House
Legislative
Analysis
Section

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# "U-PICK" BUSINESS: LIMIT LIABILITY



House Bill 4202 as enrolled
Second Analysis (8-5-87)

Sponsor: Rep. Carl F. Gnodtke
House Committee: Agriculture and Forestry
Senate Committee: Agriculture and Forestry

## *THE APPARENT PROBLEM:*

The popular "u-pick" orchard or berry patch and the familiar farmer's roadside stand are part of the developing "agriculture-tourism" industry in Michigan — businesses and activities (such as agricultural festivals, horse shows, wineries, farm markets, u-pick operations, fish retailers, and Christmas tree farms) that engage partly or wholly in the direct sales of agricultural products to tourists and other non-local customer groups. This budding new industry not only provides new sources of revenue to Michigan farm families seeking ways to survive in today's difficult agricultural situation but also has the potential for contributing significantly to Michigan's economy. Not every traditional agricultural producer will find the combination of agriculture and tourism either attractive or feasible, but for many this combination may provide the added income that will enable them to continue in the agricultural industry.

Increasingly, however, businesses involving both agriculture and tourism, such as u-pick operations, have been experiencing the chilling effects of rapidly escalating liability insurance costs. Producers have asked for legislative relief from the worst abuses of the present system of liability.

## *THE CONTENT OF THE BILL:*

Under Public Act 201 of 1953, people who are hurt while using someone else's land for outdoor recreation (including fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, and snowmobiling) cannot sue the landowner unless the injured person had paid the owner to use the land or unless the injuries were the result of "the gross negligence or willful and wanton misconduct" of the owner. The bill would amend the act to provide limited liability protection for landowners, tenants, or lessees in three additional cases: Gleaning, hunting or fishing for a fee on a working farm, and "u-pick" operations.

The bill would add gleaning to the existing list of activities for which an owner, tenant, or lessee cannot be sued for injuries unless the injured person had paid to use the land or unless the injuries were the result of "the gross negligence or willful and wanton misconduct" of the owner, tenant, or lessee. If someone were injured while having paid to hunt or fish on a working farm (a farm used in the production of agricultural goods as defined by the Single Business Tax Act) or while picking and buying farm products at a farm or "u-pick" business, the injured person could not sue the owner, tenant, or lessee unless all of the following conditions were met: the injuries were caused by a condition which involved "an unreasonable risk of harm", the person injured did not know (or did not have reason to know) of the risk, and the owner did know of the risk, but failed to warn the person or to exercise reasonable care to make the condition safe.

MCL 300.201

## *FISCAL IMPLICATIONS:*

The Senate Fiscal Agency reports the bill has no fiscal implications to the state. (6-9-87)

## *ARGUMENTS:*

### *For:*

Owners and operators of u-pick operations work hard to provide their customers with safe, enjoyable experiences and quality products. Many have instituted detailed safety procedures to ensure that the safety of their customers is maximized. Nevertheless, and despite good safety records, in recent years u-pick owners have been faced with a rash of basically frivolous lawsuits and consequent increases in their liability premiums. For example, in one case, an orchard owner, who used to let hikers and cross-country skiers use his orchards for free, was sued for what seem to be particularly outrageous reasons. The owner, who had finally fenced his land in an attempt to protect his young trees from damage by off-road vehicles, experienced repeated instances of having his fences cut down by illegal trespassers. He repeatedly repaired his fences, but in December of one year he decided not to repair his fence once again until spring. A high school student skipped school and, driving a four-wheeled vehicle, illegally trespassed on the orchard lands. He cut his forehead (which required three stitches) on a strand of barbed wire and the owner was sued for damages, including a suit by the boy's mother for "deprivation of companionship". The insurance company settled out of court for $2,000, and the owner's insurance premiums were subsequently raised. Another case involved a lawsuit months after the alleged incident took place and there was considerable question whether the allegedly injured person had ever actually been on the owner's land.

Many owners of u-pick operations and farm markets used to offer other kinds of recreation on their land such as hiking, cross-country skiing, hay rides, mushroom hunting, and horseback riding. They have had to discontinue such activities because they cannot get insurance coverage or because the available coverage makes offering such activities economically unfeasible. (For example, one owner who discontinued allowing cross-country skiing on her operation would have had to pay three times as much money in liability premiums as she would have made from allowing skiers to use her property.) Other owners have had to discontinue the practice of allowing groups of schoolchildren to visit the farm or u-pick operation, depriving thousands of children of enjoyable and vital educational experiences.

Frivolous lawsuits are depriving Michigan agricultural producers of income (the Michigan Blueberry Growers Association, for example, estimates that the sale of blueberries in Michigan through u-pick operations or farm markets represents an income of $3-4 million) and citizens of enjoyable recreation and educational experiences. What



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is more, some of the u-pick operations bring money into the state that otherwise would go elsewhere (one operator in southwest Michigan estimates that 40 percent of his business is from the greater Chicago area). Even though the present costs of liability insurance for, say, basic u-pick operations (and excluding other, more "risky" activities such as hiking or cross-country skiing) still constitute a small percentage of operating costs, the rates at which the premiums are rising are alarming. One operator reported that her premiums rose by 100 percent in 1986 and had risen by another 50 percent in 1987.

As one operator commented, the definition of successful farmer has come to be one who can stay out of court. This nonsense must stop. The present legislation would provide a measure of protection to owners of u-pick operations and farm markets by limiting their liability to cases of "gross negligence or willful and wanton misconduct", while continuing to afford injured parties reasonable recourse to legal redress.

## *For:*

In recognition of the fact that travel and vacation expleriences on farms will attract tourism dollars, the Departments of Commerce and Agriculture are working on a campaign to promote "ag/tourism". These promotion efforts, and the resulting economic benefits to the state, will be hampered if farm operators cannot obtain liability insurance at a cost that does not financially burden their operations.

## *Against:*

The bill would codify a section of common law, reducing its flexibility to adapt to various conditions and removing some protections currently afforded to individuals. Common law recognizes three kinds of people who come on another person's land: one who has been invited (a "licensee"), one who has been invited to the advantage of the landowner (a "business invitee"), and a trespasser. A landowner's degree of responsibility differs in each case. In the case of a business invitee, the landowner has a high degree of responsibility. In the case of a trespasser, the landowner's responsibility is much more limited. For example, a hunter coming on someone else's land could be considered under common law as a licensee or as a business invitee, depending on whether or not the hunter paid the owner for coming on the land. Codifying common law, as the bill would do, would reduce the law's flexibility and would make it more difficult to seek relief for injuries if a case did not fit exactly into the conditions established by the bill. The legal tradition of common law has served the state well. Its flexibility, and the protection it affords individuals, should not be further restricted.

## *Against:*

The bill is symptomatic of the legislature's piecemeal approach to the problem of liability reform, when what is needed is a comprehensive general policy on this issue. Some liability reforms were enacted during the last legislative session, and the first public act of the current session (Public Act 1 of 1987) amended the Business Corporation Act to allow corporations to limit the personal liability of directors, while broadening corporations' authority to indemnify directors and officers for claims and suits against them. Rather than continue in this piecemeal fashion, what is needed is a comprehensive approach to this persistent problem.