FILE

In re Mistover Acres LLC
To: Applicant  
From: Lyle Palkovich  
Re: Mistover Acres LLC  
Date: July 24, 2007

We have been retained by Petra Flynn, one of three members of Mistover Acres LLC (“Mistover”), a Franklin limited liability company, to review a claim made against Mistover by Genesee Trout, Inc., for damage to its trout farm caused by the aerial crop dusting of a pesticide, MU-83, on Mistover’s fields. Mistover is a well-respected grower and seller of apples, salad greens, and herbs.

We are representing Petra Flynn in her individual capacity. Mistover has its own legal counsel. Ms. Flynn has come to us because she is concerned about her potential personal liability for the harm claimed by the trout farm. She believes that Mistover’s organization completely shields her from personal liability for Mistover’s business-related activities, but she is understandably troubled by the demand letter from Genesee Trout’s counsel. Another concern I have is whether the aerial crop dusting of MU-83 constituted an ultrahazardous activity, thereby raising the possibility of strict liability. The next meeting with Ms. Flynn on this matter is scheduled for July 31, 2007.

Please prepare an objective memorandum analyzing the following questions under Franklin law:

1) Can Ms. Flynn be held personally liable for the damage done by the aerial crop dusting?

2) Did the aerial crop dusting of MU-83 constitute an ultrahazardous activity?

You need not prepare a separate statement of facts, but in each part of the memorandum you should incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. A carefully crafted subject heading should precede each discussion section. For the purpose of your analysis, assume that the aerial crop dusting caused the damage to the trout farm.
Petra Flynn is one of three members of Mistover Acres LLC. The other two members are Petra’s brother, Gilbert Flynn, and their cousin, Chip Kendall. They formed Mistover after Petra and Gil inherited two adjoining parcels of land in Sutton Township. Mistover grows apples, herbs, and unusual varieties of lettuce that have become very popular in gourmet restaurants. Under the terms of the Mistover Acres LLC Operating Agreement, Petra and Gil lease their land, about 60 acres, to the business. Petra and Gil do some work for Mistover, but as Chip has the expertise in agriculture, most of the decisions regarding planting are left to him. Petra supervises the marketing and sale of Mistover’s produce.

Petra has come to the firm for advice regarding her potential personal liability for claims made by Genesee Trout, Inc., in a demand letter its attorneys sent to Mistover’s office. She is concerned about Mistover being liable for such a large claim, as it has yet to turn a profit and Chip invested all the money he had in Mistover when they organized it five years ago. According to Petra, Chip “is essentially judgment proof,” and Gil’s financial situation has always been precarious. She fears that, because she has substantial assets of her own, any lawsuit by Genesee Trout will try to target her as a “deep-pocket” defendant.

Sutton Township is an area of rolling hills that has long been agricultural. In the 1990s, farmers experienced economic difficulties, but in recent years, small-scale, specialized producers like Mistover have been reviving the local economy. A number of these producers are devoted to organic agricultural practices. For example, across the road from Mistover is Haakon Farms, where the owner sells goat cheese made with the milk from her own herd. And, as noted in the demand letter, Genesee Trout’s trout farm lies just east of Mistover.

According to Petra, the three members began Mistover to put into practice their belief that consumers deserved another option besides the bland fruits and vegetables grown by factory farms that dominate the selections in most supermarkets. Nonetheless, neither she nor Gil was particularly thrilled when Chip suggested growing new lettuce varieties. Mistover’s heirloom apple varieties were selling well and the lettuce varieties could not be successfully raised in amounts needed for sale without the use of some chemical fertilizers and pesticides, which they generally try to avoid. Chip, however, persuaded them that these rare lettuces would soon be “must have” salad greens in the best restaurants, and that the price Mistover could charge would
soon generate enough income to allow it to expand into other vegetable crops. Chip also argued that, as one of the only operations offering a unique and locally grown lettuce variety, Mistover would earn a reputation for being an innovator in the gourmet produce market.

Mistover first grew lettuce two years ago and the crop did well. Last year, however, Chip discovered leaf slugs on the plants. If nothing had been done about the leaf slugs, they could have destroyed one-third of the crop. Chip proposed using a pesticide, but Petra expressed concerns about the marketing consequences, as they had always emphasized that Mistover’s produce was locally grown with minimal chemicals. They researched pesticides together and ultimately selected MU-83, a new pesticide. Petra then ordered it last year through an agricultural supplier; MU-83 is not available to the general public. Chip walked through the fields with some of Mistover’s seasonal help and sprayed the lettuce crop with MU-83. It was effective, but the labor costs of the pesticide application were high.

When Chip found the leaf slugs again this season, he determined that the slugs were more numerous than last year and that hand spraying would involve even higher labor costs. Before joining Mistover, when he lived in Columbia, Chip had worked one growing season using his small airplane to dust large corn and wheat fields with pesticides and herbicides. He and Petra decided to use aerial crop dusting, and Petra ordered more MU-83. The Franklin Environmental Code requires posting for aerial crop dusting, and Petra ensured that the proper notice was posted on the Sutton Township website, at the Town Hall, and at three other public places.

Chip sprayed the fields with MU-83 on March 28, 2007. Petra was at Mistover that afternoon and watched Chip take off in his airplane, circle the farm buildings, and then fly over the plants at a height of about 20 feet to apply the MU-83. She did not observe the yellow cloud described in the letter from Genesee Trout’s attorneys, but does recall that there was a light breeze blowing from the west, which possibly could have carried MU-83 in the direction of the trout ponds. Two days later she and Chip walked through the fields and verified that the MU-83 had killed any visible leaf slugs.

The lettuce, Mistover’s best crop yet, was picked and sold at a prime price. Until the letter from Genesee Trout’s attorneys arrived, none of the LLC members had heard any complaints about the MU-83 aerial crop dusting or their farming activities in general. Petra will come in next week to discuss the situation.
July 17, 2007

Ms. Petra Flynn  
Mistover Acres LLC  
P.O. Box 572  
Derby, Franklin 38440  

Re: Genesee Trout, Inc.

Dear Ms. Flynn:

We represent Genesee Trout, Inc., the owner of the trout farm that abuts Mistover Acres on its eastern edge. On March 28, 2007, our client’s employees observed a crop-dusting airplane flying over the fields of Mistover Acres, spraying a yellow-colored substance. They then observed a yellow cloud drifting over Genesee Trout’s fish ponds. In the months since that date, a higher-than-expected percentage of our client’s trout stock has died, and the number of successful egg hatchings has substantially declined. The water in the fish ponds has been tested and has been found to contain significant levels of the pesticide MU-83. The cost to clean the ponds and restock the trout will exceed $1 million. Genesee Trout is also concerned that MU-83 will leech into the local water supply.

The presence of MU-83 in the Genesee Trout fish ponds, the resulting decline in the trout stock and egg hatchings, and the potential damage to the water supply were caused by Mistover Acres LLC’s aerial crop dusting on March 28, 2007.

Genesee Trout, Inc., is willing to settle its claims against Mistover Acres LLC. However, if a settlement cannot be reached, our client has instructed us to pursue legal action against Mistover Acres LLC and its members. If you are willing to discuss settlement, please respond to this letter within two weeks of its receipt.

Sincerely,

Walter French

Walter French
OPERATING AGREEMENT OF MISTOVER ACRES LLC

This OPERATING AGREEMENT is entered into by Petra Flynn, Gilbert Flynn, and Chip Kendall for the purpose of organizing a limited liability company pursuant to the Franklin Limited Liability Company Act, § 601 et seq.

1. **Name and Purpose:** The limited liability company shall be known as MISTOVER ACRES LLC (hereinafter “the LLC”). Its purpose is to grow and market apples and other produce for sale at farmers’ markets and to restaurants and other commercial establishments.

2. **Members:** The members of the LLC are Petra Flynn, Gilbert Flynn, and Chip Kendall.

3. **Capital Contributions:** The capital contributions of the respective members shall be as follows:
   a. Chip Kendall: $50,000 (fifty thousand dollars).
   b. Petra Flynn: $10,000 (ten thousand dollars).
   c. Gilbert Flynn: $10,000 (ten thousand dollars).

4. **Lease of Agricultural Land:** On or before the date of filing of the Articles of Organization, leases will be entered into between the LLC and Petra Flynn, and the LLC and Gilbert Flynn, for the two adjoining 30-acre parcels on Schmidt Road, Derby, Franklin, identified as Tracts 37 and 38 of Sutton Township Certified Survey 2713. The LLC shall have the exclusive right to lease these parcels for as long as the LLC continues in existence or until such time as the members agree to terminate the leases.

5. **Management:** With respect to acquisition of capital assets by the LLC, or the addition of new members or employees of the LLC, the undersigned members shall in all cases act as a group, with a majority vote or consent of the members required to take action. Day-to-day decisions regarding planting and harvesting are delegated to Chip Kendall until the members agree otherwise. The marketing and sale of the LLC’s produce shall be supervised by Petra Flynn.
6. **Sharing in Distributions and Profits**: For the first five (5) years of the LLC’s existence, the profits, if any, will be reinvested into the LLC’s operations. If any profit is realized in subsequent years, 50 percent (50%) will be reinvested into the LLC, and the remainder will be distributed in equal shares to the members.

7. **Accounting**: Members shall receive annual financial reports containing the LLC’s balance sheet and a statement showing the net capital appreciation or depreciation.

8. **Applicable Law**: All questions concerning the construction, validity and interpretation of this agreement and the performance of the obligations imposed by this agreement shall be governed by the laws of the State of Franklin.

**Dated:** February 15, 2002

**Petra Flynn**

**Gilbert Flynn**

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Petra Flynn

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Gilbert Flynn

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**Chip Kendall**

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Chip Kendall
USER’S GUIDE FOR MU-83 APPLICATION

Thank you for selecting an AgriShield, Inc., product to protect your crops! MU-83 is an effective pesticide for use on all crops, including those intended for human consumption. Studies by the University of Franklin Agricultural College have demonstrated that it is 98% successful in completely eradicating pests such as rootworm, boll weevils, and leaf slugs, when applied according to directions. It is suitable for application by hand, tractor-pulled spraying rig, or aerial dusting by airplane. Aerial dusting should occur at a distance no higher than 30 feet from the intended target area.

* * * *

As with all pesticides, persons applying MU-83 should use caution and be aware that pesticide “drift” (the movement of pesticide droplets or particles in the air from the targeted field to non-target areas) is always a risk of pesticide application. Drift and runoff may be toxic to aquatic organisms in neighboring areas. Drift will occur with every application. The amount of drift is subject to various controllable and uncontrollable factors, such as time of application, concentration, wind gusts, weather changes, and the physical characteristics of pesticide droplets or aerosols. Apply this product only in accordance with application instructions found on the label.

WARNING: Improper use or application of MU-83 may cause serious injury or death.
SUTTON TOWNSHIP

PUBLIC NOTICE

In accordance with the Franklin Environmental Code, § 22(1), Mistover Acres LLC hereby gives public notice that it will conduct aerial crop dusting of the following pesticide on the date indicated:

Pesticide: MU-83

The pesticide application will occur on March 28, 2007 on the following described property in Sutton Township:

The two adjoining 30-acre parcels identified as Tracts 37 and 38 of Sutton Township Certified Survey 2713, according to the records of the Clerk and Recorder of Washington County, Franklin, and also known as Mistover Acres LLC, 200 W. Schmidt Rd.

For further information, contact:  ___ Petra Flynn___________
  200 W. Schmidt Road
  Derby, Franklin  33510
  (920) 555-1085

Dated this 25th day of March, 2007

Mistover Acres LLC

by  Petra Flynn

Petra Flynn, its authorized representative
LIBRARY

In re Mistover Acres LLC
§ 601 General Purposes.

(1) A limited liability company may be organized under this Act for any lawful purpose…

(2) Unless otherwise provided in an operating agreement, a limited liability company organized and existing under this Act has the same powers as an individual to do all things necessary and convenient to carry out its business, including but not limited to all of the following:
   (a) Sue and be sued, complain and defend in its own name.
   (b) Purchase, take, receive, lease, or otherwise acquire and own, hold, improve, use, and otherwise deal in or with real or personal property or any legal or equitable interest in real or personal property, wherever situated.
   (c) Sell, convey, mortgage, lease, and otherwise dispose of all or any part of its property…
   (d) Make contracts and guarantees; incur liabilities…
   *   *   *   *
   (g) Elect or appoint managers, agents, and employees of the limited liability company, define their duties, and fix their compensation.
   *   *   *   *

§ 605 Liability of members.

(1) The debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company.

(2) Except as otherwise provided in this Act or by written agreement of a member, a member of a limited liability company is not personally liable solely by reason of being a member of the limited liability company for any debt, obligation, or liability of the limited liability company, whether that liability or obligation arises in contract, tort, or otherwise, or for the acts or omissions of any other member, agent, or employee of the limited liability company.

(3) Nothing in this section shall be construed to affect the liability of a member of a limited liability company to third parties for the member’s participation in tortious conduct.

(4) A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member of the limited liability company, except where the object of the proceeding is to enforce a member’s
right against or liability to the limited liability company or as otherwise provided in an operating agreement.
Hodas v. Ice LLC
Franklin Court of Appeal (2004)

This is an action to recover damages for injuries sustained in a motor vehicle accident. The complaint alleged that on March 18, 2000, between 12:00 a.m. and 1:45 a.m., Tony Veit and Todd Hodas were patrons of the Firefly Bar in Groton, Franklin. The Firefly Bar is owned by Ice LLC. Defendants Duncan O’Malley, Joe Kaufman, and Victor Casellano are the only members of Ice LLC.

While at the Firefly Bar, Veit consumed large quantities of alcohol. Despite his being obviously intoxicated, the defendants and/or their employees continued to serve him. Veit and Hodas, both grossly intoxicated, left the Firefly in Veit’s car. While speeding, Veit lost control of the vehicle and hit a tree. Veit died at the scene and Hodas was seriously injured.

Hodas claims that the defendants were negligent and reckless in their conduct by selling any alcohol to an obviously intoxicated person. O’Malley, Kaufman, and Casellano argue that they were entitled to summary judgment because liability cannot attach solely by virtue of the fact that they were members of Ice LLC, the entity that owned the bar. The trial court denied the summary judgment motion. We granted O’Malley, Kaufman, and Casellano leave to bring this interlocutory appeal.

DISCUSSION
It is undisputed that Ice LLC is a Franklin limited liability company organized under the Franklin Limited Liability Company Act (FLLCA), § 601 et seq. The original property lease agreement identifies Ice LLC as Lessee, acting through its members O’Malley and Kaufman. A liquor license application for the bar states that Casellano invested $80,000 in Ice LLC to be used for the purpose of renovating the building in Groton that houses the Firefly Bar. The Ice LLC operating agreement names the three as the sole members of the LLC.

A limited liability company, or “LLC,” is a business entity that combines the attributes of a partnership for federal income tax purposes with the limited liability protections that a corporation provides to shareholders. Like a partnership, an LLC allows the owners, called members, to participate in the management of the business. LLCs are typically governed by operating agreements. The provisions pertaining to the liability of LLC members
are found in § 605 of the FLLCA.

The FLLCA generally provides that a member of an LLC is not personally liable for acts or debts of the company solely by reason of being a member. Nevertheless, a member may be personally liable if the person participates in tortious conduct.

O’Malley and Kaufman contend that tort liability of an LLC member is limited to conduct committed outside the member role. We reject this approach as contravening the corporate and agency principles upon which the liability of LLC members is based. Nor does the language of the FLLCA support such a restriction. We recognize, however, that the “participation in tortious conduct” standard does not impose tort liability on a member for performing what is merely a general administrative duty. See Lee v. Bayrd (Franklin Ct. App. 1985) (no tort liability where corporate officer not shown to have authorized, directed, or participated in tortious act). There must be some participation; liability of individuals is derived from individual activities. This standard thus comports with the principle that members are not liable based only on their status.

O’Malley, Kaufman, and Casellano argue that this view of limited liability defeats the language of § 605(2) that bars tort liability predicated solely by reason of an individual’s status as a member of the LLC. We disagree. The phrase “solely by reason of” refers to liability based upon membership or management status. It does not immunize a member’s conduct. It is not inconsistent to protect a member from vicarious liability (e.g., for the tortious acts of another LLC member or employee), while imposing liability when the member participates in a tort. In short, liability of LLC members is limited, but not to the extent claimed by O’Malley, Kaufman, and Casellano.

O’Malley and Kaufman

The complaint alleges that O’Malley and Kaufman failed to properly supervise and train their personnel and failed to monitor their patrons to ensure safety.

O’Malley and Kaufman both admitted at their depositions that they were at the bar on March 17, 2000, into the morning hours of the 18th, and that the place was very busy. Kaufman stated that he usually deals with the customers and personnel. O’Malley testified that on that night, he was “all over the place, making sure everyone was doing what they were supposed to, greeting customers and doing other ‘PR’ work.” Neither defendant could affirm or deny whether he had personally served alcohol to Veit.

O’Malley and Kaufman would not be liable solely because of their status as members of Ice LLC. But the FLLCA does not affect the liability of an LLC member who participates in tortious conduct, whether or not that
conduct is on behalf of the LLC. See § 605(3). Given the participation of O’Malley and Kaufman in the operations of the business, there are material issues of fact which precluded the granting of summary judgment. See Goff v. PureMilk LLC (Franklin Ct. App. 1997) (summary judgment inappropriate where agreement required LLC’s member/manager to provide human resources and consulting services to LLC and extent of member’s/manager’s participation in tortious conduct was unknown). A trial is necessary to develop the facts relating to allegations of O’Malley and Kaufman’s participation in the alleged torts. For this reason, the court affirms the denial of summary judgment as to O’Malley and Kaufman.

Casellano
There was no evidence before the trial court that Casellano was at the Firefly Bar on March 17, 2000, or that he participated in the business operations at any point in time relevant to the allegations in the complaint. To support his claim for Casellano’s liability, Hodas referred to the liquor license application that was signed and filed by Casellano, a trade name certificate recorded in the Groton Land Records listing Casellano as one of the persons involved in the business known as the Firefly Bar, and the operating agreement designating Casellano as a member of the LLC.

These documents clearly demonstrate that Casellano was a member of Ice LLC in March 2000. Nothing else has been presented as a basis for Casellano’s liability. Hodas could not overcome the fact that his claim for liability is based solely upon Casellano’s status as a member of the LLC. Section 605(2) of the FLLCA precludes liability based on membership status alone. Further, a member is not liable for the acts or omissions of any other member of the limited liability company. For this reason, the court reverses the denial of summary judgment as to Casellano.

Affirmed in part, reversed in part, and remanded for further proceedings.
Defendant Gwen Ellis appeals from a judgment entered on a jury verdict awarding damages to plaintiff Adele Thurman in the amount of $50,000. The issue before us is whether the trial court erred in instructing the jury that breeders of pit bull dogs are strictly liable for any harm caused by their animals on the basis that raising pit bulls is an ultrahazardous activity.

Ellis has bred pit bulls for several years. Thurman was injured when, on a visit to Ellis’s home, the mother of the current litter attacked her while she was holding a puppy. Thurman suffered deep wounds to her arm and hand before Ellis could restrain the dog. Although Thurman alleged three other counts in her complaint, only the claim for strict liability based on an ultrahazardous activity is before us on appeal.

Those who engage in ultrahazardous activities are, as a general rule, subject to strict liability for the harm caused to the innocent as a result of the activity. When determining whether an activity is ultrahazardous, we apply § 520 of the Restatement (Second) of Torts, which requires analysis of six factors: (1) existence of a high degree of risk of some harm to the person, land, or chattels of others; (2) likelihood that the resulting harm will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which the activity’s value to the community is outweighed by its dangerous attributes. Sisson v. City of Bremerton (Franklin Sup. Ct. 1975). This is a totality of the circumstances test. No one factor is determinative.

In Franklin, assessment of the § 520 factors has resulted in the imposition of strict liability for firework displays; rock blasting where injury occurred to property on an adjacent lot; emissions from chemical separation as part of weapons-grade plutonium production; and a common carrier’s transportation of large quantities of gasoline. Under the same analysis of the factors in § 520, Franklin courts have held that the following activities are not ultrahazardous: household use of water, electricity, or gas; operation of oil and gas wells in rural areas; and ground damage caused by the crash landing of aircraft.

Sisson provides a detailed example of the court’s reasoning when applying the § 520 factors. There, it was alleged that the city’s demolition project, which caused the collapse of the retaining walls that protected the plaintiffs’ homes, constituted an ultrahazardous activity rendering the city strictly liable for the damage. The court emphasized that the inability to eliminate the risk by the exercise of reasonable care would
generally carry more weight than the other factors, but that this factor alone was not dispositive of whether an activity is ultrahazardous. Moreover, while the availability and relative costs, economic and otherwise, of alternative methods for conducting the activity are basic to the inquiry, the court stressed that an activity that was ultrahazardous in one context is not necessarily ultrahazardous for all occasions. Ultimately, the court held that the record was inadequate to determine whether the demolition project was ultrahazardous.

*Fredricks v. Centralia Fire Dept.* (Franklin Ct. App. 1999) explained that the value of an activity to the community will at times negate factors that would otherwise favor imposing strict liability. In *Fredricks*, it was claimed that the fire department had conducted an ultrahazardous activity in putting out a fire and that water used to put out the fire had spread toxic waste to adjoining properties, requiring costly cleanup. The court reasoned that, while firefighting presented a high degree of risk, the value to the community far outweighed the inherent dangers of the activity. In addition, referring to the fifth factor, the court noted that there was no reasonable basis for the plaintiff’s claim, as it “defied logic to argue that it is inappropriate to carry out firefighting at the site of a fire.” *Id.*

Here, Ellis disputes the evidence of a high degree of risk of harm. She testified that, until the attack on Thurman, none of her dogs had behaved violently. Her expert, a nationally known breeder, opined that pit bulls are good-tempered, loyal animals, unless specifically trained to be aggressive. Thurman, however, presented the opinions of a veterinarian and an authority on pit bulls to show that years of breeding had created an aggressive breed that was easily provoked, especially if an animal thought its young were in danger.

While the precise degree of risk posed by pit bulls is uncertain, it is undisputed that because of the pit bull’s powerful jaw structure, it is extremely difficult to open the dog’s mouth once it bites someone or something. This practically ensures that anyone bitten by a pit bull will sustain a severe injury. In addition, the fact that Ellis was breeding pit bulls in her home in a residential neighborhood, in close proximity to young children, as opposed to a less populated area or at least a location with sufficient space for an outdoor dog kennel, leads us to conclude that the activity was being conducted in an inappropriate place. Ellis correctly points out that no city ordinance banned breeding dogs such as pit bulls within city limits. However, the fact that an activity is legal is not a defense to a claim that the activity is ultrahazardous. The first, second, and fifth factors support holding Ellis strictly liable for the harm caused by her dogs.

Turning to the fourth factor, we recognize that dog breeding in general is a common activity. While not as numerous as many breeds, pit bulls are not so rare that raising
them should be considered uncommon. Nevertheless, we conclude that, with this breed, exercise of reasonable care is unlikely to eliminate the risk of severe injury, as pit bulls that have never bitten might, without warning, attack an individual perceived to be a threat and inflict grave injury. There was testimony from both parties’ experts that preventive measures were possible, such as keeping muzzles on the adult dogs. But dogs cannot be muzzled all the time, and we are not persuaded that the availability of such measures overcomes the other factors favoring the conclusion that raising pit bulls in the circumstances identified here is an ultrahazardous activity. Finally, unlike the situation in \textit{Fredricks}, the public benefit of the activity does not justify insulating the defendant from strict liability.

It is undisputed that the attack by Ellis’s pit bull resulted in Thurman’s injuries and therefore causation is not in doubt. Accordingly, we conclude that there is sufficient evidence to establish that by raising pit bulls in a residential neighborhood, Ellis engaged in an ultrahazardous activity. The trial court did not err in giving the ultrahazardous instruction.

Affirmed.