

Recreational Access to Agricultural Land: Insurance Issues

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I. INTRODUCTION

In the United States, a growing urban and suburban population is seeking rural recreational opportunities.¹ At the same time, many families involved in traditional agriculture want to diversify and increase the sources of income from their land.² Both the federal and state governments actively encourage agriculturists to enter land in conservation programs and to increase wildlife habitats on their land.³ In addition,

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1. See generally Langner, *Demand for Outdoor Recreation in the United States: Implications for Private Landowners in the Eastern U.S.*, in PROCEEDINGS FROM THE CONFERENCE ON: INCOME OPPORTUNITIES FOR THE PRIVATE LANDOWNER THROUGH MANAGEMENT OF NATURAL RESOURCES AND RECREATIONAL ACCESS 186 (1990) [hereinafter PROCEEDINGS].

2. A survey of New York State Cooperative Extension county agents and regional specialists indicated that an estimated 700 farm families in the state had actually attempted to develop alternative rural enterprises. An estimated 1,700 farm families were considering starting alternative enterprises or diversifying their farms. Many alternatives involved recreational access to the land, including the addition of pick-your-own fruit and vegetable operations, petting zoos, bed and breakfast facilities, and the provision of campgrounds, ski trails, farm tours, and hay rides on farm property. N. SCHUCK, W. KNOBLAUCH, & J. GREEN, FARMING ALTERNATIVES: RESULTS OF A SURVEY OF COOPERATIVE EXTENSION FIELD STAFF REGARDING ALTERNATIVE FARMING ENTERPRISES 2-3, 18-21 (A.E. Ext. 87-12 1987). Fee or lease hunting on agricultural land is common in many southern states, particularly Alabama, Georgia, Louisiana, Mississippi, Texas and Virginia. *Mixed Uses for Grazing Land Can Yield Extra Income*, FARMLINE, Feb. 1988, at 12-13.

3. The conservation title of the Federal Food Security Act of 1985 initiated programs, including the Conservation Reserve Program, conservation compliance, sodbuster, and swampbuster, that may significantly increase wildlife habitat in the United States. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1504-1518 (codified as amended at 16 U.S.C.A. §§ 3801-3847 (West Supp. 1991)). For assessments of the benefits of these programs to wildlife, see M. RIBAUDO, D. COLACICCO, L. LANGNER, S. PIPER & G. SCHABLE, NATURAL RESOURCES AND USERS BENEFIT FROM THE CONSERVATION RESERVE PROGRAM 30-35 (USDA, Agric. Econ. Rep. No. 627, 1990); Robinson & Berner, *Implementing the Conservation Title: Effects on Wildlife*, in IMPLEMENTING THE CONSERVATION TITLE OF THE FOOD SECURITY ACT OF 1985, at 296 (1990). Title XIV of the Food,

most states have adopted recreational use statutes, which limit the tort liability of landholders⁴ who make their land available for recreation.⁵

A plausible outcome of these trends is increased access to private rural land for recreational and tourist activities. Studies indicate, however, that the concern of landholders about legal liability for bodily injuries to recreational users is a major barrier to recreational access on private rural land.⁶

Liability insurance provides a landholder with the means of shifting to an insurer the financial risk of liability arising from the use of the land by recreational users. Although insurance will not prevent a landholder from being sued, it does provide a landholder with two major benefits: (1) payment of damages to a third party for injuries that are covered by the insurance policy, up to the amount covered by the policy;⁷ and (2) an entity, the insurer, with a duty to defend the landholder against all actions brought against the landholder on any allegation of

Agriculture, Conservation, and Trade Act of 1990 modified existing conservation programs and provided new conservation measures. Pub. L. No. 101-624, 104 Stat. 3359, 3568-3604 (codified at 16 U.S.C.A. §§ 3801-3847 (West Supp. 1991)). Many states have also legislated incentives for rural landowners to increase wildlife habitat. For example, Indiana law provides for a one dollar (\$1) per acre general property tax assessment rate for private land classified as wildlife habitat by the state Department of Natural Resources. The landowner must enter into an agreement with the Department that establishes standards of wildlife management for the parcel of land. IND. CODE ANN. §§ 6-1.1-6.5-1 to -25 (Burns 1989). California has initiated a private lands wildlife management program. The landowner manages the land under a wildlife management plan approved by the state Department of Fish and Game. In return, the landowner is exempt from requirements to obtain most licenses or permits or to pay fees, which would otherwise be required for activities conducted under the wildlife management plan. CAL. FISH & GAME CODE §§ 3400-3409 (West 1984 & Supp. 1991).

4. The term "landholder" as used in this Article denotes any person who has control of property when harms occur to recreational entrants on the property. Tort liability for personal injuries on land is predicated on the defendant's possession and control of the land. The general rule is that a tenant, not a landlord or lessor, is liable for injuries to third parties arising from activities on leased land. See 2 N. HARL, AGRICULTURAL LAW § 4.01[3] (1990). For a review of situations under which landlord liability may arise, see 3 N. HARL, AGRICULTURAL LAW § 8.02 (1990); RESTATEMENT (SECOND) OF TORTS § 357 (1965).

5. As of 1988, 48 states had adopted some form of recreational use legislation. For a comprehensive analysis of this legislation, see 2 B. VAN DER SMISSSEN, LEGAL LIABILITY AND RISK MANAGEMENT FOR PUBLIC AND PRIVATE ENTITIES 189-251 (1990). See *infra* notes 58-67 and accompanying text.

6. See, e.g., Kaiser & Wright, *Recreational Access to Private Land: Beyond the Liability Hurdle*, 40 J. SOIL & WATER CONSERVATION 478, 479 (1985); R. HILDEBRANDT, PUBLIC ACCESS TO PRIVATE KANSAS LANDS FOR RECREATION 6-7 (Agric. Experiment Station, Kan. St. U., Manhattan KS, Rep. of Progress No. 582, 1989).

7. See generally 1 W. FREEDMAN, FREEDMAN'S RICHARDS ON THE LAW OF INSURANCE §§ 1:49, 5:1, 5:10 (6th ed. 1990).

facts and circumstances potentially covered by the insurance policy, including groundless, false, or fraudulent claims.⁸

The adequacy of presently held liability insurance policies and the availability of additional insurance coverage are significant financial risk management questions for farmers or ranchers who allow recreational access to their property. This Article provides an analysis of these questions in light of the exposure to legal liability that arises when agricultural landholders allow recreational use of their land. Part II of the Article provides background on the tort liability of landholders for injuries to recreational users of their land. Part III discusses the adequacy of state recreational use statutes in limiting this tort liability, and concludes that most of these statutes do not provide immunity from liability if a landholder wants to earn significant income from the recreational use of the land. Even if a landholder charges no fees for access, the statutes do not provide unequivocal liability immunity for all recreational uses and circumstances.

In Part IV, this Article examines the adequacy of coverage of liability policies that a rural landholder may already carry, including a standard farm or ranch comprehensive liability policy, a homeowner's policy, or a motor vehicle liability policy. This examination reveals that for most recreational access, these policies are too narrowly tailored to cover personal injury liability risks for recreational access, particularly if a landholder receives a fee or other monetary benefit for the access. Part V provides information on insurance that a landholder may obtain to insure against injuries to recreational entrants, and discusses risk management possibilities other than insurance carried by the landholder.

The reader should note that each state has its own laws and regulations governing tort liability and defenses, recreational use immunity, insurance policy provisions, and insurance requirements for particular enterprises. This Article is not a comprehensive and exhaustive examination of each state's laws. Rather, this Article provides a general overview of the insurance issues arising when agricultural landholders allow recreational access to their land.

II. LANDHOLDER TORT LIABILITY FOR RECREATIONAL ACCESS

In the context of recreational access, landholder tort liability can arise from three major sources of injury to recreational users: (1) conditions on the premises; (2) activities of the landholder, including the provision of recreational equipment; and (3) domestic animals, including those provided by the landholder to the entrant for recreational use.

8. *Id.* § 5A:3.

This section examines landholder liability under premises liability doctrines and under other tort rules that are particularly relevant to landholders who provide recreational access and services.

A. *Conditions on the Premises*

The majority of states follow rules governing premises liability under which the duty of care owed by landholders to entrants for conditions on the land is determined by the status of the entrant as a trespasser, licensee, or invitee.⁹ Other states, following the lead of the California Supreme Court in *Rowland v. Christian*,¹⁰ have abolished rigid status distinctions and have adopted a standard of reasonable care toward entrants based on ordinary negligence principles.

1. *Majority Rule: Liability Based on Entrant's Status.*—Under traditional premises liability rules, a landholder owes the lowest duty of care to trespassers, defined as persons who enter or remain on the land without the actual or implied consent of the landholder.¹¹ The landholder is liable for intentional, willful, or wanton acts against the trespasser. Generally, the landholder has no duty to ensure that conditions on the land are safe for trespassers or to warn trespassers of dangerous conditions.¹²

Some jurisdictions have carved out significant exceptions to the general rule regarding trespassers. First, a landholder who has actual knowledge or who should reasonably know that trespassers frequent the property may be held to a higher standard of care, which requires that the landholder warn trespassers of dangerous artificial conditions or that the landholder refrain from dangerous activities when trespassers are on the land.¹³ The second exception, referred to generally as the attractive nuisance doctrine, imposes liability for physical injury to child trespassers who are attracted to dangerous artificial conditions on the land.¹⁴

9. Indiana follows the majority rule, which bases premises liability on an entrant's status. See *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983).

10. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (Cal. 1968).

11. RESTATEMENT (SECOND) OF TORTS § 329 (1965).

12. *Id.* § 333 (1965). Under this rule, landholders who set traps for trespassers cannot escape liability. In addition, some courts have ruled that artificially created hazards on the land may give rise to liability, even if the landholder did not have a specific intent to harm trespassers. See 1 N. HARL, AGRICULTURAL LAW § 4.07 (1990).

13. RESTATEMENT (SECOND) OF TORTS §§ 334-337 (1965).

14. Under the *Restatement* formulation of the attractive nuisance doctrine, the following elements must be found before imposing liability for injuries to child trespassers: (1) the landholder knows or has reason to know of a condition which is likely to attract children; (2) the child trespassers are too young to appreciate the danger; (3) the burden

Licensees are entrants who are privileged to enter or remain on the land by the landholder's express or implied consent.¹⁵ Licensees, in contrast to invitees, are not on the premises for business purposes or other purposes that primarily benefit the landholder. This category includes recreational users such as hikers, birdwatchers, and hunters, who are on the land with the landholder's permission but pay no fees or other compensation for the use of the land. Most jurisdictions include social guests as licensees, even those guests who are on the property at the express invitation of the landholder.¹⁶

Under the *Restatement*, the landholder has a duty to warn licensees of hidden dangers known to the landholder, but has no duty to inspect the premises to ensure the licensee's safety. The landholder must also refrain from intentional, willful, or malicious conduct that may result in injury to the licensee. Some jurisdictions do not require a landholder to warn licensees of hidden dangers, and thus equate the duty of care toward licensees with the duty of care toward trespassers.¹⁷

Two definitions apply to the final category of entrants, invitees. Under the generally applied common law definition, an invitee is a person expressly or impliedly invited onto the land by the landholder for a business purpose or for other benefits to the landholder.¹⁸ The *Restatement* establishes an additional category of invitees, those persons invited onto the premises as a member of the public for a purpose for which the property is maintained.¹⁹

The highest duty of care is owed to invitees. Landholders must use ordinary care to ensure that the premises are in a reasonably safe condition for any uses consistent with the purposes for which an invitation is extended. This duty also requires that the landholder periodically

of eliminating the condition and the utility of maintaining the dangerous condition are slight compared to the risk to the children; and (4) the landholder fails to exercise reasonable care in eliminating the danger or protecting children from the danger. *Id.* § 339 (1965). Only three states - Maryland, Ohio, and Vermont - have not adopted a special rule governing a landholder's liability for harms to child trespassers. 4 S. SPEISER, C. KRAUSE, & A. GANS, *THE AMERICAN LAW OF TORTS* § 14:73 (1987).

15. *RESTATEMENT (SECOND) OF TORTS* § 330 (1965).

16. See 1 N. HARL, *AGRICULTURAL LAW* § 4.06 (1990). But see *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991) (court abolishes distinction between commercial visitors and social guests, and rules that both have the tort rights of invitees).

17. 1 N. HARL, *AGRICULTURAL LAW* § 4.06 (1990).

18. For a detailed discussion of the definition of business invitee, see *Fleischer v. Hebrew Orthodox Congregation*, 504 N.E.2d 320, 322-23 (Ind. Ct. App. 1987), cited with approval in *Burrell*, 569 N.E.2d at 641-42.

19. *RESTATEMENT (SECOND) OF TORTS* § 332 (1965). Indiana courts recognize this category of "public invitees." See *Fleischer*, 504 N.E.2d at 323-24 (court adopts "public invitee" category and holds that members of a congregation are public invitees while on synagogue premises).

inspect land encompassed by an invitation for concealed dangers, and warn invitees of the discovered dangers.²⁰

Landholders are not guarantors or insurers of invitees' safety under all circumstances. Curtailment of a landholder's duty of care with respect to natural conditions is particularly relevant to outdoor recreational activities. Natural conditions on the land, such as streams, gullies, or trees, may create hazards to recreational users. In general, a landholder is not required to eliminate these hazards, and invitees are expected to use ordinary care in avoiding the hazards.²¹

The threshold determination of an entrant's status is not always simple. Some jurisdictions have ruled that trespassers who habitually enter another person's land are entitled to the standard of care owed licensees. This rule rests on notions of implied consent of the landholder and on the foreseeability of frequent entrants on the land.²²

Distinguishing licensees from invitees is even more difficult. States have adopted differing definitions of "invitee." In addition, many courts apply a case-by-case factual analysis to determine the point at which social guests have rendered services for a host that are sufficient to transform guests from licensees into invitees. The following cases illustrate the results when courts apply different analyses. In *Sutton v. Sutton*,²³ a Georgia court held that the status of a son visiting his father's farm changed from social guest-licensee to invitee when the son helped capture a bull. The court held that chasing a bull was a substantial task.²⁴ Alabama follows the rule that a business invitee is one who enters another's property for a purpose that is of material or commercial benefit to the landholder.²⁵ Under this definition, a son who dismantled

20. See 3 J. LEE & B. LINDAHL, MODERN TORT LAW § 39.09 (rev. ed. 1988).

21. Courts rely on various legal doctrines to avoid holding landholders liable for natural conditions. For example, in *Batzek v. Betz*, 519 N.E.2d 87 (Ill. App. Ct. 1988), a 14-year-old boy was rendered a quadriplegic when he fell from a tree in a commercial campground. The court first noted that because the tree was a natural condition on the land, the landholder may have no duty to protect an entrant from inherent dangers of trees. The court then ruled that, even in the absence of a special rule abolishing a duty of care for natural conditions, under ordinary negligence rules no one could reasonably suggest that landholders are required to chop down trees, fence them, or otherwise protect against the possibility that a child will climb one of them and fall. *Id.* at 89-90.

In many states, landholders are liable for harms arising from artificial conditions on the land, but not for natural conditions or man-made features with natural characteristics, such as farm ponds. See, e.g., *Lohrenz v. Lane*, 787 P.2d 1274 (Okl. 1990); see generally 1 N. HARL, AGRICULTURAL LAW § 4.09 (1990).

22. See, e.g., *Libby v. West Coast Rock Co.*, 308 So. 2d 602, 604 (Fla. Dist. Ct. App. 1975).

23. 243 S.E.2d 310 (Ga. Ct. App. 1978).

24. *Id.* at 312.

25. See *Grider v. Grider*, 555 So. 2d 104 (Ala. 1989).

a deck attached to his father's house, without monetary compensation, was found to have provided a material benefit to his father.²⁶ Therefore, the son was as an invitee for tort purposes.²⁷

Recently, the Indiana Supreme Court, in a quartet of cases led by *Burrell v. Meads*,²⁸ ruled that invitees are those persons on a premises pursuant to an express or reasonably implied invitation. This ruling abolishes the distinction between social guests and commercial visitors and classifies social guests as invitees for purposes of premises liability. As invitees, social guests are entitled to a duty of reasonable care from landholders.²⁹ Before this ruling, Indiana courts generally followed the rule that social guests were transformed from licensees to invitees only if they were invited onto the host's premises to further the host's business interests or to provide a pecuniary benefit to the host.³⁰ This economic benefits test had previously been eroded by *Fleischer v. Hebrew Orthodox Congregation*,³¹ in which the third district of the Indiana Court of Appeals classified as invitees persons who are invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. In *Burrell*, the Indiana Supreme Court not only adopted an "invitation test" for defining invitees, but also explicitly approved the ruling in *Fleischer*, which extends a duty of reasonable care towards public invitees.³²

2. *Minority Rule: Standard of Reasonable Care Toward Entrants.*—In 1968, the California Supreme Court reviewed the development of premises liability law under the traditional status-based classifications.³³ The court noted that California courts had fashioned many exceptions to the status-based distinctions. These exceptions included landholder liability for a landholder's active negligence and for the maintenance of hidden dangers that constitute traps. The court concluded that the exceptions and refinements rendered the law confusing and that the historical justifications for the status distinctions, which arose from concerns

26. *Id.* at 105.

27. *Id.*

28. 569 N.E.2d 637 (Ind. 1991), *reh'g denied* (June 3, 1991); *accord Parks v. Parks*, 569 N.E.2d 644 (Ind. 1991); *Risk v. Schilling*, 569 N.E.2d 646 (Ind. 1991); *LeLoup v. LeLoup*, 569 N.E.2d 648 (Ind. 1991).

29. *Burrell*, 569 N.E.2d at 643. Under Indiana law, a landholder owes a licensee a duty to refrain from willfully or wantonly injuring the invitee or acting in a manner to increase the invitee's peril and a duty to warn the licensee of any latent dangers on the premises which are known to the landholder. *Id.* at 639.

30. *Id.* at 640-42.

31. 504 N.E.2d 320 (Ind. Ct. App. 1987), *trans. denied*, 539 N.E.2d 1 (Ind. 1989).

32. 569 N.E.2d at 641-42.

33. *Rowland v. Christian*, 443 P.2d 561, 70 Cal. Rptr. 97 (Cal. 1968).

of large landholders in feudal England, do not apply to modern urban society.³⁴

Rather than continue to carve out exceptions to the status-based doctrine, the *Rowland* court adopted a new standard of premises liability grounded in ordinary negligence principles. Under this standard, the status of the entrant is only one of many factors for a court to consider in determining the extent of landholder liability for injuries on the premises. Other major factors include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff has suffered harm; the closeness of the connection between the injury and the defendant's conduct; the moral blame attached to the defendant's conduct; the extent of the burden to the defendant and the consequences to the community of imposing liability; the policy of preventing future harm; and the prevalence, cost, and availability of insurance for the risk involved.³⁵

Subsequently, California courts have read *Rowland* as providing that the prime concern in premises liability is the foreseeability of the risk of harm.³⁶ The courts have also emphasized that in some cases the status of the entrant may still determine liability. An entrant's status is relevant to the issue of the foreseeability of injury and to the determination of whether the landholder acted in a reasonable manner toward the plaintiff.³⁷

Seven states have followed *Rowland*, and currently apply ordinary negligence rules to premises liability cases.³⁸ Nine other states apply

34. *Id.* at 567, 70 Cal. Rptr. at 100-02.

35. *Id.* at 567, 70 Cal. Rptr. at 100, 103.

36. See, e.g., *McDaniel v. Sunset Manor Company*, 269 Cal. Rptr. 196, 199 (Cal. Ct. App. 1990).

37. See, e.g., *Williams v. Carl Karcher Enterprises*, 227 Cal. Rptr. 465, 468-69 (Cal. Ct. App. 1986).

38. Courts in Alaska, Hawaii, Louisiana, New Hampshire, New York, Montana, and Rhode Island have adopted a standard of reasonable care toward all entrants. See *Lohrenz v. Lane*, 787 P.2d 1274, 1276 (Okla. 1990) (Oklahoma Supreme Court reviewed decisions of other state courts before deciding to reject *Rowland* rule); see also Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4TH 294 (1983 & Supp. 1990). Colorado premises liability law appears to have endured the most extensive changes in recent years. In 1971, the Colorado Supreme Court abolished common law status distinctions as the measure of liability and adopted the *Rowland* standard. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (Colo. 1971). Fifteen years later, the Colorado General Assembly abrogated *Mile High Fence* by adopting a statute intended to restore the traditional premises liability rules. COL. REV. STAT. ANN. § 13-21-115 (West 1989). The new statute interchanged the traditional duty of care owed to invitees with that owed to licensees. In 1989, the Colorado Supreme Court held that the statute was unconstitutional because it violated equal protection guarantees of both the federal and Colorado state constitutions. The court found that the statute bore no rational relation to the legitimate governmental interest in promoting responsibility of landowners and entrants because its classification

ordinary negligence principles in cases involving invitees and licensees, but retain a lowered standard of care for trespassers.³⁹

B. Activities of the Landholder

Some jurisdictions that follow traditional status-determinative premises liability rules have carved out an exception for injuries to entrants arising from a landholder's negligent activity.⁴⁰ This active negligence exception is used primarily to compensate licensees whose presence was known to the landholder for injuries caused by the landholder's negligent conduct. The threshold determination is whether the licensee's injury arose from the landholder's activity conducted on the premises. If so, ordinary negligence principles apply. If an injury arose from the landholder's "passive" failure to inspect the land for hazards or improve conditions on land, the traditional status rules apply.⁴¹

An Oregon court applied this doctrine in *Mounts v. Knodel*,⁴² a case in which a social guest-licensee was injured by falling from a horse. The plaintiff alleged that the fall was caused by defective riding equipment that the landowner had provided. The court ruled that the maintenance and provision of the equipment was not a condition of the land subject

scheme gave licensees a higher degree of protection than invitees. The classification scheme could not be justified either historically or logically. *Gallegos v. Phipps*, 779 P.2d 856, 862-63 (Colo. 1989). In 1990, the Colorado General Assembly amended § 13-21-115 by requiring that landholders exercise reasonable care in protecting invitees against dangers about which landholders actually knew or should have known. The statute provides an exception for invitees on land designated as agricultural or vacant land for property tax purposes. In that case, the landholder need only warn the invitee of dangers that are actually known to the landholder. COL. REV. STAT. ANN. § 13-21-115 (West Supp. 1990).

39. Courts in Florida, Maine, Massachusetts, Minnesota, Oregon, North Dakota, Tennessee, and Wisconsin have abandoned the distinction between invitees and licensees who are lawfully on the premises and apply a standard of reasonable care under the circumstances towards these entrants. See *Lohrenz*, 787 P.2d at 1276 n.11 (Note that Florida retains uninvited licensees as a distinct category. See *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973)); Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4TH 294 (1983 & Supp. 1990). The Illinois Premises Liability Act abolishes the traditional common law distinction between invitees and licensees and provides that the duty of care owed to these entrants is reasonable care under the circumstances regarding the state of the premises or acts done or omitted on the premises. ILL. ANN. STAT. ch. 80, para. 302 (Smith-Hurd 1987).

40. See, e.g., *Bowers v. Ottenad*, 240 Kan. 208, 729 P.2d 1103 (Kan. 1986). But see *Fort Wayne National Bank v. Doctor*, 272 N.E.2d 876, 882 (Ind. Ct. App. 1971) (court expressly overrules adoption of active negligence doctrine for landholder's conduct toward licensee).

41. *Bowers*, 729 P.2d at 1103-04.

42. 730 P.2d 594 (Or. Ct. App. 1986).

to premises liability rules.⁴³ Instead, the court ruled that the provision of equipment was an activity on the land, and under Oregon law the landholder had a duty to exercise reasonable care in the conduct of activities for the protection of licensees.⁴⁴

C. Domestic Animals

When recreational users are allowed access to agricultural land, the possibility exists that they will be injured by domestic animals that are part of an agricultural or recreational enterprise operated by the landholder. A plethora of common law tort theories are applied when domestic animals owned or controlled by a landholder injure entrants. Additionally, many states have adopted legislation that controls cases involving injuries caused by various classes of domestic animals, particularly dogs.⁴⁵

Under the common law rules of some states, the owner or keeper of a domestic animal is liable for injuries the animal caused only if the plaintiff was lawfully on the premises and can prove that the owner had knowledge of the animal's dangerous propensities that caused the harm.⁴⁶ This knowledge falls into two categories: (1) general knowledge about the behavior of a class of animals to which the animal belongs; and (2) knowledge about the circumstances and individual past behavior of a particular animal.⁴⁷ An injured plaintiff must show that the defendant knew or should have known of the animal's propensity for behavior that caused the plaintiff's harm. Once this showing is made, the defendant is strictly, or absolutely, liable for the plaintiff's injuries.⁴⁸

Other states apply two separate common law tort theories to cases involving domestic animals. If the plaintiff shows that the owner knew or should have known that the animal had a propensity to commit the particular type of mischief that was the cause of harm, the defendant is strictly liable for the harm.⁴⁹ In the alternative, even if the owner or keeper is unaware of any mischievous propensity on the animal's part, the owner is liable in negligence for failing to exert reasonable care in controlling the animal or preventing harm caused by the animal.⁵⁰ The

43. *Id.* at 596.

44. *Id.* (quoting the ruling in *Ragnone v. Portland School District No. 1J*, 291 Or. 617, 633 P.2d 1287 (1981)). *But see Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 517 A.2d 1122 (1986) (court applies premises liability doctrine to assess landholder's liability for provision of allegedly defective riding equipment).

45. For a comprehensive summary of the law governing liability for injuries caused by animals, see 3 J. LEE & B. LINDAHL, *MODERN TORT LAW* §§ 37.01-.19 (rev. ed. 1990).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

plaintiff must show that the defendant did not exercise effective control of the animal in a situation in which it would be reasonably expected that injury would occur. The amount of control is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the foreseeability of injuries.⁵¹

Some state courts have expressly rejected the adoption of tort rules narrowly tailored to domestic animal injuries, and instead have widened the scope of premises liability to include risks arising from the presence of domestic animals on the land.⁵² In *Sendelbach v. Grad*,⁵³ a case of first impression, the North Dakota Supreme Court declined to adopt a strict liability standard for injuries caused when defendant's farm dog bit a person who was on the farm premises to buy eggs. The court noted that a strict liability standard would increase the liability of the landholder for the acts of a domestic animal that was useful to the farming operation.⁵⁴ The court reasoned that applying strict liability in this situation would ignore both the utility of the animal and a commonsense balancing of all interests concerned.⁵⁵

A number of states have enacted legislation that supersedes the common law by providing that an animal's owner is strictly liable for unprovoked injuries to persons lawfully on the premises which are caused by domestic animals, even if the owner had no knowledge of the animal's vicious or dangerous behavior.⁵⁶ Florida's statute provides absolute li-

51. See *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 357-58, 517 A.2d 1122, 1129-30 (1986).

52. See, e.g., *Sutton v. Sutton*, 243 S.E.2d 310, 313 (Ga. Ct. App. 1978) (ruling that premises liability doctrine is not restricted to purely physical defects in real property, but also encompasses risks upon the premises in the nature of vicious animals or ill-tempered individuals likely to inflict harm).

53. 246 N.W.2d 496 (N.D. 1976).

54. *Id.* at 500.

55. *Id.* at 500-01. The court further ruled, however, that a domestic dog with dangerous propensities falls within the "hidden peril" exception to the standard of care owed to licensees. Under this exception, a landholder has a duty to warn licensees of dangers known to the landholder but not open to the licensee's observation. *Id.* at 501. This ruling was made superfluous by *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977), in which the North Dakota Supreme Court adopted a uniform standard of care toward licensees and invitees.

56. See 3 J. LEE & B. LINDAHL, MODERN TORT LAW § 37.07 (rev. ed. 1990). Illinois's Animal Control Act reads, in part:

If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

ILL. STAT. ANN. ch. 8, para. 366 (Smith-Hurd 1975).

Under the Act, a plaintiff must show: (1) an injury caused by an animal owned by

ability for injuries caused by dogs, but also provides for an absolute defense if the owner prominently displays on the premises a sign with the words "Bad Dog."⁵⁷

III. LANDHOLDER LIABILITY UNDER RECREATIONAL USE STATUTES

To encourage recreational access to private lands, as of 1987, forty-eight states had adopted legislation limiting the liability of landholders for injuries to recreational entrants on their land.⁵⁸ Many of these statutes are based on a 1965 Model Act drafted by the Council of State Governments;⁵⁹ however, states have tailored their statutes to meet local needs and to comply with state public policy concerns.

Under most recreational use statutes, a landholder who charges a fee for access or recreational activity is not protected by the statute, even if the fee covers only the costs of allowing access, with no profit to the landowner.⁶⁰ In addition, an injury that arises from a particular recreational activity, for which there is no charge, may result in liability if the landholder receives indirect pecuniary benefits from the recreational activity. For example, a landholder who does not charge for entry to the land but provides recreational equipment for a fee may be disqualified from using the statute as a defense in an action alleging injuries arising from the conditions of the land.⁶¹

the defendant; (2) a lack of provocation; (3) the peaceable conduct of the plaintiff; and (4) the presence of the injured person in a place where he has a legal right to be. *See, e.g.,* Robinson v. Meadows, 203 Ill. App. 3d 706, 561 N.E.2d 111 (Ill. Ct. App. 1990) (provides comprehensive discussion of meaning of "provocation" under the Illinois Animal Control Act).

57. FLA. STAT. ANN. § 767.04 (West 1986).

58. Alaska has never adopted a recreational use statute. North Carolina repealed a comprehensive statute in 1980, and in 1987 adopted a law limited to the North Carolina Trail System. For a summary of these statutes, see B. VAN DER SMISSSEN, RECREATIONAL USER STATUTES (1988) (available from the American Motorcyclist Association).

59. COUNCIL OF STATE GOVERNMENTS, *Public Recreation on Private Lands: Limitations on Liability*, XXIV SUGGESTED STATE LEGISLATION 150 (1965).

60. A number of states do allow limited compensation under their recreational use statutes. For example, Arkansas excludes the following from the definition of charges, which if included would void the application of its statute: (1) the "sharing of game, fish, or other products of recreational use;" and (2) "[c]ontributions in kind, services, or cash paid to reduce or offset costs and eliminate losses from recreational use." ARK. STAT. ANN. § 18-11-302(4) (1987). New Hampshire's statute expressly provides that landowners who receive remuneration for pick-your-own or cut-your-own produce operations are liable only for willful, wanton, or reckless conduct toward the entrants. N.H. REV. STAT. ANN. § 508:14 (1983). Some states, including Indiana, extend the statute's benefits to landholders who receive state or federal monetary remuneration for providing recreational access. IND. CODE § 14-2-6-3 (1989).

61. Cf. Douglas v. Dewey, 453 N.W.2d 500, 505 (Wis. Ct. App. 1990) (plaintiff

In general, recreational use statutes limit the landholder's duty of care to recreational entrants to that duty of care owed by landholders to trespassers under common law premises liability principles. The landholder must refrain from wilful, malicious, or wanton acts toward the recreational entrants, but need not keep the premises safe for the use of the entrant or warn of dangerous conditions on the premises.⁶²

States differ on the degree of public access that landholders must allow in order to qualify for the statute's protection. At a minimum, landholders must hold the land open to some members of the general public in order to receive the benefits of the statute. The Kentucky Supreme Court has ruled that to benefit from the state's recreational use statute, a landholder must show that he knew of and condoned the public's recreational use of the property.⁶³ The landholder's words, actions, or lack of action must infer that the landholder intended to permit the use.⁶⁴ Courts in Illinois and Pennsylvania have ruled that a landholder need not open the land to all members of the public at all times.⁶⁵ Louisiana's recreational use statute expressly provides that a landholder

was injured diving from a dock on defendant's resort property; defendant did not charge for the swimming activity, but court ruled that indirect pecuniary benefits from swimming, including charges for other recreational activities on the property, should be assessed to determine if defendant is disqualified from the immunity of the recreational use statute), *review denied*, 454 N.W.2d 805 (Wis. 1990); *Seminara v. Highland Lake Bible Conference, Inc.*, 112 A.D.2d 630, 492 N.Y.S.2d 146, 149 (N.Y. App. Div. 1985) (defendant may be denied recreational use immunity defense if plaintiff shows nexus between recreational activity giving rise to injury and another activity for which consideration was given to defendant).

62. See COUNCIL OF STATE GOVERNMENTS, *Public Recreation on Private Lands: Limitations on Liability*, §§ 3, 4, in XXIV SUGGESTED STATE LEGISLATION 150 (1965). Some states retain higher standards of care for specified categories of entrants. For example, Indiana's statute expressly does not affect the preexisting law of liability concerning business invitees in commercial establishments and invited guests. IND. CODE § 14-2-6-3 (1989).

63. *Coursey v. Westvaco Corp.*, 790 S.W.2d 229, 232 (Ky. 1990).

64. *Id.*; see also *Crawford v. Tilley*, 780 P.2d 1248, 1251 (Utah 1989) (landholders who have not made their property available to at least some members of the general public for recreational purposes may not invoke the protection of Utah's Landowner Liability Act).

65. *Gallo v. Yamaha Motor Corp., U.S.A.*, 363 Pa. Super. 308, 315, 526 A.2d 359, 363-64 n.7 (1987) (landholder need not directly or indirectly invite public to use land in order to benefit from recreation use statute), *appeal denied*, 517 Pa. 623, 538 A.2d 876 (1988); *Johnson v. Stryker Corp.*, 388 N.E.2d 932, 934-35 (Ill. App. Ct. 1979) (agricultural landholders cannot afford to keep their land open to all members of the public at all times). For a discussion of the difficulty of determining how much access is enough access, see *Le Poidevin v. Wilson*, 330 N.W.2d 555, 563 (Wis. 1983) (inviting occasional social guests onto the land was not sufficient public access to afford landholder protection of recreational use statute). Note that Wisconsin's recreational use statute was subsequently amended to incorporate the ruling in *Le Poidevin*. WIS. STAT. ANN. § 895.52(6)(d) (West Supp. 1990).

may limit the use of the land to "persons other than the entire public" by granting a lease, right of use, or other right of occupancy to a selected group of recreational users.⁶⁶

Even with the protection of recreational use statutes, landholders are exposed to tort liability costs. The statutes serve as an affirmative defense to personal injury lawsuits.⁶⁷ A landholder may incur significant initial costs in defending a lawsuit.

IV. ADEQUACY OF CURRENTLY HELD INSURANCE POLICIES

Agricultural landholders have valid concerns about increased liability exposure if they allow recreational users on their land. As the previous discussion indicates, landholders who restrict access to their land have less exposure to tort liability than do landholders who permit access. Landholders who charge fees for recreational access not only incur the highest liability exposure, but in most states they also lose the limited liability immunity of recreational use statutes. Agricultural landholders who wish to increase the income from their land by charging fees for recreational access must manage the risks of liability exposure.

Insurance provides a means for managing financial risk for personal injury liability if the landholder's policy adequately covers the risks that arise with recreational access. An initial question is whether liability

66. LA. REV. STAT. ANN. § 9:2791 (West Supp. 1991). This 1989 amendment to the statute appears to abrogate *Peterson v. Western World Insurance Co.*, 536 So. 2d 639, 643 (La. Ct. App. 1988), *writ denied*, 541 So. 2d 858 (La. 1989), in which the court ruled that a private hunting club, which leased land for recreational purposes, was not entitled to the benefits of the state's recreational immunity statute because the club limited the use of the land to its members.

Conversely, too much recreational use may also disqualify a landholder from a statute's protection. In *Logan v. Old Enter. Farms, Ltd.*, 544 N.E.2d 998, 1106-07 (Ill. App. Ct. 1989), the court ruled that if land is used exclusively for recreational purposes, the landholder may not qualify for the recreational use statute. The court reasoned that the legislature intended to provide an incentive for landholders to allow recreational access on a casual basis and that landholders who use land only for recreational purposes do not need the incentive of limited liability to open up their lands to recreational use. *Id.* at 1106-07. Note that this ruling is apparently rendered moot by the Illinois Supreme Court's decision on appeal which reversed the case on other grounds. *Logan v. Old Enter. Farms, Ltd.*, 139 Ill. 2d 229, 241, 564 N.E.2d 778, 784 (1990). In contrast, the California Supreme Court recently ruled that the California recreational use statute, CAL. CIV. CODE § 846, applied to land in a national forest that was subject to a grazing permit but also publicly owned and open to the public for recreational purposes. *Hubbard v. Brown*, 785 P.2d 1183, 1185-86, 266 Cal. Rptr. 491, 495 (1990).

67. See, e.g., *Golding v. Ashley Central Irrigation Co.*, 793 P.2d 897, 899 (Utah 1990) (recreational use statute is used as an affirmative defense, which does not necessarily prevent a lawsuit but may support a motion to dismiss on the pleadings).

policies typically held by agricultural landholders are adequate to insure against risks associated with recreational access.

A. Standard Farmer's Comprehensive Liability Insurance

Farmer's Comprehensive Liability Insurance (FCLI)⁶⁸ policies are designed to provide protection against risks that are peculiar to farming activities. The policies are essentially homeowner's liability policies tailored to the special needs and requirements of persons who live in rural areas and generally engage in agricultural activities that are carried on in rural areas.⁶⁹

FCLI generally covers the insured's liability for injuries to persons who are on the insured's premises with the permission of the landholder, unless the liability is otherwise excluded from coverage. A business pursuits exclusion is typical of most FCLI policies or endorsements. Indeed, the policies are written so that farming activity, the major focus of the policies, is included as an exemption to this exclusion. The exclusion provides that coverage does not apply to bodily injury or property damage arising out of business pursuits of any insured except (a) farming; and (b) activities that are ordinarily incident to nonbusiness pursuits.⁷⁰

FCLI policies do not include a comprehensive definition of the term "farming."⁷¹ Not surprisingly, the definition of "farming" has been a major litigation issue. In the absence of a definition within the policy, courts have turned to sources such as dictionaries, zoning laws, and tax laws for a definition of the term.⁷² These sources focus primarily on

68. This section draws on information gleaned from various policies and the cases of a number of jurisdictions. The discussion encompasses both ranch and farm enterprises. The actual coverage of any particular policy depends on the exact language of the policy, the intent of the parties, and the laws and regulations of the appropriate jurisdiction. Before allowing recreational access to their land, landholders should consult their insurance agents or brokers, as well as attorneys, to determine the scope of liability coverage provided by specific policies.

69. *Wint v. Fidelity & Casualty Co. of New York*, 507 P.2d 1383, 1389, 107 Cal. Rptr. 175, 181 (1973) (Sullivan, J., concurring and dissenting).

70. *Id.*

71. FCLI policies or endorsements may cover specific farm-related enterprises by excluding them from the definition of "business pursuits." For example, "the operation of roadside stands maintained principally for the sale of the insured's farm products" may be expressly exempted from the definition of business pursuits and, therefore, be covered by the policy.

72. These sources may be used to ascertain the understanding of the insurer and the insured at the time the policy was issued. For example, in *Bloss v. Rural Mutual Casualty Insurance Co.*, 70 N.W.2d 602 (Wis. 1955), the court applied a statutory definition of "farming" to determine if mink ranching was a farming activity. Because the statutory definition was not amended to include mink ranching until after the policy was issued, the court held that mink ranching was not a farming activity covered by the policy. *Id.* at 605.

traditional farming activities and do not include recreational access, even in regions where certain recreational activities on agricultural land, such as fee hunting, are common.⁷³ Courts may also define "farming" to include activities that are not strictly necessary for the basic operation of the farm but are complementary to farming. A court may find that these complementary activities are an integral part of whole farming operations in their jurisdictions. An insured may need to submit evidence of activities commonly engaged in by farmers in the area to show that a nontraditional activity falls within "farming."⁷⁴

The definition of farming is also relevant to accidents involving employees. FCLI policies generally cover the medical expenses of third parties from accidents caused by farm employees.⁷⁵ An employee engaged in a recreational enterprise, however, does not qualify as a "farm" employee covered by the policy.⁷⁶

Even if an activity does not meet the definition of "farming," the activity may be exempt from the business pursuits exclusion if the activity is ordinarily incident to nonbusiness pursuits. Courts have devised two tests for distinguishing nonbusiness pursuits from business pursuits. Under the first test, any activity pursued by an insured for profit is a business pursuit, even if the activity does not actually generate profits.⁷⁷ Under this test, liability for injuries related to a recreational enterprise intended by the insured to supplement farm income probably would not be covered

73. One major case, *Wint v. Fidelity & Casualty Co. of New York*, indicates that courts tend to define "farming" narrowly. 507 P.2d 1383, 107 Cal. Rptr. 175 (1973). In *Wint*, the insured operated a for-profit riding academy and horse training and breeding facility. He also pastured his own horse and the horses of others for a fee. The court held that horse pasturing fell within the "farming" exception to the business pursuits exclusion in the insured's FCLI policy. *Id.* at 1387, 107 Cal. Rptr. at 179. Therefore, the policy covered liability arising from an accident that occurred when a horse escaped from the insured's pasture and collided with a car. The court indicated, however, that the "riding club" activity alone may be beyond any reasonable interpretation of farming. *Id.* at 1386-87, 107 Cal. Rptr. at 178-79.

74. See, e.g., *Martin v. Shepard*, 134 Vt. 491, 365 A.2d 971 (1976) (if there is any doubt as to whether Vermont farmers commonly engage in a specific activity, trial court must consider evidence on the question and cannot take judicial notice of the fact).

75. See, e.g., IMT Ins. Co., Farmers Comprehensive Personal Liability Policy (Policy provisions pt. 1, Form No. 400A-1, eff. 1-87, rev. 11-89) at 2 (on file at the Indiana Law Review office). FCLI policies may also cover "domestic employees" who perform duties related to the care and use of the insured premises. *Id.* at 1.

76. *Id.* ("farm employee" is narrowly defined as an employee whose duties are in connection with the farming operations of the insured).

77. See, e.g., *Heggen v. Mountain West Farm Bureau Mut. Ins.*, 220 Mont. 398, 715 P.2d 1060 (Mont. 1986) (steer roping contests conducted three or four times per year at an arena on the insured's ranch were business pursuits, even though the insured made no profits from the contests).

by the policy. Other jurisdictions have adopted an alternative test that requires an additional element of continued and regular activity before a profit-motivated activity is excluded from coverage.⁷⁸

The business pursuits exclusion does not appear to exclude FCLI coverage for liability arising from injuries to gratuitous entrants on the land. Accidents resulting from farming operations would be covered under the "farming" exemption. If no fee or other compensation is required for recreational entry, the recreational activity on the land is not a business pursuit. If a landholder wants to significantly increase income from the land by charging for recreational access or recreational amenities, however, liability for injuries to recreational entrants could be perceived as arising from a business pursuit that FCLI policies do not cover.⁷⁹

Some insurance companies issue farm and ranch policies that include liability coverage for specified activities, such as fee hunting, that typically provide supplemental income to farming operations. Usually, there is a cap on the amount of supplemental income allowed under the policy. If the cap is exceeded, the activity is viewed as a nonfarming business pursuit excluded from coverage under the policy.⁸⁰

The definition of "premises" covered by an FCLI policy may also determine whether coverage is available for recreational entrants' personal injuries. One of two definitions of "premises" is commonly found in FCLI policies. Premises may be defined functionally as all the locations that the named insured operates as a farm. Land holdings not actively farmed or no longer capable of being farmed may be excluded from coverage. For example, in *Foremost Insurance Co. v. Travelers Insurance Co.*,⁸¹ a clause in a FCLI policy excluded coverage for injury and damage arising out of operation of a snowmobile away from the insured's farm

78. For example, in *Randolph v. Ackerson*, 310 N.W.2d 865 (Mich. Ct. App. 1981), the insured, a farm owner, razed an old barn and sold the wood for profit. A customer loading the wood into a truck was injured. The insured had never before engaged in barn razing and was not engaged in a continuous barn razing business. The court ruled both elements of a two pronged test must be found in order to exclude coverage for the injuries: (1) the insured must have profit motive; and (2) the insured's activity must be a stated occupation or customary engagement. The court held that the second prong of the test had not been met and therefore the "business pursuit" exclusion did not apply. *Id.* at 866-67.

79. A landowner who allows even occasional, gratuitous recreational access should at a minimum question his or her insurance agent or broker about the adequacy of FCLI coverage for this access and should obtain a written opinion from the agent or broker as to the adequacy of coverage.

80. N. Hamilton, *Pheasants Galore: An Innovative Program of Private Fee Hunting*, at 3 (unpublished manuscript) (on file at the Indiana Law Review office).

81. 388 N.Y.S.2d 402 (N.Y. App. Div. 1976).

premises. Applying a functional definition of premises, the court held that liability arising from a collision between an automobile and a snowmobile operated by the insured's daughter on a road that bisected the insured's farm was not covered by the policy.⁸² Although the location of the accident was included in the deed description that conveyed title of the farm to the insured, the location had been used as a public highway for ten years and was maintained by the county. The court found that the location was no longer available to the insured for farm purposes, and therefore did not fall within the definition of "farm premises."⁸³ In *Daire v. Southern Farm Bureau Casualty Insurance Co.*,⁸⁴ the plaintiff was injured by falling from the porch of a building used primarily as a fishing camp. The landholder's FCLI policy defined the covered premises as all premises owned and operated by the insured as a farm and other premises for use in connection with a farm. The court held that the "fishing camp" was within the covered premises because the building was used occasionally by farm hands as a cook house. If the building had been used exclusively for recreational activity, the court would have denied coverage under the policy.⁸⁵

Agricultural landholders may want to derive additional income from marginal lands that are not farmed. If a policy uses a functional definition of the premises covered by the policy, the landholder may need additional insurance to cover liability for accidents occurring on land that is not actively farmed but is used by recreational entrants.

As an alternative to a functional definition, some FCLI policies define the premises as a specific geographical location or locations described in the policy's declarations.⁸⁶ Injuries occurring on the described premises, and not otherwise excluded from the policy, are covered. Note, however, that policies using either method to define the insured premises usually include an exclusion for any premises upon which a business other than farming is conducted.

82. *Id.* at 404.

83. *Id.*

84. 143 So. 2d 389 (La. Ct. App. 1962).

85. The *Daire* case is included for the reasoning involved in defining farm premises. The Louisiana legislature adopted a recreational use statute, LA. REV. STAT. § 9:2791 (West 1965), to overcome the decision of the trial court in this case, which held that the landowner was liable for the recreational guest's injuries. See *Holder v. Louisiana Parks Service*, 552 So. 2d 20 (La. Ct. App. 1989).

86. See, e.g., *Dorre v. Country Mutual Ins. Co.*, 363 N.E.2d 464, 465 (Ill. App. Ct. 1977) (insurer had no duty to defend insured against tort action when accident occurred on twelve-acre parcel of land that farmer had not listed on the policy declarations; policy expressly provided that premises owned, rented, or controlled by the insured and not listed in the declarations were excluded from coverage).

B. Homeowner's Liability Insurance Policy

The standard homeowner's liability insurance policy provides coverage for bodily injuries to persons on the insured premises with the permission of the insured. Liability coverage may be available for injuries arising from a condition in the insured location or immediately adjoining it, from activities of the insured or of a resident employee in the course of the resident employee's employment by the insured, or actions of an animal owned by or in the care of the insured.⁸⁷

A homeowner's liability policy contains a business pursuits exclusion similar to that of the standard FCLI policy. Business pursuits of the insured, other than activities ordinarily incidental to nonbusiness pursuits, are not covered. Farming for profit and other profit-making pursuits may be expressly excluded.⁸⁸ Given this exclusion, the standard homeowner's liability policy is inadequate to cover incidents arising from recreational access to agricultural land. If the landholder charges fees for recreational entry, recreational activities would fall within the business pursuits exclusion. Landholders who do not charge fees but who farm for profit would not be covered for bodily injuries to entrants arising from farming activities.

Limitations on the premises covered by the policy are also relevant to liability for recreational access. The standard homeowner's insurance policy covers injuries occurring on vacant land, but may exclude from coverage farm land owned or rented by the insured.⁸⁹ A landholder would need to ensure that recreational entrants, including those not charged for entry, confine their activities to vacant land and do not enter farmland.

C. Automobile Insurance Policy

The standard automobile insurance policy is designed to cover liability arising from injuries that result from the ownership, care, maintenance,

87. W. FREEDMAN, *supra* note 7, app. K.

88. See, e.g., *Wint v. Fidelity & Casualty Co. of New York*, 507 P.2d 1383, 1386, 107 Cal. Rptr. 175, 178 (1973) (incident in which insured's horse escaped from pasture and collided with car was within business exclusion of homeowner's policy because farm on which horse was kept was operated for profit). Note that a homeowner's policy may cover incidents occurring on the premises of a farm operation if the incident does not arise out of a circumstance related to the farm enterprise. For example, in *Lititz Mutual Insurance Co. v. Branch*, 561 S.W.2d 371 (Mo. Ct. App. 1977), the court held that the insured's homeowner's policy covered injuries to a child bitten by a dog at the insured's dairy farm. The court found that the dog was not on the dairy property for a business purpose, such as guarding the premises. The court further found that the incident did not arise out of the dairy business, but out of the insured's personal conduct in harboring a vicious dog. Therefore, the court concluded that the policy's business pursuits exclusion did not apply. *Id.* at 373.

89. W. FREEDMAN, *supra* note 7, app. K.

operation, or use of the vehicle described in the policy's declarations. If there is any independent, intervening cause of the accident, there is no coverage under the policy.⁹⁰ Given these limitations on liability coverage, the standard automobile insurance policy is inadequate to cover all potential liability arising from recreational access, even if there is no charge for access.

V. SPECIALIZED INSURANCE AND RISK MANAGEMENT ALTERNATIVES

Insurance policies typically carried by rural landowners do not adequately cover liability risks associated with allowing regular recreational access. In the case of gratuitous recreational access, even if the circumstances giving rise to injuries to recreational users are covered by a policy, the amount of the coverage may not be sufficient to pay the full amount of potential damages. If an agricultural landholder supplements income from the land by charging for recreational access, exclusions in the policies may preclude coverage. Agricultural landholders need to look beyond the typical policies for a means of managing the financial risks associated with recreational access.

A. *Excess Insurance and Umbrella Policies*

If liability exposure from the type of risks arising from recreational access is adequately covered by a currently held policy, the landholder may increase the amount of coverage by obtaining an excess insurance policy. Excess insurance supplements the amount of coverage of an underlying primary policy. Excess insurance does not provide coverage until the amount of coverage of the primary policy is exhausted. This approach provides a relatively simple insurance solution for a landholder who is willing to provide recreational access for no charge but is concerned about the possibility of serious, costly injuries to recreational users.⁹¹

If currently held policies do not completely cover the risks associated with recreational access, the landholder may supplement the primary insurance with an umbrella policy. Umbrella policies supplement the

90. W. FREEDMAN, *supra* note 7, § 1:22.

91. For a review of issues concerning excess insurance, see Marick, *Excess Insurance: An Overview of General Principles and Current Issues*, 24 TORT & INS. L.J. 715 (1989). Excess insurance designed to supplement specific underlying primary policies in a co-ordinated package of insurance coverage is referred to as "following form" excess insurance. The following form policy provides that the exact same risks are covered by the policy as are covered by the primary insurance. The premiums for this excess insurance are less than those of the primary insurance because (1) the excess insurer has no duty to defend the insured; and (2) the risk of a claim against the excess insurance is decreased by the coverage of the primary insurance. *Id.* at 718.

amount of coverage of underlying primary policies and also provide coverage for additional types of risks.⁹² This additional risk insurance is essentially specialty insurance, which can be tailored to the particular type of recreational opportunity provided by the landholder.

B. Specialized Insurance Carried by the Landholder

Specialty insurance is available for many specific recreational opportunities and services.⁹³ A landholder may need to persist to find specialty insurance in light of the perception that such insurance simply does not exist.⁹⁴ Liability insurance coverage for fee recreational activities is generally written in the amount of \$100,000, \$300,000, \$500,000, or \$1,000,000. Premium rates are based on a combination of factors, including the exposure of risk for a particular recreational activity, the amount of acreage devoted to the recreational use, the number of recreational users having access to the premises, and the managerial expertise of the operator of the recreational enterprise. Actual cost may be assessed as a set fee or based on a percentage of gross receipts of the recreational enterprise.⁹⁵

92. The umbrella-policy insurer has a duty to defend the insured against the additional types of risks that are not covered by the primary insurance. *Id.*

93. Insurance may not be available to the landholder for high risk activities or unusual recreational activities for which actuarial data are not yet available. Insurance for both downhill and cross country skiing enterprises is very difficult to obtain and extremely expensive. As of spring 1989, insurance was not available for risks arising from rock climbing. See Dillard, *Insurance: Questions and Answers Related to Fee Access*, in PROCEEDINGS, *supra* note 1, at 396. See also Whiteside, *Insuring Summer Fun, Recreation Cover Abundant*, Bus. Ins., Aug. 21, 1989, at 3 (reporting that the Sierra Club had suspended all club-sponsored mountain climbing trips because it could not afford the premiums for insurance to cover the activity).

94. See, e.g., Lundquist, *Landowners Grapple With Liability Questions*, AMERICAN FORESTS, Jan.-Feb. 1989, at 17, 19 (quoting an American Farm Bureau representative as stating, "Neither love nor money can get insurance policies anywhere to protect the small landowner from injuries to recreational users," at the first formal meeting of the Landowner and Recreational Alliance in Washington D.C., June 14, 1988).

95. S. McCLELLAND, D. CLEAVES, T. BEDELL & W. MUKATIS, MANAGING A FEE-RECREATION ENTERPRISE ON PRIVATE LANDS 5 (Or. St. U. Extension Service, Extension Circular 1277, Mar. 1989). Specialized insurance is readily available for some common recreational enterprises. For example, insurance rating for fee hunting is based on the amount of acreage leased and the frequency with which groups hunt on the land covered by the policy. Woodward, Long & Reiger, based in New York, sells liability insurance to landowners having both small and large fee hunting tracts. Premiums in 1989 were \$5.50 per hundred dollars of gross hunting receipts, with a \$650 minimum premium. The Davis-Garvin Agency of Columbia, South Carolina sells policies for lease hunting arrangements. For large landowners, premium costs are about 15 cents per acre for tracts over 50,000 acres and 23 cents per acre for tracts in the 10,000 acre range. Premiums

State law may require recreational enterprises to carry a specific amount of liability insurance. For example, Oregon hunting and fishing outfitters and guides must carry liability insurance for occurrences caused by the outfitter or guide and employees that result in bodily injury or property damage. Coverage must be at least \$300,000 per occurrence, general liability insurance or bodily injury coverage must be at least \$100,000 per person to a total of \$300,000, and \$10,000 property damage per occurrence.⁹⁶

Before issuing specialty insurance, insurers may require landholders to provide a high level of recreational services to reduce risk. For example, a ranch charged a \$20 fee for escorting or directing hunters to good elk hunting locations on the ranch and for providing return transportation. The service was provided on a casual basis by employees engaged primarily in working the ranch. A hunter, who became lost in a storm, sued the ranch. The ranch's insurer settled the suit for tens of thousands of dollars. Subsequently, the insurer required that the ranch operate a full-fledged outfitting service as a condition of obtaining insurance.⁹⁷

Specialty insurance may take the form of a rider to an existing policy or a separate policy. If the insurance is a rider, the insurance agent should ascertain that no conflicts exist between the rider and the policy.

C. Insurance Carried by the Recreational User

As an alternative to insurance carried by the landholder, a landholder may require that recreational users carry insurance for the risks of

issued to hunting clubs cost about \$25 per hunter per year. Patterson & Patterson, *Land Lease: Sporting Rights for "Rent"*, AM. FORESTS, Sept.-Oct. 1989, at 56. The number of bed and breakfast operations is increasing. Liability coverage is readily available, with a fairly low premium rating based on receipts of the operation. A recent Minnesota study indicated that a farm-based bed and breakfast operation, which included short visits and a limited opportunity for guests to see the farming operations, could be covered by an endorsement to an existing farmer's comprehensive liability policy. Estimated premiums for this additional coverage ranged from \$25 to \$80. Insurance companies were also considering providing endorsements, rather than requiring separate policies, for farm vacation businesses offering longer visits and more opportunities to observe farm operations. J. Thompson, Summary Report and Final Recommendations: Farm Based Guest Businesses and Building Minnesota's Agricultural Tourism (unpublished manuscript) (prepared for the Minnesota Governor's Council on Rural Development). Insurance coverage is also readily available for stream and pond fishing, campground operations, and recreational hiking. See Dillard, *Insurance: Questions and Answers Related to Fee Access*, in PROCEEDINGS, *supra* note 1, at 396.

96. OR. REV. STAT. § 704.020(1)(e) (1989).

97. See Huffman, *Can Farmers and Hunters Coexist: Fee Hunting and Other Alternatives*, AGRIC. L. UPDATE, Oct. 1988, at 4.

recreational use. This is a common arrangement between landholders and groups, such as hunting clubs, which lease land for recreational use. As a term of the lease, the landholder requires the lessee to carry liability insurance on both the lessee and the landholder. The lessee's policy should name the landholder as one of the insured parties. This arrangement is typical of other leases already familiar to agricultural landholders, for example landlord-tenant leases or grazing leases.⁹⁸

Recreational users may carry standard liability policies that cover accidents and injuries caused by the recreational user.⁹⁹ Special policies or endorsements covering particular recreational activities may be available to the recreational user. For example, snowmobile liability policies providing coverage for injury and damages resulting from ownership and operation of a snowmobile are available.¹⁰⁰

There are drawbacks to a landholder's relying on insurance carried by recreational users. Ascertaining the insurance coverage of numerous casual or occasional recreational users is a significant burden to a landholder. In addition, the landholder will not have control over legal issues such as the intent of the parties to the insurance policy.¹⁰¹ Unless the landholder has clearly given control over the premises to a specific group of recreational users, a better strategy is for the landholder to acquire additional liability coverage.

D. Insurance Carried by Recreational "Brokers"

As demand for recreational access to private land increases, a new type of enterprise, the recreational "broker" has appeared. An example is Pheasants Galore, Inc. located in Iowa. Pheasants Galore enters into an agreement with a landholder under which the landholder grants hunting, shooting, and fowling rights to Pheasants Galore. Then Pheasants Galore, acting as the landholder's agent, enters into separate agree-

98. See D. PINEO, WILDLIFE AND RECREATION MANAGEMENT ON PRIVATE LANDS, A GUIDE FOR WASHINGTON 32 (1985).

99. For example, in *Ermert v. Hartford Insurance Co.*, 559 So. 2d 467 (La. 1990), a hunter negligently shot a fellow hunter in the foot at a hunting camp. The negligent hunter, who was president and majority shareholder of his corporate business, used the camp for entertaining clients and employees and generating business sales. The court found that the negligent hunter was acting in the scope of his employment at the time of the accident. *Id.* at 478. Therefore, the corporate business was vicariously liable and the accident was covered by the insurance policy of the business. The court reached this decision even though it found that the negligent hunter's predominant motive for being at the camp was recreational activity unrelated to employment. *Id.* at 475-78.

100. See *Foremost Ins. Co. v. Travelers Ins. Co.*, 54 A.D.2d 150, 388 N.Y.S.2d 402, 403 (N.Y. App. Div. 1976).

101. For a review of the role of the expectation of the parties in interpreting an insurance contract, see W. FREEDMAN, *supra* note 7, § 11:2[g].

ments with hunters which transfer the hunting, shooting, and fowling rights to the hunters. Pheasants Galore also enters into agreements with providers of bed and breakfast services.

Pheasants Galore has obtained an insurance policy from Grinnell Mutual providing \$500,000 coverage for hunting and \$500,000 coverage for bed and breakfast services. This policy is unique. Currently, Pheasants Galore also encourages individual landholders to carry liability insurance for activities conducted on their land under the agreements with Pheasants Galore.¹⁰²

E. Insurance Carried by Cooperatives or Other Groups

A single landholder may not have sufficient resources, including surplus land available for recreational use, to run a viable recreational enterprise. Grazing Lands Forum, a consortium of about twenty-five organizations and government agencies interested in management of grazing lands, suggests that landholders pool their resources and share the costs of providing recreational access. The landholder pool can assess cooperating landholders in order to fund a group liability insurance policy. The cost of a group policy to an individual landholder may be considerably less than the cost of an individual policy.¹⁰³

The Six Shooter Hunting District is an example of a landholder pool. The District was formed in 1989 by about a dozen landowners near Rapelje, Montana, who pooled their land for a fee hunting operation. The District charges \$25 to hunters for the privilege of hunting antelope on the District land. Landowners are paid for maintenance and costs. Money from the hunting fees also goes to a community development fund. About 130,000 acres of antelope habitat are included in the District.¹⁰⁴ The District carries an insurance policy, with premiums based on the amount of the revenue generated. The 1989 premium was about \$500 for the group.¹⁰⁵

The United States Department of Agriculture also has promoted cooperative approaches to providing recreational access. Liability insurance is still a necessity, but joint purchase of insurance through a

102. N. Hamilton, *Pheasants Galore: An Innovative Program of Private Fee Hunting*, at 3 (unpublished manuscript) (on file at the Indiana Law Review office). If this new recreational brokerage proves successful, it may be possible for Pheasants Galore to carry all necessary insurance for the recreational activities.

103. See *Mixed Uses For Grazing Land Can Yield Extra Income*, FARMLINE, Feb. 1988, at 14.

104. Sands, *Wildlife Payoff*, Agweek, Mar. 12, 1990, at 26, col. 3.

105. *Id.* at 27, col. 1.

cooperative or other association may reduce the members' individual costs.¹⁰⁶

In organizing a recreational association, care should be taken to ensure that individual landholders are not unexpectedly exposed to liability. As a general rule, the entity with control of property is liable for injuries to entrants. Delegation of property management in some circumstances, however, may not suffice to delegate liability. For example, in *Davert v. Larson*,¹⁰⁷ an individual holder of 1/2500 undivided interest in a ranch and recreation community managed by an owners association was not relieved of liability arising from negligent maintenance of property. The court ruled that tenants in common who delegate control and management of property are not immunized from liability to third parties for tortious conduct.¹⁰⁸ The court noted that California law does not require associations managing common areas to carry insurance to cover injuries to third persons arising from conditions of the common areas.¹⁰⁹ The court reasoned that relieving individual owners in common of liability would eliminate motivation on the part of any party to exercise due care and control of commonly owned property and could leave injured third parties without a remedy at law.¹¹⁰

Landholders may wish to retain authority over some aspects of property management, while delegating limited management authority to a recreational association. For example, a rancher may leave the management of fee hunting parties to a recreational association but still retain rights to manage the land for grazing. As a result, a single

106. USDA, AGRICULTURAL COOPERATIVE SERVICE, THE COOPERATIVE APPROACH TO OUTDOOR RECREATION 6 (Coop. Info. Rep. No. 32, 1984); see also *Mixed Uses for Grazing Land Can Yield Extra Income*, FARMLINE, Feb. 1988, at 14 (report on Grazing Lands Forum conference at which participants suggested that cooperating landholders could fund an insurance pool and obtain a less expensive group policy to insure landowners against liability for recreational access).

107. 163 Cal. App. 3d 407, 209 Cal. Rptr. 445 (1985).

108. *Id.* at 412, 209 Cal. Rptr. at 448.

109. *Id.*

110. *Id.* The court noted that the Uniform Common Interest Ownership Act, promulgated by the National Conference of Commissioners on Uniform State Laws, provides that owners are not individually liable for torts arising out of common areas. The Act assigns liability to associations formed to manage the common areas and requires that the associations maintain specified insurance that covers liability for injuries to third parties on the common areas. *Id.* The court noted that the liability of the individual tenants in common is joint and several, but did not reach the issue of apportioning liability among the individual members of the owners association. *Id.* at 406, 209 Cal. Rptr. at 447. In a subsequent case, *Kaye v. Mount La Jolla Homeowners Association*, the court indicated in dicta that members of owners associations are vicariously liable for common area torts, at least to the extent of their pro rata ownership of the common areas. 252 Cal. Rptr. 67, 76-77 (Cal. Ct. App. 1988).

premises may be subject to control and management by both an individual landholder and an association. Both entities could incur liability for injuries to recreational users, and both should take steps to assess their liability exposure and to insure against potential liability risks.¹¹¹

V. CONCLUSION

Agricultural landholders willing to open their land for recreational access have valid concerns about increased tort liability exposure. This exposure, under both traditional premises liability rules and the modern doctrine of reasonable care toward entrants, increases significantly if the landholder receives compensation for recreational use of the land. Recreational use statutes provide limited immunity for gratuitous use of the land, but in most states the statutes provide no liability immunity if landholders are compensated for the recreational use. Even if the landholder does not charge for use, loopholes and unresolved issues surrounding application of these statutes may involve the landholder in protracted litigation.

Liability insurance policies typically held by agricultural landholders are not written or intended to cover the risks of frequent recreational access. Under most of these policies, coverage is clearly precluded if the landholder opens the land to recreationists with a profit motive, hoping to obtain supplemental income from the land. Specialty insurance is available for many recreational enterprises. Innovative approaches, such as recreational brokerages and cooperatives, can help landholders decrease the costs of managing financial risks. Until the courts have ruled on the liability of individual landholders under these group arrangements, however, individual landholders should obtain insurance policies with specific coverage of the liability risks associated with recreational access.

111. See, e.g., *Fryberger v. Lake Cable Recreation Association*, 40 Ohio St. 3d 349, 533 N.E.2d 738 (1988) (court denied summary judgment in case involving plaintiff injured by diving into a lake; the court found that a factual issue existed as to whether both the owner of lake front property and the association that managed the lake owed a duty of care to the injured plaintiff for conditions in the lake).