on the web. Particularly if you have others responsible for the content on your site, you are open to some of these claims.<sup>1</sup>**

***\*\*Includes Websites, Facebook, Twitter, Email, Text messages, etc.***

1. Excerpt from <http://liabilityinsurancefacts.com/ar/cyber-liability-insurance.php>

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***Activity/Exposure:***

**You have Farm employees and/or use H2A (migrant) workers.**

**Insurance Solution:**

**Workers' Compensation policy; or  
Employers' Liability endorsement on the  
Farmowner policy (if available)**

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| <p><b>You have 400 acres, 6 pleasure horses, corn &amp; wheat crops &amp; various farm animals</b></p>                                                                                                                       | <p><b>Farmowner policy</b></p>                                                                     |
| <p><b>You have the above, plus have decided to stock &amp; sell horse feed and horse care products. (You do not re-package or re-label the products.)</b></p>                                                                | <p><b>General Liability policy</b></p>                                                             |
| <p><b>You have the above and are now boarding 10 horses for others and giving horseback riding lessons.</b></p>                                                                                                              | <p><b>Equine policy</b></p>                                                                        |
| <p><b>You have the above plus have a Halloween corn maze the last two weeks of October.</b></p>                                                                                                                              | <p><b>Special Event policy or an additional classification on the General Liability policy</b></p> |
| <p><b>You have the above and now have your own website. You advertise your farm, your horse products, horse boarding, horseback riding lessons &amp; the corn maze on it. You also advertise on your Facebook® page.</b></p> | <p><b>Cyber Liability policy</b></p>                                                               |
| <p><b>You feel you need some additional liability protection.</b></p>                                                                                                                                                        | <p><b>Commercial Umbrella policy</b></p>                                                           |

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## Insurance Websites

- [liabilityinsurancefacts.com](http://liabilityinsurancefacts.com) (Liability info)
- [www.vwc.state.va.us](http://www.vwc.state.va.us) (Work Comp)
- <http://www2.iii.org/glossary/> (Insurance Terminology)

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## Liability Acts



- **Agritourism Activities Liability Act**
  - § 3.2-6401. (Effective October 1, 2008) Liability limited; liability actions prohibited.
    - <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.2-6401>
  - § 3.2-6402. (Effective October 1, 2008) Warning required.
    - <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.2-6402>
- **Food Inspection**
  - § 3.1-398.1. Inspections required to operate food establishment <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-398.1>
  - **NOT FOR RESALE—PROCESSED AND PREPARED WITHOUT STATE INSPECTION.**
- **Recreational Use Statute**
  - § 29.1-509. Duty of care and liability for damages of landowners to hunters, fishermen, sightseers, etc. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+29.1-509>
- **Equine Activity Liability Act**
  - § 3.2-6200. (Effective October 1, 2008) Definitions. <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.2-6200>
- **Cave Liability Act**
  - *Code of Virginia - Chapter 10* <http://legis.state.va.us/Laws/CodeofVa.htm>

## References & Forms


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- Richardson, J. *Managing Liability: Legal Liability in Agritourism and Direct Marketing Operations*. Virginia Cooperation Extension.
  - References and Resources listed on page 14 – 15.
  - Forms listed on page 15 – 21.

## Call to Action

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- **Develop your Liability Management Plan**
  - Organize a team of experts: Attorney, Insurance Agent, CPA/Accountant
  - Plan . . . business organizations, titling of property, leasing, etc.
  - Purchase liability insurance. Tailor coverage to fit operation.
  - Remember *civil liability* is always an option.
  - Make safety a part of day-to-day operations.
- **Questions . . . ?**



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