WV EXTENSION SERVICE

Guide to Legal Issues in Direct Marketing for West Virginia Producers

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Introduction

Nationally, the desire for consumers to purchase food locally is on the rise. This trend can be attributed to a number of factors, including: concern over food safety, the increased industrialization of food production, which results in the decline in local farming and the loss of family farmers, and a growing interest in "clean food" as a social trend.[i] As a result, more and more consumers are looking to purchase their food directly from the farmer who grew it, or at least from a source that they know and trust. Direct farm marketing has been around forever, but the interest and demand is growing rapidly as consumers search for a better alternative.

More and more consumers are looking to purchase their food directly from the farmer who grew it, or at least from a source that they know and trust.

In its simplest form, direct farm marketing means "any transaction between the person who raises the food and the person who consumes it."[ii] From there, direct farm marketing can expand to include such activities as producers joining together in cooperatives to sell their produce or chefs establishing sources for local ingredients to be used in their restaurants. Some examples of direct farm marketing include farmers markets, pick-your-own operations, roadside stands or farm stands, food hubs, online sales, or community-supported agriculture (CSA).

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CSA operations allow consumers to have direct access to high quality, fresh produce grown by local farmers. When you become a member of a CSA, you're purchasing a "share" of the produce from a local farmer.[iii] A farmer offers a certain number of "shares" to the public, which typically consists of a box of vegetables, though other farm products such as eggs, meat, or flowers may be included. CSA members pay for an entire season of produce upfront, which enables the farmer to plan for the season, purchase new seed, make equipment repairs, etc.[iv]

Agritourism is another popular form of direct farm marketing. Although West Virginia has no exact definition of agritourism, most definitions have a common theme that combines elements of farm life and elements of the tourism industry. One formal definition of agritourism is "An activity, enterprise or business that combines primary elements and characteristics of agriculture and tourism and provides an experience for visitors that stimulates economic activity and impacts both farm and community income."[v] The objective of agritourism includes having members of the public come to the farm, with the ultimate goal being to increase and diversify farm income by providing fee-based recreation and education to consumers. With proper planning and execution, agritourism is a tool that can directly increase farm income.[vi]

No matter the form, direct farm marketing is an effort to establish personal contact between the people who grow the food and the people who consume it.[vii] This allows the people on both sides of the transaction to shorten the production and distribution chain that brings food to the marketplace. By removing several levels between them, such as wholesalers and processors, the parties can enjoy food and the producer gets the full economic benefit of his product.[viii] In fact, direct farm marketing typically will not increase the price for the consumer – it may even be lowers. Whereas on the other side, this arrangement is likely to increase the amount the producer receives.[ix]

By removing several levels between them, such as wholesalers and processors, the parties can enjoy food and the producer gets the full economic benefit of his product. In fact, direct farm marketing typically will not increase the price for the consumer – it may even be lowers. Whereas on the other side, this arrangement is likely to increase the amount the producer receives.

Like other forms of agricultural activities, direct marketing comes with its own set of legal and liability concerns. Because of its unique nature, governments have enacted additional laws at various levels to protect consumers and regulate direct farm marketing activities.[x] As a result, farmers involved in direct marketing activities need to be mindful of the effect these laws have on their operations. Although there are a growing number of resources written to assist farmers in understanding agricultural law topics, there are far less specifically aimed at direct marketing practices.[xi] Because this is a new and growing industry, the lack of information about the laws and rules creates uncertainty about how different business decisions might impact a farm, thus leaving farmers hesitant to engage.

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It should be noted that this manual is in no way an exhaustive guide to all potential legal problems direct market farmers might encounter. However, it is at least a good starting point for those interested in breaking into the industry. It is still advised that any new or current farmer

consult with an attorney about their specific farming practices if there is any doubt. With that said, this manual does attempt to provide some insight into the law to get you started in the right direction.

General Liability Principles

Liability is a legal obligation that arises to a private party, usually for payment of damages or other court-enforcement of a lawsuit.[xii]

What is a Tort, and Why Does it Matter?

Tort law decides whether a person should be held legally responsible for injury against another person, and what type of compensation the injured party is entitled to.[xiii] A tort is a civil wrong or wrongful act, whether intentional or accidental, from which another is injured. Torts include all negligence cases as well as intentional wrongs that result in harm.[xiv] There are four elements to tort law: (1) duty, (2) breach of duty, (3) causation, and (4) injury. So in order to claim damages, a producer must owe the consumer a duty of care, breach that duty, thus causing an injury to another (damages). The three main types of torts are negligence, strict liability, and intentional torts.[xv]

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Concept of Negligence

Generally, a person acts negligently if he does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are:

A person acts negligently if he does not exercise reasonable care under all the circumstances.

1. the foreseeable likelihood that the person's conduct will result in harm,
2. the foreseeable severity of any harm that may ensue, and
3. the burden of precautions to eliminate or reduce the risk of harm.[xvi]

However, it is important to note that just because someone was injured on your property, that does not necessarily mean you were negligent. Showing that the property might have been in an unsafe condition does not automatically mean that the property owner was negligent; the injured party must prove that the property owner knew or should reasonably have known that the premises were in an unsafe condition, and still failed to take proper steps to remedy or mitigate the situation.[xvii]

Strict Liability

Strict liability arises where personal injuries or property damage is caused by these activities, sometimes called "ultra hazardous activities." The strict liability standard differs from negligence because it "relieve[s] the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and [it] permit[s] proof of the defective condition of the product as the principal basis of liability."[xviii] The test for establishing strict liability in tort sometimes asks whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The particular producer does not determine the standard of "reasonable safeness", but rather it is judged by what a reasonably prudent producer's standards should have been at the time the product was made.[xix] Very dangerous activities are sometimes classified as strict liability activities. For example, some states classify blasting activities or aerial pesticide application as strict liability.

Intentional Torts

An intentional tort occurs if someone intended for the physical consequences to happen to another or knew/should have known that the intended consequences were likely to happen because of his/her conduct.[xx]

> An intentional tort is most likely to arise in a farm business when someone intrudes onto the farm property and that intrusion is resisted. Intentional torts against a person include assault (an act causing fear that a battery will occur), battery (an act causing harmful or offensive touching), fraud (intentionally misleading someone to cause them to give up a legal right), libel (written defamation) and slander (spoken defamation). Intentional torts against property include trespass (entering property without permission) and conversion (an unauthorized taking of property). A person who is accused of an intentional tort can defend himself or herself by claiming self-defense. This defense allows a person to use reasonable force to defend property and persons.[xxi]

For example, if Hunter climbed over Producer's fence without his permission and set up a deer stand on Producer's property, Hunter has trespassed on Producer's land. If Producer physically removed Hunter from his property, Producer may have committed a battery. However, if Hunter can show that he had permission to hunt on Producer's land, he would not be a trespasser because Producer consented to his presence.[xxii]

Premises Liability

Where some type of unsafe or defective condition on someone's property caused the injury, the legal concept of premises liability comes into play. To make a case for premises liability, the injured person must show that the property owner was negligent with respect to safeguarding or maintaining the property. Typically, a property owner is negligent if he failed to use reasonable care in connection with the property.[xxiii]

Liability of Owners and Lessees of Land

Not all those who enter your property are due the same standard of care. A licensee enters the property for his or her own purposes, but is present at the consent of the owner. In this case, the owner is required to warn a licensee of hidden dangers, but is not necessarily required to fix them.[xxiv] An example of a licensee would be a friend or social guest, or a neighbor who you allow to hunt or fish on your property without charging a fee. An invitee is someone who has been either expressly or impliedly invited onto your property. A property owner owes an invitee the *highest duty of care*, which includes taking every reasonable precaution to ensure the invitee's safety.[xxv]

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Patrons of agritourism are invitees. Legally, they are owed the highest degree of care to avoid injury. The property owner has the responsibility to warn invitees of potential dangers and to keep the areas that are open to the public safe. Duties owed to an invitee can include, but are not limited to:

1. taking reasonable care to ensure that the property is safe;
2. warning them about standing water, holes in the ground and logs that could cause someone to trip;
3. warning them of obviously dangerous things and keeping them away from the customers; and
4. proper disclosure and labeling of any potential health or safety risks they may encounter on your property.

For example, you should not keep farm equipment unlocked with the keys on the seat, or leave an inconspicuous pothole unfilled.[xxvi] However, West Virginia law no longer distinguishes between licensees and invitees.*xxvii* In the 1999 case of *Mallett v. Pickens*, the West Virginia Supreme Court of Appeals abolished the common law distinction between licensees and invitees. Therefore, all non-trespassing entrants are owed a duty of reasonable care under the circumstances.[xxviii]

But, what if someone enters your property without your permission? A trespasser is one who "knowingly and without permission comes onto your land." If someone is hurt while trespassing, a landowner is not liable for their injuries. But, if you find a trespasser on your land, you cannot intentionally injure the person.[xxix] The 1999 case of *Mallett v. Pickens* also spoke in regard to trespassers, about which the Court stated, "[w]e retain our traditional rule with regard to a trespasser, that being that a landowner or possessor need only refrain from willful or wanton injury."[xxx] A landowner or possessor will also be liable if he maintains a highly dangerous condition or instrumentality on the property.[xxxi] However, it should be noted that property owner owes a special duty to children as trespassers. A property owner is liable for harm to children trespassing on their land if the following conditions are true:

If you find a trespasser on your land, you cannot intentionally injure the person.

1. they have reason to know that children are likely to trespass,
2. they know or should know that the land condition involves unreasonable risk to the children,
3. the children do not realize the risk involved,
4. the reason for having the dangerous condition and the cost of eliminating the danger are small compared to the risk to the children, and
5. the owner or tenant fails to use reasonable care to protect the children or eliminate the danger.[xxxii]

West Virginia defines a trespasser as "one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner."[xxxiii]

Summary of Landowner Duty of Care:

Trespasser	Duty of care is not to intentionally harm and warn of dangers that are not obvious
Invitee	Must warn of known dangers that are not obvious.
Licensee	Must inspect for dangers and correct or give adequate warning

Open and Obvious

West Virginia courts have historically held that an individual is not allowed to recover damages from injuries that occur due to hazards that are "open and obvious," thus providing a defense to property owners.[xxxiv] For example, if there is a large and visible pit on the farmer's property and is the danger is seemingly "open and obvious," the property owner will not be held liable for an injury sustained to a child who was playing too close to the pit and fell in.[xxxv] Although the West Virginia Supreme Court issued a decision in 2013 that abolished the previous standard, the West Virginia Legislature created a new policy in 2015 that reinstated the open and obvious doctrine to its status prior to the Court's 2013 decision.[xxxvi]

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Under the statute, a possessor of real property "owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant."[xxxvii] This new statute authorizes courts to dismiss an action without a trial if the judge determines that the hazard is open and obvious. The judge's determination serves as a complete defense to all liability for damages, regardless of the relative fault of the landowner or occupier and the individual who failed to exercise self-protective care.[xxxviii]

Recreational Use Statutes

Property owners can limit liability through their state's recreational use statute. Recreational use statutes were enacted to encourage property owners to make their land available for recreational activities such as hunting, fishing, and hiking by making it less likely that they would be liable for damages if a recreational user is injured on their property.[xxxix] Every state has a recreational use statute. Although they vary, generally they relieve a property owner from a duty of care to keep their property safe for use, a duty to warn of dangerous conditions, or an assurance of the user's safety.[xl]

West Virginia's recreational use statute states that:

1. A property owner owes no duty of care to keep the premises safe for entry or use by others for recreational or wildlife propagation purposes, or to give any warning of a dangerous or hazardous condition, use, structure or activity on such premises to persons entering for such purposes.
2. An property owner who either directly or indirectly invites or permits without charge any person to use such property for recreational or wildlife propagation purposes does not:
   a. extend any assurance that the premises are safe for any purpose
   b. confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or
   c. assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.
3. This does not in any way limit liability which otherwise would exist for:
   a. deliberate, willful or malicious infliction of injury to persons or property; or
   b. injury suffered in any case where the owner of land charges the person or persons who enter or go on the land other than the amount, if any, paid to the owner of the land by the federal government or any agency thereof, the state or any agency thereof, or any county or municipality or agency thereof.[xli]

A landowner may exclude hunters, trappers and fishermen by fencing, enclosing, posting, or marking with purple paint.[xlii] It is a trespass to enter onto land that is indicated by posting, including by purple paint markings, fencing, or cultivation.[xliii] Purple paint markings must be clearly visible; at least 8" long × 2" wide; the bottom of the mark not less than 3' nor more than 6' from the surface; affixed to immovable, permanent objects no more than 100' apart and clearly visible; and accompanied by signs posted at all roads, driveways or gates.[xliv]

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Although recreational use statutes have been very successful in encouraging property owners to open up their property for recreational purposes, it is important to remember that the statute is not a total bar to liability.

Liability Release Waivers

Owners and operators may seek to avoid liability by having visitors sign a waiver or anticipatory release of liability. In West Virginia, anticipatory releases of liability are generally enforceable if an express agreement "is freely and fairly

made, between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes."[xlv] However, liability waivers are void if the party being released from liability is charged with a duty of public service to the releasing party or the releasing party is protected by law from the person causing the injury.[xlvi]

For some dangerous recreational activities, liability waivers are void where the released party violates a statute or commits "intentional or reckless misconduct or gross negligence."[xlvii] In a West Virginia case, the Court held that anticipatory releases for "inherently hazardous recreational or amusement activities" such as the whitewater rafting excursion at issue there "will usually be unenforceable when they involve a violation of statutory safety standards or intentional or reckless misconduct or gross negligence."[xlviii]

Agritourism Liability Acts

A number of states have enacted agritourism liability acts. Agritourism liability acts relieve a property owner of some – but not all – premises liability. For example, the Virginia provision on liability of the operator provides for liability if the agritourism professional does any one or more of the following:

Agritourism liability acts relieve a property owner of some – but not all – premises liability.

1. Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant and that act or omission proximately causes injury, damage, or death to the participant.
2. Has actual knowledge or reasonably should have known of a dangerous condition on the land or in the facilities or equipment used in the activity or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant, and the danger proximately causes injury, damage, or death to the participant.
3. Intentionally injures the participant.[xlix]

An operator can limit exposure to liability in these cases with the use of release forms and contracts. If, for example, school groups are visiting the farm, the operator should have the parents of the participants sign release forms.

West Virginia enacted the state's version of an agritourism liability act in 2018 with the Agritourism Responsibility Act[l]. The Act is similar to other agritourism liability acts, but contains some unique features. "Agritourism" is defined broadly, as "any lawful 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.[li]

If the operator of an agritourism business posts a notice in the form prescribed in the law, neither the business nor employees or volunteers are liable for accidents that result from "inherent risks of agritourism activities", with certain exceptions for grossly negligent or intentional acts. The "inherent risks" include, among other things, "the behavior of wild or domestic animals" and failing to follow the instructions given by agritourism professionals.[lii]

West Virginia producers involved in agritourism activities should consult an attorney and post the sign in the exact form required by the Act to receive the protections. However, the other steps outlined in this manual should be followed to further limit liability, and the operator should still obtain adequate liability insurance. The impact of the Act will not be known until lawsuits test the limits.

Products Liability

One form of civil liability is products liability. Products liability law refers to 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. For example, Paula Producer sells produce to Greta's Grocery Store. Greta's Grocery Store sells some of the produce to Harry Homemaker. Harry Homemaker prepares and serves the food, infected with a pathogen, to his family and friends. Paula is potentially liable to Harry, his family members, and his friends for personal injury and property damage. In addition, potential liability attaches to every enterprise in the chain of supplying a product to market, including the producer, wholesaler, and retailer – in this case, Greta's Grocery Store.[liii]

In the past, products liability cases in agriculture usually involved the farmer as an injured party. For example, farm workers injured by defective farm machinery and operators harmed by defective feed, medicines, or chemicals have successfully filed suit in various states.

Now, farmers are increasingly the target of products liability lawsuits due to illness or death caused by contaminated agricultural products. Products liability applies to raw produce, baked goods, value-added products, and goods purchased from others for resale. Exposure to liability increases as the amount of processing increases. Something as simple as slicing a cantaloupe in half for sale at a farmers market counts as "processing" and increases your exposure to liability as well as possibly limiting your insurance coverage.[liv]

Three factors make products liability an increasing concern to agricultural producers in West Virginia and across the country.

1. The number of claims and lawsuits in products liability has grown significantly in recent years.
2. Injured parties increasingly receive large amounts of compensation in these cases, through either court judgments or settlements.
3. The marked increase in the number of Virginia operations that include farm markets and other direct sales of farm products exposes producers to higher risk.[lv]

Whether the food products provided are produced on the farm or purchased from suppliers, farmers face liability. Many producers now process and package products for direct sale, further increasing potential liability. Producers have a duty to warn only of risks that may arise from foreseeable uses of a product.

Whether the food products provided are produced on the farm or purchased from suppliers, farmers face liability. Many producers now process and package products for direct sale, further increasing potential liability. Producers have a duty to warn only of risks that may arise from foreseeable uses of a product. As the West Virginia Supreme Court of Appeals has stated, "[a] manufacturer must anticipate all foreseeable uses of his product. In order to escape being unreasonably dangerous, a potentially dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe."[lvi]

In most states, producers are strictly liable for injuries incurred due to contaminated products sold by them, regardless of fault (strict liability). Delaware, Massachusetts, Michigan, North Carolina, and Virginia appear to be the only exceptions.[lvii]

Liability Insurance[lviii]

Risk can be addressed in four different ways: avoid it, reduce it, accept it, or transfer it to another party – namely an insurance company. Most businesses choose to transfer at least a portion of the risk to an insurance company. However, insurance companies are not required to accept any risk. The greater the risk, the greater the cost of the policy. Occasionally, a risk is too great even for an insurance company to bear. In these cases, the farmer can best avoid any financial risk of loss by abstaining from that activity altogether.

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An insurance policy is a contract between the insurance company and the insured. The purchase of an insurance policy generally serves to shift at least a portion of the financial risk of certain losses to the insurance company. Liability insurance refers to coverage for injury to another person or damage to another person's property for which you are legally responsible. In today's business world, virtually every business should be covered by a liability insurance policy. In addition to paying any covered claims up to the limits of liability, liability insurance pays defense costs, including attorney's fees, for covered events.

The alternative to purchasing liability insurance is to self-insure for liability losses. Self-insuring involves retain sufficient cash reserves to pay for the defense of claims and to pay valid claims. Given the cost of litigation and the possibility of judgments in the hundreds of thousands of dollars, most businesses find it more feasible to purchase a liability insurance policy.

All agricultural producers and marketers MUST have a liability insurance policy with adequate liability limits and that covers their activities. Even if your business takes every possible step to be safe YOU MUST HAVE LIABILITY INSURANCE. Even if your state has an agritourism liability act, YOU MUST HAVE LIABILITY INSURANCE. Even if you have no assets or few assets, YOU MUST HAVE LIABILITY INSURANCE. EVERYONE should have liability insurance.

Producers and marketers should also speak with their insurance agent periodically to verify that all existing activities and new activities are covered, and to explore whether additional coverage options should be considered. Whenever your agent tells you that you are covered – GET IT IN WRITING!

Who is Insured Under the Policy?[lvix]

Obviously, the provisions of the policy cover the person or business that purchases the insurance policy. This person or business is the "named insured." However, the named insured or others dealing with the named insured should consider adding additional insureds. An "additional insured" is a party not automatically included on another's insurance policy who has been named in order to afford them protection.

Two situations should induce the policyholder to name additional insureds.[lx]

1. If the named insured is a business entity, like a partnership, corporation, or limited liability company, the owners and the spouses of the owners of the business entity should be named as additional insureds. An injured party may well file suit against the business entity and the owner(s). Particularly where the owners personally perform business duties with respect to the operation, the threat of liability is real.
2. Where the named insured deals with other persons or businesses, the other businesses may require that the named insured add them as an additional insured. For example, a church runs a food stand at an agribusiness operation. Whether the agritourism operator charges the church a fee or not, the operator should require that the church name the agritourism operation as an additional insured on the church's policy and provide a certificate of insurance to show proof of coverage if someone becomes ill after eating food at the church booth, a lawsuit will likely name both the church and the agritourism operator.

Another common situation that calls for additional insured is a farmers market. If a vendor at a marked is sued, chances are the market and the landowner will be sued as well. The farmers market should require a certain level of insurance by vendors. If the vendor has no insurance, an injured party will look to the farmers market or landowner for recovery. In addition, the farmer market and landowner should require that they be named as additional insured and that the vendors provide a certificate of insurance as proof of the amount of coverage and the named insured status.

The Farmers Comprehensive Personal Liability Policy

One step in your liability minimization plan involves obtaining adequate liability insurance. Standard homeowner's insurance policies do not typically provide coverage for commercial operations such as the sale of produce, cottage food operations, or agritourism activities. A typical homeowners policy contains an exclusion similar to the following:

> Liability coverage does not apply to bodily injury or property damage because of or arising out of a business owned or financially controlled by an insured or by a partnership or joint venture of which an insured is a partner or member.

Persons operating businesses from the home may also lose coverage on the structure/contents as a result of a loss resulting from the business (e.g. fire loss). For example, assume that you own a computer that you use in your home business. If a fire destroys the computer, your homeowners policy will not recover the loss of the computer.

The farmers comprehensive personal liability policy (FCPL policy) is another particular form of liability insurance policy. Most farmers use the FCPL policy, and its provisions seek to meet the particular needs of farmers. This section discusses the common provisions of the FCPL policy in Virginia, points out common shortfalls in the policy for farm operations, and suggests steps to ensure that a farmer's policy protects against applicable risks.

Obligations of the Insurance Company[lxi]

Duty to Indemnify

The insurance company agrees to pay for bodily injury and property damage arising from covered activities. Policy limits set the boundaries for this liability. For example, if a farmer holds a $500,000 liability insurance policy and an injured party obtains a $75,000 judgment against the farmer for a covered activity, the farmer remains personally liable for the $250,000 excess judgment.

Duty to Defend

The insurance company agrees to pay for bodily injury and property damage arising from covered activities. Policy limits set the boundaries for this liability. For example, if a farmer holds a $500,000 liability insurance policy and an injured party obtains a $750,000 judgment against the farmer for a covered activity, the farmer remains personally liable for the $250,000 excess judgment.

Duty to Defend

The insurance company additionally agrees to defend, at its expense, the insured in a lawsuit brought by a third party relating to a covered risk. The company will choose and pay the attorney. However, the attorney represents the insured, not the insurance company.

Some insurance policies provide that the cost of defending a lawsuit reduces the limits of liability. For example, a farmer has a policy with limits of liability of $250,000 per occurrence and $1 million total. The company defends a lawsuit against the farmer at a cost of $50,000. The farmer now holds coverage for $20,000 for that particular incident and $950,000 total.

The company normally holds the right to settle the case on the insured's behalf. Therefore, even if you wish to go to trial, the insurance company can settle the claim. In cases where the injured party asks for more than the policy's limits, the

company may pay the totally limit of liability and not defend the case.

Using the information from the above example, if the injured party sued for $1 million, the company may pay the injured party $250,000 and then have no further obligations in the case. If the case if settled for less than the policy limits, then the case is over and the policyholder has nothing else to pay. However, the insurance company may also pay the full amount of policy limits and leave the policyholder, at the policyholder's expense, to defend against any further recovery.

Obligations of the Insured

The insurance company may be relieved of its duties if the farmer fails to live up to his or her promises. Failure to pay premiums on time results in loss of coverage.

Duty to Cooperate

The insured must promptly notify the company of accidents or incidents that may result in liability claims. Additionally, the insured must cooperate fully in the investigation and defense of the case, including giving statements, appearing at trial, and participating in settlement negotiations. Failure to cooperate results in a loss of coverage for that incident.

Duty to Disclose

Farmers make certain representations when applying for an insurance policy. For example, the agent, when completing the application for insurance, will ask about the type of operation. If the farmer states on his application that he grows crops on his land and an accident then occurs in the corn maze he operates, failure to disclose the existence of the corn maze may mean the insurance policy does not cover that activity.

Exclusions

Perhaps the most important section of the insurance policy – and the part that all farmers and their attorneys should read carefully and understand – is the exclusions section. This section lists activities that the policy will not cover. Some of these excluded activities are discussed in the following section on specific farm activities. What follows lists some general exclusions from coverage but not all exclusions in the standard policy.

Products Liability

Many standard FCPL policies exclude liability from coverage except for raw agricultural products. Processed products or products obtained from suppliers are not covered, and a commercial endorsement or separate commercial policy should be obtained with products liability coverage. For example, if you sell cantaloupes at a roadside stand on the covered premises, the policy would cover illnesses caused by the cantaloupes. However, if you slice the cantaloupes, you have "processed" them and the FCPL would generally not cover any illnesses caused by consuming the cantaloupes.

Policyholder and Family

Injuries to the policyholder or family members of the policyholder are normally excluded. In addition, if the policyholder damages his or her personal property, coverage does not apply.

Business Activities Other Than Farming[lxii]

Generally, activities other than farming are not covered. Farming includes producing crops and raising livestock. In addition, roadside stands and farm markets maintained primarily for the sale of the insured's own farm products fall within the definition of farming.

Any other activities should be discussed with your agent and specially addressed or they are not covered. For these activities, a commercial endorsement or separate commercial policy should be obtained. For example, taking produce grown on the property to a farmers market is generally not covered by the FCPL. Furthermore, agritourism looks less like traditional farming and may not be covered. Farmers markets, agritourism, and any other activity should be discussed with your agent and specifically addressed, or the activity may not be covered.

Activities excluded under the FCPL policy may be covered for an additional charge through the addition of a policy rider or the purchase of an additional policy. Policy riders are amendments to the policy to include additional activities within the coverage. Types of insurance policies or riders include commercial business, incidental farming liability as an addition to a homeowners policy, umbrella or excess liability, products liability, premises liability, employee's liability and workers' compensation.

Commercial business liability policies are designed to protect those activities connected to the business. Incidental farming liability may be offered from homeowners insurance providers; however, sales are often limited to less than $5,000 per year. An umbrella policy or extension of coverage protects beyond what is covered in the standard liability contract. Products liability protects the producer when a customer is injured while using or consuming the purchased product.

Premises liability protects against damages to the public or public property. Employers' liability insurance and workers' compensation protects against injuries to workers, and physical damage insurance protects against loss of property.

How to Limit Liability[lxiii]

The best, and least costly, method to reduce exposure to liability is to engage in a proactive safety program to protect employees, customers, and others. These measures include much of what has been discussed in this booklet, like obtaining adequate liability insurance and using release forms. In addition, operators should use appropriate business entities for their operation. This publication cannot address all of the issues involved in forming business entities. For more information on Virginia business entities, see "Virginia Business Legal Structures," listed in the Resources section of the Appendix (Cook, Matson, and Suter 2011). Two major points with respect to business entities directly impact legal liability. First, operators often become part of an "accidental partnership." A partnership is a voluntary association of two or more persons engaging in a business endeavor.

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Partnerships should be avoided because each partner is personally liable for the acts of the other partners in the scope of the business. For example, three farmers combine their crops in a community supported agriculture enterprise. They have no written agreement, but share the profits according to the amount of produce supplied. One of the farmers has an automobile accident when delivering vegetables, and a third party is severely injured. The other two farmers are individually liable for the damages and may lose their personal assets, including their homes. Before engaging in joint activities with other producers, consult an attorney and put the business agreement in writing.

The other major issue involving business entities is the "magic LLC" syndrome. A limited liability company (LLC) is a business entity that gives the owners protection from personal liability and favorable federal income tax treatment. Many people are forming limited liability companies for the liability protection and think the entity protects them totally from liability. This false sense of protection can lead to dire consequences for the producer. A limited liability company may be appropriate in certain circumstances.

However, no business entity provides complete protection from liability. Proactive steps should be taken to minimize liability and adequate liability insurance should be obtained in all circumstances. The following list sets out general steps that every operation should undertake to minimize exposure to risk from civil liability. The list is not intended to be exhaustive and operators should consult with their attorney, insurance agent, and other advisors to tailor a program to their individual operations.

No business entity provides complete protection from liability. Proactive steps should be taken to minimize liability and adequate liability insurance should be obtained in all circumstances.

- Develop a proactive liability assessment program. Watching for possible problems should be part of every employee's job.
- Develop a safety routine for your facility and stick to that routine. Provide checklists for employees to ensure that corridors are clear, hazards are prevented, etc. Make safety a key word every day.
- Use contracts to clarify rights and responsibilities. Contracts with suppliers and customers, where appropriate, can limit liability.
- Use release of liability forms. Note that these forms are often not legally enforceable, but they discourage lawsuits.
- Use safety latches and locks to secure areas not open to the public, remove keys from tractors and other equipment, and keep dangerous items out of reach of the public.
- Post signs with pictures to warn customers of potential risks and hazards
- Keep walkways, aisles, driveways, etc., clean and free and clear of obstacles, snow, ice, etc.
- Set up the facility specifically for the activity.
- Minimize or eliminate contact between animals and customers.
- Use equipment appropriate to the activity.
- Develop the proper, appropriate business entity (limited liability company, sole proprietor, partnership, etc.).
- Never apologize, but treat accident victims kindly, efficiently, and with care. (Apologizing can be seen as an admission of guilt, admissible in court for that purpose.)
- Obtain adequate liability insurance.
- Keep good records and document safety procedures and steps taken to make the operation safe.
- Engage in good agricultural practices (GAP) and good handling practices (GHP).[lxiv]

Conclusion

As the saying goes, an ounce of prevention is worth a pound of cure. Similarly, a proactive approach to liability issues in direct marketing proves best. Design your operation to minimize liability. Make safety a responsibility for everyone involved in the operation. Conduct a safety audit at least annually to ensure that the operation is safe. Finally, obtain adequate liability insurance and visit with your insurance agent often to make sure that the policy is suited to the activities connected with your operation.

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