

# AGRICULTURAL LAW

## Quarterly Report



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### RECREATIONAL USE OF PRIVATE LANDS AND ASSOCIATED LEGAL ISSUES AND CONCERNS

By **Gina M. Cervantes**

Recreational activities on private lands have increased in recent years due to the inability of public lands to meet this demand. The prospect of monetary gain and the liability protection provided by state law for recreational activities on private land provide incentives for the increased use of farm and ranch land for recreational activities. The key questions for those wishing to operate fee based recreational activities on rural land are potential liability exposure to participants, the extent to which state law provides liability protection, and whether additional steps are necessary to insulate against liability claims.

#### REVIEW OF PREMISES LIABILITY LAW

The traditional approach varied the duties owed to the entrant based upon the benefit the entrant bestowed upon the owner or possessor, with an adult trespasser the lowest duty is owed. An owner or possessor of land only has a duty to refrain from willfully or wantonly injuring an adult trespasser. Child trespassers are treated differently. Under the "attractive nuisance doctrine" if a landowner has a reasonable expectation that children will be attracted to the premises by a dangerous artificial condition on the land, trespassing children can be treated legally as an invitee. As to invitees, the landowner must make and keep the premises safe unless warned of existing dangers. Potentially, this doctrine has a wide reach with respect to agricultural. Many farm assets such as livestock, machinery and equipment can attract curious children to the premises. For farm ponds, most courts that have considered the question have indicated that bodies of water are not attractive nuisances and that child trespassers will be treated the same as adult trespassers in terms of the duty that the landowner or occupier of the real estate owes to them. The attractive nuisance doctrine only applies to artificial conditions on the land. The doctrine does not apply to natural bodies of water. However, the natural bodies of water exception does not apply when the child is an invitee. For farm ponds located remote areas, most courts hold that it would be an unfair burden on property owners and occupiers to have to shoulder liability for injury to child trespassers. However, items associated with farm ponds (such as a pier, dock or tree tire swing) can be attractive nuisances.

A licensee is anyone on the premises with permission or acquiescence, but who does not bestow a benefit on the landowner or occupier. Examples include the hunter with permission who does not pay a fee. While the landowner or occupier is not obligated to make the premises safe, due care must be exercised to avoid injury to the licensee. In addition, a licensee is entitled to the mourning of hidden dangers and hazards known to the landowner or occupier that the licensee cannot reasonably be expected to discovery.

A social guest is a person on the premises who does not confer an economic benefit but does confer a social benefit on the landowner or occupier. A social guest might be able to recover from a fall on a highly waxed

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### Gina M. Cervantes



Gina M. Cervantes is an attorney in the Bakersfield office of Borton Petrini, LLP.

Gina has lived in the community for over 30 years and is familiar with problems facing both small family farms, as well as large corporate operations. She has worked closely with local agricultural agencies in Kern County and government officials.

Gina's primary area of practices with Borton Petrini, LLP are civil litigation, business litigation and transactions and land use.

Gina is a member of the California State Bar Association, the Kern County Bar Association, the Kern County Women's Bar Association, Kern County Young Lawyers Association and the Bakersfield Breakfast Rotary. She is also admitted to practice in United States District Court, Eastern District of California.

## RECREATIONAL USE OF PRIVATE LANDS AND ASSOCIATED LEGAL ISSUES AND CONCERNS

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floor, a faulty step or a poorly lighted stairway, for example. If it can be established that the premises were carelessly maintained, the social guest is likely to recover.

An invitee is a person on the premises for business purposes or for mutual advantage rather than solely for the benefit of the person entering the property. Examples include business guests such as cattle buyers, milk truck drivers, veterinarians and employees. Door-to-door salesmen can be classified as an invitee once they have been greeted and invited inside.

In recent years, court opinions in various states have moved away from basing an owner or occupier's liability to entrance on the status of the entrant. The modern approach tends to replace the traditional entrant classification scheme with the ordinary negligence principles of foreseeable risk and reasonable care.

### RECREATIONAL USE STATUTES

In 1965, model legislation was promulgated by the council of state governments that was designed to provide a measure of liability protection to rural landowners who made their land available to the general public for recreational purposes without charge. For example, California Civil Code section 486 covers a wide array of recreational activities that might occur on private land. Private landowners covered by the statute owe no duty to entrance to keep the premises safe or to give any warning of dangerous conditions. To obtain the protection of the statute, however, a landowner must not charge the entrant a fee.

Owners and occupiers of land in California that operate fee-based recreational activities on their land are not covered by the recreational use statute. Thus, other means of protecting against potential liability claims must be utilized. Many farmers and ranchers have a general comprehensive liability policy covering bodily injury and property damage arising out of farming activities and activities that are incidental to farming. However, most standard policies do not provide liability protection for claims arising out of business pursuits other than farming. Thus, fee-based recreational activities are not likely covered. Likewise, the recreational activities are probably not incidental to farming activities. Consequently, endorsements to an existing policy may be necessary to ensure coverage, or it may be necessary to buy a standard commercial general liability policy and then modify it with a recreational use endorsement. In any event, it may be wise to require recreational users to carry their own liability insurance in addition to whatever coverage the owner or occupier may have.

Another means of protection against liability is to have recreational entrants sign liability release forms. To be an effective liability shield, the release must be carefully drafted. The courts generally construe release language against the drafter and severely limit the landowner's ability to contract away liability for the landowner's negligence. Thus, while the law generally disfavors release agreements, the court will uphold them if they contain clear and unambiguous language, are not unusually long or complex, and are the result of roughly equal bargaining power between the contracting parties. However, release agreements signed by minors are generally not enforceable, and thus a parent or guardian must sign on the minor child's behalf.

Persons conducting fee-based recreational activities must also take care to ensure compliance with the Americans Disabilities Act, Title 2 of the Civil Rights Act of 1964, and the Safe Drinking Water Act. They must also ensure that the activities of guests do not constitute a nuisance to neighboring landowners and that guests do not trespass on others' lands.

Certain common sense steps should be taken to minimize the liability risks associated with fee-based recreational activities. Those include conducting routine safety audits, plugging abandoned wells, fencing off dangerous areas, separating recreational users from livestock, establishing and posting guidelines and having emergency supplies and equipment available. With proper structuring and planning, fee-based recreational activities can provide additional income for the farm and ranch family.



## THE BUSINESS OF WINE CAN SOMETIMES YIELD UNWANTED LEGAL TONNAGE

By Steven R. Baker

### INTRODUCTION

It is not uncommon for wine grape growers to deliver their grapes to wineries well in advance of actually being paid for them. However, due to circumstances beyond their control, wine grape growers can sometimes find themselves in a legal "sticky wicket," as the title of this article suggests. I had a client to whom this happened. This article will discuss the particular scenario, the salvage steps taken, and recommendations for some preventative measures to avoid or minimize the negative impact that the wine grape grower and winery relationship can sometimes generate.

### SETTING THE STAGE

My client delivered wine grapes to a particular winery over the course of three consecutive years under three separate contracts. A total of over 80 tons of wine grapes were delivered to this winery for use in blending its wine. The total value of the shipments was in excess of \$105,000.00.

The essence of the three contracts were what I call "ship now-- pay later" type contracts where my client would deliver "x" tons of grapes at an agreed-to price per ton and the winery would commence payments sometime later, usually at or around the time they actually started using the grapes in their various blends of wine. The obvious problem with these types of contracts are that the amount of time elapsed between the delivery to the winery and actual payment for them can be significant. My client continued to hold up his end of the bargain on the three contracts in terms of delivering grapes, however, the winery became delinquent on payments. When my client started to become concerned with the lack and lateness of payments, he approached one of the owners of the winery to discuss some kind of investment and/or equity ownership in the winery thinking that this would increase leverage and his chances of getting back his money via the investment route. However, the two were not able to work out any type of mutually agreeable arrangement. We filed a U.C.C. Financing Statement (aka, "UCC-1") on June 10, 2005, on behalf of our client.

On or about September 1, 2005, my client learned that the winery had filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. My client was not noticed or served with respect to the Chapter 11 petition itself. His vineyard was listed as creditor number 53 on "Schedule 'F' - Creditors Holding Unsecured Non-priority Claims."

### SALVAGE

Shortly after learning of my client's customer's Chapter 11 bankruptcy petition, we went to work investigating the bankruptcy court file, and other documents in my client's possession. We soon determined that my client was in a much better position relative to the other creditors in line in the Chapter 11 proceeding than was initially indicated by his

listing as creditor number 53 on Schedule “F”. Despite the existence of other secured creditors in line in this Chapter 11 proceeding, my client’s position was bolstered by the fact that a producer’s lien (aka, grower’s lien) was created and attached with each and every delivery of wine grapes as a secured interest on behalf of my client a Chapter 11 creditor. (Cal. Food & Agr. Code, §§ 55632 and 55635.) Such a producer’s lien does not require further documentation or any form of filing to become effective. Additionally, this lien extended to the wine that the debtor winery produced and processed from my client’s grapes. (Cal. Food & Agr. Code, §§ 55631 and 55634.)

We quickly filed objections and opposition to a motion put forth by the debtor winery for an order authorizing the winery to sell its wine inventory along with other assets. The hearing for this motion for order authorizing the debtor winery to sell its wine and other assets was scheduled to be held less than a month after my client learned of the Chapter 11 petition’s existence. Our quick reaction paid off because the rest of the parties in the proceeding quickly recognized our client’s strong lien position with his existing producer’s lien as we established in our objections and opposition to the debtor winery’s motion. (See Cal. Food & Agr. Code, § 55633.) As a result, we were able to salvage approximately 20 to 25 percent of our client’s outstanding balance due him for grapes that he already delivered under the three contracts already mentioned above.

One draw back of the producer’s lien under the above-cited statutes is that the lien typically does not attach to the proceeds of the sale of either the grapes and/or the wine or wine grape juice that is made from them. However, we were able to negotiate with the rest of the parties in this proceeding that if we allowed the sale to proceed that the proceeds therefrom would attach and my client would receive a prorated share of the proceeds based on the percent of my client’s grapes that were blended into the wine inventory that was sold pursuant to this motion.

The percentage of the \$105,000 owed to my client by the debtor winery that was not recovered was due to a portion of it being dissipated through various blending activities and for accounting thereof such that my client was unable to trace the grapes or blended wine product in order to collect monies based on the existing producer liens. Also, there was a large portion of grapes under one of the wine grape contracts that was sold 90 days prior to the following of a Chapter 11 bankruptcy. However, based on the factual circumstances, it was untenable to attempt to avoid the bulk wine sale through either 11 U.S.C. section 547 (avoidance of a preferential transfer) or 548 (avoidance of a fraudulent transfer). Therefore, under the circumstances, obtaining 20 to 25 percent of my client’s outstanding monies owed him we considered to be a “win” for our client. Our client was pleased with the results since he had already written off obtaining any of the \$105,000 due and owing when the winery filed its Chapter 11 petition for bankruptcy.

### **PREVENTATIVE STEPS AND SUGGESTIONS**

As a wine grape grower, one of the first places to look would be the nature of your contract with the winery. If the wineries you do business with like the “delivery now-pay later” type contracts, instead of not doing business with them, perhaps you can arrange for some kind of compromise. For example, negotiate a partial payment upon delivery with the balance due upon crushing or blending. There are many ways to modify and refine contracts that can work to the benefit of all parties involved versus just letting your client dictate all of the terms.

Another critical area to examine is the nature of your relationship with the winery. Is the winery client a good business manager or just an excellent wine maker? Perhaps you can investigate the winery’s history with other vendors in the history and/or interview former business partners, associates, etc. This could give you insight as to how the winery typically operates, i.e., pays its vendors, especially those

providing grapes used in its wine product. Learning about a winery client before they become a client can pay off since client who is a bad business manager, and always near financial problems, will lessen your chance of ever collecting on grapes delivered.

There are several legal tools that a wine grape grower can use to increase the chances of collecting on wine grapes delivered to a winery. First of all, I would strongly recommend filing a UCC-1 on each and every shipment of grapes delivered to a winery. If that becomes impractical, perhaps every 6 to 12 shipments would be more appropriate.

When you notice that the winery is falling behind on its payments for grapes that you have already delivered, rather than just quit shipping the grapes - which could also be deemed a breach of your contract - perhaps it would be appropriate to ask for further assurances. Essentially, this is a modification of your existing contract in order to provide better security or assurance that you will actually be paid at some point. Possible methods of providing for further assurances would be possible additional collateral that you would have access to if payments were not made in certain amounts and a certain time. Perhaps an equity-investment arrangement in the winery or perhaps the winery’s wine product. Although these options are theoretically possible, it may be difficult to get winery clients to agree to them especially if they are a large winery with a lot of clout in the industry. However, it is at least worth attempting to further secure the investment and hard work you have put into your harvest.

Once you notice that the winery is behind on making payments on wine grapes already delivered to it, and all other efforts seem to not bear fruit, it is highly recommended that you foreclose on your producer’s liens before the winery client files Chapter 11 and/or is too far beyond due dates when payments for delivered grapes are due. At the same time foreclosure is sought, an injunction against the winery to keep from losing the leverage of the grapes (or their wine product) as collateral is also available. (Cal. Food & Agr. Code, § 55651).

It is understandable that at a time when costs are high, the wine industry is growing rapidly, and competition is keen, that the services of a lawyer seems like just another added expense to an already jam packed bottom line. After all, you are busy trying to make your clients happy and generate some profit and there is nothing wrong with your existing relationship which makes it understandably easy to fall into these kinds of situations which my client did. As trite as it may seem, there is still much truth in a new blend of the old adage that an ounce of prevention is better than a pound of the best varietal anytime.



## **Steven R. Baker**



Steven R. Baker is an attorney in the Bakersfield office of Borton Petrini, LLP. After 20 plus years in marketing and sales for Fortune 500 companies and private corporations, Steve segued into law, graduating *cum laude* from Whittier Law School at Costa Mesa, California in 2001.

At the Firm, Steve’s areas of specialty are agricultural law, business transactional law, bankruptcy, civil and business litigation, unfair competition and business practices, business entity formation, and contract law.

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