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Tort Reform Agritourism Style

By Larry Magill, KAIA, Executive Vice President

Some may think that Kansas tourism is an oxymoron. And in truth, the future doesn’t look bright for the tourism industry in the Kansas Legislature. The Special Economic Development Interim Committee failed to do much more than suggest to Dave Kerr, Secretary of Commerce that he ought to have the state’s tourism director report directly to him. They would not endorse the idea of a dedicated funding source or a separate quasi-public authority like the Turnpike Authority. The interim committee members mentioned that the Wildlife & Parks people should work closely with Tourism since hunting is one of Kansas’ strong points and even suggested that they consider combining the magazines published by each organization. But this is just a backdrop for this article’s main point—that agritourism in Kansas enjoys limited liability protection.

Agritourism is defined as “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 whether or not the participant pays to participate in the activity. An activity is not an agritourism activity if the participant is paid to participate in the activity.”

What Types of Operations Does The Act Apply To?

To take advantage of the limited liability provided by the act, the agritourism operation must register with the Kansas Department of Commerce. Part of registering is that the Department of Commerce will promote the business on their website, www.travelks.com.

The application gives a good picture of the types of operations contemplated for protection under the act by asking them to check all of the following that apply:

- Wildlife Based Recreation
- Farm Activity Based Recreation
- Prebooked/Group Events
- Food Production/Tasting Room/Concessions
- Tours
- Western Experience
- Special Events/Festivals
- Demonstrations/Seminars/Hands-on Activities

“Wildlife Based Recreation” is further broken down into those that provide any of the following:

- Types of activities: Fishing; Wildlife Watching; Archery; Shooting Sports
- Types of Game: Predators; Deer; Quail; Chukar; Rabbits; Pheasant; Turkey; Prairie Chicken; Migratory Game Birds
- Types of Services: Guides; Fishing Guides; Kenneling/Dogs; RV Hook-ups; Airport Pickup; Meals; Processing game

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“Farm Activity Based Recreation” examples might include: Horseback Riding, Boarding Stables, Cattle Ranch, and Other Livestock operations.

As you can see, the range of activities that would be eligible for the liability protection is quite broad. More information can be found at the Department of Commerce’s website, www.kansasagritourism.org. To date, approximately 250 agritourism businesses have registered under the act. The list is not available to the public but examples of types of operations that have applied include: wineries, vineyards, hunting lodges, sporting clays ranges, controlled shooting areas, pumpkin patches, on-farm retail sales operations, farm & ranch operations like the Moore Ranch in Bucklin, corn maizes, and you-pick orchards.

What Liability Protection Is Afforded?
The first attempt to pass legislation limiting the liability of agritourism operations was in the 2003 session in SB 134. Governor Sebelius vetoed it at the request of the Trial Lawyers. The following year SB 334 was passed and signed giving limited liability protection to the operations. Basically the act provides that any participant is assuming the inherent risks of the agritourism activity. The exceptions to this protection for the operator are for willful or wanton negligence or for failure to warn of known dangerous conditions on the land, equipment or animals.

To qualify, they must register with the Secretary of Commerce and they must post a sign in black letters at least 1” high, in a clearly visible location, with the following wording:

Warning
Under Kansas law, there is no liability for an injury or death of a participant in a registered agritourism activity conducted at the 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 same wording must be used in any contracts the operator uses. On request, the operator has to give a participant a written description of the agritourism operation the warning applies to.

The operator’s liability will not be limited if:

a) The operator injures the participant by willful or wanton conduct; or

b) The operator injures the participant by willful or wanton conduct; or...
b) The operator has actual knowledge of a dangerous condition in the land, facilities or equipment used in the activity or the dangerous propensity of a particular animal used in the activity and does not make the dangerous condition known to the participant and that condition causes the injuries.

Related Liability Limitations
The act does not replace the limited liability afforded farmers and ranchers through the existing Land and Water Recreational Areas statutes or the liability limiting statutes for domestic animals defined as cows, swine, sheep, goats, domesticated deer, llamas, poultry, rabbits, horses, ponies, mules, jennies, donkeys or hinnies. You can find the latter statutes on the Kansas Horse Council site at: http://www.kansashorsecouncil.com/signs/ksstatutes.html

Basically the act defines domestic animal activity and provides that the sponsors are protected by an assumption of risk by the participant as long as certain conditions are met. Some of the exceptions to the assumption of risk defense include faulty equipment, failure to determine the ability of the participant, known dangerous conditions on the premises, failure to meet the standard of care of a reasonable domestic animal professional or for a willful, wanton or intentional act of the sponsor. The act requires the posting of similar signs and use of the warning language in all written contracts just like the agritourism act.

Landowners who allow their land to be part of the walk in hunting areas are protected under K.S.A. 58-3201 to 3207. The act provides that an owner of land who makes all or any part of the land available to the public for recreational purposes 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 such premises. According to Wildlife & Park’s website, “liability is waived for private individuals who lease land to the state for recreational purposes. State law provides immunity from damages or injuries resulting from ordinary negligence”. As with the other acts limiting liability mentioned in this article there is an exception for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity or where the landowner of non-agricultural land charges an entry fee. Payments by the state for public use of the land do not trigger this exception, however.

Tax Credits For Insurance
2008 is the last year of a Kansas income tax credit for agritourism operations in existence when the act was passed in 2004 equal to 20% of their liability insurance premium with a maximum credit of $2,000.

New operations established after 2004 are eligible for the tax credit for 5 years. Unused credits may be carried over.

If you are looking for a carrier with an appetite for some of these risks, check out Big I Markets (BIM) described in the article beginning on page ___ of this issue. IIABA members have access to Markel online at www.bigimarkets.com. Markel will write hunting and fishing lodges and rod and gun clubs.

If you have questions about agritourism contact Sarah Larison, the Agritourism Program Manager at the Department of Commerce, 1000 SW Jackson Ave, Suite 100, Topeka, 66612, 785-296-8132 and fax 296-3776. Her email is slarison@kansascommerce.com.