



LIABILITY



2010
AGRI-TOURISM
IS IT FOR YOUR FARM OR RANCH?

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Disclaimer

- I'm a lawyer – of course I need one!
- This presentation is for general discussion purposes only and is not intended to constitute legal advice
- Participants should discuss their specific situations with their own legal counsel

Liability issues



Topics to be discussed

- Landowner liability
- Equine limited liability
- Agricultural recreation limited liability
- Other protections, including releases

Actions Against Landowners

- Section 13-21-115, Colorado Revised Statutes, first enacted in 1986 and revised in 1990 as responses to court decisions
- Different standards with respect to an invitee, licensee, and trespasser (in that order)
- Protects landowners in some circumstances where they were not protected at common law

Landowner

- Broadly defined to include fee owners and tenants as well as anyone responsible for the condition of the real property or for the activities conducted or circumstances existing on the real property
- The intent seems to be to include all potential defendants who have premises liability exposure

Trespasser

- A person who enters or remains on the land of another without the landowner's consent
- May recover only for damages willfully or deliberately caused by the landowner
- EXCEPT the statute does not change the doctrine of attractive nuisance for children under 14 years of age

Attractive Nuisance

- If an owner sees fit to keep on his premises something that is an attraction and allurement to the natural instincts of childhood, the law imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect them from personal injury such as may be attracted thereby

Licensees

- Visitors entering the property for their own convenience or to advance their own interests
- Also a social guest
- If the danger is created by the landowner and known to the landowner, liable only when there is an unreasonable failure to exercise reasonable care
- As to all other hazards, liable only when there is a failure to warn of dangers not ordinarily present on the type of property involved and the danger is known to landowner

Invitees

- Transacting business in which the parties are mutually interested or are there by landowner's express or implied representation that the public is requested, expected or intended to enter or remain
- Liable for unreasonable failure to exercise reasonable care to protect against dangers he knew or should have known
- If taxed as agricultural property or vacant land, liable for unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew

Doesn't 33-41-101 regarding owners of recreational areas help?

- 33-41-101 et seq. only applies if you permit the general public to use your land for recreational use at no charge
- If you do, the public is treated as a trespasser under the law we have discussed
- The contemplated recreational uses are very broad
- There is no protection if the injury is incidental to the use of the land on which a commercial or business enterprise of any kind is being carried on
- There is also a provision that affords limited liability to landowners who lease land or grant rights to a public entity for recreational purposes

Equine Liability



Equine Activities – Limitation from Civil Liability

- Section 13-21-119, Colorado Revised Statutes limits liability for equine activities
- An equine activity sponsor, equine professional, DVM or any other person shall not be liable for injury or death of a participant resulting from inherent risks of equine activities

EXCEPT

- When the person provided equipment or tack and knew or should have known that it was faulty, and it caused the injury
- When the person provided the animal and failed to make reasonable and prudent efforts to match the participant's ability with the animal and the participant's ability to participate in the activity
- When the person owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities and injury was because of a dangerous latent condition known to the person
- When the person's act is a willful or wanton disregard for the safety of the participant

The Supreme Court weighs in

- Clyneke v. Waneka, 157 P.3d 1072 (2007), a Colorado Supreme Court case
- Reaffirmed that the exemption from liability will be strictly construed
- Held that the activity sponsor must determine that the rider has the ability to participate in the activity and has the ability to manage the particular animal based upon the rider's representation of his/her ability

Engages in an equine activity

- Riding, training, assisting in medical treatment, driving, being a passenger, assisting a participant or show management
- Does not include a spectator unless the spectator puts himself in an unauthorized area and in immediate proximity to the equine activity

Equine activity

- Equine shows, fairs, competitions, performances, parades
- Equine training or teaching activities
- Boarding
- Riding, inspecting or evaluating another's horse
- Rides, trips, hunts, and anything else sponsored by an equine activity sponsor

Equine activity sponsor

- Individual, group, club, partnership or corporation
- Sponsors, organizes, or provides the facilities for an equine activity
- Examples: pony clubs, 4-H clubs, hunt clubs, riding clubs, classes, programs, instructors, promoters

Inherent risks of equine activities

- Dangers or conditions which are an integral part of equine activities, including:
 - Propensity of the animal to behave in ways that may result in injury to persons on or around them
 - Unpredictability of the animal's reaction to sounds, movement, unfamiliar things
- Certain hazards such as surface or subsurface conditions
- Collisions with animals or objects
- Potential for a negligent participant (such as failing to maintain control of the animal or not acting within his ability)

Signs and contract warnings

- The signs are available from Colorado Horse Council
- Every equine professional shall post the signs where specified and shall include the language in contracts
- “Under Colorado Law, an equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to section 13-21-119, Colorado Revised Statutes”

Agricultural Recreation Activities



Agricultural recreation activities – limitation of civil liability

- Section 13-21-121, Colorado Revised Statutes limits liability for agricultural recreation activities
- An activity related to the normal course of agriculture engaged in for entertainment, pleasure, recreation or education, including hunting, shooting, swimming, diving, tubing, riding or operating a motorized recreational vehicle, planting, cultivating, irrigating, harvesting, animal husbandry, rodeo and livestock activities, maintaining equipment

Agricultural recreation

- Does not matter whether a fee is paid
- Protected facilities include privately owned and operated farms and ranches and public property leased, rented or under the control
- Protected facility person owns, leases, operates, manages, is employed at or volunteers at the facility
- Not liable for injury or death from inherent risks including varied skill and experience, equipment, location, ground conditions, weather, animal behavior, collisions, etc.
- Except if provided faulty equipment and knew it was faulty, gross negligence or willful disregard for safety, intentional injury

Protecting yourself

- The statutory protections
- Risk assessments
- Risk management
- A very well-drafted Release and Indemnification Agreement

The Release and Indemnification Agreement

- It is a contract, closely scrutinized by the courts and strictly construed against the proponent
- It must be legally entered into
- Key is to state expressly, clearly, unambiguously and in as plain language as possible the intention of the parties to extinguish liability
- It does not provide a shield against a claim for willful and wanton conduct
- When operating on public property, particular care is needed to check regulations and permits for any public policy limiting the effectiveness of a waivers and releases

The language

- Identify the activity
- Notice of the equine limited liability statute
- Listing of inherent risks
- Binders – read and understands, agrees with terms and conditions, signed voluntarily, opportunity to consult with attorney if desired, without reliance upon any statement or representation not in the document
- Clarify if participant is the signer or if signing for a minor
- Bind personal representatives, heirs, agents, assigns and successors
- Attest legal competency to sign
- Accept responsibility and assume risks for signing

More legalese

- Release everyone involved
- Release from any and all actions, claims, demands, losses, damages, costs, attorney fees, etc. arising from or related to, directly or indirectly, the participation
- Indemnification for signatory's acts or omissions
- Covers risk of bodily injury, illness or death and risk of damage to personal property
- Specify that it is as broad as allowed by Colorado law and that Colorado law controls

The issue with minors

- Section 13-22-107, Colorado Revised Statutes was enacted in response to a Colorado Supreme Court case in which a waiver signed by a parent on behalf of a minor was held invalid
- Legislature recognized the impact upon youth activities
- Parents may, on behalf of the child, release or waive claim for negligence
- Cannot release or waive willful or wanton, reckless or grossly negligent acts or omissions

Other factors

- Time available to read the release
- Pressure exerted
- Type-size
- “Fairness” issues

Other documents

- Be certain that the other documents you use such as contracts and agreements also protect you as much as possible under Colorado law
- Release, waiver and indemnification provisions should be consistently applied in all of the documents you use

The End

