Increased urbanization puts livestock farms closer than ever to highways and population centers, heightening the risk of accidents and resulting liabilities. Consequently, it is important to understand law regarding liabilities for damages caused by loose livestock. This session will look at the exposures relating to loose livestock, the owner’s responsibilities, and reasonable precautions to avoid such risks.
Notes

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Loose animal liabilities can be potentially enormous. Because of the continuing urbanization of our country and expansion of residential areas into the countryside, livestock facilities are now closer than ever to highways and populated cities. This increases the risk for injuries, claims, and, consequently, lawsuits.

These materials are designed to help claims staff, underwriters and agents understand the liabilities and legalities of loose livestock claims. These materials also provide practical suggestions to help avoid and respond to these claims.

I. OVERVIEW

The law regarding liability for escaping or trespassing livestock has undergone an evolution of sorts. By way of history, under English common law the owner or possessor of livestock was strictly liable for damages resulting from their trespasses. Speiser, *The American Law of Torts* § 21:32 (1990). However, the livestock’s owner, at common law, had no duty to keep his animals off of public highways and would be liable only where he knew the animal had a dangerous propensity or trait or unless he should reasonably have expected that injury would result from the situation. Speiser, *The American Law of Torts*, § 21:34 (1990).

Over time, state laws have modified this basic common-law standard. Areas of high population density — typically in the Eastern United States — usually follow the “fence in” rule that obligates animal owners and/or keepers to keep their livestock reasonably confined and makes them liable in some way when animals escape under theories of negligence and/or strict liability. By comparison, some states (or sections of states) follow an open range or “fence out” rule that imposes no fencing-in requirement. The state-by-state variations can be tremendous.

A. Negligence

The majority of the states impose liability on the animal owner or keeper who was negligent in causing or contributing to the animal’s escape. But what is negligence? A highly authoritative, widely-accepted definition of negligence can be found in *Black’s Law Dictionary* (5th Edition), which states, in part:

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under the circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances.

It is the imprecise nature of this definition and the flexibility in which it is interpreted in the courts that make each negligence claim unique and outcomes can be difficult to predict. Frustrating things even further for the legal and insurance industries, “expert witnesses” often become involved in the litigation; despite their purported expertise, they rarely agree as to what does, or does not, qualify as “negligent” or below the standard of care.
The fact is, in any negligence matter plaintiffs always bear the burden of proof. Consequently, they must provide some valid explanation of how the conduct of the insured or the defendant was negligent or unreasonable. With very few exceptions (that are discussed in these materials) the mere happening of an occurrence — no matter how tragic — is usually not, in itself, sufficient evidence of negligence.

1. Examples of Negligence Matters

Allegedly Defective Fences

MISSOURI - Barrett v. Parker, 757 So.2d 182 (Miss. 2000). Court noted that where defective fences or cattle guards have been shown, evidence of prior accidents or stock previously loose may be admitted to show fence condition.

TEXAS - Harlow v. Hayes, 991 S.W.2d 745 (Tex. 1999). Because the incident occurred in an area where there was no "stock [confinement] law," fencing standards in Agricultural Code could not be used to establish standard of care for purposes of negligence claim.

OKLAHOMA - Kelley v. Barrett, 897 P.2d 289 (Okla. 1995). Plaintiff’s vehicle struck defendant's horse, which was loose on the street. Some evidence existed that the defendant's fences were not in good repair and that the horses had escaped several times before. Reversing the trial court, the Oklahoma Supreme Court found that the plaintiff had presented sufficient evidence of disrepair of the fence to raise issues of fact regarding the defendant’s negligence.

Allegedly Poor Maintenance

NORTH CAROLINA - In Bynum v. Whitley, 656 S.E.2d 16 (N.C. App. 2008) (unpublished), plaintiff was a passenger in a car driven by his wife that collided at night with a loose horse on to the road. Evidence showed that the defendant property owner had removed barbed wire from his fencing with the intention of later replacing it with electrified wire, but never did the installation. The court held that although no evidence existed that the defendant property owner knew of or consented to the escape of his horses, issues of fact remained as to whether he “exercised ordinary care and the foresight of a prudent person in keeping the horse in restraint” because the horses were, in fact, able to push over the fence. In so ruling the court rejected the defendant's argument that the horse had no prior escapes from the pasture.

OHIO - Petersheim v. Corum, 815 N.E.2d 1132 (Ohio App. 2004). Wrongful death case brought wife of motorist who was killed when his vehicle collided with the defendant’s bull. Defendant, the bull’s owner and keeper, had a 238-acre farm in Licking County, Ohio, from which the bull escaped. Applying a common-law negligence standard, the Court focused evidence as to the reasonableness of defendant’s fence maintenance and other precautions to prevent the bull from escaping. Defendant asserted that he visually inspected his fence every week or two on his ATV for 1 to 12 hours. Plaintiff’s expert witness, an agricultural engineering expert, claimed defendant’s claimed maintenance practices were "unreasonable and inadequate"
in that he believed it would be impossible to adequately inspect the entire fence on the 268 acres in this amount of time, given the amount of trees, brush and debris in the area.

**Open Gates**

SOUTH DAKOTA - *Atkins v. Stratmeyer*, 600 N.W.2d 891 (S.D. 1999). Plaintiff was injured when his vehicle collided with the defendant’s horses on a highway. The court affirmed that the jury properly found the defendant horse owners liable because testimony was presented at trial that the most probable manner in which the horses escaped was through an open gate, and the defendant horse owners were admittedly the last to check the gate.

**FLORIDA - Toole v. Dupuis**, 735 So.2d 582 (Fla. App. 1999). The court held that a jury must decide whether the defendant stable was liable and whether its worker (whose independent contractor or employee status was unclear) was negligent in leaving open the pasture gate.

**Escaping or Spooking Horse**

NEW YORK - *Johnson v. Waugh*, 663 N.Y.S.2d 928 (N.Y. App. 1997). Defendants were about 20 feet from a highway when they were unloading a racehorse from a horse trailer, but the horse spooked and ran onto the highway. The horse had previously been accustomed to vehicular traffic, and his spooking could not be explained. Plaintiffs had no evidence of industry standard to unload horse in a different manner, and their claim failed.

**History of Prior Escapes**

ARKANSAS - *Chambers v. Davenport*, 2003 WL 22094592 (Ark. App. 2003) (unpublished). Though the trial court granted the defendant land owner summary disposition in this case, where a motorist was injured by a loose horse on the road, the appellate court disagreed. It found, among other things, issues of fact that jury needed to evaluate, among other things, whether the defendant land owners knew that their horse escaped on previous occasions.

**Liability of Third Parties**

COLORADO - *Kallage v. Alvidrez*, 969 P.2d 743 (Colo. App. 1998). Cattle escaped when the county’s snow plow operator filled a cattle guard with snow and allowed cattle to escape onto a public highway. Liability of the operator was at issue.

IOWA - *Butcher v. White’s Iowa Institute*, 541 N.W.2d 262 (Iowa App. 1995). Animals escaped after a parked truck, owned by White’s Iowa Institute, rolled down hill and broke the defendant’s pasture fencing. The fencing was otherwise in good condition. The defendant stable owner was able to rebut the legal presumption of negligence (created by virtue of the animals’ escape) by proving that the truck had, two days earlier, unlocked its parking brake when parked on a slope.
Negligence Per Se by Violation of Statute, Code or Ordinance

MONTANA - Inendi v. Workman, 899 P.2d 1085 (Mont. 1995). Montana Supreme Court held that it was negligence per se for the property owner to have a fence that failed to comply with fencing requirements established by statute; however, the property owner could assert the defense that third party somehow damaged or tampered with fence.

TEXAS - Harlow v. Hayes, 991 S.W.2d 745 (Tex. 1999). Court held that fencing standards in the Texas Agricultural Code did not establish the defendant’s standard of care for purposes of the plaintiff’s negligence claim because the incident occurred in an area where there was no “stock [confinement] law.”

Negligent Failure to Warn

GEORGIA - In Burns v. Leap, 2007 WL 1345738 (Ga. App. May 9, 2007), the plaintiff boarded a horse on the defendant's property but was injured when a horse ran into her and knocked her into a barbed wire fence. Her lawsuit alleged that the defendant stable negligently failed to insure that the gates were closed, negligently advised the plaintiff to wave her arms to deter approaching horses, negligently failed to instruct the plaintiff to flee the area, and negligently failed to warn her of dangers in the pasture. After the trial court granted summary judgment for the defendant, the plaintiff appealed, but the Court of Appeals affirmed. Citing a statute involving injuries caused by vicious or dangerous animals [Code of Ga. Anno. ' 5-2-7, which states in part that “[a] person who owns or keeps a vicious or dangerous animal of any kind and who by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured”], the court focused on the plaintiff’s failure to show that the horse at issue that knocked her had any vicious propensities — even despite the fact that plaintiff had boarded a horse at the defendant’s stable for several years but had no knowledge of the horse at issue either rearing, kicking, pushing, attacking, charging, or harming a person — and the plaintiff’s failure to show a dangerous condition of which the defendant premises owner had superior knowledge. These elements, the court held, were essential to prevail on a premises liability claim.

Inference of Negligence – “Res Ipsi Loquitur”

Where a plaintiff simply cannot find sufficient evidence of negligent conduct by the defendant, some states will allow negligence to be inferred where the plaintiff can prove that the incident would only have occurred if negligence had taken place and that the agency or instrumentality causing the injury was in the defendant’s exclusive control and management. This rule of evidence is the legal doctrine of “res ipsa loquitur” and some states have allowed plaintiffs to proceed under it with loose livestock cases.

LOUISIANA - Granger v. Guillory, 819 So.2d 477 (La. App. 2002) and Honeycutt v. State Farm Fire & Cas. Co., 890 So.2d 756 (La. App. 2004). Plaintiffs in each of these cases were injured when they collided with loose livestock on the highway. Plaintiffs in both cases had no direct evidence that the defendant was liable. Yet, defendants were found liable in both cases. The appellate courts affirmed the trial courts’ use of the doctrine of res ipsa loquitur as a
basis for finding the defendants liable, leaving defendants to rebut the presumption of their negligence.

NEW YORK - *Osborne v. Schoenborn*, 628 N.Y.S.2d 886 (N.Y. App. 1995). Nine Thoroughbred weanlings escaped from defendant’s 300-acre horse farm and wandered onto a highway where two different vehicles struck and killed eight of them. Plaintiff, one of the drivers, sued. Though the exact cause of the horses’ escape was never proven conclusively, the defendant testified about a damaged gate apparently forcefully torn at its top hinge from its gate post and “reasonably fresh” deer tracks in and around the paddock along with deer hair on the gate and on the wire fence surrounding the paddock. Even though the trial court allowed the jury to be instructed on *res ipsa loquitur*, the jury ruled for the defendant, and the appellate court affirmed.

2. Property Damage Matters

Usually, the claimant or plaintiff will join together claims for bodily injury and for property damages. Discussed below is an example of a case where the plaintiff sought only compensation for alleged property damages and economic losses.

IDAHO - *Marchbanks v. Roll*, No. 30863 (Idaho Supreme Court 11/9/05). Defendant’s horses became loose from their pastures and trespassed onto neighboring lands owned by the plaintiff. Plaintiff, a farmer, grew hay and wheat crops and claimed the horses caused loss of income and property damage. On appeal, the Idaho Supreme Court affirmed a damage award in favor of plaintiff in the amount of about $3,100, plus plaintiff’s attorney fees and costs.

B. Statutes

"Open Range” Laws

IDAHO - The defense won out in *Moreland v. Adams*, 143 Idaho 687, 153 P.3d 558 (Idaho App. 2007), thanks to an "open range" statute in Idaho. In that case, a motorcyclist was killed when he collided with a loose calf along the roadway in an "open range" district. His estate sued the animal's owners and the landowners. The defendants argued that they were immune from liability by statute [Idaho Code ' 25-2118] because the incident occurred in an area legally designated as "open range." On that basis, the trial court dismissed the case. Plaintiffs argued on appeal that the area was not "open range" and, as a result, the defendants were not entitled to immunity; that is, they argued that the statute required the courts to apply a three-prong test to determine whether land qualified as "open range"; the land must be A(1) unenclosed, (2) outside of cities, villages, and herd districts, and (3) land on which cattle by custom, license, lease, or permit, are grazed or permitted to roam." The Idaho Supreme Court disagreed. It found that the statute did not support plaintiff’s proposed three-part test and instead held that Athe >fence out' rule prevails in Idaho, and that where a herd district has not been established, cattle are customarily permitted to roam."
MONTANA - Anderson v. Two Dot Ranch, 49 P.3d 1011 (Wyo. 2002). The plaintiffs’ vehicles collided with a loose cow at night on an unfenced public highway and in a posted “open range” or herd district. The Wyoming Supreme Court held that state law afforded the plaintiffs no basis for a claim. It held that Wyoming law "does not require a livestock owner to prevent livestock from wandering onto public highways so long as the area is posted as open range."

LOUISIANA - Willis v. Cloud, 758 So.2d 835, 837 (La. App. 2000), writ denied, 760 So.2d 347 (La. 2000). A "closed range" ordinance stated that "it shall be unlawful for any person to intentionally or negligently permit any horse, mules, cattle, sheep, goats, or hogs to rove at large." Plaintiff struck defendant’s cow on a road within the parish and sued for damages. The trial court granted summary judgment to defendant and plaintiff appealed. The appellate court, looking at an exception to the ordinance, found that the area of the collision actually was "open range" such that defendant had no duty to confine his cows and was not liable.

TEXAS - Gibbs v. Jackson, 990 S.W.2d 745 (Tex. 1999). Plaintiff, a motorist, collided with defendant’s horse that was loose on the road. No state statute or local stock law prohibited the horse from being on the road in that area. Plaintiff sued the horse owner for negligently failing to restrain the horse. Recognizing that the legislature and municipality had not made roaming horses unlawful, the Texas Supreme Court held that it would be “unwise to erect barriers that the Legislature has declined to impose.” Accordingly, the Court held that the defendant horse owner had no duty to prevent the horse from roaming loose.

**Strict Liability Statutes**

MARYLAND - Gunpowder Horse Stables v. State Farm, 673 A.2d 621 (Md. App. 1996). State Farm, which insured a driver who collided with a loose horse, brought subrogation proceedings under the theory that the defendant horse owner was strictly liable for violating a Baltimore County animal control ordinance. However, the Maryland appellate court held that the municipality lacked authority to enact an ordinance that would override existing Maryland common-law; this was a job for the state Legislature.

**Criminal Laws**

CALIFORNIA - Sea Horse Ranch v. Superior Court, 30 Cal. Rptr.2d 681 (Cal. App. 1994). This case involved a mis-applied California criminal statute. There, a California statute imposed liability upon the “owner of a mischievous animal” who, “knowing its propensities, willfully suffers it to go at large.” The Court held that a horse is not a “mischievous animal” merely because it may run loose. It noted that the intent of the statute was to target owners of dogs that become loose and attack children.

II. **WHO SHOULD BE LIABLE IN LOOSE LIVESTOCK CLAIMS**

Is the party accused of being liable for the escape and its consequences the proper party? In more obvious settings, some statutes impose liability on the “owner” of the loose animal (read the definition to learn who qualifies), while the common-law might more appropriately impose liability on the keeper of the animal who was, arguably, in the best position to prevent its escape.
As these somewhat recent cases indicate, however, creative thinking can sometimes impose liability against other less obvious parties.

"Owner or Keeper" Liability

OHIO - Moore v. Ferkel, 1998 WL 160040 (Ohio App. 1998)(unpublished). A son (who likely was un-insured or under-insured) maintained his horse on his father’s adjacent property but the horse escaped, injuring the plaintiff. Ohio’s statute imposed liability on the “owner or keeper” who “permit them to run at large in the public road. . ..” Though the son owned the horse and cared for it on his father’s land, the court held that the jury should nevertheless evaluate whether the father qualified as the “keeper” under Ohio’s statute.

GEORGIA - Supchak v. Pruitt, 503 S.E2d 581 (Ga. App. 1998). Facts were much like those in Moore v. Ferkel, above, but the son kept and maintained his horse on his mother’s property. The Court held that the mother did not legally qualify as an “owner” under Georgia’s statute, which imposed liability on an “owner” who “permits livestock to run at large on or stray upon public roads” and defined "owner" as any person who owned, had custody of or in charge of livestock. Merely having custody was deemed not tantamount to “ownership.”

OKLAHOMA - United Services Automobile Assoc. v. State Farm Fire and Casualty Co., 110 P.3d 570 (Okla. App. 2004). This case looked at the insurance implications as to whom is an “insured” under a policy when a horse escapes. While babysitting his granddaughter, Bradford opened a gate to move his car and accidentally caused a horse to escape onto a roadway. The horse injured a motorist who sued Bradford and the property owner. USAA insured Bradford through homeowner’s insurance, and State Farm insured his daughter-in-law. USAA settled with the injured driver then sued State Farm for contribution, seeking reimbursement. At issue was whether Bradford, the visiting grandfather, could be covered under his daughter-in-law’s policy with State Farm, even though he was not a named insured under her policy. The State Farm policy included within its definition of “insured” people who were “legally responsible” for animals at the time of the incident. Testimony showed that Bradford viewed his role when visiting and babysitting to look after the animals, if necessary. Somewhat consistently, the daughter-in-law and son testified that Bradford would be expected to seek remedial attention if a problem arose in the household or with the animals on the property. In a divided opinion, the court held Bradford was “legally responsible” for the horse while on his son and daughter-in-law’s property and, accordingly, qualified as an “insured” under State Farm’s policy.

Finally, be careful whom you assume is the true “owner” of the livestock. Courts in a few states have held that a horse’s registration papers are not conclusive evidence of ownership.  

Municipality and Public Official Liability

Aside from the traditional defenses of sovereign immunity (which may have exceptions and is not absolute), motorists have brought claims against the municipality. This may be instructive when evaluating possible subrogation proceedings.
CONNECTICUT - *Malloy v. Colchester*, 858 A.2d 813 (Ct. App. 2004). Injured motorist whose vehicle struck a loose horse sued the town, a city councilman, a zoning officer and an animal control officer under the theory that those officials had, for years, failed to take appropriate steps to keep the horses belonging to a particular homeowner off of the road. The Court of Appeals reversed and found no liability because the connection between these defendants’ alleged omissions and the accident was deemed too remote.

NEBRASKA - *Larreau v. DeLara*, 2004 WL 2339481 (Neb. App. 2004)(unpublished). Plaintiff sued a county and its deputy sheriff after his motorcycle collided with a loose horse on a highway but did not activate his vehicle’s emergency lights or siren. The defendant deputy sheriff attempted to track the horse from his patrol car. Plaintiff alleged this was unreasonable and the deputy sheriff should have undertaken more extensive precautions, but the trial court sided for the defendants and the appellate court affirmed.

TAXAS - *Military Highway Water Supply Corp. v. Morin*, 114 S.W.3d 728 (Tex. App. 2003), reversed, 156 S.W.3d 569 (Tex. 2005). In a wrongful death action against Military Highway Water Supply Corp., a utility company excavated a hole near a highway. As the plaintiff’s decedents were driving within a county with no local stock law and where livestock were permitted to roam freely, their vehicle struck a loose horse and, over 500 feet later, encountered the utility’s open hole, causing the vehicle to flip and crash into a tree. At the lower court levels, the utility was found liable, but the Texas Supreme Court reversed and held that the car’s deviation from the road was not a normal incident of travel and, therefore, the utility owed no duty to the decedents.

FLORIDA - *White v. City of Waldo*, 659 So.2d 707 (Fla. App. 1995). An appellate court found that sovereign immunity might not protect a municipality for the actions of a police officer who had been chasing a loose horse at night on an unlit road (in an apparent attempt to catch it) before the incident occurred. Evidence showed that the officer attempted to herd the horse near the highway median with his patrol car running without lights (the officer had earlier decided that the lights might have been spooking the horse and turned them off). Plaintiff’s motorcycle later collided with the horse, and plaintiff asserted that the officer was negligent for, among other things, failing to illuminate the area to help motorists on the dark roadway see the loose horse.

III. DEFENSES

The following defenses could potentially apply to loose livestock claims depending on the facts and law. These defenses can either eliminate liability altogether or minimize it:

**A. No Duty Owed to the Claimant/Plaintiff Based on the State Law and/or The Circumstances of the Animal’s Escape**

EXAMPLE: This attorney (Julie Fershtman, Esq.) successfully raised a “no duty” defense in a wrongful death case to extricate the insureds from the case in *Estate of Solano v. Wolf, et al.* (Oakland County, Michigan, Circuit Court Case No.: 97- 001910-NI). There, a laid-up race horse mysteriously escaped from its boarding stable late at night and wandered onto a nearby highway, where the horse was struck by a car traveling at approximately 50 miles per hour. The
collision killed the horse as well as a passenger in the vehicle. The passenger’s estate sued the horse's non-custodial owners and the boarding stable. The trial court dismissed the non-custodial horse owners finding that they were not involved in the horse's daily care or the keeping of the grounds and therefore owed no duty to the decedent.

B. The Insured Exercised Reasonable Care in the Care, Keeping, and Confinement of the Animal(S) at Issue and Therefore Cannot Be Liable.

EXAMPLE: This attorney/author raised this in defense of a personal injury case brought by a pedestrian who was struck and injured by a loose horse; the horse had run away from the defendant after being spooked. Accepting this as a complete defense at the close of the plaintiff's proofs at trial, the trial judge granted a directed verdict in the defendant's favor, finding that the plaintiff failed to sustain his burden of proof that the defendant acted unreasonably in the manner in which she held the horse. The case was O'Boyle v. O'Boyle, No.: 03-000782-NO (St. Clair County, Michigan, Circuit Court)

C. Insufficient Causal Connection Between the Insured’s Complained-of Acts and The Incident or Injuries of the Claimant

D. Comparative or Contributory Negligence of the Claimant

E. No Basis for Legal Action Under the Statute Asserted

IV. INSURANCE IMPLICATIONS AND CLAIMS HANDLING POINTERS

A. Claims Handling Pointers

In matters where the owner and keeper are two different people, especially when the keeper is someone giving temporary care to the animal on the owner’s premises, questions can arise as to whether the homeowner's insurance policy insures the keeper.

Evaluating coverage

OKLAHOMA - *United Services Automobile Assoc. v. State Farm Fire and Cas. Co.*, 110 P.3d 570 (Okla. App. 2004). This case, discussed in greater detail above, examined the status of an "insured" under a homeowner's insurance policy when a horse got loose while under the care of a non-owning relative.

Claim adjusting strategies as to liability of the insured

When liability claims arise involving loose or trespassing livestock, helpful information for claims adjusters can include the following:

☐ The accident’s date, time, and place
☐ Name of owner(s), lessor(s) or lessee(s) of the loose horse or livestock
☐ Names of owners and keepers of the animals
Names of the owners of the land from which the animal escaped
Names of all persons charged with maintaining the animal (such as pasturing, feeding, and exercising)
Last known persons with access to the facility and/or fencing
Information regarding livestock (type, size, color, weight, path taken)
Quality of confinement (fences, gates, latches, stalls, electrified wires and chargers, dates fences constructed and repaired before incident, inspection schedules of the fencing, if any, etc.) Photographs of several areas and/or video are very helpful
Local ordinances regarding fencing quality and type (fence heights, materials, etc.)
Police report, if any
Signage in the area of the collision, if any (examples: speed limit, open range district, etc.)
Details regarding the sequence of events before and after collision (examples: time of animal’s escape; efforts to recapture; evidence of avoidance maneuvers, if any, by driver, etc.)
Autopsy and toxicology reports of claimant, if applicable
Motor vehicle speed limit in roadway where claimant proceeded
Driver’s history and conduct (speed; experience; driving record; intoxication level, if any, etc.)
Weather report for the area and information regarding outdoor lighting, if any
Information regarding prior escapes of animals from the insured’s facility or pastures

Obviously, the nature of the incident and even the applicable law would dictate what additional information is needed. Also, as the foregoing indicates, adjusters need to review the applicable state law to determine the appropriate standards for liability before making a liability evaluation.

Assessing the Claims Asserted Against the Insured

Claims staff, in evaluating a claim might want to ask:

- Did the incident occur in a legal “open range” district; if so, how does the claimant believe liability can and should legally be assessed?

- Did the incident occur in a strict liability jurisdiction? Does the jurisdiction impose, as some do, strict liability for property damage claims but not bodily injury claims?

- If the applicable law is one of common-law negligence, then what theory of negligence does the claimant assert? Remember that in most states the claimant must prove that the insured had a duty to protect the plaintiff and that the insured engaged in an act that was not reasonable.

B. Bailment/Negligence Claims Brought by the Demised Animals’ Owners

Farm and livestock facilities that board livestock owned by others in its care, custody, and control might also see claims from the demised animal’s owners. Agricultural insurers typically offer a “Care, Custody, and Control endorsement” to Commercial General Liability Insurance policies to protect insureds against such claims. Without this endorsement, however, Commercial General Liability insurance policies often specifically exclude coverage for them.
Below are examples of equine cases denying coverage for such third-party claims based on policies' "Care, Custody, and Control" exclusions.

LOUISIANA - In Keller v. Case, 757 So. 2d 920 (La. App. 2000). Favorable case. The Court upheld a Care Custody and Control exclusion in a policy issued by American Bankers and precluded coverage for a third-party claim involving the loss of an equine at a boarding stable (but ruled that claims for mental anguish as a result of property damage would be covered). In doing so, the Court expressly found the exclusion to be “clear [and] unambiguous” and that A[t]he policy clearly excludes coverage for property damage claims for property that is in [the insured stable’s] care, custody, or control.”

NEBRASKA - In Erickson v. Carhart, 1996 WL 674334 (Neb. App. 1996)(unpublished). The Court found the “CCC” exclusion in a Farm Bureau Insurance homeowner’s policy to be “plain and clear” enough to preclude a third-party claim for coverage relating to a horse that was killed in a barn fire, and the loss of related equipment such as tack and a trailer.


Beware, however, of the possibility that a court might find the CCC exclusion to be “ambiguous,” as this has occurred in other settings and in some states. See generally, Windt, Insurance Claims and Disputes, Fourth Edition' 11:18 at 518-521 (2001). This author (Julie I. Fershtman, Esq.) experienced this in a case in New York, where a court found ambiguity in the exclusion within a Commercial General Liability policy purchased by a horse boarding stable.

C. Subrogation

Subrogation should not be ruled out in appropriate matters. Here are examples of two cases involving subrogation in the setting of loose livestock.

FLORIDA - Toole v. Dupuis, 735 So.2d 582 (Fla. App. 1999). Horse owner sued motorist who collided with and killed his loose horse. The motorist raised a defense that Florida's animal at large statute made owners or keepers liable for their loose horses, and the law did not impose liability on motorists who collide with these loose horses. However, the court was not impressed with this defense and rejected it. Rather, to deflect liability from a claim from the aggrieved horse owner, the court stated, the motorist needed to prove that the owner was negligent in causing the horse’s escape onto the highway in the first place.

NEBRASKA - Hausse v. Kimmy, 524 N.W.2d 567 (Neb. 1994). Plaintiff, a horse owner, sued the driver of a vehicle that left the road and broke the pasture fence, which later caused the plaintiff’s horse to escape onto a highway and be killed by another motorist. Plaintiff also won case against the driver who collided with the horse because he was speeding immediately before the collision with the horse.
D. Underwriting

Agents and underwriting staff can evaluate proposed insureds who are stable and farm owners in many different ways. Some examples:

☐ Consider assessing whether the facility is in compliance with statutes and/or ordinances that address fencing heights, materials, construction and locations.
☐ Evaluate the facility’s fencing fences, gates, and latches.
☐ Does the facility use "hot wire" (electrified wire)? Evaluate its chargers.
☐ Consider insisting on photographs or videos of facility, its pastures, its borders, and its barns (interior and exterior).
☐ To further evaluate the facility's general area from an aerial view, consider typing the facility's address on Google Earth or similar site. This free website provides overhead views. You can actually see nearby roads, highways, and structures

About the Author

Julie I. Fershtman, a Shareholder with Foster Swift Collins & Smith, PC, in Michigan, has been a lawyer for 30 years. With a law practice that is uniquely national in scope, she represents insurance companies on general liability, coverage, farm, agricultural, recreational, and equestrian claims as well as general first-party property, construction, premises liability, and coverage. Insurers have hired her to serve as co-counsel, consulting counsel, EUO counsel, litigation defense counsel, and coverage counsel. Her law practice also includes commercial litigation and equine law.

She has successfully tried cases before juries in 4 states and has been admitted pro hac vice (out of state) counsel in state and federal courts in 17 jurisdictions. She is listed in The Best Lawyers in America, 2013-2016 and is rated "AV" [highest rating for abilities and ethics] by Martindale-Hubbell. She has been listed in Michigan Super Lawyers® from 2008-2016 and was recognized as one of its “Top 25 Women Business Lawyers in Michigan” and “Top 50 Women Lawyers in Michigan” for 2013-2016. Michigan Lawyer's Weekly named her a “2010 Leader in the Law.” She is also a Fellow of Litigation Counsel of America. A past President of the 44,000-member State Bar of Michigan, she received the State Bar’s Michael Franck Award in 2014 for service to the profession.

Her speaking engagements span 29 states, primarily on topics of liability, insurance, and risk management. In addition, she has authored over 400 published articles and 3 books. The ABA is expected to publish her fourth book in 2017. She is a graduate of Emory College in 1983 and Emory Law School in 1986.

For more information, please visit: