



PennState Law

Center for Agricultural
and Shale Law





PennState Law

Center for Agricultural
and Shale Law

Legal Planning for Specialty Crop Producers: Understanding Liability Protections, Regulatory Processes, and Other Legal Risks

A multi-part 2022 educational series to assist Pennsylvania specialty crop producers successfully augment wholesale sales revenue with income from direct sales, pick-your-own, value-added commodity processing, or agritourism, agritainment & educational activities, Penn State Law's Center for Agricultural and Shale Law is conducting an educational series of workshops and webinars over the coming year about the prevention and planning necessary to best avoid contractual, tort, and regulatory liabilities in conducting income-augmenting activities.

Visit our website at aglaw.psu.edu for registration and details.

Topic #1

Legal Liability Risks from Business Invitees on the Farm

This topic will examine the ways in which legal liability can arise from the care, custody, and control of real estate upon which visitors are invited for the purpose of doing business with a specialty crop producer, as well as liability insurance coverage, waivers, etc.

- Wednesday, Mar. 9, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

Topic #2

Legal Liabilities in Selling Raw and Processed Specialty Crop Products

This topic will educate producers on the various theories of contractual, warranty, and common law legal liabilities, including “products liability,” that can arise from the production and sale of both raw agricultural products and value-added processed products, as well as how insurance may protect against such claims.

- Wednesday, Mar. 23, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

Topic # 3

Business Structures for Operational Resilience and Liability Avoidance

This topic will review the various forms of business entity structures that may be employed by specialty crop producers, the attributes and pros and cons of each, the formalities that must be followed to maintain financial and legal liability protections.

- Wednesday, Apr. 6, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

**Spring
2022
Sessions**

Topic #4

Licensing and Regulatory Obligations in Selling Raw and Processed Specialty Crop Products

This topic will educate producers on the state laws and county/municipal ordinances that regulate the activity of producing and selling foods for human consumption, including health/food code licensing requirements for the storage, production and sale of food, sales tax licensing and collection, and other regulatory requirements that may apply in particular contexts, venues, or jurisdictions.

- Wednesday Nov. 16, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

Topic #5

Municipal Law & Zoning for Agritourism / Agritainment, Specialty Crop Processing & Sales

This topic will provide producers an understanding of local municipal government requirements and procedure for permits and approvals that may be required for agritourism, agritainment, processing, and sales activities conducted in conjunction with the production of specialty crops.

- Wednesday, Nov. 30, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

Topic #6

Statutory Protections/Restrictions: Understanding PA's Ag Area Security, Right-To-Farm, ACRE, and Clean & Green Laws for Specialty Crop Producers

This topic will instruct producers on how to understand the scope of, and potentially employ, the various statutory protections in Pennsylvania law for agricultural operations, and frequently also available in other jurisdictions. It will also examine business operation limitations that arise from voluntary enrollment in governmental benefit programs which seek to preserve agricultural uses of land.

- Wednesday, Dec. 14, 2022, 12 noon, via Zoom. Register at aglaw.psu.edu

**Fall
2022
Sessions**



Topic #2

Legal Liabilities in Selling Raw and Processed Specialty Crop Products



March 23, 2022



Objective

This session will educate producers on the various theories of *common law* legal liabilities, including concepts of “products liability,” that can arise from the production and sale of both raw agricultural products and value-added processed products and the role of insurance in protecting against such claims.



What is a Legal Liability?

- The right to make a legal claim against a person or business entity that is capable of being enforced through filing a lawsuit in a court of law.
 - Most legal claims never even get close to being filed in a court, but the reason they are of concern is that they could end up there if not dealt with, including through an insurance “indemnity” payment (if a “tort” claim, not a contract claim). Such payments are referred to as “settling a claim.”



“Civil Liability” (vs. other forms of liability)

- **Civil Liability**

- Claim or lawsuit brought by a private party
- Usually based upon a contract or “tort” liability
- Remedy: pay the injured party (sometimes an injunction)

- **Criminal Liability**

- Brought by the state
- Public wrong that is made a crime by legislature
- Remedy: jail, pay a fine, etc.

- **Regulatory Liability**

- Failure to follow regulations from government re: a property or business
- Fines, correct the conduct, “injunctive relief” (“cease and desist” order)



What is a Tort?

- An act or omission that results in injury or harm to a person, property, or reputation.
- Contrasted with a claim based upon a contract.
- Today, we are talking about an injury to the person, i.e. a “personal injury”



Tort Example – Negligence Claim

- Example:
 - Farmer A operates a pick your own strawberry. A chronically leaking manure pit discharges into the strawberry fields and contaminates the soil and strawberries and several customers become ill.
- Could there be a regulatory liability? Perhaps.
- Could there be a criminal action? Very, very rare.
(Example: Peanut Corporation of America contaminated factory case.)



Burden of Proof

- In a civil case filed in the local county court system:
 - Proof of facts by a “preponderance of the evidence”
 - Tipping the scales by the slightest amount
- In contrast, a criminal case brought by the local District Attorney or a U.S. Attorney requires proof of a facts “beyond a reasonable doubt”
- Federal courts also exist to hear disputes between citizens of different states, or if federal laws are the basis of the case



Relief possible in a civil case

- Compensatory damages
 - Medical expenses, lost income
 - Pain & suffering – determined by a jury
- Punitive damages (for “outrageous / egregious” conduct)
 - Intended to punish the defendant
- Injunctive relief
 - Court order requiring the defendant to cease the activity



Types of Torts

- **Negligence**
- Intentional Tort
- Strict Liability for “ultrahazardous activities” (rare)
- **Products Liability**



Negligence – What “state of mind?”

- Failure to act as a reasonable person would act under similar circumstances to prevent injury to others
 - Carelessness, thoughtlessness, oversight
- Criminal liability generally requires an “intent” to do the act.
- Regulatory liability generally is strict liability with no required “state of mind,” intentional or otherwise. But there are exceptions to that.



Negligence

Proving negligence requires 4 elements:

- **Duty** to protect others from injury
- **Breach** of the “Standard of Care” owed to the injured party?
- The alleged breach must be the “**Proximate Cause**” of the injury
- Actual **Damages** must be suffered.



Negligence – When is there a duty?

- When is there a duty?
 - Arises from common law
 - Ex: a farmer moving farm equipment on a public roadway
 - Ex: selling a product to a consumer intended for human consumption
 - Since industrialization, selling a product is never “buyer beware”
 - Arises from a contract
 - Ex: a farmer contracts to do custom harvesting
 - A voluntary assumption of a duty
 - Ex: a Good Samaritan attempts to render medical assistance



Negligence Duties – examples

- Land Ownership or Control: There is a duty of care owed to persons on the property to prevent them from being injured by a condition of the property.
 - The “standard of care” owed depends upon their status on the land as a *Trespasser*, *Licensee*, or *Invitee*.
- Food Production and Sales: There is duty of care owed to *consumers* not to cause a foodborne illness by the intended method of consumption of the food. (Generally, in its raw or “as is” state. However raw meat is a unique case.)



Negligence – What is the standard of care owed?

- To determine if there was a breach of duty, we must first determine the “*Standard of Care*” owed.
 - Standard of Care: What a reasonable person would do under similar circumstances
 - Did the farmer/business owner meet the safety standards expected in the business in which he/she is engaged?



Negligence – Standard of Care established by a government standard

- Negligence *per se*: when conduct that is a violation of law or regulation from government causes harm
 - Violating the law is inherently considered negligent behavior
 - Elements:
 - There is a law or regulation that defines a standard of conduct
 - Defendant violated the law or regulation.
 - The plaintiff is a member of the class that the statute/law was designed to protect
 - The plaintiff suffered the type of injury the statute/law was designed to prevent



Negligence – Proximate Causation

- Were the defendant's actions a "substantial factor" in causing the injury?
- The injury must be the reasonably foreseeable result of the defendant's action or failure to act.



Negligence – requires actual damages

- Economic loss
 - Fair market value of lost property (if applicable)
 - Repairs to damaged property (if applicable)
 - Medical expenses & lost income
- Non-Economic Damages
 - Reduced quality of life
 - Pain & suffering



Negligence - Defenses

“Comparative negligence”

- The jury is asked to assign fault between the parties with percentages
- Generally, the injured party may still recover damages so long as their negligence was less than that of the defendant, but damages are reduced by % attributable to the injured party.



Negligence - Defenses

“Assumption of the Risk” – “raw agricultural products”

- Raw meat example?
- What about raw fish?
- “Buyer’s Clubs” - Participants may sign a “waiver”
 - The defendant is not absolved from risks that are not expected risks of the activity.
 - Technically, under Pennsylvania law, no signed waiver by a parent is legally effective to “waive” a tort claim of a minor child.



Vicarious Liability – important principle

- An employer is generally liable for torts of an employee that were done within the scope of employment
- However, that is not the case with independent contractors.
- Highlights the “employee” vs. “independent contractor” distinction and why independent contractors may have to show proof of insurance in many instances.
- **Wholesaler vs. Retailer - Selling wholesale means you are an independent contractor. Same applies you are retailing someone else’s products.**



Protections From Civil Liabilities

- Operate your business in accordance with all law, regulations and safety standards in the industry.
- Go above and beyond that minimum standard of care
- Signage, signage, signage (for land)
- Labels, labels, labels (for food)
- Business Entity Formation that protects assets
- State Immunity Legislation – very rarely exists
- **Liability Insurance !!!!!**



Protections: Liability Insurance

- Insurance may be required by permits, licenses, state or municipal approvals.
- But the question remains, what kind of insurance and what does it really cover?
- **Exclusions:** not all companies may be willing to cover all activities and very few business really know what coverage they are buying.



Protections: Business entity formation protects your personal assets

Examples:

- Corporation
 - LLC
 - Non-profit Corporation
-
- Sole Proprietorship & Partnerships do NOT protect your personal assets from debts of the business.



State Immunity Laws from negligence claims

- PA Equine Activity Immunity Act
- Recreational Use of Land and Water Act
- Pennsylvania's Agritourism Activity Protection Act
- There are no such laws re: food production and sales
- The policy choice in the PA agritourism immunity law was that food and beverage service should NOT be given immunity.



Protections: Liability Insurance

Enable your insurance to provide the benefits you are seeking from it:

- Your insurance agent needs to be an integral business consultant. Spend time with them and ask questions about exactly what is covered.
- Disclose all aspects of your business to your insurance agent and make sure you have a record of what you disclosed to them.
- If you expand your business endeavors, notify your insurance agent.
- Post-claim: Notify your insurance agency or insurance company immediately if an injury occurs.
- Document everything that occurred and occurs throughout the process. Take photos. Preserve “evidence” in a safe place, undisturbed by aging or tampering.



Products Liability – a specialized tort

- Food-borne illness cases generally take the form of “products liability” tort cases with negligence as a “tack-on” claim.
- All parties in the chain of manufacturing/processing and distribution of a product may be liable for damages caused by that product.
- In manufactured/processed products, potential defendants are:
 - producer of components/ingredients (if the cause of defect/injury)
 - an assembling manufacturer/processor
 - a wholesaler
 - a retail store owner



Products Liability

- Elements:

1. The defendant sells a product that the plaintiff uses.
2. The defendant is in the commercial business of selling that product.
3. The plaintiff suffers an injury using the product.
4. When the defendant sold the item, the item was defective.
5. The defect was an actual and proximate cause of the plaintiff's injury.

- Notice there is no “mental state” (no negligence or intent needed).
- ***Product defects*** can be in manufacturing/processing, design or marketing (warnings/labeling).
- Contamination is generally the product defect in a food borne illness case.



Product Liability is “strict liability”

- A defendant is liable when the plaintiff proves that the product is defective, regardless of the defendant’s exercise of reasonable care.
- Defense: Dispute a finding that the product is “defective”
 - Risk-Utility Test: Products’ utility outweighs an inherent risk of harm (ex: a butcher knife)
 - Consumer Expectation Test:
If a reasonable consumer would not find the product to be defective when using it in a reasonable manner.
- Example: Sales of raw ground beef. What about raw milk?



Products Liability and Insurance

- Most liability insurance provisions of a standard farm policy of insurance exclude “products liability” claims.
- Why? Because insurance industry forms were not developed in an era of direct sales, value-added and producer processing. They were written for the production and wholesale sale of a raw agricultural commodity for further processing, generally monoculture.



Completed Products & Operations Coverage

- To get insurance coverage for claims from value-added processing and direct sales, a producer must purchase supplemental coverage that specifically covers claims arising from those activities.
- Your insurance agent and company must know what you are doing in your business in order to provide the right insurance.



Additional Insured Coverage

- If you are selling products wholesale, for resale by a third party (a store), your insurance policy must have “vendors endorsement” coverage which confers upon the resellers of your products the status of an **“additional insured”** under your policy products liability coverage.
- You are the **“named insured.”** Re-sellers of your products, are “additional insureds.”



CERTIFICATE OF LIABILITY INSURANCE

DATE (mm/dd/yyyy)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME	FAX (incl. No.)
	PHONE (incl. No.)	
INSURED	INSURER(S) AFFORDING COVERAGE	NAIC #
	INSURER A:	
	INSURER B:	
	INSURER C:	

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

REF. LTR.	TYPE OF INSURANCE	ACORD FORM NO.	POLICY NUMBER	POLICY EFF. DATE (mm/dd/yyyy)	POLICY EXP. DATE (mm/dd/yyyy)	LIMITS
	COMMERCIAL GENERAL LIABILITY					
	CLAIMS-MADE <input type="checkbox"/> OCCUR					
	GEN'L AGGREGATE LIMIT APPLIES PER:					
	POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC <input type="checkbox"/>					
	OTHER:					
	AUTOMOBILE LIABILITY					
	ANY AUTO					
	ALL OWNED AUTOS					
	HIRSD. AUTOS					
	SCHEDULED AUTOS					
	NON-OWNED AUTOS					
	UMBRELLA LIAB.					
	EXCESS LIAB.					
	CLAMS-MADE <input type="checkbox"/>					
	RETENTION \$					
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY					
	ANY PROPRIETOR/PARTNER/DIRECTIVE OFFICER/OWNER EXCLUDED? (Mandatory in NH)					
	T-INS. (Mandatory in NH)					
	DESCRIPTION OF OPERATIONS SHOWN					

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER	CANCELLATION
	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE

© 1988-2014 ACORD CORPORATION. All rights reserved.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – VENDORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization (Vendor):

ANY AND ALL VENDORS OF PRODUCTS SET OUT IN THE YOUR PRODUCTS SECTION OF THE SCHEDULE. LIST OF APPLICABLE VENDORS ON FILE WITH US.

Your Products:

LIST OF PRODUCTS ON FILE WITH US.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (referred to below as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:

- The insurance afforded the vendor does not apply to:
 - "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
 - Any express warranty unauthorized by you;
 - Any physical or chemical change in the product made intentionally by the vendor;
 - Repackaging, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;

- Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
 - Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
- This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.



Additional Insured Coverage

- Must be written on an “***occurrence***” basis, not a “claims made” basis. The policy covers claims arising from sales of the product made within the policy period.
- ***Additional Insured Certificates*** are the evidence which the re-seller of your product will request to prove that this coverage has been purchased. Insurance Certificates may be issued by your insurance agent (or even you, in some instances).



Alteration of the product in distribution

- Products Liability and insurance coverage against such claims is based entirely upon the premise that the product is not altered in any unanticipated way from the condition it was in when it left the possession of the manufacturer/processor.
- If the product was altered in way that solely caused or simply contributed to the damage, then the other parties in the distribution chain may have independent liability for those actions. Also, their additional insured coverage may be void.



Summary:

- In a tort claim for negligence, the minimum “standard of care” owed to customers to prevent their injury or illness is that a business made its product in compliance with all requirements of the laws and regulations of the jurisdiction where the business is located.
 - Failure to do so is *negligence per se*, but it also gives rise to regulatory liabilities like fines, lose of license or permit, cease and desist orders, injunctions, etc.
- Food-borne illness caused by contamination causes strict product liability, regardless of how careful you have been. So, make sure you buy Completed Products Liability Insurance coverage and you have Vendors Endorsement Coverage that supplies additional insured status to any re-sellers.



THANK YOU!

Brook Duer

Staff Attorney

Center for Agricultural and Shale Law

Penn State Law

329 Innovation Boulevard, Suite 118

University Park, PA 16802

(814) 863-3396

dhd5103@psu.edu





Thanks to our Partners

This presentation was created as part of the
Pennsylvania Specialty Crop Block Grant Program



Agricultural
Marketing
Service



pennsylvania
DEPARTMENT OF AGRICULTURE

Specialty Crop Block Grant Program



**PENN STATE CENTER FOR
AGRICULTURAL AND SHALE LAW**

329 Innovation Blvd., Suite 118
University Park, PA 16802
Phone: 814-865-4290
Fax: 814-865-3851
Website: AgLaw.psu.edu

PROFESSIONAL STAFF

Center Director

Ross H. Pifer
rpifer@psu.edu

Staff Attorney

Brook Duer
dhd5103@psu.edu

Staff Attorney

Jackie Schweichler
jks251@psu.edu

Research Specialist

Chloe Marie, LL.M.
cjm445@psu.edu

CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

This publication is available in alternative media upon request. Penn State is committed to affirmative action, equal opportunity, and the diversity of its workforce.

