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land for horse-related activity.*

Horses, Land, and the Law¹

by Holly Rudolph, J.D.

Are you a rider? A trail group leader? Or, are you a landowner who has been asked to let people ride across your property? Across the country, private ownership of land and federal park closures are reducing the free spaces available for horseback riding. This makes cooperation between horse people and landowners ever more important for maintaining trail access. That cooperation begins with an understanding of exactly what a rider is asking of a landowner when seeking to cross his land. And perhaps more importantly, what riders have to do when using someone else's property.

For many years, all of the states have had Recreational Land Use (RLU) laws. These laws recognize that part of being a society means that people pursue hobbies and aim to protect landowners who allow hobby activities on their land. In addition to RLUs, forty-six states also have Equine Activity Liability Act (EALA) laws that specifically address equestrian pursuits. Do you know which laws cover which activities? Do you know how the RLUs and the EALAs differ and how to comply with both? Do you know what your rights and obligations are under these laws?

The fact is, these laws were often not coordinated with each other, so they frequently overlap and may even have conflicting terms. Whether you are a lone rider, part of a group, or a landowner, the most important thing you can do is understand your obligations and potential liability before you saddle up or let riders cross your property. As with any legal issue, you should always consult an attorney who is familiar with your local laws and who can evaluate your individual circumstances. But you also now have a resource available that can briefly and simply outline the law in your state: The Hoofway Project.

Two Laws, One Source

In 2009, the Equine Land Conservation Resource created the Hoofway Project.¹ The project focuses on landowners who allow riders to cross their land, but who are not otherwise

involved with the rides or riders; this is where RLU and EALA laws can overlap. EALAs are designed with an eye toward traditional equine professionals, facilities, and activities like shows and lessons. RLU statutes are much broader, but may at times conflict with EALAs because they can include “riding animals.” There are several legal principles that you will need to understand when looking at these laws. This guide is designed to give you a very basic understanding of tort, property, and contract law to help you understand what your state laws actually mean.²

Torts for Beginners

“Tort” is simply the legal word for anything done (or not done) by one person that harms another person (including damage to property), for which a court will impose civil liability (usually money) in order to right the wrong.³ Torts can be either intentional or negligent.⁴ An intentional tort is a wrongful act committed by someone who knows what they are doing at the time and who meant to cause the result.⁵ An example of an intentional tort would be someone purposely spooking your horse while you are riding. On the other hand, a negligent tort is a failure to act as a reasonable person in similar circumstances would. Unlike an intentional tort, negligence does not require that a person consciously know that they did something wrong, only that the act be “unreasonably risky behavior.”⁶ A good example of a negligent act would be failing to correctly tighten the girth when saddling a horse for someone else.

Public Policy

Public policy prevents RLUs and EALAs from shielding certain kinds of behavior. Public policy is the idea that certain things are necessary for society’s good and cannot be legislated or contracted away.⁷ This means that the law cannot protect certain acts because doing so would prevent the righting of a wrong or would leave an innocent party unable to recover against a bad actor.

Gross negligence and intentional misconduct are typically not protected for public policy reasons. Gross negligence is a failure to use the care that even a careless person would use.⁸ Not watching students during a beginner hunter jumper class might be grossly negligent. The

¹ “Hoofway” is a term coined by the authors to describe informal equestrian trails. The Hoofway Project is available at www.elcr.org, “Library of Resources” (<http://www.elcr.org/ss2.htm>).

greater and more obvious the risk that conduct will cause harm to others, the further it moves from being gross negligence to intentional misconduct.⁹ Intentional misconduct is purposeful conduct where the actor knows his actions may cause harm to others. Unlike gross negligence, intentional misconduct requires intent, not just extreme carelessness. An example, of intentional misconduct could be someone setting off firecrackers near a hoofway, knowing that a group of riders is coming.

Recklessness and ‘willful and wanton misconduct’ are sometimes used interchangeably,¹⁰ but RLUs and EALAs sometimes separate the two. Reckless misconduct is an extreme form of gross negligence, which is defined as conduct that completely disregards the harmful consequences to others, although no harm was intended.¹¹ For example, driving a carriage full of passengers while intoxicated could be considered reckless misconduct. Even though the driver may not intend to hurt the passengers, his conduct recklessly disregards his duty to keep them safe.

Willful and wanton misconduct is considered the most extreme form of negligence.¹² “[Willful] misconduct is characterized by intent to injure. [Wanton misconduct] implies indifference as to whether...[the conduct] will injure another.”¹³ Willful and wanton misconduct creates an unreasonably high risk to others where the person knows of the risk but continues anyway.¹⁴ An example of willful and wanton misconduct might be igniting firecrackers on a hoofway while riders pass, trying to scare the horses.

The distinctions between these classifications can be extremely subtle. Usually the differences will only matter once an accident has occurred, so they are not very helpful when planning an activity. But they all deal with the requirement that people must behave reasonably and not cause harm or damage to other people or their property. If a person or group has a responsibility to maintain a trail or look out for one another, they must take that duty seriously. People without such a duty may not act in a way that could foreseeably cause harm to someone else. Simply put: be careful, and be reasonable.

Horse and Rider

Equine liability and recreational use laws protect property owners from liability for harm not just to humans, but also to horses. If this protection is lost for some reason, liability may include veterinary care and the cost of replacing a horse that dies because of the injury. In some places, courts have even allowed an owner to recover for emotional distress or loss of companionship when an animal dies.¹⁵ Some courts are also beginning to recognize recovery for the animal’s pain and suffering.¹⁶ For a property owner, this means you need to be careful to

comply with your state's requirements, or you may be responsible for an injured rider *and* an injured horse.

Property101

The first step in gaining permission to ride may seem obvious, but could be trickier than it first appears: find the proper owner. In most cases, you can simply ask the apparent owner if they own the land, but you may encounter vacant property, or you may have to deal with legal arrangements called easements or servitudes. To ensure that you are talking to the right person, it is always a good idea to go to your local public records office and check the deeds of the land you want to create a trail on. The deed should note the proper owner and any encumbrances (such as easements, *see below*) on the land which may affect the permissions you will need.

The most important thing to know about leased property is that you must get the permission of *both* the landlord and the tenant to run a trail.¹⁷ A tenant has the right to occupy the property, and any activity that conflicts with their right to be the exclusive user may violate the tenant's rights and could create trespassing problems.¹⁸ On the other hand, the landlord still owns the property and anything that alters the land (such as a trail) affects the landlord's rights.¹⁹

Property can also be subject to various types of servitudes.²⁰ A servitude is "a right to the limited use [of land] without possession of it."²¹ Most servitudes stay attached to property even if the land is sold or transferred to other owners.²² For example, a hoofway crossing private property may be considered a servitude in some situations. One of the most common types of servitude is the easement. An easement is "an interest in land owned by another person [that grants]...the right to use or control the land...for a specific limited purpose."²³ Unlike property that you can see and touch, easements may not be noticed by simply looking at the property. Easements are commonly granted for access to roads or utilities, allowing the owner of a landlocked plot of land to drive or walk across someone else's property to get to the road, or to run pipes to reach county water and sewer lines. Easements are also commonly held by utility companies for maintenance of lines and equipment. For this reason, easements should be - and typically are - recorded on the property's deed.²⁴ If your hoofway crosses an easement, you will also need the permission of the easement holder, since they also have a property interest in the land. It is therefore important to examine the deed to know whether and how an easement affects a particular property.

A conservation easement is an easement that prohibits certain activities on a property. The purpose of a conservation easement is to protect property from development for the benefit of society.²⁵ Conservation easements are not the right to *do* something, as other easements tend to be, they are obligations *not* to do something: usually build. Conservation easements are normally held by a government or private organization that ensures the terms of the easement are followed.²⁶ Modification of a conservation easement requires that both the easement holder and the property owner agree to the change.²⁷

Visitors

You should also understand the different categories of visitors to land. There are three legal categories of visitors: invitees, licensees, and trespassers.²⁸ Many RLUs and EALAs speak in terms of the duties owed to one of these categories, but their legal definitions are somewhat counterintuitive. An invitee is someone who is on the property for the *owner's* benefit.²⁹ For example, delivering hay or repairing fences. The duty owed by property owners to invitees is a “duty to inspect the premises and to warn the invitee of dangerous conditions.”³⁰ This means that the owner must ensure that the property is safe for the invitee’s use. It is not enough to send someone to the back pasture if you have never checked the area for sinkholes or exposed wellheads; lack of knowledge is a very poor defense if you have not taken reasonable steps to make yourself aware of dangerous conditions. Failure to recognize this duty may subject a property owner to a lawsuit if the invitee is injured.

Unlike an invitee, a licensee is there for her own purposes, not for the owner’s benefit.³¹ For example, a social guest or someone who is allowed to ride on the property is a licensee. The property owner has “a duty to warn the licensee of any [known] dangerous conditions....[that are] unknown to the licensee.”³² However, the property owner has “no duty to warn of dangers which are open and obvious to a reasonable person.”³³ The laws speak of “latent” conditions – meaning things that a reasonable person couldn’t see for themselves. A low-hanging tree branch is not a “latent” condition, because anyone watching where they’re going could see it. However, a rotten branch that could fall *is* a latent condition, since there is no way to know of the danger simply by looking. Where the laws differ is whether the landowner has to actually know about the danger (“known” condition) or if the landowner has to check for risks (“should have known”). Generally an owner does not have to actively inspect their property – only to warn of dangers they actually know about. The laws will tell you whether you are protected from liability for dangers that you didn’t know about, but could have discovered by reasonable inspection. Remember though, the “should have known” standard only requires *reasonable* inspection – you don’t have to climb every tree or poke every inch of ground – just be reasonable and check things out before you send people out onto your property. If you are aware of any *potential* risks like a weak creek bank, always err on the side of caution and warn riders. Riders must also be reasonable and pay attention to their surroundings. If there is a reasonably apparent danger, the landowner will not be liable for injuries because a rider wasn’t paying attention.

A trespasser is unlike a licensee or an invitee because he is an uninvited visitor, and this is the term you will most likely see in your state laws. Since trespassers are not invited and do not have permission to enter, there is typically no duty owed to a trespasser.³⁴ The one exception is when a property owner knows or should know that trespassers have been intruding (or are very likely to intrude) upon the property. In this situation, the property owner must warn (or at least attempt to warn) trespassers of any condition that would likely cause serious injury or death but would not be noticed by the trespasser.³⁵ For example, if a property owner knows that people routinely trespass on his property by riding their horses and does nothing to stop them, the property owner has a duty to warn of known dangers, such as growth-covered wellheads or hidden prairie dog villages. Otherwise, there is no duty to the trespasser.

Language and Signs

Equine liability laws often require property owners to post signs, and often require that specific language be included in signs, waivers, and contracts. Failure to follow the law's requirements may cause an owner to lose protection and become liable for injuries.

There are two different signage requirements in many states: warnings of dangerous land conditions like sinkholes or weak branches, and general notices about the state's EALA. Where signs are required, the law may have specific language that must be on the sign, and some also include specific colors and letter sizes. The Hoofway Project website provides links to these requirements so that you can check your state's rules easily and consider the requirements in the context of your individual situation.

Contract Basics and Waivers

If there's one thing about horse people that makes their lawyers crazy and invites unnecessary problems, it's the pervasive rejection of written contracts. Most of the agreements that horse people make among and between themselves are handshake deals that are almost guaranteed to result in disagreements later about who meant what by which words and what the terms were supposed to be. You've all heard it a million times, but make it a million and one: **WRITE IT DOWN!** The single best thing you can do to avoid problems and make sure everyone knows what is expected and what won't be allowed is to write down the terms of your agreement and have a lawyer review it. No one ever thinks about the worst case scenario in the warm glow of a new deal or friendly agreement, but when that worst case scenario happens, everyone wishes they had.

There are a few things you need to know about contracts when you use them to set up a hoofway. Your first stop should be the Hoofway Project to review any sign and contract language required by your EALA. Often a state will tell you exactly what to say in your contract, but keep in mind that these are minimum requirements and you will almost certainly need to add terms specific to your situation.

In addition, transfers of property interests must be in writing, and generally must be signed by both parties to be valid.³⁶ So if your intent is to create a trail easement, you must have a written agreement. Otherwise what you will end up with is a 'license' to use the land, which can be revoked at any time by the landowner.³⁷ On the other hand, you can draft your agreement to be revocable under certain circumstances if both sides want to.

One kind of contract that you will probably encounter is a waiver of liability. As discussed above, some states have specific language that must be included in a waiver, so read your state's law carefully. Waivers can sometimes be used to expand the protection of the law, but they are limited by the kinds of public policy concerns discussed above. Waivers can be tricky documents, especially where minors are concerned. Some states no longer permit parents

to sign waivers on behalf of their children, and children cannot legally sign them either. There are many good resources available³⁸ to help you understand your state's waiver laws, but it is important to realize that every situation is specific and general statements may not accomplish your goals. Because of specific rules about what can be waived and by whom, you should *always* discuss waivers with an attorney before relying on them to protect you.

Equine Activity Liability Acts and You

The first thing you should know about EALAs is that they do NOT protect anyone from liability for everything. Their primary goal is to prevent people from suing for things that are “inherent risks” of equine activities. Most states include a “such as” list of the kinds of incidents they target. Things like horses spooking, bucking, rubbing a rider against a wall, kicking, or stepping on someone will most likely be covered since these are the kinds of things that people should know might happen anytime they are around a horse. But these laws do NOT protect from bad acts and certain other exceptions. Chiefly, if you provide a horse or tack to a rider, many states require that you evaluate the horse/rider pair for ability and that you make sure all tack is intact and reliable, otherwise you may be liable for the rider's injuries. The Hoofway Project notes unusual provisions in a state's law and exceptions that apply to landowners for non-obvious, dangerous conditions of the land (“dangerous latent condition”). Most importantly, as discussed above, many states require specific signs before you can be protected, and most will not protect willful and wanton misconduct.

One tricky element of EALAs is a tendency for the laws to be circular in their definition of an “equine activity.” While most statutes protect “any person,” many define an “equine activity” as (among other things) an informal ride sponsored by an “equine activity sponsor.” An “equine activity sponsor” may be a person who “sponsors or provides facilities for an equine activity.” While no state defines what it means to “sponsor” an activity or what “facilities” are, landowners may be able to argue that because they have provided land (“facilities”) for an activity, they should be protected as “equine activity sponsors.” However, in West Virginia this would mean arguing that the landowner is a “horseman,” which also imposes extensive duties that you should review closely. No court has yet addressed this circular definition, so be sure to review both EALAs and RLUs to ensure the best chances for protection.

Recreational Land Use Laws Want to Play Too

Where the EALA laws *might* protect a landowner as a provider of facilities, the RLU laws in most states almost certainly will. Many states with EALAs have also retained ‘horseback riding’ or similar language in their RLU statutes, so the laws will often overlap where equestrian activities are involved. Other states have significant restrictions in their RLUs that may force landowners to seek protection from EALA's.

Most RLU laws are broad, covering activities “including but not limited to” specified activities. Some states, though, limit who can claim protection. For example:

- Mississippi’s RLU only applies to a specific list of activities, which does not include riding animals. However, there is conflicting language that appears to be the result of two or more statutes being cobbled together. “Outdoor recreational activity” does say “including, but not limited to,” but later elements, like duty of care, do not use that defined term, leaving the statute vague and contradictory.
- Alaska, New Jersey and Tennessee limit their recreational use protections to landowners enrolled in state programs.
- Texas has specific insurance requirements.
- Missouri limits protection for recreational use to land that is not within corporate boundaries.
- Oklahoma does not apply recreational protection to farm or ranch land, or to adjacent lands.

In states with these types of restrictions, landowners may have to seek protection for a particular activity under an EALA.

It will also be crucial to know whether your state permits charging a fee to use land for recreational purposes. In most states, charging a fee or receiving anything more than an incidental token in exchange for permission to ride will destroy the RLU’s protections. Some states only permit receiving a share of agricultural products taken from the land during the activity. For example, if you entered to pick berries or chop firewood and shared the fruit or wood with the owner, protection would probably still apply. Paying money to enter for the same purpose, though, would destroy protection. The Hoofway Project notes what your state allows a landowner to receive while still remaining covered. It is possible that in a state that prohibits fees, charging a fee could actually strengthen the argument that a landowner “provided facilities” for an equine activity, supporting their position as an “equine activity sponsor” who should benefit from the EALA.

When a property owner leases property to a state or local government, specific rules often apply. State leases and usage permits (like hunting or event permits that people pay a fee to the state for) are common exceptions to the ‘no fee’ rules. In these situations, the property owner can still qualify for protection despite receiving lease payments from the state. Because fees are not limited to cash, and because any fee may destroy your protection completely, it is important

to read the law carefully and make sure that you comply with your state's requirements. If you have any questions, check with a local attorney

Know Your Laws

In any given situation, both RLUs and EALAs may provide protection to landowners. It is critical to know what is required of an owner under both types of laws, as certain situations may eliminate these protections, or may impose certain obligations to invoke the law's protection. Riders and group leaders should also know what is expected of them. Whether researching how to prepare a trail or after a problem arises, the Hoofway Project's summary and direct links to the laws make this easier than ever!

Suggestions and Recommendations

We hope this information is useful as a basic reference for anyone involved in creating a hoofway or other equestrian use area. The information here should be read together with your state's EALA and RLU laws, as well as any local ordinances or zoning requirements. The following short list of suggestions and recommendations is not exhaustive, and you should always consult a knowledgeable attorney to fully understand the general statements provided here and the summaries in the Hoofway Project. Every state is different, and every court interprets things differently. A local attorney will be able to more fully and specifically advise you on how best to proceed with any given project.

1. Determine who owns the property, and be certain that you have the right person. Examine the property's deed in the public record – don't rely on word of mouth or what you see on the property. This will also tell you if the property is affected by servitudes such as easements. A lease will not typically be recorded on the deed, so make sure to ask the owner about leases. Property records may be old and subject to errors, so make sure you also ask the property owners if they know of any servitudes on the property.
2. Consider the potential for a lawsuit. Discuss with the property owner the basic duty of care they will be assuming. Remember that laws *limiting* liability are not *zero* liability laws. Make sure the landowner's normal activities and use of land could not be mistaken for (or become) reckless, willful, or wanton misconduct. If necessary, make sure to post appropriate signs or provide appropriate waivers. None of the laws require a landowner to personally buy or post the signs, only that the signs be proper. A group can most likely contract to provide and maintain the signs to encourage landowners to permit trails. Check with an attorney about any waivers or changes in liability this may cause.
3. Make sure that everyone is informed of what they are doing. Be it a landowner donating or selling a trail easement, or an organization purchasing or leasing the land for a

hoofway, put the agreement in writing and be sure it is signed by the correct parties. Carefully consider “then what” and “what if” questions as you write the contract. Always consider the worst possible outcome, and account for how things will be handled and who must handle unexpected events. Also consider that if your group is buying the trail easement, you will most likely be taking all liability from the landowner and should be prepared to scrupulously maintain the property and carry private insurance.

4. Read your state’s equine liability or recreational use laws carefully and make sure your property complies with the law’s requirements. The Hoofway Project will take you directly to your state’s laws. Be aware that the laws are almost always in more than one section, so you may have to click through several sections of the law to get all of the necessary information. The Hoofway Project’s links will take you either directly to the first section so you can click “next,” or to a higher level so that you can click through to get to the parts you need. Generally, the first number of the law is the highest level, so start there, and then the next level is the next number. So, for example, Alabama’s EALA is at 6-5-337, so go to Title 6, Chapter 5, Section 337. Each state is arranged a little differently, but this is the general pattern.

Once again, always consult a local attorney. The information here is necessarily general, and most cases depend heavily on the specific facts of the case. As with any activity involving horses, it is far better to be safe than sorry.

Happy Trails!

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² This guide is not intended as legal advice and may not accurately reflect the law in your area. You should not rely on the information contained herein, as these principles are broad statements of the most common rules. Always consult a knowledgeable attorney before taking any further steps.

³ DAN B. DOBBS, *THE LAW OF TORTS 1* (West 2000).

⁴ *Id.* at 2; JAMES A. HENDERSON, RICHARD N. PEARSON & JOHN A. SILICIANO, *THE TORTS PROCESS 2* (6th ed. 2003).

⁵ DOBBS, *supra* n. 3 at 2.

⁶ Dobbs et al. *supra*, n. 3 at 2-3.

⁷ BLACK’S LAW DICTIONARY 1351 (9th ed. 2009) (public policy).

⁸ BLACK’S *supra* n. 7 1134 (gross negligence).

⁹ DOBBS, *supra* n. 3 at 52.

¹⁰ DOBBS, *supra* n. 3 at 51-52.

¹¹ BLACK’S *supra* n. 7 1385 (reckless).

¹² DOBBS, *supra* n. 3 at 51.

¹³ *Adkisson v. Seattle*, 258 P.2d 461, 466 (Wa. 1953).

¹⁴ DOBBS, *supra* n. 3 at 51.

¹⁵ Am. Humane Soc’y, *Case Law and Statutes Involving Damages for Harm to Animals* (2009),

<http://www.americanhumane.org/assets/docs/protecting-animals/PA-cases-damages-harm-to-pets.pdf>.

¹⁶ *Id.*

¹⁷ JOSEPH WILLIAM SINGER, *PROPERTY* 24-25, 432 (Aspen 2010).

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 24-25.

²⁰ Lloyd Duhaime *Easements & Covenants*, DUHAIME.ORG, Oct. 20, 2006, <http://duhaime.org/LegalResources/RealEstateTenancy/LawArticle-67/Easements-Covenants.aspx> (last updated Sept. 5, 2010).

²¹ BLACK’S *supra* n. 7 1492 (servitude).

²² SINGER, *supra* n. 17 at 221.

²³ BLACK’S *supra* n. 7 585-88 (easement).

²⁴ SINGER, *supra* n. 17 at 182.

²⁵ Dan Tesini, *Working Forest Conservation Easements*, 41 Urb. Law. 359, 359 (Spring 2009).

²⁶ *Id.*

²⁷ ELIZABETH BYERS & CAROL PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 183-89 (The Land Trust Alliance and Trust for Public Land, San Francisco, 2005) (The chapter give a nice step by step process of how to modify an easement).

²⁸ THOMAS J. ALLEN, DENNIS K. SMITH & ANTHONY FERRISE, *REAL PROPERTY: RURAL LANDOWNERS—LIABILITY AND POSTING OF LAND* 1 (1998), <http://www.wvu.edu/~exten/infores/pubs/other/rd725.pdf>.

²⁹ BLACK'S *supra* n. 7 904 (invitee).

³⁰ *Id.*

³¹ BLACK'S *supra* n. 7 1004 (licensee).

³² *Id.*

³³ ALLEN ET AL., *supra* n. 28.

³⁴ BLACK'S *supra* n. 7 1643 (trespasser).

³⁵ ALLEN ET AL., *supra* n. 28.

³⁶ GERALD KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES* 33 (2d ed. 2004).

³⁷ SINGER, *supra* n. 17 at 176, 178, 182-188.

³⁸ An excellent book that lays out many of the limits and requirements of waivers by state is “Waivers and Releases of Liability” by Doyice J. Cotton and Mary B. Cotton (see www.sportwaiver.com).