Legal Risk Management: Protecting Your Farm and Family

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What we’ll cover today

- Concepts of Negligence & Premises Liability
  - Most common cause of action
  - Your duty of care as a land owner

- Business Organizations
  - Ways to protect your business assets and your personal assets

- Contracting
  - Get it in writing! – Here’s why
  - Issues to consider, questions to ask before signing
It’s always about the FACTS

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

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

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

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

• So now there are people on your land…
  • How did they get there?
  • Did you invite them or charge them to come onto your land?

• Did they ask your permission? Are you allowing them to enter for free?

• Are they trespassing? Are you aware of their presence?
Liability Issues

3 Categories of People on Your Premises

- **Trespasser**
  - Lowest duty of care

- **Licensee**
  - Higher duty of care than trespasser, but less than invitee

- **Invitee**
  - Highest duty of care
Liability Issues: Trespasser

• **Trespasser**
  • Entered upon land without permission or invitation

• **Knowledge of trespasser**
  • No knowledge - no duty, no liability
  • Knowledge - duty not to affirmatively harm
    • A course of action which shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others

• **Example:** Teenagers going out to your pond and fishing without your permission
Liability Issues: Licensee

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

• **Your Duty:**
  • Refrain from injuring the person through willful or wonton conduct
    • I.e., deliberate behavior
  • Warn of hidden dangers where the person does not know or is unlikely to know of the conditions or risks

• **Example:**
  • Someone asks for permission to hunt, walk, use land without a fee
    • Need to warn of the bull on the back 40 that isn’t fenced in
Liability Issues: Invitee

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

• **Your duty:**
  • Highest duty of care
  • A general duty to use ordinary care to keep the premises reasonably safe for the benefit of the invitee
  • This means making sure your employees have safe equipment, facilities, proper training, etc.
The status of a person on your land can change fluidly.

For example -

- If you allow someone to fish in your pond, but they explore other parts of your land, they may change from a licensee to a trespasser.

It is important to define the area that visitors have permission to use.
Where are we?

• We’ve talked about premise liability

• Now we’ll talk about some different business organizations available for your operation.
Business Organizations
Options for your enterprise
Types of Business Structures

• Sole Proprietorship
• General Partnership
• Limited Partnership
• Limited Liability Corporation

• Corporations
  - Subchapter “S”
  - Subchapter “C”
Issues we’ll cover for each one

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

• Liability of Owners
  - 100% liability for the business debt
    - Creditors will be able to reach your personal assets as well as what you invested into the business.

• Legal Status
  - Not a separate legal entity
    - You would be sued directly.
Sole Proprietorship

• Formation
  • No formalities are required
  • Formed or dissolved at the discretion of the individual who owns it
  • Only 1 person, or it becomes a partnership

• Management
  • Easy decision making – only one person to consult!

• Taxation
  • Income is taxed on the individual’s tax return
    • Schedule C
General Partnership

Definition

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

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

- **Legal Status**
  - Recognized as a separate legal entity

- **Formation**
  - No formalities are required
  - Can be formed unintentionally (only intent required is to run business for profit)
  - There can be a formal partnership agreement that details management responsibilities and how profits/losses will be split
General Partnership

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

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

• Limited Liability Partnership
  - A more formal business organization that limits some liability

• Liability
  - General Partner
    - Is fully liable for the financial and legal obligations of the business
  - Limited Partner
    - Only at risk of losing the capital invested or pledged to the business
    - Personal assets are not at risk
Limited Partnership

• **Legal Status**
  - Separate legal entity

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

- **Management**
  - The General partner manages the business
  - Policy reasons: General partner has the most at stake. Incentive to make sound business decisions

- **Taxation**
  - Limited Partnership is also a “pass-through entity”
  - Income is only taxed after it is passed on to the general or limited partners.
Limited Liability Corporation (LLC)

- **LLC**
  - Similar to Limited Partnerships
  - Provides protection to personal assets
  - Made up of “members” rather than “partners”

- **Liability**
  - Members’ personal assets are protected from creditors of the business.
  - Creditors can only reach that which has been invested or pledged to the business
LLC

- **Legal Status**
  - Recognized as separate legal entity

- **Formation**
  - Can be formed with 1 or more members
  - Created by delivering Articles of Organization to the Secretary of State’s office
  - Must include
    - Name of LLC
    - Address of LLC
    - Agent for service of process
  - Certain reports must be filed each year to maintain LLC status
LLC

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

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

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

- **Liability**
  - Shareholders are protected from creditors of the corporation in most cases

- **Legal Status**
  - Corporation is a separate legal entity
Corporations

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

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

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

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

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

- Deciding which business structure to use is an important decision.

- Many factors to consider
  - Who is involved
  - What is their role
  - What are the requirements
  - What makes the most sense for my business
Which way are we headed?

We’ve talked about premise liability and business organizations.

Now on to contracting!
What is a contract...really?

- An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law

- The writing that sets forth such an agreement
Why should it be in writing?

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

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

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