

Oil and Gas, Natural Resources, and Energy Journal

Volume 2 | Number 6

March 2017

The Texas Agritourism Act: Why the Texas Legislature Put Farmer Liability Out to Pasture

Mason W. Smith

Follow this and additional works at: <http://digitalcommons.law.ou.edu/onej>

 Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Mason W. Smith, *The Texas Agritourism Act: Why the Texas Legislature Put Farmer Liability Out to Pasture*, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 685 (2017),
<http://digitalcommons.law.ou.edu/onej/vol2/iss6/5>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oil and Gas, Natural Resources, and Energy Journal by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 2

NUMBER 6

THE TEXAS AGRITOURISM ACT: WHY THE TEXAS LEGISLATURE PUT FARMER LIABILITY OUT TO PASTURE

MASON W. SMITH*

“It reminds us of all that was good and could be again. People will come. People will most definitely come.”¹ Terence Mann was talking about baseball, but perhaps he should have been talking about agritourism.

I. Introduction

Director Phil Alden Robinson’s *Field of Dreams* depicts the curious story of an Iowa corn farmer who, risking foreclosure, plows under his crops to build a baseball diamond, later used to save his family and farm.² The experience of this film’s first-generation farmer parallels that of modern, small-scale farmers and ranchers faced with the industry’s inherent challenges. More important, the story of Ray Kinsella is a familiar example of an unfamiliar agricultural practice that has borne fruit in recent years—agritourism.

In short, agritourism is a “commercial enterprise that links agricultural production [and] tourism in order to attract visitors” onto a farm or ranch

* Mason W. Smith, J.D. Candidate, University of Oklahoma College of Law, 2018; BBA Management with Highest Honors, Abilene Christian University, 2014. I would like to thank my wife, Ali, for her unconditional encouragement and support. I would also like to thank Micah Adkison, David Wilken, and Professor Gail Mullins for their input and direction.

1. FIELD OF DREAMS (Universal Pictures 1989).
2. Review of *Field of Dreams*, ROGER EBERT, <http://www.rogerebert.com/reviews/field-of-dreams-1989> (last visited Feb. 27, 2017).

for education, entertainment, and income.³ The grim reality that *Field of Dreams* did not address is that operators who invite the public onto their land for agritourism also invite the danger of liability should a participant sustain an injury along the way.⁴ Suppose, for example, that a shortstop at Ray's field had stepped into a gopher hole. Would Ray be on the hook? The fear of litigation and its corresponding costs may deter prudent farmers like Ray from implementing agritourism, despite its many benefits.

Fear not. In the past decade, more than a dozen states adopted legislation to limit agritourism operator liability,⁵ indicating that state lawmakers recognize agritourism's value and desire that it continue to flourish. In 2015, Texas enacted its own agritourism statute—the Texas Agritourism Act—which provides that agritourism operators who comply with certain requirements are not liable for injuries participants sustain while engaging in agritourism activities on the operator's land.⁶ The Texas statute arrived on the heels of a similar agritourism law enacted in Oklahoma⁷ and other comparable legislation nationwide.

Texas agriculture—especially the family farms of the state's remote, rural areas—stands to benefit from the statute's passage.⁸ Because of enticing urban job opportunities and high entry-costs for first-time farmers,⁹ one growing concern for Texas agriculture is that a generation of farmers will be left without successors to fill their shoes.¹⁰ Among other challenges, the nationwide trend away from small, diversified farms in favor of large, consolidated operations has increased environmental burdens and

3. *Agritourism—An Overview*, NAT'L AGRIC. L. CENTER, <http://nationalaglawcenter.org/overview/agritourism/> (last visited Feb. 27, 2017).

4. Elizabeth Dooley, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 DRAKE J. AGRIC. L. 455, 456 (2010).

5. *See States' Agritourism Statutes*, NAT'L AGRIC. L. CENTER, <http://nationalaglawcenter.org/state-compilations/agritourism/> (last visited Feb. 27, 2017).

6. TEX. CIV. PRAC. & REM. CODE § 75A.002 (West 2015).

7. OKLA. STAT. ANN. tit. 2, § 5–14 (West 2013).

8. *See generally* Dooley, *supra* note 4.

9. Carrie MacLaggan, *Farms Aren't Going Away, but a Lot of Little Ones Are*, TEX. TRIB. (Jan. 3, 2014, 6:00 AM), <https://www.texastribune.org/2014/01/03/farms-arent-going-away-lot-little-ones-are/>.

10. *Texas Ag Stats*, TEX. DEP'T OF AGRIC., <https://texasagriculture.gov/About/TexasAgStats.aspx> (last visited Feb. 27, 2017) (noting that the average age of farmers and ranches in Texas is 58 years).

threatened family farming's economic viability.¹¹ By complementing traditional farming operations, agritourism helps mitigate these concerns,¹² and promoting it could “bolster agriculture’s reorientation toward more local, sustainable approaches”¹³ and revitalize rural communities.¹⁴

Some commentators doubt that agritourism statutes can accomplish their purposes of reducing litigation and protecting landowners.¹⁵ These critics anticipate procedural issues with the agritourism statutes’ liability-limiting provisions and uncertainty regarding the scope of their coverage.¹⁶ The language of the Texas Agritourism Act’s liability-limiting provision, however, differs in a crucial way from that of other states and offers clearer protection for operators.¹⁷ Most statutes require courts to decide whether the injury’s cause was an “inherent risk” of the agritourism activity.¹⁸ But in Texas, farmers who comply with warning requirements simply are not liable for injuries that guests sustain “arising from [their] participation” in the activity.¹⁹

Even so, the Texas Agritourism Act lacks certain features and provisions that distinguish other agritourism laws. For example, Texas does not disclose the statute’s purpose²⁰ and does not require agritourism operators to register with a governing body.²¹ Concern over the statute’s departures and omissions remains unsatisfied—agritourism legislation, after all, is

11. *How Corporate Control Squeezes Out Small Farms*, PEW CHARITABLE TRS. (July 18, 2012), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2012/07/18/how-corporate-control-squeezes-out-small-farms>.

12. Dooley, *supra* note 4, at 462–63 (“Beginning and young farmers could use agritourism as additional income to help alleviate some of the economic burdens associated with entering farming.”).

13. Dooley, *supra* note 4, at 459.

14. *Id.* at 460–61 (discussing agritourism’s benefits such as increased tax bases, environmental stewardship, and job creation).

15. Terence J. Centner, *Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks*, 10 KAN. J. L. & PUB. POL’Y 102, 118 (2009) (expressing concern for the inherent-risk approach employed by most states).

16. *Id.* at 119 (“Given the difficulty of definitively describing agritourism activities, courts may be called to address issues of whether an activity is covered by a statute.”).

17. *See infra* Part III.

18. *See, e.g.*, KAN. STAT. ANN. § 32–1435 (West 2004).

19. TEX. CIV. PRAC. & REM. CODE §§ 75A.001(5), 75A.002(a) (West 2015).

20. *See, e.g.*, KAN. STAT. ANN. § 32–1431 (West 2004); COLO. REV. STAT. ANN. § 13–21–121(1) (West 2014).

21. *See, e.g.*, OKLA. STAT. ANN. tit. 2, § 5–15(2) (West 2013); KAN. STAT. ANN. § 32–1433 (West 2004); MO. STAT. ANN. § 537.850(8) (West 2012); N.D. CENT. CODE ANN. § 53–13–02 (West 2011).

relatively new.²² In the meantime, Texas should consider adopting some of the provisions and programs that have made agritourism a fruitful enterprise across the country.

This Comment argues that the Texas Agritourism Act will fortify agritourism activities in Texas for farmers and ranchers seeking to diversify their operations. Part II introduces the concept of agritourism, highlights the value of agriculture in Texas, and discusses agritourism's importance given the challenges and opportunities facing agriculture. Part III outlines the Agritourism Act and compares its provisions with similar statutes in other states, particularly Kansas, Colorado, and Oklahoma. Part IV discusses the Agritourism Act's relationship to similar Texas statutes pertaining to landowner liability, and Part V outlines suggestions for improving the Agritourism Act and the promotion of agritourism based on systems other states have employed.

II. If You Build It, They Will Come

A. Defining Agritourism

In a nutshell, agritourism is the intersection of agriculture and tourism.²³ In some circles, agritourism is also called "agrotourism," "agritainment," and "on-farm recreation."²⁴ Besides its names, commentators have pegged agritourism with a host of definitions,²⁵ and the various definitions that appear in legislation highlight the difficulty of establishing a uniform definition for agritourism.²⁶ For introductory purposes, agritourism is a "form of commercial enterprise that links agricultural production [or] processing with tourism in order to attract visitors onto a farm [or ranch] for the purposes of entertaining [or] educating the visitors and generating income for the farm, ranch, or business owner."²⁷ Lay definitions aside, landowners and participants in agritourism activities must be cognizant that

22. In fact, the nation's forerunner on agritourism legislation, the State of Kansas, passed its statute just over one decade ago. KAN. STAT. ANN. § 32-1430 (West 2004).

23. *Agritourism—An Overview*, *supra* note 3.

24. Carlos E. Carpio, *The Demand for Agritourism in the United States*, 33 J. AGRIC. & RES. ECON. 254, 254 (2008).

25. *Id.* (citing at least thirteen different definitions); *see also* Claudia Gil Arroyo, *Defining Agritourism: A Comparative Study of Stakeholders' Perceptions*, 37 TOURISM MGMT. 39, 40 (2013) ("Definitions of agritourism are abundant[,], reflecting the ambiguity surrounding its meaning.").

26. *See, infra* Part III.

27. *Agritourism—An Overview*, *supra* note 3.

the statutory definition—and the activities it includes—will vary from state to state.²⁸

The types of activities that qualify as agritourism range from small, seasonal operations to large, year-round agricultural attractions.²⁹ Familiar examples include farmers' markets, dude ranches, pumpkin patches, pick-your-own produce, bed-and-breakfast lodges, winery tours, Christmas-tree farms, petting zoos, corn mazes, and many others.³⁰ Which attractions qualify as agritourism, and thus warrant statutory protection, depends on a state's chosen definition,³¹ and broader definitions ensure increased protection for farmers.³²

Fiddlesticks Farms, the “premier fall attraction” in Midland, Texas, is an example of agritourism in action.³³ Just south of town, Matt and Jessica Norton manage forty acres where they grow watermelon, cotton, and other crops.³⁴ In 2007, the couple resolved to create “an educational, agriculture-based attraction that would teach children about farm life” and attract residents.³⁵ The Nortons now open their land to the public each fall and charge admission for activities like pumpkin patches, corn mazes, and hay rides.³⁶ Throughout the year, the farm also welcomes hundreds of Permian Basin students for field trips.³⁷ The farm's main attraction is its “learning barn” where Matt educates visitors about farm animals.³⁸ Indeed, most

28. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 75A.001(2) (West 2015); OKLA. STAT. ANN. tit. 2, § 5–15(1) (West 2013); COLO. REV. STAT. ANN. § 13–21–121(2)(b) (West 2014); KAN. STAT. ANN. § 32–1432(a) (West 2004); ARK. CODE ANN. § 2–11–103(2)(A) (West 2011).

29. *Agritourism—An Overview*, *supra* note 3.

30. *Id.*

31. *See, e.g.*, OKLA. STAT. ANN. tit. 2, § 5–15(1) (West 2013) (defining “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”).

32. Centner, *supra* note 15, at 108 (“The broad definitions of rural activities prescribed by the statutes may allow some defendants to raise multiple statutory defenses to defeat liability for negligence allegations.”).

33. Meredith Moriak Wright, *Farm Serves as Avenue to Share Agricultural Education*, MIDLAND MAG., Sept. 25, 2016, at 20.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Wright, *supra* note 33.

statutory definitions of agritourism embrace all Fiddlesticks Farms' attractions.

Agritourism benefits farmers financially because its start-up costs are low. To blend agritourism with ordinary operations, there is little (if any) need to dedicate monetary resources to new labor and equipment.³⁹ These activities are thus a convenient strategy for farm diversification. Because most farmers use agritourism to increase farm revenue, they are more likely to experiment with activities that allow them to capitalize on existing operations and exploit their expertise.⁴⁰ For example, the owner of a pecan orchard, at a relatively low cost, could arrange facility tours and product tastings, which educate customers, ensure farm longevity, and bolster existing sales.⁴¹

From the farmer's perspective, a "complex set of economic and non-economic goals drive agritourism development."⁴² The primary goals are economic: Farmers diversify their operations to adjust for shifting income levels, create new revenue streams, and expand their existing market share.⁴³ But the non-economic goals, though less quantifiable, are just as important to consider. For farmers, the non-economic goals of agritourism include "keeping the farm in the family, developing a hobby, [and] enjoying the rural lifestyle."⁴⁴ Achieving these goals promotes the continued success of family farms and consequently sustains intrinsic rewards of the farming profession.⁴⁵

The concept of agritourism is not new.⁴⁶ Its prevalence in the United States, however, has increased considerably over the last decade despite a

39. Christine Tew, *The Perceived Benefits of Agritourism: The Provider's Perspective*, 33 *TOURISM MGMT.* 215, 217 (2012).

40. *Id.* ("[F]arm operators tend to offer activities similar to their existing farm procedures, which do not have to dramatically alter farm production and may take advantage of . . . individual schedules and experiences.").

41. Kathy Gibbons, *Agritourism Expands Pecan Farm's Reach*, *VEGETABLE GROWERS NEWS* (Aug. 14, 2014), <http://vegetablegrowersnews.com/article/agritourism-expands-pecan-farms-reach/> (documenting a Caldwell, Texas pecan farmer whose sales have "increased dramatically" since implementing agritourism).

42. Tew, *supra* note 39, at 217.

43. *Id.*

44. *Id.*

45. *Id.* ("More than the economics of the farming profession, being able to continue farming is associated with the personal value of 'being a farmer' in terms of self-identity as well as of enjoying the practice of farming.").

46. Arroyo, *supra* note 25, at 39 (noting that agritourism has been recognized worldwide since the early twentieth century).

consistent lack of government support as compared with other nations.⁴⁷ This pattern of growth likely will persist “because of increasing tendencies of traveling as a family, shorter travels by car, multi-activity trips, and a desire to help out local farmers and communities.”⁴⁸ In short, continued efforts to polish agritourism statutes and protect operators will contribute to agritourism’s continued expansion.

B. Texas Land and Agriculture

Texas author Wallace Chariton once quipped, “In the covered wagon days, if a baby was born in Texarkana while the family was crossing into the Lone Star State, by the time they reached El Paso, the baby would be in the third grade.”⁴⁹ Though hyperbolic, Chariton’s remark captures this certain truth: Texas is geographically expansive. The state’s total land area exceeds a quarter-million square miles,⁵⁰ greater than ninety-five percent of which is privately owned.⁵¹ These so-called working lands “account for [eighty-three] percent of the state’s total land base and provide substantial economic, environmental, and recreational resources that benefit the state’s population.”⁵² Further, the quantity of agricultural operations in the state is unrivaled; Texas boasts nearly 250,000 farms and ranches, which span a whopping 130 million acres, and one of every seven working Texans performs an ag-related job.⁵³ Most notable, family farms, partnerships, and family-held corporations account for all but a handful of such operations.⁵⁴

47. *Id.*

48. *Id.* at 39–40.

49. W.F. Strong, *You May All Go to Hell and 9 More Great Texas Quotes*, TEX. STANDARD (June 1, 2016, 9:30 AM), <http://www.texasstandard.org/stories/you-may-all-go-to-hell-and-9-more-great-texas-quotes/>.

50. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/state-area.html>.

51. *Land Trends Fact Sheet*, TEX. LAND TRENDS, txlandtrends.org/files/lt-2014-fact-sheet.pdf (last visited Feb. 27, 2017). Remarkably, the federal government owns less than two percent of Texas land but lays claim to roughly half the land in California, Wyoming, and Oregon. See Jackie Hicken, *From 0.3 to 81.1: What Percentage of Each State is Owned by the Federal Government?*, DESERET NEWS (Mar. 7, 2014, 6:29 AM), <http://www.deseretnews.com/top/2318/0/From-03-to-811-What-percentage-of-each-state-is-owned-by-the-federal-government.html>.

52. *Id.*

53. *Texas Ag Stats*, *supra* note 10.

54. *Id.* This percentage mirrors the national percentage of operations classified as family farms, based on the USDA definition. See *Farm Household Glossary*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/topics/farm-economy/farm-household-well-being/glossary#family-farm> (highlighting a national percentage between 97.1 and 98.3 percent of all farms). The

Agriculture's importance in Texas cannot be disputed. Without question, Texans put their working lands to productive use. The economic value is exceptional, as the state's food-and-fiber sector constitutes an annual \$100 billion industry.⁵⁵ The Lone Star State claims the third-highest total value of agricultural products sold and leads the country in the following agricultural commodity groups: (1) cotton and cottonseed; (2) cattle and calves; and (3) sheep, goats, wool, and mohair.⁵⁶ By comparison, Kansas ranks second in cattle and sixth in total value of products sold;⁵⁷ Colorado ranks fifth in cattle and twentieth in total value of products sold;⁵⁸ and Oklahoma ranks sixth in cattle and twenty-third in total value of products sold.⁵⁹ These statistics demonstrate that Texas, perhaps more than any other state, has much to offer its residents through agritourism.

Given the state's position in national agricultural production, the opportunity for abundant use of agritourism is self-evident. Research suggests this may already be the case, with one study indicating that Texas farms account for almost one-quarter of nationwide agritourism revenues.⁶⁰ Kansas and Montana rank second and third, with only five percent of such revenues to their credit.⁶¹ The work of Texas A&M University's AgriLife Extension Service also highlights the existing use of agritourism in Texas.⁶² Thus far, AgriLife has inventoried 437 agritourism businesses but notes that

USDA loosely defines "family farms" as those "in which the majority of the business is owned by the operator and individuals related to the operator by blood, marriage, or adoption, including relatives that do not live in the operator household." *Id.*

55. *Texas Ag Stats*, *supra* note 10.

56. *2015 Agriculture Overview–Texas*, USDA NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=TEXAS (last visited Feb. 27, 2017).

57. *2015 Agriculture Overview–Kansas*, USDA NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=Kansas (last visited Feb. 27, 2017).

58. *2015 Agriculture Overview–Colorado*, USDA NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=Colorado (last visited Feb. 27, 2017).

59. *2015 Agriculture Overview–Oklahoma*, USDA NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=Oklahoma (last visited Feb. 27, 2017).

60. Arroyo, *supra* note 25, at 39.

61. *Id.*

62. *See Agritourism Facts*, TEX. A&M UNIV. NATURE TOURISM DEV., <http://naturetourism.tamu.edu/agritourism/facts-agritourism/> (last visited Feb. 27, 2017).

this number represents a fraction of such businesses already operating across the state.⁶³

Despite this success, statistics regarding urban population growth and land loss in Texas are troubling. The state is home to “seven of the [fifteen] most rapidly growing cities in the nation,” and its population increased by seven million residents over a recent fifteen-year span.⁶⁴ During that same period, “there was a net loss of approximately 1.1 million acres of working lands converted to non-agricultural uses.”⁶⁵ The logical inference is that as the state’s population increases, fewer acres of land are available to Texas farmers. Yet, as the state’s largest metropolitan cities bleed into historically rural areas,⁶⁶ local farmers have an opportunity to market their services to Texans who may not otherwise investigate or contribute to the state’s agricultural operations.

C. The Value of Agritourism

1. Combating Commercial Agriculture

On a national scale, the agriculture industry faces the problem of an “eroding middle” in farming—a handful of large, commercial farms account for the lion’s share of food production.⁶⁷ Farms with greater than one million dollars in annual sales comprise only four percent of farms, but two-thirds of sales nationwide.⁶⁸ In contrast, three-quarters of all farms report no greater than \$50,000 in annual gross revenues, and such farms constitute only four percent of sales related to agriculture.⁶⁹ From these numbers, one can infer that although there are many small farms in the United States, “relatively few small farm operators are making a living solely on agricultural production.”⁷⁰

63. *Id.*

64. *Land Trends Fact Sheet*, *supra* note 51 (noting that the majority of this population increase took place within the top 25 highest total population growth counties).

65. *Id.*

66. Population growth has primarily occurred in the Austin, Houston, and the Dallas/Fort Worth metropolitan areas. *See id.*

67. Mark Koba, *Meet the ‘4%’: Small Number of Farms Dominate US*, CNBC U.S. NEWS (May 6, 2014, 11:46 AM), <http://www.cnbc.com/2014/05/06/state-of-american-farming-big-producers-dominate-food-production.html>.

68. *Id.* (citing the USDA 2012 Census of Agriculture).

69. *Id.* (citing the USDA 2012 Census of Agriculture).

70. Stephen R. Miller, *Agritourism at the Rural-Urban Interface: A National of Legal Issues with 20 Proposals for Idaho*, SSRN at 32 (May 11, 2014), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2435306 (select “Download this Paper”).

This disparity is due, at least partly, to the industry's "consolidation," a process through which commercial farms concentrate geographically and specialize in certain areas of production.⁷¹ Although commercial farms yield production in higher volumes, public discord about excess waste and use of pesticides to expedite growth suggests a preference for "more traditional diversified farms" that maintain "a balanced mix of crops and livestock."⁷² To keep pace and increase production, smaller operators must incur substantial costs for the requisite labor and technology,⁷³ and few can justify such expenditures.⁷⁴ Commercial farms simply have more resources, which forces smaller operators to pursue different streams of revenue divorced from agricultural production.⁷⁵

Utilizing agritourism helps preserve family farms despite these market pressures. By capturing the "recreational aspect of the farm,"⁷⁶ farmers can diversify their operations and secure higher revenues through direct sales. This concept is trending nationwide, as the "direct sale of products from farms to consumers" recently increased more than eight percent over five years.⁷⁷ As with any on-farm diversification activity, agritourism widens the farmer's income base so they are not forced to seek off-farm income.⁷⁸

Consider, for example, South Carolina's Chattooga Belle Farm.⁷⁹ Near the Georgia border, the farm's proprietor, Ed Land, harvests fruit, including twenty-six varieties of apples.⁸⁰ Besides traditional sales, Land offers "a slew of value-added products[.]" including jams, butters, and wines, at his on-site store.⁸¹ Chattooga Belle doubles as a wedding venue—where, unlike with crops, the income is guaranteed—and hosted seventy-two weddings in

71. *How Corporate Control Squeezes Out Small Farms*, *supra* note 11 (addressing animal agriculture industry) ("Consolidation in the livestock industry has occurred through mergers, acquisitions, and the demise of small businesses, and today's market reflects the dominance of a relative handful of large entities[.]").

72. *Id.*

73. Aditya Khanal, *Agritourism and Off-Farm Work: Survival Strategies for Small Farms*, 45 *AGRIC. ECON.* 65, 66 (2014).

74. MacLaggan, *supra* note 9.

75. Miller, *supra* note 70, at 32.

76. Khanal, *supra* note 73, at 66.

77. Koba, *supra* note 67.

78. Miller, *supra* note 70, at 33.

79. See Derek Lacey, *Apple Growers Hear Diversifying, Marketing Strategies*, BLUE RIDGE NOW (Jan. 11, 2017, 11:00 AM), <http://www.blueridgenow.com/news/20170111/apple-growers-hear-diversifying-marketing-strategies> (reporting on the annual Southeastern Apple Growers Meeting in Ashville, North Carolina).

80. *Id.*

81. *Id.*

the last year alone.⁸² In addition, Land built a star-viewing platform and disc golf course, which welcome hundreds of visitors each year.⁸³ Land's goal is to ensure year-round income by giving people "different reasons to come to the farm."⁸⁴ For Land, there is "no limit to what a farm can do" with agritourism.⁸⁵

For farmers like Ed Land, the use of online marketing is also of growing importance. Between 2007 and 2012, farms in Texas reporting internet access increased from roughly fifty to nearly seventy percent,⁸⁶ highlighting an opportunity for improved marketing of the state's small farms. Operators in other states have already leveraged the power of e-commerce and social media.⁸⁷ Academic groups, such as the University of Tennessee Center for Profitable Agriculture, host workshops that help these operators develop web-based platforms for attracting customers and promoting events.⁸⁸ Because nearly eight-in-ten Americans use Facebook,⁸⁹ utilizing social media is critical to agritourism promotion. With the help of online marketing, increased use of agritourism in Texas helps ensure that farms remain viable while the cost to compete rises.⁹⁰

2. Exploiting Urbanization

The "urban sprawl"⁹¹ occurring in Texas' metropolitan hubs suggests that the "prairie sky" is not as "wide and high" as it once was.⁹² Texas leads the country in loss of working lands, with a net loss exceeding one million

82. *Id.*

83. *Id.*

84. Lacey, *supra* note 79.

85. *Id.*

86. Koba, *supra* note 67 (citing USDA 2012 Census of Agriculture).

87. See Ashley Davenport, *Utilizing Social Media to Boost Agritourism Businesses*, AG WEB (Jan. 11, 2017, 2:43 PM), <http://www.agweb.com/article/utilizing-social-media-to-boost-agritourism-businesses-naa-ashley-davenport/> (highlighting the \$54 million annual economic impact of agritourism operations in Tennessee).

88. *Id.*

89. Shannon Greenwood, *Social Media Update 2016*, PEW RES. CENTER (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> (reporting that 79 percent of Americans use Facebook, 32 percent use Instagram, and 24 percent use Twitter).

90. The legislature could initiate such marketing; government-run internet promotional efforts have already proven beneficial to operations in other states. See, e.g., OKLA. AGRITOURISM, www.oklahomaagritourism.com (last visited Feb. 27, 2017).

91. Logan Hawkes, *Urban Sprawl Threatens Texas Farm Leases*, FARM PRESS (Mar. 18, 2016), <http://southwestfarmpress.com/management/urban-sprawl-threatens-texas-farm-leases>.

92. Perry Como, *Deep in the Heart of Texas* (Decca Records 1942).

acres to non-agricultural uses between 1997 and 2012.⁹³ This loss was concentrated to cities that experienced significant population increases.⁹⁴ Consider, for example, the central Texas cities of San Marcos, Cedar Park, and Georgetown, each less than a forty-minute drive from Austin, the state's capital. Between 2012 and 2013 alone, these hill-country towns combined for an eighteen percent population increase,⁹⁵ requiring substantial land conversion for residential and commercial development.

Although helpful to large cities, the conversion of land to urban uses opposes the interests of most farmers. Expansion has provoked construction of new infrastructures and water-resource depletion, hindering the irrigation efforts of local growers.⁹⁶ Yet Texas has enjoyed a thirty-six percent increase in the market-value-per-acre of its working lands.⁹⁷ Soaring land prices and an aging farmer population have driven many families to sell their property and seek new careers in urban settings.⁹⁸

Nevertheless, implementing agritourism in Texas will combat the economic effects of land loss for farmers and capitalize on rising populations in historically rural areas. Additional revenue streams from agritourism provide an alternative to selling off acreage or abandoning farming wholesale.⁹⁹ Aging farmers unwilling to surrender their land can maintain profitability by highlighting their farm's recreational worth and exploiting their expertise.¹⁰⁰ And despite high start-up costs for prospective farmers who do not inherit a farm,¹⁰¹ legislative support will allow a new generation of farmers to preserve Texas' family farms through a combination of agritourism and traditional operations.

Passage of the Texas Agritourism Act indicates that the legislature is mindful of the burden that continued urbanization levies upon the state's farmers. The statute, however, does not feature a provision specifically addressing its purpose. The states whose statutes include purpose sections

93. *Land Trends Fact Sheet*, *supra* note 51.

94. See *Land Trends Report*, TEX. LAND TRENDS, txlandtrends.org/files/lt-2014-report.pdf (last visited Feb. 27, 2017).

95. *Id.*

96. Hawkes, *supra* note 91.

97. *Land Trends Fact Sheet*, *supra* note 51.

98. See MacLaggan, *supra* note 9 ("You can come out here and listen to meadowlarks, but it might do to trade solitude for a bit of culture.").

99. Miller, *supra* note 70, at 35–36.

100. Tew, *supra* note 39, at 217.

101. Mark Koba, *Wanted: More Young People for an Old US Industry*, CNBC U.S. ECON. (Apr. 11, 2014, 1:10 PM), <http://www.cnbc.com/2014/04/11/-to-keep-the-younger-generation-down-on-the-farm.html>.

generally do not mention urbanization,¹⁰² with the exception of Idaho's Agritourism Promotion Act, which mentions it explicitly:

The legislature finds that agriculture plays a substantial role in the economy, culture and history of Idaho. As *an increasing number of Idahoans are removed from day-to-day agriculture experiences*, agritourism provides a valuable opportunity for the general public to interact with, experience, and understand agriculture. Inherent risks exist on farms and ranches, the elimination of which would diminish the agritourism experience. Uncertainty of potential liability associated with inherent risks has a negative impact on the establishment and success of agritourism operations.¹⁰³

In this way, the Idaho statute claims to bridge the gap between urban residents and farmers while reinforcing agritourism's non-economic goals. Because urbanization is even more pervasive in Texas,¹⁰⁴ the Texas legislature should add a similar purpose provision that characterizes agritourism as a mechanism for integrating urbanization and agriculture.¹⁰⁵

3. Recognizing Renewed Interests in Food

Even as rural populations shrink and urban ones surge, there is a trending interest in sustainable living and urban agriculture among non-farmers.¹⁰⁶ Examples of urban agriculture include "raising chickens for eggs [and] planting gardens" outside one's home.¹⁰⁷ Given the harsh environmental concerns often associated with commercial farming,¹⁰⁸ the nation's "locavores"¹⁰⁹ seek ways to healthily and responsibly feed themselves and their families. Additionally, books and films depicting the "adverse health

102. See KAN. STAT. ANN. § 32-1431 (West 2004); COLO. REV. STAT. ANN. § 13-21-121(1) (West 2014); ARK. CODE ANN. § 2-11-102 (West 2011).

103. IDAHO CODE ANN. § 6-3002 (West 2013) (emphasis added).

104. *Land Trends Fact Sheet*, *supra* note 51 (noting that seven of the country's fifteen most rapidly growing cities are in Texas).

105. See *infra* Part V.

106. See generally Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231 (2012).

107. *Id.* at 233.

108. *Id.* at 234-35.

109. *Definition of Locavore*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/locavore> (last visited Feb. 27, 2017) (defining locavore as "one who eats food grown locally whenever possible").

consequences of typical American diets” have spurred interest in the “slow food” and “local food” movements.¹¹⁰

Today, perhaps more than ever before, “food is more than just fuel to people.”¹¹¹ Decisions about what to eat are “intimately intertwined” with human identity and “can express our religious beliefs, our political views, and our basic understandings of culture.”¹¹² Agritourism is just one channel through which local-food proponents can “experience rural life and interact . . . with agricultural production.”¹¹³ And for areas still hindered by restrictive municipal ordinances,¹¹⁴ agritourism is a way to indulge newfound cravings for hands-on interaction with agriculture.

Besides its advantages to farmers, agritourism provides recreational, educational, and social benefits to urban residents and is a connection point between metropolitan centers and local agriculture. In sum, farmers and non-farmers alike stand to reap the rewards that agritourism sows.

III. Sister-State Legislation and the Texas Agritourism Act

A. Kansas

The Kansas Agritourism Promotion Act¹¹⁵ was the first statute of its kind.¹¹⁶ The statute’s purpose is to promote agritourism and benefit farmers by limiting liability and creating an agritourism registry.¹¹⁷ Statutorily, the purpose is broad in scope:

The purpose of this act is to promote rural tourism and rural economic development by encouraging owners and operators of farms, ranches, and *rural attractions*, including historic, cultural, and natural attractions, to invite members of the public to view, observe and participate in such operations and attractions for

110. Miller, *supra* note 70, at 37.

111. Melissa D. Mortazavi, *Tainted: Food, Identity, and the Search for Dignitary Redress*, 81 *BROOK. L. REV.* 1463, 1464 (2016).

112. *Id.*

113. Miller, *supra* note 70, at 37.

114. *See* Schindler, *supra* note 106, at 239–44.

115. *KAN. STAT. ANN.* § 32–1430 (West 2004).

116. In 2004, Kansas became the first state to provide limited liability to farmers engaging in agritourism. *See About Kansas Agritourism*, TRAVEL KAN., <https://www.travelks.com/industry/agritourism/about-kansas-agritourism/> (last visited Feb. 27, 2017).

117. *Id.* (“The purpose of the act is to promote the growth of the agritourism industry in Kansas.”).

recreational or entertainment purposes. *This act shall be liberally construed to effectuate that purpose.*¹¹⁸

The Kansas statute's purpose section resembles those of other states that address legislative objectives,¹¹⁹ but is the only such section to require liberal construction. For this reason—and because any number of activities could be considered “rural attractions”—the statute likely applies beyond the farm context.¹²⁰ A narrower definition may be preferable for advancing the farm-centric purposes of agritourism.¹²¹

Consistent with its purpose statement, the Kansas statute offers a broad definition of agritourism. Under the statute, an agritourism activity is any event that allows the public, “for recreational, entertainment, or educational purposes,” to take part in rural activities.¹²² These events include, but are not limited to, “farming activities, ranching activities or historic, cultural or natural attractions.”¹²³ This broad definition of agritourism supports the proposition that numerous activities outside of farming and agriculture may warrant the statute's coverage. In addition, there is sizable overlap between Kansas' agritourism statute and its recreational use statute, which limits the liability of landowners who “make land and water areas available to the public for recreational purposes.”¹²⁴

118. KAN. STAT. ANN. § 31–1431 (West 2004) (emphasis added).

119. *See* COLO. REV. STAT. ANN. § 13–21–121(1) (West 2014); ARK. CODE ANN. § 2–11–102 (West 2011). Note the unique purpose ascribed to the Idaho Agritourism Promotion Act, which impliedly addresses the issue of urbanization. IDAHO CODE ANN. § 6–3002 (West 2013) (stating that “[a]s an increasing number of Idahoans are removed from day-to-day agricultural experiences, agritourism provides a valuable opportunity for the general public to interact with, experience and understand agriculture”).

120. *See* Dooley, *supra* note 4, at 464 (“For example, a rural, non-farmer landowner could open an old country schoolhouse for tours. As a ‘rural attraction,’ the operator could possibly call it agritourism even though it does not directly promote education, appreciation, or knowledge of agriculture.”).

121. *Id.* (arguing that legislators should “limit the scope . . . to those agricultural activities conducted on a farm or ranch by a farmer or rancher in order to further the intent and purpose of supplementing farm income”).

122. KAN. STAT. ANN. § 32–1432(a) (West 2014).

123. *Id.*

124. *See id.* § 58–3201 (enacted in 1965). Activities amounting to a recreational purpose under the Kansas Recreational Use Statute include “hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, noncommercial aviation activities and viewing or enjoying historical, archaeological, scenic, or scientific sites.” *Id.* § 58–3202(c). Some, if not most, of these activities arguably amount to natural attractions in line with the Kansas Agritourism Promotion Act.

To qualify for the statute's protection, agritourism operators must register with the Kansas Department of Wildlife, Parks and Tourism ("DWPT").¹²⁵ Registered operators must also post warning signs and include provisions in their release agreements to provide notice of their limited liability to participants.¹²⁶ To encourage compliance, there is no registration fee,¹²⁷ but operators must renew their registration every five years.¹²⁸ The statute requires that the DWPT distribute its list of registered operators to the public to "promote and publicize" agritourism in the state.¹²⁹ A few states have followed Kansas' lead by requiring registration,¹³⁰ and in these states the benefit to farmers is twofold—limited liability and state-funded marketing.

For limiting liability, the Kansas statute provides that "any participant [assumes] the inherent risk" by engaging in agritourism such that, on any damages claim, the operator should plead the affirmative defense of assumption of risk.¹³¹ Of course, there are exceptions: The statute does not preclude liability for willful conduct or failure to warn the participant of dangerous conditions known to the operator.¹³² The statute defines inherent risks as "those dangers or conditions which are an integral part" of the agritourism activity.¹³³ Naturally, the pertinent issue on many damages claims will be whether the risk was inherent to the activity.¹³⁴ In effect, the statute charges the finder-of-fact with deciding whether the injury stemmed from an inherent risk, leaving room for creative lawyers to elude the

125. *Id.* § 32-1433(a) (requiring operators to describe the agritourism activity and the location in which it will take place).

126. *Id.* § 32-1434 (providing the required language for signs and contracts).

127. KAN. STAT. ANN. § 32-1433(d) (West 2014).

128. *Id.* § 32-1433(c).

129. *Id.* § 32-1433(b).

130. OKLA. STAT. ANN. tit. 2, § 5-15(2) (West 2013); MO. STAT. ANN. § 537.850(8) (West 2012); N.D. CENT. CODE ANN. § 53-13-02 (West 2011).

131. KAN. STAT. ANN. § 32-1435 (West 2004). Most states with agritourism legislation have adopted the inherent-risk approach.

132. *Id.* § 32-1436. This includes dangerous conditions in the land, facilities, or equipment used in the activity or the dangerous propensity of an animal. *Id.*

133. *Id.* § 32-1432(b) (including "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 operations, as well as "the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others").

134. Under this approach, operators have the burden of proof to show, by a preponderance of the evidence, that the statutory defense applies. Centner, *supra* note 15, at 115.

statute's coverage.¹³⁵ For this reason (among others), the inherent-risk approach may increase, rather than reduce, the amount of litigation to which farmers are subjected.¹³⁶

The final and most unique characteristic of the Kansas statute is its tax-credit provision, which credits registered operators twenty percent of their liability insurance costs against state income tax.¹³⁷ Kansas is the only state to offer such an incentive. Procedurally, the statute requires that the DWPT establish criteria for determining which costs qualify for the credit.¹³⁸ For qualifying operators, this provision is especially valuable. Even though the costs to diversify through agritourism are low, such costs “may be prohibitive to the farmers [who most] need supplemental income.”¹³⁹ Kansas therefore employs the tax-credit provision to offset such costs and encourage participation in agritourism.

B. Colorado

Colorado¹⁴⁰ passed its agritourism statute one decade after Kansas.¹⁴¹ Colorado's statute does not require agritourism operators to register with the state government. Instead, it commands only that operators exercise reasonable care in protecting against known dangers and post warnings on signs or written statements.¹⁴² The statute's purpose section reads as follows:

135. *See id.*

136. *See id.* at 120. Centner argues that the inherent-risk approach will add to the burden on farmers and increase litigation by requiring the involvement of a jury. *Id.* He also finds that the statutory definitions and exceptions for inherent risk “create uncertainty that undoubtedly will lead enterprising lawyers to develop reasonable arguments about the statutes' coverage.” *Id.* Finally, he contends that by requiring operators to post warnings, state legislatures have simply created “more opportunities for breaches that can lead to litigation and result in liability” for farmers. *Id.* The author agrees in part but would argue that the Texas legislature—by choosing not to employ the inherent-risk approach—crafted its statute to provide a brighter line.

137. KAN. STAT. ANN. § 32-1438(a) (West 2004).

138. *Id.* § 32-1438(c).

139. Dooley, *supra* note 4, at 464.

140. “When people first think of Colorado, they might picture the majestic Rocky Mountains and wintertime fun on skis and snowboards. However, you might be surprised to know that the foundation of the state is agriculture.” *Colorado Agritourism*, COLO. DEP'T OF AGRIC., <https://www.colorado.gov/pacific/agmarkets/agritourism> (last visited Feb. 27, 2017).

141. COLO. REV. STAT. ANN. § 13-21-121 (West 2014).

142. *Id.* § 13-21-121(5)(a) (providing warning language).

The general assembly recognizes that [participants] in . . . agritourism activities may incur injuries as a result of the inherent risks involved with these activities. The general assembly also finds that the state and its citizens derive numerous economic and personal benefits from these activities. It is, therefore, the intent of the general assembly to encourage these activities by limiting the civil liability of certain persons involved in providing the opportunity to participate in these activities.¹⁴³

In other words, the Colorado legislature reasons that the perceived benefits of agritourism outweigh the inherent risk of injury to agritourism participants.¹⁴⁴ Compared to the Kansas statute, Colorado's purpose section is superior with regard to justifying the statute's passage—it highlights the legislative rationale.

Much like the Kansas statute, Colorado's definition of agritourism blurs the line between agritourism and recreational use. It begins predictably, stating that any activity "related to the normal course of agriculture" and intended for entertainment, pleasure, recreation, or education qualifies as agritourism.¹⁴⁵ But agritourism also means (among other things) hunting, swimming, and riding motorized vehicles, so long as these occur "on or in proximity to the property of an agricultural operation."¹⁴⁶ The focus of Colorado's statute evidently is where the activity takes place, rather than whether it actually involves agriculture.¹⁴⁷

Colorado also employs the inherent-risk approach to limit operator liability. The statute provides that operators are not liable for property damage, injury, or death "resulting from the inherent risks" of agritourism.¹⁴⁸ Inherent risks are "dangers or conditions that are an integral

143. *Id.* § 13–21–121(1).

144. *Contra* Centner, *supra* note 15, at 121 ("If most people injured while participating in agritourism activities are from rural areas, the goal of spurring economic development . . . will be at the expense of its rural residents. If injured persons are not from [the] area, localized benefits may accrue at the expense of others.").

145. COLO. REV. STAT. ANN. § 13–21–121(2)(b) (West 2014).

146. *Id.*

147. To be fair, the definition also recognizes "planting, cultivation, irrigation, or harvesting of crops" as well as "animal husbandry, rodeo and livestock activities." *Id.* § 13–21–121(2)(b). Nevertheless, with all that the statute's definition provides, farmers and citizens may be left wondering what agritourism does not include.

148. *Id.* § 13–21–121(3).

part of such activities”¹⁴⁹ and participants expressly assume the risk of damages attributable to such dangers.¹⁵⁰ Liability is not precluded, however, if the operator (1) knowingly used faulty equipment; (2) acted with gross negligence or willful disregard for participant safety; or (3) intentionally injured the participant.¹⁵¹

Absent from Colorado’s liability-limiting provision is the requirement that operators plead an affirmative defense. Similar to the Georgia legislature’s approach,¹⁵² the statute functions as a bar to civil liability for those who comply with its requirements. Given the similarities between Colorado’s agritourism statute and its recreational use statute, which merely limits the damages plaintiffs can recover,¹⁵³ an effective grant of civil immunity for agritourism operators raises legitimate questions. Can lawmakers justify distinguishing between agritourism operators and others who facilitate recreational activities?¹⁵⁴

For Colorado, one justification is the importance of tourism to the state’s economy and businesses.¹⁵⁵ The number of visitors to the state and revenues attributable to tourism have increased each of the past five years.¹⁵⁶ For 2015 alone, the Colorado Tourism Office reported that seventy-eight million people visited the state, spending just over \$19 billion, which translates to \$1.13 billion in state and local taxes.¹⁵⁷ The reciprocal social benefits for tourists arguably mirror the economic benefits

149. *Id.* § 13–21–121(2)(f). Colorado’s list of inherent risks resembles that of Kansas, and litigation over whether the injury-causing risk was inherent would involve substantially the same obstacles.

150. COLO. REV. STAT. ANN. § 13–21–121(3) (West 2014).

151. *Id.* § 13–21–121(4). There is one more exception: Nothing in the liability-limiting provision “shall prevent or limit the liability of an [operator] under liability provisions set forth in the product liability laws.” *Id.*

152. *See generally* GA. CODE ANN. § 51–3–31 (West 2009) (“[A] landowner . . . shall be immune from civil liability for any injuries caused by the inherent risk.”).

153. COLO. REV. STAT. ANN. § 33–41–103(2)(a) (West 2014) (citing § 24–10–114(1)(a) for damages amounts).

154. *See* Centner, *supra* note 15, at 121 (doubting that Georgia can justify a grant of immunity).

155. *See* Jason Blevins, *Colorado Breaks Tourism Record With 77.7 Million Visitors Spending \$19.1 Billion*, DENV. POST (July 20, 2016, 1:00 PM), <http://www.denverpost.com/2016/07/20/record-colorado-tourism-2015/>.

156. *Id.*

157. *Id.*

for the state.¹⁵⁸ The Colorado Department of Agriculture boasts a similar boom for agritourism, where millions of visitors have generated a substantial economic impact for the state's agriculture industry.¹⁵⁹ In sum, an economies-of-scale¹⁶⁰ approach to agritourism may justify Colorado's decision not to include an affirmative defense requirement.

C. Oklahoma

In 2013, the Oklahoma legislature enacted the Agritourism Activities Liability Limitations Act. Unlike the Kansas and Colorado statutes, Oklahoma's statute does not contain a purpose provision. Nevertheless, its definition of agritourism is the most farm-centric of the three, providing that

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.¹⁶¹

This narrow definition ensures that the statute applies only to farmers and ranchers. It also advances one of agritourism's central goals—supplementing farm income¹⁶²—and avoids overlap between the agritourism statute and Oklahoma's recreational use statute, which does not explicitly cover activities involving agriculture.¹⁶³

158. The executive director of the Colorado Tourism Office alluded to this benefit by saying, "We don't see any benefit of moving away from [our] philosophy, which is that coming to Colorado changes people's lives and makes them feel inspired." *Id.*

159. *Colorado Agritourism*, COLO. DEP'T OF AGRIC., <https://www.colorado.gov/pacific/agmarkets/agritourism> (last visited Feb. 27, 2017).

160. *Economies of Scale*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/economiesofscale.asp> (last visited Feb. 27, 2017). As greater quantities of goods are produced, the per-unit fixed cost decreases because the costs are spread over a larger number of goods. *Id.* This logic applies with equal force to agritourism—a stronger incentive to implement agritourism leads to more operators and consequently an overall higher return for state agriculture.

161. OKLA. STAT. ANN. tit. 2, § 5–15(1) (West 2013).

162. See Dooley, *supra* note 4, at 464.

163. See OKLA. STAT. ANN. tit. 76, § 10.1 (West 2004). The statute limits the liability of landowners who make their land available to the public for outdoor recreational purposes, which includes "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

Much like its definition of agritourism, the Oklahoma statute is otherwise concise and straightforward. To warrant coverage, operators must register their agritourism activity with the Oklahoma Department of Agriculture, Food and Forestry.¹⁶⁴ They must also post warnings throughout the property and in their written release agreements with participants.¹⁶⁵ Oklahoma follows the inherent-risk approach for limiting farmer liability,¹⁶⁶ and its definition of inherent risk is comparable to that of Kansas and Colorado.¹⁶⁷ As with the Kansas statute, agritourism operators in Oklahoma must plead the affirmative defense of assumption of the risk in any action for damages related to an agritourism activity.¹⁶⁸ And finally, the Oklahoma statute does not preclude liability for actions demonstrating willful or wanton disregard for participant safety or failure to warn participants of dangerous conditions the operator knew or reasonably should have known about.¹⁶⁹

D. Texas

The Texas Agritourism Act (“Agritourism Act” or “Section 75A”) began as Senate Bill 610 in the Regular Session of the Eighty-Fourth Legislature. The legislature passed the bill into law as Texas Civil Practice and Remedies Code Section 75A on June 19, 2015.¹⁷⁰ Absent from Section 75A is any provision addressing the legislature’s intent or the statute’s purpose. Committee reports indicate that the statute’s purpose, generally speaking, is to “eliminate[] the possibility for an agritourism entity to be held liable for injury . . . if the entity provided proper warning or obtained a written waiver.”¹⁷¹ The language of Section 75A, though broad, appears to do just that.

sites, and aviation at non-public-use airports.” *Id.* § 10.1(A)(2)(b). Thus, under the Oklahoma regime, each statute serves a unique purpose.

164. OKLA. STAT. ANN. tit. 2, § 5–15(2) (West 2013).

165. *Id.* § 5–17(A).

166. *Id.* § 5–16(A).

167. *Id.* § 5–15(3) (defining inherent risk as “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”).

168. *Id.* § 5–16(A).

169. *Id.* § 5–16(B).

170. *See* TEX. CIV. PRAC. & REM. CODE § 75A (West 2015).

171. Committee Report, *Relating to Limited Liability for an Agritourism Entity Involved in an Agritourism Activity*, S. 84–610, Reg. Sess. (Tex. 2015).

The Agritourism Act provides that “an agritourism entity is not liable to any person for an agritourism participant injury or damages arising out of” such injury, so long as either a proper warning sign was posted or a written release was obtained.¹⁷² Agritourism entity means any person “engaged in the business of providing an agritourism activity,” which includes anyone who “displays exotic animals to the public on agricultural land.”¹⁷³ Agritourism activity means activities taking place “on agricultural land for recreational or educational purposes of participants.”¹⁷⁴ Section 75A defines agricultural land as “land that is *suitable for use*” in the production of plants for food or the raising of animals for use or profit.¹⁷⁵ This broad definition implies that landowners need not actually use their property for agricultural purposes to warrant coverage under the statute.¹⁷⁶ The definition of recreational purpose is also especially broad, raising concerns about overlap between the Agritourism Act and the Texas Recreational Use Statute.¹⁷⁷

In contrast to the Kansas and Oklahoma statutes, Texas agritourism operators are not required to register with a governing body to guarantee the statute’s protection. To ensure limited liability, the operator simply must either (1) post a warning sign in a “clearly visible location”¹⁷⁸ or (2) obtain a separate written release signed by the participant in advance of participation.¹⁷⁹ As with the agritourism statutes of other states, these requirements indicate that providing notice to participants of the operator’s limited liability is of utmost importance to lawmakers. In sum, Section 75A requires that participants “understand and acknowledge” that they are

172. TEX. CIV. PRAC. & REM. CODE § 75A.002(a) (West 2015).

173. *Id.* § 75A.001(3).

174. *Id.* § 75A.001(2).

175. *Id.* § 75A.001(1) (emphasis added). The full text covers any land “suitable for use in production of plants and fruits grown for human consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed; or domestic of native farm or ranch animals kept for use or profit.” *Id.*

176. *Texas Agritourism Act*, AGRILIFE EXTENSION SERV. (Feb. 1, 2016), <http://agrilife.org/texasaglaw/2016/02/01/texas-agritourism-act/>.

177. *See infra* Part IV–C. Section 75A borrows the Recreational Use Statute’s definition of recreation, which includes hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, waterskiing, bicycling, disc golf, dog-walking, radio controlled flying, and any other activity associated with enjoying nature or the outdoors. *See* TEX. CIV. PRAC. & REM. CODE § 75.001(3) (West 2015). As with the Kansas and Colorado statutes, the breadth of Section 75A’s coverage is alarming.

178. *Id.* § 75A.003 (requiring particular warning language for the sign).

179. *Id.* § 75A.004 (requiring particular warning language for the agreement and no less than 10-point boldface type).

“accept[ing] all risk[s]” when they engage in agritourism activities as a prerequisite to limited liability for farmers.¹⁸⁰

The written-release option differs from the warning-sign option in one crucial way. For written releases, a condition to enforceability is that the participant’s parent sign the release if the participant is a minor.¹⁸¹ The warning-sign provision, on the other hand, makes no mention of minors. Yet both, as mentioned, are suitable options for securing limited liability. Is the legislature suggesting that minors lack capacity to consent by signature but are nonetheless expected to appreciate warning language on an operator’s sign? If an operator posts a sign in lieu of obtaining written releases and a child is subsequently injured during an agritourism activity, would a court extend the statute’s protection to the operator just as if the child’s parent had been the one to suffer injury?

Reconciling the two modes of providing notice seems difficult respecting the issue of injured minors. Given the “strong, long-standing public policy of [Texas] to protect the interests of its children,”¹⁸² it will be interesting to see how the state’s courts treat future cases of this nature under the Agritourism Act. Many agritourism activities, after all, are designed to entertain and educate children. Despite the clerical headache, the safest approach for operators is to obtain written releases in addition to posting signs, which “may provide an important protection in the event that minor children are injured on the property.”¹⁸³

The Agritourism Act differs from the Kansas, Colorado, and Oklahoma regimes most significantly with its liability-limiting provision: Section 75A does not utilize the inherent-risk approach. Instead, it simply provides that operators are “not liable” for agritourism participant injuries or damages arising therefrom.¹⁸⁴ This approach advances the statute’s purpose as described in the committee reports—to eliminate the possibility of

180. *Id.* (providing the warning language).

181. *Id.* § 75A.004(2).

182. *Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991). The written-release option, even though it requires parents to sign on behalf of minors, may be vulnerable to attack for the same reason. *See Munoz v. II Jaz Inc.*, 863 S.W.2d 207, 209–10 (Tex. App.—Houston 1993) (holding that a section of the Family Code, which empowered a parent to make legal decisions for their child, did not give the parent the power to waive a child’s cause of action for personal injuries).

183. Tiffany Dowell Lashmet, *Landowner Liability Protections: Texas Recreational Use Statute, Agritourism Act, and Farm Animal Liability Act*, AGRILIFE EXTENSION SERV. (May 26, 2016), agriflife.org/texasaglaw/files/2016/08/Landowner-Liability-Statutes.pdf.

184. TEX. CIV. PRAC. & REM. CODE § 75A.002(a) (West 2015).

liability¹⁸⁵—and renders unnecessary the affirmative defense requirement that characterizes other statutes. Agritourism participant injury is defined as any 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.”¹⁸⁶ Texas’ approach is preferable to the inherent-risk approach because it precludes the need to distinguish between activities and injuries. It simply asks whether the injury occurred during participation in the activity. If it did, then the operator is not liable to the participant.¹⁸⁷

Finally, several exceptions apply to the liability-limiting provision. First, the Agritourism Act does not apply to injuries the operator intentionally caused.¹⁸⁸ Next, liability is not precluded for injuries proximately caused by the operator’s negligence “evidencing a disregard for the safety” of the participant¹⁸⁹ or the operator’s failure to properly train an employee.¹⁹⁰ Last, the Agritourism Act will not protect operators from liability for injuries proximately caused by either of the following dangers that the operator knew or should have known about: (1) dangerous conditions with the land, facilities, or equipment used in the activity or (2) the dangerous propensity of animals used in the activity that is not disclosed to the participant.¹⁹¹ The latter two exceptions seem especially broad and “will likely result in many case-by-case determinations” about whether the Agritourism Act should apply.¹⁹²

IV. *Interplay with Other Texas Statutes*

A. *The Right to Farm Act*

Because of its position as a national leader in agricultural production, some have characterized Texas “as a rugged, fend-for-itself western

185. *See supra* note 171.

186. TEX. CIV. PRAC. & REM. CODE § 75A.001(5) (West 2015) (emphasis added).

187. Interestingly, a similar Texas statute—the Farm Animal Liability Act—does employ the inherent-risk approach. *See* TEX. CIV. PRAC. & REM. CODE § 87.003 (West 2011) (providing that farm animal professionals are not liable for damages that are an inherent risk of a “farm animal activity” as defined by the statute).

188. TEX. CIV. PRAC. & REM. CODE § 75A.002(b)(2) (West 2015).

189. *Id.* § 75A.002(b)(1)(A).

190. *Id.* § 75A.002(b)(1)(C).

191. *Id.* § 75A.002(b)(1)(B)(i)–(ii).

192. Lashmet, *supra* note 183.

state.”¹⁹³ Texas farmers are no different, but urbanization in recent decades has spurred disagreements between landowners respecting land use and nuisance claims. Amid nationwide urban development in the 1970s and 1980s, many state legislatures concluded it was “sound policy to create an initial hurdle” to landowners wishing to bring a nuisance action “against a pre-existing agricultural operation.”¹⁹⁴ Since then, every state has enacted some version of a “right to farm” law.¹⁹⁵ And in 1981, Texas adopted its own.¹⁹⁶

In adopting the Right to Farm Act (“RTFA”), the Texas legislature’s principal aim was to “conserve, protect, and encourage the development and improvement of [Texas’] agricultural land for the production of food” and other products.¹⁹⁷ To that end, the express purpose of the RTFA is to “reduce the loss [of] agricultural resources by limiting the circumstances under which agricultural operations may be regulated or considered to be a nuisance.”¹⁹⁸ The RTFA provides that

No nuisance action may be brought against an agricultural operation¹⁹⁹ that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.²⁰⁰

To further deter litigation, anyone who violates the RTFA “is liable to the agricultural operator for all costs and expenses incurred in defense of the

193. Jason Jordan, *A Pig in the Parlor or Food on the Table: Is Texas’s Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Economic Growth?*, 42 TEX. TECH L. REV. 943, 944 (2010).

194. *Id.* at 945.

195. *Id.*

196. *See* TEX. AGRIC. CODE § 251 (West 1981).

197. *Id.* § 251.001.

198. *Id.*

199. Agricultural operation includes: “cultivating the soil; producing crops for human food, animal feed, planting seed, or fiber; floriculture; viticulture; horticulture; silviculture; wildlife management; [and] raising or keeping livestock or poultry.” *Id.* § 251.002(1). Notably, the RTFA’s coverage is narrower than that of the Agritourism Act. Under the RTFA, farmers must use the land for such operations, whereas under the Agritourism Act, the land merely must be “suitable for” such operations to warrant coverage. *See* TEX. CIV. PRAC. & REM. CODE § 75A.001(1) (West 2015).

200. TEX. AGRIC. CODE § 251.004(a) (West 1981). Importantly, the RTFA “does not restrict or impede the [state’s] authority . . . to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.” *Id.*

action.”²⁰¹ Additionally, those (including owners, lessees, or occupants of agricultural land) who develop or maintain an “agricultural improvement” are entitled to the RTFA’s protection, as such improvements expressly do not amount to a nuisance under the statute.²⁰² The RTFA does not, however, protect improvers whose conduct “obstructs the flow of water, light, or air to other land.”²⁰³

In assessing whether a farmer is entitled to protection under the RTFA, the “established date of operation is the date on which an agricultural operation commenced operation.”²⁰⁴ Importantly, subsequent expansion “does not divest the agricultural operation of a previously established date of operation.”²⁰⁵ Texas courts have not required farmers to “prove the exact date on which agricultural operations first commenced”; they must only “show when the qualifying activity relevant to a particular nuisance claim began.”²⁰⁶

In practice, the RTFA statute of repose applies where the farmer proves that (1) the operation was in business for more than one year before the plaintiff filed suit and (2) the conditions complained of have “existed substantially unchanged” since the operation began.²⁰⁷ In *Holubec v. Brandenberger*, neighbors to a sheep feedlot sued to enjoin the feedlot’s operations, alleging that odors and noise (among other things) amounted to a nuisance.²⁰⁸ The trial court agreed and granted the injunction, and the court of appeals affirmed.²⁰⁹ In reversing and dissolving the injunction, the Supreme Court of Texas stated that it is irrelevant “when the [plaintiff] discovers the conditions . . . constituting the basis for the nuisance action”

201. *Id.* § 251.004(b). Such costs may include, but are not limited to, attorney fees, court fees, travel, and “other related incidental expenses incurred in the defense.” *Id.*

202. *Id.* § 251.006(a). Such improvements may include “pens, barns, fences, and other improvements designed for sheltering, restriction, or feeding of [animals], for storage of produce or feed, or for storage or maintenance of implements.” *Id.* § 251.006(c)(2).

203. *Id.* § 251.006(b).

204. *Id.* § 251.003.

205. TEX. AGRIC. CODE § 251.003 (West 1981).

206. See *Jordan*, *supra* note 193, at 966 (citing *Aguilar v. Trujillo*, 162 S.W.3d 839, 854 (Tex. App.—El Paso 2005)).

207. *Holubec v. Brandenberger*, 111 S.W.3d 32, 38 (Tex. 2003).

208. *Id.* at 34. *Holubec* had operated the feedlot since 1987 “to wean and fatten [lambs] for sale.” *Id.* The lot was large enough to support several thousand lambs, and the nearest pen was less than 200 feet from Brandenberger’s home. *Id.* In 1997, Brandenberger “began noticing foul odors[,] swarms of flies, increased dust, and noise from bleating lambs being weaned from their mothers.” *Id.* Brandenberger filed suit. The jury concluded that the lot was a nuisance, and the trial court issued a permanent injunction. *Id.* at 35.

209. *Id.* at 35.

and that the “relevant inquiry is whether [those conditions] have existed for more than one year.”²¹⁰ The Court explained that the RTFA “was intended to bar a nuisance action against a lawful agricultural operation one year after the commencement of the conditions . . . providing the basis for that action.”²¹¹ In recent cases, the Texas courts of appeals have adhered to the *Holubec* framework.²¹²

In the only case challenging the RTFA’s constitutionality, the Corpus Christi Court of Appeals overruled both of the plaintiffs’ points of error.²¹³ In *Barrera v. Hondo Creek Cattle Company*, a group of plaintiffs alleged that flies, dust, and odors from Hondo Creek’s cattle feedlot amounted to a nuisance.²¹⁴ First, the plaintiffs argued that the RTFA was unconstitutional as applied because they had not “come to the nuisance”—the nuisance, they alleged, had come to them.²¹⁵ But the court concluded there was “no authority that [Hondo Creek] needed to prove more than the elements of the agricultural code’s statute of repose to take advantage of its affirmative defense.”²¹⁶ Second, the plaintiffs argued that the RTFA amounted to a taking of property without due compensation.²¹⁷ Under Texas law, a “taking” consists of “(1) an intentional act of a government entity; (2) accomplished for a public purpose; (3) that damages or takes property from a private citizen.”²¹⁸ Because the plaintiffs failed to satisfy the first two elements, the court concluded that the effect of the RTFA could not be a taking.²¹⁹

210. *Id.* at 38.

211. *Id.*

212. *See Ehler v. LVDVD, L.C.*, 319 S.W.3d 817 (Tex. App.—El Paso 2010) (holding that the RTFA barred a nuisance action related to manure from a dairy washed onto neighboring property by rain); *Reeves v. Hooton*, No. 12–12–00259–CV, 2013 WL 4680529 (Tex. App.—Tyler Aug. 29, 2013) (holding that use of a propane cannon to deter deer and hogs from interfering with crops had not existed substantially unchanged since the established date of operation).

213. *See Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App.—Corpus Christi 2004).

214. *Id.* at 546. The trial court found for Hondo Creek, and the court of appeals affirmed. *Id.*

215. *Id.* at 549.

216. *Id.*

217. *Id.* at 549. The court addressed the takings clauses of both the United States Constitution and Texas Constitution. *See id.* at n.9.

218. *Domel v. City of Georgetown*, 6 S.W.3d 349, 357 (Tex. App.—Austin 1999) (citing *Steele v. Houston*, 603 S.W.2d 786, 788–92 (Tex. 1980)).

219. *Barrera*, 132 S.W.3d at 549.

In light of *Barrera* and the statute's existing language, the RTFA "is likely to withstand constitutional scrutiny."²²⁰ Yet the Supreme Court of Texas has not addressed the RTFA's constitutionality and "the United States Supreme Court [has a] history of protecting private property rights."²²¹ Moreover, plaintiffs in other states have successfully challenged their versions of the non-nuisance law.²²² It follows that although the RTFA—like the Agritourism Act—certainly demonstrates the legislature's desire to promote agricultural interests (even at the expense of other citizens), its persuasive value extends only so far. Whether agritourism participants will challenge the Agritourism Act's constitutionality remains to be seen, but operators defending such challenges in the future should rely on the other Texas statutes below before citing the RTFA for support.

B. The Farm Animal Liability Act

As early as 1995, the Texas legislature took measures to protect farmers and ranchers from personal injury claims with its adoption of the Farm Animal Liability Act ("FALA").²²³ With respect to its structure and purpose, this statute closely resembles the Agritourism Act. Under the FALA, operators²²⁴ are not liable to a "participant in a farm animal activity or livestock show [for damages if such damages result] 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."²²⁵ Such inherent risks may include

- (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;

220. Jordan, *supra* note 193, at 979.

221. *Id.* at 970.

222. *Id.* at 958–60 (discussing state supreme court decisions in Iowa and Washington).

223. See TEX. CIV. PRAC. & REM. CODE § 87 (West 2011).

224. Such individuals include "farm animal activity sponsor[s], farm animal professional[s], livestock producer[s], livestock show participant[s], or livestock show sponsor[s]." *Id.* § 87.003. Each designation bears its own definition under the FALA. See *id.* § 87.001.

225. *Id.* § 87.003.

- (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.²²⁶

Interestingly, the FALA employs the inherent-risk approach, as featured in the agritourism statutes of every state other than Texas. Given the similar construction and purpose of the FALA and the Agritourism Act, this discrepancy raises the question of why the legislature chose not to utilize the inherent-risk approach for the Agritourism Act. Regardless, the FALA's language "reflects an expansive view" of inherent risk, as the five examples "cover a broad range [but] are expressly non-exclusive."²²⁷ The FALA also provides a list of exceptions to limited liability for operators,²²⁸ which "necessarily implies that [those exceptions] might otherwise be deemed inherent in [farm animal activities]."²²⁹

Coupled with the issue of inherent risk, those exceptions have prompted litigation.²³⁰ In *Loftin v. Lee*, Janice Lee went horseback riding at Terri

226. *Id.*

227. *Loftin v. Lee*, 341 S.W.3d 352, 356 (Tex. 2011).

228. The operator will be liable for damages if (1) the injury was caused by faulty equipment that the operator provided and knew or should have known was faulty; (2) the operator did not make a reasonable effort to assess the participant's ability to safely engage in the activity and manage the animal; (3) the injury was caused by a latent condition on the land under control of the operator and no warnings were provided to the participant; (4) the operator's act or omission causing the injury amounted to willful or wanton disregard for the participant's safety; (5) the operator intentionally caused the injury; or (6) for livestock shows, the operator allowed the injured person to participate and that person was not a participant as defined by the statute. TEX. CIV. PRAC. & REM. CODE § 87.004 (West 2011).

229. *Loftin*, 341 S.W.3d at 356.

230. Two cases from Texas courts of appeals are worthy of note. In *Gamble v. Peyton*, the court ruled that a horse's "violent reaction to being stung by [fire] ants . . . clearly [fell] within the statutorily defined inherent risks." 182 S.W.3d 1, 3 (Tex. App.—Beaumont 2005). In that case, the court concluded that "the horse [had] unexpectedly reacted to wild animals" and disagreed with the plaintiff's argument that fire ant beds amount to a "dangerous latent condition of land" to trigger one of the FALA's exceptions. *Id.* In *Young v. McKim*, the court held that an operator's alleged failure to inform the participant that a horse had been rescued and recently castrated did not amount to willful or wanton disregard for the participant's safety. 373 S.W.3d 776, 784 (Tex. App.—Houston 2012). The court stated that under the

Loftin's home.²³¹ Loftin, who raised horses, chose a horse for Lee to ride.²³² When the group rode down a muddy trail with overhanging vines, Lee's horse bolted, which caused Lee to fall and fracture a vertebra.²³³ Lee sued Loftin. Concluding that the FALA barred Lee's claims, the trial court granted summary judgment for Loftin, which the court of appeals reversed and remanded.²³⁴ On appeal, the Supreme Court of Texas reversed and rendered judgment for Loftin.²³⁵

Lee made two arguments on appeal. First, she argued that Loftin caused her injury by choosing an unfavorable trail and that because such "sponsor negligence" was avoidable, it was not an inherent risk.²³⁶ In response, the Court stated that the FALA "simply cannot be fairly read to limit inherent risks to those which are unavoidably associated with [farm animal] behavior."²³⁷ Instead, "determining what risks are inherent should be based on a common-sense understanding of the nature of [farm animal] activities."²³⁸ Second, Lee argued that Loftin was liable under the FALA for "failing to make a reasonable and prudent effort to determine [Lee's] ability to ride."²³⁹ The Court clarified that this exception to the FALA applies "only when the failure to make the required determination is itself the cause of the damage" and that, for the defendant to defeat the exception, "a formal, searching inquiry" is not required.²⁴⁰ Because Lee did not argue that "any further inquiry by Lofton into her ability to ride could have prevented" her injury, the FALA exception did not operate to hold Loftin liable.²⁴¹

FALA, willful and wanton disregard "is synonymous with gross negligence"—it means an act or omission that "was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Id.* at 783 (citing *Little v. Needham*, 236 S.W.3d 328, 334 (Tex. App.—Houston 2007)).

231. *Loftin*, 341 S.W.3d at 354.

232. *Id.*

233. *Id.* at 355.

234. *Id.*

235. *Id.* at 354.

236. *Id.* at 356. As Justice (now Chief Justice) Hecht put it, "[Lee] insists that her injury resulted, not from her horse's propensities, but from having been put in a place where those propensities could cause harm. Loftin was to blame, Lee argues, not the horse. A negligent sponsor is not an inherent risk of horseback riding." *Id.* at 357.

237. *Loftin v. Lee*, 341 S.W.3d 352, 358 (Tex. 2011).

238. *Id.*

239. *Id.* at 357.

240. *Id.* at 359.

241. *Id.*

The FALA's application of the inherent-risk approach stymies every effort to make predictions about the future of the Agritourism Act. Because the Agritourism Act's language removes the need to ask whether an injury-causing event was an inherent risk, FALA case law is beneficial only as far as it addresses the statute's exceptions. For example, both the FALA and the Agritourism Act include exceptions to limited liability for negligence demonstrating a disregard for participant safety and dangerous conditions on the land about which the operator knew or should have known. Texas cases interpreting those exceptions could prove useful to advocates in the future, if and when the issue of agritourism operator liability reaches the state's appellate courts.

In addition, the Agritourism Act may apply where the FALA does not. The FALA provides examples of farm-animal activities,²⁴² which hampers creative arguments for the statute's application. In contrast, an agritourism activity simply means "an activity on agricultural land for recreational or educational purposes of participants."²⁴³ Given its near-boundless definition of recreation, the Agritourism Act merits broad application and could fill holes that the FALA leaves uncovered. Armed with both statutes, Texans can confidently welcome the public onto their property for agritourism.

C. The Recreational Use Statute

The Agritourism Act somewhat resembles provisions of the Texas Recreational Use Statute ("RUS"), which the legislature adopted in 1985.²⁴⁴

242. Farm animal activity "means (1) a farm animal show, fair, competition, performance, rodeo, event, or parade that involves any farm animal; (2) training or teaching activities involving a farm animal; (3) boarding a farm animal, including daily care; (4) 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; (5) informal farm animal activity, including a ride, trip, or hunt that is sponsored by a farm animal activity sponsor; (6) placing or replacing horseshoes on an equine animal; (7) examining or administering medical treatment to a farm animal by a veterinarian; or (8) without regard to whether the participants are compensated, rodeos and single event competitions, including team roping, calf roping, and single steer roping." TEX. CIV. PRAC. & REM. CODE § 87.001(3) (West 2011).

243. TEX. CIV. PRAC. & REM. CODE § 75A.001(2) (West 2015). Recall that the subsection defines agricultural land as any land that is "suitable for" producing plants or raising animals for use or profit. *Id.* § 75A.001(1).

244. *See* TEX. CIV. PRAC. & REM. CODE § 75 (West 2015). Other sections of the RUS apply to non-agricultural land, government entities, and utility companies. This discussion focuses only on sections that apply to agricultural land.

Every state has promulgated a recreational use law,²⁴⁵ but “throughout the country [they] are neither uniform nor uniformly applied.”²⁴⁶ These statutes “promote public recreational use of privately owned land [by] granting landowners broad immunity from liability for [injuries] suffered by land users pursuing recreational activities” on the property.²⁴⁷ Texas’ version of the statute, and its treatment in the courts, sheds light on the future of the Agritourism Act. Even so, the kinship between these statutes raises an important question: If the RUS also limits liability for owners of agricultural land, what is the Agritourism Act’s role?

“Nature is full of risks [and] human interaction with [it] may lead to injuries and possibly even death.”²⁴⁸ The RUS therefore limits liability for agricultural landowners²⁴⁹ who permit or invite others to “enter the premises for recreation.”²⁵⁰ Because making wild lands safer costs “both dollars and scenic beauty,” the statute favors “leaving things as they are, but encouraging people to enjoy them nonetheless.”²⁵¹ Similar to the Agritourism Act, the drafters of the RUS reasoned that the benefit of preserving untouched lands was worth the cost of limiting premises liability claims.

The RUS and the Agritourism Act are most similar respecting their definition sections. The RUS’s definition of agricultural land is nearly identical to that of the Agritourism Act, requiring only that the land be “suitable for” certain agricultural uses.²⁵² The definition of recreation—which the Agritourism Act simply incorporates by reference—features a non-exclusive list of activities and includes “any other activity associated

245. *States’ Recreational Use Statutes*, NAT’L AGRIC. L. CENTER, <http://nationalaglawcenter.org/state-compilations/recreational-use/> (last visited Feb. 27, 2017).

246. *Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 56 (Tex. 2015).

247. Stuart J. Ford, *Wisconsin’s Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491 (1991).

248. *City of Waco v. Kirwan*, 298 S.W.3d 618, 624 (Tex. 2009).

249. Throughout this section, “owner” also includes “lessees” and “occupants” of agricultural land. *See* TEX. CIV. PRAC. & REM. CODE § 75.002(b) (West 2015).

250. *Id.* § 75.002(b).

251. *State v. Shumake*, 199 S.W.3d 279, 290 (Tex. 2006) (Brister, J., dissenting) (“We can make a river safer by removing every rock and posting warning signs every 50 feet, but it is no longer a river—it is a waterpark.”).

252. TEX. CIV. PRAC. & REM. CODE § 75.001(1) (West 2015). The RUS differs only in that it considers land suitable for “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” as agricultural land. *Id.* Such lands would evidently not warrant protection under the Agritourism Act.

with enjoying nature or the outdoors.”²⁵³ This definition is broad²⁵⁴ but does not include “every enjoyable outside activity.”²⁵⁵ Although it seems that the legislature intended to limit the meaning of recreation, the RUS “provides no clear guidance as to what those limits are.”²⁵⁶ Because the Agritourism Act applies to activities in which participants engage “for recreational or educational purposes,”²⁵⁷ future disputes involving the statute likely will surround whether the activity served a recreational purpose. In that respect, RUS case law may prove useful.

Despite these similarities, there are practical differences concerning who the statutes protect. Rather than requiring warning signs or written releases, coverage under the RUS hinges on monetary considerations. The RUS only protects landowners (1) who do not charge for entry; (2) whose combined charges for the previous year do not exceed twenty times the total amount of *ad valorem* taxes imposed on the premises for that period; or (3) who have liability insurance coverage in amounts that coincide with a subsection of the statute.²⁵⁸ The Agritourism Act may therefore protect landowners of the second or third variety because it operates “without regard to [the operator’s] compensation.”²⁵⁹

253. *Id.* § 75.001(3). Specifically, the list includes hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, bird-watching, cave exploration, waterskiing, bicycling, disc golf, dog walking, and radio-controlled flying. *Id.*

254. Courts have deemed other activities not included in the statute’s list as recreation. *See City of San Antonio v. Peralta*, 476 S.W.3d 653, 658 (Tex. App.—San Antonio 2015) (bicycling to work); *City of Lubbock v. Rule*, 68 S.W.3d 853, 858 (Tex. App.—Amarillo 2002) (playing on playground equipment); *City of Bellmead v. Torres*, 89 S.W.3d 611, 614 (2002) (sitting on a swing); *Garcia v. City of Richardson*, No. 05–01–01755–CV, 2002 WL 1752219 (Tex. App.—Dallas (2002) (kicking a soccer ball).

255. *Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 55 (Tex. 2015) (analyzing the scope of the RUS’s catchall provision and concluding that spectators at a sporting event are not engaged in recreation within the meaning of the statute).

256. *Id.* at 61 (Boyd, J., concurring) (concluding that “the statute cannot be sensibly applied, at least without the aid of additional canons of statutory construction”).

257. TEX. CIV. PRAC. & REM. CODE § 75A.001(2) (West 2015) (emphasis added).

258. *Id.* § 75.003(c). Liability for owners of agricultural land for an act or omission by the owner that results in damages to a person “is limited to a maximum amount of \$500,000 for each person and \$1 million for each single occurrence of a bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.” *Id.* § 75.004(a). Importantly, however, these limitations only apply to an owner of agricultural land “who has liability insurance coverage in effect on an act or omission [as described above] in the amounts equal to or greater than those provided[.]” *Id.* § 75.004(b).

259. *Id.* § 75A.001(2).

The RUS is also distinct in the way that it limits landowner liability. First, when an owner of agricultural land “gives permission or invites another to enter the premises for recreation,” such permission does not “assure that the premises are safe for that purpose.”²⁶⁰ Likewise, the landowner does not owe the guest “a greater degree of care than is owed to a trespasser.”²⁶¹ Under the RUS, this means the landowner is not liable “except for willful or wanton acts or gross negligence.”²⁶² Finally, the landowner does not “assume responsibility or incur liability” for any injury caused by the guest’s own actions.²⁶³ Compared to the Agritourism Act, this guests-as-trespassers standard demands less of the landowner to ensure limited liability and “effectively immunizes [them] from ordinary negligence claims[.]”²⁶⁴

Differing degrees of interactivity between landowner and guest likely explain this discrepancy with limited liability. In the recreational-use context, landowners may not see their guests or even be present while recreational activities are ongoing. In contrast, agritourism operators—as teachers, instructors, and guides—play the role of host, which requires them to engage their visitors more actively. The difference, in short, is customer service. Because agritourism operators retain greater control over the activities they offer, the Agritourism Act features broader exceptions to limited liability.²⁶⁵

The Texas Supreme Court’s recent decision in *University of Texas at Arlington v. Williams* highlights this difference.²⁶⁶ The court held that the RUS’s catchall provision within its definition of recreation “does not catch” spectating at competitive sporting events.²⁶⁷ One reason the RUS covers outdoor activities like bird-watching, but not spectating at sporting events,

260. *Id.* § 75.002(b)(1).

261. TEX. CIV. PRAC. & REM. CODE § 75.002(b)(2) (West 2015).

262. *Id.* § 75.002(a). Unsurprisingly, liability under subsection (b) is not limited for owners who acted with gross negligence, with malicious intent, or in bad faith. *Id.* § 75.002(d).

263. *Id.* § 75.002(b)(3).

264. *Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 49 (Tex. 2015).

265. *See* TEX. CIV. PRAC. & REM. CODE § 75A.002(b) (West 2015).

266. *See* 459 S.W.3d 48 (Tex. 2015).

267. *Id.* at 55. In reaching its decision, the court employed a familiar canon of statutory construction, the principle of *ejusdem generis*, which provides that “general terms and phrases should be limited to matters similar in type to those specifically enumerated.” *Id.* at 52. The court noted that recreation under the statute has remained “more specific than the word’s ordinary meaning” and does not include “all refreshing, relaxing, or enjoyable activities.” *Id.*

is because a landowner “does not build a stadium or otherwise make improvements” to the land for bird-watching.²⁶⁸ The former is a “pursuit of nature” while the latter is a “celebration of organized human activity.”²⁶⁹

What are the implications of *Williams* for the meaning of “agritourism activity” under the Agritourism Act? Are the traditional examples of agritourism more like bird-watching or attending an organized sporting event? And if “recreation” after *Williams* is limited to activities that amount to “pursuits of nature,” do farmers’ markets, pumpkin patches, and corn mazes fit the bill? In future controversies involving the Agritourism Act, perhaps courts will interpret the statute’s “educational” component to encompass these activities. Until then, these questions underscore the importance of statutory definitions of agritourism.

V. Suggestions Based on Approaches in Other States

The Agritourism Act, though concise and straightforward, is a tremendous start for agritourism promotion in Texas. By precluding questions about whether the injury’s cause was an inherent risk, the statute’s liability-limiting provision is arguably superior to those of other states. Yet Section 75A is a spring chicken. It will no doubt protect operators, but it could do more to promote agritourism in the state generally. For this reason, the legislature should consider the following three suggestions for improving Section 75A.

A. Introduce a Purpose Provision

For several agritourism statutes in other states, the defining feature is a purpose or legislative intent section. Of the twenty-two states with an agritourism law, only five states have included such a provision.²⁷⁰ Nevertheless, a purpose section is advisable for three reasons. First, for the states that do have one, this provision sets the statute’s tone and gives meaning to the rest of the provisions. Second, this provision informs citizens, who must abide by the statute, about what motivated the legislature and what the statute seeks to achieve. Finally, this provision

268. *Id.* at 54.

269. *Id.* (“Gathering together in a stadium to cheer a soccer team is not to remove oneself from human habitation but to embrace it; it is not the pursuit of nature but rather the celebration of organized human activity.”).

270. See KAN. STAT. ANN. § 32-1431 (West 2004); IDAHO CODE ANN. § 6-3002 (West 2013); COLO. REV. STAT. ANN. § 13-21-121(1) (West 2014); ARK CODE. ANN. § 2-11-102 (West 2011); KY. REV. STAT. ANN. § 247.800 (West 2012).

instructs courts, who must apply the law, concerning statutory construction and the legislature's goals.

Examples from existing statutes support these propositions. In Kansas, the purpose section highlights the legislature's goals on the one hand and advises judges on the other. The statute, of course, seeks to "promote rural tourism and rural economic development" within the state.²⁷¹ More important, however, the Kansas statute commands that its language "be liberally construed to effectuate that purpose."²⁷² The promotional feature is unremarkable—every agritourism statute promotes rural tourism. But the latter clause bears on a judge's interpretation of the text and makes an already farmer-friendly statute much more protective of agricultural interests.

In Colorado, the purpose section speaks of preserving the existing profitability of agritourism operations within the state. Because "the state and its citizens derive numerous economic and personal benefits" from agritourism, the legislature resolved to "encourage these activities" by limiting operator liability.²⁷³ Thus, the Colorado statute is more than an instrument of future success: It is a mechanism for growing an industry, the value of which the state's residents have already begun to realize.

Finally, the Idaho statute's purpose section highlights agritourism's non-economic goals. The Idaho legislature found that because "an increasing number of [the state's residents] are removed" from agricultural experiences, agritourism is "a valuable opportunity for the general public to interact with, experience, and understand agriculture."²⁷⁴ Limiting farmer liability is sensible for developing agritourism within the state because "potential liability [hinders] the establishment and success" of these operations.²⁷⁵

Texas should adopt its own purpose section and use these examples as guides. The Kansas and Idaho purpose sections are especially strong, so borrowing from their language is a logical jumping-off point. Similar to the Idaho statute, the legislature should emphasize urbanization and the importance of agriculture to the state's history and economy. In addition, it should adopt a liberal-construction clause, like that of Kansas, to ensure

271. KAN. STAT. ANN. § 32-1431 (West 2004). Note that the language of the Arkansas purpose section is almost identical to that of Kansas. See ARK CODE ANN. § 2-11-102 (West 2011).

272. KAN. STAT. ANN. § 32-1431 (West 2004).

273. COLO. REV. STAT. ANN. § 13-21-121(1) (West 2014).

274. IDAHO CODE ANN. § 6-3002 (West 2013).

275. *Id.*

that Texas courts interpret the statute in the way most favorable to landowners. Without question, adding these provisions would inform the state's residents about the statute's meaning and fortify Section 75A as a protective measure for agritourism operators.

B. Require Registration with the State

Even less common than provisions addressing legislative intent are provisions requiring farmers to register their agritourism operations with the state government. In fact, only four states require registration as a condition precedent to limited liability under their agritourism statutes.²⁷⁶ Despite its limited recognition, the registration requirement serves the interests of both state governments and agritourism operators themselves. For two reasons in particular, Texas should require registration as a prerequisite to coverage under Section 75A.

The first reason benefits the government. By requiring registration, the Texas legislature could catalog the state's operators and screen agritourism activities within its borders. Although their statutes employ different language, Kansas, Oklahoma, and North Dakota each require their operators to register the activity to be offered,²⁷⁷ and Kansas even requires details about the location where the activity will take place.²⁷⁸ Based on the statutory text, it is not clear whether these states also condition their statutes' coverage on approval of the activity, but Texas should adopt such a requirement.²⁷⁹ Requiring registration, if nothing else, would allow the state to gather information from operators, which the legislature can then use for promotional efforts.

276. See KAN. STAT. ANN. § 32-1433 (West 2004); OKLA. STAT. ANN. tit. 2, § 5-15(2) (West 2013); MO. STAT. ANN. § 537.850(8) (West 2012); N.D. CENT. CODE ANN. § 53-13-02 (West 2011).

277. See, e.g., *id.* § 53-13-02(2) ("The registration must include a description of the agritourism activity that the person provides or intends to provide.").

278. KAN. STAT. ANN. § 32-1433(a)(2) (West 2004).

279. The legislature could delegate an application and approval process to a state agency, such as the Department of Agriculture. Approved operators and activities would still be subject to the Agritourism Act's warning sign or written release requirement (as in other states), but requiring approval ensures that activities in the state comport with the legislature's definition of agritourism (though it is likely broad because of its reference to the RUS). If the activity is not agritourism as the legislature understands it, the operator could amend its application or abandon the endeavor. Requiring approval also promotes a higher-quality agritourism experience across the state, as a registration requirement may deter less serious operators.

The second reason benefits the operators. After it has cataloged the state's operators and activities, the legislature could make this information available to the public as a form of state-sponsored agritourism marketing. The Kansas statute, for example, requires a state agency to publicize registered operators to "advance the purpose of [the statute] by promoting and encouraging" agritourism in the state.²⁸⁰ As a result, the government enjoys the prospect of increased out-of-state visitors and operators enjoy increased traffic to their attractions. In the same way, Texas should require registration to bolster marketing efforts and facilitate the final suggestion below.

C. Develop Online Agritourism Resources

Once it has assembled sufficient information about agritourism within its borders, the Texas legislature should launch online marketing efforts on behalf of the state's operators. A handful of states have developed comprehensive agritourism websites to promote their agritourism industries and connect consumers with operators.²⁸¹ Oklahoma's website, *Oklahoma Agritourism*, is the strongest example.²⁸² The site is a valuable resource for tourists and operators alike and serves as a model after which Texas could craft its own program.

For tourists, *Oklahoma Agritourism* provides information about the state's operators and the activities they offer at their farms. There is plenty to explore, as the site catalogs "more than 500 events and destinations."²⁸³ The interface is simple to navigate and compatible with mobile devices.

280. *Id.* § 32-1433(b). Specifically, the Kansas statute requires the Secretary of Wildlife, Parks, and Tourism to keep a list of registered operators, activities, and locations, and to make its list available to the public. *Id.* The Secretary should also "publicize registered agritourism operators, activities, and locations" to promote agritourism "in conjunction with other agritourism and rural tourism efforts" of that office. *Id.* Registration in Kansas is effective for five years, and no fee is charged to agritourism registrants. *Id.* § 32-1433(c)-(d); see also N.D. CENT. CODE ANN. § 53-13-02(3)-(4) (West 2011) (same). North Dakota's statute also requires the state Division of Tourism to provide a copy of the statute to each agritourism registrant. *Id.* § 53-13-07.

281. See OKLA. AGRITOURISM, <http://oklahomaagritourism.com/> (last visited Feb. 27, 2017); KAN. AGRITOURISM, <https://www.travelks.com/industry/agritourism/> (last visited Feb. 27, 2017); KY. FARMS ARE FUN, <http://www.kentuckyfarmsarefun.com/> (last visited Feb. 27, 2017); TENN. AGRITOURISM, <http://tennesseeagritourism.org/> (last visited Feb. 27, 2017); MISS. AGRITOURISM, <http://msagritourism.org/> (last visited Feb. 27, 2017).

282. See OKLA. AGRITOURISM, <http://oklahomaagritourism.com/about/> (last visited Feb. 27, 2017). *Oklahoma Agritourism* is a joint program of the Oklahoma Department of Agriculture, Food and Forestry and the Oklahoma Tourism and Recreation Department. *Id.*

283. *Id.*

Users can browse by activity type²⁸⁴ or region of the state,²⁸⁵ allowing for quick searches of activities that interest them, narrowed by geographic area. When a user clicks on an attraction, the site provides detailed information about the operator and an inset map so the user can conveniently plan their trip.²⁸⁶ The site also includes icons linked to social media platforms so the user can quickly forward or share the operator's information.

For operators, *Oklahoma Agritourism* promises that its staff is “dedicated to helping entrepreneurial farmers . . . develop their agritourism attractions [with] extensive marketing and public relations campaigns to help promote and develop their businesses into destinations.”²⁸⁷ First, the operator must submit their farm to the state agritourism inventory.²⁸⁸ Next, an *Oklahoma Agritourism* representative contacts the operator to arrange a meeting at their farm.²⁸⁹ Finally, the operator's information is added to the website and becomes eligible for publication in *Oklahoma Agritourism's* e-newsletter and relevant travel brochures.²⁹⁰ Registered operators also have access to other marketing resources and topical workshops.²⁹¹ Most important, these services are free to operators who register their farms.²⁹²

VI. Conclusion

Texas is well-positioned to provide these services to its operators and residents. Section 75A marks the beginning of the story for Texas agritourism, but the state's agritourism regime ought to be as much about

284. The activity drop-down list includes birding, country stays, farm and ranch attractions, farmers markets, guest ranches, hunting, mazes, petting farms, pumpkin picking, specialty crops or products, teachable moments, trail riding, u-pick, vineyards and wineries, and weddings. *Id.*

285. The regions drop-down list includes Central, Northeast, Northwest, South-Central, Southeast, and Southwest Oklahoma. *Id.*

286. Each operator page features a description of the attractions offered, hours of operation, contact information, and directions to the operator's land. *Id.*

287. *Becoming a Producer*, OKLA. AGRITOURISM, <http://oklahomaagritourism.com/about/becoming-a-producer/> (last visited Feb. 27, 2017).

288. *Add a Farm*, OKLA. AGRITOURISM, <http://producer.oklahomaagritourism.com/> (last visited Feb. 27, 2017). The operators must disclose their name, the name of their business, contact information, location, and a brief description of their current business.

289. *Marketing*, OKLA. AGRITOURISM, <http://producer.oklahomaagritourism.com/> (last visited Feb. 27, 2017).

290. *Id.*

291. *Id.*

292. *About Us*, OKLA. AGRITOURISM, <http://producer.oklahomaagritourism.com/> (last visited Feb. 27, 2017).

promotion as protection. Given its dominant position in agriculture and the scenic beauty of its lands, the only thing holding Texas back is itself. To be sure, farmers will do their part. The state's humble workmen "keep food on our plates without much fanfare or recognition."²⁹³ Promoting agritourism is one way to return the favor, but all parties involved stand to benefit. Agritourism "reminds us of all that was good and could be again," and Terence Mann's message has never been more true: If you build it, they will come!

293. Dooley, *supra* note 4, at 483.