

# **RANCHERS' AGRICULTURAL LEASING HANDBOOK: GRAZING, HUNTING, & LIVESTOCK LEASES**



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## **Funding**

Funding for the development of these materials was provided by the USDA National Institute of Food and Agriculture through the Southern Risk Management Education Center, Agreement Number: 21665-05.

## **Acknowledgements**

The authors gratefully acknowledge the invaluable assistance of Ms. Cari Rincker, owner of Rincker Law, PLLC in New York, New York, Mr. Jim Bradbury, owner of James D. Bradbury, PLLC, in Austin, Mr. James Decker, partner at Shahan Guevara Decker Arnott in Stamford, TX, Mr. Trace Blair, partner at Wiginton Rumley Dunn & Blair in San Antonio, Mr. Austin Voyles, Potter County Agricultural Extension Agent, and Fred Hall, Tarrant County Agricultural Extension Agent who provided innumerable insights to the subject matter of this handbook and reviewed its contents. The authors also appreciate the photography skills of Mr. Steve Byrns, Texas A&M Agrilife Communications, for the cover photo.

## **Author Credit**

Authorship credit is as follows: Tiffany Dowell Lashmet (Chapters 1, 2, 4, 5, 6, and 7), Shannon Ferrell (Chapters 2, 3, and 4), Rusty Rumley (Chapters 8 and 9), and Paul Goeringer (Chapters 10 and 11).



**Disclaimer**

This handbook is for educational purposes only, does not create an attorney-client relationship, and is not a substitute for competent legal advice by an attorney licensed in your state. The checklists and forms are provided only as general guidance and are certainly not exhaustive. On the other hand, many of the suggested terms may be unnecessary in all circumstances. The authors strongly suggest that all parties consult with their own attorney when entering into a lease agreement.

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## CHAPTER I: WHY LEASE LAND OR LIVESTOCK?

Whether a person owns land or is seeking to find land to rent, leasing property for grazing or hunting leases can be beneficial for both parties. Similarly, both the owner and lessee of livestock benefit from lease agreements as well. According to one article, “Leasing land can benefit almost any farmer in any situation.”<sup>1</sup>

### **Benefits of Leasing to the Lessor.**

For a landowner (“lessor”), leasing property can serve many purposes. First, the payments made by the tenant (“lessee”) for a grazing lease serve as an added source of income. This may allow a landowner to expand his or her operation and make land payments using lease income. For example, if a family purchases land subject to a mortgage, but then leases the land to a third party for at least the amount of the mortgage payment, the family would be able to use that lease income to build equity in their own land. Second, a grazing lease arrangement may allow the lessor to ensure care for the property by another, thereby avoiding some expenses and physical effort otherwise required of the landowner. This is a particularly desirable situation for older landowners who may no longer be able to care for the land as they were before.

Another issue that may make leasing land desirable for a landowner involves the special use valuation for agricultural or open space land with regard to ad valorem taxes. Most states offer an alternative method of calculating property taxes due on agricultural land. Rather than basing the taxes owed on the fair market value of the land—which may be greatly in excess of the potential agricultural income that can be derived from the property—the property taxes are calculated based on the potential productive value that could be generated with prudent agricultural practices on the land. This can make a significant difference in the amount of property taxes due by a landowner. One fifth-generation ranch in Texas recently reported that without the ag use valuation method, their taxes would have been 10 times higher, making the taxes more than the income generated from the land. If a landowner is not in a position to satisfy the requirements for agricultural valuation, a lease may allow the landowner to still retain the benefits of the special tax valuation method. Landowners should be careful to understand the rules in their states and in their particular appraisal district in order to ensure they are compliant with the requirements needed to receive the special use valuation.

Third, with regard to hunting leases, a landowner is able to supplement his or her income, while still farming or ranching the land the remainder of the year. Oftentimes, a landowner can run cattle or grow crops while still making a sizable income from lease payments during prime hunting seasons. Additionally, allowing hunters to harvest animals that may be competing with livestock for forage can be beneficial as well.

Fourth, leasing livestock can be beneficial for the livestock owner by allowing the owner to retain ownership rights in the animal, while generating an additional income and seeing how the animal might produce. For example, if a cattle rancher has a young bull, he might consider

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<sup>1</sup> See Meg Grzeskiewicz, *Building your farm business on leased pasture*, On Pasture (May 20, 2013).

leasing the bull to a neighbor and seeing how the calves turn out before using the bull on his own herd.

### **Benefits of Leasing to the Lessee.**

For a tenant, a grazing lease can provide the ability to start or grow a livestock operation without the high capital investment needed to purchase his or her own land. For new farmers, the extensive costs involved with getting into the industry pose a significant problem. As a result, statistics show that the average age of the American farmer has risen to 58.<sup>2</sup> This means that for every six farmers over the age of 65, there is only one under the age of 35.<sup>3</sup> Leasing land may be a key option in helping to reverse this trend by allowing younger farmers to enter into agricultural production. Further, leased land allows the lessee to avoid having a large down payment often required to qualify for a mortgage to purchase land, and to avoid paying interest or property taxes on land.

Similarly, leasing livestock can offer cost-saving benefits as well. While a producer may desire to improve the quality of herd or implement new genetics, the costs of purchasing new livestock—particularly breeding stock—may make doing so seem unfeasible. By leasing a breeding animal (particularly a male), a producer may be able to obtain the new genetics at a fraction of the cost that purchasing the animal outright would require.

Lessees and lessors alike should carefully consider the benefits and obligations offered by grazing, hunting, and livestock leases.

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<sup>2</sup> See Dan Nosowitz, *USDA vows to help young farmers, but will it be enough?*, Modern Farmer (Nov. 13, 2015).

<sup>3</sup> *Id.*

## **CHAPTER II: WHY IS A WRITTEN LEASE NECESSARY?**

Lease agreements are governed by state law. Leases are simply one type of contract, and the principles of contract law apply. There are several applicable legal provisions that are important for parties negotiating a lease agreement to consider.

### **The Importance of Written Agreements.**

The agriculture industry is perhaps that most reliant on the handshake deal. For decades, producers have made deals with their friends, neighbors, and other ranchers to lease land. Although in a perfect world, a person's handshake might be good enough to memorialize a lease agreement, this is simply not true in the real world.

The most important step a party to an agricultural lease can take it to put the lease terms in writing. Here are a number of reasons why.

- Written leases protect relationships. Oftentimes, ranchers say, "I cannot ask for a written lease, he will think that I do not trust him!" Distrust is simply not a valid reason to obtain written lease agreements. On the contrary, written lease agreements can actually help ensure trust and understanding between the parties and protect the relationship between them. Leases do not have to be one-sided, but can be drafted to carefully protect both parties' interests and investments.
- Written leases ensure details are well thought through. When two people verbally agree to a lease agreement, there are oftentimes important details that just did not come up and were not thought through by the parties. When a person undertakes to put the details of an agreement on paper, many additional thoughts, details, and issues arise. Having a written lease agreement assists not only in memorializing the parties' agreement, but in helping the parties come up with the topics on which such agreement is needed.
- Written leases protect in the event the unexpected happens. Sometimes, life throws curve balls out of the blue. Written leases can help provide stability in the event one of these curve balls affects a lease agreement. For example, assume a cattle rancher leased land from his friend for the past 20 years on an oral lease agreement without incident. Now assume the friend died, and the land is inherited by his nephew from New York City, who has never seen a cow, never set foot on a ranch, and has no idea what is common in a grazing lease arrangement. The new landlord could make the tenant's life miserable if there was no written lease in place for the tenant to rely on to protect his rights.
- Some written leases must be in writing to be enforceable. A legal doctrine known as the Statute of Frauds—which exists in some form in all 50 states—requires that certain contracts be in writing in order to be enforceable. Although the details of the Statute of Frauds differ by state, most states require that at least some agricultural leases be in writing and signed by the person against whom

enforcement is sought. For example, in many states, leases lasting at least one year must be in writing in order to be legally enforceable. Thus, if a person entered into a 5-year oral grazing lease, he or she would not be able to successfully sue for breach of contract because, pursuant to the Statute of Frauds, the lease would not be a valid contract.<sup>4</sup>

The specific details of the Statute of Frauds differ by State. Here is more specific information:

- *Texas*: 3 Texas Business & Commerce Code Chapter 26 requires that “a lease of real estate for a term longer than one year” be written and signed by the party against whom enforcement is sought in order to be enforceable.
- *Oklahoma*: 15 Oklahoma Code Section 15136.4 requires “an agreement for the leasing for a longer period than one year” be written.
- *Arkansas*: Arkansas Code Annotated Section 4-59-101(a)(5) applies to “any lease of lands, tenements, or hereditaments for a longer term than one year.”

### **The “Four Corners Rule.”**

Another important legal principal related to lease agreements is the “Four Corners Rule,” which deals with how courts analyze lease agreements in the event of a dispute. The rule, applicable in most states, provides that when analyzing a breach of contract case, a court will begin with the “four corners of the document.” In other words, the court will begin by reading the language of the contract.

If the contractual language is unambiguous—meaning that the language itself clearly answers the question at hand—the court will not consider any evidence beyond the lease language in making its decision. In this instance, the information contained in the four corners of the lease agreement will govern.

If, on the other hand, the lease is silent or ambiguous on the pertinent issue, the court could then consider other—what is called extrinsic—evidence. Examples of extrinsic evidence include oral statements made by the parties, testimony regarding what is common in the industry, and evidence showing past course of dealing by the parties.

The lesson to be taken from the Four Corners Rule is that it is absolutely critical that every detail and every promise involved in a lease agreement be included in writing. A party who relies on an oral statement or an industry custom could find herself without the ability to bring that evidence before a judge or jury based on this rule.

### **Continuation of Lease after Sale of Property?**

Suppose a person has leased land for grazing for years from a landowner. Then, one day without warning, the landowner decides to sell the property to someone whom the cattle rancher

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<sup>4</sup> There are other legal remedies based in equity that may still be available in this situation even if a breach of contract claim is not an option.



does not know. An important question will immediately arise: Does the lease continue after the property is sold? As with most legal questions, the answer depends on the facts.

- Texas:  
There is surprisingly little Texas case law on this issue. There does, however, appear to be fairly settled rules that govern this situation.

First, if the lease agreement itself between the landlord and tenant addresses the issue, the term will be enforced as written. For example, if a lease states that the landlord shall have the right to terminate the lease if the property is sold, then the landowner has that right. It is highly recommended that the parties consider whether continuation of the lease (or perhaps the right to continue the lease if desired) will occur after the property is sold and include this type of provision in the lease agreement. Having an express agreement up front about what will happen if the property is sold is the best option for all involved.

What about a scenario where the lease is silent as to what happens if the property is sold during the term? Then the common law applies and the question becomes whether the new purchaser of the land was on “notice” that the lease agreement was in place. If the new purchaser had notice, the sale of the property does not terminate the agreement and the new purchaser basically steps into the shoes of the prior owner until the lease is concluded.

How, then, can notice occur?

- *Record notice:* A lessee can accomplish record notice by filing a memorandum of lease or a copy of the lease agreement in the deed records at the courthouse in the county where the property is located. The filing would then come up in a title search and would inform potential buyers of the lease’s existence. In this situation, even if the new purchaser never conducted a title search and found the document, the fact that it was filed in the records would be sufficient to constitute notice and allow the lease to continue.
- *Actual notice:* Actual notice occurs when the purchaser is informed of the existence of a lease. Often, the seller, a realtor, or the tenant could contact the potential buyer and inform him or her that the lease agreement exists. Of course, it is always best for a tenant to do this in writing in order to have proof that actual notice occurred.
- *Constructive notice:* The most difficult type of notice to prove is constructive notice, which requires the existence of the lease be open and obvious to an ordinary person. For example, assume a farmer is purchasing farmland in Texas that was owned by a woman in New York City. Also assume that grain harvest is currently happening and the field is full of tractors, combines, grain carts, and semi-trucks. These are the types of facts that could put the new purchaser on notice that a lease

exists. However, whether a judge or jury would find that constructive notice existed would be determined on a case-by-case basis.

One additional issue that may arise if termination occurs during the middle of the term involves which party has the right to harvest and sell any growing crops. This issue is governed by the "doctrine of emblements," which is discussed in detail in Section D, below.

- Oklahoma

In Oklahoma, case law provides that a landowner selling land subject to a lease is selling the landowner's right to receive the property back to him- or herself after the expiration of the lease (his or her "reversionary interest"). The general assumption of Oklahoma law is that anyone who purchases land takes that land subject to the leases on the property at the time the purchaser takes title to the property.<sup>5</sup> A land purchaser that attempts to cancel an otherwise valid lease on the property he or she purchased may be liable to the tenant for damages.<sup>6</sup>

The assumption that a purchaser takes the land subject to the leases on it can be changed by the language of the lease; for example, if the lease says that the sale of the land terminated the lease, the lease will be enforced.<sup>7</sup>

As with Texas, one of the most important tools in Oklahoma for protecting landlords and tenants is the recording of the lease in the county land records. Recording the lease is construed by the courts as providing notice to the entire world – including any prospective purchasers of the land – that the lease is in place.

If a lease is terminated either by sale of the property with a lease that provides the sale terminates the lease, or if the lease is terminated for any other reason that is not caused by the tenant (for example, termination for failure to pay rents would be a termination caused by the tenant, but failure of a landlord to renew a periodic lease would not be a termination caused by the tenant), the tenant is entitled to either re-enter the property to harvest any crops growing at the time of the termination or to have the crops harvested and turned over to them.<sup>8</sup>

### **Ending the lease.**

Another important issue to consider is how and when the lease may end. Again, different rules apply depending on the state in which the property is located.

- Texas

First, it is important to note that Texas law respects the parties' rights to enter into contractual agreements. Because of this, if the lease agreement addresses the

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<sup>5</sup> See *Sevy v. Stewart*, 122 P. 544 (Okla. 1912).

<sup>6</sup> See *Scheer v. Cihak*, 142 P. 1007 (Okla. 1914).

<sup>7</sup> Cf. *Scheer v. Cihak*, 142 P. 1007 (Okla. 1914).

<sup>8</sup> See *Moore v. Coughlin*, 128 P. 257 (Okla. 1912), *Bristow v. Carriger*, 103 P. 596 (1909).

issue of termination and notice required, the court will respect that agreement. For example, if the lease sets a specific end date, such as “this lease shall run from January 1, 2016 to December 31, 2016,” then the lease will terminate based upon its own terms without any additional notice being required. Similarly, if the lease provides that it lasts “from January 1, 2016 to December 31, 2016, but shall automatically renew unless written notice is given by either party 60 days prior to the end of the lease term,” the court would follow this agreement as well and notice would be required to be given in writing 60 days before the end of the term.

If, on the other hand, a lease is silent with regard to notice, Texas law will imply requirements with regard to what notice is required to cancel the lease. The Texas Property Code provides that if the rent-paying period of a lease is at least one month, then at least one month notice must be given.<sup>9</sup> If the rent-paying period is less than one month, the lease terminates at the later of the day notice is given or the day following the expiration of the period beginning on which day the notice is given.<sup>10</sup>

With agricultural leases—particularly those involving crops such as hay or other row crops—an issue arises with regard to a tenant’s rights if the lease is terminated while crops are growing in the field. As with nearly all potential issues, the best approach for the parties is to address this issue in the lease agreement themselves, as set forth the rights and responsibilities should this arise. If the lease is silent as to the tenant’s rights in this situation, Texas law provides that this issue is governed by the “doctrine of emblements.”

This doctrine provides that a former tenant has the right to re-enter the leased property to cultivate, harvest, and remove crops that were planted prior to the termination of the tenancy. In order for this doctrine to apply, the following elements must be proven: (1) the tenancy was for an uncertain duration; (2) the termination was due to an act of God or by an act of the landlord and the termination was no fault of the tenant and was done without his previous knowledge; and (3) the crop was planted by the tenant during his right of occupancy.

- *Uncertain duration:* In order for the doctrine of emblements to apply, the lease at issue must be for an uncertain duration. Many times, parties have unwritten leases or leases that have continued on for years without certain termination dates. These leases would fall under the doctrine. Further, a lease for a set period of time, but which could end based on certain circumstances prior to the conclusion of the set time period is considered to be a lease of uncertain duration for which the doctrine can apply. For example, a lease for 5 years that provided that should the property be sold during that time, the lease would terminate, was found to meet this

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<sup>9</sup> Tex. Property Code § 91.001(b).

<sup>10</sup> Tex. Property Code § 91.001(c).

requirement.<sup>11</sup> Additionally, if the parties to a lease for certain duration agreed to allow a crop to be planted with knowledge or agreement that harvest would occur after the lease terminated, the tenant may still have a right to the growing crops. Generally, however, a lease for a specific duration of time, such as a lease that will terminate on a certain date, would not be within the doctrine.

- *Termination due to act of God or landlord and not the fault or with knowledge of the tenant*: Not surprisingly, the doctrine does not apply to situations where the tenant is at fault for the termination. For example, if a tenant is evicted from the property for failure to pay rent, he or she is not entitled to harvest the crops that were planted during the lease.
- *Crop planted during right of occupancy*: In order for the doctrine to apply, the crop must have been planted during the time that the tenant was permitted access to the property. For example, if a landlord terminated a lease in March, but the tenant trespassed and planted crops in April, the tenant would have no right to harvest those crops. Similarly, if the tenant knows that a landlord claims possession to the property or that a lawsuit regarding title of the property is pending at the time he or she plants the crop, the doctrine offers the tenant no protection.

- Oklahoma

In Oklahoma, a lease may provide for an end date within the lease itself. For example, if the lease says “this lease shall run from January 1, 2016 to December 31, 2016,” then the lease ends on its own terms, and no additional notice is required by either the landlord or tenant to end the lease on that date. However, many leases may be “periodic” leases, meaning those leases automatically renew on some regular basis unless either the tenant or the landlord provides notice to the other party that they wish to end the lease at the date of the next renewal. In Oklahoma, such notices must be provided in writing, and have to be provided with the following advance times prior to the renewal date:

- If the lease period is year-to-year, 3 months’ notice.
- If the lease period is from 1 to 3 months, 1 month’s notice.
- If the lease period is less than one month, one period’s notice.

For example, if a lease period runs from January 1 to December 31, three months of notice means the written notice must be provided on or before September 30. One factor that can arise in agricultural leases is setting renewal dates (and the corresponding notice dates) in the middle of a crop’s growth cycle. For example, many leases have periods running from January 1 to December 31. A notice that the lease will not be renewed could be provided as late as September 30<sup>th</sup>, but crops such as winter wheat would already be planted by that date. Oklahoma cases suggest that a tenant on a periodic lease who had planted a crop without knowing the lease would not be renewed would be allowed to re-enter the land to harvest the crop. However, the most prudent course for both landlord and tenant

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<sup>11</sup> *Dinwiddie v. Jordan*, 228 S.W. 126 (Tex. Ct. App. 1921).

is to set renewal periods and notice dates so that both landlord and tenant can know the status of the next year's lease with plenty of time to make planting and other production decisions.

### **Attorney Review of Written Leases.**

As with all written contracts, it is extremely important to hire an attorney to review any lease agreement before signing. Although this handbook will provide checklists and sample lease language, it is by no means a substitute for qualified legal counsel from an attorney licensed in your jurisdiction. Without question, having an attorney review a lease is an additional up-front expense. It is, however, well worth that expense if it can save a legal dispute down the road. Additionally, because most attorneys bill by the hour, using the resources in this handbook to prepare a draft lease agreement for an attorney to review, rather than having the attorney start from scratch, will likely save time and, therefore, money.

How, then, does a person go about finding a knowledgeable attorney to review a grazing, hunting, or livestock lease agreement? There are a number of resources available to assist people in finding attorneys well-versed in agricultural law. First, the authors of this textbook have numerous connections with agricultural attorneys across the country and would be happy to assist with locating attorneys in specific states. Second, the American Agricultural Law Association is the national membership organization for agricultural attorneys. The executive director maintains a list of members in all 50 states. Third, attorneys must register with the State Bar Association in all states in which they are licensed to practice. Generally, these registrations include seeking information about areas of practice for attorneys, which may help a person to determine which attorneys practice agricultural law.

In trying to determine which attorney to hire, following factors may be useful in selecting the right representation for an agricultural lease.

- Can you have an intelligent conversation with the attorney? Unfortunately, not all attorneys are easy to communicate with. In order for you to obtain the best representation, it is essential that you are able to easily communicate with your attorney. You need to be able to understand your attorney, and your attorney needs to listen carefully and understand you. There will need to be an open dialogue between you and your attorney and the conversation will likely, at some point, include difficult or uncomfortable issues. Ensuring that you are able to communicate well with your attorney is a key first step in evaluating who to hire.
- Does he or she promptly return emails and phone calls? The biggest complaint against attorneys with state bar associations is failure to keep a client informed of the status of the case with the prompt return of emails or phone calls. Now, it is important to be realistic in this expectation, as your attorney has other cases and clients to tend to as well. A good rule of thumb is that an attorney should respond to you in some way within 24-48 hours of you contacting them. This may be a returned phone call or email discussing the issues you wish to raise, or it may just be a short email letting you know that he or she is in court, but setting a time to talk in the future. This is something that can be determined by visting with other clients of

the attorney, and by making a phone call or two to the attorney early on in the process to see how he or she responds.

- Does he or she have experience in with the specific legal issue you are dealing with? One misconception a lot of people have about attorneys is that in law school, we learned the law, all of it. Sometimes, people expect an attorney to be able to answer any question from agricultural leases, to DWIs, to divorce, to patent law. The truth is, it is nearly impossible for an attorney to be proficient in every area of the law! It is important that you find an attorney who is capable of handling your specific legal issue. For example, it may well be that a general practitioner can easily help you prepare an estate plan, draft a will, and litigate a breach of contract dispute. If, however, you end up in a complex water law case before the United States Supreme Court, you may need to bring in another attorney to assist you. During the initial consultation, be sure you ask the attorney about his or her experience with your specific legal issue.
- Does the attorney know the difference between a cow and a bull? Those of us involved in agriculture may take for granted that everyone understands farming and ranching. If you have a legal issue for which a background in agriculture is important, you may want to consider seeking an attorney who has that type of background. This is not to say that only attorneys who own cattle are worth hiring, but it is something to consider depending on your specific legal issue.
- Is the fee structure clear to you? Everyone knows that attorneys are expensive, there is no real way to sugar coat that. It is important for you to understand the fee structure that a prospective attorney will be using. Oftentimes, attorneys bill a set fee per hour worked. Other times, attorneys may quote a flat rate to handle one project (i.e. a will). Still other times, an attorney might take a case on a contingency basis, meaning you do not pay up front, but will share some portion of the eventual recovery with the attorney. Make sure you understand the approach that will be taken for your case, and ask questions like who pays for fees such as copying or legal research database charges, how often billing statements will be coming in the mail, and exactly how a contingency fee will be calculated.

## **CHAPTER III: SETTING PAYMENTS FOR A LEASE**

*Note: This chapter is adapted from “Fixed and Flexible Cash Rental Arrangements for your Farm,” North Central Farm Management Extension Committee Publication NCFMEC-01, “Crop Share Rental Arrangements for Your Farm,” North Central Farm Management Extension Committee Publication NCFMEC-02, and “Pasture Rental Agreements for your Farm,” North Central Farm Management Extension Committee Publication NCFMEC-03.*

As you will see in this handbook, numerous considerations go into writing a lease agreement for your agricultural land. Chapter 2 emphasized the importance of a written lease and the fact that the process of negotiating the lease can help the landowner and tenant think through a number of issues. That process can prevent a lot of problems before they even occur. Similarly, thorough discussion of how rents will be paid encourages the parties to think not only about the economics of their arrangement, but about how both parties will cooperate in the management of the property.

### **Cash Rental Agreements versus Share Rental Agreements**

Traditionally, rental agreements fell into two categories: a “cash rent” arrangement in which the tenant paid a specific dollar amount in rent or a “share rent” arrangement in which the tenant gave the landlord a share of the crop produced from the land (usually with the landlord and tenant sharing in the input costs for growing the crop). Recent years have seen the development of many varieties of these two basic arrangements. Before committing to either category of arrangements, though, both landlords and tenants need to consider the potential advantages and disadvantages of each arrangement.

### **Cash Rental Agreements**

Cash rental arrangements are generally considered the most straightforward rental arrangements since the tenant makes a pre-determined lease payment on a regular basis, and the landlord provides little or no input into the management decisions for the land during the period of the lease. Even in a cash rental agreement, though, there are a number of considerations to ponder for both landlord and tenant.

#### *Advantages of Cash Renting for Landlords*

Perhaps the most easily-identified advantage of cash rental agreements for landlords is their simplicity. As mentioned above, the landlord does not have to involve him- or herself in production or marketing decisions. This can be an important advantage for a landlord with little or no experience in operating agricultural land (note, though, that this does not mean the landlord should be uninterested in the management of the property and just wait on the “mailbox money” to come in). Fixed cash rental payments also shifts virtually all of the price, cost, and production risk of the crop to the tenant, leaving the landlord only with the financial risk of the tenant’s ability to pay. Landlords relying on lease payments to support them in retirement may find this an important benefit. Further, income under fixed

cash rental arrangements is not considered self-employment income (and thus is not subject to self-employment tax) and does not reduce Social Security benefits if the landlord is retired.

#### *Disadvantages of Cash Renting for Landlords*

Although cash rental agreements can be simple, determining a rental rate can be difficult, as discussed below. Further, once that rate is set, psychological factors may make it difficult to change the rate even though a number of market forces may suggest a change is needed. The transfer of risk to the tenant means the tenant not only bears “downside” risk (risk that input costs might increase, commodity prices might decrease, or that production may be low) but that they get all the advantages of “upside” risk (input costs decrease, commodity prices increase, or production increases). There may also be fewer alternatives for tax management compared to a share lease (the reason for this is discussed below with share rental agreements). Finally, there are some incentives for tenants to “mine” the land’s nutrients – especially under a short-term lease – since the tenant’s profits under a fixed cash lease come from increasing yields while minimizing costs such as fertilizer or soil amendments. However, longer term leases and well-written leases can significantly reduce these risks.

#### *Advantages of Cash Renting for Tenants*

Tenants in a cash rental agreement have significant freedom in their management decisions, since there is little or no requirement for management input from the landlord. The pre-determined nature of the rental payment makes that cost of operation fixed, which provides more stability in projecting costs for the year(s) ahead. Since they bear the majority of risks in production, the tenant can reap all the “upside” risk in crop production if prices and/or production conditions are favorable.

#### *Disadvantages of Cash Renting for Tenants*

Bearing virtually all of the risk in a cash rental arrangement, the tenant may have difficulty making rental payments if economic conditions have been difficult. Psychologically, even if conditions have been difficult for a number of consecutive years, landlords may not adjust rental rates downward. Finally, the tenant faces the cash-flow issues of bearing all costs of crop inputs (compared to a share arrangement where the landlord participates in the purchase of crop inputs).

### **Share Rental Agreements**

In a share rental agreement, the landlord and the tenant are both actively involved in the production of the crop. Both parties participate in the management decisions and the costs of growing and marketing the crop. The rent paid is a proportion of the crop produced, which can be paid either by turning over part of



the physical commodity itself or paying the landlord that proportion of the revenue from the sale of the crop by the tenant.

#### *Advantages of Share Renting for Landlords*

Share rental agreements naturally result in the sharing of risk between the landlord and tenant. As a result, the benefits of a “good year” are shared by both parties. This enables the landlord to capture some of the “upside risk” involved in production. If the landlord is an experienced producer, they can use that experience to aid the tenant in management decisions, which hopefully increase the returns to the landlord. Since the landlord is actively involved in the agricultural operation of the land, they can use that participation to build Social Security base since their income from the rent is subject to self-employment tax, and the landlord can also take advantage of Internal Revenue Code Section 179 depreciation on capital investments made in the agricultural operation.

#### *Disadvantages of Share Renting for Landlords*

Risk of a “bad year” means the landlord’s returns are subject to the same variability as those of the tenant. This can mean share leases may provide too much risk for landlords depending on rents for their primary source of income. Depending the nature of the landlord’s involvement, the income from the lease may also reduce the amount of Social Security benefits for which the landowner is eligible if he or she is retired. The amount of involvement required for a share lease agreement may also make these agreements unsuitable for landlords without significant experience in operating a farm or ranch.

#### *Advantages of Share Renting for Tenants*

Perhaps the two greatest advantages of a share rental agreement for tenants is the reduction in operating capital requirements and the sharing of risk with the landlord. Since the landlord and tenant both share in the operating costs of the land, the tenant is not required to finance the entire cost of those inputs as he or she would be under a fixed cash rental agreement. Similarly, the cost of rent is reduced (in cash equivalent terms) in “bad” years. The ability to tap into the expertise of the landlord through shared management decisions can be another important advantage, particularly for beginning producers.

#### *Disadvantages of Share Renting for Tenants*

The risk-sharing features of a share rental agreement means the tenant has less ability to capture “upside” risk since that upside must be shared with the landlord. Determining and delivering shares also involves more work on the part of the tenant since he or she may have to make multiple deliveries of product to multiple locations. Finally, the management input

of the landlord may conflict with the desired decisions of the tenant.

### **Setting a Cash Rental Amount**

Although cash rents are quite simple once established, establishing that amount can be one of the most complicated and contentious pieces of negotiating a rental agreement. Determining the rental rate depends not only on the local land market, but on the land itself and the parties as well. Markets matter, and all other things being equal, an active local market for land will drive rental rates upward just as relatively little demand for agricultural land will drive rental rates down. The characteristics of the land itself, including its soils, drainage, size, shape, location, and facilities drive values, as do the production history of the tenant and the lease provisions desired by the parties. All of these factors combine in different ways to create several different approaches to establishing a cash-rent value.

### **Cash-Rent Market Approach**

The cash-rent market approach is the standard against which all other methods are measured; if another method yields a rental rate significantly above or below the market rate, there should be significant justification for that difference. This is probably the approach coming first to mind for landowners and tenants, and may sound like the most straightforward – simply ask around for rates paid for similar land.

However, that simplicity can be deceptive for two primary reasons. First, it can be difficult to get objective information about rental rates. Rates may be subject to exaggerations or from transactions that are not the result of arms-length transactions between unrelated parties. The quality of information obtained is thus very important. A good place to start are lease surveys conducted by your state Extension service or the National Agricultural Statistics Service (USDA-NASS), but also remember that these surveys generally present averages of values and may not be specific to your very local area. That leads to the second reason market data can be deceptive – it reflects values paid for land other than the land actually in question. Numerous adjustments have to be made from market rates to reflect the unique traits of the land at hand.

Despite these challenges, the cash-rent market approach should be the starting point of any rental rate calculation. Start with the best data available, and think carefully about any adjustments that need to be made from the prevailing rates to take into account the positive or negative production characteristics of the land to be leased.

### *Landowner's Ownership Cost Approach*

The landowner ownership cost approach does just what its name implies – calculates the cost of ownership to the landlord – and uses that cost to determine a base for the rental amount. Put another way, the rental amount should at least exceed the ownership cost of the land and provide a

measure of profit to the landowner while also providing the tenant the opportunity to make a profit.

The first piece of information needed for this approach is the fair-market price of the land (valued for agricultural use, and not for some other use such as residential development). Second, an “interest charge” (meaning the “opportunity cost” of owning the land – in other words, if the land were sold and placed into an investment with similar risk, what rate of return would it yield?) must be calculated. This is often done by using the “rent to value” ratio reported by USDA-NASS for various regions in the United States. Together, the price and interest rate provide an annual charge for the land itself. Next, the real estate taxes paid on the land by the landowner are incorporated as an ownership cost. Finally, land improvement costs such as treatments for soil pH, building or maintaining conservation structures, etc. are included. Adding these costs together on an annual basis provides a starting point for the landowner’s asking price in rents.

Figure 4-1: Example of Landowner’s Ownership Costs Calculation  
 Source: NCFMEC-01

Crops Grown: <i>corn, soybeans, wheat</i>		Acres: <i>150</i>	
Item	Per Acre Value	Rate	Annual Charge
Land	\$ <u>4,000</u> ×		
Interest		× <u>4</u> %	\$ <u>160</u>
Real Estate Tax		× <u>0.5</u> %	\$ <u>20</u>
<b>Land Improvements</b>			
Tiling	\$ <u>500</u> ×	<u>5</u> %	\$ <u>25</u>
Surface drainage	\$ _____ ×	_____ %	\$ _____
Conservation practices	\$ _____ ×	_____ %	\$ _____
Liming	\$ _____ ×	_____ %	\$ _____
<b>Total Cost</b>			\$ <u>205</u>

*Landowner’s Adjusted Net-Share Rent Approach*

This approach works to calculate the cash-rent equivalent of a share lease. The general assumption is that a cash rent should be slightly less than a share lease amount since under a cash lease, the tenant bears almost all the risk. To calculate a cash rent under an adjusted net-share rent approach, the landlord and tenant must first determine the prevailing shares for the crop in question – these shares vary significantly from crop to crop and region to region, and frequently occur as 1/3-2/3 shares, 1/2-1/2 shares, or 40%-60% shares. Next, historical data for the yields of the land in

question and for input and product costs should be gathered to determine what the average share rent would have been for the property. Finally, and adjustment should probably be made to reflect the additional risk that the tenant will take under a cash rental approach. The following provides an example of how a rent can be calculated under this approach.

Figure 4-2: Example of Landowner's Adjusted Net-Share Rent Approach

Source: NCFMEC-01

Landowner's Share of Gross Crop Value							
Crops	Acres	Yield per Acre <sup>2</sup>	Percent of Crop	Tons or Bushels	Price <sup>3</sup>	Total Value	Per Acre Value
Corn	75	170	50 %	6375	\$ 4.50	\$ 28,687	\$
Soybeans	40	50	50 %	1000	\$ 11.00	\$ 11,000	\$
Wheat	35	65	50 %	1138	\$ 6.00	\$ 6,825	\$
Other Income <sup>4</sup>			%		\$	\$	\$
Totals (A)	150					\$ 46,512	\$ 310.08

Landowner's Share of Shared Expenses							
Crops	Landowner Share	Seed <sup>3</sup>	Fert. & Lime <sup>3</sup>	Pesticides <sup>3</sup>	Harvest/Drying <sup>3</sup>	Total Cost	Cost/Acre
Corn	50 %	\$ 3,375	\$ 4,125	\$ 1,312	\$ 1,688	\$ 10,500	\$
Soybeans	50 %	\$ 1,160	\$ 920	\$ 400	\$ 500	\$ 2,980	\$
Wheat	50 %	\$ 560	\$ 1,312	\$ 228	\$ 438	\$ 2,538	\$
Totals (B)	%	\$	\$	\$	\$	\$ 16,018	\$ 106.79

Landowner's Crop Rent (A-B)	\$ 203.29
Less risk shifted to operator <sup>5</sup>	\$ 15.50
Net landowner's share rent per acre	\$ 187.79

<sup>1</sup> If whole farm leased on a cash-rent basis, list all crops grown, income and shared expenses from each crop

<sup>2</sup> Use average yields, allowing for both good and bad years. Incorporate trend in yields

<sup>3</sup> Use current prices and costs.

<sup>4</sup> USDA payments, crop stover, etc.

<sup>5</sup> Example risk value is 5% of total crop receipts. This number will vary depending on the production risk in your area.

### Operator's Net Return to Land Approach

The operator's net return to land approach is something of a counterpoint to the landowner's ownership cost approach in that it is a calculation of what the tenant (or operator) can afford to pay given the productivity of the land. This approach takes into account the productivity of the land and the costs of inputs, fixed costs, and returns to labor and management. Per-acre costs are deducted from per-acre returns to determine how much rent can be paid at a break-even level given the assumptions made. An example is provided in Figure 4-3 below.

Figure 4-3: Example of Operator's Net Return to Land Approach  
 Source: NCFMEC-01

Gross Value of Crops Produced					
Crops	Acres	Yield per Acre <sup>2</sup>	Price <sup>3</sup>	Total Value	Per Acre Value
Corn	75	170	\$ 4.50	\$ 57,375	\$
Soybeans	40	50	\$ 11.00	\$ 22,000	\$
Wheat	35	65	\$ 6.00	\$ 13,650	\$
Other Income <sup>4</sup>			\$	\$	\$
<b>Totals (A)</b>				\$ 93,025	\$ 620.17

Total Variable Costs <sup>3</sup>				
Crops	Acres	Variable Costs per Acre <sup>2</sup>	Total Variable Costs	Per Acre Value
Corn	75	\$ 340	\$ 25,500	\$
Soybeans	40	\$ 190	\$ 7,600	\$
Wheat	35	\$ 180	\$ 6,300	\$
<b>Totals (B)</b>	150		\$ 39,400	\$ 262.67

Total Fixed Costs, Labor, and Management <sup>3</sup>	
Crop machinery: machinery value per acre	\$ 500.00
Depreciation for <u>10</u> years	\$ 50.00
Interest on average investment at <u>6</u> percent	\$ 30.00
Taxes at <u>    </u> %	\$
Insurance at <u>.25</u> %	\$ 1.25
<b>(C) Total machinery fixed costs</b>	\$ 81.25
<b>(D) Labor charge<sup>5</sup> (<u>2.0</u> hrs/ac @ <u>\$13</u> /hr)</b>	\$ 26.00
<b>(E) Management charge (<u>5.0</u> % of total crop values)</b>	\$ 31.01
<b>(F) Total production costs (B+C+D+E)</b>	\$ 400.93
<b>(G) Amount that can be paid for rent per acre (A-F)</b>	\$ 219.24

<sup>1</sup>If whole farm leased on a cash-rent basis, list all crops grown, income from each crop, and variable expenses for each crop.

<sup>2</sup>Use average yields, allowing for both good and bad years. Incorporate trend in yields.

<sup>3</sup>Use current prices and costs. Variable costs include fuel, oil, repairs, fertilizer, herbicide, insecticide, interest on operating costs, custom hire, drying, insurance, and miscellaneous costs.

<sup>4</sup>USDA payments, crop stover, etc.

<sup>5</sup>Labor expense or charge may be included in variable expenses.

### Percent of Land Value Approach

Perhaps the most straightforward of all the cash rental approaches discussed here, the percent of land value approach simply consists of calculating the "opportunity cost" of the land. In other words, if the landowner sold the land and invested the proceeds in a similar investment

(in the case of land, a long-term investment with similar risks), what would that investment yield on an annual basis? For agricultural land, the best way of calculating an opportunity cost is the rent-to-value ratio (the average ratio in a region of agricultural land's rent to the total value of the land). The per-acre value of the land in question is then multiplied by the "opportunity cost" interest rate – in this example, the rent-to-value ratio – to determine the desired per-acre rent. Note, though, that this approach may not reflect the market realities in the area, and that rent-to-value ratios may be slow to change over time and thus may be further off in years where there have been significant changes in returns to agricultural land.

Figure 4-4: Example of Percent of Land Value Approach  
 Source: NCFMEC-01

<b>Crops Grown:</b> <i>Corn, soybeans, wheat</i>		<b>Acres:</b> <i>150</i>	
<b>Item</b>	<b>Per Acre Value</b>	<b>Rate</b>	<b>Annual Charge</b>
Land	\$ <u>4,000</u>	×	
Typical Rent to Value		×	<u>5 %</u>
<b>Total Cost or Desired Return</b>			\$ <u>200</u>

*Percent of Gross Revenue Approach*

Another angle of attack to determine a rental amount would be to calculate the percent of gross revenues a landowner would be entitled to under a share rental agreement. This requires collection of data on the average production of the land in question, historical commodity prices, and the percentage of gross income received by landowners under share leases in the region. Note that there is an important distinction to be made in determining the landlord's percentages under this method – the percentages used should be from leases in which the tenant pays all of the input costs for the leased land, since the landlord will be paying no input costs under this method. An example of this calculation is provided in Figure 4-5 below.



Figure 4-5: Example of Percent of Gross Revenue Approach

Source: NCFMEC-01

Crop	Expected Yield	Expected Price	Expected Gross Revenue	Rent as % of Gross Revenue	Cash Rental Rate
Corn	170 bu.	\$ 4.50	\$ 765	33 %	\$ 252.45
Soybeans	50 bu.	\$ 11.00	\$ 550	40 %	\$ 220.00
Wheat	65 bu.	\$ 6.00	\$ 390	45 %	\$ 175.55
Weighted Average:					
Based on Corn: 75 acres, soybeans: 40 acres, wheat: 35 acres					\$ 225.85

#### *Dollars per Bushel of Production Approach*

A method that can take into account the specific productivity of a piece of land is the dollars per bushel of production approach. With this approach, historical rents and crop production records in the area are reviewed to determine how much rent has been paid per bushel of production. Once this has been calculated, the landowner and tenant have two options: they can use the historical average productivity of the specific parcel and this per-bushel amount to set a rent in advance, or they can make the rent variable based on the actual production of the land that year (though it should be noted that making the rent variable affects a number of factors in the advantages and disadvantages of the lease, as well as potentially impacting the tax implications of the lease).

Figure 4-6: Example of Dollars per Bushel of Production Approach

Source: NCFMEC-01

Crops Grown: Corn		Acres: 150	
Item	Average Yield <sup>1</sup>	Price per Bushel <sup>2</sup>	Annual Charge
Corn	170	\$ 1.20	\$ 204

<sup>1</sup> Certain states have a productivity rating that may be used

<sup>2</sup> Based on a percent of observed historical rents

#### *Fixed Bushel Rent Approach*

The fixed bushel rent approach is something of a variation on the dollars per bushel of production approach in that the fixed bushel rent approach uses the historical average production of the land and an agreed price to calculate a rental rate. It also relies on information from share rental rates in the region to determine what share of production would be paid to the landlord (assuming the landlord pays no other expenses other than land). Assuming that a dollar-per-bushel amount is fixed at the time the lease is entered, the lease is considered to have a fixed cash rent, but if that

number is flexible, the lease is considered a variable rent, with all that implies.

Figure 4-7: Example of Fixed Bushel Rent

Source: NCFMEC-01

Crops Grown: <i>Corn</i>		Acres: <i>150</i>	
Item	Bushel Rent <sup>1</sup>	Price per Bushel	Annual Charge
<i>Corn</i>	<i>56 bu. ×</i>	<i>\$ 4.50</i>	<i>\$ 252</i>

<sup>1</sup> Based on historic rent as a percent of revenue. Based on an equitable crop share percentage (landowner paying no expenses except land) with a discount for production risk.

#### *Flexibility in Cash Leases*

A common theme throughout this discussion has been the allocation of risk to the tenant under almost all cash rent forms. In some cases, tenants may be willing to accept that risk allocation, but may want some protection if either input or product prices get so far away from averages as to make the cash rent payments extremely difficult. By the same token, landlords may want to take advantage of some “upside risk” when times are exceptionally good. Thus, both parties may want to introduce some flexibility into the lease by providing for a baseline rate of cash rent that is adjusted by some formula based on either on input costs, product prices, the productivity of the land, or even some combination of all elements. A number of these methods are discussed in the NCFMEC publications for which links are provided at the end of this Chapter. To keep this discussion relatively brief, any adjustments need to have very clear triggers and calculations that can be objectively determined by both parties. For example, if one variable is the price of a commodity, the lease should be very clear about both *when* that price is determined (for example, at a set date, when harvest is commenced, when harvest is completed, etc.) and *how* that price is determined (by local elevator cash price, by USDA market report, by nearby futures contract price, etc.). Consider also that it may be inequitable for only one party to have the benefit of flexibility – a tenant may be uncomfortable signing a lease wherein the landlord gets the advantage of upside risk but the tenant bears all downside risk. Further, the more variable a lease becomes, the more potential tax implications are triggered and the more the lease looks like a share lease. At some tipping point, a share lease may be more desirable.

#### *Combining the Methods to Calculate a Fair Cash Rent*

This discussion examined a number of methods used to calculate a cash rent amount. Which method is the right one? The answer might be one, more, or all of them. Neither landlord nor tenant may have the time or



resources to pull together the information needed to calculate a rental rate under all the methods, but calculating two or more methods might help both parties get some different perspectives on what a fair rental amount could be. Additionally, calculating the rent under different methods can trigger some important insights – if all of the methods used arrive a roughly similar amounts, it is a strong suggestion that a rent in that range is fair to the parties. If one or more methods are sharply different, it may be cause to examine why those differences arise, as they may indicate something about the market or the land that justifies a different lease rate.

Figure 4-8: Comparison of Calculation Methods

Source: NCFMEC-01

	Example Farm	Your Farm
Cash Rent Market Approach	\$ 200.00	\$ _____
Landowner's cost or desired return (Worksheet 1)	\$ 205.00	\$ _____
Landowner's Adjusted Net-share Rent (Worksheet 2)	\$ 187.79	\$ _____
Operator's Net Return to Land (Worksheet 3)	\$ 219.24	\$ _____
Percent of Land Value (Worksheet 4)	\$ 200.00	\$ _____
Percent of Gross Revenue (Worksheet 5)	\$ 225.85	\$ _____
Dollar per Bushel (Worksheet 6)	\$ 204.00	\$ _____
Fixed Bushel Rent (Worksheet 7)	\$ 252.00	\$ _____

Discussing the calculation methods can not only help landlord and tenant arrive at a mutually-agreeable rental rate, but can also help them discuss the risk factors faced by both, which can lead to a better rental agreement itself.

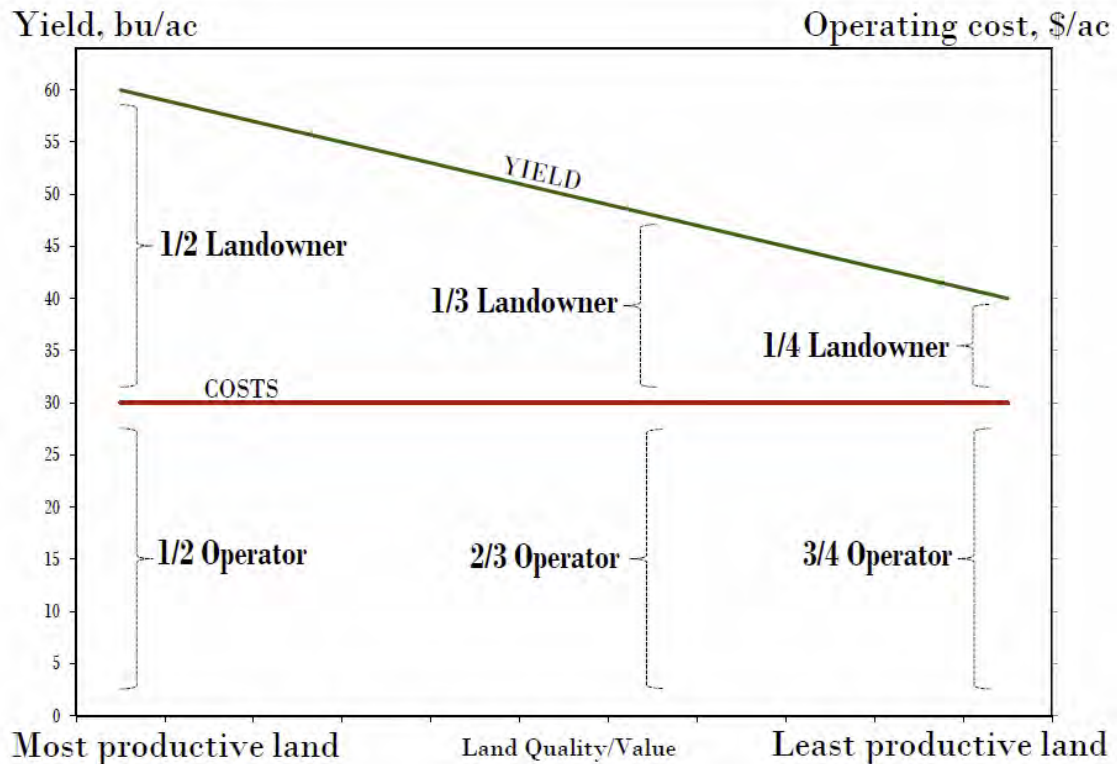
### Setting Shares under a Share Rental Agreement

At a fundamental level, share leases focus on sharing both the costs operating the agricultural land and the profits from its production. This means both upside and downside risk are shared by the parties as well. But how does one set the appropriate shares to be paid and received by landlord and tenant? The North Central Farm Management Extension Committee has proposed five principles to help set shares:

1. Variable expenses that increase yields should be share in the same percentage as the crop is shared. The principles of agricultural economics demonstrate that using this principle will make sure the incentives for both the landlord and the tenant will guide them to use the most efficient levels of inputs. Conversely, not following this principle will create incentives for one party to use too much of an input to capture more revenue while shifting costs to the other party.

2. Share arrangements should be adjusted to reflect the effect new technologies have on relative costs contributed by both parties. New technologies can cause substitutions of inputs, which can shift the economics of the lease arrangement. For example, when a farm is shifting from conventional tillage to a low- or no-till system, chemical weed control may be used as a substitute for mechanical weed control through cultivation. So, should the cost of chemical weed control be paid by the landlord, the tenant, or shared? Another example is seed (such as corn seed) that is frequently bundled with other inputs such as herbicide, insecticide, and perhaps even fertility products. If the seed product affects the need for other inputs, who should pay for the seed? The answers to these questions depend on the nature of the substitution.
  - If the input is a yield-increasing input, the landowner and operator should share the costs in the same proportion as the crop is shared, as discussed in principle 1.
  - If the input is a true substitution, the party responsible for the item substituted in the original lease should pay for the input.
  - If the input is both yield-increasing and a substitute, the lease needs to address this situation after discussion of how the cost should be shared by the parties.
  
3. The landlord and tenant should share total returns in the same proportion as they contribute resources. This principle sounds simple, but may be the most complex to implement. The parties have to discuss and determine the value of what each is “bringing to the table,” so to speak. The landlord is contributing the production asset, land, and the tenant is likely contributing the majority of operating labor and machinery expense. Both contribute management and bear risk. In many cases, the operator’s primary costs (labor and machinery) are largely the same whether dealing with high-quality or low-quality land, but other input costs may vary considerably. For this reason, shares on high-quality land and/or crops with high variable input costs tend to be more equal, whereas shares on lower-quality land and/or crops with low variable input costs tend to be place larger share values with the tenant, as illustrated below.

Figure 4-9: Effect of Land Quality and Farm Costs on Crop-Share Rental Arrangements  
 Source: NCFMEC-02



4. Tenants should be compensated at the termination of the lease for the undepreciated balance of long-term investments they have made. In some cases, the parties may need to invest in inputs whose lives could extend beyond the life of the lease, such as perennial seeds (alfalfa, for example), pH amendments to the soil such as lime, and tiling or other soil drainage. A tenant will likely be unwilling to share in those costs if they are not assured of having access to the land for the entirety of the inputs' productive life. Thus, it may be wise to include lease language that guarantees the tenant will receive back the undepreciated share of their investment if their lease is terminated before the end of the investment's life.
5. Good, open, honest communication should be maintained between the landowner and tenant. Communication is vital in any productive lease arrangement, but it is even more important in a share leasing arrangement, since the parties must share in many of the decisions made in the course of agricultural operations on the leased land. Frequent communication between the parties can do much to provide transparency and to make both parties feel that their concerns have been acknowledged and understood by the other.

Subject to these two principles, the first step in determining what shares would be equitable for the leasing arrangement is to form a thorough crop budget for the land in question.

The items in the budget will do a great deal to show the value to be contributed by each party, which in turn will help determine the equitable balance of shares for the lease.

- *Land*: The land in question should be valued at its fair market value in agricultural use; non-agricultural uses (such as residential development or recreational uses) should be ignored since they are not relevant to the crop enterprise for the purposes of the budget.
- *Interest on land*: As discussed above, the usual value placed on land interest (“opportunity cost”) for the purposes of lease budgeting is the rent-to-value ratio for the area. One way of determining a land cost for the purposes of the crop budget is to multiply the land value by the rent-to-value ratio.
- *Cash rent on land*: *Cash rent on land can also be a valid measure for the value of the land contributed to the lease.* Here, cash rent represents the cost that would be incurred if the parties had to lease the land on a cash basis.
- *Real estate taxes*: Real estate taxes can be a carrying cost of land, but be careful not to include this value twice, since it is likely imputed to the values for cash rental rates or on interest on land.
- *Land development*: The average cost per year for lime, conservation practices, and other improvements are another land cost. Use caution with these costs to avoid double-counting just as with real estate taxes, though, as they too are often included in cash rental rates.
- *Crop machinery*: The machinery charges should be the average value of a good line of machinery needed to farm the land in question, which is not necessarily the same as the value of *new* machinery.
- *Depreciation*: Use a market rate of depreciation for machinery (often 8 to 12 percent of the average value annually), not a tax-based depreciation rate – tax rates are often far higher and will result in an over-charge of the machinery cost.
- *Machinery repairs, taxes, and insurance*: Research data suggests annual repairs average between 5 to 8 percent of the machinery’s original value. Taxes and insurance costs can be obtained from actual costs in farm records.
- *Machinery interest*: The prevailing local interest rate for machinery loans (or operating capital loans) can be used to determine the opportunity cost for machinery).
- *Custom rates*: Rates for activities that the parties intend to hire out, such as fertilizer application or harvesting can be entered using bids from local providers.
- *Irrigation equipment, depreciation, repairs, taxes, insurance, and interest*: These costs for irrigation systems can be determined and calculated in much the same fashion as machinery costs, as discussed above.
- *Labor*: Labor may be contributed solely by the tenant, or may be joint between the tenant and landlord. However, the contribution of significant labor by the landlord can make the share lease look much more like a joint venture or partnership, and that may not be the desired legal outcome of the parties. When valuing labor, use prevailing wage rates for comparable agricultural labor in the area. Note that the value contributed by the management skills of the tenant may make them far more valuable than the average farm laborer in the area, but that value is captured separately.
- *Management*: The management contributions of the landlord and tenant can vary significantly depending on their operational experience. In most cases, management charges may simply be a function of the bargaining power of the parties. There are a number of ways this can be valued, but two possible rules of thumb are:

- One rule is that management should be valued at 1 to 2.5 percent of the average capital managed in the business, measured as the market value of the land, machinery, and irrigation equipment. This rule is probably more stable since it will not fluctuate as much as the next rule on year-to-year basis.
- Another guide can be the management fees charged by professional farm managers. These managers commonly charge between 5 to 10 percent of adjusted gross receipts.

Once these costs have been compiled and a budget for the production of the crop has been estimated, the parties can use one of two methods to determine the appropriate shares for landlord and tenant.

### **The Contribution Approach**

In the contribution approach, the percentage of overall costs contributed by each party are calculated, as well as those costs that are shared by some pre-determined proportion. The remaining costs – which should be the “yield-increasing inputs” as discussed above – and the income should be shared in the same proportions. Consider the following example using a corn-soybean rotation:

Figure 4-10: Example Crop Budget Worksheet  
 Source: NCFMEC-02

<b>Crop(s):</b> <i>Corn and soybeans</i>					
<b>Acres:</b> <i>Approximately 156 tillable acres</i>					
<b>Farm:</b> <i>NE 1/4 of Brown Place</i>					
<b>Comment:</b> <i>Average costs/acre for 2-yr rotation (share fertilizer, chemicals, and crop insurance)</i>					
Line	Value <sup>a</sup>	Annual Rate	Annual cost <sup>a</sup>	Contributor cost <sup>a</sup>	
				Landlord	Tenant
1. Land <sup>b</sup>	\$0	× 4.00%	\$0.00		
1a. Real-estate tax		× 0.50%	\$0.00		
1b. Land maintenance		× 0.00%	\$0.00		
1c. Cash rent (in lieu of lines 1-1c)			\$225.00	\$225.00	
2. Crop machinery	\$250				
2a. Depreciation		× 9.00%	\$22.50		\$22.50
2b. Interest		× 7.00%	\$17.50		\$17.50
2c. Repairs		× 6.00%	\$15.00		\$15.00
2d. Taxes and insurance		× 0.50%	\$1.25		\$1.25
2e. Custom rates (in lieu of lines 2a-2d)					
3. Irrigation equipment	\$0				
3a. Depreciation		× 5.00%	\$0.00		
3b. Interest		× 7.00%	\$0.00		
3c. Repairs		× 1.00%	\$0.00		
3d. Taxes and insurance		× 0.50%	\$0.00		
4. Labor (hours and \$/hour)	2.00	× \$15.00	\$30.00		\$30.00
5. Management	\$5,000	× 1.00%	\$50.00	\$20.00	\$30.00
6. Seed			\$75.00		\$75.00
7. Fertilizer					
8. Herbicides					
9. Insecticides/fungicides					
10. Crop insurance					
11. Fuel and oil			\$18.00		\$18.00
12. Irrigation pumping expense					
13. Custom machinery hire					
14. Drying					
15. Hauling					
16. Other <i>Miscellaneous</i>			\$10.00	\$2.50	\$7.50
17. Other					
18. TOTAL SPECIFIED COSTS (lines 1 through 17)			\$464.25	\$247.50	\$216.75
19. Percent of Specified Costs (percent of total costs to each party)			100.0%	53.3%	46.7%
<b>Adjustments to Reach Desired Share</b>					
20. Cash transfer between parties to achieve desired split		<i>Add items previously shared or include a cash transfer between parties to obtain desired shares.</i>	\$0.00	-\$15.50	\$15.50
21.					
22.					
23.					
24. ADJUSTED TOTAL (lines 19 + lines 20 through 23)			\$464.25	\$232.00	\$232.25
25. Percent Crop Share Desired (percent of total costs to each party)			100.0%	50.0%	50.0%

<sup>a</sup> Value and annual cost can either be total for farm/field or average per acre.

<sup>b</sup> Land contribution should be either land value × interest rate or cash rent.

In the example, the costs contributed by the landlord equal \$247.50 per acre or 53.3 percent of the total costs, and the costs contributed by the tenant are \$216.75 or 46.7 percent of the total costs. Note also that the worksheet has assumed that costs for fertilizer, herbicides, and insecticides/fungicides have not been included since the landlord and tenant intend to share those costs among themselves. The shares calculated suggest something close to a 50/50 share arrangement. With this approach, the budget has led the way to suggested shares.

### **The Desired-share Approach**

Conversely, the desired share approach works backward from a desired share arrangement. For example, with the same corn-soybean rotation, the parties may want to target a 50/50 share arrangement. In such a case, they would simply adjust their contributions so that the end result is a 50/50 share of the expenses. This approach is much less common, but may be desirable based on the circumstances of the parties.

### **Pasture Lease Rates**

The calculation of pasture lease rates can borrow from a number of the principles discussed above of leases primarily involving cropland. As with the methods above, some homework is involved in collecting information on the price of land, an applicable interest rate for the land, land taxes, land development costs (such as conservation practices) the costs of facilities such as pens, loading docks, etc. (and the depreciation, interest, repairs and taxes on the same). Any labor and management costs on the part of the landlord should also be included.

Another important piece of information is the desired stocking rate for the land. The long-term productivity of the land is dependent upon maintaining a proper stocking rate and not “over-mining” forage species or depleting soil nutrients. Understanding how many animal units can be grazed on the property can help in setting guidelines for the lease in terms of stocking rate; it can also help in selecting the method of rent payment. For example, setting pasture rent on a per-acre basis or share-of-gain basis creates incentives for the tenant to over-stock the property. Thus, restrictions on stocking rates as well as properly calculated rent terms are important. Stocking rates can be expressed as an average stocking number (taking into account the fact that herd numbers may change over the course of the lease), or can be based on animal-days or animal-unit days.



Figure 4-11: Landowner Cost Estimate for Pasture Leasing

Source: NCFMEC-03

Land and Facility Investments	Agricultural Value	Acres	Useful life
Land value	\$ 240,000	160	
Fences	\$ 10,000		25 yrs
Corrals	\$ 0		25 yrs
Other Investments	\$ 0		25 yrs
Stocking Rate (acres/head or animal unit)	4		

Item	Valuation	Rate	Annual Charge
<b>Land Charges</b>			
Interest	\$ 240,000	1 %	\$ 2,400
Land Taxes	\$ 240,000	0.5 %	\$ 1,200
Annual Land Development Costs			\$ 0
<b>Facility Charges</b>			
Depreciation			\$ 400
Interest	\$ 10,000	5 %	\$ 250
Repairs	\$ 10,000	1.0 %	\$ 50
Taxes	\$ 10,000	0.5 %	\$ 25
Insurance	\$ 10,000	0 %	\$ 0
<b>Other Contributions</b>			
Fertilizer			\$
Labor and Management			\$
<b>Total Pasture Ownership Charges</b>			\$ 4,325
<b>Landowner's Contribution (\$/head or animal unit)</b>			\$ 108.13
<b>Landowner's Contribution (\$/acre)</b>			\$ 27.03

The livestock owner must also estimate their net returns from grazing operations on the land. A helpful start to this process is accessing livestock enterprise budgets from your Cooperative Extension Service. Generally, these budgets will estimate costs on a per-head basis, which is likely the most useful format since marketing revenues will also be calculated on a per-head basis. The estimated market value of the animal less the non-land costs of production, equals the livestock owner's net returns to pasture, as illustrated in figure 4-12.



Figure 4-12: Livestock Owner Cost Estimate

Source: NCFMEC-03

	Weight (lbs./animal)	Value (\$/cwt)	Value (\$/animal)
Final Value of Animal	800	\$ 110.00	\$ 880.00
Initial Value of Animal	580	\$ 120.00	\$ 696.00
Value of Gain			\$ 184.00

Livestock Owner's Contribution	Units	Rate	Cost (\$/animal)
Time on pasture (months/year)	4		
Interest		6.5 %	\$ 15.08
Taxes, vet, insurance, miscellaneous			\$ 18.50
Marketing, hauling		%	\$ 17.05
Death loss		1 %	\$ 6.96
Supplemental Feed			\$ 39.00
Labor	1.5	\$ 11.00	\$ 16.50
Management			\$ 10.00
Livestock Owner's Contribution (\$/head)			\$ 123.09
Livestock Operating Cost and Initial Value (\$/head)			\$ 819.09
Net Returns to Grazing (\$/head)			\$ 60.91
Stocking Rate (acres/head)	4		
Livestock Owner Net Returns to Pasture (\$/acre)			\$ 15.23

As you can see from this example, the contributions by the landowner are greater than the returns to grazing on the part of the livestock owner. Thus, the landowner will likely want a higher rate of rent than the livestock owner is willing to pay. This means that the parties will have to negotiate, with one or both parties taking a lower rate of return (or otherwise, both parties would walk away from the leasing opportunity. Below are some examples of how a compromise can be found.

### Fixed Per-acre or Per-head Rent

As with crop leases, a simple fixed per-acre or per-head rental amount could be charged. Given the example above, the landowner would likely want at least \$27 per acre, while the livestock owner would like to pay approximately \$15 per acre. The parties would have to negotiate for an amount somewhere between the two values. If a fixed per-acre rent is used, negotiated limits on stocking rates are important to include in the lease, as discussed above. This arrangement shifts risk away from the landowner and to the livestock owner.

### Fixed Charge per Pound of Gain

Livestock production faces two major risks – price risk in the amount received for the animal at market, and the gain of the animal (production risk). Weight gain is

a function of the animal's inherent productivity (often dictated by the animal's genetics and health) and the productivity of the pasture land. The productivity risk associated with land (although it is also tied to the productivity of the animal) can be shifted back toward the landowner through a fixed charge per pound of gain. For example, the lease could specify a cost of \$0.45 per pound of gain. Since this arrangement does shift risk to the landowner, they may insist on a higher rate to offset this risk.

### Share of Gain

One potential method of distributing the income from the grazing operation is to value the contributions made by the landlord and livestock owner to determine the shares of that income.

Figure 4-13: Calculating Share of Gain

Source: NCFMEC-03

	Landowner	Livestock Owner	Total
Value of Gain (\$/head from Worksheet 2)			\$ 184.00
Estimated Contribution (\$/head from Worksheets 1 and 2)	\$ 108.13	\$ 123.09	\$ 231.22
Percent contribution	47 %	53 %	100 %
Net Return Allocation (\$/head)	\$ 86.05	\$ 97.95	
Stocking Rate (acres/head or animal unit)			4.00
Implied Cash Rental Rate (\$/acre)	\$ 21.51		

In the example used here, the landowner is contributing approximately 47 percent of the costs of production and the livestock owner is contributing approximately 53 percent. The landowner and livestock owner can agree to share this proportion of the proceeds when the livestock are sold. Under this arrangement, the actual rental is not known until the end of the lease when the final value of gain is known (not unlike in a crop share lease).

### Conclusions

It is clear from this discussion that there are numerous factors involved in determining an equitable rental rate for agricultural land. The more information that is available to both parties, the greater their ability to have a productive conversation about the contributions that both parties will be making to what is hoped to be a profitable agricultural enterprise. As with other lease terms, the conversation about rental rates has tremendous value in and of itself to help the parties identify issues before they become problems.

### For more information:

“Fixed and Flexible Cash Rental Arrangements for your Farm,” North Central Farm Management Extension Committee Publication NCFMEC-01.

<http://aglease101.org/DocLib/docs/NCFMEC-01.pdf>

“Crop Share Rental Arrangements for Your Farm,” North Central Farm Management Extension Committee Publication NCFMEC-02. <http://aglease101.org/DocLib/docs/NCFMEC-02.pdf>

“Pasture Rental Agreements for your Farm,” North Central Farm Management Extension  
Committee Publication NCFMEC-03. <http://aglease101.org/DocLib/docs/NCFMEC-03.pdf>

## **CHAPTER IV: WHEN CAN A LANDOWNER/LESSEE BE LIABLE FOR INJURIES TO A THIRD PARTY?**

Landowner liability is an important issue in a variety of contexts, including leasing. Not only should landowners be aware of their potential liability during the lease term, landowners leasing land for recreational activities like hunting or fishing should also be aware of state statutes that offer limitations on liability if certain conditions are met.

### **Common Legal Claims**

Because laws differ by state, it is important to understand the law regarding common legal claims for the state in which property is located.

#### **Texas**

When a person is injured on the property of another, there are generally two legal claims that can be made: Premises Liability or Negligent Act. Because each claim requires vastly different elements be proven, it is important to understand when each claim applies.

##### *Premises Liability*

A premises liability claim arises when a person is injured due to a condition on the land itself. For example, if a person falls into a hole, that would be a premises liability claim.

A plaintiff must prove the following: (1) the defendant had actual or constructive knowledge of some condition on the premises (requirement depends on the category of person injured); (2) the condition posed an unreasonable risk of harm; (3) the defendant did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner's failure proximately caused the plaintiff's injuries.

##### *Negligent Act*

A negligent act occurs where there was an "ongoing activity" at the time when the plaintiff was injured. For example, in one foundational Texas case, a court found that a plaintiff injured by a box being dropped on his head while at Wal-Mart had a negligent act claim.

Negligent act claims are the same as a traditional negligence claim. A plaintiff must prove the following elements: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's action caused the plaintiff's injury, and (4) the plaintiff's damages.

#### **Oklahoma**

Oklahoma follows rules fairly similar to those of Texas with respect to premises and negligent act liability. To prove a case of either kind, Oklahoma requires a showing that (1) the defendant landowner had a duty to the person injured (and

that duty is generally defined by the relationship of the landowner to the injured person, as discussed below), (2) the landowner breached that duty, (3) the injured party sustained some form of damages, and (4) that the damages sustained resulted from the breach of the duty owed to that party by the landlord.<sup>12</sup> As with Texas, premises liability in Oklahoma stems from a condition on the land itself, while a “negligent act” would refer to an action or failure to act by the landlord or some other party with a legal connection to the landlord.

## **General Landowner Liability**

The rules applicable to landowner liability also differ by state. These rules can be rather complicated, so it is important to carefully evaluate how the duties imposed on landowners might apply to each individual operation.

### **Texas**

When dealing with a premises liability claim, the question that arises is whether the landowner breached the duty owed to the plaintiff. The duty owed to a plaintiff depends upon which of the three legal categories a plaintiff is categorized. Different duties exist for each category.

#### *Trespasser*

A person who enters the property of another without permission or legal right to do so falls under the category of trespasser. The landowner owes the lowest duty of care to a trespasser. A landowner’s only obligation to a trespasser is not to intentionally injure the trespasser or to injure the trespasser by gross negligence. There is no requirement that dangerous conditions be made safe or that warnings be given.

Gross negligence involves an act or omission involving an extreme degree of risk, of which the defendant had actual awareness, but proceeded in conscious indifference to the rights, safety, and welfare of others. This is a very high standard that is difficult for a plaintiff to prove.

#### *Licensee*

A person who enters the land with permission for his or her own benefit is a licensee. The most common example is a social guest or a salesman. Landowners must warn or make safe any condition posing an unreasonable risk of harm that is actually known to the landowner and is not similarly known by the plaintiff.

- *Actual Knowledge:* A plaintiff must show that the landowner had actual knowledge of the unreasonably dangerous condition; the fact that a landowner could or should have known is insufficient. Actual knowledge can be shown in a number of ways, including evidence that

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<sup>12</sup> See, e.g. *Travelers Ins. Co. v. Taliaferro*, 54 P.2d 1069 (Okla. 1935).

the landowner has seen or been told of the condition, proof of prior incidents, proof that the landowner created the condition, and the fact that the landowner attempted to remedy or prevent the condition.

- *Plaintiff Did Not Have Similar Knowledge:* A landowner does not have to warn or make safe a dangerous condition that is actually known to the licensee. Oftentimes, similar knowledge of the licensee is proven where the dangerous condition was visible to the licensee.
- *Duty to Warn or Make Safe:* Where a landowner has actual or constructive knowledge of a condition creating an unreasonable risk, he or she has a duty to use reasonable care to either warn the invitee or to make the condition safe. These are alternatives, of which a landowner need only satisfy one.

### *Invitee*

An invitee is defined as a person who enters the land with the owner's knowledge and for the mutual benefit of both parties is an invitee. Examples include business patrons, owner's employees, mailmen, and meter readers.

Landowners owe the greatest duty to an invitee. A landowner must warn or make safe any condition posing an unreasonable risk of which the landowner has actual or constructive knowledge.

- *Actual or Constructive Knowledge:* A landowner is responsible not only for conditions of which he or she has actual knowledge, but also those of which he or she is deemed to have constructive knowledge. This means that the landowner **could** have discovered the condition with a reasonable inspection, even if the landowner failed to make an inspection. Let's take a classic slip and fall case in a grocery store. If a plaintiff slipped on a grape that had been on the floor for only 5 minutes, the grocery store likely would not be found to have constructive knowledge, because it would not be reasonable to expect them to inspect the entire store every 5 minutes. If, on the other hand, a customer slipped on a grape that had been on the floor for 5 hours, constructive knowledge would be more likely to exist.
- *Unreasonable Risk:* Not all conditions create an unreasonable risk of harm. Liability is imposed only where a plaintiff can show that this unreasonable risk exists. There are certain conditions that Texas courts have found **not** to be unreasonable as a matter of law, including icy bridges during cold weather, mud accumulation on a concrete slab, naturally occurring ice accumulating without assistance or involvement of unnatural contact, and dirt in its natural state.

- *Duty to Warn or Make Safe:* This requirement is identical to that element of a licensee—the landowner may either warn the licensee or make the condition safe.

## Oklahoma

Much like Texas, Oklahoma defines a landowner’s duty to a party based upon the classification of that party. Oklahoma uses three basic classifications in this system: trespasser, licensee, and invitee. Most of these classifications are summarized in the case of *Pickens v. Tulsa Metro. Ministry*, 951 P.2d 1079, 1083-84 (Okla. 1997).

### *Trespasser*

*“To a trespasser, a landowner owes in the common law status-based classification system only a duty to avoid injuring him willfully or wantonly.”* Put another way, a landowner has no duty to a trespasser except to avoid intentionally causing him or her an injury.

### *Licensee*

*“To a licensee, an owner owes a duty to exercise reasonable care to disclose to him the existence of dangerous defects known to the owner, but unlikely to be discovered by the licensee. This duty extends to conditions and instrumentalities which are in the nature of hidden dangers, traps, snares, and the like.”* As in Texas, a person on the property as a social guest (someone on the property for a non-commercial purpose) or someone on the property for *their* economic benefit (such as a salesman) is classified as a licensee. Such parties need only be warned of known, hidden dangers. This means the landowner is not obligated to make an inspection of the property to discover any dangers of which he or she was not already aware.

### *Invitee*

*“To an invitee, an owner owes the additional duty of exercising reasonable care to keep the premises in a reasonably safe condition for the reception for the visitor. Even vis-à-vis an invitee, to whom a landowner owes the highest duty in this trichotomous classification system, the law does not require that the landowner protect the invitee against dangers which are so apparent and readily observable that one could reasonably expect them to be discovered. . . . A hidden danger within this rule of liability need not be totally or partially obscured from vision or withdrawn from sight; the phrase is used for a condition presenting a deceptively innocent appearance of safety ‘which cloaks a reality of danger.’”* In Oklahoma, much like Texas, an “invitee” is someone on the premises for the economic benefit of the landowner, such

as a business customer (the liability for parties such as lease hunters, who could be argued to be on the premises for the economic benefit of the landowner, is discussed later). For invitees, Oklahoma requires the landowner to make inspections of the property on a reasonably regular basis to discover any potentially hidden hazards and to either warn parties that might come on the property of the hazards or to make those hazards safe by either eliminating them or blocking access to them.

### **Attractive Nuisance Doctrine**

Another important legal doctrine that could impact a landowner's liability is known as the attractive nuisance doctrine. The purpose of the doctrine is to offer additional legal protection for children injured by extremely dangerous conditions who are not old enough to appreciate the serious risks. Although not commonly successful, the doctrine is sometimes used by plaintiffs' attorneys.

### **Texas**

Under Texas law, the attractive nuisance doctrine comes into play when the trespasser is a young child and the following elements are met:

- *Defendant knew or should have known there was an artificial condition on the land and children were likely to trespass.* Note here that the doctrine applies only to artificial conditions, not to natural ones. Artificial conditions to which the doctrine has been applied include open caliche pits, billboards, large irrigation pipes, and cattle dipping vats.
- *Defendant knew or should have known the artificial condition posed an unreasonable risk of injury or death to children.*
- *Plaintiff did not realize the risk involved with the condition because of his or her age.* This is a case-by-case determination that takes into account the child's mental capacity, whether the child is unusually bright or slow, and age. Although there is no set age, the majority of cases applying the doctrine involve children 12 years of age or younger.
- *The utility of the defendant maintaining the condition and burden of eliminating the danger were slight compared to the risk to the children.* This element is a fact-specific balancing test.
- *The defendant's failure to exercise reasonable care to eliminate the danger or otherwise protect the plaintiff caused the plaintiff's injury.*

### **Oklahoma**

As in Texas, the rule that landowners owe no duty of care to trespassers is modified by the "attractive nuisance" doctrine in Oklahoma. The attractive



nuisance doctrine in Oklahoma largely follows the same elements as in Texas.<sup>13</sup> Although there is no set age below which the attractive nuisance doctrine applies in Oklahoma, one case has noted that the doctrine is presumed not to apply to anyone 14 years of age or older.<sup>14</sup>

### **Landowner Liability During Lease Term**

Another important question that frequently arises is whether, and under what circumstances, a landowner can be liable for injuries occurring on the land during a lease term.

#### **Texas**

In Texas, the general rule is that a landowner is not liable to the tenant or to others on the land for physical harm caused by any dangerous condition that existed at the time the lessee took possession of the land.

As with most laws, however, there are several exceptions to this rule. A landowner may be liable for injuries to the tenant or another in the following circumstances:

- *The landowner fails to disclose to the tenant a dangerous condition which involves an unreasonable risk of harm if the tenant does not know or have reason to know of the condition and the landowner does know or have reason to know of the condition and should realize the risk and expect the tenant would not discover the condition or realize the risk.* This exception basically provides that if a landowner knows of or conceals a latent defect when he or she leases the property to a tenant, the landowner may still be held liable for injuries on the property.
- *The landowner leases land for a purpose involving admission of the public who knows or should know of a condition creating an unreasonable risk of injury to the public and has reason to expect the lessee will admit people before the land is made safe and fails to exercise reasonable care to remedy the condition or otherwise protect the public.* This exception refers to situations where a person leases land knowing that the public will be admitted. For example, if a landowner leases his roping arena to a group to hold a public rodeo, that situation would fall under this exception. It is important for such landowner to ensure there are no conditions creating unreasonable risk.
- *The landowner contracts to make repairs.* If a landowner agrees in the lease itself to make repairs, he or she will be held liable for failure to do so.

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<sup>13</sup> See *Keck v. Woodring*, 208 P.2d 1133 (Okla. 1948).

<sup>14</sup> *Id.*

- *The landowner makes negligent repairs.* Both of the exceptions related to repairs essentially provide that if the landowner agrees to make repairs and fails to make them, or if a landowner negligently makes such repairs, he or she can be held liable. This makes sense from a logical standpoint, as the liability here is not based merely on owning the land, but instead on the negligent acts of the landowner in making or contracting to make repairs.
- *The landowner retains part of the lease premises in his or her control, but allows the tenant to use the area.* This issue often arises in cases dealing the common areas (such as lobbies or stairways) in apartment buildings. But it also raises an important point about agricultural leases. Generally, when a party leases land to another, the tenant has the exclusive right of possession to the property during the term of the lease and the landowner has no right to enter the property. If, however, a landowner were to reserve the right to enter the property for any reason, would that reservation subject the landowner to potential liability? In 2004, Texas Supreme Court held that the answer to this question was no. Merely retaining the right to enter a leased property, alone, is not sufficient to deem the property in the landowner's "control" such that this exception would apply.

## Oklahoma

As in Texas, the general rule in Oklahoma states when a landlord transfers the control of the premises to a tenant, the landlord has no liability to an injured third party,<sup>15</sup> also, as with Texas, there are exceptions to this rule.

- *The property is leased for residential use.* Oklahoma specifically overruled the previous rule with respect to residential properties and found that landlords have an obligation to maintain leased property in reasonably safe condition, even if the area where an injury occurred was exclusively within the tenant's control or use.<sup>16</sup> In the case announcing this rule, the exception seemed to be specifically targeted at residential leases, though; it seems unlikely this would be the rule for agricultural land leases.
- *The property is leased for public purposes and the landlord knows of an unsafe condition.* An exception to the general rule is found when the landlord leases the property for public purposes (that is, when the public may enter on to the property) and *at the time the lease is entered* there is a condition on the property that the landlord knows of rendering the premises unsafe, then the landlord may be liable for injuries to a third

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<sup>15</sup> See *Strader-Faiazi v. Edmond Fourth of July Festivals*, 28 P.3d 1161 (Okla. 2001).

<sup>16</sup> See *Miller v. David Grace, Inc.*, 212 P.3d 1223 (Okla. 2009).

party.<sup>17</sup>

- *The landlord completes repairs in a negligent fashion.* As with Texas, Oklahoma imposes liability on a landlord for negligence in making repairs or improvements to the property.<sup>18</sup>

## Recreational Use Statutes

All 50 states offer statutory limited liability under recreational use statutes. The basic premise behind such statutes is that legislatures want to encourage private landowners to open up their property and allow persons to come and engage in recreational activities. In order to do so, legislatures have passed statutes limiting the instances where such landowners may be held liable if a plaintiff is injured during a recreational activity. The full text of the Texas, Oklahoma, and Arkansas Recreational Use Statutes may be found in Appendix I. A compilation of statutes by state may be found at the National Agricultural Law Center Reading Room (<http://nationalaglawcenter.org/state-compilations/recreational-use/>).

## Texas<sup>19</sup>

Essentially, where the statute applies, the landowner, lessee, or occupier owes the plaintiff the same duty as a trespasser—meaning that the landowner, lessee, or occupier may not intentionally injure or act in gross negligence. As explained by the statute, the statute does not apply to acts of gross negligence, bad faith, or malicious intent. No additional duties (such as those owed to invitees or licensees) apply. The following elements must be met in order for the Recreational Use Statute to apply.

- *Defendant is the owner, lessee or occupier of agricultural land or “real property other than agricultural land.”*

First, the statute offers protection not only to landowners, but also to lessees and occupiers of land.

Next, as you can see, essentially, the statute applies to all real property. The level of protection, however, is the greatest for agricultural land. For example, for agricultural land, the statute applies to social guests, whereas it does not for non-agricultural land. Additionally, the liability cap available if sufficient insurance is held applies only to agricultural land. Finally, for agricultural land, the attractive nuisance doctrine is inapplicable for anyone over 16 years of age.

Agricultural land is defined as land “suitable for” use in the production of plants and fruits grown for human or animal consumption, or plants grown

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<sup>17</sup> See *Strader-Faiazi v. Edmond Fourth of July Festivals*, 28 P.3d 1161 (Okla. 2001).

<sup>18</sup> See *Continental Oil Co. v. Ryan*, 392 P.2d 492 (Okla. 1963), *Buck v. Miller*, 198 Okla. 617 (Okla. 1947).

<sup>19</sup> Tex. Civ. Practice & Remedies Code § 75.001 *et seq.*

for the production of fibers, floriculture, viticulture, horticulture, or planting seed; domestic or native farm or ranch animals kept for use or profit; or forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber or other items used for industrial, commercial, or personal consumption.

- *The plaintiff enters the property for a recreational purpose.*

Recreation is broadly defined as including “any activity related to enjoying the outdoors.” This includes hunting, fishing, swimming, boating, camping, the use of ATVs, water skiing, biking, and hiking. Court decisions have also found swinging on a swing set, golfing, and playing sand volleyball to constitute recreation. The courts have found this not to include outdoor weddings and spectating at sporting events.

- *The plaintiff meets one of the three monetary options:*

- The landowner, lessee, or occupier charges no fee to the plaintiff.
- The fee charged by the landowner is less than 20 times the amount of ad valorem taxes paid by the landowner last year. This language sounds more complex than it really is. A landowner just needs to add up the total income from recreational uses for the last calendar year. Next, the landowner would add up the total paid on ad valorem taxes for all his or her property (both that where recreation occurred and all other property owned by the landowner in Texas) last year. So long as the amount received for recreation is not twenty times greater than the amount paid for taxes, the landowner is protected by this prong of the statute.
- The landowner, lessee, or occupier of agricultural land maintains insurance coverage as defined by statute. Note, initially, that this prong of the test is available only to agricultural landowners, lessees, and occupiers. The minimum coverage amount is defined by statute as 500,000 for each person, 1 million for each single occurrence of bodily injury or death, and \$100,000 for each single occurrence of injury or destruction of property.

An added benefit is available to agricultural landowners, lessees, or occupiers who meet this “adequate insurance” requirement. The statute provides a cap for damages equal to the insurance coverage that the plaintiff can recover. That this means is that an agricultural landowner, lessee, or occupier maintaining “adequate

insurance” would not be required to pay over the insurance coverage to a plaintiff.

## Oklahoma

Oklahoma’s public recreational use statute resembles that of Texas in many ways, but also poses some important differences. Perhaps most importantly, it specifically states that it does not apply to land that is used primarily for farming or ranching purposes, but rather that the Oklahoma Limitation of Liability for Farming and Ranching Land Act governs such land.<sup>20</sup> Assuming the land in question is not primarily used for farming or ranching purposes, the “owner” of the land is regarded as (1) not extending any assurance that the land is safe for any purpose, (2) not incurring any duty of care toward a person who enters or uses the land, and (3) not assuming any liability or responsibility for any injury to persons or property caused by the act or omission of a person who enters or uses the land. In effect, much like the Texas statute, the Oklahoma statute essentially gives owners the same legal status with respect to recreational users as to trespassers. However, the Oklahoma statute only applies so long as the following conditions hold:

- *The defendant is the “owner” of the land.* Contrary to the usual understanding of “owner,” the statute defines owner as “the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the land.” Thus, under the right circumstances, anyone with legal possession of the property could be regarded as an owner under the statute.
- *The owner provides public access to the land for “outdoor recreational purposes” at no charge.* “Charge” is defined by the statute as “the admission price or fee asked in return for invitation or permission to enter or go upon the land.” It should be noted that the statute says the liability protections do not apply if a charge is made for outdoor recreational purposes *or* if a charge is “usually made.” Several examples of recreational use are provided in the statute: “‘Outdoor recreational purposes’ includes any of the following or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, jogging, cycling, other sporting events and activities, nature study, water skiing, jet skiing, winter sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, and aviation at non-public-use airports.”

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<sup>20</sup> 76 OKLA. STAT. § 10.1(H).

- *The owner conducts “any commercial or other activity for profit directly related to the use” on any part of the land.* The statute does not define what the phrase “related to the use” means, nor has any case interpreting 76 OKLA. STAT. §10.1 interpreted the phrase, but it could be read to mean that the owner does not have the liability protection of the statute on any portion of the property if the owner charges for any recreational use on another portion of the property. However, the safer interpretation seems to be that no for-profit activity of any kind be conducted on any of the owner’s land connected to the recreational property in question.

## **Agritourism Statutes**

Another source of statutory limited liability comes from agritourism statutes. Over half the states in the US have enacted these statutes, including Texas and Oklahoma. The full text of the Texas, Oklahoma, and Arkansas Agritourism Statutes may be found in Appendix II. A compilation of statutes by state may be found at the National Agricultural Law Center Reading Room (<http://nationalaglawcenter.org/state-compilations/agritourism/>).

### **Texas<sup>21</sup>**

The Texas Agritourism Act provides that an "agritourism entity" is not liable to any person for injury or damages to an "agritourism participant" if: (1) the required signage is posted; or (2) a written agreement containing required language is obtained.

- *Definitions*
  - The act is aimed at protection persons injured while participating in an "agritourism activity." By definition, an agritourism activity is an activity on agricultural land for recreational or educational purposes of the participants, regardless or compensation.

The requirement that the property involved be "agricultural land" means that it must be land suitable for use in the production of fruit or crops grown for human or animal consumption, or plants grown for production of fibers, floriculture, viticulture, horticulture, or planting seed, or suitable for domestic or native farm or ranch animals to be kept for use or profit. This is a very broad definition--requiring only that land be "suitable for" this wide range of agriculturally related activities. Importantly, however, it does not expressly include forestry land, as does the Recreational Use Statute.

The requirement is identical to that included in the Recreational Use statute. A "recreational purpose" is defined as including

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<sup>21</sup> Tex. Civ. Practice & Remedies Code § 75A.001 *et seq.*

hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving (including ATVs), nature study, cave exploration, water sports, biking, disc golf, walking dogs, radio control flying, and other activities associated with enjoying nature or the outdoors. Again, this is an extremely broad definition.

So, for example, if a plaintiff was on a defendant's ranch land to hunt deer, that would meet the definition of an "agritourism activity" required for the statute to apply.

- The Act offers protection to "agritourism entities." This is defined as a person engaged in the business or providing an agritourism activity, without regard to compensation. For example, a farmer or rancher who allowed persons to enter their property for recreational or educational purposes would meet this definition.
  - The Act applies to "agritourism participants." This term is defined as an individual engaged in an agritourism activity. This means that any person who is on agricultural land for a recreational or educational purpose meets this requirement. Specifically excluded from this definition, however, are employees of the agritourism entity. So, assume a ranch allows a neighbor to come over to fish and he is injured. That neighbor would be an agritourism participant. If, however, it was an employee of the ranch who was injured while fishing, the statute would not apply.
  - The Act applies to "agritourism participant injures." This term is defined as "an injury sustained by an agritourism participant, including bodily injury, emotional distress, death, property damage, or any other loss arising from the person's participation in an agritourism activity." Again, this is a broad reaching definition that will allow limited liability for most damage claims.
- *Requirements for limited liability.*

If the above requirements are satisfied and the Act applies, an agritourism entity is not liable for any agritourism participant injuries if one of the following two options are met: (1) required signage is posted; or (2) a release including required language is obtained.

- Required signage. The first option in order to qualify for limited liability is for a landowner to post warning signs. Under the statute, the signs must be clearly visible on or near any premises where an agritourism activity occurs. The sign must contain the following language: WARNING: UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE),

AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY.

- Required release language. The alternative option is for the agritourism entity to obtain a signed written agreement from participants. The agreement must be (1) signed before participation in an agritourism activity; (2) be signed by the participant or the participant's guardian if he or she is a minor; (3) be separate from any other agreement between the participant and entity except a different warning, consent, or assumption of risk, (4) be printed in at least 10-point bold type; and (5) contain the following language: AGREEMENT AND WARNING: I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES.
- *Exceptions to limited liability*

Importantly, the limitation on liability offered by this statute is not unlimited. Numerous exceptions apply.

- As noted above, the statute expressly states it does not apply if an employee of the entity is injured.
- The protections do not apply if the injury was caused by the entity's "negligence evidencing a disregard for the safety of the agritourism participant."
- The protections do not apply if the injury is caused by a dangerous condition of which the entity had actual knowledge or reasonably should have known on the land, facilities, or equipment used in the activity.
- No limited liability exists if the injury is caused by the dangerous propensity of a particular animal used in the activity not disclosed to the participant of which the entity has actual knowledge or reasonably should have known.
- Protections do not apply if the injury is caused by the entity's failure to adequately train an employee involved in an agritourism



activity.

- No limited liability exists for injuries intentionally caused by the entity.

## Oklahoma

The Oklahoma Agritourism Activities Liability Limitations Act (2 OKLA. STAT. §§ 5-14 through 5-17) provides protection to “agritourism professionals” from the “inherent risks of agritourism activities.” Naturally, understanding the statute’s protections requires a step-by-step examination of each of these definitions.

- *Agritourism activity*: The statute defines “agritourism activity as “any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity.” Note this last phrase indicates that, in contrast with the public use statute discussed above, participation fees or other charges *can* be imposed under the agritourism statute and the owner can still have the protections of the statute.
- *Agritourism Professional*: “Agritourism professional” is defined as “any person who is engaged in the business of providing one or more agritourism activities, whether or not for compensation and whose agritourism activity is registered with the Oklahoma Department of Agriculture, Food, and Forestry.” To register an Oklahoma Agritourism business, contact the Oklahoma Department of Agriculture, Food, and Forestry’s (ODAFF) Market Development staff at (405) 522-5652. Regulations for the registration process can be found in the Oklahoma Administrative Code at OKLA. ADMIN. CODE § 35:40-17-3. Prior to registration, ODAFF must make several determinations:
  - Is the facility is in compliance with all federal, state, and local regulations for health, safety, sanitation, and zoning?
  - Does the facility comply with all Oklahoma Tax Commission regulations?
  - Does the facility carry liability insurance?
  - Does the facility post and adhere to regular business hours?
  - Does the facility maintain its facilities in good repair?
  - Additional requirements are imposed for hunting facilities, “country stay” facilities, and wineries.
- *Inherent risks of agritourism activities*: “Inherent risks of agritourism activities” are defines as “those dangers or conditions that are an integral part of an agritourism activity including certain hazards, surface and

subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. Inherent risks of agritourism activity also include the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, including failing to follow instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity.”

In addition to the satisfaction of the definitions above, the protections of the Act are only available if the following warning is posted at the facility:

**WARNING**

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

The warning must be posted in a clearly visible location at the entrance to the agritourism location, and also at the site of the agritourism activity. Per the statute, “the warning notice shall consist of a sign in black letters, with each letter to be a minimum of one (1) inch in height.” Additionally, “every written contract entered into by an agritourism professional for the providing of professional services, instruction, or the rental of equipment to a participant, whether or not the contract involves agritourism activities on or off the location or at the site of the agritourism activity, shall contain in clearly readable print the warning notice.”

There are two critical exceptions to the protections provided by the Act.

- No liability protection is available if the agritourism professional “commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage, or death to the participant.”
- The agritourism professional cannot use the liability protection of the Act if he or she “has actual knowledge or reasonably should have known of a dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant, and the danger proximately causes injury, damage, or death to the participant.”

These exceptions mean that agritourism professionals are still held to traditional

negligence standards. Nevertheless, the Act can still provide important liability protections for injuries and damages that do not occur as result of individual negligence.

Finally, it is important to note that the language of the Oklahoma Agritourism Activities Liability Limitations Act states that if all the requirements of the Act are satisfied, “no participant *or participant’s representative*” can maintain a legal action to recover for an injury. This is important, as “participant’s representative” includes a minor’s guardian. In some cases, a guardian cannot waive liability for injuries, but this statute provides an exception to that rule.

### **Farm Animal Liability Acts**

Another potential source of limited liability are statutes aimed at limiting liability where injuries occur involving farm animals and/or equine animals. Currently, all states except for California, Maryland, Nevada, and New York have enacted this type of statute. The full text of the Texas, Oklahoma, and Arkansas Acts may be located in Appendix III.

#### **Texas<sup>22</sup>**

The Texas Farm Animal Liability Act provides that certain defendants are not liable for property damage, personal injury, or death if each of the Act’s requirements are satisfied.

- *Animals to which the Act applies.*  
In 2011, the Texas Legislature passed several amendments to the Act. Most significantly, the Act was expanded to apply to all farm animals, not just equines. A “farm animal” is defined as including an equine animal (horse, pony, mule, donkey, or hinny), bovine animal, sheep, goat, pig, hog, ratite (ostrich, rhea, emu), and chicken or other fowl.
- *Persons to whom the protection is given.*

The limited liability applies to the following defendants:

(1) Farm animal professionals (persons engaged for compensation in instructing a participant or renting to a participant a farm animal for the purpose of riding, driving or being a passenger; renting equipment or tack to participants; providing medical care to a farm animal; or providing farrier services);

(2) Farm animal activity sponsors (persons who sponsor, organize or provide facilities for farm animal activities or operators,

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<sup>22</sup> Tex. Civ. Practice & Remedies Code § 87.001 *et seq.*

instructors, or promoters for facilities where farm animal activities are held);

(3) Livestock producers (person who owns, breeds, raises, or feeds livestock animals);

(4) Livestock show sponsors (groups that sanction livestock shows); and

(5) Livestock show participants (person who registers for and is allowed to compete in a livestock show by showing an animal on a competitive basis, or a person who assists the show participant).

- *Plaintiffs to whom the Act applies.*

The Act applies to all “participants” which is defined as “a person who engages in a farm animal activity without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free” and a person who registers for and is allowed to compete in a livestock show or a person assisting the competitor.

An interesting and important question has arisen under Texas law. Does the Act apply to situations where the injured plaintiff is an employee or independent contractor of the farm animal operation? The Texas Supreme Court has not yet addressed this question, but appellate courts to date have found that the Act does not apply to limit liability where employees are injured and does aptly to limit liability where independent contractors are injured.

- *Activities to which the Act applies.*

The Act applies to all “farm animal activities” which includes shows, fairs, performances, rodeos, or events involving farm animals; training or teaching activities involving farm animals; boarding farm animals; daily care of farm animals; riding, inspecting, evaluating, hauling, loading, or unloading a farm animal belonging to another; informal farm animal activities including rides or hunts; shoeing horses; providing medical treatment to animals; and rodeos and ropings.

Persons are engaged in farm animal activities if they are riding, handling, training, driving, loading or unloading, assisting in medical treatment of, being a passenger on, or assisting a participant or sponsor with a farm animal.

The Act does not apply to spectators at farm animal activities unless the spectator is in an unauthorized location in the immediate proximity of the farm animal activity.

- *Causes of injury to which the Act applies.*

The Act's limited liability protections apply to any "property damage, injury, or death resulting from the dangers or conditions that are an inherent risk of a farm animal activity or the showing of an animal on a competitive basis at a livestock show." Further, the Act offers examples of the types of injuries that would be covered: (1) propensity of a farm animal to behaving in a way that may result in personal injury or death to persons around it; (2) unpredictability of farm animal's reaction to sound, sudden movement, or unfamiliar object, person, or other animal; (3) with respect to equine animals, certain land conditions and hazards including surface and subsurface conditions; (4) a collision with another animal or object; and (5) the potential of a participant to act in a negligent manner that may contribute to the injury of the participant or another.

- *Exceptions to the Act*

There are 6 injuries that are expressly not covered by the Act, meaning that there is no limited liability offered if the injuries are caused by any of these situations:

(1) Injury was caused by faulty tack or equipment provided by defendant and defendant knew or should have known it was faulty;

(2) Defendant provided the farm animal to the participant and did not make reasonable effort to determine the ability of the participant to engage safely in the farm animal activity;

(3) Injury was caused by a dangerous latent condition of the land and the defendant knew of the condition and did not warn the participant;

(4) Defendant acted with willful or wanton disregard for the safety of the participant;

(5) Defendant intentionally caused the injury;

(6) Defendant allowed or invited a non-competitor to participate in an activity connected with a livestock show and the injury resulted from that activity.

- *Required signage and contractual language*

The Act requires a farm animal professional anyone that manages or controls a stable, corral, or arena where farm animal activities are conducted to post a sign clearly visible on or near the stable, corral, or arena containing the following language:

**WARNING: UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE & REMEDIES CODE) A FARM ANIMAL PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN THE FARM ANIMAL ACTIVITIES RESULTING FROM THE INHERENT RISKS OF FARM ANIMAL ACTIVITIES.**

Additionally, this language must be included in every written contract the farm animal professional enters into with a participant for professional services, instruction, or the rental of tack.

For livestock shows, sponsors who manages or controls a stable, barn, corral, or arena where the show is conducted must place a sign in a clearly visible location near the stable, barn, corral, or arena containing the following language: **WARNING: UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE & REMEDIES CODE) A LIVESTOCK SHOW SPONSOR IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN A LIVESTOCK SHOW RESULTING FROM THE INHERENT RISKS OF LIVESTOCK SHOW ACTIVITIES.**

## **Oklahoma**

The Oklahoma Livestock Activities Liability Limitation Act (OLALLA), found at OKLA. STAT. §§ 50.1 – 50.4 provides “a livestock activity sponsor, a participant or a livestock professional acting in good faith and pursuant to the standards of the livestock industry shall not be liable for injuries to any person engaged in livestock activities when such injuries result from the inherent risks of livestock activities.” Again, though, taking advantage of those protections requires walking through a number of definitions.

- "Livestock" means any cattle, bison, hog, sheep, goat, equine livestock, including but not limited to animals of the families bovidae, cervidae and antilocapridae or birds of the ratite group;
- "Livestock activity" includes but is not limited to:
  - livestock shows, fairs, livestock sales, competitions, performances, or parades that involve any or all breeds of livestock and any of the livestock disciplines, including, but not limited to, rodeos, auctions, driving, pulling, judging, cutting and showing,
  - livestock training or teaching activities or both such training and teaching activities,
  - boarding or pasturing livestock,

- inspecting or evaluating livestock belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the livestock or is permitting a prospective purchaser of the livestock to inspect or evaluate the livestock,
  - drives, rides, trips, hunts or other livestock activities of any type however informal or impromptu that are sponsored by a livestock activity sponsor,
  - placing or replacing horseshoes on an equine, or otherwise preparing livestock for show, and
  - agritourism activities involving the viewing of, handling of, riding of, showing of, or other interactive activities with livestock;
- "Livestock activity sponsor" means an individual, group, club, partnership or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, a livestock activity, including but not limited to: livestock clubs, 4-H clubs, FFA chapters, school and college-sponsored classes, programs and activities, therapeutic riding programs, and operators, instructors, and promoters of livestock facilities, including, but not limited to, barns, stables, clubhouses, ponyride strings, fairs and arenas at which the activity is held;
  - "Livestock professional" means a person engaged for compensation in:
    - instructing a participant or renting to a participant livestock for the purpose of engaging in livestock activity, or
  - Renting equipment or tack to a participant;
  - "Participant" means any person, whether amateur or professional, who engages in a livestock activity, whether or not a fee is paid to participate in the livestock activity.
  - "Engages in a livestock activity" includes training, racing, showing, riding, or assisting in medical treatment of, or driving livestock, or engaging in any agritourism activity involving livestock or on a location where livestock are displayed or raised, and any person assisting a participant, livestock activity sponsor or livestock professional. The term "engages in a livestock activity" does not include being a spectator at a livestock activity, except in cases where the spectator places himself or herself in immediate proximity to livestock activity;
  - "Inherent risks of livestock activities" means those dangers or conditions which are an integral part of livestock activities, including but not limited to:

- the propensity of livestock to behave in ways that may result in injury to persons on or around them,
  - the unpredictability of livestock's reaction to such things as sounds, sudden movement and unfamiliar objects, persons or other animals,
  - certain hazards such as surface and subsurface conditions unknown to the livestock activity sponsor,
  - collisions with other livestock or objects, and
  - the potential of tack to become dislodged or move in ways that may result in injury to persons on or around livestock activities;
- "Agritourism activity" includes, but is not limited to, any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant pays to participate in the activity;

While the OLALLA provides important liability protections, it also contains a number of exceptions. Liability protection is not provided to livestock activity sponsors, participants, or livestock professionals if that party:

- commits an act or omission that constitutes willful or wanton disregard for the safety of any person engaged in livestock activities, and that act or omission caused the injury,
- intentionally injures a person engaged in livestock activities,
- provided the equipment or tack, which was faulty, and such equipment or tack was faulty to the extent that it did cause the injury. The provisions of this subparagraph shall not apply to livestock activities sponsored by youth organizations when youth participants share equipment or tack between themselves,
- provided the livestock and failed to make a reasonable effort to determine the ability of the participant to manage the particular livestock based upon the participant's representations of such participant's ability. Provided, however, a participant in a livestock show, livestock sale, or rodeo shall be presumed to be competent in the handling of livestock if an entry form is required for the activity and signed by the participant, or
- owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous condition which was known to the livestock activity sponsor, livestock professional or person and not made known to the participant.



Further, the statute also provides that it does not provide protection for products liabilities claims (that is, it does not limit liability if the livestock activity sponsor, livestock professional, or participant would have been liable for the injury under products liability laws) or the livestock activity resulted in the death of a person and that death was caused by the inherent risks of livestock activities.

Given these exemptions, parties involved in livestock activities should continue to engage in thorough inspections of their facilities and equipment, as well as engaging their participants to make sure they understand the risks of livestock activities and to assess their ability to safely participate in those activities. An additional precaution would be the execution of a liability waiver for the activity; the OLALLA provides that waivers covering the risks of livestock activities are enforceable.<sup>23</sup>

Previous versions of the OLALLA required the posting of a sign in a clearly visible location on or near barns, stables, corrals or arenas where the livestock activities took place, with the sign text to read as follows:

<p>WARNING Under Oklahoma Law, a livestock professional or livestock activities sponsor is not liable for an injury to a participant in livestock activities resulting from the inherent risks of livestock activities, pursuant to the Oklahoma Livestock Activities Liability Limitation Act</p>
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While the statutory language requiring such signs was eliminated in the most recent revision of the Act, posting such signs is still prudent to remind participants of the risks involved in their activity.

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<sup>23</sup> 76 OKLA. STAT. § 50.4.

## **CHAPTER V: DRAFTING A VALID LIABILITY WAIVER**

Liability waivers are commonly used in a variety of situations. Questions arise over whether such waivers are valid and enforceable. As with every legal issue, the facts will govern the validity of such waivers, generally speaking, if correctly written, such waivers can and will be enforced by courts. Importantly, however, courts in many states (including Texas and Oklahoma) generally disfavor liability releases, and will interpret them narrowly against the released party in the event ambiguity exists. Thus, it is critical that landowners work with licensed attorneys in their jurisdiction to draft carefully thought out, unambiguous waiver language.

### **Texas Law**

To be enforceable in Texas, a release must meet the requirements of fair notice, which include (1) satisfying the express negligence doctrine; and (2) being conspicuous. Additionally, a number of undecided legal issues exists of which parties should be aware.

#### **Express Negligence Doctrine**

The express negligence doctrine requires that in order for a release to be valid, the releasing party's intent must be expressed in unambiguous terms within the language of the release. The purpose of this requirement is to ensure that parties understand specifically which claims they are releasing when signing a waiver.

In order to satisfy this doctrine, a release should expressly state the legal claims to which it applies, such as negligence, gross negligence, and strict liability. For example, a release that said, "Party A releases Party B for all losses related to the use of the premises for hunting deer" would likely not be enforceable. Instead, a clause should be more specific, stating that "Party A releases Party B for all claims of negligence, gross negligence, and strict liability related to the use of the premises for hunting deer" would be much more likely to satisfy the doctrine.

Additionally, the enforceability of the release may also hinge upon when it was signed versus when the injury occurred. For example, if a release was signed but an injury did not occur for months or years later, a plaintiff could argue that he or she did not intend to release liability for all time by signing the release so long ago. This could allow plaintiff's counsel to argue lack of express intent to waive the claims at issue, thereby potentially invalidating the release.

Finally, the release should clearly state the activity to which it applies. This detail will help to undercut a plaintiff's argument that he or she did not intend to release claims for their specific injury. For example, a release that waives claims for "all activities on the property" may be more problematic than a release that waives all claims for "all injuries incurred while hunting deer on the property."

## **Conspicuousness**

Next, under Texas law, a release must be conspicuous. Texas had adopted the definition of conspicuous set out by the Uniform Commercial Code, Section 1.201(10), which states that a clause is conspicuous “when it is so written that a reasonable person against whom it is to operate ought to have noticed it.” The UCC goes on to list several examples of conspicuous terms, including a heading and/or text in capitals equal to or greater in size than surrounding text; contrasting type, font, or color to the surrounding text; and placing the language in a larger type than the surrounding font. Adopting these principles, the Texas Supreme Court has explained that “language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous.”

Numerous Texas cases have considered this issue, and the results are extremely fact specific. For example, in *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the court found release language non-conspicuous when the language was located on the back of a work order in a series of numbered paragraphs without headings or contrasting type in a lengthy contract. Similarly, in *Safeway Scaffold Co. v. Safeway Steel Prod, Inc.*, 570 S.W.2d 225 (Tex. App. Houston [1st Dist.] 1978), the court held that the language failed to meet the conspicuous requirement where it was small text in light type on the back of a rental form, surrounded by unrelated terms. On the other hand, a release provision titled “Liquidated Damages and Indemnity” and printed in all capital letters was found to be conspicuous in *Arthur’s Garage, Inc. v. Racal-Chubb Sec. Systems Inc.*, 997 S.W.2d 803 (Tex. App. Dallas 1999). Likewise, in *Quintana v. Crossfit Dallas, LLC*, 347 S.W.3d 445 (Tex. App. Dallas 2011), the court found a release valid where it was only two pages long, it used the word “release” and the text was typed in bold, larger font.

## **Undecided Issues**

Importantly, there are several issues related to liability releases that remain undecided. First, the Texas Supreme Court has not yet ruled on whether a pre-injury liability waiver can waive claims for gross negligence. Nearly all appellate level courts considering this issue in Texas has held that releases may not waive claims for gross negligence as doing so would be against public policy. See, e.g., *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App. Beaumont 1986) (holding that release of a defendant’s gross negligence is invalid as against public policy). Conversely, the San Antonio Court of Appeals reached the opposite conclusion in *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713 (Tex. App. San Antonio 1994). There, the court found that the plaintiff effectively waived her claims for both negligence and gross negligence.

Additionally, the Texas Supreme Court has not ruled on whether a liability release signed by a parent on behalf of a minor child is enforceable. At least one Texas appellate court has held that releases signed by a parent or guardian on behalf of a minor child are not enforceable. *See Munoz v. II Jaz Inc.*, 863 S.W.2d 207 (Tex. App. Houston 1993). The rationale behind this decision is that Texas law seeks to be especially protective of children and that parents should not be able to waive a child's personal injury claims.

## **Oklahoma Law**

Oklahoma law imposes a three-part test in order to analyze the validity of a liability waiver (referred to in Oklahoma case law as an "exculpatory clause.")<sup>24</sup> Release language is enforceable only if: (1) the language evidences a clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages; (2) there was no vast difference in bargaining power existed at the time the contract was signed; and (3) enforcement of the clause would not be injurious to public health, public morals, or confidence in the administration of law, or undermine the security of individual rights vis-à-vis personal safety or private property as to violate public policy. Let's review each of these requirements.

### **Clear and Unambiguous Intent**

In analyzing this requirement, courts seek to ensure that the releasing party understood the document that he or she was signing. Important factors include clarity of the language, use of words such as "release from liability" and "covenant not to sue." The requirement of initialing through a document and a signature at the conclusion stating that the party understood the release and agreed to be bound by its terms also appears to be an important consideration for Oklahoma courts.

### **No Vast Difference in Bargaining Power**

In considering the balance of bargaining power, courts consider the importance of the subject matter to the physical or economic wellbeing of the injured party and the amount of free choice the party had when electing alternative services.<sup>25</sup> For example, a plaintiff injured sky diving did not need to do so for economic wellbeing and would have had other options for training and skydiving services.

### **Enforcement Is Not Against Public Policy**

Finally, Oklahoma courts seek to determine if enforcing such releases would be against public policy. This generally depends on the activity at issue. For example, courts have found that enforcing releases against persons injured while participating in extreme sports was not against public policy.

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<sup>24</sup> *Schmidt v. United States*, 912 P.2d 871 (Okla. 1996).

<sup>25</sup> *Schmidt*, 912 P.2d at 874.

## **Decided Issues**

Unlike the law in Texas, Oklahoma has answered both the questions of whether a party may release claims for gross negligence and whether a parent may release claims of a minor. Both were decided in the negative. “The clause will *never* avail to relieve a party from liability for intentional, willful or fraudulent acts or grow, wanton negligence.”<sup>26</sup> This is based on a strong legislative policy to exempt persons from their own willful conduct causing injury to another person.

Additionally, in 2015, an Oklahoma federal court decided that a valid release signed by a parent on behalf of a minor was sufficient to waive the claims of the parents, but did not suffice to relieve the claims of the minor child.<sup>27</sup> Although the Oklahoma Supreme Court has not yet addressed this issue, the Oklahoma federal court opines that the likely outcome would be for the Court to reject allowing a waiver to be enforced.

## **Conclusions**

Because of the difficulty of this issue and importance of ensuring releases are adequately drafted, this handbook does not include sample release documents. Instead, it is highly recommended that landowners consult with an attorney licensed in the jurisdiction to draft a valid liability waiver. Additionally, in order to receive some of the statutory limited liability protections discussed in Chapter 4, certain language may need to be included in a lease agreement and/or liability waiver. Be sure to carefully analyze the need for such language with an attorney.

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<sup>26</sup> *Schmidt*, 912 P.2d at 874.

<sup>27</sup> *Wethington v. Swainson*, No. 5:2014cv00899 (W.D. Okla. 2015).

## CHAPTER VI: GRAZING LEASE CHECKLIST

As previously discussed in Chapter 1, leasing land to another person for grazing purposes can benefit both the landowner ("lessor") and the tenant ("lessee") by allowing an additional source of income for the landowner and by permitting the lessee to run livestock on land without incurring the long-term debt associated with purchasing property.

Although it has been common throughout rural America for business to be done between neighbors on nothing more than a handshake, it is advisable for all agricultural leases to be put into writing. This ensures that the leases are enforceable, memorialize the parties' understanding, and helps to protect both parties' rights.

The following items are intended to provide a checklist of many of the most common terms found in grazing leases. This list is certainly not exhaustive, and it is likely that not all of these terms are necessary in every lease. This list is not a substitute for legal advice. All parties—lessors or lessees—should consult with their own attorney when entering into a grazing lease to ensure that the lease is complete, legally binding, and protects their interest.

- **Names of the parties:** The lease should include the legal names and address of the parties, both the landowner and the lessee.
- **Duration of lease:** The length of the lease should be specified with particularity and may range from a matter of weeks to several years. It is important to note that leases of certain durations may be required to be in writing in order to be enforceable. For example, pursuant to the Statute of Frauds, many states will require a lease of real property lasting for more than 1 year to be in writing. *See* Chapter 2 for more information. Generally, grazing leases are classified either as a "tenancy for a term of years" or a "periodic tenancy." A tenancy for term of years simply refers to any set lease term (whether months or years) that terminates upon the conclusion of the term. Conversely, under a periodic tenancy, the lease will automatically renew at the end of the initial term unless a specific notice of the intent not to renew is given by either party. In this instance, it is important to determine the amount of notice that will be required. It is likely in the best interest of both the landowner and tenant to require a lengthy notice period so that in the event the lease will not be renewed the landowner has time to secure a new tenant and the lessee has time to find alternative arrangements for his or her livestock. It is advisable that notice be given in writing.
- **Description of the land:** The land need be described so that both parties (and a judge or jury if there ever were to be a dispute over the lease) can understand exactly what land was being leased. This can be done by legal metes-and-bounds descriptions, a photograph or diagram showing the specific location, or simply by words if a specific description can be conveyed. Further, if there are any areas that are to be excluded from the lease, this limitation must be included in detail in the lease agreement. For example,

if there is an apple orchard in the back corner of the property and the landowner does not want the lessee's cattle in that area, this must be addressed in the lease.

- **Stocking limitations:** A grazing lease should set forth stocking limitations that address the number of head, breed, and species of animal permitted. For example, the stocking rate may differ if the lessee intends to run 1,000 pound Angus cattle on the land versus if he or she intends to run 1,600 pound Charolais cattle on the land. Similarly, the weight of stocker calves on the property may well change the stocking limitations needed. A landowner may want to address this issue and specify the breed or size of cattle permitted. The following chart from the Natural Resource Conservation Service<sup>28</sup> is useful in calculating animal units for various species.

Kind of Animal	Body Weight	Daily Ave Intake	Annual Forage Intake	AU per Head	Head per AU
	Pounds	% of BW	Pounds		(Rounded)
Beef Cattle (Cow)*	1000	2.6	9490	1	1
Horse	1100	3.0	12045	1.27	1
Domestic Sheep (Ewe)	130	3.5	1661	0.18	6
Spanish Goat (Nanny)	90	4.5	1478	0.16	6
Boer x Spanish Goat (Nanny)	125	4.0	1825	0.19	5
Angora Goat (Nanny)	70	4.5	1150	0.12	8

- **Price:** The price for grazing leases varies based upon a number of factors including the number of acres of land, the available forage, the number of livestock that may be grazed per acre, the type of livestock to be grazed, etc. Price may be based upon any formula that the parties desire, although most commonly, grazing leases are priced either per acre, per head, or per animal unit. Additionally, although less common in grazing leases than farming leases, the parties could agree to a sort of “crop share” lease based upon a percentage of the calf crop sold. For more information on this topic, refer to Chapter 3.
- **Payment method:** Payments may be made in any manner agreed upon by the parties. Frequently, payments are set up in a month-to-month format. A landowner should

<sup>28</sup> Chart developed by Steve Nelle and Stan Reinke, NRCS with input from literature and other specialists from TCE and TPWD.

consider including details on exactly how and when rent is due and including penalties and interest for late payments.

- **Failure to pay:** In addition to imposing penalties and interest on late payments, a landowner may want to provide that once the total amount owed in late payments, interest, and fees reaches a certain amount, the landowner has the right to terminate the lease. Further, landowners should be aware of any statutory lien rights available to unpaid landowners in their state, including understanding any action that must be taken by the landowner for such rights to be enforced.
- **Security deposit:** A landowner may want to consider requiring a security deposit to cover any damage caused to the property, improvements, fences, crops, or livestock while the lessee is in possession of the property.
- **Access to land:** The lease should provide how the lessee is to access the property, including designating the points at which the lessee may enter the property, any gates that the lessee may utilize, and the roads on the property the lessee is permitted to use.
- **Use of vehicles or ATVs:** The lease should state whether the lessee is permitted to use vehicles or ATVs on the property and, if so, whether there are any areas where such vehicles are prohibited.
- **Requirement gates be kept closed:** A landowner may wish to require that all gates be kept closed at all times. Additionally, if other livestock is present or in adjacent pastures, a landowner may also include a requirement that the lessee is liable for the death or injury of any livestock or damages to a third party caused by any livestock that escape due to a gate being left open by the lessee or his employees.
- **Use and repair of facilities on property:** The lease should discuss the right of the lessee to use any facilities on the property including corrals, buildings, barns, and houses. If any repairs are necessary, the lease should describe who will be responsible for undertaking repairs and paying for both parts and labor.
- **Inspection of fences:** It is important that a lease address who will be responsible to inspect and repair fences, particularly where the leased property abuts a highway. The lease should set forth which party will make these inspections and the frequency at which they should be made.
- **Right to erect improvements on property:** The lease should address whether the lessee has the right to erect any improvements on the property during the lease. Generally, permanent improvements will stay on the land after the termination of the lease. Consequently, the landowner may want to have an input on the location and building specifications for any such improvements. Some leases require the lessee to obtain written permission from the landowner before taking any such action. In order to avoid confusion or conflict, the lease should specify whether the lessee has the right to remove any improvements at the end of the lease and set a deadline for such removal.



- **Landowner’s rights to the property:** Unless reserved, the landowner grants exclusive possession of the property to the lessee, meaning that the landowner may not enter the property. The landowner may want to reserve the right to enter the property for various reasons during the lease, including to care for crops and to inspect the premises. Importantly, a landowner should discuss this issue with his or her attorney to determine if the right to inspection might be outweighed by liability concerns that such right might impose. Further, if the landowner wants to retain rights as to the property, including the right to hunt, this should be expressly set forth in the lease agreement.
- **Other surface uses:** There may be other surface users of the property during the lease term. Examples include oil and gas companies who may have a mineral estate lease, hunters that may have a hunting lease with the landowner, and the landowner himself. The lease should expressly identify all such surface users so the lessee is aware of these uses and should require that the lessee will act in good faith to accommodate and cooperate with these other surface owners. With regard to a potential mineral lessee, it is important to understand the law in your state regarding mineral rights versus surface rights and how this could potentially impact a grazing lessee. For example, under Texas law, a mineral owner has the right to use as much of the surface estate as is reasonably necessary to produce oil and gas. This may mean an oil rig showing up in the middle of a leased pasture. A lessee may wish to include a provision allowing the lessee to terminate the lease in the event oil or gas production occurs on the property.
- **Care of livestock:** Under some lease agreements, a landlord may not only offer grazing land, but may also agree to provide care for the livestock. In this event, it is extremely important that the landowner and lessee be specific with regard to their expectations for care. For example, requiring “adequate hay” is insufficient as it is almost a certainty that the landlord’s definition of “adequate” differs from the livestock owner’s definition of the same term. In order to avoid this type of dispute, a lease should spell out the expectations of the landowner providing care of livestock, including the type and amount of hay and feed to be provided, the type of mineral that should be available, the frequency with which the livestock should be checked by the landowner, etc. Finally, an interesting term found in some of these types of leases provides an incentive for a landowner who provides superior care for the livestock. For example, the lease might provide that if calves reach a certain average daily gain or a set weaning weight goal, the landowner receives a bonus from the lessee. Similarly, there could be a provision if the landowner is set to care for first-calf heifers that would include a bonus if there was a low death loss percentage. This type of incentive may help to ensure better care for livestock.
- **Proof of vaccination:** Some leases require that the lessee provide the landowner with a health certificate declaring that cattle have received certain vaccinations, such as blackleg shots for calves or Bang’s vaccinations for cows and bulls.
- **Breachy livestock:** Many grazing leases involving cattle include a provision whereby any animal known to be “breachy” (i.e. frequently escaping the pasture by jumping or breaking through fences), must be removed from the premises.

- **Disaster contingencies:** The parties should consider how disasters such as drought or fire may impact the landlord/lessee relationship. In the event that all or some of the grazing land is destroyed, how will a determination regarding the lease be made? Who will determine if it is necessary to lower the number of livestock permitted to be on the property, or whether it is necessary to terminate the lease all together? Parties may want to consider agreeing on a neutral third party, such as a county extension agent, or another livestock operator in the area, to help with this determination. In the event that the lease is limited or cancelled, the lease agreement should address whether a refund of any pre-paid rent will be made.
- **Transferability:** The lease should address the rights of the parties as to assignment or sublease. May the lessee sublease or assign his rights to a third party without the landowner's permission? What happens to the lease if the landowner dies or sells the property? The parties may want to provide a clause stating that the lease shall be binding upon heirs or assigns, or, conversely, that the lease shall terminate upon the death of either of the parties. Laws vary by state on this issue, so it is important to know the law in your state and address this in the lease agreement.
- **Lease does not create a partnership:** Unless the landowner and lessee intend to create a partnership, the lease should expressly state that it does not do so. This provision is important because generally, one partner is liable for the obligations and debts of the other partner. Although this type of provision, alone, will not prevent a partnership from being created in all circumstances, it does provide evidence that the parties did not intend to create a partnership arrangement.
- **Effect of breach:** Many leases include a clause stating that the violation of any term, covenant, or condition of the lease agreement by the lessee allows for the landowner, at his option, to terminate the lease upon notice to the lessee. This provision allows the landowner the option of terminating the lease if any term is violated, rather than merely having the right to sue the lessee for damages. If included, this clause should address the type of notice required to the lessee and whether any refund of payment or security deposit will be available.
- **Damages to property:** The lease should prohibit damage to the property and require the lessee to repair or pay for any damage caused including the destruction of crops, death or injury to livestock, harm to fences, gates or improvements, and trash or other debris left on the premises.
- **Liquidated damages:** A lease may provide for certain liquidated damages, which essentially mean contractually agreed upon damage amounts. These damages are often used in situations where the calculation of actual damages might be difficult. Instead, the parties agree up front to a set amount of damages for certain actions.
- **Attorney's Fees:** Generally, a successful litigant is not entitled to recover his or her attorney fees from the other party absent a contractual agreement or a statute so

authorizing. A landowner should consider including a provision providing that if the landowner is successful in a dispute (whether in arbitration or in court) with the lessee, the lessee will be responsible for the landowner's reasonable costs and attorney's fees. The lessee will likely request a reciprocal clause requiring payment of his or her attorney fees if the lessee is successful.

- **Lessee Insurance:** A landowner may require the lessee to acquire liability insurance that will be maintained throughout the lease term. If so, the landowner should also require that the lessee include the landowner as an "additional insured." This should offer insurance coverage to the landowner pursuant to the lessee's policy in the event of a claim made by a third party against the lessee and landowner. The landowner may also want to require a specific minimum level of coverage.
- **Liability and Indemnification:** A landowner should consider including liability and indemnification clauses in case the landowner is sued as a result of the lessee's conduct. These terms simply provide that the landowner is not liable for any action or inaction of the lessee, his agents, or employees and that, in the event the landowner is sued for the lessee's actions or inactions, the lessee will hold the landowner harmless as to any attorney's fees or judgment.
- **Choice of law:** A choice of law provision in a lease allows the parties to determine which state's law will govern the lease in the event of a dispute. Generally choice of law clauses are enforced by a court so long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice of law provision could significantly impact rights under a lease, a landowner should consult with an attorney with regard to this provision to determine the potential options available and to determine which would be most advantageous to the landowner.
- **Forum clause:** A forum clause provides that a dispute over a lease will be heard in a particular location or court. For example, a lease could require that any dispute over the lease be filed in the county where the land is located. This clause may be important for a landowner by requiring suit to be filed in his or her county, particularly if the lessee lives some distance away.
- **Dispute resolution:** A landowner should consider the inclusion of a dispute resolution clause. The purpose of these types of clauses is to limit the time and expenses of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third party arbitrator (usually an attorney) will hear evidence and render a decision. If the arbitration is "binding" that judgment is final on the parties absent evidence of fraud by the arbitrator. Mediation, on the other hand, involves a neutral third party who will work with the landowner and lessee to attempt to reach a mutually-acceptable resolution. If both parties refuse to agree to settle, the case will then proceed on to court. A dispute resolution clause should identify how the arbitrator or mediator will be selected. It is important to understand the difference between these options and determine which option is best in consultation with an attorney.

- **Confidentiality clause:** The landowner may want to consider the use of a confidentiality clause if there is any information that he or she does not want made public. For example, a landowner may not want the fee charged to one party disclosed if the landowner intends to charge an increased fee to another party or in the future.

It is impossible to create a lease form, or even a list of possible issues, that addresses every potential problem that may arise from a hunting lease. It is advised to carefully consider the facts of your particular situation and seek counsel from an attorney in your jurisdiction before entering into any contractual agreement.

**CHAPTER VII:  
SAMPLE GRAZING LEASE**

*This sample lease is a compilation of clauses from many existing hunting leases that are available online. It is important that parties carefully read and understand what is covered in any lease form because the language in the written document will generally resolve disputes that arise under the lease. This document is intended for educational purposes only and should not be used as a legal form without modification by competent council to fit the parties' circumstances.*

- 1. Parties.** This lease is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ between \_\_\_\_\_ of \_\_\_\_\_ (“Lessor”) and \_\_\_\_\_ of \_\_\_\_\_ (“Lessee.”).
- 2. Term of Lease.** The term of this lease shall be \_\_\_\_\_, commencing on the \_\_\_\_\_ day of \_\_\_\_\_ and ending on the \_\_\_\_\_ day of \_\_\_\_\_. The lease shall continue in effect from year to year thereafter unless written notice of termination is given by either party to the other at least \_\_\_\_\_ days prior to the expiration of the lease or end of any year of continuation.
- 3. Property Description.** The Lessor hereby leases to the lessee, for the purpose of grazing livestock only, the Leased Premises identified by legal description:  
\_\_\_\_\_, consisting of approximately \_\_\_\_\_ acres, situated in \_\_\_\_\_ County, \_\_\_\_\_. A map depicting the Leased Premises is included as Exhibit A.
- 4. Payment.** The Lessee agrees to pay \$\_\_\_\_\_/acre for use of the Leased Premises during the lease term. This payment shall be made by cash or check on or before the commencement of the Lease.
- 5. Security Deposit.** The Lessee agrees to provide the Lessor a security deposit of \$\_\_\_\_\_ to cover any damage to crops, improvements, fences, etc. on the Leased Premises during the Term of the Lease. Upon termination, Lessor shall return this security deposit to the Lessee within 5 days, or provide a written description of why any amount of the deposit is being withheld.
- 6. Stocking Limitation.** No more than \_\_\_\_\_ animal units may be kept on the Leased Premises at any time. Violation of this provision shall constitute grounds for termination of the lease unless the Lessee obtains written consent from the Lessor. Each 1,000 pounds of average weight for the pasture period shall constitute 1 animal unit.

7. **Transfer of Property.** If the Lessor should sell or otherwise transfer title to the Lease Premises during the Term of the Lease, such action will be done subject to the provisions of this lease agreement.
8. **Use of vehicles.** The Lessee is permitted to utilize vehicles and ATVs on the property, but shall do so reasonably so as not to damage grass or crops on the Leased Premises.
9. **Gates.** The Lessee agrees to keep gates on the Leased Premises closed at all times.
10. **Repair and Upkeep of Fences.** The parties agree that if any repairs to fences are necessary during the Term of the Lease, the Lessor shall provide the materials and the Lessee shall provide the labor to complete such repairs. The Lessee agrees to reasonably inspect perimeter fences and notify the Lessor if such repairs are necessary.
11. **Repair and Upkeep of Windmills and Pumps.** The parties agree that if any repairs to windmills, pumps, or other water sources are necessary during the Term of the Lease, the Lessor shall pay for materials and the Lessee shall pay for labor. This does not include the costs of drilling a new well on the Leased Premises.
12. **Right to Erect Improvements.** The parties agree that prior to erecting any permanent improvements on the property, the Lessee will obtain written consent from the Lessor.
13. **Landowner's Right to Enter Property.** The Lessor reserves the right to enter the property during the lease period. The Lessor agrees to provide \_\_\_\_\_ notice to the Lessee and accommodate and not interfere with any activities of the Lessee.
14. **Rights of Mineral Owners.** The Lessee understands that a third party owns the mineral rights beneath the property and, as such, may have rights to utilize the surface of the property. Lessee agrees not to interfere with such rights. If mineral production commences on the property, the Lessee has the right to terminate this lease agreement with \_\_\_\_\_ notice. In the event such termination occurs, Lessee will receive a pro-rata refund of the lease paid for the calendar year.
15. **Proof of vaccination.** Lessee agrees to provide landowner with a health certificate declaring the cattle have received \_\_\_\_\_ vaccinations.
16. **Breachy Livestock.** Lessee agrees not to pasture livestock known to be breachy. Should any animal be found outside the pasture at least \_\_\_ times, the Lessor may request its removal.

- 17. Lessee Insurance.** Lessee shall maintain liability insurance of at least \$ \_\_\_\_\_ throughout the Term of the Lease. The Lessee shall list the Lessor as an additional insured on the policy.
- 18. Lessor Release and Indemnification.** Lessor hereby releases, indemnifies, defends, and holds harmless and agrees to reimburse Lessee from any liability, costs (including reasonable attorney's fees and costs including expert fees), expenses, payments or claims resulting acts or omissions of the Lessor, his employees, agents, assigns, or heirs.
- 19. Lessee Release and Indemnification.** Lessee hereby releases, indemnifies, defends, and holds harmless and agrees to reimburse Lessor from any liability, costs (including reasonable attorney's fees and costs including expert fees), expenses, payments or claims resulting acts or omissions of the Lessee, his employees, agents, assigns, or heirs.
- 20. Sublease or Assignment of Lease.** Lessee may not assign or sublease the Leased Premises without written permission of the Lessor.
- 21. Lease Does Not Create a Partnership.** This lease agreement does not create a partnership between Lessor and Lessee. Both parties agree they will not pledge credit of the other party for any purpose. Neither party shall be liable for the debts or obligations of the other party.
- 22. Right to Terminate.** In the event a breach occurs, the non-breaching party has the right to immediately terminate the lease agreement. Notice of such termination must be provided in writing. If the lease is terminated by the Lessor, the Lessee shall be entitled to a pro-rata refund of rent paid for the current calendar year.
- 23. Dispute Resolution.** In the event a dispute arises related to this Lease, the parties agree to attend mediation prior to filing any litigation in court. The parties shall select a mutually agreeable mediator or, if the parties are unable to agree, \_\_\_\_\_ shall appoint a neutral mediator.
- 24. Choice of Law.** Any disputes arising under or related to this lease agreement shall be construed under the laws of \_\_\_\_\_.
- 25. Forum Clause:** Any disputes arising under or related to this lease agreement shall be heard in the \_\_\_\_\_ court in \_\_\_\_\_, \_\_\_\_\_.

**26. Attorney's Fees:** In the event of any litigation (including arbitration) arising from or related to this Agreement, or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys' fees, and all other related expenses incurred in such litigation. In the event of a no-adjudicative settlement of litigation between the parties or a resolution of a dispute by arbitration, the term "prevailing party" shall be determined by that process.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Lessor

\_\_\_\_\_  
Lessee



## **CHAPTER VII: HUNTING LEASE CHECKLIST**

Besides renting out property for agricultural production, landowners may also have the ability to rent out their land for hunting, fishing, hiking and other recreational purposes. Depending on the species available, the right to hunt or fish on the property may be more valuable than the rental value earned through agricultural activities! As a landowner, you may wish to evaluate your property's potential for a recreational lease. Some landowners may be in position to not only rent out their property for agricultural purposes, but also for recreational purposes at the same time.

Evaluating your willingness to enter into a hunting lease will be the first step to take. Hunting leases are not a viable option for every landowner, so deciding what you are comfortable with will be critical before considering any form of leasing arrangement. Once you decide you are interested in leasing your property for recreational purposes, the rest of this chapter will focus on factors to consider before entering into a lease agreement. Lease agreements, whether agricultural or hunting, are extremely flexible before the lease is executed; however it can be very difficult to amend a lease later on without the consent of all lease parties. Because of this reality, it is important for both the landlord and the tenant to carefully negotiate the scope of the lease before entering into the agreement.

There are numerous examples of sample hunting and fishing leases that can be found on the internet. It is important to note that since no two pieces of property (or owners for that matter) are identical, it is impossible to draft one lease form that will fit every possible leasing situation. This can be further complicated by various state laws. For example, in Arkansas, any oral agricultural lease does not include the right to hunt and fish on the property unless permission is specifically granted in writing. *See Ark. Code Ann. § 18-16-113.* The landowners in that situation can either use the hunting rights themselves or they can lease them to a third party without any input from the agricultural tenant.

The following items are intended to provide a checklist of many of the most common terms found in hunting leases. This list is certainly not exhaustive, and it is likely that not all of these terms are necessary in every lease. This list is not a substitute for legal advice. All parties—lessors or lessees—should consult with their own attorney when entering into a livestock lease to ensure that the lease is complete, legally binding, and protects their interest.

- **Names of the parties:** The lease should include the name and address of the parties, both the landowner and the lessee. Additionally, if the lessee intends to allow others to hunt on the property with him, it may be wise to require each of those parties to sign the lease as well so that they will be bound by its terms.
- **Duration of lease:** The duration of the lease may be from a matter of days to several years. The length of the lease should be specified with particularity. It is important to note that certain leases may be required to be in writing in order to be enforceable. For example, pursuant to the Statute of Frauds, many states will require a lease of real

property lasting for more than 1 year to be in writing. Another important consideration is whether the lease will automatically renew for the next year and what type of notice may be required by either party to terminate the lease.

- **Description of the land:** The land need be described so that both parties (and a judge or jury if there ever were to be a dispute over the lease) can understand exactly where the lessee had permission to hunt. This can be done by legal metes-and-bounds descriptions, a photograph or diagram showing the specific location, or simply by words if a specific description can be conveyed.
- **Price:** The price for a hunting lease varies greatly based on numerous factors including the duration of the lease, the species of animals to be hunted, the hunting method allowed, and the number of acres available. Leases may require payment per animal, per acre, per year, per person, or any hybrid of these. Most leases require payment in full be received before hunting season begins. If using an installment payment scheme (i.e. monthly payments), the landowner may want to impose a penalty for late payments.
- **Payment method:** Payments may be made in any manner agreed upon by the parties. Frequently, payments are set up either as one lump sum prior to hunting season, or a landowner may require a partial payment up front and the remainder on the first day of the lease.
- **Security deposit:** A landowner may want to consider requiring a security deposit to cover any damage caused to the property, improvements, fences, crops, or livestock while the lessee is on the property.
- **Access to land:** The lease should provide how the lessee is to access the property, including designating the points at which the lessee may enter the property, any gates that the lessee may utilize, and the roads on the property the lessee is permitted to use.
- **Use of vehicles or ATVs:** The lease should state whether the lessee is permitted to use vehicles or ATVs on the property and, if so, whether there are any areas where such vehicles are prohibited.
- **Requirement that gates be kept closed:** A landowner will likely require that all gates be kept closed at all times, particularly if there are livestock on the property. A landowner may also include a requirement that the lessee is liable for the death or injury of any livestock or damages to a third party caused by any livestock that escape due to a gate being left open by the lessee.

- **Use of facilities on property:** The lease should discuss the right of the lessee to use any facilities on the property including deer blinds, tree stands, camping areas, bunk houses, barns or sheds.
- **Hunting methods permitted:** The lease should specify the type of hunting method allowed. This includes both the type of weapon that may be used (rifle, shotgun, bow, etc.) as well as other considerations, such as whether the lessee may use dogs during the hunt.
- **Any requirements or limitations on hunt:** If there are to be any limitations or requirements imposed on the lessee (i.e. each hunter may kill only one trophy buck or each hunter must kill one doe before killing a buck) these should be expressly set forth in the lease.
- **Cleaning and disposal of animal:** The landowner may wish to specify a limited area where any animal may be cleaned on the property and make certain requirements for disposal of the carcass.
- **Information provided to landowner after kill:** A landowner may require the lessee to provide certain information about the animals killed. This could include photographs and measurements for use in advertising purposes.
- **Number of hunters permitted on property:** The lease should specify the maximum number of hunters allowed to be on the property at any one time and/or a total number of hunters allowed during the lease. This provision serves to ensure the safety of the hunters on the land and the number permitted will depend on the size and geography of the property.
- **Guests of lessee:** The lease should address whether the lessee is permitted to bring guests onto the property. It may be wise to require that any guest be approved in writing by the landowner and be required to sign a liability release and indemnification agreement (discussed below). Additionally, if any minors are to be present with the lessee, it is important that the lease require the minors to be under direct adult supervision at all times, the adult supervisors shall be fully responsible for the safety of the children, and the adult supervisors will be liable for any injury and indemnify the landowner.
- **Right to erect improvements on property:** The lease should address whether the lessee has the right to erect any improvements on the property including deer blinds, feeders, or tree stands. Some leases require the lessee to obtain written permission from the landowner before taking any such action. Further, the lease should specify whether the

lessee has the right to remove the improvements at the end of the lease and set a deadline for such removal.

- **Requirement that lessee abide by all federal and state laws:** The lease should require the lessee and any other hunters to have a valid hunting license covering the species identified in the lease. Further, the lease should require compliance with all other state and federal hunting laws, such that if the lessee were to break the law, he would also breach the contract.
- **Safety practices:** The lease should outline safe hunting practices that should be honored such as maintaining safe gun practices, not shooting in the direction of people, livestock or buildings, not shooting across property lines, not using alcohol or drugs, and using care to prevent fires on the property.
- **Damages to property:** The lease should prohibit damage to the property and require the lessee to repair or pay for any damage caused including the destruction of crops, death or injury to livestock, harm to fences, gates or improvements, and trash or other debris left on the premises.
- **Landowner's right to hunt on property:** The lease should specify whether the landowner and his family have permission to hunt on the property during the term of the lease, or if the lease grants exclusive hunting rights to the lessee only.
- **Other surface uses:** There are likely to be other surface users of the property during the lease term. Examples include oil and gas companies who may have a mineral estate lease, farmers or ranchers who may have leased the property for raising crops and livestock, and the landowner himself. The lease should expressly identify all such surface users so the lessee is aware of these uses and should require that the lessee will act in good faith to accommodate and cooperate with these other surface owners. Because the law regarding surface estate versus mineral estate rights differs by state, it is important to understand the law in your state and the impact it may have on the rights of a hunting lessee.
- **Transferability:** The lease should address the rights of the parties as to assignment or sublease. May the lessee sublease or assign his rights to a third party without the landowner's permission? What happens to the lease if the landowner dies or sells the property? Laws vary by state on this issue, so it is important to know the law in your state and address this in the lease agreement.

- **No Warranty of Success:** A landowner may want to include a lease provision that states he or she is not making any promise or warranty that the lessee will be successful in killing any animal during the lease term.
- **Cancellation Clause:** Many hunting leases include a clause stating that the violation of any term, covenant, or condition of the lease agreement by the lessee allows for the landowner, at his option, to terminate the lease upon notice to the lessee. This provision allows the landowner the option of terminating the lease if any term is violated, rather than merely having the right to sue the lessee for damages. If included, this clause should address the type of notice required to the lessee and whether any refund of payment or security deposit will be available.
- **Lessee Insurance:** A landowner may require the lessee to acquire liability insurance prior to hunting on the property and require such insurance be maintained throughout the lease term. If so, the landowner should also require that the lessee include the landowner as an “additional insured.” This should offer insurance coverage to the landowner pursuant to the lessee’s policy in the event of a claim made by a third party against the lessee and landowner. The landowner may also want to require a specific minimum level of coverage.
- **Release of Liability and Indemnification:** A landowner should require the lessee to agree to a release of liability. If there are to be guests with the lessee, a similar document should be required signed by each of them. The legal requirements for a valid waiver of liability and the scope of such waiver vary by state, so it is important to understand the requirements for this release to be effective. For example, states may require any such release to be conspicuously written or contain specific language. In addition to the liability release, the lease should provide that the lessee will indemnify and hold the landowner harmless from any claim, demand, loss, damage, attorney fees, and cost resulting from any such claim. It is important to discuss this type of clause with your attorney to ensure that the clause includes all of the required information in order to be valid in your state.
- **Choice of law:** A choice of law provision in a lease allows the parties to determine which state’s law will govern the lease in the event of a dispute. Generally choice of law clauses are enforced by a court so long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice of law provision could significantly impact rights under a lease, a landowner should consult with an attorney with regard to this provision to determine the potential options available and to determine which would be most advantageous to the landowner.

- **Forum clause:** A forum clause provides that a dispute over a lease will be heard in a particular location or court. For example, a lease could require that any dispute over the lease be filed in the county where the land is located. This clause may be important for a landowner by requiring suit to be filed in his or her county, particularly if the lessee lives some distance away.
- **Dispute resolution:** A landowner should consider the inclusion of a dispute resolution clause. The purpose of these types of clauses is to limit the time and expenses of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third party arbitrator (usually an attorney) will hear evidence and render a decision. If the arbitration is “binding” that judgment is final on the parties absent evidence of fraud by the arbitrator. Mediation, on the other hand, involves a neutral third party who will work with the landowner and lessee to attempt to reach a mutually-acceptable resolution. If both parties refuse to agree to settle, the case will then proceed on to court. A dispute resolution clause should identify how the arbitrator or mediator will be selected. It is important to understand the difference between these options and determine which option is best in consultation with an attorney.
- **Liquidated damages:** A lease may provide for certain liquidated damages, which essentially mean contractually agreed upon damage amounts. These damages are often used in situations where the calculation of actual damages might be difficult. Instead, the parties agree up front to a set amount of damages for certain actions.
- **Attorney’s Fees:** Generally, a successful litigant is not entitled to recover his or her attorney fees from the other party absent a contractual agreement or a statute so authorizing. A landowner should consider including a provision providing that if the landowner is successful in a dispute (whether in arbitration or in court) with the lessee, the lessee will be responsible for the landowner’s reasonable costs and attorney’s fees. The lessee will likely request a reciprocal clause requiring payment of his or her attorney fees if the lessee is successful.
- **Confidentiality clause:** The landowner may want to consider the use of a confidentiality clause if there is any information that he or she does not want made public. For example, a landowner may not want the fee charged to one party disclosed if the landowner intends to charge an increased fee to another party or in the future.
- **Statutory Provisions:** In addition to drafting a thorough lease, it is critical for landowners to be aware of any recreational land use or agritourism statutes in their state that might have an effect on their rights and liability. Many states have these type of

statutes to add additional legal protections for landowners. For example, in Texas, there is a recreational guest statute that limits the liability of landowners to hunters on agricultural land if certain requirements are met. *See* Tex. Civ. Practice & Remedies Code Chapter 75. It is critical that landowners consult with an attorney in their state to determine if these types of statutes exist and to ensure that the requirements necessary in order to fall within the statutory protections are met.

It is impossible to create a lease form, or even a list of possible issues, that addresses every potential problem that may arise from a hunting lease. It is advised to carefully consider the facts of your particular situation and seek counsel from an attorney in your jurisdiction before entering into any contractual agreement.

**CHAPTER 9:  
SAMPLE HUNTING LEASE**

*This sample lease is a compilation of clauses from many existing hunting leases that are available online. It is important that parties carefully read and understand what is covered in any lease form because the language in the written document will generally resolve disputes that arise under the lease. This document is intended for educational purposes only and should not be used as a legal form without modification by competent council to fit the parties' circumstances.*

*In addition to a written lease agreement, it is advised that landowners require all parties entering the land to sign a valid liability waiver as discussed in Chapter 5.*

This Hunting Lease (referred to as " Lease" hereafter) is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ between \_\_\_\_\_ (hereinafter referred to as "Lessor") and the following individual or group of individuals,

\_\_\_\_\_  
(hereinafter singularly or collectively referred to as "Lessee").

Subject to the terms and conditions set forth in this Agreement, Lessor does hereby grant to Lessee the exclusive right to access and hunt on the Leased Premises described below:

*Insert legal description here*

A map of the leased premises is attached to the end of the Lease.

**THIS LEASE IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:**

1. The term of this Agreement shall run from \_\_\_\_\_ to \_\_\_\_\_ commencing at 12:01 a.m. on beginning date, and terminating at 11:59 p.m. on ending date. This Agreement automatically will be renewed on an annual basis unless written notice is delivered on or before \_\_\_\_\_ (date).
2. Lessee shall pay as annual rent for the lands leased the sum of \_\_\_\_\_ Dollars (or \$ \_\_\_\_\_ per acre) to be paid on or before \_\_\_\_\_ (date). Additionally, lessee shall provide a security deposit of \$ \_\_\_\_\_, which will be returned by \_\_\_\_\_ on \_\_\_\_\_, 20\_\_, provided that there is no damage to the Leased Premises.



3. Lessee, collectively, shall be entitled, under this agreement, to kill and remove from the Leased Premises the following numbers of animals and no more, except as expressly indicated in this lease and subject, however, to all state and federal game laws governing bag limit and possession:

\_\_\_\_\_ buck deer  
\_\_\_\_\_ doe deer  
\_\_\_\_\_ quail  
\_\_\_\_\_ rabbits  
\_\_\_\_\_ squirrels  
\_\_\_\_\_ turkeys  
\_\_\_\_\_ bear

Nuisance species such as coyote, crows and feral hogs may be taken at any time as the law allows. The Lessor does not warrant or guarantee that the Lessee will see or harvest any such animals.

4. Any animals harvested shall be cleaned and disposed of in the designated cleaning area, identified on the map attached to the end of this Lease.
5. Lessee shall not assign this Lease or sublet the Leased Premises without the express written consent of Lessor.
6. No commercial hunting, fishing or guide activities may occur on the property by any Lessee or Lessee's guest(s).
7. The Lessee agrees to limit number of guest(s) in order to protect game populations. Each Lessee may designate \_\_\_\_\_ guest(s) to use the Lease when the Lessee is physically present in the Leased Premises. The names of the designated guest(s) must be provided in writing to the Lessor before the guests can hunt on the property. The Lessee is responsible for the actions of the guest(s).
8. Lessee agrees to help protect said lands from trespass by posting signage and reporting trespassers to the Lessor. Lessee will also make an effort to put out, suppress or report any wildfires that may occur on the property.
9. Lessee and guest(s) shall at all times obey all state and federal laws and regulations and Lessee shall be responsible for the conduct of Lessee's guest(s). Lessee and guest(s) shall also obey all hunting laws and restrictions and shall be responsible for any violation of said hunting laws or regulations by said Lessee or guest(s).

10. While on the Leased Premises, the Lessee shall: observe the rules of safe gun handling; never shoot in the direction of any people, buildings, or livestock; leave all gates as the Lessee's finds them; use proper care in crossing fences; and not use alcohol or drugs.
11. Hunting and shooting are prohibited within 75 yards of any dwelling on the Leased Premises or dwellings on neighboring property.
12. Lessee understands and agrees that the Lease Premises is not leased for agricultural purposes and takes subject to the rights of persons holding this interest. Lessee further take subject to the right of any oil, gas, and mineral leases presently in existence on the lease premises or that may be executed during the term of this Lease.
13. The Lessor, along with Lessor's agents or employees, reserves the full, free, and absolute right and authority, to go on and over the Leased Premises for any purpose or purposes, including, but not limited to, planting, cutting, removing, protecting, caring for and dealing with any part of the Leased Premises.
14. Lessee shall take the proper care of the lease property, buildings, and all other improvements located thereon, and shall be liable for Lessor for any damage caused to domestic livestock, fences, or other property of Lessor due to the activities of Lessee or their guests exercising privileges under this Lease. Lessee shall also be responsible for any actions damaging the livestock, fences, or property of the neighbors of the Leased Premises.
15. Vehicles are to be parked in designated areas only. Trucks or automobiles must remain on established roads and in the designated parking areas. ATVs and Recreational Vehicles are prohibited from being used on the property at all times.
16. Lessee agrees to allow no trash on the premises, to remove all material refuse and litter that Lessee or Lessee's guests deposit. Failure to do so will result in loss of the lessee's security deposit.
17. Lessee or designated parties are permitted to construct deer blinds and put up tree stands on the Leased Premises. However, no deer blind shall be built or erected in a manner that damages any of the trees located on the Leased Premises. Lessee shall be required to remove blinds and tree stands upon termination of this Lease.
18. Lessee further covenant that they have inspected the described property and have found the premises to be in an acceptable condition and hereby waive any right to complain or to recover from Lessor in the future relating to the condition of the lease property or any

improvement located thereon.

19. Lessee agree to protect, defend, indemnify, and hold Lessor harmless from any and all liability, claims, demands, causes of action of every kind without limit and regardless to the cause of the harm to any person or property on the Leased Premises or for any actions on the Leased Premises that cause harm to any person or property outside of the Leased Premises.
20. Lessee shall provide proof of a general liability insurance policy, with the Lessor named as co-insured, in the amount of \$ \_\_\_\_\_ with a company licensed and approved to do business in this state.
21. Terms of the lease are to be interpreted according to the laws of the State of \_\_\_\_\_ without regard to conflict of law provisions.
22. Lessee agrees that if a dispute arises under the Lease then the \_\_\_\_\_ County Court in the State of \_\_\_\_\_ will have jurisdiction. Lessee agree to submit to the personal jurisdiction of the courts located in the \_\_\_\_\_ County Court in the State of \_\_\_\_\_.
23. If any provision or clause of this Lease is found to be unenforceable then the balance of this Lease shall be interpreted and enforced as if the unenforceable provision or clause had never been a part hereof.
24. If Lessee default in the performance of any of the covenant or conditions listed in the Lease, then such breach shall cause an immediate termination of this lease and a forfeiture to Lessor of all rentals prepaid.
25. In the event a dispute arises out of, or in connection, with this Lease and the rights of the parties thereof, the prevailing party in a mediation, arbitration, or litigation matter may recover not only actual damages and costs, but also reasonable attorney's fees expended in the matter.
26. This Lease contains the entire understanding and agreement between the parties. All prior agreements and discussions between the parties have no further force and effect. This Lease may not be changed, amended or modified except by a writing properly executed by all parties to the Lease.

In witness whereof, the parties below have set their hands this the day of \_\_\_\_\_  
20\_\_\_\_\_.

Lessee: \_\_\_\_\_ DATE: \_\_\_\_\_

Lessor: \_\_\_\_\_  
DATE: \_\_\_\_\_

## CHAPTER X: LIVESTOCK LEASE CHECKLIST

*Note: This chapter was adapted from “Some Terms for Bull Leases” by Cari Rincker, Rincker Law, PLLC.*

As discussed in Chapter 1, leasing of livestock can be beneficial both to the owner of the animal (“lessor”) and to the producer wishing the lease the animal (“lessee”). The following terms should be considered when negotiating and drafting a livestock lease agreement. Like many other agricultural leases, historically, livestock leases have been oral in nature. It is, however, important to reduce agreements to writing to protect the rights of both parties.

The following items are intended to provide a checklist of many of the most common terms found in livestock leases. This list is written as though the animal at issue is a bull, but could certainly be adopted for cows and for other species as well.

This list is certainly not exhaustive, and it is likely that not all of these terms are necessary in every lease. This list is not a substitute for legal advice. All parties—lessors or lessees—should consult with their own attorney when entering into a livestock lease to ensure that the lease is complete, legally binding, and protects their interest.

- **Names of the parties:** The lease should include the name and address of the parties, both the animal owner (“lessor”) and the person leasing the animal (“lessee”).
- **Term:** The term of the breeding season should be listed (e.g., March 1 to June 30, July 1 to September 1).
- **Number of Bulls:** Note the number of bulls leased from the lessor plus any other bulls leased from other cattlemen during the breeding season.
- **Payment:** The lease should note the amount owed, due date, payment instructions, type of payment accepts, interest and/or penalties for late payments. Additionally, both parties should be aware of statutory lien rights available to livestock owners who are not properly paid. For example, in Texas, the Stock Breeder’s Lien provides that the owner of a stallion, jack, bull, or boar confined to be bred for profit has a preference lien on the offspring of the animal in the amount of charges for breeding services. *See* Tex. Property Code § 70.201.
- **Security Deposit:** In some cases, the bull owner may request a deposit be made on the bull that will be returned upon the safe return of the animal to his/her farm or ranch.
- **Bull Owner Representations:** The lessee may request that certain representations be made such as bull health, body condition score, fertility, breed registration, pedigree, structural soundness, libido, genetic DNA markers, strength with Expected Progeny Differences (“EPD’s”). If genetic DNA markers are relied upon by the lessor, there

should be clause indicating that the bull owner is not liable if the genetic testing company made a mistake.

- **Lessee Representations on Cow Herd:** The lessor may request the certain representations be made such as herd health, fertility (especially if there is a penalty for low conception rates), and number of cows that the bull(s).
- **Health:** It might be appropriate to add more detail about the health of the bull and the cow herd of the lessee including health certification from a licensed veterinarian or special tests that need to be performed.
- **Delivery of Bull to Cow Herd:** Who will pick-up and/or drop-off the bull(s) and payment for same? Will there be a penalty for late pick-up or drop off after the breeding season? How will the bulls be transported? Who will be liable if the bull is injured during transport?
- **Movement of Bull from Lessee's Farm:** Will the lessee farmer or rancher be allowed to move the bull during the lease term?
- **Death, Injury or Illness of the Bull:** Who will be liable for the death or injury of the bull (i) before the lease date, (ii) during transportation or (iii) during the breeding season term? The bull owner should also be promptly notified in these instances, including if the bull is missing. Some leases include provisions requiring a necropsy be conducted in the event the bull dies while in the possession of the lessee.
- **Injuries to People:** The lease should discuss potential liability (and indemnification) from an injury to a family member, farm employee, farm visitor or child from the bull. Along these lines, a lessor may want to discuss with the lessee compliance with the applicable farm animal liability statute as an added layer of potential protection.
- **Insurance:** Will either party be required to carry insurance? Consider the type of insurance, the level of required coverage, and whether the other party will be a co-holder, additional insured, or not included under the policy terms.
- **Performance:** The lessee may wish to be compensated if the bull has a breeding rate under a predetermined level. If this provision is added, it is important that the lessor have a provision relating to conditions such as a drought, weather extremes or deficient grazing that may affect the bull's performance.
- **Management:** The lessee should promise to use good management practices, such as proper animal handling techniques. The more objective and measurable these standards can be written, the better.
- **Feed and Nutrition:** The lessee be required to provide the bull(s) with adequate feed and dietary supplements. Any special feed or nutrition requirements should be memorialized. The lease should include specific requirements such as the type of hay to

be fed, the amount of hay or feed per day or week, and any required supplements that should be available. The bull(s) should not be allowed to be returned to the owner in state of malnutrition. In this instance, the lease should explain what the lessee's responsibility or liability would be (e.g., payment for veterinary expenses and or feed during the recovery period).

- **Right of Inspection:** Will the bull owner have the right to inspect the bull during the breeding term at the lessee's farm or ranch? Without such provision being expressly included, the lessor may not have that right.
- **Ownership of Bull:** The lease should specifically state that the title and registration papers, if applicable, will remain with the bull owner to prevent a later dispute about ownership.
- **Option to Purchase:** On that note, the lease may provide an option for the lessee to purchase the bull at the end of the term at a mutually agreed upon price. Perhaps the lessee is only given the option of first refusal to purchase the bull for 30 days after the termination of the lease.
- **Subleasing:** A lessor may want to include a clause expressly prohibiting subleasing of the bull without written consent from the owner. This will ensure that the lessee does not allow another party to use the bull during the lease term.
- **Title of Progeny:** The lease should specifically state that the lessee owns the progeny sired by the bull and that no profits are to be shared from their sale. Again, parties need to be aware of any lien statutes in the proper state that may impact this issue.
- **Relationship of the Parties:** The bull lease should specifically state that the parties are not forming a partnership or joint venture. This provision is important because generally, one partner is liable for the obligations and debts of the other partner. Although this type of provision, alone, will not prevent a partnership from being created in all circumstances, it does provide evidence that the parties did not intend to create a partnership arrangement.
- **Termination:** The lease<sup>[00]</sup> lease with adequate notice with certain conditions. Parties should think carefully about the desired length of notice before termination occurs. It is also prudent to require these terminations to be made in writing.
- **Liquidated damages:** A lease may provide for certain liquidated damages, which essentially mean contractually agreed upon damage amounts. These damages are often used in situations where the calculation of actual damages might be difficult. Instead, the parties agree up front to a set amount of damages for certain actions.
- **Confidentiality:** In every contract between cattlemen, including bull leases, the parties should ask themselves whether there is any information that they may wish to remain secret (e.g., payment terms).

- **Choice of Law:** A choice of law provision in a lease allows the parties to determine which state's law will govern the lease in the event of a dispute. Generally choice of law clauses are enforced by a court so long as they are not against public policy and are reasonably related to the contract. Because contract laws vary by state and a choice of law provision could significantly impact rights under a lease, parties should consult with an attorney with regard to this provision to determine the potential options available and to determine which would be most advantageous.
- **Forum Clause:** A forum clause provides that a dispute over a lease will be heard in a particular location or court. For example, a lease could require that any dispute over the lease be filed in the county where the bull owner's operation is located. This clause may be important for a bull owner by requiring suit to be filed in his or her county, particularly if the lessee lives some distance away.
- **Dispute resolution:** Parties should consider the inclusion of a dispute resolution clause. The purpose of these types of clauses is to limit the time and expenses of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third party arbitrator (usually an attorney) will hear evidence and render a decision. If the arbitration is "binding" that judgment is final on the parties absent evidence of fraud by the arbitrator. Mediation, on the other hand, involves a neutral third party who will work with the bull owner and lessee to attempt to reach a mutually-acceptable resolution. If both parties refuse to agree to settle, the case will then proceed on to court. If included, a dispute resolution clause should identify how the arbitrator or mediator will be selected. It is important to understand the difference between these options and determine which option is best in consultation with an attorney. Additionally, in the event of an emergency, the parties may wish to have a provision allowing them to proceed directly to court.
- **Attorney's Fees:** Generally, a successful litigant is not entitled to recover his or her attorney fees from the other party absent a contractual agreement or a statute so authorizing. The parties should consider including a provision providing that the successful in a dispute (whether in arbitration or in court) may recover his or her reasonable costs and attorney's fees.



**CHAPTER XI:  
SAMPLE BULL LEASE**

*This sample lease is a compilation of clauses from many existing leases that have been collected by the authors. It is important that parties carefully read and understand what is covered in any lease form because the language in the written document will generally resolve disputes that arise under the lease. This document is intended for educational purposes only and should not be used as a legal form without modification by competent council to fit the parties' circumstances.*

This lease entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

hereafter known as "the bull owner" or "lessor", and

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

hereafter known as "the breeder" or "lessee."

**Description of Bull(s)**

The livestock owner hereby leases to the breeder, to use for breeding purposes, the following bull(s):

\_\_\_\_\_  
\_\_\_\_\_

consisting of \_\_\_\_\_ head.

**Description of Cows**

Breeder agrees to utilize the bull(s) on the following cows/heifers:

\_\_\_\_\_

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**Restriction on bull(s).** The breeder shall not use the bull(s) that are covered by this agreement during the period of the lease without express permission of the bull owner on the following heifers or cows:

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**Payment:** Breeder will pay to bull owner \$\_\_\_\_\_ for use of the bull(s) on the date of commencement of this lease. Breeder agrees to put up a security deposit of \$\_\_\_\_\_ that will be held until the return of the bull(s). In the event the bulls are in acceptable condition, defined as being sound and at a \_\_\_ on a body condition score scale as analyzed by the bull owner's veterinarian, said deposit will be refunded in full within 5 days of the bull's return.

**Ownership of Calves:** Any calves born as a result of this lease agreement shall be the property of the breeder. This clause does not modify any statutory liens regarding the rights of an unpaid breeder.

**Bull Representations:** Bull owner agrees to provide breeder with bull(s) described above. Bull owner agrees the bull(s) possesses the following Expected Progeny Differences (EPDs):

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**General Terms of Lease**

A. **Time period covered.** The provisions of this agreement shall be in effect commencing on the \_\_\_ day of \_\_\_\_\_, 20\_\_\_. This agreement will run for \_\_\_\_\_ days and will cease on \_\_\_\_\_, 20\_\_.

B. **Delivery Options:** Bull(s) is located at \_\_\_\_\_

- Locations and arrangements should be made by breeder to pick up and return bull(s) at breeder's expense.
- If delivery is required of bull by bull owner, the following conditions will apply:

- \$ \_\_\_\_\_ per loaded mile for \_\_\_\_\_ gooseneck or smaller shall be paid upon delivery, or
- \$ \_\_\_\_\_ per loaded mile for \_\_\_\_\_ gooseneck or larger shall be paid upon delivery.
- If the bull is injured or killed during transport, he is deemed to be in the possession of the breeder and the lease terms applicable to injury while in possession of the breeder shall apply.

C. **Return of Bull:** Bull owner and breeder agree to return the bull(s) to the following location \_\_\_\_\_

\_\_\_\_\_.

Bull owner and breeder agree return will be at the expense of the breeder. All liability for death or injury during transport rests with the breeder.

D. **Good Management Practices:** Lessee agrees to utilize good management practices, including but not limited to safe animal handling techniques. Additionally, the bull(s) shall be offered \_\_\_\_\_ pounds of \_\_\_\_\_ hay per week and have mineral available free choice.

E. **Injury or Death:** In the event bull(s) is injured so as to make unserviceable (to include crippled, unsound, or sore-sheathed) in the future, or bull(s) dies or is lost while in the care of the breeder, a payment of \$\_\_\_\_\_ per injured, or lost, or dead bull will be assessed by lessor to lessee. This amount is over and above any lease payment paid or due. If injured in the breeder's care, the bull shall be taken to a veterinarian and the bull owner made aware within 24 hours. If the bull is injured or killed, photographs and/or video shall be taken by the breeder and provided to the bull's owner within 1 week.

F. **Injury to Third Parties:** While the bull(s) is in the possession of the breeder, including during transport, if he injures or causes damage to any person or property, the bull owner shall not be held liable for the actions or inactions of the breeder, his employees, agents, independent contractors, or assigns. Further, the breeder shall indemnify and hold

harmless the bull owner in the event an injury or damage occurs.

- G. **Following Animal Welfare Laws:** Breeder agrees to compile with all applicable federal and state laws related to the transportation of animals and while the bull(s) is in breeder's care, including state animal welfare laws and the federal Twenty-Eight Hour Law (49 U.S.C. § 80502).
  
- H. **Health:** Bull owner agrees to deliver bulls(s) in good health and condition. This specifically includes the bull being returned sound and with a Body Condition Score of at least \_\_\_\_\_. If bull(s) require veterinary care while in breeder's care, breeder will make bull owner aware within 24 hours. Breeder shall be responsible for all veterinary expenses while bull(s) is in breeder's care.
  
- I. **Fertility Tests:** Bull owner agrees to provide fertility test upon delivery. Fertility test does not warrant against poor condition of breeder's herd, non-sufficient feed, grass etc. Breeder must take the risk all the natural conditions when putting out the bull(s) with cows. Bull owner does not guarantee the percentage of bred cattle at the end of the bull lease term.
  
- J. **No right to sublease:** The bull owner does not convey to the breeder the right to lease or sublet any part of the farm or cowherd or to assign the lease to any person or persons whomsoever.
  
- K. **Binding on heirs:** The provisions of this lease shall be binding upon the heirs, executors, administrators, and successors of both the bull owner and the breeder in like manner as upon the original parties, except as provided by mutual written agreement.
  
- L. **Amendments and alterations:** Amendments and alterations to this lease shall be in writing and shall be signed by both the bull owner and the breeder.
  
- M. **No partnership intended:** It is understood and agreed that this lease shall not be

deemed to be, nor intended to give rise to, a partnership relationship between the bull owner and the breeder.

- N. **Record keeping:** Breeder shall provide the following records on progeny born from bull(s): \_\_\_\_\_  
\_\_\_\_\_.
- O. **Termination:** Breach by the breeder of any terms of this agreement shall be grounds for immediate termination without refund, at the sold option of the Lessor. Termination under this lease is effective only when put in writing and delivered to the other party. Upon termination, the breeder shall deliver to the bull owner all leased animals within \_\_\_\_\_ days.
- P. **Choice of Law:** Any disputes arising under or related to this lease agreement shall be construed under the laws of \_\_\_\_\_.
- Q. **Forum Clause:** Any disputes arising under or related to this lease agreement shall be heard in the \_\_\_\_\_ court in \_\_\_\_\_, \_\_\_\_\_.
- R. **Arbitration of Disputes:** Any disputes between the parties as to their rights or obligations under this lease that are not settled by mutual agreement after thorough discussion, shall be submitted for arbitration to a committee of three disinterested persons, one selected by each party hereto and the third by the two thus selected. The committee's decision shall be accepted by both parties.
- S. **Attorney's Fees:** In the event of any litigation (including arbitration) arising from or related to this Agreement, or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys fees, and all other related expenses incurred in such litigation. In the event of a no-adjudicative settlement of litigation between the parties or a resolution of a dispute by arbitration, the term "prevailing party"

shall be determined by that process.

Executed in duplicate on the date first above written:

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Bull Owner

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Breeder

## **APPENDIX I: RECREATIONAL USE STATUTES**



**Tex. Civ. Prac. & Rem. Code Ann. § 75.001 to § 75.004**  
*Current through the end of the 2015 Regular Session.*

**§ 75.001. Definitions**

In this chapter:

- (1) “Agricultural land” means land that is located in this state and that is suitable for:
  - (A) use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed;
  - (B) forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption; or
  - (C) domestic or native farm or ranch animals kept for use or profit.
  
- (2) “Premises” includes land, roads, water, watercourse, private ways, and buildings, structures, machinery, and equipment attached to or located on the land, road, water, watercourse, or private way.
  
- (3) “Recreation” means an activity such as:
  - (A) hunting;
  - (B) fishing;
  - (C) swimming;
  - (D) boating;
  - (E) camping;
  - (F) picnicking;
  - (G) hiking;
  - (H) pleasure driving, including off-road motorcycling and off-road automobile driving and the use of all-terrain vehicles and recreational off-highway vehicles;
  - (I) nature study, including bird-watching;
  - (J) cave exploration;
  - (K) waterskiing and other water sports;
  - (L) any other activity associated with enjoying nature or the outdoors;
  - (M) bicycling and mountain biking;
  - (N) disc golf;
  - (O) on-leash and off-leash walking of dogs; or



(P) radio control flying and related activities.

(4) “Governmental unit” has the meaning assigned by Section 101.001.

## **§ 75.002. Liability Limited**

(a) An owner, lessee, or occupant of agricultural land:

- (1) does not owe a duty of care to a trespasser on the land; and
- (2) is not liable for any injury to a trespasser on the land, except for wilful or wanton acts or gross negligence by the owner, lessee, or other occupant of agricultural land.

(b) If an owner, lessee, or occupant of agricultural land gives permission to another or invites another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:

- (1) assure that the premises are safe for that purpose;
- (2) owe to the person to whom permission is granted or to whom the invitation is extended a greater degree of care than is owed to a trespasser on the premises; or
- (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted or to whom the invitation is extended.

(c) If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:

- (1) assure that the premises are safe for that purpose;
- (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
- (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

(d) Subsections (a), (b), and (c) shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith.

(e) In this section, “recreation” means, in addition to its meaning under Section 75.001, the following activities only if the activities take place on premises owned, operated, or maintained by a governmental unit for the purposes of those activities:

- (1) hockey and in-line hockey;
- (2) skating, in-line skating, roller-skating, skateboarding, and roller-blading;
- (3) soap box derby use; and
- (4) paintball use.

(f) Notwithstanding Subsections (b) and (c), if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises.

(g) Any premises a governmental unit owns, operates, or maintains and on which the recreational activities described in Subsections (e)(1)-(4) are conducted shall post and maintain a clearly readable sign in a clearly visible location on or near the premises. The sign shall contain the following warning language:

**WARNING**

TEXAS LAW (CHAPTER 75, CIVIL PRACTICE AND REMEDIES CODE) LIMITS THE LIABILITY OF A GOVERNMENTAL UNIT FOR DAMAGES ARISING DIRECTLY FROM HOCKEY, IN-LINE HOCKEY, SKATING, IN-LINE SKATING, ROLLER-SKATING, SKATEBOARDING, ROLLER-BLADING, PAINTBALL USE, OR SOAP BOX DERBY USE ON PREMISES THAT THE GOVERNMENTAL UNIT OWNS, OPERATES, OR MAINTAINS FOR THAT PURPOSE.

(h) An owner, lessee, or occupant of real property in this state is liable for trespass as a result of migration or transport of any air contaminant, as defined in Section 382.003(2), Health and Safety Code, other than odor, only upon a showing of actual and substantial damages by a plaintiff in a civil action.

(i) Subsections (b) and (c) do not affect any liability of an owner, lessee, or occupant of real property for an injury occurring outside the boundaries of the real property caused by an activity described by Section 75.001(3)(P) that originates within the boundaries of the real property.

**§ 75.003. Application and Effect of Chapter**

(a) This chapter does not relieve any owner, lessee, or occupant of real property of any liability that would otherwise exist for deliberate, wilful, or malicious injury to a person or to property.

(b) This chapter does not affect the doctrine of attractive nuisance, except:  
(1) as provided by Section 75.0022(g) or 75.0025(c); and

(2) the doctrine of attractive nuisance may not be the basis for liability of an owner, lessee, or occupant of agricultural land for any injury to a trespasser over the age of 16 years.

(c) Except for a governmental unit, this chapter applies only to an owner, lessee, or occupant of real property who:

(1) does not charge for entry to the premises;

(2) charges for entry to the premises, but whose total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than 20 times the total amount of ad valorem taxes imposed on the premises for the previous calendar year; or

(3) has liability insurance coverage in effect on an act or omission described by Section 75.004(a) and in the amounts equal to or greater than those provided by that section.

(d) This chapter does not create any liability.

(e) Except as otherwise provided, this chapter applies to a governmental unit.

(f) This chapter does not waive sovereign immunity.

(g) To the extent that this chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under Chapter 101, this chapter controls.

(h) In the case of agricultural land, an owner, lessee, or occupant of real property who does not charge for entry to the premises because the individuals entering the premises for recreation are invited social guests satisfies the requirement of Subsection (c)(1).

#### **§ 75.004. Limitation on Monetary Damages for Private Landowners**

(a) Subject to Subsection (b), the liability of an owner, lessee, or occupant of agricultural land used for recreational purposes for an act or omission by the owner, lessee, or occupant relating to the premises that results in damages to a person who has entered the premises is limited to a maximum amount of \$500,000 for each person and \$1 million for each single occurrence of bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. In the case of agricultural land, the total liability of an owner, lessee, or occupant for a single occurrence is limited to \$1 million, and the liability also is subject to the limits for each single occurrence of bodily injury or death

and each single occurrence for injury to or destruction of property stated in this subsection.

(b) This section applies only to an owner, lessee, or occupant of agricultural land used for recreational purposes who has liability insurance coverage in effect on an act or omission described by Subsection (a) and in the amounts equal to or greater than those provided by Subsection (a). The coverage may be provided under a contract of insurance or other plan of insurance authorized by statute. The limit of liability insurance coverage applicable with respect to agricultural land may be a combined single limit in the amount of \$1 million for each single occurrence.

(c) This section does not affect the liability of an insurer or insurance plan in an action under Chapter 541, Insurance Code, or an action for bad faith conduct, breach of fiduciary duty, or negligent failure to settle a claim.

(d) This section does not apply to a governmental unit.

#### **§ 75.007. Trespassers**

(a) In this section, “trespasser” means a person who enters the land of another without any legal right, express or implied.

(b) An owner, lessee, or occupant of land does not owe a duty of care to a trespasser on the land and is not liable for any injury to a trespasser on the land, except that an owner, lessee, or occupant owes a duty to refrain from injuring a trespasser wilfully, wantonly, or through gross negligence.

(c) Notwithstanding Subsection (b), an owner, lessee, or occupant of land may be liable for injury to a child caused by a highly dangerous artificial condition on the land if:

(1) the place where the artificial condition exists is one upon which the owner, lessee, or occupant knew or reasonably should have known that children were likely to trespass;

(2) the artificial condition is one that the owner, lessee, or occupant knew or reasonably should have known existed, and that the owner, lessee, or occupant realized or should have realized involved an unreasonable risk of death or serious bodily harm to such children;

(3) the injured child, because of the child's youth, did not discover the condition or realize the risk involved in intermeddling with the condition or coming within the area made dangerous by the condition;

(4) the utility to the owner, lessee, or occupant of maintaining the artificial condition and the burden of eliminating the danger were slight as compared with the risk to the child involved; and

(5) the owner, lessee, or occupant failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

(d) An owner, lessee, or occupant of land whose actions are justified under Subchapter C or D, Chapter 9, Penal Code, is not liable to a trespasser for damages arising from those actions.

(e) This section does not affect Section 75.001, 75.002, 75.0021, 75.003, or 75.004 or create or increase the liability of any person.



States' Recreational Use  
Statutes

**STATE OF  
OKLAHOMA**

**76 Okl.St. Ann. § 10.1**

*Current through the Second Regular Session of the 55<sup>th</sup> Legislature (2016).*

**§ 10.1. Landowners encouraged to make land available to public for recreational purposes--Limitation on liability--Definitions--Applicability of section to land and attached roads, water and structures used primarily for farming or ranching activities**

A. 1. The purpose of this section is to encourage landowners to make land available to the public for outdoor recreational purposes by limiting their liability to persons entering upon and using such land and to third persons who may be damaged by the acts or omissions of persons going upon these lands.

2. As used in this section:

- a. "land" means real property, roads, water, watercourses, private ways, buildings, structures, and machinery or equipment when attached to realty,
- b. "outdoor recreational purposes" includes any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, jogging, cycling, other sporting events and activities, nature study, water skiing, jet skiing, winter sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, and aviation at non-public-use airports,
- c. "owner" means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the land,
- d. "charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land. The term "charge" shall not include:
  - (1) a license or permit fee imposed by a governmental entity for the purpose of regulating the use of land, a water or park area, or lake reservation,
  - (2) hunting, fishing, boating, and other license and permit fees,
  - (3) hunting or fishing leases, or
  - (4) donations made at fly-ins at non-public-use airports, and
- e. "non-public-use airport" means an airport that is primarily used by the owner with access to the public as permitted by the owner.

B. An owner who provides the public with land for outdoor recreational purposes owes no duty of care to keep the land safe for entry or use by others, or to give warning to persons entering or using the land of any hazardous conditions, structures, or activities.

C. 1. Except as otherwise provided by this section, an owner who provides the public with land for outdoor recreational purposes shall not:

- a. be presumed to extend any assurance that the land is safe for any purpose,
- b. incur any duty of care toward a person who enters or uses the land, or
- c. assume any liability or responsibility for any injury to persons or property caused by the act or omission of a person who enters or uses the land.

2. This subsection applies whether the person entering or using the land is an invitee, licensee, trespasser, or otherwise.

D. This section shall not apply if:

1. Any charge is made or is usually made for entering or using any part of the land; or
2. Any commercial or other activity for profit directly related to the use is conducted on any part of the land.

E. 1. An owner of land leased to the state or to other public entity for outdoor recreational purposes owes no duty of care to keep the land safe for entry or use by others, or to give warning to persons entering or using the land of any hazardous conditions, structures, or activities. Any owner who leases or subleases land to the state or other public entity for outdoor recreational purposes shall not:

- a. be presumed to extend any assurance that the land is safe for any purpose,
- b. incur any duty of care toward a person who enters or uses the leased land, or
- c. become liable or responsible for any injury to persons or property caused by the act or omission of a person who enters or uses the leased land.

2. This subsection applies whether the person entering or using the leased land is an invitee, licensee, trespasser, or otherwise, notwithstanding any other section of law.

F. 1. Except as provided in this section, no person is relieved of liability which would exist for want of ordinary care or for deliberate, willful, or malicious injury to persons or property. The provisions shall not create or increase the liability of any person.

2. This section shall not relieve any owner of any liability for the operation and maintenance of structures affixed to real property by the owner for use by the general public.

G. By entering or using land, no person shall be deemed to be acting as an employee or agent of the owner whether the entry or use is with or without the knowledge or consent of the owner.

H. The provisions of this section shall not apply to any land that is used primarily for farming or ranching activities or to roads, water, watercourses, private ways, buildings,

structures, and machinery or equipment when attached to realty which is used primarily for farming or ranching activities.

The Oklahoma Limitation of Liability for Farming and Ranching Land Act shall govern such land.





States' Recreational Use Statutes

**STATE OF ARKANSAS**

**AR ST § 18-11-301 to § 18-11-307**

*Current through the 2015 Regular Session*

**§ 18-11-301. Purpose of subchapter**

The purpose of this subchapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

**§ 18-11-302. Definitions**

As used in this subchapter:

- (1) "Aviation" means taking off, flying, or landing an airplane or aircraft;
- (2) "Charge" means an admission fee for permission to go upon or use the land, but does not include:
  - (A) The sharing of game, fish, or other products of recreational use; or
  - (B) Contributions in kind, services, or cash paid to reduce or offset costs and eliminate losses from recreational use;
- (3) "Land" means land, roads, water, watercourses, airstrips, private ways and buildings, structures, and machinery or equipment when attached to the realty;
- (4)(A) "Malicious" means an intentional act of misconduct that the actor is aware is likely to result in harm.
  - (B) "Malicious" does not mean negligent or reckless conduct;
- (5) "Owner" means the possessor of a fee interest, a tenant, lessee, holder of a conservation easement as defined in § 15-20-402, occupant, or person in control of the premises;
- (6) "Public" and "person" includes the Young Men's Christian Association, Young Women's Christian Association, Boy Scouts of America, Girl Scouts

of the United States of America, Boys & Girls Clubs of America, churches, religious organizations, fraternal organizations, and other similar organizations; and

(7) "Recreational purpose" includes, but is not limited to, any of the following or any combination thereof:

- (A) Hunting;
- (B) Fishing;
- (C) Swimming;
- (D) Boating;
- (E) Camping;
- (F) Picnicking;
- (G) Hiking;
- (H) Pleasure driving;
- (I) Nature study;
- (J) Water skiing;
- (K) Winter sports;
- (L) Spelunking;
- (M) Aviation;
- (N) Viewing or enjoying historical, archeological, scenic, or scientific sites; and
- (O) Any other activity undertaken for exercise, education, relaxation, or pleasure on land owned by another.

### **§ 18-11-303. Construction of subchapter**

Nothing in this subchapter shall be construed to:

- (1) Create a duty of care or ground of liability for injury to persons or property; or
- (2) Relieve any person using the land of another for recreational purposes from any obligation which he or she may have in the absence of this subchapter to exercise care in his or her use of the land and in his or her activities thereon or relieve any person from the legal consequences of failure to employ such care.

### **§ 18-11-304. Duty of care**

Except as specifically recognized by or provided in § 18-11-307, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.

### **§ 18-11-305. Limitation on liability**

Except as specifically recognized by or provided in § 18-11-307, an owner of land who, either directly or indirectly, invites or permits without charge any person to use his or her property for recreational purposes does not thereby:

- (1) Extend any assurance that the lands or premises are safe for any purpose; (2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;
- (3) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons; or
- (4) Assume responsibility for or incur liability for injury to the person or property caused by any natural or artificial condition, structure, or personal property on the land.

#### **§ 18-11-306. Land leased to state**

Unless otherwise agreed in writing, the provisions of §§ 18-11-304 and 18-11-305 are applicable to the duties and liability of:

- (1) An owner of land leased to the state or a political subdivision of the state for recreational purposes;
- (2) An owner of an interest in the real property burdened by a conservation easement as defined in § 15-20-402; or
- (3) A holder of a conservation easement as defined in § 15-20-402.

#### **§ 18-11-307. Owner's liability**

Nothing in this subchapter limits in any way liability which otherwise exists:

- (1) For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous; and
- (2) For injury suffered in any case in which the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state, a subdivision thereof, or to a third person, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

## **APPENDIX II: AGRITOURISM ACTS**

Texas

**Limited Liability for Agritourism Activities**

**Tex. Civil Practice & Remedies Code § 75A.001 to § 75A.004 2**

**§ 75A.001. Definitions**

In this chapter:

- (1) “Agricultural land” means land that is located in this state and that is suitable for:
  - A. Use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed; or
  - B. Domestic or native farm or ranch animals kept for use or profit.
- (2) “Agritourism activity” means an activity on agricultural land for recreational or educational purposes of participants, without regard to compensation.
- (3) “Agritourism entity” means a person engaged in the business of providing an agritourism activity, without regard to compensation, including a person who displays exotic animals to the public on agricultural land.
- (4) “Agritourism participant” means an individual, other than an employee of an agritourism entity, who engages in an agritourism activity.
- (5) “Agritourism participant injury” means an injury sustained by an agritourism participant, including bodily injury, emotional distress, death, property damage, or any other loss arising from the person’s participation in an agritourism activity.
- (6) “Premises” has the meaning assigned by Section 75.001. (*See Appendix II*).
- (7) “Recreation” has the meaning assigned by Section 75.001. (*See Appendix II*).

**§ 75A.002. Limited Liability**

- (a) Except as provided by Subsection (b), an agritourism entity is not liable to any person for an agritourism participant injury or damages arising out of the agritourism participant injury if:
  - (1) at the time of the agritourism activity from which the injury arises, the warning prescribed by Section 75A.003 was posted in accordance with that section; or

(2) the agritourism entity obtained in accordance with Section 75A.004 a written agreement and warning statement from the agritourism participant with respect to the agritourism activity from which the injury arises.

(b) This section does not limit liability for an injury:

(1) proximately caused by:

(A) the agritourism entity's negligence evidencing a disregard for the safety of the agritourism participant;

(B) one of the following dangers, of which the agritourism entity had actual knowledge or reasonably should have known:

(i) a dangerous condition on the land, facilities, or equipment used in the activity; or

(ii) the dangerous propensity, that is not disclosed to the agritourism participant, of a particular animal used in the activity; or

(C) the agritourism entity's failure to train or improper training of an employee of the agritourism entity actively involved in an agritourism activity; or

(2) intentionally caused by the agritourism entity.

(c) A limitation on liability provided by this section to an agritourism entity is in addition to other limitations of liability.

### **§ 75A.003. Posted Warning**

For the purposes of liability under Section 75A.002(a)(1), an agritourism entity must post and maintain a sign in a clearly visible location on or near any premises on which an agritourism activity is conducted. The sign must contain the following language:

WARNING

UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE), AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY.

### **§ 75A.004. Signed Agreement and Warning**

For the purposes of limitation of liability under Section 75A.002(a)(2), a written agreement and warning statement is considered effective and enforceable if it:

(1) is signed before the agritourism participant participates in an agritourism activity;

- (2) is signed by the agritourism participant or, if the agritourism participant is a minor, the agritourism participant's parent, managing conservator, or guardian;
- (3) is in a document separate from any other agreement between the agritourism participant and the agritourism entity other than a different warning, consent, or assumption of risk statement;
- (4) is printed in not less than 10-point bold type; and
- (5) contains the following language:

**AGREEMENT AND WARNING**

**I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES.**

## Oklahoma

### **Agritourism Activities Liability Limitations Act**

**Okla. Stat. tit. 2, § 5-14 to § 5-17**

#### **§ 5-14. Short title--Oklahoma Agritourism Activities Liability Limitations Act**

This act shall be known and may be cited as the “Oklahoma Agritourism Activities Liability Limitations Act”.

#### **§ 5-15. Definitions**

As used in the Oklahoma Agritourism Activities Liability Limitations Act:

1. “Agritourism activity” means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity;
2. “Agritourism professional” means any person who is engaged in the business of providing one or more agritourism activities, whether or not for compensation and whose agritourism activity is registered with the Oklahoma Department of Agriculture, Food, and Forestry;
3. “Inherent risks of agritourism activity” means those dangers or conditions that are an integral part of an agritourism activity including certain hazards, surface and subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. Inherent risks of agritourism activity also include the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, including failing to follow instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity; and
4. “Participant” means any person, other than the agritourism professional, who engages in an agritourism activity.

#### **§ 5-16. Liability of agritourism professionals and exceptions**

- A. Except as provided in subsection B of this section, an agritourism professional is not liable for injury to or death of a participant resulting from the inherent risks of agritourism activities, so long as the warning contained in Section 4 of this act is posted as required and, except as provided in subsection B of this section, no participant or



participant's representative can maintain an action against or recover from an agritourism professional for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of agritourism activities. In any action for damages against an agritourism professional for agritourism activity, the agritourism professional must plead the affirmative defense of assumption of the risk of agritourism activity by the participant.

- B. Nothing in subsection A of this section prevents or limits the liability of an agritourism professional if the agritourism professional does any one or more of the following:
  - 1. Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage, or death to the participant;
  - 2. Has actual knowledge or reasonably should have known of a dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant, and the danger proximately causes injury, damage, or death to the participant.
- C. Any limitation on legal liability afforded by this section to an agritourism professional is in addition to any other limitations of legal liability otherwise provided by law.

#### **§ 5-17. Notice of warning**

- A. Every agritourism professional shall post and maintain signs that contain the warning notice specified in subsection B of this section. The sign shall be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity. The warning notice shall consist of a sign in black letters, with each letter to be a minimum of one (1) inch in height. Every written contract entered into by an agritourism professional for the providing of professional services, instruction, or the rental of equipment to a participant, whether or not the contract involves agritourism activities on or off the location or at the site of the agritourism activity, shall contain in clearly readable print the warning notice specified in subsection B of this section.
- B. The signs and contracts described in subsection A of this section must contain the following notice of warning:

#### **“WARNING**

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

- C. Failure to comply with the requirements concerning warning signs and notices provided in this section shall prevent an agritourism professional from invoking the privileges of immunity provided by the Oklahoma Agritourism Activities Liability Limitations Act.

Arkansas

**Agritourism Act**

**Ark. Code § 2-11-101 to § 2-11-107**

**§ 2-11-101. Title**

This chapter shall be known and may be cited as the “Agritourism Act”.

**§ 2-11-102. Legislative intent – Construction - Purpose**

(a) It is the intent of this chapter to:

- (1) Promote rural tourism and rural economic development by encouraging owners or operators of farms, ranches, and other rural land or attractions, including historic, cultural, and natural attractions, to invite members of the public to view, observe, and participate in the operations and attractions for educational, entertainment, or recreational purposes; and
- (2) Encourage agritourism activities by limiting civil liability of those engaged in agritourism or providing the activities of agritourism.

(b) This chapter shall be liberally construed to carry out the purposes described in subsection (a) of this section.

**§ 2-11-103. Definitions**

As used in this chapter:

- (1) “Agribusiness operation” means an agricultural, horticultural, viticultural, forestry, dairy, livestock, poultry, bee, or any other farm, ranch, plantation, or range business operation;
- (2)(A) “Agritourism activity” means an interactive or passive activity carried out with or without payment to an agritourism activity operator on a farm, ranch, or agribusiness operation related to agriculture, food production, historic traditions, or nature-watching conducted by an agritourism activity operator for the education, entertainment, or recreation of participants.
- (B) “Agritourism activity” includes without limitation:
  - (i) A farming or ranching activity;
  - (ii) The viewing of historic, cultural, or natural attractions;

- (iii) A harvest-your-own activity;
- (iv) Nature-watching; and
- (v) An activity involving an animal exhibition at an agricultural fair.

(C) “Agritourism activity” does not include:

- (i) A roadside fruit and vegetable stand; or
- (ii) An operation exclusively devoted to the sale of merchandise or food at retail;

(3) “Agritourism activity operator” means an individual or entity that provides the facilities and equipment necessary to participate in an agritourism activity;

(4) “Inherent risk” means dangers or conditions that are an integral part of an agritourism activity, including without limitation:

(A) The propensity of a wild or domestic animal to behave in ways that may result in injury, harm, or death to persons on or around the wild or domestic animal;

(B) Hazards such as surface and subsurface conditions;

(C) Natural conditions of land, vegetation, and waters;

(D) Ordinary dangers of structures or equipment used in farming or ranching operations; and

(E) The potential of a participant to act in a negligent way that may contribute to injury to the participant or others, whether failing to follow safety procedures or failing to act with reasonable caution while engaging in the agritourism activity; and

(5) “Participant” is defined as a person, other than the agritourism activity operator, who engages in an agritourism activity.

#### **§ 2-11-104. Assumption of risk by participant**

Except as provided in § 2-11-105, a participant assumes the inherent risk of an agritourism activity by engaging in the agritourism activity.

#### **§ 2-11-105. Liability of agritourism activity operator**

This chapter shall not prevent or limit the liability of an agritourism activity operator if the agritourism activity operator or an agent of the agritourism activity operator:

- (1) Commits an act or omission of gross negligence concerning the safety of a participant that proximately causes injury, damage, or death to the participant;
- (2) Has actual knowledge of a dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in the activity that proximately causes injury, damage, or death to the participant and does not make the danger known to the participant that proximately causes injury, damage, or death to the participant;
- (3) Intentionally injures a participant; or
- (4) Commits other acts, errors, or omissions that constitute willful or wanton misconduct, gross negligence, or criminal conduct that proximately causes injury, damage, or death.

**§ 2-11-106. Limitation of liability**

- (a) An agritourism activity operator or participant is not liable for damages arising from the personal injury or death of a participant if:
  - (1) The injury or death results from an inherent risk; and
  - (2) The warning contained in § 2-11-107 is posted.
- (b) The limitation of liability provided by this section is in addition to any other limitation of liability provided by law.

**§ 2-11-107. Warning required**

- (a) At each agritourism activity, the agritourism activity operator shall post and maintain signage in a clearly visible location at or near the main entrance to the agritourism activity and in black letters at least one inch (1") in height containing the following warning:

“WARNING -- Under Arkansas law, an agritourism activity operator is not liable for the injury or death of a participant in an agritourism activity resulting from the inherent risk of agritourism activities. Inherent risks include without limitation the risk of animals, weather, land conditions, and the potential for you as a participant to act in a negligent way that may contribute to your own injury or death. You are assuming the risk of participating in this agritourism activity.”

- (b) The agritourism activity operator shall include, in clearly visible print, the warning contained in subsection (a) of this section in a written contract between the agritourism activity operator and each participant.
- (c) At each agritourism activity, the agritourism operator shall post and maintain signage of a specific or known hazard in the particular area on or surrounding the agritourism activity.

## **APPENDIX III: FARM ANIMAL LIABILITY ACTS**

## TEXAS

### **Liability Arising from Farm Animal Activities or Livestock Shows**

#### **V.T.C.A., Civil Practice & Remedies Code § 87.001 to § 87.005**

#### **§ 87.001. Definitions**

In this chapter:

(1) “Engages in a farm animal activity” means riding, handling, training, driving, loading, unloading, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with a farm animal. The term includes management of a show involving farm animals. The term does not include being a spectator at a farm animal activity unless the spectator is in an unauthorized area and in immediate proximity to the farm animal activity.

(2) “Equine animal” means a horse, pony, mule, donkey, or hinny.

(2-a) “Farm animal” means:

- (A) an equine animal;
- (B) a bovine animal;
- (C) a sheep or goat;
- (D) a pig or hog;
- (E) a ratite, including an ostrich, rhea, or emu; or
- (F) a chicken or other fowl.

(3) “Farm animal activity” means:

- (A) a farm animal show, fair, competition, performance, rodeo, event, or parade that involves any farm animal;
- (B) training or teaching activities involving a farm animal;
- (C) boarding a farm animal, including daily care;
- (D) riding, inspecting, evaluating, handling, loading, or unloading a farm animal belonging to another, without regard to whether the owner receives monetary consideration or other thing of value for the use of the farm animal or permits a



prospective purchaser of the farm animal to ride, inspect, evaluate, handle, load, or unload the farm animal;

(E) informal farm animal activity, including a ride, trip, or hunt that is sponsored by a farm animal activity sponsor;

(F) placing or replacing horseshoes on an equine animal;

(G) examining or administering medical treatment to a farm animal by a veterinarian; or

(H) without regard to whether the participants are compensated, rodeos and single event competitions, including team roping, calf roping, and single steer roping.

(4) “Farm animal activity sponsor” means:

(A) a person or group who sponsors, organizes, or provides the facilities for a farm animal activity, including facilities for a pony club, 4-H club, hunt club, riding club, therapeutic riding program, or high school or college class, program, or activity, without regard to whether the person operates for profit; or

(B) an operator of, instructor at, or promoter for facilities, including a stable, clubhouse, pony ride string, fair, or arena at which a farm animal activity is held.

(5) “Farm animal professional” means a person engaged for compensation:

(A) to instruct a participant or rent to a participant a farm animal for the purpose of riding, driving, or being a passenger on the farm animal;

(B) to rent equipment or tack to a participant;

(C) to examine or administer medical treatment to a farm animal as a veterinarian; or

(D) to provide veterinarian or farrier services.

(6) “Livestock animal” means:

(A) an animal raised for human consumption; or

(B) a farm animal.

(6-a) “Livestock producer” means a person who owns, breeds, raises, or feeds livestock animals.

(7) “Livestock show” means a nonprofit event at which more than two species or breeds of livestock animals are gathered for exhibition or competition.

(8) “Livestock show sponsor” means a recognized group or association that organizes and sanctions a livestock show, including a political subdivision or nonprofit organization that is exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, as amended, by being listed as an exempt organization in Section 501(c)(3) of that code.

(9) “Participant” means:

(A) with respect to a farm animal activity, a person who engages in the activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free; and

(B) with respect to a livestock show, a person who registers for and is allowed by a livestock show sponsor to compete in a livestock show by showing an animal on a competitive basis, or a person who assists that person.

### **§ 87.002. Applicability of Chapter**

This chapter does not apply to an activity regulated by the Texas Racing Commission.

### **§ 87.003. Limitation on Liability**

Except as provided by Section 87.004, any person, including a farm animal activity sponsor, farm animal professional, livestock producer, livestock show participant, or livestock show sponsor, is not liable for property damage or damages arising from the personal injury or death of a participant in a farm animal activity or livestock show if the property damage, injury, or death results from the dangers or conditions that are an inherent risk of a farm animal activity or the showing of an animal on a competitive basis in a livestock show, including:

(1) the propensity of a farm animal or livestock animal to behave in ways that may result in personal injury or death to a person on or around it;

(2) the unpredictability of a farm animal's or livestock animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal;

(3) with respect to farm animal activities involving equine animals, certain land conditions and hazards, including surface and subsurface conditions;

(4) a collision with another animal or an object; or

(5) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or another, including failing to maintain control over a farm animal or livestock animal or not acting within the participant's ability.

#### **§ 87.004. Exceptions to Limitation on Liability**

A person, including a farm animal activity sponsor, farm animal professional, livestock show participant, or livestock show sponsor, is liable for property damage or damages arising from the personal injury or death caused by a participant in a farm animal activity or livestock show if:

- (1) the injury or death was caused by faulty equipment or tack used in the farm animal activity or livestock show, the person provided the equipment or tack, and the person knew or should have known that the equipment or tack was faulty;
- (2) the person provided the farm animal or livestock animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the farm animal activity or livestock show and determine the ability of the participant to safely manage the farm animal or livestock animal, taking into account the participant's representations of ability;
- (3) the injury or death was caused by a dangerous latent condition of land for which warning signs, written notices, or verbal warnings were not conspicuously posted or provided to the participant, and the land was owned, leased, or otherwise under the control of the person at the time of the injury or death and the person knew of the dangerous latent condition;
- (4) the person committed an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission caused the injury;
- (5) the person intentionally caused the property damage, injury, or death; or
- (6) with respect to a livestock show, the injury or death occurred as a result of an activity connected with the livestock show and the person invited or otherwise allowed the injured or deceased person to participate in the activity and the injured or deceased person was not a participant as defined by Section 87.001(9)(B).

#### **§ 87.005. Warning Notice**

(a) A farm animal professional shall post and maintain a sign that contains the warning contained in Subsection (c) if the professional manages or controls a stable, corral, or arena where the

professional conducts a farm animal activity. The professional must post the sign in a clearly visible location on or near the stable, corral, or arena.

(b) A farm animal professional shall include the warning contained in Subsection (c) in every written contract that the professional enters into with a participant for professional services, instruction, or the rental of equipment or tack or a farm animal. The warning must be included without regard to whether the contract involves farm animal activities on or off the location or site of the business of the farm animal professional. The warning must be clearly readable.

(c) The warning posted by a farm animal professional under this section must be as follows:

**WARNING**

UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), A FARM ANIMAL PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN FARM ANIMAL ACTIVITIES RESULTING FROM THE INHERENT RISKS OF FARM ANIMAL ACTIVITIES.

(d) A livestock show sponsor shall post and maintain a sign that contains the warning prescribed by Subsection (f) if the livestock show sponsor manages or controls a stable, barn, corral, or arena at which the livestock show sponsor conducts a livestock show. The livestock show sponsor must post the sign in a clearly visible location near the stable, barn, corral, or arena.

(e) A livestock show sponsor shall include the warning prescribed by Subsection (f) in every written contract that the sponsor enters into with a livestock show participant. The warning must be clearly readable.

(f) The warning posted by a livestock show sponsor under this section must be as follows:

**WARNING**

UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), A LIVESTOCK SHOW SPONSOR IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN A LIVESTOCK SHOW RESULTING FROM THE INHERENT RISKS OF LIVESTOCK SHOW ACTIVITIES.

## Oklahoma

### **Livestock Activities Liability Limitation Act**

**Okla. Stat. tit. 76, § 50.1 to § 50.4**

#### **§ 50.1. Short title--Legislative intent--Construction**

A. This act shall be known and may be cited as the “Oklahoma Livestock Activities Liability Limitation Act”.

B. 1. The Oklahoma Legislature recognizes that persons who engage in livestock activities may incur injuries as a result of the risks involved in such activities even in the absence of any fault or negligence on the part of persons or entities who sponsor, participate or organize those activities.

2. The Oklahoma Legislature finds that the state and its citizens derive numerous economic and personal benefits from livestock activities.

3. It is, therefore, the intent of the Oklahoma Legislature to encourage livestock activities by limiting the civil liability of livestock activities sponsors, participants and livestock professionals involved in such activities.

C. The provisions of the Oklahoma Livestock Activities Liability Limitation Act shall not be construed to conflict or amend Sections 10 through 15.1 of Title 76 of the Oklahoma Statutes.

#### **§ 50.2. Definitions**

As used in the Oklahoma Livestock Activities Liability Limitation Act:

1. “Engages in a livestock activity” includes training, racing, showing, riding, or assisting in medical treatment of, or driving livestock, or engaging in any agritourism activity involving livestock or on a location where livestock are displayed or raised, and any person assisting a participant, livestock activity sponsor or livestock professional. The term “engages in a livestock activity” does not include being a spectator at a livestock activity, except in cases where the spectator places himself or herself in immediate proximity to livestock activity;

2. “Agritourism activity” includes, but is not limited to, any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An

activity is an agritourism activity whether or not the participant pays to participate in the activity;

3. “Livestock” means any cattle, bison, hog, sheep, goat, equine livestock, including but not limited to animals of the families bovidae, cervidae and antilocapridae or birds of the ratite group;

4. “Livestock activity” includes but is not limited to:

a. livestock shows, fairs, livestock sales, competitions, performances, or parades that involve any or all breeds of livestock and any of the livestock disciplines, including, but not limited to, rodeos, auctions, driving, pulling, judging, cutting and showing,

b. livestock training or teaching activities or both such training and teaching activities,

c. boarding or pasturing livestock,

d. inspecting or evaluating livestock belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the livestock or is permitting a prospective purchaser of the livestock to inspect or evaluate the livestock,

e. drives, rides, trips, hunts or other livestock activities of any type however informal or impromptu that are sponsored by a livestock activity sponsor,

f. placing or replacing horseshoes on an equine, or otherwise preparing livestock for show, and

g. agritourism activities involving the viewing of, handling of, riding of, showing of, or other interactive activities with livestock;

5. “Livestock activity sponsor” means an individual, group, club, partnership or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, a livestock activity, including but not limited to: livestock clubs, 4-H clubs, FFA chapters, school and college-sponsored classes, programs and activities, therapeutic riding programs, and operators, instructors, and promoters of livestock facilities, including, but not limited to, barns, stables, clubhouses, ponyride strings, fairs and arenas at which the activity is held;

6. “Livestock professional” means a person engaged for compensation in:

a. instructing a participant or renting to a participant livestock for the purpose of engaging in livestock activity, or

b. renting equipment or tack to a participant;

7. “Inherent risks of livestock activities” means those dangers or conditions which are an integral part of livestock activities, including but not limited to:

a. the propensity of livestock to behave in ways that may result in injury to persons on or around them,

b. the unpredictability of livestock's reaction to such things as sounds, sudden movement and unfamiliar objects, persons or other animals,

c. certain hazards such as surface and subsurface conditions unknown to the livestock activity sponsor,

d. collisions with other livestock or objects, and

e. the potential of tack to become dislodged or move in ways that may result in injury to persons on or around livestock activities; and

8. “Participant” means any person, whether amateur or professional, who engages in a livestock activity, whether or not a fee is paid to participate in the livestock activity.

### **§ 50.3. Scope of liability**

A. Except as provided in subsection B of this section, a livestock activity sponsor, a participant or a livestock professional acting in good faith and pursuant to the standards of the livestock industry shall not be liable for injuries to any person engaged in livestock activities when such injuries result from the inherent risks of livestock activities.

B. 1. The provisions of the Oklahoma Livestock Activities Liability Limitation Act shall not apply to employees of the sponsor or livestock professional in the performance of their duties who are covered by or subject to the provisions of the workers' compensation laws of Title 85 of the Oklahoma Statutes.

2. Nothing in subsection A of this section shall prevent or limit the liability of a livestock activity sponsor, a participant or a livestock professional, if the livestock activity sponsor, a participant or livestock professional:

a. commits an act or omission that constitutes willful or wanton disregard for the safety of any person engaged in livestock activities, and that act or omission caused the injury,

b. intentionally injures a person engaged in livestock activities,

c. provided the equipment or tack, which was faulty, and such equipment or tack was faulty to the extent that it did cause the injury. The provisions of this subparagraph shall not apply to livestock activities sponsored by youth organizations when youth participants share equipment or tack between themselves,

d. provided the livestock and failed to make a reasonable effort to determine the ability of the participant to manage the particular livestock based upon the participant's representations of such participant's ability. Provided, however, a participant in a livestock show, livestock sale, or rodeo shall be presumed to be competent in the handling of livestock if an entry form is required for the activity and signed by the participant, or

e. owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous condition which was known to the livestock activity sponsor, livestock professional or person and not made known to the participant.

3. Nothing in subsection A of this section shall prevent or limit the liability of a livestock activity sponsor, a participant or a livestock professional:

a. under liability provisions as set forth in the products liability laws, or

b. for livestock activities which result in the death of any person engaged in livestock activities from the inherent risks of livestock activities.

C. A sponsor shall not be held vicariously liable for the acts or omission of a participant or a livestock professional.

#### **§ 50.4. Waiver of liability**

Two or more persons may agree, in writing, to extend the waiver of liability pursuant to the provisions of the Oklahoma Livestock Activities Liability Limitation Act. Such waiver shall be valid and binding by its terms.



Arkansas

**Equine and Livestock Activity Statute**

**A.C.A. § 16-120-201 to § 16-120-202**

**§ 16-120-201. Definitions**

As used in this subchapter, unless the context otherwise requires:

- (1) “Equine” means a horse, pony, mule, donkey, or hinny;
- (2) “Equine activity” means:
  - (A) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including without limitation dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;
  - (B) Equine training and teaching activities;
  - (C) Boarding equines;
  - (D) Riding, inspecting, or evaluating an equine belonging to another person regardless of whether the owner receives monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; and
  - (E) Rides, hunts, or other equine activities, however informal or impromptu;
- (3) “Equine activity sponsor” means an individual or legal entity that sponsors, organizes, or provides facilities for an equine activity;
- (4) “Livestock” means swine, bovine, sheep, and goats;
- (5) “Livestock activity” means the following:
  - (A) Grazing, herding, feeding, branding, milking, or other activity that involves the care or maintenance of livestock;
  - (B) A livestock show, fair, competition, or auction;
  - (C) A livestock training or teaching activity;

- (D) Boarding livestock; and
- (E) Inspecting or evaluating livestock;
- (6) “Livestock facility” means a property or facility at which a livestock activity is held;
- (7) “Livestock owner” means a person who owns livestock that is involved in a livestock activity;
- (8) “Livestock sponsor” means an individual or legal entity that sponsors, organizes, or provides facilities for a livestock activity; and
- (9) “Participant” means a person, whether amateur or professional, who engages in an equine activity or a livestock activity regardless of whether a fee is paid to participate in the equine activity or livestock activity.

#### **§ 16-120-202. Liability**

(a)(1) Except as provided in subdivision (a)(2) of this section, an equine activity sponsor, an employee of an equine activity sponsor, a livestock sponsor, an employee of a livestock sponsor, a livestock owner, a livestock facility, or a livestock auction market is not liable for an injury to or the death of a participant resulting from the inherent risks of an equine activity or a livestock activity.

(2) Subdivision (a)(1) of this section does not prevent or limit the liability of an equine activity sponsor, an employee of an equine activity sponsor, a livestock sponsor, an employee of a livestock sponsor, a livestock owner, a livestock facility, or a livestock auction market that:

(A) Provides the equipment or tack and knows or should know that the equipment or tack is faulty to the extent that the equipment or tack caused injury;

(B) With respect to an equine activity sponsor, an employee of a equine activity sponsor, a livestock activity sponsor, or an employee of a livestock activity sponsor, provides the equine or livestock and fails to make reasonable and prudent efforts to determine the ability of a participant to engage safely in an equine activity or a livestock activity or to determine the ability of a participant to engage safely in an equine activity or a livestock activity and to safely manage the particular equine or livestock based on the participant's representation of his or her ability;

(C) Owns, leases, rents, or otherwise is in lawful possession and control of the facility upon which a participant sustains an injury because of a dangerous latent

condition that is known or should have been known to the equine activity sponsor, an employee of the equine activity sponsor, the livestock activity sponsor, an employee of the livestock activity sponsor, the livestock facility, or the livestock auction market and for which warning signs had not been conspicuously posted;

(D) Commits an act or omission that :

(i) Constitutes willful or wanton disregard for the safety of a participant;  
and

(ii) Causes an injury; or

(E) Intentionally injures a participant.

(3) Subdivision (a)(1) of this section does not prevent or limit the liability of an equine activity sponsor, an employee of an equine activity sponsor, a livestock activity sponsor, an employee of a livestock activity sponsor, a livestock owner, a livestock facility, or a livestock auction market under products liability laws.

(b)(1)(A) An equine activity sponsor or a livestock activity sponsor shall post and maintain signs that contain the warning notice specified in subdivision (b)(2) of this section.

(B) The signs required under subdivision (b)(1)(A) of this section shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine activity sponsor or livestock activity sponsor conducts an equine activity or livestock activity.

(C) The warning notice specified in subdivision (b)(2) of this section shall appear on the sign in black letters with each letter to be a minimum of one inch (1") in height.

(2) The signs described in subdivision (b)(1) of this section shall contain the following warning notice:

#### **“WARNING**

Under Arkansas law, an equine activity sponsor, livestock activity sponsor, livestock owner, livestock facility, and livestock auction market are not liable for an injury to or the death of a participant in equine activities or livestock activities resulting from the inherent risk of equine activities or livestock activities.”

(c) The immunity provided under this section does not apply to thoroughbred horse racing as authorized and regulated in the Arkansas Horse Racing Law, § 23-110-101 et seq.