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Insurance Coverage and Custom Farming

Chad G. Marzen
Florida State University

INSURANCE COVERAGE AND CUSTOM FARMING

*Chad G. Marzen**

I. INTRODUCTION

The success of agriculture is vital for the success and growth of the rural economy in the United States.[1] As with many industries, the field of agriculture is quite diverse, ranging from traditional agriculture,[2] sustainable agriculture,[3] and urban agriculture,[4] to the new and emerging industry of agricultural tourism opening the door to agricultural experiences beyond the

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* Assistant Professor of Legal Studies in Business, Florida State University, College of Business – Department of Risk Management/Insurance, Real Estate and Legal Studies. J.D. St. Louis University School of Law 2008, B.A. Political Science Grinnell College 2005. The author can be reached at cmarzen@fsu.edu. This article is dedicated to my wife, Laura Elizabeth Grice – yours always.

[1] *See* Barbara Soderlin & Russell Hubbard, *Expected record harvest won't profit farmers facing their third year of falling income*, OMAHA WORLD-HERALD (Oct. 2, 2016), http://www.omaha.com/money/expected-record-harvest-won-t-profit-farmers-facing-their-third/article_0e167711-ba66-5809-866e-14e25a9d8420.html [http://perma.cc/25PM-8MT5].

[2] *See What is traditional agriculture?*, REFERENCE.COM, https://www.reference.com/business-finance/traditional-agriculture-f3f8ba321ed6c758 (last visited Oct. 3, 2016) ("Traditional agriculture is a type of farming that uses techniques developed over decades and centuries to ensure good, sustainable yield over time in a specific area or region. Traditional farms are based around mixed crops that complement one another.") [https://perma.cc/7EEK-KYW8].

[3] *See* Nathalie J. Chalifour & Heather McLeod-Kilmurray, *The Carrots and Sticks of Sustainable Farming in Canada*, 17 VT. J. ENVTL. L. 303, 314–315 (2016) ("The impetus to define and create policy in favor of sustainable agriculture comes, of course, from the fact that conventional agriculture has become unsustainable. For instance, farming practices can have significant environmental impacts, creating a major source of water pollution and contributing to soil erosion, reduced soil quality, biodiversity loss through habitat fragmentation and degradation, and emissions of GHGs. Sustainable farming practices aim to reduce these impacts by taking steps such as reducing the use of pesticides, herbicides and/or fertilizers, limiting soil erosion and water runoff, and improving soil quality, among other things.").

[4] *See* Matthew R. Dawson, Note, *Perennial Cities: Applying Principles of Adaptive Law to Create a Sustainable and Resilient System of Urban Agriculture*, 53 U. LOUISVILLE L. REV. 301, 305–306 (2015) ("Simply put, urban agriculture can be defined as 'growing food within cities.' This broad definition recognizes that urban agriculture exists in a variety of different forms, is exercised by a diverse array of groups and individuals, and serves numerous and varying purposes. It can include anything from a windowsill herb garden used to add flavor and aroma, to home-cooked meals, to a commercial operation that grows produce for sale in a local farmers' market, and everything in between. Urban agriculture includes hydroponic lettuce grown on rooftops, as well as fresh eggs from backyard chicken coops. It is practiced by all walks of life.").

picturesque white picket fence gates of family farms[5] Just as there are many different types of agriculture, various farming arrangements also exist. Perhaps the most traditional archetype is the farmer that purchases and owns his or her own land and equipment and then harvests those crops without assisted labor. While owning farmland has its advantages in terms of flexibility and utilization of the land,[6] land prices are expensive,[7] and the start-up costs are immense for young farmers seeking entry into agriculture.[8]

Although land prices may make it prohibitive for a farmer to purchase land outright, an option that creates more flexibility to expend capital in other areas, such as machinery, is the option to lease farmland.[9] With a lease, the owner of the farmland exchanges the right to utilize the farmland to another individual

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[5] For a comprehensive discussion of various state agritourism statutes, *see* Terence J. Centner, *Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks*, 19 KAN. J.L. & PUB. POL'Y 102 (2009). For instance, Utah has defined agritourism as "the travel or visit by the general public to a working farm, ranch, or other commercial agricultural, aquacultural, horticultural, or forestry operation for the enjoyment of, education about, or participation in the activities of the farm, ranch, or other commercial agricultural, aquacultural, horticultural, or forestry operation." UTAH CODE ANN. § 78B-4-512(b) (West 2015).

[6] *See* Andrew Jenner, *Rent or Buy? The Beginning Farmer's Rock and Hard Place*, MODERN FARMER (Dec. 4, 2014), http://modernfarmer.com/2014/12/rent-buy-beginning-farmers-rock-hard-place/ [https://perma.cc/QT6Z-GRNM].

[7] *See* Joshua Rogers, *Dirt Cheap? Investors Are Plowing Into Farmland, Here's Why*, FORBES (Sept. 23, 2014, 10:02 AM), http://www.forbes.com/sites/joshuarogers/2014/09/23/dirt-cheap-investors-are-plowing-into-farmland-heres-why/#526a4c1f2ab2 [https://perma.cc/HPG4-TSZ6].

[8] *See* Alicia Meuleners, Note, *Finding Fields: Opportunities to Facilitate and Incentivize the Transfer of Agricultural Property to New and Beginning Farmers*, 18 DRAKE J. AGRIC. L. 211, 212 (2013) ("As access to productive land is arguably the core of the agricultural industry, much attention has been given to processes by which land ownership can be made more affordable. With the support and enthusiasm of state governments and environmental and sustainability interest groups, Congress has explored various opportunities to assist new farmers and provide a competitive edge to a group generally lacking much of the equipment, capital, and bargaining power of established agricultural operations. Through the development of loan financing and credit systems, policymakers have sought to offset this significant, if not prohibitive, hurdle facing new farmers, and provide start-up operations with a competitive boost in an aggressive real property market.").

[9] *See* Paul Goeringer et al., *Owning and Leasing Agricultural Real Estate*, PENN STATE EXTENSION, http://extension.psu.edu/business/ag-alternatives/farm-management/owning-and-leasing-agricultural-real-estate (last visited Oct. 3, 2016) [https://perma.cc/9TEE-HW53].

or entity in exchange for rent.[10] The two general types of leases in farming include the "cash rent lease" and the "crop share lease".[11] In a cash rent lease, the farmer pays the landowner a set rate per acre or a set rate for the entire property in exchange for the ability to plant and harvest crops on the land.[12] With a crop share lease, the landowner receives a percentage of the actual crop, typically depending upon local custom.[13] In addition to the two general types of leases, a third type of lease, the "hybrid" lease, which combines elements of both the cash rent and crop share lease.[14]

Yet another option for farming, an option that is popular in the Midwest, is that of custom farming.[15] With custom farming, a landowner pays a custom operator a set rate to complete all the mechanical operations on the farm.[16] In a custom farming arrangement the landowner provides all the seed and

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[10] *Id.* ("A lease is a legally enforceable contract allowing the owner of real property, equipment, and/or livestock to convey the right to use that property to a person in exchange for rent. The lease defines the rights between the landlord and the tenant, and defines how the landlord/tenant relationship will operate.").

[11] *See Agricultural Leases: An Overview*, THE NAT'L AGRIC. L. CTR., http://nationalaglawcenter.org/overview/agleases/ (last visited Oct. 3, 2016) [https://perma.cc/7HC2-8WYX].

[12] *Id.* ("In a typical cash rent lease situation, the tenant is obligated to pay a set price per acre or a set rate for the leased property. With this form of lease, the tenant bears certain economic risks, and the landlord is guaranteed a predictable return, regardless of commodity prices. The landlord does carry the risks of the tenants not paying the rent or using farming practices that reap short-term benefits from the land. Parties can negotiate terms to help limit their exposure to these risks, the tenant can negotiate for flexible rent terms, and the landlord can include terms that specify the type of farming practices that should be used.").

[13] *Id.* ("With a crop-share lease, the landlord receives a share of the crops produced in exchange for the use of the land by the tenant. The amount of the share typically depends on local custom. The landlord usually agrees to pay a portion of the input costs under a crop-share lease. This type of lease exposes the landlord to more risk but does allow the landlord to benefit if commodity prices or production increase. The crop-share lease also allows the tenant to spread the risk of reduced yields and price risk and reduces the amount of capital needed for the operation.").

[14] *Id.*

[15] *See Custom Farming – A Business Smart Choice for Your Farm*, OLSEN CUSTOM FARMS, http://www.olsencustomfarms.com/siterun_data/about_us/doc85663651201666760.html (last visited Oct. 3, 2016) [https://perma.cc/6VAH-BFUX].

[16] *See* Kent Thiesse, *Custom farming agreements gain popularity, require communication*, TRI-STATE NEIGHBOR (Apr. 8, 2015, 7:30 AM), http://www.tristateneighbor.com/news/regional/custom-farming-agreements-gain-popularity-require-communication/article_a5212348-d88c-11e4-87c4-77a0e4d5bc3f.html [https://perma.cc/X7UM-VM5X].

fertilizer for the custom operator but typically retains the profits produced from the farm.[17] Custom farming is also an arrangement that is utilized in livestock production as well.[18] Some farms utilize custom feeding arrangements for livestock production, where a custom feeder provides a facility and labor force to care for the livestock while the other farmer provides feed and veterinary services.[19]

With any agricultural operation, farmers can better manage liability risk by obtaining adequate insurance coverage. At least one commentator has comprehensively analyzed the provisions of the farmer's comprehensive liability policy.[20] However, there is a gap in the literature relating to legal issues involving insurance coverage and custom farming. This article is intended to fill in the gap in the literature and provide a comprehensive examination of several of the key issues relating to insurance and custom farming that have been litigated. Insurance coverage and custom farming intersect in a number of areas, such as the agricultural use of an automobile, the duty to procure insurance coverage, whether the training of a horse constitutes custom farming, which particular activities constitute custom farming, and the effect of custom farming exclusions and endorsements in insurance policies.

II. "FARM USE" AND AUTOMOBILE LIABILITY POLICIES

In some cases, custom farming is involved in questions of whether an insured was engaged in a "farm use" and within the scope of their insurance policy covering "farm use". "Farm use" of a truck was an issue in the South Dakota case of *Sunshine Mut.*

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[17] *Id.*

[18] *See* Jeff DeYoung, *Hog operation, young family keep couple busy*, IOWA FARMER TODAY (May 31, 2012, 6:00 AM), http://www.iowafarmertoday.com/news/livestock/hog-operation-young-family-keep-couple-busy/article_ddd0df72-aa85-11e1-ac28-001a4bcf887a.html [https://perma.cc/UT9P-VYGC].

[19] *See Custom Feeding*, IDLENOT FARMS GP, http://www.idlenotfarmsgp.com/custom-feeding.html (last visited Oct. 3, 2016) [https://perma.cc/2NNY-3SNU].

[20] *See generally* John D. Copeland, *Analysis of the Farmer's Comprehensive Liability Policy*, 24 IND. L. REV. 1451 (1991) (discussing farmer's comprehensive liability policies).

Ins. Co. v. Addy.[21] In *Addy*, the insured owned a Dodge truck, which he utilized for farm use and also an International truck used in his trucking business.[22] On the way to transport two head of cattle and a hog from a nearby farm utilizing his Dodge truck, the insured was struck by another vehicle in an accident.[23] Coverage for liability insurance in the applicable policy was limited to situations in which the vehicle was utilized for a "farm use".[24] In examining the facts of the case, the Supreme Court of South Dakota held that the insured was not transporting the two head of cattle and hog from a nearby farm for a "farm use" but instead was engaging in the business of a commercial trucker, which was not covered under the policy.[25] The court concluded that the truck was not "put to a farm use as contemplated by the policy even though the articles being transported are products of the farm."[26] Thus, no liability coverage was available for the insured.[27]

In *Texas Farm Bureau Mut. Ins. Co. v. Carnes*, the insured sought recovery for a loss of a cotton-picking machine that was damaged in a fire in Texas.[28] In that case, an endorsement in the policy modified the agreement to include coverage for the cotton-picking machine for "custom farming within a radius of fifty miles from the principal place of garagement."[29] The actual fire loss of the cotton picker occurred approximately 150 miles from garagement.[30] The insurer contended that it had no duty to pay the insured on the claim due to the breach of the endorsement terms because the breach materially affected the risk.[31] In response, the insured argued that the breach of the endorsement did not directly contribute to

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[21] *See* Sunshine Mut. Ins. Co. v. Addy, 38 N.W.2d 406, 407 (S.D. 1949).

[22] *Id.* at 406.

[23] *Id.* at 407.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 408.

[28] Tex. Farm Bureau Mut. Ins. Co. v. Carnes, 416 S.W.2d 863, 864 (Tex. Civ. App. 1967).

[29] *Id.*

[30] *Id.*

[31] *Id.*

the fire loss,and that the breach of the endorsement should not be asserted as a defense to indemnity under the policy.[32]

In ruling for the insured, the Texas Court of Appeals closely examined the provisions of the fire insurance policy and noted that the policy did not contain any provision that would only make the policy effective if the endorsement was complied with.[33] In addition, the court noted that the policy did not include any statement indicating that noncompliance with the endorsement would result in a void policy.[34] Therefore, the court held that since the use of the cotton picker at the time of the loss did not contribute to the fire, the policy must be resolved in favor of coverage.[35]

In contrast with *Addy* where transporting livestock was not "farm use" under the motor vehicle liability policy, the Missouri Court of Appeals held in *Farm Bureau Town and Country Ins. Co. of Missouri v. Franklin* that hauling a load of "smashed cars" and "junk farm equipment" in order to clear land so the pasture could be used for livestock was a "farm use" under a motor vehicle liability policy.[36] In *Franklin*, the insured was involved in an accident on a trip while hauling smashed cars and junk farm equipment to visit a company that purchased scrap metal.[37] The insurance policy at issue in *Franklin* included an endorsement stating that the insured vehicle must be utilized exclusively for "farm use" and that "any custom farming done by the insured or others, except in the occasional hauling of farm products for neighbors, voids the policy."[38] The insured contended that he was engaged in a farming operation at the time of the hauling of the cars and equipment, and the insurer argued the insured was engaged in a "salvage business" – an activity not covered under the farm policy.[39]

In its determination of whether the hauling of cars and equipment constituted a "farm use" under the policy, the

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[32] *Id.* at 865.
[33] *Id.* at 868.
[34] *Id.*
[35] *Id.*
[36] *See* Farm Bureau Town & Country Ins. Co. of Mo. v. Franklin, 759 S.W.2d 361, 364–65 (Mo. Ct. App. 1988).
[37] *Id.* at 362.
[38] *Id.*
[39] *Id.* at 364.

Missouri Court of Appeals closely examined the testimony of the insured and a representative of the insurer.[40] The insured testified that he had previously hauled wood four or five times in the several months prior to the accident in order to clear the tract for pasture.[41] In addition, the insured testified that he had been clearing the tract of timber for several years and that he planned to use the proceeds of the trip in which the accident occurred to buy grass to sow for pasture.[42]

The court noted that the insurer's representative, its director of underwriting, testified that clearing land for farming would be a "farm use" under the policy.[43] In addition, the director also admitted that if a farmer had an "old junk tractor" on his farm and the farmer hauled it away on a motor vehicle, then such activity would be "farm use".[44] Despite these admissions, the insurer contended that the insured's activities were not minimal in nature and constituted the running of a salvage business.[45] In upholding the trial court's finding that the insured's activities constituted a "farm use", as contemplated by the insurance policy, the Missouri Court of Appeals stated that "clearing land of junk so it could be used as pasture for livestock can reasonably be said to be a natural and necessary incident or consequence of a farming operation, even though perhaps not a foreseen or expected consequence of such operation."[46]

III. CUSTOM FARMING AND THE DUTY TO PROCURE INSURANCE

Issues related to custom farming and insurance coverage have also appeared in a case involving an insurance producer's duty to procure insurance coverage. It is a general duty of an insurance producer to make at least a good faith effort to procure the desired insurance and promptly inform the customer of their

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[40] *Id.* at 362–364.
[41] *Id.* at 362.
[42] *Id.* at 362–363.
[43] *Id.* at 363.
[44] *Id.*
[45] *Id.* at 364–65.
[46] *Id.* at 367.

eligibility.[47] Failing to fulfill this duty will result in liability to the producer.[48] However, the insured also has a duty to unequivocally inform the producer of the specific coverage and policy terms he/she requests.[49]

In *Manzer v. Pantico* an insured allegedly sprayed a client's farm in Nebraska with 2-4-D in an improper manner while conducting custom farming operations causing approximately $10,000 in damages.[50] The insurer denied insurance coverage on the claim on the basis that the policy did not cover custom farming operations.[51] Following the denial, the insured filed suit against its insurance producer for breaching its duty to procure insurance for the insured's custom farming operations.[52]

During the trial court proceedings, the insured admitted that he did not remember ever specifically requesting the producer to obtain insurance coverage for custom farming operations, nor did the insured directly notify the producer he engaged in custom farming operations.[53] The trial court granted the defendant insurance producer's motion for summary judgment and dismissed the plaintiff's petition.[54]

On appeal, the insured argued that a genuine issue of fact existed as to whether the insurance producer had actual knowledge of the insured's custom farming operations.[55] The insured noted one past conversation in which he told the

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[47] *See* DONNA POPOW, BUSINESS LAW FOR INSURANCE PROFESSIONALS § 8.17 (The Institutes, 1st ed. 2010).

[48] *See* Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 16 (2004) ("An intermediary may be liable to the insured if he fails to procure insurance, or if the coverage he does procure is materially deficient in some way. If an intermediary is unable to procure the insurance he has agreed to provide, he has a further duty to inform his client timely of this so the client may look elsewhere or take other steps to protect its interests. These duties do not arise, however, merely because an agent or broker and an insured discuss coverage options or otherwise strike up a relationship. An intermediary is not obligated to assume a duty to procure insurance for a customer. Rather, the intermediary's duty depends on a specific, unequivocal request by the insured to procure coverage.").

[49] *Id.*

[50] Manzer v. Pentico, 307 N.W.2d 812, 813 (Neb. 1981).

[51] *Id.*

[52] *Id.* at 812–813.

[53] *Id.* at 813.

[54] *Id.*

[55] *Id.*

insurance producer about fertilizing a crop on the wrong land.[56] The Nebraska Supreme Court noted that irrespective of the nature of the conversation, it was not material whether the plaintiff requested insurance coverage for custom farming, specifically.[57] While an insurer has a duty to procure insurance coverage for an insured, the insured also has a duty to inform the insurance producer of the coverage requested.[58] A prior case in Nebraska, *Kenyon v. Larsen*, established that the insured has a duty to advise an insurance producer of the requested insurance coverage.[59] Since the insured in *Manzer* did not produce evidence that they had affirmatively requested insurance coverage from the producer for custom farming operations, his claim for a breach of duty to procure insurance failed.[60]

Manzer illustrates the significance that farmers who engage in custom farming must affirmatively request specific coverage for custom farming in order to receive proper insurance coverage for these operations. Even in the event the insurance producer has knowledge of custom farming operations, without affirmative requests for coverage by the insured, the insured cannot rely on or assume that adequate insurance coverage will be in place for custom farming.

IV. CUSTOM FARMING EXCLUSIONS AND ENDORSEMENTS IN INSURANCE POLICIES

Along with questions related to procuring insurance coverage, a question that has arisen in a number of cases is whether or not a particular insured is engaged in custom farming activities and whether an insured engaged in custom farming activities is covered under a liability policy. In *United Fire & Cas. Co. v. Mras*, the Supreme Court of Iowa addressed a situation in which an insured, under a farm liability policy, collided with an automobile while driving a tractor with a hay baler from one

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[56] *Id.*

[57] *Id.*

[58] *See id.* (citing Kenyon v. Larsen, 286 N.W.2d 759, 764 (Neb. 1980); *and* Collegiate Mfr. Co. v. McDowell's Agency, 200 N.W.2d 854, 857 (Iowa 1972).

[59] *See* Kenyon v. Larsen, 286 N.W.2d 759, 764 (Neb. 1980).

[60] *See Manzer*, 307 N.W.2d at 813.

custom farming hay baling site to another.[61] The policy included an exclusion for personal injuries and property damage incurred while the insured engaged in custom farming.[62] The Supreme Court of Iowa held that the exclusion did not apply since the exclusion was an "activity clause", which applies only to the activity engaged in at the very moment of the accident.[63] Since the insured was not engaged in custom farming at the very moment of the accident, the exclusion did not apply.[64]

In *Harrison v. Donovan*, the Minnesota Court of Appeals also addressed this question in the context of whether horse training is considered "custom farming".[65] In *Harrison*, a horse trainer allegedly permitted a horse to escape, and the horse suffered injuries.[66] The horse trainer submitted the claim to his insurer, which made the determination that no coverage existed due to a policy exclusion for property damage arising out of custom farming.[67]

In agreeing with the insurer that the policy unambiguously excluded coverage in the case, the court examined the policy, wherein the definition of "custom farming" stated: "'Custom farming' means the use of any farm machinery, farm implement, or draft animal in connection with farm operations for hire; or the care or raising of livestock or poultry for hire."[68] The court found that the horse was within the meaning of "livestock" as it was raised for home use or profit, and that it was still livestock when it was in the care of the horse trainer.[69] Thus, no coverage under the policy was afforded to the insured since the insured's "care of the horse was the care of livestock for hire."[70]

In 1998, one year after *Harrison*, the Supreme Court of North Dakota faced the question of whether the employee of an insured's custom farming business was covered by a farm and

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[61] United Fire & Cas. Co. v. Mras, 55 N.W.2d 180, 181 (Iowa 1952).

[62] *Id.*

[63] *Id.* at 182.

[64] *Id.*

[65] *See* Harrison v. Donovan, No. C2-97-347, 1997 WL 570948, at *1 (Minn. Ct. App. Sept. 16, 1997).

[66] *Id.*

[67] *See id.*

[68] *Id.* at *2.

[69] *Id.*

[70] *Id.*

ranch insurance policy.[71] In *Rebel v. Nodak Mut. Ins. Co.*, an employee of a custom farming business suffered a serious injury in a grain drill auger accident while engaged in custom seeding work.[72] The custom farming business's farm and ranch insurance policy included a policy exclusion for "bodily injury or property damage sustained by any farm employee arising out of custom farming operations."[73] The insurer refused to defend and indemnify its insured, contending that the policy did not provide coverage for the employee's claims.[74] Both the insured's employee and insured entered into a *Miller-Shugart* agreement,[75] in which both parties stipulated to a settlement of all claims and that any claims would be paid from insurance proceeds.[76] In a declaratory judgment action, the trial court ruled that the policy did not provide coverage for the employee's injuries.[77] While the employee of the insured appealed summary judgment in favor of the insurer, the custom farming business did not.[78]

On appeal, the Supreme Court of North Dakota held that the employee did not have standing.[79] The procedural fact that proved fatal to the employee's claim was that the custom farming business did not properly assign its rights against the insurer to the employee.[80] Thus, the Supreme Court of North Dakota dismissed the employee's appeal.[81]

Assuming, *arguendo*, a standing issue did not exist in the *Rebel* case, it is unlikely the employee of the insured's custom farming business would have recovered had the appeal progressed. The applicable insurance policy of the insured contained an exclusion for custom farming, and the facts indicated that the insured did not pay an additional premium for

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[71] *See* Rebel v. Nodak Mut. Ins. Co., 585 N.W.2d 811, 812 (N.D. 1998).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Rebel*, 585 N.W.2d at 812; *see also* Judge Jerome Abrams, *Failure to Allocate? Nobody Pays: Using Miller Shugart Settlements in Cases of Questionable Insurance Coverage*, 4 WM. MITCHELL J.L. & PRAC. 2 (2010) (discussing Miller-Shugart agreements generally).

[76] *See Rebel*, 585 N.W.2d at 812 n.1.

[77] *Id.* at 813.

[78] *Id.*

[79] *Id.* at 814.

[80] *Id.* at 813.

[81] *Id.* at 815.

custom-farming coverage.[82] Absent an ambiguity in the policy, it is very likely that the court would have found that the insurer did not have a duty to defend and indemnify the custom farming business.

However, finding an ambiguity relating to exclusions in a liability insurance policy will often result in a situation where coverage would be afforded to an insured.[83] The Georgia Court of Appeals found that an ambiguity existed in *Georgia Farm Bureau Mut. Ins. Co. v. Meyers*, by reading a custom farming endorsement and medical pay endorsement together in a liability insurance policy.[84] In *Meyers*, a non-resident employee of a cattle company suffered an injury when he was struck by a wooden pole while in the scope and course of employment.[85] The applicable insurance policy contained an exclusion for bodily injuries sustained by non-resident employees of the insured.[86] However, the same policy included a "Custom Farming Liability Coverage" endorsement which provided coverage for bodily injury claims for custom farming operations relating to "the operation, maintenance, use, loading or unloading of farm tractors, trailers, implements, draft animals or vehicles you use while under contract."[87] In addition to the custom farming endorsement, the policy included a second endorsement for medical payment insurance but contained an exclusion for bodily injuries sustained by farm employees.[88]

The trial court ruled that reading the two provisions together highlighted an ambiguity in the policy. Thus, the trial court denied the insurer's motion for summary judgment.[89] On

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[82] *Id.* at 812.

[83] *See* David F. Tavella, *Are Insurance Policies Still Contracts?*, 42 CREIGHTON L. REV. 157 (2009) ("[W]hile courts consider insurance policies contracts of adhesion, and construe any ambiguity strictly against the drafter, courts have always considered an insurance policy a contract."); *see also* Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not be Construed Against the Drafter*, 30 GA. L. REV. 171 (1995) (generally discussing the ambiguity rule with insurance contracts).

[84] *See* Ga. Farm Bureau Mut. Ins. Co. v. Meyers, 548 S.E.2d 67, 68 (Ga. Ct. App. 2001).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

appeal, the Georgia Court of Appeals noted that the insured, as well as its employees, would have been aware of the particular risks associated with the insured's farm location but not with the risks associated with various custom farming locations.[90] Therefore, the court found that it would be reasonable for an insured to not have coverage for bodily injuries sustained at the insured's location, but to have coverage at custom farming locations for employee bodily injuries "because of the different risks of injury from negligence over which the insured and the employee have less control and familiarity."[91]

Applying the reasonable expectations doctrine,[92] the court indicated that a reasonable person, considering the insured's position, would reasonably conclude the insured intended coverage to apply for bodily injuries sustained by employees at custom farming locations but not at the insured's primary farm location.[93] Therefore, the court found that the trial court did not commit any error in providing coverage.[94]

In *Banner v. Raisin Valley, Inc.*, an insured farmer was involved in an automobile accident in Ohio while driving a semi-tractor after hauling seed corn for a neighboring farmer.[95] The accident resulted in two fatalities and several other injuries.[96] At the time of the accident, the insured farmer was covered under a farmowner's insurance policy as well as a personal umbrella liability policy.[97] The plaintiffs in the case contended that both the farmowner's insurance policy and the personal umbrella

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[90] *Id.* at 69.

[91] *Id.*

[92] *See generally* Arthur J. Park, *What to Reasonably Expect in the Coming Years from the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165 (2012) (discussing the reasonable expectations doctrine in insurance law); *see also* Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT TRIAL & INS. L.J. 729 (2000) (discussing the traditional application of the reasonable expectation doctrine in modern courts); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998) (explaining how the reasonable expectation doctrine has been restricted and the ways it should be applied moving forward); & John Dwight Ingram, *The Insured's Expectations Should Be Honored Only if They Are Reasonable*, 23 WM. MITCHELL L. REV. 813 (1997).

[93] *See Meyers*, 548 S.E.2d at 69.

[94] *Id.* at 70.

[95] Banner v. Raisin Valley, Inc., 33 Fed. App'x. 767, 768 (6th Cir. 2002).

[96] *Id.*

[97] *Id.*

liability policy provided adequate coverage for the accident.[98] The trial court granted summary judgment on behalf of the insurer, holding that neither policy provided coverage to the plaintiffs.[99]

The applicable farmowner's policy provided coverage for custom farming activities.[100] However, the insurance policy defined custom farming as "farming operations involving the production or harvesting of crops for others away from the insured location for remuneration."[101] On appeal, the United States Court of Appeals for the Sixth Circuit examined the precise language of the definition, noting that the insured was not engaged in the "production" or "harvesting" of crops when he hauled seed corn from one location to another.[102] Thus, the court affirmed holding that the farmowner's policy did not provide coverage.[103]

Despite the court's holding in *Banner* with regard to farmowner's policy, it also closely examined the personal umbrella liability policy.[104] The insurer contended that since a corporate entity paid the premiums on the umbrella policy, the umbrella policy was in excess of primary insurance that the insured paid for, himself.[105] However, the court also noted that the insured could have reasonably believed the umbrella policy covered personal liability in excess of the underlying primary policy.[106] Therefore, the court held that the personal umbrella liability policy was ambiguous, and accordingly, coverage was provided for the farmer insured through the personal umbrella liability policy.[107]

Finally, in *Trujillo v. North Carolina Grange Mut. Ins. Co.*, the North Carolina Court of Appeals found no coverage for two individuals who were injured (one fatally and one non-

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[98] *Id.*
[99] *Id.*
[100] *Id.* at 769.
[101] *Id.*
[102] *See id.*
[103] *Id.* at 770.
[104] *See id.* at 770–71.
[105] *Id.* at 773.
[106] *Id.*
[107] *Id.* at 774.

fatally) by the operator of a cotton picker.[108] The applicable insurance policy included a custom farming endorsement with extended liability coverage for "farm tractors, trailers, implements . . . , or vehicles used while under contract to others for a charge in connection with any farming operation."[109] However, the court noted there was no evidence that the cotton picker was being used "under a contract to others for a charge" at the time of the accident.[110] Since the custom farming endorsement did not apply, the operator of the cotton picker was not an "insured" under the insurer's policy, and thus, there was no coverage under the policy.[111]

All of the above cases indicate that insurance policies vary widely as to whether liability coverage will exist in situations where an insured engages in custom farming. Liability coverage for the loss of livestock in custom farming situations is being increasingly litigated across the country.

V. CUSTOM FARMING, LIVESTOCK LOSSES AND INSURANCE COVERAGE

A majority of courts have held that farm insurance policies do not provide coverage in situations where a livestock loss is suffered while in the care of a custom farmer. In *Grinnell Mut. Reinsurance Co. v. Laforge*, the Illinois Court of Appeals heard an insurance coverage case involving a custom farmer who had several hundred hogs in his care when an electrical company turned off his power due to the farmer's alleged failure to pay a power bill.[112] Ultimately, approximately 700 pigs died.[113]

The insurer's initial letter to the insured custom farmer noted that its investigation of the loss was completed and that the farm policy did not furnish coverage for the loss.[114] In a

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[108] *See* Trujillo v. North Carolina Grange Mut. Ins. Co., 561 S.E.2d 590, 591 (N.C. Ct. App. 2002).

[109] *Id.* at 593.

[110] *Id.* at 593–594.

[111] *Id.* at 594.

[112] *See* Grinnell Mut. Reinsurance Co. v. LaForge, 863 N.E.2d 1132, 1134 (Ill. Ct. App. 2006).

[113] *Id.*

[114] *Id.*

subsequent letter, sent approximately one month later, the insurer once again asserted the farm policy did not furnish coverage but also noted a custom farming exclusion applied.[115] On appeal, the insured custom farmer argued that the "mend-the-hold" doctrine applied to bar the insurer from asserting the custom farming exclusion.[116] The mend-the-hold doctrine,[117] addressed in a number of jurisdictions,[118] bars an insurer from denying a claim for one purported reason initially, and then denying it for another in the midst of litigation.[119]

In examining the mend-the-hold issue, the *LaForge* court remarked that the original letter from the insurer to the insured contained a reservation of the right to assert additional bases for denying coverage later on.[120] In addition, the court also noted a timing issue – the insurer asserted the custom farming exclusion prior to the filing of a declaratory judgment complaint concerning coverage.[121] Thus, the mend-the-hold doctrine did not apply since the doctrine applies only in situations of an inconsistency during litigation.[122] Finally, the *LaForge* court stated that the doctrine does not apply in the absence of showing a detriment, unfair

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[115] *Id.* at 1134–35.

[116] *Id.* at 1140.

[117] For an extensive commentary on the mend-the-hold doctrine, *see* Michael V. Laurato, Sr., *Mending the Hold in Florida: Getting a Better Grip on an Old Insurance Doctrine*, 4 FLA. A & M U. L. REV. 73 (2009); Robert H. Sitkoff, Comment, *"Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. CHI. L. REV. 1059 (1998).

[118] *See, e.g.*, Dahlmann v. Geico Gen. Ins. Co., No. 324698, 325225, 2016 WL 1125976, at *8 (Mich. Ct. App. Mar. 22, 2016) ("It appears that – under Michigan practice – this doctrine is equitable in nature and applies when it would be unfair to allow an insurer to assert an additional ground for denial after inducing the insured to rely on a different ground for denial to the insured's detriment."), Health Corp. v. Clarendon Nat. Ins. Co., C.A. No. 07C-09-102 RRC, 2009 WL 2215126, at *14 (Del. Sup. Ct. July 15, 2009) ("The 'mend the hold' doctrine 'bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out.' Thus, the 'mend-the-hold' doctrine is an equitable doctrine intended to prevent a party from asserting grounds for repudiating contractual obligations and then, in bad faith, asserting different grounds for repudiation once litigation has commenced and it becomes apparent the original grounds for repudiation will not work."(quoting Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop., 2008 WL 1746974, at *14 (Del. Ch. April 7, 2008))), *and* Liberty Mut. Ins. Co. v. Am. Home Assurance Co., 858 N.E.2d 530, 539 (Ill. Ct. App. 2006).

[119] *See LaForge*, 863 N.E.2d at 1140.

[120] *Id.* at 1140–1141.

[121] *Id.* at 1141.

[122] *Id.*

surprise, or arbitrariness.[123] No facts of unfair surprise or arbitrariness were present since the insurer filed the declaratory judgment complaint nine months after giving notice to its insured concerning the custom farming exclusion.[124]

Coverage for livestock losses in a custom farming situation may also be barred by the "business pursuits" exclusion of an insurance policy. A number of insurance policies contain "business pursuits" exclusions denying liability coverage.[125] In *McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co.*, the insured custom farmer entered into a feeding agreement contract for hogs.[126] The farmer suffered a loss of 808 hogs when the ventilation system of the insured's hog confinement building failed to activate while pumping manure from the building.[127] The insurer declined to provide coverage to the custom farmer for the underlying claim for the loss of the hogs, asserting that the "business pursuits" exclusion of the policy applied.[128] The Iowa Court of Appeals noted that while the policy excepted custom farming activities from the "business" definition when such custom farming activities do not exceed $3,000 in a year, the language of the policy exception would imply that any custom farming activities above $3,000 in a year would be defined as a "business" activity.[129] Therefore, the "business pursuits" exclusion applied.[130]

Finally, courts have also tended to uphold the exclusion for property damage in the "care, custody, or control" of the insured in situations involving livestock losses. For example, in *Gaza Beef, Inc. v. Grinnell Mut. Reinsurance Co.*, the insured faced a claim for the negligent feeding of cattle in a feeding cattle

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[123] *Id.*

[124] *Id.*

[125] *See* John D. Copeland, *The Farmer's Comprehensive Liability Policy: The Business Pursuits Exclusion*, 26-APR ARK. LAW. 44 (1992) (discussing the "business pursuits" exclusion in liability insurance policies).

[126] *See* McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co., 781 N.W.2d 101 (Iowa Ct. App. 2010).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

operation.[131] The policy also contained a "custom feeding endorsement," and the insured contended that the endorsement conflicted with other provisions of the policy.[132] The Minnesota Court of Appeals upheld the "care, custody, or control" exclusion, and applied it to exclude coverage of the cattle loss.[133] In its decision, the court stated that the purpose of the "care, custody, or control" exclusion is to prevent general liability insurance coverage from being transformed into a form of property insurance coverage.[134] In addition, the *Gaza Beef* court mentioned that the purpose of a "custom feeding endorsement" is to provide liability coverage for situations such as personal injuries taking place on the custom feeding premises, and if an insured wished to obtain coverage for the loss of property under the insured's care or control, the insured should purchase a first-party property insurance policy.[135]

Other courts have come to similar conclusions regarding the applicability of the "care, custody, or control" exclusion to livestock losses that take place while the livestock are in the care of an insured. For example, the United States Court of Appeals for the Eighth Circuit held in *Grinnell Mut. Reinsurance Co. v. Schwieger* that a "custom feeding" endorsement did not provide coverage where a "care, custody, or control" exclusion applied.[136] Additionally, the Iowa Supreme Court issued a similar holding in *Boelman v. Grinnell Mut. Reinsurance Co.*[137] There, the *Boelman* court remarked that even in other contexts, such as commercial general liability policies, an endorsement removing a pollution damage exclusion would not provide coverage. Thus, the endorsement removing the pollution damage exclusion would

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[131] *See* Gaza Beef, Inc. v. Grinnell Mut. Reinsurance Co., No. A11-444, 2011 WL 36554533, at *1 (Minn. Ct. App. Aug. 22, 2011).

[132] *Id.* at *4.

[133] *Id.*

[134] *Id.*

[135] *Id.* at *5.

[136] *See* Grinnell Mut. Reinsurance Co. v. Schwieger, 685 F.3d 697, 703 (8th Cir. 2012).

[137] *See* Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494, 504 (Iowa 2013).

trump a "care, custody, or control" exclusion for property damage.[138]

The *Boelman* court also closely examined the insureds' reasonable expectations argument.[139] Interestingly, the court stated that the insureds did not conduct the requisite discovery indicating that their reasonable expectations with the custom feeding endorsement was to provide coverage for the hogs while they were in their care, custody or control.[140] The *Boelman* court specifically remarked that the insureds did not file an affidavit concerning their reasonable expectations of coverage.[141] However, the court also noted that the policy itself did not contain any ambiguous language, despite the presence of both a custom feeding endorsement and a "care, custody or control" exclusion.[142]

The *Gaza Beef*, *Schwieger*, and *Boelman* decisions all indicate that courts in the future are unlikely to find coverage through a custom feeding endorsement for livestock losses suffered while in the care, custody, or control of a custom farmer. In addition, the *Boelman* case indicates that reasonable expectations arguments may not apply, even if the insured proffers evidence through affidavits concerning an insured's reasonable expectations.[143] These decisions all indicate that a custom farmer may not have adequate coverage for a livestock loss if they do not have a separate property insurance policy covering property loss.

VI. CONCLUSION

As all the cases discussed above indicate, there are a variety of legal issues that have arisen with regard to custom farming and insurance. With custom farming gaining more popularity, especially among younger farmers,[144] the insurance coverage and limitations associated with custom farming need to

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[138] *Id.*; *see also* Kemper Nat'l Ins. v. Heaven Hill Distilleries, 82 S.W.3d 869, 875 (Ky. 2002).

[139] *See Boelman*, 826 N.W.2d at 505–506.

[140] *Id.* at 506.

[141] *Id.*

[142] *Id.*

[143] *See id.*

[144] *See* Thiesse, *supra* note 16.

be recognized by all farmers and those with vested interests in agricultural insurance.