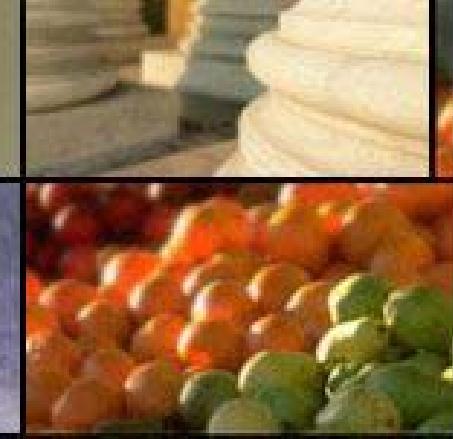


The National Agricultural Law Center



University *of* Arkansas
School *of* Law



www.NationalAgLawCenter.org

Legal Risk Management: Protecting Your Farm and Family

Shannon Mirus
Staff Attorney
2/21/09

479-575-7646 • nataglaw@uark.edu

Disclaimer

- The University of Arkansas School of Law's National Agricultural Law Center does not provide legal advice.
- **Any information provided on or by this website is not intended to be legal advice, nor is it intended to be a substitute for legal services from a competent professional.**
- This work is supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115, and any opinions, findings, conclusions, or recommendations expressed in the material on this website do not necessarily reflect the view of the U.S. Department of Agriculture.

What we'll cover today

- Concepts of Negligence & Premises Liability
 - Most common cause of action
 - Your duty of care as a land owner
- Business Organizations
 - Ways to protect your business assets and your personal assets
- Contracting
 - Get it in writing! – Here's why
 - Issues to consider, questions to ask before signing

It's always about the FACTS

- Sometimes it can be hard to answer a legal question with specificity
- Each situation is different based on the facts
- Courts make determinations of FACT before they apply the law
- Often the answer is “It depends!”
 - The facts of your specific situation may change the outcome



Premises Liability

The notion of people on your land and how YOU- the land owner - may be liable.

Basic legal concepts

- Premises Liability is based on the notion of negligence
 - failure to exercise the care that a reasonably prudent person would exercise in like circumstances

Negligence

- There are 4 parts to a cause of action for negligence
 - Duty of Care
 - Your responsibilities as a land owner; different in each situation
 - Typically the “reasonable person” standard
 - Breach of Duty
 - A failure on your part regarding your responsibilities
 - Causation
 - Your failure caused the “injury”
 - Damages
 - There must be an actual harm that can be redressed

Liability Issues

- So now there are people on your land...
 - How did they get there?
 - Did you invite them or charge them to come onto your land?
 - Did they ask your permission? Are you allowing them to enter for free?
 - Are they trespassing? Are you aware of their presence?

Liability Issues

- 3 Categories of People on Your Premises
 - Trespasser
 - Lowest duty of care
 - Licensee
 - Higher duty of care than trespasser, but less than invitee
 - Invitee
 - Highest duty of care

Liability Issues: Trespasser

- Trespasser
 - Entered upon land without permission or invitation
 - Knowledge of trespasser
 - No knowledge - no duty, no liability
 - Knowledge - duty not to affirmatively harm
 - A course of action which shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others
 - Example: Teenagers going out to your pond and fishing without your permission

Liability Issues: Licensee

- Licensee
 - Present for a non-commercial, non-business purpose with the consent of the possessor of the property, such as a social guest at someone's residence

Liability Issues: Licensee

- Your Duty:
 - Refrain from injuring the person through willful or wanton conduct
 - I.e., deliberate behavior
 - Warn of hidden dangers where the person does not know or is unlikely to know of the conditions or risks
- Example:
 - Someone asks for permission to hunt, walk, use land without a fee
 - Need to warn of the bull on the back 40 that isn't fenced in

Liability Issues: Invitee

- Invitee

- Person who is invited upon the premises in order to conduct business with the possessor
- Came on the land for *your* benefit
 - Customers in store or shopping center
 - Employees
 - Students
 - Business visitor

Liability Issues: Invitee

- Your duty:
 - Highest duty of care
 - A general duty to use ordinary care to keep the premises reasonably safe for the benefit of the invitee
 - This means making sure your employees have safe equipment, facilities, proper training, etc.

Status of Entrant

- The status of a person on your land can change fluidly.
 - For example -
 - If you allow someone to fish in your pond, but they explore other parts of your land, they may change from a licensee to a trespasser
- It is important to define the area that visitors have permission to use.

Where are we?



- We've talked about premise liability
- Now we'll talk about some different business organizations available for your operation.

Business Organizations

Options for your enterprise

Types of Business Structures

- Sole Proprietorship
- General Partnership
- Limited Partnership
- Limited Liability Corporation
- Corporations
 - Subchapter "S"
 - Subchapter "C"

Issues we'll cover for each one

- Liability of Owners
- Legal Status
- Formation
- Management
- Taxation

Sole Proprietorship

- Liability of Owners
 - 100% liability for the business debt
 - Creditors will be able to reach your personal assets as well as what you invested into the business.
- Legal Status
 - Not a separate legal entity
 - You would be sued directly.

Sole Proprietorship

- Formation
 - No formalities are required
 - Formed or dissolved at the discretion of the individual who owns it
 - Only 1 person, or it becomes a partnership
- Management
 - Easy decision making – only one person to consult!
- Taxation
 - Income is taxed on the individual's tax return
 - Schedule C

General Partnership

Definition

- An association of two or more “persons” who agree to carry on as co-owners of a business for profit.
- No intent is necessary to form a general partnership

General Partnership

- Liability
 - Each partner is jointly and severally liable for the debts of the business
 - Creditors can reach your personal assets, in addition to what you have invested into the business

General Partnership

- Legal Status
 - Recognized as a separate legal entity
- Formation
 - No formalities are required
 - Can be formed unintentionally (only intent required is to run business for profit)
 - There can be a formal partnership agreement that details management responsibilities and how profits/losses will be split

General Partnership

- Management
 - Each member of the partnership is called a “general partner”
 - The decisions are made by all partners and all partners actively participate
 - Profits and losses are split evenly
 - Unless the partnership agreement states otherwise

General Partnership

- Taxation
 - The general partnership has the advantage of being a “pass-through entity”
 - This means the partnership itself pays no income taxes
 - Instead, income is taxed only after it is distributed to the partners.
 - This is different than the “double tax” where income is taxed when the business earns it and when it is paid out to the individual partners.

Limited Partnership

- Limited Liability Partnership
 - A more formal business organization that limits some liability
- Liability
 - General Partner
 - Is fully liable for the financial and legal obligations of the business
 - Limited Partner
 - Only at risk of losing the capital invested or pledged to the business
 - Personal assets are not at risk

Limited Partnership

- Legal Status
 - Separate legal entity
- Formation
 - Requires at least 1 General partner and 1 Limited partner
 - Requires a partnership agreement that lays out how the business will be run, including how profits/losses will be divided
 - Certificate must be filed with Secretary of State
 - Name of business must have “limited” or “LLP”

Limited Partnership

- Management
 - The General partner manages the business
 - Policy reasons: General partner has the most at stake.
Incentive to make sound business decisions
- Taxation
 - Limited Partnership is also a “pass-through entity”
 - Income is only taxed after it is passed on to the general or limited partners.

Limited Liability Corporation (LLC)

- LLC
 - Similar to Limited Partnerships
 - Provides protection to personal assets
 - Made up of “members” rather than “partners”
- Liability
 - Members’ personal assets are protected from creditors of the business.
 - Creditors can only reach that which has been invested or pledged to the business

LLC

- Legal Status
 - Recognized as separate legal entity
- Formation
 - Can be formed with 1 or more members
 - Created by delivering Articles of Organization to the Secretary of State's office
 - Must include
 - Name of LLC
 - Address of LLC
 - Agent for service of process
 - Certain reports must be filed each year to maintain LLC status

LLC

- Management – 2 options
 - Member Management
 - All members have the right to participate in management
 - This is the more common option
 - Manager Management
 - Only designated members have management authority as provided in articles of organization
- Profits and losses are shared equally among members unless otherwise agreed

LLC

- Taxation
 - The LLC can elect to be a “pass-through entity”
 - Income is taxed only when it is distributed to the members
 - Or the LLC also has the option of being taxed as a corporation
 - Income would be taxed when the LLC earns it and again when it is distributed to the members

Corporations

- Most complex business organization
- Offer liability protection for shareholders
 - Similar to that of LLC

Corporations

- Liability
 - Shareholders are protected from creditors of the corporation in most cases
- Legal Status
 - Corporation is a separate legal entity

Corporations

- Formation
 - Articles of incorporation must be filed with Secretary of State
 - Must include
 - Name of corporation
 - Purpose of corporation
 - Stock structure
 - Fictitious name statement
 - By Laws
 - Include details of how the corporation will be run
 - Officers
 - Shareholder meetings
 - Number and terms of Directors on Board

Corporations

- Formalities
 - Record keeping requirements
 - Regular board meetings
 - Annual shareholder meetings
 - Annual filing requirements for the state

Corporations

- Management
 - Shareholders elect a Board of Directors
 - Board of Directors appoint Officers
 - Officers are responsible for day-to-day management decisions
 - Board of Directors is responsible for long term planning and management
 - Shareholders have limited management authority and vote only on extraordinary measures
 - Like selling more than 1/2 of the assets or dissolving

Types of Corporations

- S Corporation
 - Limited number of shareholders
 - “Legal persons” that are allowed to be shareholders is limited to citizens, resident aliens, estates and certain trusts
 - No corporations, non-resident aliens
 - Only one class of voting stock
 - Distribution rights to shareholders must be equal
 - No tax at the corporate level
 - Similar to taxation of LLC

Types of Corporations

- C Corporation
 - Unlimited number of shareholders
 - No limits on who (or what legal entities) can be shareholders
 - Can issue common or preferred stocks or bonds
 - Distribution rights are very flexible
 - Income is taxed at the corporate level
 - And then again when it is distributed to shareholders

How to choose!

- Deciding which business structure to use is an important decision.
- Many factors to consider
 - Who is involved
 - What is their role
 - What are the requirements
 - What makes the most sense for my business



Which way are we headed?

We've talked about premise liability and business organizations.

Now on to contracting!

What is a contract...really?

- An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law
- The writing that sets forth such an agreement

Why should it be in writing?

- Good business practices
- Evidence of revenue stream
- The law may require it to be enforceable
 - Easements
 - If not in writing, they are just a license
 - Statute of Frauds
 - Sale or transfer of rights in land
 - Leases for longer than 1 year
 - Sale of goods over \$500

What should be included?

- Description of property
- The length of the lease - day, season, annual
- Amount of rent, due date, penalties
- Who is allowed to use the property
 - Only members of the hunting club or any one?
- Ground rules for use of the land
 - For hunting leases, responsibilities of hunters, fines for damage, etc.

Issues with Contracts

- Turns into “he said” – “she said”
- Courts look to put everyone in an equitable position
 - Try to do what’s fair
- But they only have so much to work with
 - If your agreement is not in writing, what will they base their decision off of?
 - If only part of your agreement is in writing, how will they use that?

www.NationalAgLawCenter.org

Shannon Mirus
Staff Attorney
smirus@uark.edu