Analysis of the Farmer's Comprehensive Liability Policy

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I. Introduction - Overview of Liability Problems

Farming is an inherently dangerous activity that ranks only behind subsurface mining in danger to its participants.[1] Not only is farming dangerous to those who practice it, but farming also carries with it the risk of injury or damage to other persons and their property. Because of the risks associated with farming, the potential legal liability arising out of agricultural activities and land ownership is enormous. The following is a brief sketch of such potential liability.

A. *Misuse of Chemicals*

The use of chemicals to control weeds, insects, and other pests is prevalent in modern farming.[2] Although the use of chemicals is responsible for much of modern agriculture's productivity, such chemicals as pesticides, herbicides, and other chemicals may cause harm to people or their property if the chemicals reach areas other than their targeted designations. Because of the dangers associated with farm chemicals, farmers must take reasonable precautions in their use. Failure to do so may cause injury to neighbors and their property as a result of chemical drift or pollution. A number of states have imposed strict liability on farmers whose chemicals have caused damage to others.[3]

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1. There were 1,300 agricultural work deaths in 1989, of which 700 involved farm residents in farm work and 600 involved nonfarm residents working on farms and anyone working in other industries classified as agriculture. The corresponding injury totals were 120,000 in agricultural work — 70,000 to farm residents and 50,000 to others.

National Safety Council, Accident Facts 100 (1990).

2. J. Looney, J. Wilder, S. Brownback & J. Wadley, Agricultural Law: A Lawyer's Guide to Representing Farm Clients 591-93 (1990).

3. *Id.*

B. Injury to Farm Visitors

Farmers frequently have other persons on their land. The extent of the farmer's duty to protect such persons depends on the legal status of the visitor. For example, some visitors may be invitees. An invitee is one who is on the land for a business purpose. A landowner owes an invitee the highest duty of care. The landowner must warn the invitee against any dangerous conditions existing on the land and must take reasonable precautions to inspect the premises periodically to discover dangers.[4] Invitees include persons who enter the property for hunting, fishing, and camping purposes and are charged a fee for such use. Persons entering the property to purchase the farmer's products are also invitees.

Some visitors are classified as licensees. Licensees are persons who enter or remain on the land with the owner's consent for nonbusiness purposes. The farmer is obligated to use reasonable care to protect the safety of the licensee, and must warn the licensee of known dangers.[5] Licensees include social guests and recreational users of the farmer's land, so long as they are not charged a fee.

Finally, the landowner even owes a limited duty to trespassers. Trespassers are those who enter or remain on the land without the possessor's consent. Even to trespassers, the farmer owes a duty to refrain from committing willful, malicious, or reckless injury. There is, however, no duty to make land generally safe for trespassers.[6]

C. Escaping Animals

Possessors of land have a duty to keep their animals properly fenced. The failure to keep fences in good repair can result in escaping livestock, causing injury to neighboring persons and their property for which the farmer is legally liable. Under the doctrine of strict liability, which is applicable to dangerous animals, even a landowner who has exercised careful control over the animals may be liable for any damage caused by escaping animals.[7]

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4. Olexa & Mack, *Introduction to Basics of Law Relative to Natural Resources Enterprises*, in NATURAL RESOURCES MANAGEMENT AND INCOME OPPORTUNITY SERIES: LEGAL ISSUES 2-3 (1990) (available through the National Center for Agricultural Law Research and Information, University of Arkansas).

5. *Id.*

6. *Id.*

7. *See* Bottrell, Johnson, & Anderson, *Liability and Farm Liability Insurance*, AGRIC. ECON. MISCELLANEOUS REP. No. 60, at 2 (a joint report of the Department of Agriculture Economics, North Dakota State University, Fargo, ND and The University of North Dakota School of Law, Grand Forks, ND) [hereinafter AGRIC. ECON. REP. No. 60].

D. Motor Vehicle Liability

Modern agriculture is highly mechanized. The use of motor vehicles and heavy equipment in everyday farming activities involves potential liability for injuries or damages caused by careless operation.[8]

E. Liability for Agricultural Employees

Farmers frequently employ laborers. As an employer, the farmer may be held responsible for the negligent conduct of employees who harm third parties. If an employee injures a third party while the employee is acting within the course and scope of employment, the farmer potentially faces vicarious liability.[9]

F. Liability to Employees

Not only does the farmer have responsibility for the actions of his employees, but he is responsible for their protection. Farmers must provide employees with safe tools and equipment and a safe and suitable place to work. Farmers must use reasonable care in selecting employees and must properly instruct employees in the dangers associated with their work, including the care of animals and equipment. Failure to fulfill these duties exposes the farmer, as an employer, to potential liability. If the farmer's employees are not covered under state workers' compensation law, the farmer faces liability for the injured employee.[10]

The foregoing is only a sample of the liability problems that farmers face. Because a farmer can be financially ruined by a large personal injury or property damage judgment, the farmer should reduce, as much as possible, any potential financial exposure. The primary means of eliminating, or at least reducing, the risk of loss is through liability insurance.

The Farmer's Comprehensive Liability Policy (FCLP) is the most common liability policy for farmers. The policy is designed to meet the specific needs of farmers, and necessarily includes a combination of coverages including comprehensive personal liability, employer's liability, and use of powered equipment. Although many farmers have FCLPs, very few fully understand the nature and extent of the coverage provided by the standard FCLP. This Article discusses the more common provisions found in the standard FCLP and the problems arising under those provisions.

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8. *Id.* at 9.
9. *Id.* at 12.
10. *Id.* at 12-13.

II. Some Insurance Law Basics

The first thing a farmer must understand about an FCLP is that it is subject to the same rules, regulations, limitations, and court interpretations as any other liability policy. Insurance is nothing more than a means of transferring or allocating risk. In exchange for consideration (a premium) paid by the insured, the insurer assumes the insured's risk by making a series of promises to the insured.

A. Promise to Indemnify

Liability insurance is primarily concerned with the insured's legal liability for injuries to others or for damage to another person's property. The insurer typically promises that: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence."[11]

"Bodily injury" is defined as bodily injury, sickness, or disease sustained by any person during the policy period, including death resulting therefrom.[12] "Property damage" is defined as physical injury to or destruction of tangible property occurring during the policy period, including loss of property use.[13]

However, the insurer's obligation to pay for personal injuries or property damage is conditioned on an occurrence. Virtually all modern liability insurance policies are written on an occurrence basis. Occurrence is a term of art which is generally defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended by the insured. Unless there is an occurrence, there is no coverage under the liability policy.[14]

Generally, an accident is not defined within the terms of the policy. The courts, however, have defined "accident" as a fortuitous event that

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11. Fireman's Fund Insurance Companies, § I. Coverage L-Personal Liability (reciting specimen FCLP).

In 1985, the Insurance Service Office (ISO) rewrote and simplified the language of the FCLP. ISO is a national, nonprofit corporation that assists insurance companies in the preparation of insurance policies and programs. Insurance companies that have adopted the new policy language use the following clause: "We will pay those sums that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." *See* Commercial Lines Manual, Division Four, Farm, FL-00-20-10-88, Coverage H-Bodily Injury and Property Damage Liability § 1a (Copyright, Insurance Services Office, Inc. 1985, 1988) [hereinafter ISO, FL-00-20-10-88].

12. Rhodes, *General Liability Insurance*, The Law of Liability Insurance 10-11 (1989).

13. *Id.*

14. *Id.* at 10-9.

is neither expected nor intended by the insured.[15] Intentional acts, such as assaults, are outside policy coverage even if the policy has no specific exclusion as to such an event.[16]

Occurrences include spontaneous events, such as automobile collisions, as well as injuries or damages sustained over an extended period of time. Bodily injury or property damage triggers the occurrence, and the loss must occur within the effective dates of the policy.[17]

Besides obligating the insurer to pay the insured's liability to third parties, the policy also obligates the insurer to pay expenses incurred by the insured in any suit the insured defends, including such costs as required bonds or premiums, postjudgment interest and prejudgement interest awarded against the insured. However, all of this is done within the confines of the insurer's policy limits as stated on the declarations page.[18]

B. Promise to Defend

The second promise made by the insurer is to defend the insured in any lawsuit brought by a third party alleging liability covered by the policy. The insurer promises to defend the insured within the scope of the policy. An example of such a provision follows:

> [A]nd the insurer shall have the right and duty to defend any suit against the insured seeking damages . . ., even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient.[19]

In a sense, liability insurance is also litigation insurance. The duty to defend is a greater duty than the duty to pay proceeds. The duty to defend is owed unless the insurer establishes that the facts contained in the lawsuit fall within an applicable policy exclusion.[20]

C. Limitations on the Duties to Defend and Indemnify

Although the standard personal liability insurance policy contains broad language as to the insurer's duties to indemnify and defend the

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15. *Id.*

16. *Id.*

17. *Id.* at 10-10.

18. R. Jerry, II, Understanding Insurance Law 456-57 (1987).

19. Fireman's Fund Insurance Companies, *supra* note 11. The new ISO material states as follows: "We will have the right and duty to defend any 'suit' seeking those damages. We may at our discretion investigate any 'occurrence' and settle any claim or 'suit' that may result." ISO, FL-00-20-10-88, *supra* note 11.

20. *See* R. Jerry, II, *supra* note 18, at 561-87 for a complete explanation of the duty to defend.

insured, the language is naturally limited by provisions within the policy. These limitations are established by:

1. The duties imposed on the insured with respect to the payment of premiums, the giving of notice in the event of accidents or occurrences, and cooperation with the insurance company;
2. The identification of particular areas of activity not covered by the policy;
3. The specific coverage exclusions;
4. The limitations on the period of time in which coverage exists; and
5. The dollar limitations on the amount of damages.[21]

D. Construction of Policies

The basic principles governing the construction of insurance contracts are fully applicable to the farmer's comprehensive liability policy, even though the policies are specifically designed to meet and protect the somewhat specialized needs of farmers.[22] Generally speaking, the following rules of construction favor the insured in an insurance coverage dispute with the insurer:

1. As with any contract, the insurance agreement must be enforced according to its terms.
2. Insurance policies are to be construed in their entirety, and no greater significance shall be given to any single provision of the policy.
3. All insurance policies must be interpreted according to the purposes and hazards against which the policy was designed to protect.
4. It is the obligation of the insurer to clearly define in explicit terms any limitations or exclusions to coverage expressed in the contract.
5. In interpreting insurance contracts, the words of the policy must be measured by the reasonable expectations of the insured.

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21. The following is an example of such a provision: "But: (1) The amount we will pay for damages is limited as described in SECTION 11-LIMITS OF INSURANCE; and (2) Our right and duty to defend ends when we have used up the applicable Limit of Insurance in the payment of judgements or settlements." ISO, FL-00-20-10-88, *supra* note 11 (capitals in the original).

22. Isaac v. Reliance Ins. Co., 201 Kan. 288, 293, 440 P.2d 600, 604-05 (1968).

6. Any ambiguities in the contract must be construed in favor of the insured.
7. Language is ambiguous when the language is susceptible to two or more meanings by a reasonably prudent person.
8. If contractual language is ambiguous, extrinsic evidence may be used to show the intention of the parties.
9. Plain and unambiguous language contained in the contract must be given its fair and natural meaning.
10. Parole evidence is inadmissable to contradict, supplement, or vary a written contract that is clear, and explicit and contains no ambiguities.[23]

In purchasing an FCLP, the farmer must be cognizant of the following considerations:

1. What persons are insured under the policy;
2. What activities of those persons are insured;
3. Are there any limits on where those activities can be performed; and
4. What exclusions contained in the policy may limit my coverage?

III. Persons Covered

A. *Named Insureds and Additional Insureds*

"[T]he 'insured' is the person whose loss triggers the insurer's duty to pay proceeds."[24] The named insured is the person specifically designated as an insured under the policy. However, liability policies often designate not only a named insured, but also other insureds by description. The other insureds are usually classes of people who have some relationship to the named insured, such as family members, household residents, and any other persons under the age of twenty-one in the insured's care.[25]

Many of the more recently written FCLPs also make it clear that "insured" includes not only the named insured, but also any partnerships or joint ventures in which the insured is involved, including the spouse of any partners, but only with respect to conducting farming operations. Furthermore, other organizations to which the insured may belong,

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23. D. Dey & S. Ray, Annotated Comprehensive General Liability Insurance Policy 111-18 (1984).
24. R. Jerry, II, *supra* note 18, at 211.
25. *Id.* at 211-18.

including corporate ventures, are also included if they are connected with farming operations. If the corporation is covered under the policy, all executive officers and directors are also insured. Stockholders are also covered, but only for their liability as stockholders.[26]

The liability policy protects all those persons who qualify as insureds against liability claims of third parties for bodily injury or property damage arising out of an insured's negligence. This means that the insurer owes both the named insured and the additional insureds the duties of indemnification and defense. Although these additional insureds may be provided liability protection as to third-party claims, often they are excluded from coverage for claims they might have against the named insured.

B. Household Exclusion

Many FCLPs contain what is commonly known as the family or household exclusion. This exclusion provides no coverage for members of the insured's household for any bodily-injury liability claims against the named insured. For example, if the insured's son negligently drives a tractor and injures a third party, there is typically insurance coverage for the accident. However, if a similar accident occurs in which the named insured injures his own son, the son is not covered under the policy if a family exclusion exists.

Family exclusions are criticized on public policy grounds, especially in automobile accident cases. Critics argue that the clause unfairly excludes coverage from those persons most likely to be injured by acts of negligence. Some argue that the clause is unconscionable because most insurance buyers are unaware of the exclusion and its coverage limitation. Supporters of the exclusion, primarily the insurance industry, argue that the clause is necessary to promote family harmony and to avoid collusive lawsuits.[27] Some jurisdictions have stricken the clause on public policy grounds,[28] but many jurisdictions still permit family ex-

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26. Fire Casualty and Surety Bulletins, Aug. 1990, at Farms Ap-3, Mar. 1990, at Public Liability Ad-1 [hereinafter FC&S Bulletins].

27. R. Jerry, II, *supra* note 18, at 676-78. *See also* Note, *Family Exclusion Clauses Void in Automobile Insurance Policies,* 35 Drake L. Rev. 817 (1986-87); Comment, *Family Exclusion Clauses: Whatever Happened to the Abrogation of Intrafamily Immunity?*, 21 San Diego L. Rev. 415 (1984); Note, *The Household Exclusion Clause - Returning to the Days of Family Immunity*, 7 Hamline L. Rev. 507 (1983).

28. *See, e.g.*, Jennings v. Government Employees Ins. Co., 302 Md. 352, 488 A.2d 166 (1985); Meyer v. State Farm Mut. Auto. Ins. Co., 689 P.2d 585 (Colo. 1984); Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441 (1982); Allstate Ins. Co. v. Wyoming Ins. Dep't, 672 P.2d 810 (Wyo. 1983).

clusion clauses in liability policies.[29] Such clauses have a significant impact on liability claims.

For example, in *National Farmer's Union Property and Casualty Co. v. Maca*,[30] the insured's adult son was injured while operating a corn picker on the insured's property. The son filed a lawsuit against his father alleging negligence. The insurance company refused to recognize coverage because the son was excluded from coverage under the FCLP's family exclusion provision.[31] The father and son argued that the son was only temporarily residing at the father's home, had no intention of becoming a permanent resident of the household, was not a member of the household, and would eventually move out.[32] The court, however, sustained the insurance company's position and found that the son was a resident of the father's household because he lived there, took his meals there, and even though he planned to leave, his plans were indefinite, and there was a sense of permanence about the matter.[33]

Similarly in *Goller v. White*,[34] injuries to a twelve-year-old foster child, suffered while riding on the insured's tractor, were not covered because of the household exclusion. The child's temporary stay at the insured's residence was enough to bring the incident under the household exclusion.[35]

However, an Illinois court reached a different result in *Country Mutual Insurance Co. v. Watson*.[36] The insured's foster child was injured while cutting string on hay bales. The insured's FCLP contained a household exclusion which was pleaded by the insurance company as a defense to any cause of action under the policy. The court found, however, that the boy's stay at the insured's home was of a temporary nature and that the critical element of intention to make the home his permanent abode was lacking. The court concluded that the foster child was not a resident of the household, and therefore the household exclusion did not apply.[37]

C. Coverage Concerning Employees

1. Actions of Employees.—A key feature of any FCLP is liability coverage for negligence of the insured's employees. FCLPs commonly define employees as insureds under the insurance policy:

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29. *See, e.g.*, Cook v. Wausau Underwriters Ins. Co., 299 Ark. 520, 772 S.W.2d 614 (1989); Walker v. American Family Mut. Ins. Co., 340 N.W.2d 599 (Iowa 1983).

30. 26 Wis. 2d 399, 132 N.W.2d 517 (1965).

31. *Id.* at 403, 132 N.W.2d at 518.

32. *Id.* at 407, 132 N.W.2d at 521.

33. *Id.* at 408, 132 N.W.2d at 521-22.

34. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

35. *Id.* at 407-09, 122 N.W.2d at 195-96.

36. 1 Ill. App. 3d 662, 274 N.E.2d 136 (1971).

37. *Id.* at 670, 274 N.E.2d at 138.

> "[F]arm employee" means an employee of any insured whose duties are principally in connection with the farming operations of the insured including the maintenance or use of automobiles or teams, but does not include a residence employee or an employee while engaged in an insured's business other than farming.[38]

However, disputes frequently arise as to whether the worker is actually an employee. In *Savoie v. Fireman's Fund Insurance Co.*,[39] the insured's cousin often assisted the insured in cutting and baling hay. While the insured's cousin was driving a tractor, the insured's daughter was thrown off the tractor and was killed. The insured's policy covered liability of employees. However, a court denied coverage on the basis that the cousin was not an employee. The court found that the cousin was not an employee within the FCLP because the insured lacked control over the cousin's actions and paid no wages or other compensation to the cousin.[40]

Even if the worker is clearly the insured's employee, disputes may still arise when the policy covers only those actions taken by the employee during the course and scope of employment. In *Commercial Union Insurance Co. of New York v. St. Paul Fire & Marine Insurance Co.*,[41] the court held that the actions of an insured farmer's employee who negligently drove a farm tractor onto a highway and killed three people in a collision with an automobile were not covered.[42] The court found no coverage because the worker stopped working to get something to eat.[43]

2. Farm Employer's Liabilities.—

a. Exclusion of employees

Although the FCLP protects the insured farmer or rancher from the claims of third parties injured by the negligent conduct of the farmer's employees, the employees are not always financially protected from the negligent conduct of their employer. Many policies provide that the insurer is not liable for bodily injury to any farm employee or is not liable unless the employee is specifically designated as covered in the

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38. This clause is taken from the definitions section of an FCLP issued by Fireman's Fund Insurance Companies. The new ISO language is: "'Farm employee' means any 'insured's' employee whose duties are principally in connection with the maintenance or use of the 'insured locations' as a farm. These duties include the maintenance or use of the 'insured's' farm equipment." ISO, FL-00-20-10-88, *supra* note 11, § IV-Definitions.

39. 339 So. 2d 914 (La. App. 1976), *aff'd*, 347 So. 2d 188 (La. 1977).

40. *Id.* at 916-17.

41. 211 Va. 373, 177 S.E.2d 625 (1970).

42. *Id.* at 376-77, 177 S.E.2d at 628.

43. *Id.*

policy.[44] Such an exclusion places both the employee and employer at risk because lack of insurance funds may severely affect both parties. As a result, there is often conflict between the insurer, the insured, and the injured party as to whether the injured party is an employee.

Austin-St. Paul Mutual Insurance Co. v. Belshan[45] involved an FCLP that excluded bodily injury coverage for any farm employee. The insured hired a worker to mow hay on the insured's farm. During a work break, the worker assisted the insured to repair a piece of broken machinery. While helping with the repairs, a piece of metal struck the worker in the eye. The Minnesota Supreme Court held that the employee exclusion did not apply because the worker was no longer mowing hay for which he had been hired and was involved in a purely gratuitous activity.[46]

In *Huntington Mutual Insurance Co. v. Walker*,[47] the insured farmer's policy excluded coverage for employees injured as a result of the insured's negligence. A tree trimmer working on the insured's farm was injured when the insured moved a tree limb with a tractor.[48] The insurance company pleaded the employee exclusion. The court, however, found the term "employee" to be ambiguous.[49] The court also found the tree trimmer to be a "casual" employee who was not excluded under the policy.[50]

b. Inclusion of employees

An employers' liability and employees' medical payments endorsement can be added to an FCLP to provide farm employers liability coverage. The endorsement covers the insured for liabilities arising out of a farm employee's injury. For there to be coverage three conditions concerning the injury must be met:

> (1) it must be caused by an occurrence; (2) it must be sustained by a "farm employee"; (3) it must arise out of and in the course of the employee's employment in duties relating to the ownership, maintenance, or use of the "insured location" owned or operated for "arming purposes."[51]

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44. *See, e.g.*, Finegan v. Lumbermens Mut. Casualty Co., 329 F.2d 231 (D.C. Cir. 1963) (a farm employee injured during course of employment was not covered under the farmer's FCLP because the policy excluded injuries to employees, unless specifically declared in the policy, and the farmer failed to declare the employee). *See also* Farmers Home Mut. Ins. Co. v. Lill, 332 N.W.2d 635 (Minn. 1983) (employee injured in baling accident not covered because no premium charge had been made for farm employee).

45. 297 Minn. 522, 211 N.W.2d 517 (1973).

46. *Id.* at 523-24, 211 N.W.2d at 518.

47. 181 Ind. App. 617, 392 N.E.2d 1182 (1979).

48. *Id.* at 620, 392 N.E.2d at 1184.

49. *Id.* at 621, 392 N.E.2d at 1185.

50. *Id.*

51. FC&S Bulletins, *supra* note 26, Aug. 1990, at Farms Apf-1.

The bodily injury need not occur on the insured location. If employment duties take the farm employee off the location and the employee is injured, coverage still exists.[52]

The issue that most often arises with respect to farm employers' liability is whether the injured party is truly an employee. Even if the policy covers injuries to employees, a number of exclusions restrict or eliminate the coverage. For example, coverage does not apply to liabilities arising out of injuries to a farm employee if the injuries are in the scope of workers' compensation, disability benefits, unemployment compensation, or any similar laws.[53]

Other exclusions that apply to farm employer's liability coverage include:

> (1) any contractually arranged obligations; (2) any claims or suits against the insured brought more than 36 months after the end of the policy period; (3) an employee's operation or maintenance of aircraft if it is designed to carry people or cargo; (4) injury to an illegally employed person, if the insured has knowledge of the illegal employment; (5) punitive damages for injury to any employee employed in violation of law; and (6) consequential damages sought by the spouse, child, parent or sibling of an injured "farm employee."[54]

3. Medical Payments for Employees.—In addition to providing compensation for bodily injury, the employers' liability and employees' medical payments endorsement also covers medical payments for employees. Expenses, however, must be incurred or ascertained within three years of the date of the accident causing the bodily injury. Reasonable medical expenses include first aid, medical, surgical, X-ray, and dental services; prosthetic devices; and ambulance, hospital, professional nursing, and funeral services. Payments under the policy are excluded, however, if the insured voluntarily provides or is required to provide benefits

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52. *Id.*

53. *See* Oregon Farm Bureau v. Thompson, 235 Or. 162, 378 P.2d 563, *reh'g denied*, 235 Or. 176, 384 P.2d 182 (1963); Bakel v. Colorado Farm Bureau Mut. Ins. Co., 512 P.2d 285 (Colo. App. 1973).

54. FC&S Bulletins, *supra* note 26, Aug. 1990, at Farms Apf-2. *See* Tisdale v. Hasslinger, 79 Wis. 2d 194, 255 N.W.2d 314 (1977) (an 11 year old, injured while operating a hay baler on the insured's farm, was not covered as an employee because state law specifically forbade anyone under 16 years of age from operating farm tractors or self-propelled vehicles). *See also* Farm Bureau Ins. Co. v. Pedlow, 3 Mich. App. 478, 142 N.W.2d 877 (1966) (15-year-old boy injured while operating a defective manure spreader was not an employee because state statute prohibited any person under age 18 from cleaning moving machinery or being employed in any hazardous job).

under any workers' compensation, disability benefits, or unemployment compensation law, or any similar law.[55]

Many of the FCLPs, however, exclude medical payments for farm employees unless such coverage is specifically added. They also exclude coverage for any "other persons" engaged in work "incidental to the maintenance or use of the premises as a farm."[56] This exclusion does not apply, however, to persons injured on the property while involved in a neighborly exchange of assistance for which the insured is not obligated to pay any money. For there to be medical coverage for a neighbor injured while assisting a farmer, the situation must be a typical neighborly exchange with the insured performing services in return. Furthermore, there must be no obligation on the part of the insured to pay money for the help. This feature applies only to injuries that happen on the insured's premises.[57]

IV. Farming Activities and the Business Pursuits Exclusion

The farmer's comprehensive liability policy provides coverage for bodily injuries and property damage arising out of farming activities, and excludes from coverage business pursuits other than farming. The following is typical of the farming definition and business pursuits exclusion found in the FCLPs.

This coverage does not apply

> to *bodily injury* or *property damage* arising out of (1) business pursuits of any *insured* except (i) activities therein which are ordinarily incident to non-business pursuits and (ii) *farming*, or (2) the rendering of or failing to render professional services.[58]

A. Definition of Farming

Although the standard FCLP provides coverage only for farming activities, farming is rarely defined within the policy. As a result, the courts often have been left to define the term. In attempting to define farming, the courts have relied have upon a variety of sources, including Webster's Dictionary, various law dictionaries, agricultural zoning cases, and tax cases involving the preferential treatment of agricultural lands.[59]

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55. FC&S Bulletins, *supra* note 26, Aug. 1990, at Farms Apf-2.

56. *Id.* at Farms Apf-9.

57. *Id.*

58. Clause taken from Fireman's Fund Insurance Companies FCLP § I. Coverage L-Personal Liability, Exclusions Cb (emphasis added). *See also* FC&S Bulletins, *supra* note 26, Aug. 1990, at Farms Ap-5.

59. *See* Aetna Casualty Ins. Co. v. Brethren Mut. Ins. Co., 38 Md. App. 197, 379 A.2d 1234 (1977).

The courts have defined farming broadly to include all acts and products connected with the tillage of soil and agricultural husbandry.

The courts frequently have had difficulty determining what constitutes a farming activity, an activity incidental to farming, or a separate business pursuit not covered under the terms of the policy. In *Bloss v. Rural Mutual Casualty Insurance Co.*,[60] the court had to determine whether raising mink constituted a farming activity. An employee sustained injuries while tending to the insured's minks. The employee also performed traditional farm duties. The court held that the mink raising operation was not a farming activity covered under the employer's FCLP.[61]

The confusion as to what constitutes farming is further exacerbated because the standard FCLP does not clearly define what constitutes an uninsured business pursuit. Such policies typically define a business as any "trade, profession or occupation, other than farming and roadside stands maintained principally for the sale of the insured's produce."[62]

The failure to define farming clearly, or to delineate within the policy what constitutes a noninsured business activity, is even more problematic given that many farmers supplement their farm income with other fee-generating activities. Those fee-generating activities that are derived from the use of the land for something other than traditional farming activities can be especially troubling. For example, farmers occasionally lease their land to others for hunting and fishing purposes. A number of economic studies recommmended that landowners supplement their farm income with earnings from recreational activities on their land.[63] But when such activities occur, the question arises as to whether the farmer is protected under the FCLP from the liability claims of persons who might be injured during those activities.

In determining whether an activity constitutes a business pursuit not covered under the FCLP, the courts traditionally have used a two-pronged test. The courts look to see if there is 1) a profit motive, and 2) evidence of continuity in the activity. If both elements are present, the courts invariably have found that the landowner's activity constitutes a business pursuit, separate and apart from farming, and any cause of action arising out of the activity is not covered under the farm owner's liability policy.

For example, in *Heggen v. Mountain West Farm Bureau Mutual Insurance Co.*,[64] the court found that both prongs of the business pursuit

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60. 270 Wis. 127, 70 N.W.2d 602 (1955).

61. *Id.* at 130, 70 N.W.2d at 604-05.

62. *See* Martin v. Shepard, 134 Vt. 491, 493, 365 A.2d 971, 973 (1976).

63. *See, e.g.*, Conference Proceedings: Income Opportunities for the Private Landowner Through Management of Natural Resources and Recreational Access, West Virginia University Extension Service, Rural Development Publication No. 740 (1990).

64. 220 Mont. 398, 715 P.2d 1060 (1986).

test were met when the insured staged an annual steer roping contest on his ranch. Although the annual fees charged to the participants only totalled between $1,200 to $1,500, and the fees were distributed as prize money, the court still found a profit motive.[65] The court also found that the steer roping events were regular and continuous, even though in some years several were held and in other years only one was held. As a result, the business exclusion applied and there was no coverage under the insured's FCLP when a participant was injured.[66]

The court in *Aetna Casualty & Security Co. v. Brethren Mutual Insurance Co.* found that the insurer's failure to define the term "farming" created an ambiguity.[67] The insureds were involved in the raising, training, and pasturing of thoroughbred race horses. The insurance coverage issue arose when the insureds' horses escaped and were involved in an automobile collision. The insurer claimed that the insureds' activities constituted a business pursuit excluded from the FCLP coverage.[68] The court, however, held that although the pasturing of horses for a fee normally would be regarded as a business pursuit, the raising and grazing of animals constituted farming.[69] Although some of the insureds' activities, such as the breeding, training, and selling of horses and the activities incident thereto, could be characterized as a business, other activities, such as the grazing and raising of horses could be characterized as farming.[70]

Cases involving off-the-farm activities have presented the courts with fewer difficulties. A court had little difficulty in finding that a farmer who also worked as a school teacher was not covered under his FCLP for the alleged physical abuse of a student occurring at the school.[71] A court also dismissed the coverage claim of a farmer who also worked as a locomotive engineer for injuries arising out of the insured's negligent operation of the locomotive and subsequent accident.[72]

A more difficult case, however, was *White v. State Farm Mutual Automobile Insurance Co.*[73] The insured obtained a comprehensive policy

65. *Id.* at 1062-63.

66. *Id.* at 1063. *But see* Randolph v. Ackerson, 108 Mich. App. 746, 310 N.W.2d 865 (1981) (using the two-pronged test, the court found that the insured, who tore down an old barn and sold the wood for a profit, was not engaged in business pursuit within the policy exclusion, because there was no evidence he regularly razed barns for profit).

67. 38 Md. App. 197, 205, 379 A.2d 1234, 1238 (1977).

68. *Id.* at 208, 379 A.2d at 1236.

69. *Id.* at 213, 379 A.2d at 1243.

70. *Id.* at 213, 379 A.2d at 1242-43.

71. Reliance Ins. Co. v. Fisher, 164 Mont. 278, 521 P.2d 193 (1974).

72. Transamerica Ins. Co. v. Preston, 30 Wash. App. 101, 632 P.2d 900 (1981).

73. 59 Tenn. App. 707, 443 S.W.2d 661 (1969).

to cover his farming operations. In addition to his farming activities, the insured was also a partner in a bulldozer operation.[74]

The insured rented farm land from a property owner who hired the insured's bulldozer operation to clear the land for cultivation. During the clearing process, an employee hired by the insured was injured while burning piles of brush.[75] The insured's FCLP provided coverage for injured employees. The insurer, however, refused coverage because the injured employee worked for the bulldozer operation at the time of the accident and not for the insured as a farm employee and because the policy contained a business pursuits exclusion.[76]

The court agreed with the insurance company and held that at the time of the accident the employee worked for the bulldozer company, even though the insured would farm the cleared land. Because the employee was employed by the insured's other business pursuit and not employed as a farm laborer, there was no coverage under the FCLP.[77]

B. *Exemption for Activities Ordinarily Incident to Nonbusiness Pursuits*

The standard FCLP does exempt from the business pursuits exclusion those activities ordinarily incident to nonbusiness pursuits. Certain activities are exempt from the business pursuits exclusion even though they are profit motivated and have continuity because they are incidental to the farming operation. The classic example of an exempt activity is the operation of a roadside stand to sell the farmer's produce. If a customer is injured at the stand as a result of the farmer's negligence, the event would be covered under the farmer's FCLP. Some policies now make a specific reference to the roadside stand exception.

Under the incidental to farming exception, coverage under FCLPs has been found in a variety of situations. For example, in one case a farmer received a monthly state allotment as a foster parent for agreeing to care for children temporarily.[78] The farmer occasionally permitted the foster children to feed the cattle. Although the children considered farm chores to be pleasure rather than work and the farmer received state aid as a foster parent, the court still found that coverage under the farmer's comprehensive liability insurance policy existed when one of the foster children was injured while cutting the binding on a bale of

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74. *Id.* at 715, 443 S.W.2d at 664.

75. *Id.*

76. *Id.* at 719, 443 S.W.2d at 666-67.

77. *Id.* at 722, 443 S.W.2d at 668-69.

78. Country Mut. Ins. Co. v. Watson, 1 Ill. App. 3d 667, 669-70, 274 N.E.2d 136, 138 (1971).

hay.[79] The court held the child's activity to be an ordinary incident to normal farming operations.[80]

Occasionally, courts have stretched the concept of what constitutes an activity incidental to farming to find coverage. For example, in *Wint v. Fidelity & Casualty Co. of New York*,[81] the insured's operation consisted of a riding stable and pasturing other people's horses for a fee. Several of the pastured horses escaped onto a public highway. One of the horses collided with a vehicle and the driver of the vehicle was killed.[82]

One of the issues in the case was whether the event was covered under an FCLP.[83] While conceding that a "riding club" venture might be beyond a reasonable interpretation of "farming," the court held that a broad definition could include the grazing of animals.[84]

The court added that even if "grazing for hire" activities were a nonfarming pursuit, coverage under the FCLP still existed.[85] The court found that keeping fences and gates repaired, as well as closed, is ordinarily incident to normal farming activities. Because the injuries arose from a failure to keep the gates closed, there was coverage under the FCLP.[86]

C. Custom Farming

Custom farming is also excluded under the standard FCLP unless the landowner pays a separate premium for the coverage. FCLPs typically contain the following language as to custom farming:

> This policy does not apply
>
> under any coverage for injury, death or destruction arising out of custom farming operations unless such coverage is designated in the declarations and a premium paid therefor; . . .[87]

Custom farming is defined as "the use of any tractor, farm implement or farm machinery for farming purposes for others for a charge, including the maintenance, movement, or transportation of any tractor, farm implement or farm machinery in connection therewith and incidental thereto."[88]

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79. *Id.*
80. *Id.*
81. 9 Cal. 3d 257, 507 P.2d 1383, 107 Cal. Rptr. 175 (1973).
82. *Id.* at 260, 507 P.2d at 1385-86, 107 Cal. Rptr. at 177.
83. *Id.* at 260-62, 507 P.2d at 1386, 107 Cal. Rptr. at 177-78.
84. *Id.* at 262-63, 507 P.2d at 1387, 107 Cal. Rptr. at 178-79.
85. *Id.* at 263, 507 P.2d at 1387, 107 Cal. Rptr. at 179.
86. *Id.*
87. Shelter Mutual Insurance Company's FCLP, § Exclusions (f).
88. *Id.* at IV Other Definitions (g).

Some FCLPs provide coverage for custom farming activities if the receipts from the activity over a particular period do not exceed a specified dollar amount. The following is typical of such provisions: "But this exclusion will apply only when your receipts during the 12 months immediately preceding the date of the 'occurrence' from such operations exceed $2,000."[89]

A number of courts have determined that the custom farming exclusion applies to the actual activity of custom farming and not necessarily to the activities preparatory to custom farming. Thus, on a number of occasions coverage has been found under an FCLP even though the insured clearly was about to engage in custom farming. For example, the custom farming exclusion did not preclude recovery when a collision occurred between the insured's tractor and the plaintiff's car while the insured farmer was towing a hay baler from one custom farming job to another.[90]

V. Insured Premises

A. Described Premises

The basic FCLP extends coverage to liability arising from the ownership, use, or maintenance of the "farm premises."[91] FCLPs specifically describe the insured farm premises. The description is normally set out on the policy's declarations page. Generally, bodily injury or property damage occurring away from the described farm premises is not covered. The farm premises is the location identified in the declarations page and operated for farming purposes. The structures used as residences, garages, stables, and individual or family cemetery plots are included within the definition.[92]

If a structure is located on the insured premises, it may be covered under the FCLP even if its primary use is not farm related. In *Daire v. Southern Farm Bureau Casualty Insurance Co.*,[93] an accident occurring at a fishing camp located on the insured's farm was found to be within the FCLP because the camp was frequently used by the farm hands for cooking and other purposes. The court found that the use of a building in connection with a farming operation meant that its use had only to

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89. ISO, FL-00-20-10-88, *supra* note 11, Coverage H-Bodily Injury and Property Damage Liability, § 2i. *See also* FC&S BULLETINS, *supra* note 26, Aug. 1990, at Farms Ap-5.

90. *See* United Fire and Casualty Co. v. Mras, 243 Iowa 1342, 55 N.W.2d 180 (1952).

91. FC&S BULLETINS, *supra* note 26, Aug. 1990, at Farms Ap-2, 3.

92. *Id.*

93. 143 So. 2d 389 (La. 1962) (superseded by statute as stated in Holder v. Louisiana Partes Service, 555 So. 2d 20 (La. App. 1989), *cert. denied*, 556 So. 2d 59 (La. 1990)).

be related to, or associated with, the ownership of the farm operation.[94]

B. Undescribed Premises

The FCLP excludes from coverage any liability arising out of premises owned, rented, or controlled by the insured if those premises are not listed in the policy declaration. In *Dorre v. Country Mutual Insurance Co.*,[95] the insured declared his 309-acre grain farm. The insured did not list an adjoining twelve-acre tract owned by his son. When a tenant was injured on the son's tract, the court held that there was no coverage under the father's policy even though the father helped his son farm the adjoining tract.[96]

However, in a similar case, *Industrial Fire & Casualty Insurance Co v. Grinnell Mutual Reinsurance Co.*,[97] the court found coverage under a father's FCLP. The policy's premises description included not only the insured's premises as listed on the declarations page, but also other premises owned, operated, or rented by the insured. The insured father and his son jointly owned cattle on the son's adjacent farm. The cattle were tended by the son under an agreement with his father. When some of the cattle escaped onto a public highway and caused an accident, the father's policy covered the damages. The son's farm constituted "other premises" used in connection with the father's insured premises.[98]

C. Ways Adjoining and Adjacent to the Described Premises

FCLPs frequently provide that the coverage on premises also includes the ways adjoining and adjacent to the premises described on the declarations page. The terms "ways adjoining" and "adjacent thereto" are relative, and can only be determined by the context in which they are used and by the facts and circumstances surrounding each dispute. The interpretation of these terms has led to frequent litigation.

In *Farm Bureau Mutual Insurance Co. v. Sandbulte*,[99] the insured's farm owner's liability policy provided coverage for motor vehicles on the insured premises or "ways immediately adjoining" the premises. The insureds were involved in an accident while driving a pickup truck on a public highway between parcels of land that were owned by the insured and that were covered as insured premises under the FCLP. The insurance company refused to provide a defense or accept coverage because the

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94. *Id.* at 391.
95. 48 Ill. App. 3d 880, 363 N.E.2d 464 (1977).
96. *Id.* at 882, 363 N.E.2d at 466.
97. 100 Ill. App. 3d 593, 427 N.E.2d 431 (1981).
98. *Id.* at 597, 427 N.E.2d at 434.
99. 302 N.W.2d 104 (Iowa 1981).

policy excluded coverage for motor vehicles "while away from the insured premises or the ways immediately adjoining."[100] The court agreed with the insurance company. The court held the phrase "ways immediately adjoining" to be unambiguous and to mean that the "way" upon which the incident occurs must touch or abut the insured premises at the point of occurrence.[101]

D. Away From Premises Exclusion

FCLPs routinely exclude from coverage bodily injuries or property damage from the use of automobiles or other mechanical devices, such as snowmobiles, "away from the premises." The exclusion applies to the ownership, maintenance, operation, use, loading, or unloading of such equipment if the bodily injury or property damage occurs away from the insured premises. For example, in *Stover v. State Farm Mutual Insurance Co.*,[102] the insured's farm owner's liability policy did not cover the insured's employee in a fall from the insured's truck while the employee was loading shelled corn onto the truck at a farm owned by a third party.

Insureds have attempted to circumvent the exclusion by asking courts to focus on the situs of the act of negligence instead of the location of the actual accident. The argument is that although the accident may have occurred away from the insured premises, the act of negligence that caused the accident took place on the farm premises. In *Scherschligt v. Empire Fire & Marine Insurance Co.*,[103] the insured negligently constructed a trailer hitch on farm equipment used in his farming operation.[104] The hitch broke while the insured was towing an old pickup truck on a public highway. The resulting accident severely injured the driver of another vehicle. The insurance company denied coverage because the action arose out of the insured's use of an automobile away from the insured farm premises.[105] In holding for the insurance company, the court emphasized the location of the loss rather than the negligence that precipitated it.[106]

The court reached a similar result in *Bankert v. Threshermen's Mutual Insurance Co.*[107] The insureds entrusted their minor son with an unlicensed motor vehicle. The act of entrustment took place on the farm premises.

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100. *Id.* at 107.
101. *Id.* at 108.
102. 189 N.W.2d 588 (Iowa 1971).
103. 662 F.2d 470 (8th Cir. 1981) (applying Neb. law).
104. *Id.* at 471.
105. *Id.*
106. *Id.* at 473.
107. 110 Wis. 2d 469, 329 N.W.2d 150 (1983).

The son drove the vehicle off the premises and was involved in an accident that severely injured another person. The court upheld the insurance company's position that there was no coverage under the FCLP.[108] Although the negligent entrustment occurred on the farm premises, the accident took place away from the premises.[109]

VI. Pollution Coverage

Farmers are concerned about whether their FCLP, provide coverage for pollution. The liability claims that can arise out of polluting events are extensive and varied. Besides the traditional claims of personal injury, property damage, and business interruption, there are also unique claims such as "'inverse condemnation,' natural resource deprivation, medical surveillance, emotional distress, [and] environmental cleanup."[110]

Pollution cases also have some unique characteristics that are particularly perplexing to insurance companies and their insureds. Some of the characteristics include the following:

1. The amounts claimed are often indeterminate and frequently substantial;
2. Claims are often made as to exposures, conduct, or circumstances that occurred years before the claims are actually made. As a result, information concerning the events are often difficult to recreate;
3. Pollution claims extend over long periods of time in which there may have been many changes to the extent of insurance carried by the accused, as well as changes in insurers;
4. The relief request is often nontraditional. Relief may include not only payments of money, but also such nontraditional costs as medical surveillance or environmental cleanup.[111]

Traditionally, agriculture has not been subjected to environmental litigation to the extent of industrial and other commercial enterprises. Possibly the lack of litigation involving farms or ranches and agribusiness in general can be attributed to the public's rather benign view of agriculture. Factories pollute, not farms.

However, the public's perception of agriculture as a clean, nonpolluting activity is rapidly changing. A recent poll indicated that over seventy percent of Americans feel that agriculture uses too many chem-

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108. *Id.* at 480, 329 N.W.2d at 154.
109. *Id.* at 481, 329 N.W.2d at 154-55.
110. M. Dore, Law of Toxic Torts 28-3 (1988).
111. *Id.* at 28-4.

icals.[112] There also have been a number of environmental studies that blame a large percentage of the nation's environmental problems on agriculture, especially ground water contamination.[113]

In light of a changing public perception of agriculture and increased scientific evidence that agriculture is a major polluter, it is only a matter of time before those involved in agriculture are subjected to an ever-increasing number of environmental lawsuits.

Just as farmers are finding an increasing need for pollution coverage, insurers are limiting the availability of coverage under the standard FCLP. To understand the present restrictions on pollution coverage within FCLPs, it is useful to trace the development of pollution coverage. Many of the pollution cases subsequently referred to are not agricultural cases. These cases involve the interpretation of commercial or comprehensive general liability insurance policies (CGLs) rather than FCLPs. However, the legal principles set forth are equally applicable to agricultural activities. The pollution coverage issues and policy language are virtually identical in CGLs and FCLPs.

A. *Accident-Based Policies*

Before 1966, comprehensive liability policies were "accident-based" policies that made the following promise on behalf of insurers:

> To pay, on behalf of the insured, all funds which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease . . . sustained by any person, or because of any injury to or destruction of property . . . caused by an accident.[114]

The term accident implies an event rather sudden in nature.[115] Certainly, insurers intended that coverage was available only as to those events that were "sudden, violent, catastrophic and specific."[116] However, the policies' failure to define the term "accident" naturally created some confusion and concern in the courts. One court even expressed "wonderment" over the failure of insurers to define the term.[117]

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112. National Farm Finance News, Aug. 3, 1990, at 10, col. 1.

113. *See* EPA, Report to Congress: Nonpoint Source Pollution in the U.S. 2-6-2-13 (1984); EPA, National Water Quality Inventory, 1988 Report to Congress 7-10, 22-25, 121-26.

114. M. Dore, *supra* note 110, at 28-11-28-12.

115. FC&S Bulletins, *supra* note 26, Nov. 1987, at Public Liability Cop-1.

116. Farnow, Inc. v. Aetna Ins. Co., 33 Misc. 2d 480, 483, 227 N.Y.S.2d 634, 638 (Sup. Ct. 1962).

117. *See* White v. Smith, 440 S.W.2d 497, 511 (Mo. Ct. App. 1969).

1. Interpretation Problems in General.—Some courts held that the "plain meaning" of the term "accident" excludes coverage for situations that do not involve "the happening of a single event referable to [a] definite time and place."[118] Other courts, however, permitted coverage for situations in which the events giving rise to liability transpired over a period of time, recognizing that "damage caused by a glacier is every bit as accidental as that caused by an avalanche."[119] Instead of focusing on the amount of time involved, the courts focused on whether the results were intentional.[120]

Questions also arose as to when an accident actually occurred. Did an accident take place when the event occurred or when the injury was manifested? Most courts have determined that coverage is triggered when the injury was suffered rather than when the conduct giving rise to the injury took place.[121] Also at issue was the perspective from which the accident should be viewed. Was the existence of an accident determined from the standpoint of the victim or the insured? From the victim's standpoint, there was almost always an accident. However, if viewed from the standpoint of the insured, there may or may not have been an accident. The courts generally have viewed the event from the standpoint of the insured.[122]

Some courts held that coverage did not extend to foreseeable damage because the damage was the natural and probable consequence of the insured's negligent conduct. It was not necessary that the actual result was foreseeable, but simply that the result was a natural and probable consequence of the activity.[123]

2. Pollution Cases.—In pollution cases, the concept of foreseeability frequently has been applied in interpreting "accident-based" policies. For example, coverage was denied with respect to contamination caused by sewage lagoons because the court determined that the insured took a calculated risk that pollution might occur.[124]

Other courts, however, rejected foreseeability tests in pollution cases. If the actual injury was not intended, the injury, by definition, was caused by an accident, regardless of the circumstance giving rise to the injury and the negligent conduct of the insured.[125]

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118. *See* M. Dore, *supra* note 110, at 28-19.

119. *Id.* at 28-20.

120. *Id.*

121. *Id.*

122. *Id.* at 28-21.

123. *Id.* at 28-21 to -22.

124. *See* Town of Tieton v. General Ins. Co. of America, 61 Wash. 2d 716, 380 P.2d 127 (1963); *see also* M. Dore, *supra* note 110, at 28-20 to -23.

125. *See* Taylor v. Imperial Casualty and Indem. Co., 82 S.D. 298, 144 N.W.2d 856 (1966); *see also* M. Dore, *supra* note 110, at 28-20 to -23.

City of Kimball v. St. Paul Fire & Marine Insurance Co.[126] illustrates the divided authority on the concept of foreseeability. This case concerned coverage for the seepage of the waste from a municipality sewage lagoon. The majority held that the city's failure to discover the migration of waste from the sewage system resulted in damage that was unexpected and accidental.[127] However, the dissent determined that storage of waste materials in an unfilled lagoon was so likely to result in migration of waste that the coverage should not be permitted.[128]

B. Occurrence-Based Policies

Confusion over defining the term "accident," as well as demands for increased coverage, led to the 1966 revision in which accident-based policies were changed to "occurrence-based" policies. The duty-to-pay clause was changed to read as follows: "The company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage . . . caused by an occurrence."[129] Occurrence was defined in such policies as "an accident, including injurious exposure to conditions, which result, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[130]

In 1973, the occurrence language was changed to read as follows: "[A]n accident, *including continuous or repeated* exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[131]

Although occurrence was defined, the term accident was still left undefined in such policies. The use of occurrence language clarified to some extent issues that arose under the accident-based policies:

1. While coverage still attached when bodily injury resulted during the policy period, it was now clear that the injury-producing incident could occur over an extended period of time, and did not have to be a single catastrophic event.[132]
2. Because an occurrence was defined as damage or injury "neither expected nor intended from the standpoint of the

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126. 190 Neb. 152, 206 N.W.2d 632 (1973).

127. *Id.* at 161-62, 206 N.W.2d at 638.

128. *Id.* at 162-69, 206 N.W.2d at 638-41 (White, C.J., and Boslaugh, J., dissenting). *See also* M. Dore, *supra* note 110, at 28-22.

129. M. Dore, *supra* note 110, at 28-23.

130. *Id.*

131. *Id.* at 28-24 (emphasis added).

132. *Id.*

insured," it was clear that unintended results of intentional acts frequently were covered under the standard liability policy.[133]

3. The issue of whether an occurrence had taken place which was neither expected nor intended was to be viewed from the standpoint of the insured.[134]

Although a number of problem areas were resolved under the new language, interpretation problems still existed. All too frequently from the standpoint of the insurers, these interpretation problems were resolved in favor of the insureds. A number of courts took the position that the definition of an "occurrence" was broader than the term "accident," and therefore "occurrence-based" policies substantially expanded insurance coverage.

The leading case that expanded coverage was *Grand River Lime Co. v. Ohio Casualty Insurance Co.*[135] This case involved extensive air pollution from a quarry and manufacturing site that caused damage to cars and homes in a nearby village. The insurer denied coverage and responsibility for the duty to defend because the damages resulted from seven years of pollution and because the results were to be "expected or intended."[136]

The court, however, held the term "occurrence" to be broader than the term "accident."[137] Although accidents happen in a certain way, occurrences happen or come about in any way. Furthermore, even though Grand River Lime intended to pollute, it did not intend to harm people or property. As a result, the insurer had to provide a defense and coverage.[138]

Other courts also adopted the position that the occurrence definition was broader than the term accident, and the coverage could be found for intentional acts if the resulting damage was not intended or expected. For example, in *Steyer v. Westvaco Corp.*,[139] Christmas tree farmers sued a neighboring insured paper mill for exposing the trees to pollution. The pollution occurred over a four-year period. The court found an "occurrence" because the injury was not expected or intended.[140]

The same result was reached in *United States Fidelity & Guarantee Co. v. Armstrong*.[141] Raw sewage dumped onto neighboring property

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133. *Id.*
134. *Id.* at 28-25.
135. 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972).
136. *Id.* at 180-83, 289 N.E.2d at 362-64.
137. *Id.* at 184, 289 N.E.2d at 365.
138. *Id.* at 185, 289 N.E.2d at 365.
139. 450 F. Supp. 384 (D. Md. 1978).
140. *Id.* at 390.
141. 479 So. 2d 1164 (Ala. 1985).

was covered because even if the damage was foreseeable, it still was not expected or intended from the standpoint of the insured.[142]

C. *Creation of the Pollution Exclusion*

The court decisions finding pollution coverage under the "occurrence-based" liability policy naturally alarmed the insurance industry. The industry became even more alarmed as tough environmental laws were enacted in the early 1970s and a series of massive environmental disasters took place, such as the sinking of the oil tanker *Torrey Canyon.*[143] As a result, the industry created the first pollution exclusion clause that was added to liability policies in 1973.

This insurance does not apply

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[144]

In drafting the 1973 pollution exclusion clause, the insurance industry steadfastly maintained that the "occurrence-based" policies already excluded from coverage most acts of pollution. Industry leaders contended that the new exclusion was meant only to clarify the existing exclusion:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The [pollution] exclusion clarifies this situation so as to avoid any questions of intent. Coverage is continued for pollution or contamination caused by injuries where the pollution or contamination results from an accident.[145]

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142. *See also* Benedictine Sisters v. St. Paul Fire & Marine, 815 F.2d 1209 (8th Cir. 1987); Pepper's Steel & Alloy v. United States & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984). *But see* American Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929 (W.D. Pa. 1987) (in which groundwater contamination from uncorrected disposal problems at a dump site, after notification, was outside the definition of an occurrence as the additional damage was to be expected).

143. Comment, *Pollution Exclusion Clauses: The Agony, The Ecstasy, and the Irony For Insurance Companies*, 17 N. Ky. L. Rev. 443, 449 (1990).

144. *Id.* at 449 (citing M. Rhodes, Couch on Insurance 2d § 1.172 (1984)).

145. Joest, *Will Insurance Companies Clean the Augean Stables - Insurance Coverage for the Landfill Operator*, Ins. Coun. J. 258, 259 (Apr. 1983).

However, the exclusion actually goes one step beyond the "occurrence" definition because damage arising out of the discharge, dispersal, release, or escape of pollutants is not insured, regardless of the insured's expectations or intentions. The only exception is for those polluting events that are sudden and accidental.[146]

1. Court Decisions Invalidating the Exclusion.—Although the insurance industry believed it solved its pollution coverage problems, a long series of court decisions demonstrated otherwise. The validity of the exclusion was ruled on first in *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Insurance Co.*[147] The court declared the clause to be ambiguous and refused to deny coverage for pollution caused by the dispersal of sand and dirt during construction of a subdivision.[148]

Niagra County v. Utica Mutual Insurance Co.[149] was especially damaging to insurers. The case involved litigation that arose over Love Canal. In determining the insurer's duty to defend, the court held that the exclusion clause applied only to "active polluters."[150] The court also focused on whether the harm from the event was sudden and accidental, as opposed to whether the release of chemicals was sudden and accidental.[151] The court found that from the county's viewpoint, the pollution was sudden and accidental because it did not occur until the deleterious effects of the buried industrial toxic chemicals were discovered.[152]

From 1981 through 1987, insurers won only eight out of thirty-five cases interpreting the 1973 pollution exclusion.[153] Not only did a number of courts find the pollution clause to be ambiguous, one court declared the clause to be superfluous. The court held that the clause was nothing more than another way to define an "occurrence."[154]

2. Waste Management Decision.—By 1986, the insurance industry began to prevail in some of the cases interpreting the 1973 pollution exclusion. The true turning point, however, was *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*[155] The case involved a hazardous waste landfill that leaked into and contaminated a groundwater supply.

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146. FC&S Bulletins, *supra* note 26, Nov. 1987, at Public Liability Cop-2.

147. 347 So. 2d 95 (Ala. 1977).

148. *Id.*

149. 103 Misc. 2d 814, 427 N.Y.S.2d 171 (N.Y. Sup. Ct.), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (1980).

150. *Id.* at 817, 427 N.Y.S.2d at 174.

151. *Id.* at 820, 427 N.Y.S.2d at 174-75.

152. *Id.* at 821, 427 N.Y.S.2d at 175-76.

153. *See* Comment, *supra* note 143, at 455 n.78 (listing of the decided cases).

154. *See* Jackson Township Mun. Util. Auth. v. Hartford Accident and Indem. Co., 451 A.2d 990 (N.J. 1982).

155. 315 N.C. 688, 340 S.E.2d 374 (1986).

In construing the pollution exclusion in the insurance policy, the North Carolina Supreme Court found:

(1) The clause was not ambiguous;
(2) The focus of the exclusion is not upon the release, but upon the fact that it contaminates or pollutes;
(3) Gradual seepage is not by definition, "sudden" or "accidental."[156]

Since *Waste Management*, the reasoning of which many courts have adopted, insurers have fared much better in the courts. At the very least, there seems to be a fairly equal split. From 1987 through October 1989, of the fifty-one reported pollution cases, twenty-eight were decided in favor of insurers.[157]

3. Two Agricultural Cases.—A couple of agricultural cases clearly demonstrate the two views on interpreting the pollution exclusion.[158] In *Farm Family Mutual Insurance Co. v. Bagley*, the insureds were hired to spray oat fields. Using a boom sprayer, the defendants released chemicals approximately eighteen inches off the ground. Unfortunately, the sprayed chemicals were carried to neighboring land, causing damage to vineyards and crops. The insured's policy contained the standard pollution exclusion.[159]

The key issue in the case was whether the spraying of the neighboring land was sudden and accidental. The court determined that something is accidental when it is "unexpected, unusual and unforseen" from the standpoint of the insured.[160] Because the insured had used due care and diligence in spraying the oat fields, (no wind was present at the time the oat fields were sprayed), the dispersal of the chemicals onto the neighboring vineyards and crops was unexpected, unusual, and unforeseen from the standpoint of the insured. Thus, the pollution was sudden, accidental, and within the insured's FCLP coverage.[161]

In *Weber v. IMT Insurance Co.*,[162] the court interpreted two insurance policies with respect to an act of pollution. The insureds, the Webers, owned a modern farming operation that included raising hogs from farrow to finish. As part of their operation, they used a spreader to

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156. *Id.* at 695-700, 340 S.E.2d at 381-82; *see* Comment, *supra* note 143, at 459 (parenthetical explanation).

157. Comment, *supra* note 143, at 460 n.98.

158. Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978).

159. *Id.* at 1014, 409 N.Y.S.2d at 295.

160. *Id.*

161. *Id.* at 1014, 409 N.Y.S.2d at 295-96.

162. No. 9-437-1389, slip op. (Iowa Ct. App. Apr. 24, 1990) (affirming declaratory judgment), *vacated*, 462 N.W.2d 283 (Iowa 1990).

transport manure down a gravel road. During hauling, the spreader sometimes dropped manure on the gravel road. This operation had been conducted for a number of years when the Weber's neighbors, the Newmans, filed an action seeking damages for the contamination of their corn crop and other property by fumes from the manure dropped or spread on the road. The Webers had two policies, a standard policy and an umbrella policy, with IMT. The Webers looked to IMT to defend them and to provide them with insurance coverage. However, IMT denied coverage.[163]

With regard to the first policy, IMT relied on language that stated that coverage was limited to accidents "neither expected nor intended from the standpoint of the insured" and that there was no coverage for the discharge of "waste materials" unless the discharge was "sudden and accidental." In a declaratory judgment for the insurance company, the court held the pollution exclusion to be unambiguous.[164] The court stated that the exclusion applied to waste materials, and that a reasonable interpretation of that would include hog manure.[165]

The court also agreed with the insurance company's contention that the insured's spilling and depositing of manure on the road was not sudden and accidental. Instead, the pollution and its consequences were a result of the Webers' regular and ongoing farming activities occurring over a ten- to fifteen-year period.[166] The Iowa court cited the Sixth Circuit ruling in *United States Fidelity & Guarantee Co. v. State Fire Co., Inc.*,[167] which held that such pollution clauses as found in the Webers' policy apply to the release of waste materials and pollutants taking place on a regular basis or in the ordinary course of business.[168]

With regard to the umbrella policy issued by IMT, the policy did not contain a pollution exclusion, but did contain the following definition of an occurrence: "[O]ccurrence means an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[169] The court found that occurrence means an accident. Furthermore, for there to be coverage under the policy, the accident must result in damage that was neither expected nor intended. In determining whether an injury is expected or intended from the standpoint

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163. *Id.* at 3.
164. *Id.* at 4.
165. *Id.* at 4-6.
166. *Id.* at 6-8.
167. 856 F.2d 31 (6th Cir. 1988).
168. *Weber*, No. 9-437-1389, slip op. at 7.
169. *Id.* at 10.

of the insured, the test of substantial probability is to be used. Substantial probability is more than "reasonably foreseeable."[170] Applying the substantial-probability standard to the facts of *Weber*, the court concluded that the damages caused to the neighboring property were highly likely to occur.[171] As a result, there was also no coverage under the umbrella policy of insurance.[172]

On October 17, 1990, the Iowa Supreme Court vacated the court of appeals decision. The court affirmed in part and reversed in part the district court decision, and remanded the case.[173]

The Iowa Supreme Court affirmed the lower court's ruling that there was no coverage under the primary liability policy because of the pollution exclusion. The court agreed that the term "waste material" in the pollution exclusion was not ambiguous, even though the term was not defined in the policy. Giving the term its ordinary meaning, the court held that the term would encompass hog manure spilled on the road.[174] The court also agreed with the lower court ruling that there was nothing "sudden and accidental" about the spill.[175]

However, the Iowa Supreme Court differed from the lower court with respect to the umbrella policy. The court held that although the Webers were aware that they were spilling manure, there was no evidence that they intentionally contaminated the Newmans' sweet corn crop.[176]

As to whether the damage was expected, the court held that the evidence did not support the lower court's ruling that the Webers knew, or should have known, that the spilled manure would ruin the Newmans' sweet corn.[177] There was no evidence that the Newmans had previously complained to the Webers that the sweet corn crop was being ruined by the spilled manure, nor was there any testimony that the Webers knew damage was occurring. As a result, it could not be said that the Webers expected property damage to occur.[178]

D. Absolute Exclusion

A number of liability policies, especially those written after 1986, contain an absolute pollution exclusion. The following is typical of such exclusions:

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170. *Id.* at 11.
171. *Id.* at 12.
172. *Id.* at 12-13.
173. Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990).
174. *Id.* at 285.
175. *Id.* at 286-87.
176. *Id.* at 288.
177. *Id.*
178. *Id.* at 289.

This coverage does not apply to:

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) At or from premises you own, rent, occupy or *borrow*;
(b) At or from any site or location used by or for you or others from the handling, storage, disposal, processing or treatment of waste;
(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
(i) If the pollutants are brought on or to the site or location in connection with such operations; or
(ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.[179]

(2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.[180]

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.[181]

E. Limited Coverage

Because of the absolute exclusion, some farmers now are obtaining an endorsement to their FCLPs for limited farm pollution coverage. The limited coverage is obtained by means of an exception to item (1) of the pollution exclusion permitting coverage for "*bodily injury or property damage caused by or resulting from the discharge, dispersal, release or*

179. FC&S BULLETINS, *supra* note 26, Aug. 1990, at Farms App-1.
180. *Id.*
181. *Id.*

escape of smoke or farm chemicals, liquids or gases used or intended for use in normal and usual farming or agricultural operations."[182]

Obviously, this limited coverage does not protect the insured from lawsuits involving run-off animal wastes. Also, the coverage is subject to the following three conditions:

1. If "the discharge, dispersal, release or escape" occurs off the farm premises, it must be sudden and accidental and occur during transportation or storage;
2. The pollutant "must not have been released from an aircraft;"
3. The "agricultural operations must not be in violation of any ordinance or law."[183]

VII. A Potpourri of Other Exclusions

Besides the exclusions already discussed, the standard FCLP contains a number of other exclusions that affect farmers and their activities. Many of these exclusions frequently catch unaware farmers.

A. *Products Liability and Warranty Exclusions*

FCLPs usually contain products liability and warranty exclusions. Such exclusions typically read as follows:

This policy does not apply to

> [a]ny occurrence arising out of the handling or use of, the existence of any condition in, or a warranty of, goods or products manufactured, produced, grown, sold, handled or distributed by the insured if the occurrence arises after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured.[184]

This sort of exclusion, of course, has great significance to agricultural producers who find that their liability coverage ends the moment their product leaves the farm premises. Thus, if the product, such as produce, grain, or even baled hay, is sold to third parties and removed from the premises and the third party is injured by the product, there is no liability coverage under the FCLP.

Some insureds have attempted to avoid this exclusion by arguing that even though the third-party damage occurred off the farm premises,

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182. FC&S Bulletins, *supra* note 26, Oct. 1987, at Farms Aplp-4 (emphasis in original).

183. *Id.*

184. National Farmers Union Property & Casualty Co. v. Iverson, 346 F. Supp. 660, 663 (D.S.D. 1972).

the negligent act occurred on the insured's premises and therefore should be covered under the policy. For example, in *National Farmers Union Property & Casualty Co. v. Iverson*,[185] the insured's business consisted of cutting, baling, and selling alfalfa hay. A dairy farm purchased some of the hay. The hay contained bits of metal that caused the dairy cattle to get hardware's disease. The insurance company for the alfalfa business refused to provide coverage because of the standard products liability exclusion found in the policy. The insured argued that the negligence took place on the premises, and even though the cattle were damaged off the premises, there was continuity between the act of negligence and subsequent injury.[186]

The court, however, held that the exclusion was applicable, and found that liability was established at the place where the injury occurred and not where the cause of action arose.[187] The court noted that in most cases where damages or injuries are caused by the handling or use of a defective product, the occurrence can be traced to some preexisting negligence.[188] To give controlling effect to the allegation of the preexisting negligence to determine at what point liability arose would emasculate the product liability exclusion.[189]

B. Care, Custody, or Control Exclusion

The standard FCLP excludes coverage for property or persons in the care or custody and control of the insured. As a result of the exclusion, the insured is relieved from liability for bodily injuries or property damage sustained by such property or persons.

1. Persons.—The care, custody, or control exclusion for people is analogous to the family or household exclusion. For example, in *Goller v. White*,[190] the court found a twelve-year-old foster child to be a member of the insured's household; thus, the child's injuries were subject to the family exclusion. In addition, the care, custody, or control exclusion was applicable. The child had been placed in the insured's legal care for medical treatment and education, and the insured had a duty to control and discipline the child.[191]

2. Property.—Numerous cases discuss an exclusion for property damage. For example, in *Moore v. M.F.A. Mutual Insurance Co.*,[192]

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185. *Id.* at 663.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 664.
190. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
191. *Id.* at 407-09, 122 N.W.2d at 195-96.
192. 422 S.W.2d 357 (Mo. App. 1967).

the insured farmer operated a combine owned by a third party. An accident occurred while the insured operated the combine on a public highway. In affirming a summary judgment for the insurance company, the court held that the insured could not recover under the provisions of his FCLP because although he did not own the combine, it was in his care, custody, or control at the time of the accident and therefore came within the applicable exclusion.[193]

A less typical case, but one in which the exclusion also applied, is *A. H. Karpe v. Great American Indemnity Co.*[194] In *Karpe*, the insured raised registered herefords. A third party left a hereford cow with the insured to be bred at the insured's ranch. The insured mistook the third party's hereford cow for one of his own and sent the cow to the slaughter house.[195] The insured's carrier refused to acknowledge coverage because the animal was destroyed while in the care, custody, or control of the insured and because there was an applicable exclusion in the insured's policy. The insured argued that the event of liability — the death of the cow — actually occurred at the slaughter house.[196] The court rejected the insured's argument and found that the negligence occurred while the animal was under the insured's care, custody, or control.[197]

An example of a case in which the care, custody, or control exclusion did not apply is *Connecticut Fire Insurance Co. v. Reliance Insurance Co.*[198] In that case, the insured leased land from his brother. The leased land contained structures and equipment belonging to the brother. The lessee used the structures and equipment in varying degrees. A fire occurred on the leased premises as a result of the negligence of the lessee's employees. The fire destroyed goods of the lessor's brother that had been left in several of the structures.[199] The lessee's insurance company refused to pay for the destroyed goods because they had been left in the care, custody, or control of the lessee and were excluded from coverage under the policy.[200] The lessee ultimately prevailed against his insurance company because the court found that the lessee rarely, if ever, actually used the property, even though the property had been left on the leased premises.[201]

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193. *Id.* at 359.
194. 190 Cal. App. 2d 226, 11 Cal. Rptr. 908 (1961).
195. *Id.* at 228, 11 Cal. Rptr. at 909.
196. *Id.* at 231-32, 11 Cal. Rptr. at 910-12.
197. *Id.* at 233-34, 11 Cal. Rptr. at 912.
198. 208 F. Supp. 20 (D. Kan. 1962).
199. *Id.* at 22.
200. *Id.* at 23.
201. *Id.* at 25.

C. Motor Vehicle Exclusion

The FCLP is not designed to provide coverage for bodily injury and property damage arising out of the ownership, maintenance, or use of motor vehicles, including loading and unloading of trailers and semi trailers. Instead, coverage for such events must be obtained via an automobile liability policy. The FCLPs usually describe motor vehicles as being any land motor vehicle, trailer, or semi trailer designed for travel on public roads, including any machinery or apparatus attached thereto.

Farm tractors, trailers, implements, or vehicles in use on the farm not subject to motor vehicle registration, or any other equipment designed for use principally off public roads, are not excluded from coverage. As a result, litigation frequently arises as to whether the particular piece of machinery is subject to motor vehicle registration. If it is subject to motor vehicle registration, it falls under the motor vehicle definition and is excluded from coverage.

In *North Star Mutual Insurance Co. v. Moon*,[202] the insured purchased a three wheeler for use on the insured's farm premises. The insured's FCLP covered off-terrain vehicles used on the farm so long as they were not subject to motor vehicle registration and were used exclusively on the farm premises. The insured frequently used the three wheeler to travel between noncontiguous farm land parcels. The insured modified the three wheeler by installing a mirror, horn, and brake light, registered the vehicle with the Department of Public Safety, and obtained a license for the vehicle.[203] The vehicle was eventually involved in an accident while driven by the insured's fourteen-year-old daughter. A passenger on the vehicle was seriously injured and brought suit. The insured's carrier denied coverage because the three wheeler was modified for use on the public highways and was licensed for such use.[204] The court agreed with the insurance company and held that an accident occurring on a public road with a modified ATV was not the sort of risk contemplated by the insurance carrier under the farm liability policy. As a result, the motor vehicle exclusion applied and there was no coverage.[205]

A court reached a different conclusion in *Utah Farm Bureau Mutual Insurance Co. v. Orville Andrews & Sons*.[206] In that case, a two-ton Ford truck was modified as a spread feeder for cattle. Although the

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202. 357 N.W.2d 95 (Minn. 1984).
203. *Id.* at 96.
204. *Id.*
205. *Id.* at 97-98.
206. 665 P.2d 1308 (Utah 1983).

truck was used year round on the insured's feedlots, it was used occasionally on public roads for an eleven-mile round trip to carry feed. A traffic accident occurred when the truck was on a public highway.[207] The insurance company denied coverage on the basis that the vehicle met the motor vehicle exclusion contained in the insurance policy. The court, however, found that the truck was always used for agricultural purposes and was never used for personal transportation. As a result, the court refused to apply the motor vehicle exclusion to a piece of equipment that obviously was used for agricultural purposes and was in the process of satisfying an agricultural purpose when the accident occurred.[208]

Similarly, the court also found coverage in *Heitkamp v. Milbank Mutual Insurance Co.*,[209] in which a pickup truck was used for both agricultural and nonagricultural purposes. The insurance policy excluded farm implements from the motor vehicle exclusion. The court found the term "implement" to be ambiguous, and held that it could either include or exclude a pickup that occasionally was used for nonagricultural purposes.[210] The court found that the accident was covered, even though the accident occurred on a public highway and did not involve an agricultural use at the time, because the pickup was a farm implement purchased for use on the family farm, was depreciated by the insured on the insured's income tax filing as a farming operation expense, and because the farm had priority of use as to the pickup.[211]

D. *Aircraft Exclusion*

The basic farmer's FCLP contains two aircraft exclusions. The first exclusion typically states: "This coverage does not apply to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft."[212] The second exclusion commonly states: "This coverage does not apply to property damage arising out of any substance released or discharged from any aircraft."[213]

These exclusions obviously are designed to exclude coverage for farmers and ranchers who use aircraft as a part of their operations. Although the use of aircraft may seem exotic to some farmers, aircraft are a necessary tool for many large western and southwestern farms and

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207. *Id.* at 1309.
208. *Id.* at 1310.
209. 383 N.W.2d 834 (N.D. 1986).
210. *Id.* at 837.
211. *Id.* at 836.
212. *See, e.g.*, FC&S Bulletins, *supra* note 26, Aug. 1990, at Farms Ap-6, 7.
213. *Id.*

ranches. To obtain coverage for the use of aircraft on the farm, the farmer must pay an extra premium and obtain a special endorsement to the insurance policy.

However, some courts narrowly interpret the exclusions to find coverage. In *Southern Farm Bureau Casualty Insurance Co. v. Adams*,[214] the insureds hired an aviation company to spray their cotton crop. The aviation company accidentally sprayed an innocent bystander who suffered serious personal injury. When a suit was filed against the insureds for the negligent conduct of the aerial sprayer, the insureds sought protection under their FCLP.[215] The insurance company, however, denied coverage on the basis of the standard aircraft exclusions found in the insured's policy. The insurance company took the position that the term "use" in the policy meant more than actually piloting the plane.[216] The court, however, agreed with the insureds' argument that use meant something more than simply hiring a plane for aerial spraying. The court found that there had to be some sort of personal involvement. Because the insureds were not personally involved in piloting the airplane, coverage was found under the policy.[217]

Courts also have held that there must be a causal connection between the use of the aircraft and the resulting damage before the aircraft exclusion applies. In *Little v. Kalo Laboratories, Inc.*,[218] a rice farmer used aerial spraying to put 2-4-D on his rice crop. An antidrift agent was used with the chemical. Nevertheless, the 2-4-D spread to a neighboring cotton farm and caused extensive damage. It was determined that the chemical spread when it became granulated after being applied to the rice crop, and was then wind-driven on to the cotton crop.[219] The rice farmer's insurance carrier contended that there was no coverage for the damage to the neighboring crop because of the aircraft exclusion contained in the insured's FCLP.[220] The court, however, refused to apply the exclusion because there was no causal connection between the aerial spraying and the subsequent damage to the cotton crop.[221]

VIII. Conclusion

Professors Harnett and Thornton stated in their article on the insurable interest doctrine that "the creation and enforcement of insurance

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214. 570 S.W.2d 567 (Tex. Ct. App. 1978).
215. *Id.* at 569.
216. *Id.*
217. *Id.* at 570-71.
218. 406 So. 2d 678 (La. App. 1981).
219. *Id.* at 679.
220. *Id.* at 689.
221. *Id.* at 682-83.

contracts impinge at every turn upon the public interest and vitally affect the social and economic welfare of individuals."[222] Farmers, like everyone else, need insurance coverage for their activities, and given the potential for liability claims arising from farming activities, it is only prudent that farmers carry comprehensive liability insurance. However, the standard FCLP does not cover all of the liability claims that a farmer may face. Farmers must, therefore, be made aware not only of the coverage benefits found in the standard FCLP, but also of the coverage deficiencies of such policies.

It is only by fully understanding how such policies work that a farmer can decide what additional insurance coverages may be necessary to provide the maximum amount of liability coverage for the farmer's particular operation. For example, a farmer with a chemically intensive operation or an operation with potential for significant animal waste runoff would want to consider obtaining separate pollution coverage. Conversely, a farmer who has adopted low chemical input practices or who does not maintain lagoons for animal waste conceivably could get by on the standard FCLP.

Unfortunately, many farmers, like the rest of us, often are ignorant of the terms and provisions contained in their liability insurance policies. Even more unfortunately, enlightenment often comes only after a liability claim has arisen and the insurer denies coverage. Too often it is only after the farmer has opened his or her land to the public for recreational purposes to bring in a few extra dollars and an invitee is injured that the farmer learns of the significance of the business pursuits exclusion. The same applies to many other exclusions found in the standard FCLP. This Article analyzes some of the more common and recurring problem areas, and hopefully will assist farmers and those who represent them to deal more intelligently with their insurers.

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222. Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162 (1948).