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INTRODUCTION

The Kansas Agritourism Promotion Act promulgated by Senate Bill 334 and found at K.S.A. 74-50,165 through 74-50,173 provides two primary benefits to agritourism operators. Those benefits are (1) a limitation on liability from certain injuries related to agritourism activities, and (2) a tax credit to partially defray the expense of procuring liability insurance for agritourism activities. In order to better explain the protections under the Act, I will cover basic tort principles as they relate to premises liability, the Kansas Recreational Use law which has limited applicability to agritourism operators, as well as the Kansas Agritourism Promotion Act. Please note that the Agritourism Promotion Act has obviously not yet been interpreted by Kansas courts so its true impact on liability is not known.

Basic Tort Principles

There are typically four basic elements for establishing a tort claim against a property owner. Those elements are:

- An individual injured on private property must generally be able to establish that the landowner was legally responsible to some degree for their safety;
- the landowner was negligent or violated their responsibility to the injured person;
- the negligence resulted in some ascertainable injury to the individual; and
- the person suffered damages as a result of the injury.

In Kansas, the duty owed by a landowner to those who enter with the knowledge or permission of the owner is one of "reasonable care under all circumstances." Factors to be considered in determining whether a landowner exercises "reasonable care" include:

- How likely is the possibility of injury?
- Would such an injury be serious or relatively minor?
- What is the burden upon the land occupier in terms of inconvenience or cost in providing adequate protection *i.e.*, what is the fiscal and practical effect of making your property safer?

A lesser duty of care is owed to a trespasser *i.e.*, one who enters the premises **without** the express or implied permission of the landowner. That duty of care requires a landowner to refrain only from willfully, wantonly, or recklessly injuring the individual.

Kansas Recreational Use Statute

In 1965, the Kansas Legislature adopted the Kansas Recreational Use Statute (KRUS) found at K.S.A. 58-3201 *et seq.* The purpose of KRUS is to encourage landowners to make land and water areas available to the public for recreational purposes by limiting their liability towards persons entering thereon for such purposes. Consequently, a landowner who makes all or any part of their land available to the public for recreational purposes owes no duty of care to keep the premises, or that part of the premises so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. While KRUS may provide some protection to agritourism operators, it also differs significantly from the Agritourism Promotion Act.

- The KRUS distinguishes between agricultural land and non-agricultural land. Agricultural land is defined as "land suitable for use in farming and includes roads, water, water courses and private ways located upon or within the boundaries of such agricultural land and buildings, structures and machinery or equipment when attached to such agricultural land."
- Non-agricultural land means all land other than agricultural land.
- The distinction between agricultural and non-agricultural land is important because K.S.A. 58-3204 appears to state that owners of agricultural land who allow their property to be used for recreational purposes, may charge a fee for such use and still receive liability protection. However, owners of non-agricultural land receive the limited liability **only** if they do not charge a fee for use of the property.
- Kansas courts have rarely interpreted KRUS; however, the United States District Court appeared to make a distinction that the recreational use statute applies only in circumstances whereby the landowner **has not charged a fee** for use of the property. This case is in apparent conflict with the actual language of the statute.
- Agritourism operators may be afforded some liability protection based on the KRUS. The law applies to any number of recreational purposes, including hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and the viewing of historical, archeological, scenic, or scientific sites. However, due in part to the apparent conflict between the statutory language and the case law regarding whether charging a fee results in a loss of liability protection, and because agritourism operators will charge such a fee, the KRUS should not be considered an absolute defense against liability.

Agritourism Promotion Act

Effective July 1, 2004, the Kansas Agritourism Promotion Act (the Act) became law. The purpose of the Act is to promote rural tourism and economic development by encouraging owners or operators of farms, ranches, and rural attractions, including historical, cultural, and natural attractions, to invite members of the public to view, observe and participate in such operations and attractions for recreational or entertainment purposes. The Act shall be liberally construed to effectuate that purpose.

The Act provides two primary benefits to those who meet its requirements:

- (1) There is a legislative effort to **limit** liability for injury or death to participants in registered agritourism activities; and
- (2) Tax credits of up to 20% of the increased cost for liability insurance directly related to agritourism activities.

The Act

- "Agritourism Activity" means any activity which allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities, including, but not limited to, farming activities, ranching activities, or historic, cultural, or natural attractions. An activity may be an agritourism activity regardless of whether the participant pays to participate in the activity. (This arguably distinguishes the Act from the KRUS.)
- The Act provides only **limited liability** against claims from injuries resulting from "inherent risks of a registered agritourism activity." This reference means **only** those dangers or conditions which are an integral part of such agritourism activity including, but not limited to, certain hazards such as surface and subsurface conditions; natural conditions of land, vegetation, and water; the behavior of wild or domestic animals; and ordinary dangers of structures or equipment used in farming or ranching operations. The Act should not be considered as blanket protection from any and all financial liability under all circumstances. Agritourism operators may still have liability in certain situations.

Prerequisites to Benefits Under the Act

There are two requirements to receiving limited liability protection under the Act. Both criteria must be satisfied. They are (1) registration and (2) appropriate signage.

Only "**registered** agritourism activity" is subject to the limitations on liability found in the Act. If you do not register your agritourism activity with the Kansas Department of Commerce, then you will not be in a position to benefit from the limited liability provisions in the Act.

- Registration is achieved by completing the form provided by the Department of Commerce (copy attached). The form requires (1) identification of the **activity** which the person conducts or intends to conduct and (2) a description of the **location** where the

person intends to conduct such agritourism activity. Registration is free and is good for five years.

- The Act further requires that at every "**registered** agritourism location" the "**registered** agritourism operator" shall post and maintain signage which contains the warning notice noted below. Such signage shall appear in black letters, with each letter a minimum of one inch in height, and state:

WARNING: UNDER KANSAS LAW THERE IS NO LIABILITY FOR AN INJURY OR DEATH OF A PARTICIPANT IN A REGISTERED AGRITOURISM ACTIVITY CONDUCTED AT THIS REGISTERED AGRITOURISM LOCATION IF SUCH INJURY OR DEATH RESULTS FROM THE INHERENT RISKS OF SUCH AGRITOURISM ACTIVITY. INHERENT RISKS OF AGRITOURISM ACTIVITIES INCLUDE, BUT SHALL NOT BE LIMITED TO, THE POTENTIAL OF YOU AS A PARTICIPANT TO ACT IN A NEGLIGENT MANNER THAT MAY CONTRIBUTE TO YOUR INJURY OR DEATH AND THE POTENTIAL OF ANOTHER PARTICIPANT TO ACT IN A NEGLIGENT MANNER THAT MAY CONTRIBUTE TO YOUR INJURY OR DEATH. YOU ARE ASSUMING THE RISK OF PARTICIPATING IN THIS REGISTERED AGRITOURISM ACTIVITY.

- This signage must be posted at every agritourism location;
- The warning notice language shall also be included in every written contract "for the providing of a registered tourism activity;" and
- Operators shall provide, upon request, a written description of the agritourism activity for which the Act limits liability.

Exceptions to Limited Liability

- The Act does not provide complete protection against all liability. A registered agritourism operator may still be liable for **willful or wanton conduct** or if the registered agritourism operator has **actual knowledge of a dangerous condition on the land**, facilities, or equipment used in the registered agritourism activity or the dangerous propensity of a particular animal used in such activity and does not make such dangerous condition known to the participant and such dangerous condition causes a participant to sustain injuries.
- The meaning of "willful and wanton conduct" is subject to judicial interpretation and depends on the specific facts of each case. It does not mean intentional. Proof of willingness to injure is not necessary in establishing willful and wanton negligence. A wanton act is something more than ordinary negligence but something less than willful injury. To constitute wantonness, the acts must indicate a realization of the eminence of danger and a reckless disregard or a complete indifference or unconcern for the probable consequences of the wrongful act. *Willard v. City of Kansas City*, 235 Kan. 655 (1984). While each case must be examined on its individual facts, the judicial decisions indicate there is an element of foreknowledge in the cases in which wanton or willful conduct has been found.

Tax Credit

The Act also provides a tax credit to **registered** agritourism operators who otherwise qualify. The credit is available against the tax liability imposed under the Kansas Income Tax Act in an amount equal to 20% of the cost of liability insurance paid by a registered agritourism operator who operates an agritourism activity on the effective date of the Act.

- No tax credit claimed pursuant to the Act shall exceed \$2,000.
- A taxpayer may carry forward the amount of the tax credit for up to three tax years.
- Tax credit is available to both existing and start-up agritourism operators for the first five years after commencement of such a business.

SUMMARY

SB 334 provides significant benefits to agritourism operators. These protections are not absolute and in order to take advantage of the Act, all agritourism operators must (1) register with the Department of Commerce and (2) post signage as required by the Act.