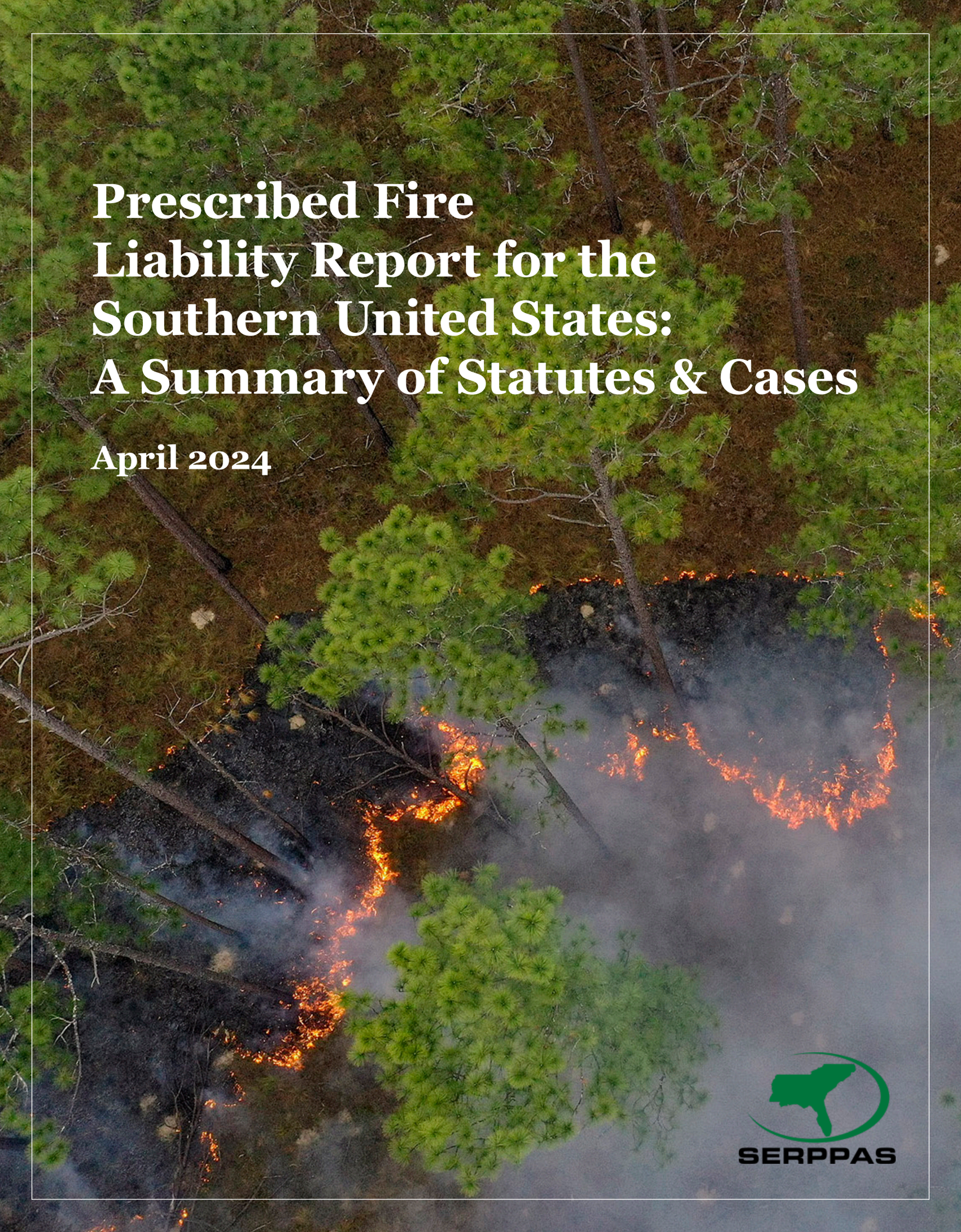

Prescribed Fire Liability Report for the Southern United States: A Summary of Statutes & Cases

April 2024

SERPPAS

Prescribed Fire Liability Report for the Southern United States

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Suggested Citation

Cary, B., Lowdermilk, J., & Fawcett, J. E. (2024). *2024 Prescribed Fire Liability Report for the Southern United States: A Summary of Statutes and Cases*. Southeast Regional Partnership for Planning and Sustainability.

Executive Summary

The Southeast Regional Partnership for Planning and Sustainability (SERPPAS) works across geographic and organizational boundaries to overcome development pressures in select areas for management of military lands, compatible resource-use decisions, and coordination among regions, states, communities, and military services. The *Comprehensive Strategy for Prescribed Fire to Restore Longleaf Pine in the Southeast* was written to fulfill SERPPAS's Strategic Action Plan goal of developing a comprehensive, regional strategy for increasing prescribed burning in the Southeast. The vision of the Strategy was to have region-wide application of prescribed fire at the scale and frequency needed for longleaf pine restoration and maintenance. Since a majority of forestland in the Southern region is privately held, an important goal of the Strategy was to minimize landowners' risk of liability associated with prescribed fire.

Liability is an important consideration for private landowners and others who conduct prescribed burning. Minimizing the risk of liability will require increasing understanding of—and perhaps modifying—prescribed fire laws, developing robust and affordable liability insurance, and promoting public communication and outreach to alleviate concerns about fire-related risks.

Each of the thirteen states in the Southern region has laws in place related to prescribed burning, but the laws vary regarding the legal obligations imposed and the guidelines for liability protection. This Report summarizes these laws, associated regulations, and known court cases for each Southern state to help increase understanding and minimize landowners' risk of liability associated with prescribed fire.

This Report is not legal advice, *see* Disclaimer, but instead is a general overview intended for educational purposes. To understand the issues in detail for the areas where you engage in prescribed burning, the authors encourage you to read the statutes and rules and regulations, and to consult with legal counsel with any questions.

Acknowledgements

University of North Carolina School of Law

This Report began as a research initiative in 2013 supported by the University of North Carolina School of Law, through its Pro Bono Program. Since then, including recent research and updates, the authors gratefully acknowledge the work of the following students: Darien Aassar, Lucy Andrzejewski, Shripad Bangaru, Kimberly Cornella, Aubrey Cosper, Noah Crosswhite, Jacob Farrell, McKenna A. Fono, Thomas Hammons, Julie Leopold, Amalia Manolagas, Mandy Mericle, Seth Morris, Evan B. Ryland, Emily Carolyn Stellman, Temple Shepherd, Justice Warren, and Adam Henry Webster.

Further, the Pro Bono Program in collaboration with the Environmental Law Project, has established an annual process for pro bono students to conduct research in support of updating this Report. The authors are much obliged to the Environmental Law Project 2022 co-chairs, Will Wales Metcalf and Carolina Victoria Randive, for coordinating the establishment of this annual review.

State Forestry Agencies

The authors also gratefully acknowledge the review and comments of all of the Southern Region's state forestry agencies, in addition to the review and coordination by Jim Prevette with the Southern Group of State Foresters, whose input greatly improved an earlier draft of this Report.

Financial Support & Nondiscrimination

The creation of this Report was supported, in part, through a grant from the National Fish and Wildlife Foundation, which was made possible by the U.S. Forest Service and the U.S. Department of Defense. These institutions are equal opportunity providers.

Photos that appear in the report are taken by David Godwin, University of Florida, with the exception of the photos that appear in the Oklahoma section that are taken by Carol Baldwin, Kansas State University.

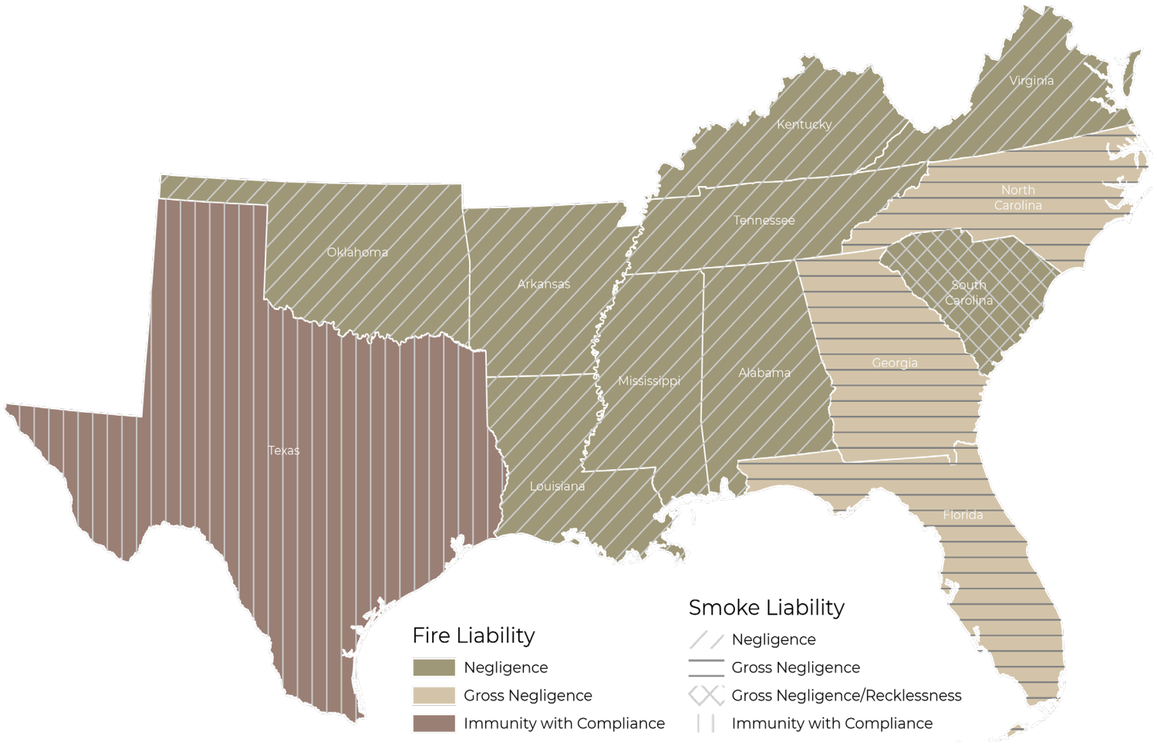

Figure 1. The 13-state region (Southern Region) considered in the review of prescribed fire statutes and cases.

Introduction

This 2024 Prescribed Fire Liability Report for the Southern United States: A Summary of Statutes and Cases (Report) addresses the liability to which a prescribed burner or landowner could be exposed in conducting a prescribed burn and ways to help shield a burner or landowner from such exposure. The discussion focuses on the state laws—statutory and common law—in the thirteen Southern states (Figure 1: Southern Region map). The Report first explains basic common law principles generally applicable in all thirteen states. Then, a table summarizes how each state's prescribed burning statute impacts the common law of liability. Finally, there is a detailed state-by-state analysis of each state's prescribed burning statute and liability issues, including a discussion of any cases we believe may be informative.

This Report does not discuss federal law. We are not aware of any federal statutes specifically addressing prescribed fire or imposing liability (criminal or civil) for burning on private land. However, the Clean Air Act (42 USC § 7401 et seq.) and each state's implementing programs of that Act are important considerations that anyone involved in prescribed burning should become familiar with. As a general rule, each state has a smoke management plan, which is their method for coordinating prescribed burning in compliance with applicable EPA and state regulations.

This Report also does not discuss statutes specific to agricultural burning. Many states have separate statutes for the use of fire in agriculture. This Report focuses on prescribed burning as applicable to forest management.

Disclaimer

This Report is provided for general information and educational purposes only, not to provide specific legal advice. It does not create an attorney-client relationship between the authors and anyone who uses it. This Report should not be used as a substitute for competent legal advice from a licensed competent attorney in your state.

The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the opinions or policies of the U.S. Government or the National Fish and Wildlife Foundation and its funding sources. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government, the National Fish and Wildlife Foundation, or its funding sources.

Prescribed Fire Liability

Legal Liability Generally

If a landowner or burner causes damage to others or society from an escaped fire or from smoke, the landowner or burner may be held accountable. This is known as **liability**. This Report addresses potential levels of liability relevant to prescribed fire in the Southeast.

In general, people may be held accountable for their actions via criminal or civil law. Criminal law typically holds people accountable for actions considered to be an offense against society, whereas civil law holds people accountable for actions considered to be an offense against another person or private party, such as a business.

Prescribed Fire Civil Liability

Most states have a statute addressing the use of prescribed fire and limitations on liability. That is, liability may be reduced if the prescribed fire is conducted in accordance with the applicable statute.

These liability protections are not absolute and sometimes include significant exceptions. So, regardless of the protections in place, readers may benefit from understanding the potential liabilities created by conducting a prescribed burn.

Both the person conducting the burn (the Burner) and the person whose property is being burned (the Owner) may be liable for damages to people or property. In this Report, the discussion of liability for each (Burner and Owner) is separate even though the same person may serve as both the Burner and the Owner.

Development of Civil Liability[1]

A. Common Law

Common law is the body of law that has evolved through court cases as opposed to statutes, which are laws enacted by state or federal legislatures. **Torts** are the common law principles applicable to personal or property damage. Whenever someone (the actor) engages in an activity that results in damage to the person or property of another, a question arises as to who is liable for the damage.

[1] What follows is a condensation of a full year of a law school torts class. While attempting to make the subject matter useful to non-lawyers in managing their prescribed burning, it is necessarily complex and thus may require more than one review; our regrets.

Under common law, the injured person or owner of the impaired property has to accept the damage unless a basis exists for shifting liability to someone else: to the actor (if the actor violated the following tort standards); to a third-party (if the third-party agreed to accept liability, like an insurer); or, to some other party that bears some or all responsibility for causing the damage.

When the activity that results in damage is intentional burning, the two primary theories under which that burning could result in liability for the actor are the torts of **negligence** and **nuisance**. Because each state has its own courts and cases, the common law principles that have evolved are different—sometimes significantly so—from state to state. Additionally, common law principles continue to evolve as cases continue to be decided by courts. Still, similarities exist across states, making multi-state comparisons helpful.

Predicting how the law will be applied to a particular circumstance is not an exact science. Given that common law is ever evolving, some say that the law is not what the court held *last* time, but what the court is *going* to hold *this* time.

In all states, if a case for negligence or nuisance is filed, there will be questions of law—that is, what is the law applicable to these facts—and questions of fact—what happened, who was involved, and what were the circumstances. The judge decides all questions of law and, if a jury trial has been requested by either party, the jury—not the judge—will decide questions of fact. The judge will instruct the jury on the applicable law, but the jury will then determine what happened and apply the law to the facts. The only exception is that the judge may decide the case (for either party) if there is no genuine dispute about the important facts or reasonableness of conduct. For example, even if the person bringing a case for negligence (the plaintiff) proved everything alleged, the plaintiff would still lose if, as a matter of law, there is no genuine factual dispute that the defendant acted reasonably.[2]

Even with variations among states in their common law, the following principles are generally applicable.

[2] This is referred to as summary judgment.
[3] Readers also may hear negligence described as "simple negligence."

1. Negligence

Negligence Standard. Negligence[3] is a theory of liability governed by the "reasonable person" standard. This standard asks what a reasonable person would do, or not do, under similar circumstances to determine whether the actor (the defendant once a case is filed) was negligent and therefore liable for the damage caused. What is or is not reasonable almost always is a jury question; the judge will not ordinarily decide if the actor acted reasonably. In applying this standard to a Burner, the facts will be considered in relation to the reasonableness of the prescribed burn as would be perceived by the common experience and judgment of juries in that area. Though incomplete, a list of factors a jury may be asked to consider could include: Was the Burner experienced; did the Burner investigate the circumstances and plan adequately; did the Burner have the proper tools and contingency plans; did the Burner respond appropriately to circumstances as they changed?

In addition, the state may have enacted statutes that impose specific duties. A breach of a statutory duty usually suffices as evidence of negligence and may constitute negligence as a matter of law, known as negligence *per se*. Negligence *per se* means the harm that resulted is the very harm the statute seeks to protect against. For example, in North Carolina (NC), a criminal statute, which is distinct from NC's prescribed burning law, requires advance notice to adjacent landowners before burning. Failure to comply with this statute may be sufficient for the judge to find negligence *per se* in a civil lawsuit if such notice would have avoided the harm that forms the basis of the lawsuit.

Thus, a Burner ordinarily will be held to a standard of reasonableness in conducting the burn. If an Owner employs a third person to conduct the burn, the Owner's liability usually is not measured by what the Burner does thereafter. However, the Owner will be judged by the reasonableness of the Owner's selection of and delegation of authority to the Burner, as well as by the Owner's other conduct such as complying with the Burner's instructions. Again, though incomplete, a list of factors a jury may be asked to consider could include:

Did the Owner reasonably investigate the Burner's qualifications and experience; did the Owner follow the Burner's instructions?

If the Owner selects a qualified Burner but, through no fault of the Owner, the burn is conducted negligently, the Owner's responsibility will in most cases depend on whether the Burner was an independent contractor or the Owner's "servant." The test for independent contractor status can be complex but, generally, if the Burner has control and authority over the materials, methods, and personnel used, the Burner will be considered an independent contractor responsible for its own actions and negligence. Note that if the Owner maintains authority to direct the conduct of the Burner, the Burner is the Owner's "servant" and the Owner is **automatically liable** for anything the Burner does in the course and scope of its engagement by the Owner. This automatic liability does not apply if the Burner is an independent contractor. Accordingly, an Owner who wants to avoid automatic liability for the Burner's actions, or lack thereof, should maintain a relationship with an independent contractor. A written agreement that tracks these elements—and is followed—is recommended.

Gross Negligence Standard. Gross negligence, although not easily defined, typically involves more offensive conduct than simple negligence. A common definition is the failure to exercise that degree of care that every person of common sense, however inattentive that person may be, exercises under the same or similar circumstances. Another definition is the lack of diligence that even careless people are accustomed to exercising. For example, in Florida, gross negligence means conduct so reckless or devoid of care that the conduct constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. In some states, the prescribed burning statute provides a shield from liability for those who burn in accordance with the statute unless the burn is conducted with gross negligence. Because gross negligence is difficult to prove, these statutes provide significant protection. Statutes that do **not** include a "gross negligence only" standard simply preserve the common law standard of negligence and therefore do not reduce potential liability.

Damages. For a case with simple negligence, if the defendant is found liable, the plaintiff is entitled to recover its actual damages to the plaintiff's person or property, including, in the case of personal injury, damages for pain and suffering. Punitive damages are damages intended to punish the defendant rather than compensate the plaintiff, and are not recoverable for simple negligence. However, if the defendant was grossly negligent, punitive damages may be awarded by the jury. Further, since the purpose of punitive damages is to punish the defendant, the jury is allowed to take into consideration the defendant's wealth and circumstances so that the goal of punishment is effective.

Defenses. At common law, there were a variety of defenses to negligence, including the defendant proving that the plaintiff contributed to its injuries by its own negligence (contributory negligence). Most states have adopted—judicially or by statute—a variety of modifications to this defense so that it is difficult to generalize about this area of the law. That said, a plaintiff's own negligence may reduce the amount of damages to which the plaintiff would be entitled and, in some states or circumstances, may bar any recovery.

2. Nuisance

The essence of nuisance is that the actor's conduct or use of their own land or devices unreasonably interfered with either the plaintiff's use and enjoyment of their land (private nuisance[4]) or with the rights of the public generally (public nuisance[5]). The law of nuisance is not frequently an issue now with respect to prescribed burning. Virtually all of the state prescribed burning laws explicitly[6] or effectively[7] eliminate nuisance as an independent theory for recovery. But, failure to comply with the statute could result in a plaintiff asserting claims under this theory, even if the Owner and the Burner did not act unreasonably (*i.e.*, were not negligent). Damages for a nuisance claim are measured in the same way as for a negligence claim.

[4] An example of private nuisance is smoke interfering with a neighbor's outdoor theater business.
[5] An example of public nuisance is smoke obstructing traffic on a public road.
[6] Designated in the summary table as "Eliminates."
[7] Designated in the summary table as "Silent."

3. Another Theory: Strict Liability

For some conduct, the actor is **always** liable, regardless of the care used—called strict liability. Strict liability applies where the activity is ultra-hazardous or so inherently dangerous that, as a matter of public policy, damages when things go wrong are seen as part of the cost of engaging in that activity. None of the thirteen states presented in this Report have ruled by statute or common law that ordinary prescribed burning is ultra-hazardous. That said, a prescribed burn conducted under extremely dangerous circumstances could fall under the doctrine of strict liability (*e.g.*, burning undergrowth around a propane storage tank). If a Burner is held strictly liable, damages are the same as in a negligence action.

Development of Civil Liability *Cont.*

B. Effect of Prescribed Burning Statutes

The other factor changing the common law formulation of liability is the application of a state's prescribed burning law, which may provide a shield from liability if the Owner or Burner complies with the statute. These statutes frequently distinguish between damage caused by fire and damage resulting from smoke, and may limit liability for one but not the other. Even when the statute establishes a limit on liability, it is important to examine what the statute **specifically says**. For example, some statutes say there is no liability for smoke except when the burn was conducted negligently. Other than eliminating nuisance as a basis for damages, this statute is in reality no shield—it is a restatement of the common law. The only significant potential limitation on liability is if the statute adopts a gross negligence exception instead of an ordinary or simple negligence exception.

Table 1 summarizes the liability standard for each Southern state, including recent court decisions interpreting such statutes. In the table, we've defined the statutory discussion on nuisance as either "Silent," which means that the statute does not address nuisance specifically, but compliance with the statute indicates the unavailability of nuisance as a cause of action, or "Eliminates," which means that the statute specifically eliminates causes of action premised on nuisance if the prescribed burn complies with the statute(s).

Prescribed Fire Criminal Liability and Relationship with Civil Liability

Most states have criminal statutes related to fire, and some states' prescribed fire statutes may not necessarily be consistent with the older criminal laws. For example, violation of Georgia's criminal statute regarding the unlawful burning of "any brush, field, forest land, campfire, or debris, . . . without taking the necessary precautions before, during, and after the fire to prevent the escape of such fire onto the lands of another," Ga. Code § 16-7-63(a)(2), typically would serve as proof of negligence in a civil action. The criminal statute explicitly states that "[t]he escape of such fire shall be prima-facie evidence that necessary precautions were not taken[.]" *Id.*

Prima-Facie Evidence. Prima-facie evidence is evidence that is **sufficient** to prove negligence, but is not **conclusive** for such proof. This means that the conduct raises a presumption of negligence but the presumption can be rebutted. For example, in Georgia, if a prescribed burn escapes the intended or authorized burn area (a violation of the **criminal** statute), the fact that the burn escaped would raise a presumption in a **civil** action of negligence. However, that presumption may be rebutted with evidence of compliance with Georgia's prescribed burning act.

First, an escaped prescribed burn only raises a presumption of failure to use necessary precautions. The Georgia legislature, in its prescribed burning act (the Act), defined what necessary precautions are, making compliance with the Act evidence that would rebut the presumption created by the escape. Second, an element of every crime is a wrongful intent, called *mens rea*.[8] Without wrongful intent, no crime occurs. That is, an experienced Burner burning in compliance with the Act does not have an intent to fail to use necessary precautions. The Burner reasonably believes the precautions taken are sufficient—the legislature has said so. Thus, compliance with the Act negates the *mens rea* element of the crime of unlawful burning.

Regardless, and to be safe, compliance with a state's civil and criminal statutes is recommended. If there is a conflict—for example, the prescribed fire statute allows something the criminal statute does not—consult a competent lawyer.

[8] Mens rea is not required where the statute creates strict criminal liability, which is not typical and is not the liability created with Georgia's statute.

Table 1: Summary of Prescribed Fire Civil Liability by State

STATE	FIRE	SMOKE	NUISANCE	STATUTE(S)	CASE LAW
ALABAMA	Negligence	Negligence	Silent[9]	Ala. Code § 9-13-273	None
ARKANSAS	Negligence	Negligence	Eliminates[10]	Ark. Code § 15-30-104	None
FLORIDA	Gross Negligence	Gross Negligence	Eliminates	Fla. Stat. § 590.125	None
GEORGIA	Gross Negligence	Gross Negligence	Eliminates	Ga. Code § 12-6-148	*Newton v. Jacobs*, 358 Ga. App. 180, 186, 854 S.E.2d 359, 365 (2021) (affirming trial court's dismissal on defendants' motion for summary judgment based on absence of evidence of gross negligence); *Patton v. Cumberland Corp.*, 347 Ga. App. 501, 507, 819 S.E.2d 898, 902 (2018) (same).
KENTUCKY	Negligence	Negligence	Silent	Ky. Rev. Stat. §§ 149.175, 149.375	None
LOUISIANA	Negligence	Negligence	Silent	La. Stat. § 3:17	*Lowe v. Noble, L.L.C.*, 2017-1948 (La. 2/9/18), 235 So. 3d 1095, 1096 ("no duty on the part of [landowners] to conduct controlled burning").
MISSISSIPPI	Negligence	Negligence	Eliminates	Miss. Code. § 49-19-307	None
NORTH CAROLINA	Gross Negligence[11]	Gross Negligence	Eliminates	N.C. Gen. Stat. § 106-967	None
OKLAHOMA	Negligence	Negligence	Eliminates	Okla. Stat. tit. 2, § 16-28.2	None
SOUTH CAROLINA	Negligence	Gross Negligence/ Recklessness	Eliminates	S.C. Code § 48-34-50	None
TENNESSEE	Negligence	Negligence	Eliminates	Tenn. Code § 11-4-1003	None
TEXAS	Immunity with compliance	Immunity with compliance	Silent	Tex. Nat. Res. Code §§ 153.081-153.083	None
VIRGINIA	Negligence	Negligence	Eliminates[12]	Va. Code § 10.1-1150.5	None

[9] "Silent" means that the statute does not address nuisance specifically, but compliance with the statute indicates the unavailability of nuisance as a cause of action.
[10] Unless otherwise described in this Report, "eliminates" means that the statute specifically eliminates causes of action premised on nuisance if the prescribed burn complies with the statute(s).
[11] Negligence continues to be the standard for damage to public utilities infrastructure. *See* § 106-197(d).
[12] The statute eliminates nuisance as an independent cause of action, but allows a claim for nuisance arising from negligence.

Key Cases

While the common law and statutes vary from one state to another, several cases from the Southeast are instructive.

In an early decision by the Supreme Court of Alabama, the court identified flammability of materials, wind conditions, size of the planned fire, and type of material on adjacent property as some of the factors to be considered in weighing the reasonableness of a prescribed burn. *Robinson v. Cowan*, 158 Ala. 603, 605, 47 So. 1018, 1019 (1908). Ultimately, the court concluded due care "does not embrace the obligation to anticipate unusual wind springing up after the fire is started, or other factors intervening not reasonably suggested by the caution, care, and prudence stated." *Id.* at 605, 47 So. at 1019.

In a case based on negligence that arose before the state enacted its prescribed burning statute, the Mississippi Supreme Court held that the standard of reasonable care applies both to the setting of a prescribed fire and to the tending of the fire thereafter: "Such [ordinary and reasonable] care must be used in setting the fire, and in keeping it or preventing its spread. It is commensurate with the danger reasonably to be anticipated, and is dependent on the circumstances of the particular case." *Wofford v. Johnson*, 250 Miss. 1, 5, 164 So. 2d 458, 459 (1964). In *Wofford*, the defendant did not tend the fire and was liable for damage to his neighbor's property.

More recently, in a case that came before the Georgia Court of Appeals, the landowner hired a former agricultural service employee to manage his land (the "burner"). *Newton v. Jacobs*, 358 Ga. App. 180, 854 S.E.2d 359 (2021).

The burner had extensive experience with prescribed burning and planned to conduct the prescribed fire when the burner knew a member of the Georgia Forestry Commission (the "GFC") would be available to assist if needed. In preparation, the burner cut firebreaks on three sides of the field intended for burning and the GFC cut a line on the fourth. The burner also requested a burn permit for the specific day of burning, which the GFC issued. After testing the wind, the burner ignited the fire by "str[inging] a line of fire along the four sides of the field, intending for the fire lines to meet roughly in the center of the field." However, the fire jumped the initial firebreak and subsequent fire lines cut by the GFC and the burner. Ultimately, the fire escaped to a neighbor's property where the fire destroyed the neighbor's "garage workshop, including various tools and car parts." *Id.* at 180–82, 854 S.E.2d at 359–62.

The neighbor brought suit against the landowner and the burner. The defendants moved for summary judgment, asserting protection under Georgia's Prescribed Burning Act. "The trial court granted summary judgment to [the landowner and the burner], finding that [the landowner and the burner] were entitled to the protections afforded by . . . § 12-6-148 and that the record contained no evidence from which a jury could reasonably conclude that [the burner] was grossly negligent. *Id.* at 182, 854 S.E.2d at 362.

The above cases provide general guidance on how courts may determine liability for a Burner or Owner. The following section summarizes the requirements and protections specific to prescribed fire liability in each particular state.

Alabama

The Alabama Prescribed Burning Act (the Act) provides that "prescribed burning is a landowner property right and a land management tool that benefits the safety of the public, the environment, the natural resources, and the economy of Alabama." Ala. Code § 9-13-271(a). Prescribed burning is defined as "[t]he controlled application of fire to naturally occurring vegetative fuels for ecological, silvicultural, agricultural, and wildlife management purposes under specified environmental conditions and the following of appropriate precautionary measures which cause the fire to be confined to a predetermined area and accomplishes the planned land management objectives." § 9-13-272.

To comply with the Act, a prescribed burn must meet four requirements.

1. Certified Burner

At least one certified prescribed burn manager must supervise the prescribed burn. § 9-13-273(b)(1). A "certified prescribed burn manager" is an individual who has completed a certification program approved by the Alabama Forestry Commission (Commission). § 9-13-272(1); *see also* https://forestry.alabama.gov/pages/fire/burnmanager.aspx. Note that certification is not required to conduct a burn on "one's own property or on the lands of another with the landowner's permission as long as applicable state laws and rules relating to prescribed burning are complied with." § 9-13-274. However, a landowner or burner will not be protected by the Act—and may be vulnerable to liability—if a certified prescribed burn manager does not supervise the prescribed burn.

2. Written Prescription

The burn must involve a written prescription that has been prepared and witnessed or notarized prior to the burning. § 9-13-273(b)(2). The Act defines a prescription as "[a] written plan for starting and controlling a prescribed burn to accomplish the ecological, silvicultural, and wildlife management objectives." § 9-13-272(3).

3. Burning Permit

A burning permit must be obtained from the Commission. § 9-13-273(b)(3). For details on creating and maintaining a burn permit, see the Commission's Online Burn Permit website: https://burnpermits.forestry.alabama.gov/.

4. Compliance with State Law and Rules

The burn must be "conducted pursuant to state law and rules applicable to prescribed burning." § 9-13-273(b)(4).

Regulations enacted by the Commission further detail training requirements for certification of prescribed burn managers and associated fees. *See* Ala. Admin. Code 390-X-6-.01, *et seq*. These regulations also define the minimum standards for prescribed burn plans, which standards the Commission publishes to its website: https://forestry.alabama.gov/Pages/Informational/Legal/Prescribed_Burn_Act.aspx.

Civil Liability
Alabama

In Alabama, a landowner or burner will not be held liable for fire or smoke damage from a prescribed burn conducted according to the requirements above so long as the landowner or burner exercise "that degree of care required of others similarly situated." § 9-13-273(a). That is, the Act codifies the common law standard of negligence.[13] Prior to the passage of the Act, but applying the same common law negligence codified in the Act, the Alabama Supreme Court upheld a jury instruction defining negligence for a controlled burn:

> [O]ne who sets a fire upon land which he owns or has in charge, even for a lawful purpose, is liable for the damages caused by the spread of the fire to the property or premises of another, if he has been guilty of negligence either in kindling the fire or in preventing its spread. The duty rests upon him to use ordinary or reasonable care in setting the fire and in keeping it under control, and this care must be in keeping with the danger reasonably to be anticipated, and is dependent upon the circumstances of each particular case. The fire should be kindled at a proper time, under ordinarily favorable circumstances, and in a reasonably prudent manner. A person or corporation is not at liberty to kindle fires, when on account of the conditions existing in the vicinity, it appears probable that damage to others will result, such as setting it in a dry season, or when the wind is strong or without guarding it sufficiently to prevent its spreading.

Jefferson Lumber Co. v. Berry, 247 Ala. 164, 165, 23 So. 2d 7, 7 (1945).[14]

Additionally, Alabama's Supreme Court has held that an allegation of nuisance arising from prescribed burns is unlikely to survive given that a nuisance must be recurring, which prescribed burns generally are not. *See, e.g., Banks v. Corte*, 521 So. 2d 960, 962 (Ala. 1988).

In summary, so long as a landowner or burner adheres to the four requirements of the Act, including (1) the supervision of at least one certified prescribed burn manager, absent the consent of the landowner, (2) preparation of a witnessed or notarized burn plan, (3) obtaining a permit, (4) adherence to other laws and rules of the State for prescribed burning, and conducts the burn with reasonable care, the burner is likely to be protected from civil liability.
§§ 9-13-273(a), 9-13-273(b), 9-13-274.

Criminal Liability
Alabama

As with most other states, Alabama has enacted several criminal statutes relating to liability for intentional or negligent fires that endanger or harm others or their property. A person that commits any of the following is guilty of a misdemeanor:

- "[R]ecklessly or with wanton disregard for the safety of persons or property allows a fire to escape . . . whereby any property of another is injured or destroyed[,]" § 9-13-11(b)(1);
- "[B]urn[s] any brush, stumps, logs, rubbish, fallen timber, grass, stubble, or debris of any sort, whether on one's own land or that of another, without taking reasonably necessary precautions, both before lighting the fire and all times thereafter to prevent the escape thereof[,]" § 9-13-11(b)(2);
- "[S]et[s] fire to any brush, stumps, logs, rubbish, fallen timber, grass, stubble, or debris of any sort within or near any forest or woodland, unless the area surrounding said material to be burned shall be cleared of all inflammable material for a reasonably safe distance in all directions and maintained free of all inflammable material so long as such fire shall continue to burn[,]" § 9-13-11(b)(3);
- "[S]et[s] a fire within or near any forest, woodland, or grassland without clearing the ground immediately around it free from material which will carry fire, or shall leave such fire before it is totally extinguished[,]" § 9-13-11(b)(4);
- "[S]et[s] fire to or procure[s] another to set fire to any woods, logs, brush, weeds, grass or clearing . . . without giving adjacent landowners five days' written notice of such intention to do so, unless . . . all possible care and precaution [has been taken against] against the spread of such fire." § 9-13-13.

Prior to the enactment of the Prescribed Burning Act, an individual who had obtained a burn permit under Alabama Code § 9-13-11(d) was charged criminally for leaving a fire unattended in violation of § 9-13-11(b)(4). *Hobbs v. State*, 603 So. 2d 1134, 1134 (Ala. Crim. App. 1992). The fire did not escape from the individual's property. The Alabama Court of Criminal Appeals held that because the defendant had obtained and complied with the permit conditions, and because the fire had not escaped from the defendant's property, the individual could not be held criminally liable. *Id.* at 1136. Regardless, compliance with all criminal statutes is advisable. *See id.* ("This court's construction of § 9-13-11 . . . is not meant to encourage unregulated burning on private property in this state.").

[13] In Alabama, negligence is defined as "the failure to exercise reasonable or ordinary care, such care as a reasonably prudent person would have exercised under the same or similar circumstances. Negligence is also said to be either the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or, the doing of something which a reasonably prudent person would not have done under the same or similar circumstances." *Sanders v. Scarvey*, 284 Ala. 215, 218, 224 So. 2d 247, 250 (1969).

[14] In an earlier decision, the Court had identified flammability of the materials, wind conditions, size of the planned fire, and type of material on adjacent property as some of the factors to be considered in weighing the reasonableness of the conduct, but concluded that due care "does not embrace the obligation to anticipate unusual wind springing up after the fire is started, or other factors intervening not reasonably suggested by the caution, care, and prudence stated." *Robinson v. Cowan*, 158 Ala. 603, 605, 47 So. 1018, 1019 (1908).

Arkansas

Arkansas enacted its Prescribed Burning Act (the Act) in August of 2023. Ark. Code § 15-30-101. The Act defines prescribed burning as "the planned and controlled application of fire to vegetative fuels under specified weather, environmental, and other conditions, while following appropriate precautionary measures that will: (i) Confine the fire to a predetermined area; and (ii) Accomplish the intended management objectives for the area to be burned." § 15-30-103(2)(A). The Act also recognizes the many public and private benefits realized by prescribed burns conducted in a "responsible and safe manner." § 15-30-102.

Compliance with the Act involves three requirements.

1. Written Prescription

A qualified prescribed burner must develop a written prescribed burning prescription in advance and a copy of the prescription must be provided to the landowner and kept on site during the burn in the possession of whoever is conducting the burn (either a qualified prescribed burner or the landowner). § 15-30-105(a). The prescription must include:

(1) The landowner's name and address;
(2) A description of the burn area;
(3) A map of the burn area;
(4) The objectives of the prescribed burning;
(5) The name of the qualified prescribed burner responsible for conducting the prescribed burning;
(6) A summary of the methods intended for starting, controlling, and extinguishing the prescribed burn, "based on the particular circumstances involved"; and
(7) A description of allowable weather conditions for burning § 15-30-105(b).

2. Qualified Prescribed Burner

Unless the burn area is less than one hundred (100) acres, a qualified prescribed burner (QPB) must conduct the prescribed burning by being present and in charge "from the start of the prescribed burning until the prescribed burning is adequately confined to reasonably prevent escape of the prescribed burning from the area intended to be burned[.]" §§ 15-30-105(c)(1), 15-30-105(c)(2). The Act defines a QPB as "an individual who has successfully completed a prescribed burner training program approved by the Department of Agriculture or the Arkansas State Game and Fish Commission." § 15-30-103(4)(A). Certification from other states also may be recognized. § 15-30-103(4)(B).

3. Notice

The landowner or their agent must notify the Department of Agriculture in advance of the prescribed burning and, if requested, must provide a copy of the written prescription. § 15-30-105(d). Notice also should be provided to all adjoining landowners to avoid liability under a separate statute. § 18-60-103(b).

The Act permits a **landowner** to conduct a prescribed burning without being a QPB so long as the burning occurs on one hundred (100) acres or less of land owned by the landowner and follows a prescription prepared by QPB. § 15-30-105(c)(3).

Civil Liability
Arkansas

If "conducted in compliance" with the Act, qualified prescribed burners and landowners are protected from civil claims for public or private nuisance. § 15-30-104(a). For damages from fire or smoke, the Act codifies the common law standard of negligence. § 15-30-104(b).

Given that the Act is so new, no cases have been decided under its provisions. However, a prior case gives some guidance on what would give rise to a finding of negligence. In *Whiteside v. Tyner*, a landowner was sued for damages for a fire that escaped onto an adjoining landowner's (the plaintiff's) property. 238 Ark. 985, 986, 386 S.W.2d 239, 239 (1965). To recover damages from the landowner defendant, the plaintiff had to prove that the landowner failed to take necessary precautions before, during, or after the burn. The jury found for the landowner, which the court of appeals upheld based on: (1) a road that separated the landowner's land from the plaintiff's land; (2) heavy rain that fell the night before the burn; (3) the absence of any wind prior to the burn beginning; (4) the landowner's efforts to control the burn on the landowner's property; and (5) the landowner's report to the local State Forestry Office of his intent to burn. *Id.* at 987, 386 S.W.2d at 240. The case demonstrates the importance of preparing a written prescription in advance and complying with its conditions.

Arkansas' codification of the Act does not change the applicability of civil fines for uncontrolled burning that results in a public nuisance. Ark. Code § 20-22-303(a) (defining a public nuisance to include any uncontrolled fire of "forested, cut-over, brushlands, or grasslands"). A landowner that fails to adhere to the requirements of the Act can be held liable for damages, § 20-22-304, and suppression costs., § 20-22-303(b), from an uncontrolled fire. That is, if the landowner fails to control and extinguish a fire, the Arkansas Forestry Commission or similar organization may extinguish the fire at the landowner's expense. Additionally, if the fire injures a person, the injured person is entitled to "double damage" as recovery. § 20-22-304. And any criminal conviction of unlawful burning will be substantial "evidence of responsibility in [a] civil action to recover damages or suppression costs." § 20-22-306.

Criminal Liability
Arkansas

Although not directly referenced, it's likely the Act's requirements would be used to evaluate whether a landowner or burner "t[ook] necessary precaution[s]" before initiating or while managing a prescribed fire that resulted in an escaped fire. §§ 5-38-310(a)(2), 5-38-310(a)(3)(A) (describing potential liability for an escaped fire as a misdemeanor crime). Additionally, the "escape of fire to adjoining timber, brush, or grassland" will be substantial "evidence that a necessary precaution was not taken." § 5-38-310(a)(3)(B). Criminal liability also arises if a landowner or burner initiates a prescribed burn "in violation of a burn ban on outdoor burning." § 5-38-310(a)(9). However, a landowner or burner may protect themselves by receiving a permit "issued by the chief executive of the political subdivision issuing the burn ban" or limiting the fire to "any crop remainder or remaining vegetation after harvest of the crop" with "adequate disking of field perimeters or . . . other safety measures as required by the county burn ban officer." In other words, following the prescribed burning requirements above and, if a burn ban is in place, ensuring a permit has been issued or the prescribed fire meets the safety requirements of the county burn ban officer.

Florida

In Florida, a certified prescribed burn is "considered to be in the public interest and does not constitute a public or private nuisance when conducted under applicable state air pollution statutes and rules." Fla. Stat. § 590.125(3)(b)(6). Florida defines "certified prescribed burning" as "prescribed burning in accordance with a written prescription conducted by a certified prescribed burn manager." § 590.125(1)(d).

In turn, "prescribed burning" is defined as "the application of fire by broadcast burning for vegetative fuels under specified environmental conditions, while following appropriate measures to guard against the spread of fire beyond the predetermined area to accomplish the planned fire or land management objectives." § 590.125(1)(j).

The statute limits certified prescribed burning to five purposes: "silviculture, wildland fire hazard reduction, wildlife management, ecological maintenance and restoration, and agriculture." § 590.125(3)(b). If the burn is not conducted for one of these five purposes, the statute and its protections do not apply.

Florida conditions certified prescribed burning on five requirements.[15]

1. Landowner Consent

The landowner or their designee must provide specific consent for a prescribed burn before requesting authorization from the Florida Forest Service. § 590.125(3)(b)(3).

2. Prescription

A written prescription must be prepared before receiving authorization to burn from the Florida Forest Service. § 590.125(3)(b)(2). The statute defines "prescription" as "a written plan establishing the conditions and methods for conducting a certified prescribed burn." § 590.125(1)(k).

Note that a new prescription or authorization is not required for smoldering—or monitoring the smoldering activity even if flames begin to spread—within the authorized burn area *unless* new ignitions are conducted by the certified prescribed burn manager. § 590.125(3)(b)(2).

3. Authorization

The Florida Forest Service must have authorized the prescribed burn before ignition. § 590.125(3)(b)(4).

4. Certified Prescribed Burn Manager

A certified prescribed burn manager must be present on site with a copy of the prescription and directly supervising the burn until complete. § 590.125(3)(b)(1). A "certified prescribed burn manager" is defined as "an individual who successfully completes the certified prescribed burning program of the Florida Forest Service and possesses a valid certification number." § 590.125(1)(c). The statute defines "complete" for broadcast burning as "no continued lateral movement of fire across the authorized area into entirely unburned fuels within the authorized area." § 590.125(1)(f)(1).

5. Adequate Fire Breaks, Personnel, and Equipment

The burn site must have "adequate firebreaks" and the prescription must involve "sufficient personnel and firefighting equipment to contain the fire within the authorized burn area." § 590.125(3)(b)(5). The statute further provides two caveats to this requirement: "Fire spreading outside the authorized burn area on the day of the certified burn ignition does not constitute conclusive proof of inadequate firebreaks, insufficient personnel, or lack of firefighting equipment . . . [and c]ontinued smoldering of a certified prescribed burn resulting in a subsequent wildfire does not by itself constitute evidence of gross negligence . . . ." § 590.125(3)(b)(5)(a),(c). The statute also provides a rebuttable presumption of non-negligence regarding this requirement—which shifts the burden of proof to a plaintiff—if the certified prescribed burn is contained within the authorized burn area during the authorized period. § 590.125(3)(b)(5)(b).

[15] Florida distinguishes between broadcast burning and certified pile burning. This Report details the requirements for broadcast burning. Requirements for certified pile burning may be found in the same statute and largely track the broadcast burning requirements with additional preparation requirements and time restrictions. See § 590.125(4).

Florida's statute also provides for "noncertified" burning with associated requirements. However, if the fire escapes the boundary of the authorized area, the burner may be subject to civil and criminal charges.

The Florida Forest Service is the primary agency responsible for management of wildfires with the use of controlled burns, including "prevention, detection, and suppression," in addition to "evaluation, coordination, and allocation of resources[.]" Fla. Stat. § 590.01. The Florida Forest Service is authorized to enforce the requirements of prescribed burning and further "[a]uthorize broadcast burning, prescribed burning, pile burning, and land clearing debris burning[.]" Fla. Stat. § 590.02(1).

Civil Liability
Florida

Conducting a noncertified burn, even if otherwise in compliance with the requirements, may subject the landowner or burner to civil liability if the plaintiff proves negligence. A certified prescribed burn conducted in compliance with the statute's requirements protects the landowner or burner against civil claims for public or private nuisance, *see* Fla. Stat. § 590.125(3)(b)(6), and for damage or injury from fire or smoke unless the plaintiff proves gross negligence by the landowner or burner. § 590.125(3)(c).

Note that in a case decided before recent updates to the statute, a jury found that Florida's Division of Forestry acted grossly negligently in conducting a certified prescribed burn that resulted in damage to the neighboring plaintiff's property. *Dep't of Agric. & Consumer Servs. v. Shuler Ltd. P'ship*, 139 So. 3d 914, 915 (Fla. Dist. Ct. App. 2014). Over the Division of Forestry's objection and contrary to its expert testimony, the trial court judge interpreted burn completion to mean that the "CPBMs had to be present each and every day until the prescribed burn was completely and totally out, not merely extinguished . . . ." *Id.* at 925 (Makar, J. dissenting). The Florida legislature subsequently updated the statute to define "complete" as described above. *See* Fla. Stat. § 590.125(f).

Criminal Liability
Florida

Florida's prescribed burning statute extends criminal liability to certified and noncertified burners who violate the conditions and requirements listed above. *See* § 590.125(3)(d), 590.125(2).

Georgia

The Georgia Prescribed Burning Act (the Act) recognizes prescribed burning as "a resource protection and land management tool which benefits the safety of the public, Georgia's forest resources, the environment, and the economy of the state." Ga. Code §§ 12-6-145, 12-6-146(a). The Act defines prescribed burning as "the controlled application of fire to existing vegetative fuels under specified environmental conditions and following appropriate precautionary measures, which causes the fire to be confined to a predetermined area and accomplishes one or more planned land management objectives or to mitigate catastrophic wildfires." § 12-6-147(2). Prescribed burning conducted in accordance with the Act "shall [b]e considered in the public interest and shall not create a public or private nuisance." § 12-6-148(a)(2).

The Act involves two requirements.

1. Experienced Burner

"Prescribed burning . . . shall [b]e accomplished only when an individual with previous prescribed burning experience or training is in charge of the burn and is present on site until the fire is adequately confined to reasonably prevent escape of the fire from the area intended to be burned." § 12-6-148(a)(1).

2. Burning Permit

"Prescribed burning . . . shall [b]e conducted in accordance with a permit issued under [§ 12-6-90]," which is issued by "the forest ranger of the county" where the prescribed burn is to take place. § 12-6-148(a)(4); *see also* § 12-6-90(a) (describing permit process).

Under the Act, "[n]o property owner or owner's agent conducting an authorized prescribed burn . . . shall be liable for damages or injury caused by fire or resulting smoke unless it is proven that there was gross negligence in starting, controlling, or completing the burn." § 12-6-148(b).

Recent decisions applying this standard illustrate how a Georgia landowner may insulate themselves from liability with sufficient preparations and prudence in conducting a prescribed burn. In *Newton v. Jacobs*, the landowner hired a former agricultural service employee to manage his land (the "burner"). 358 Ga. App. 180, 854 S.E.2d 359 (2021). The burner had extensive experience with prescribed burning and planned to conduct the prescribed fire when the burner knew a member of the Georgia Forestry Commission (the "GFC") would be available to assist if needed. In preparation, the burner cut firebreaks on three sides of the field intended for burning and the GFC cut a line on the fourth. The burner also requested a burn permit for the specific day of burning, which the GFC issued. After testing the wind, the burner ignited the fire by "str[inging] a line of fire along the four sides of the field, intending for the fire lines to meet roughly in the center of the field." However, the fire jumped the initial firebreak and subsequent fire lines cut by the GFC and the burner. Ultimately, the fire escaped to a neighbor's property where the fire destroyed the neighbor's "garage workshop, including various tools and car parts." *Id.* at 180-82, 854 S.E.2d at 359–62.

The neighbor brought suit against the landowner and the burner. The defendants moved for summary judgment, asserting protection under Georgia's Prescribed Burning Act. "The trial court granted summary judgment to [the landowner and the burner], finding that [the landowner and the burner] were entitled to the protections afforded by . . . § 12-6-148 and that the record contained no evidence from which a jury could reasonably conclude that [the burner] was grossly negligent. *Id.* at 182, 854 S.E.2d at 362.

On appeal, the plaintiffs contested the fourth requirement of § 12-6-148—whether the prescribed burn was "conducted in accordance with a permit issued" by the Georgia Forestry Commission pursuant to § 12-6-90—as well as the failure by defendants to conduct a "prescribed burn" as defined by the statute because the fire escaped. The Georgia Court of Appeals disagreed on all counts. As to the definition, the court cited the legislature's intent, codified at § 12-6-146, and held that "the General Assembly clearly contemplated that an authorized prescribed burn could escape the area intended to be burned." *Id.* at 184, 854 S.E.2d at 363. Regarding the permit, the plaintiffs argued that § 12-6-148 did not apply because the permit did not specifically allow the burning of agricultural land by the burner and because the burner started the fire almost two hours after the time stated in the permit. The court found the prescribed burn to be permitted activity based on the testimony of the burner and an affidavit of the chief ranger for the GFC stating that "the burn permit issued to [the burner] was appropriate for the activity of clearing land of stump piles and land clearing for planting food plots." *Id.* at 185, 854 S.E.2d at 363–64. As to the ignition time, the chief ranger's affidavit also stated that the permit's "'begin time' is the earliest that the burn may begin and that the burn is not required to begin at the listed time." On this and the absence of any evidence to the contrary, the court found for the defendants. *Id.* at 185, 854 S.E.2d at 364.

Finally, the plaintiffs also argued that summary judgment was inappropriate; specifically, plaintiffs argued that sufficient evidence warranted a jury determining whether the burner was grossly negligent. The court first turned to Georgia's definition of gross negligence, which is "equivalent to [a] failure to exercise even a slight degree of care." *Id.* at 186, 854 S.E.2d at 364 (quotations and citations omitted). Plaintiffs contended that "the fire was started on a high fire danger day, that the wind was blowing at nine miles per hour at the time of the fire, and that [the burner] misunderstood the effect of humidity on fire behavior." But, the court found an absence of any evidence regarding gross negligence. Recounting the burner's preparations, the court quoted the trial court's finding that "[e]ven assuming there was evidence sufficient to create a jury issue as to whether [the burner] was negligent in some way while starting, controlling, or completing the burn, there is no evidence from which a jury could reasonably conclude that [the burner] failed to exercise slight diligence and was therefore grossly negligent." *Id.* at 186, 854 S.E.2d at 364–65.

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Civil Liability
Georgia

continued

Similarly, in *Patton v. Cumberland Corporation*, the landowner conducted a prescribed burn on its 3,000-acre quail hunting reserve. 347 Ga. App. 501, 501, 819 S.E.2d 898, 899 (2018). The employees conducting the burn had extensive experience with controlled burning (the "burners"), and prepared for the burn "by cutting 12-to-14-foot-wide firebreaks to prevent the fire from spreading, . . . prepar[ing] equipment[,] check[ing] the wind conditions, and [] secur[ing] a burn permit from the Georgia Forestry Service." *Id.* at 502, 819 S.E.2d at 899. The burners initiated the fire by first burning against the wind to create an additional fire break and then igniting other fires such "that the fires would meet in the middle and extinguish each other." *Id.* The prescribed fire involved approximately 100 acres and lasted about an hour and a half. Upon conclusion, the burners "made sure the firebreaks were clear, checked for hot spots, and poured water on any areas that were still burning." 347 Ga. App. at 502–03, 819 S.E.2d at 899–900.

That evening, one of the burners uncovered fire outside of the burn area and near a power pole, which the burner extinguished. The next morning, the plaintiff was driving near the burn area when a wire hanging across the roadway "caught the rear of [the plaintiff's] truck, lifting it 18 inches or more off the ground." One of the poles holding the wire had fallen over and appeared to have been burned off. *Id.* at 503, 819 S.E.2d at 900. The plaintiff sustained injuries from his vehicle striking the fallen power cable and brought suit against the landowner. The defendant moved for summary judgment pursuant to § 12-6-148, which the trial court granted, "finding that (1) [the landowner] had conducted a prescribed burn in conformance with the Act and was therefore entitled to the Act's protections, and (2) the record provided no evidence upon which a jury could find that [the burners] were grossly negligent." *Id.*

On appeal, the plaintiff argued that the burners failed to be present until the fire was adequately confined as required by § 12-6-148(a)(1). Citing earlier decisions for support, the Georgia Court of Appeals noted that "the Act does not require those engaging in controlled burns to entirely extinguish fires before leaving the scene; the Act is not that stringent. Instead, they are merely tasked with ensuring that the fire is 'adequately confined.'" *Id.* at 504, 819 S.E.2d at 900–01. Relying on the record regarding preparations for the prescribed burn and patrols during the fire, and noting an absence of evidence to the contrary except observations by the plaintiff, the court found that the burners "refreshed the firebreaks and patrolled the area to put out any hot spots before leaving. This is sufficient to entitle [the landowner] to the Act's protection." *Id.* at 505, 819 S.E.2d at 901.

As in *Newton*, the plaintiff in *Patton* also asserted that a jury could find gross negligence based on the burners' "fail[ure] to create firebreaks consistent with its routine practices and in leaving the area before the burn was controlled." *Id.* The court disagreed, finding that the burners "exercised at least slight diligence in handling the controlled burn: they cut firebreaks; they patrolled the area; they doused hot spots; and they returned later that evening and extinguished a nearby fire.

Thus, although there is a factual dispute regarding whether the pole caught fire, the undisputed evidence shows that [the burners] exercised at least slight diligence in conducting the controlled burn." *Id.* at 506, 819 S.E.2d at 901–02. The court further noted that even if the burners "acted negligently in leaving the controlled burn before it was completely extinguished, [such leaving] is not enough to raise a jury question as to whether they acted with gross negligence. To go to the jury, there must be evidence that would enable a jury to find that [the burners] failed to exercise even the slightest degree of care." *Id.* at 506, 819 S.E.2d at 902; *see also Wolfe v. Carter*, 314 Ga. App. 854, 858, 726 S.E.2d 122, 126 (2012) ("'[T]he statute does not require that a fire be completely extinguished or that no smoke be present before the supervisor may leave the site; rather, it requires only that the fire be confined to reasonably prevent its escape from the intended area.").

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Civil Liability
Georgia

continued

An older decision by Georgia's Court of Appeals also affirmed the protections of the Act based on the diligence of the landowner and the burner. In *Morgan v. Horton*, the landowner conducted a prescribed burn with the assistance of the chief ranger of the local office of the Forestry Commission. 308 Ga. App. 192, 707 S.E.2d 144 (2011). The day after the burn, residual smoke from the smoldering fire combined with heavy fog, resulting in severely limited visibility on an adjacent highway. The conditions forced a tractor trailer to stop, which resulted in a collision with an oncoming automobile, killing the driver. The plaintiff asserted numerous theories for the landowner's liability, but the court found the facts of the case to show an absence of gross negligence:

> **(1)** The landowner was not grossly negligent by failing to call 911 when smoke from his prescribed burn became worse, so as to protect motorists on the adjoining highway; the landowner was not given any specific instruction regarding if and when to call 911 by the ranger in charge of supervising the burn and the ranger had specifically told the landowner that he had already notified the State Patrol about the need for warning signs along the highway.
>
> **(2)** The landowner was not grossly negligent by failing to take extra precautions prior to the burn to prevent the smoldering remains from releasing smoke or in failing to have specialized equipment at the burn site to address potential smoke-related problems; the ranger testified that there was nothing physically that the landowner could have done to stop the prescribed burn from smoldering or to prevent the resulting smoke on the nearby highway where the motor vehicle accident occurred, that the Commission's guidelines were followed, and that landowners in general do not have access to such equipment.
>
> **(3)** The landowner was not grossly negligent for failing to utilize an alternative to prescribed burning on his property; the ranger testified that the only real alternative methods to reduce the fuel load/root mat of the land were shearing or thrashing the vegetation, which would cause other problems, such as reducing the topsoil and attracting and providing a habitat for rattlesnakes and other dangerous pests, and because of those problems, the Commission no longer recommended those methods.

If a landowner does not comply with the Act, liability arises under a simple or ordinary negligence standard. In Georgia, "negligence is the omission to do something which a reasonable [person] guided by those considerations which ordinarily regulate the conduct of human affairs would do." *Mull v. Aetna Casualty & Surety Co.*, 226 Ga. 462, 453-53 (1970). In a case involving an auto accident due to smoke from a farmer burning fields, without complying with the Act, the court found that "failure to notify forestry agents of his intent to burn a field," as required by § 12-6-90, constituted "negligence *per se*." *Butler v. McCleskey*, 208 Ga. App. 341, 343, 430 S.E.2d 631, 633 (1993).

Criminal Liability
Georgia

Georgia law assesses criminal liability for the burning of "any brush, field, forest land, campfire, or debris, whether on one's own land or the lands of another, without taking the necessary precautions before, during, and after the fire to prevent the escape of such fire onto the lands of another." Ga. Code § 16-7-63(a)(2). The statute does not define "necessary precautions," but does provide that "[t]he escape of such fire shall be prima-facie evidence that necessary precautions were not taken." *Id.* Any person that fails to take the necessary precautions may be found guilty of a criminal misdemeanor. § 16-7-63(c)(1).

Prior to the enactment of the Act, a court held Georgia forestry agents negligent due to a prescribed fire escaping to a neighbor's property after the forestry agents had departed for lunch. *See McMichael v. Robinson*, 162 Ga. App. 67, 68, 290 S.E.2d 168, 169 (1982). Adherence to the requirements of the Act likely would protect landowners and burners from criminal liability, since compliance with the Act would strongly indicate that "necessary precautions" were taken. *See* Prescribed Fire Criminal Liability and Relationship with Civil Liability above.

Kentucky

Kentucky has not enacted a prescribed fire statute. Instead, the State's burn boss statute relaxes the fire prevention laws for individuals who have been certified as a burn boss by the Kentucky Prescribed Fire Council (the Council). Ky. Rev. Stat. § 149.175; *see also* § 149.375. The Council certifies burn bosses through its Burn Boss Program. *Id.; see also* Kentucky Prescribed Fire Council, https://www.kyfire.org/.

Although not defined as "prescribed," a fire may be intentionally set under Kentucky law if five requirements are met.

1. Certified Burn Boss or Landowner

Only certified burn bosses and those owning or leasing property, including their employees, may intentionally set fire to land. § 149.375.

2. Site Preparation

The burner must take "all reasonable care and precaution[] by carefully clearing around the flammable material as necessary to prevent the escape or spread of fire" beyond the lands owned or leased. § 149.375.

3. Notice

Certified burn bosses must notify the Kentucky Division of Forestry about the prescribed burn at least twenty-four hours in advance, and adjacent landowners and local emergency dispatch must be notified on the day of the burn. § 149.175.

4. Burn Ban and Seasonal Restrictions

Certified burn bosses are prohibited from setting fires under any local burn ban or on a red flag warning day as determined by the National Weather Service. § 149.175. Landowners are prohibited from setting fires between February 15 and April 30 and between October 15 and December 30, unless the fire is set between the hours of 6:00 p.m. and 6:00 a.m. or the ground is covered with snow. § 149.400.

5. Attendance

Once the burner initiates a fire, the fire must be attended until extinguished. § 149.375.

Kentucky law requires "all reasonable care and precaution" to prevent the spread of fires to adjacent properties, which is a codification of the common law standard of negligence. § 149.375. Landowners and burn bosses who fail to meet this standard may be held liable for fire suppression costs *and* damage to the property of others. *Id.*; *see also* § 149.180; 149.430 (liability for state and private damages from fire). Additionally, landowners and burn bosses may be fined and imprisoned for up to six months for lack of reasonable care and precaution. § 149.991(1). However, no cases have been brought against a landowner or burn boss for violation of these statutes.

Kentucky courts have interpreted "reasonable care" to mean "such care as a reasonably prudent person would exercise under the circumstances." *Slusher v. Brown*, 323 S.W.2d 870, 872 (Ky. 1959). If a landowner ignites a fire for lawful purposes, the landowner may still be found liable for damage to adjacent properties if they fail to use "reasonable care in setting the fire and in keeping it or preventing its spread." *Slusher v. Brown*, 323 S.W.2d 870, 872 (Ky. 1959).The level of care "must be commensurate with the danger reasonably to be anticipated." *Id.*

In a case decided well before the enactment of the burn boss statute, the Kentucky Court of Appeals reversed the trial court based on a lack of evidence of negligence. Regarding reasonable care, the court described as follows:

> [O]ne who sets a fire upon his own premises even for a lawful purpose is liable for damages occasioned by the communication of the fire to the property or premises of another where he has been guilty of negligence in kindling the fire, or in guarding against its spread. The duty rests upon him to use ordinary or reasonable care in setting the fire and in keeping it or preventing its spread, which care must be commensurate with the danger reasonably to be anticipated, and is dependent upon the circumstances of each particular case.

Louisville & N.R. Co. v. Crady, 254 Ky. 561, 71 S.W.2d 979, 980 (1934). The fire spread after the property owner's oven, which was regularly used for heating purposes, caught fire. Plaintiff, whose property was damaged by the fire, alleged that the fire resulted from a hole in the structure's attic but the hole was not discovered until after the fire. Because the property owner was using ordinary care and had no notice of the hole, the court reversed the allocation of damages against the owner and remanded for further determination by the trial court. *Id.*

Kentucky statutes and case law do not address liability for damages resulting from smoke or injury to persons from fire or smoke.

Louisiana

Louisiana's Revised Statutes include the Prescribed Burning Act (the Act), which recognizes prescribed burning as "a land management tool that benefits the safety of the public, the environment, and the economy[.]" La. Stat. § 3:17(A). The Act defines "prescribed burning" as "the controlled application of fire to naturally produced on-site vegetative fuels and sugarcane under specified environmental conditions, following appropriate precautionary measures, which causes the fire to be confined to a predetermined area to accomplish planned land management objectives, including the harvest of sugarcane." § 3:17(C)(2).

Louisiana also recognizes a "right to farm" using "generally accepted agricultural practices," La. Stat. § 3:3603, including prescribed fire. § 30:2057(1)(5)(c) (exempting prescribed fire, as a generally accepted agricultural practice under Louisiana's right to farm legislation, from ordinances prohibiting fire for air quality purposes). A farmer, however, may be liable under the common law of negligence for damages caused by the use of prescribed fire. § 3:3606.

Louisiana affords some protection from liability for landowners and farmers that comply with the Prescribed Burning Act. Compliance involves two requirements.

1. Certified Prescribed Burn Manager

The prescribed burn must be conducted "only under written authority according to the requirements of the commissioner [of the Department of Agriculture and Forestry]," § 3:17(D)(2), meaning the prescribed burn must be conducted by a certified prescribed burn manager. 7 La. Admin. Code Pt XXXIX, 903.
A certified prescribed burn manager must complete a certification program approved by the Department, § 3:17(C)(1), and must have participated "in a minimum of five prescribed burns as the person in charge of the execution of the burns." 7 La. Admin. Code Pt XXXIX, 907. Unlike other states, which often require state approval of each burn plan, the burn plan is not submitted to the Department for approval; instead, the burn plan is the sole responsibility of the certified prescribed burn manager.

2. Attendance

The prescribed burn must be conducted "only when at least one certified prescribed burn manager is present on site from ignition until the burn is completed and declared safe according to prescribed guidelines." § 3:17(D)(2). The referenced guidelines require the certified prescribed burn manager to find that (1) the ignition process has been safely accomplished; (2) the fire is safely contained within the control lines; and (3) the smoke is acting in a fashion consistent with the weather forecast and the burning prescription for that tract. 7 La. Admin. Code Pt XXXIX, 905.

While not required by the Act and as more fully described below, failure to give notice to the local fire department or other fire protection units may give rise to criminal liability if a prescribed burn escapes to adjoining land. La. Stat. § 14:204. Specifically, Louisiana's criminal statute requires "written notice of intention to burn over the lands, . . . a description of the property which will reasonably describe the location where the burning shall begin, and the date on which the lands are to be burned over." *Id.*

Civil Liability
Louisiana

Under the Act, a landowner or burner that conducts a prescribed burn in compliance with the above requirements and pursuant to related rules and regulations is protected by a "rebuttable presumption of nonnegligence." § 3:17(E). That is, if a lawsuit is brought against the landowner or burner for injury or damages from a prescribed burn, the plaintiff will have to show evidence that the landowner or burner was negligent.

No cases have been decided under the Act. In a lawsuit decided before the Act and under Louisiana's common law regarding negligence, a landowner's agent was held liable for a woodpile fire that burned a building. *Buford v. Tidwell*, 33 La. Ann. 1053, 1054 (1881). The burner had pushed logs and dead wood into a pile to burn, and the fire continued for several days. The fire spread to dry grass and sparks set fire to a nearby building. The burner's employees extinguished this fire, but the log fire continued unattended, the wind picked up the following day, and the building again caught fire and was destroyed. *Id.*

Note that Louisiana's Civil Code also addresses liability for "work" on private land that "deprive[s] [a] neighbor of the liberty of enjoying [the neighbor's] own [land], or which may be the cause of any damage to [the neighbor]." La. Civ. Code art. 667. Similar to Louisiana's common law, Article 667 requires a showing of negligence to recover. Art. 667 (landowner is liable only upon a showing that the landowner knew or should have known that "the damage could have been prevented by the exercise of reasonable care," and the landowner failed to exercise such care). Article 667 also may be used for injunctive relief, but negligence must be proved. *Collett v. Weyerhaeuser Co.*, No. CV 19-11144, 2020 WL 6828613, at *5 (E.D. La. Nov. 19, 2020).

Criminal Liability
Louisiana

Louisiana law assesses criminal liability if, by criminal negligence, a landowner or burner "set[s] fire to any grass, leaves, brush, or debris . . . and allow[s] the fire to spread or pass to lands of another." La. Stat. § 14:204. Louisiana defines criminal negligence as "such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." La. Stat. § 14:12. Although Louisiana courts liken criminal negligence to "gross negligence" in a civil context, *see State v. Dean*, 154 La. 671, 674, 98 So. 82, 83 (1923); *see also State v. Perkins*, 248 La. 293, 307, 178 So. 2d 255, 260 (1965) (Chief Justice Fournet concurring), at a minimum, a landowner should give sufficient notice to local fire protection units and consider the protections afforded by the Act if followed.

Mississippi

The Mississippi Prescribed Burning Act (the Act) defines prescribed burning as a landowner's "property right and a land management tool that benefits the safety of the public, the environment and the economy of Mississippi." Miss. Code §§ 49-19-301, 49-19-303. Prescribed burns conducted in accordance with the Act and related air pollution statutes and rules shall "[b]e considered in the public interest and shall not constitute a public or private nuisance." § 49-19-307(d).

The Act defines prescribed burning as "the controlled application of fire to naturally occurring vegetative fuels for ecological, silvicultural and wildlife management purposes under specified environmental conditions and the following of appropriate precautionary measures which cause the fire to be confined to a predetermined area and accomplishes the planned land management objectives." § 49-19-305(a).

Compliance with the Act involves four requirements.

1. Certified Prescribed Burn Manager

The prescribed burn(s) must be supervised by at least one certified prescribed burn manager. § 49-19-307(2)(a); 2 Code Miss. R. Pt. 602, R. 5.2.2. A certified prescribed burn manager is "an individual or county forester who successfully completes the certification program approved by the Mississippi Forestry Commission." § 49-19-305(b). The Commission posts information about certification courses on its website, which is available at https://www.mfc.ms.gov/programs/educational-workshops/prescribed-burning-short-course/.

2. Burning Permit

A burn permit must be obtained from the Mississippi Forestry Commission. § 49-19-307(2)(c); 2 Code Miss. R. Pt. 602, R. 5.2.2. The Commission "issues burning permits based on the daily fire weather forecast." *See* Burning Info, Miss. Forestry Comm., https://www.mfc.ms.gov/burning-info/request-a-burn-permit/ (last accessed Dec. 13, 2021).

3. Notarized Prescription

A written prescription must be prepared and notarized at least one day in advance of the prescribed burn date. § 49-19-307(2)(b); 2 Code Miss. R. Pt. 602, R. 5.2.2. At a minimum, the written prescription should include (1) a complete legal description of the property; (2) the name and address of the property owner, the name of the prescription preparer, and the burn permit number assigned by the Commission; (3) a description of stand characteristics; (4) the purpose of the burn; (5) pre-burn information, including large-scale and site-specific maps, fire lanes outlined on the maps, acres to be burned, crew size, equipment needs, special precautions specific to the site, emergency contacts, smoke management determinations, and firing techniques; and (5) the range of desired weather. *See* Sun, C. & A.J. Londo, LEGAL ENVIRONMENT FOR FORESTRY PRESCRIBED BURNING IN MISSISSIPPI, MISS. ST. UNIV., Res. Bull. FO351 at 8-10, https://www.fwrc.msstate.edu/pubs/burning.pdf (last accessed Dec. 13, 2021).

4. Burn Bans

The Mississippi Forestry Commission adopts temporary outdoor bans on burning in the presence of "drought or wildfire" conditions. § 49-19-351. Violating a burn ban will result in a fine of no less than $100 and no more than $500. § 49-19-351(4). The Commission posts information about affected counties and exemptions on its website, which is available at https://www.mfc.ms.gov/burning-info/burn-bans/ (last accessed Mar. 14, 2023).

Civil Liability
Mississippi

Under the Act, a landowner or burner cannot be held liable for damage or injury from fire or smoke unless "negligence is proven." Miss. Code § 49-19-307(1); *see also* § 95-5-25 (landowner or burner that negligently allows fire to escape to the land of another is liable for damages to the other).

No case law explores the applicability of the Act's liability provisions. Mississippi's common law defines negligence as "doing what a reasonable, prudent person would not do, or failing to do what a reasonable, prudent person would do, under substantially similar circumstances." *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1277 (Miss. 2007). Applying common law negligence standards to a burn case arising before the Act, the Mississippi Supreme Court held that the standard of reasonable care applies both to the setting of a prescribed fire and to the tending of the fire thereafter: "Such [ordinary and reasonable] care must be used in setting the fire, and in keeping it or preventing its spread. It is commensurate with the danger reasonably to be anticipated, and is dependent on the circumstances of the particular case." *Wofford v. Johnson*, 250 Miss. 1, 5, 164 So. 2d 458, 459 (1964). In *Wofford*, the defendant did not tend the fire and was liable for damage to his neighbor's property.

In another case decided before the passage of the Act, the defendant set fire to a wooded area when there was no wind and the site was relatively wet. *Gulf Oil Corp. v. Turner*, 235 So. 2d 464, 467 (Miss. 1970). However, the defendant did not contact the Mississippi Forestry Commission, which would have advised the defendant that conditions were unsuitable for burning, considering wind velocity, relative humidity, temperature, and ground moisture conditions. A jury verdict in favor of a motorist injured when smoke engulfed the highway was affirmed. *Id.* at 468.

Criminal Liability
Mississippi

Mississippi's Prescribed Burning Act does not prohibit civil and criminal liability for damages or injury that arises from gross negligence. *See* Miss. Code. § 49-19-307(4). Additionally, if a landowner or burner is found to have negligently burned a brush pile that escapes, such finding "shall be evidence" of gross negligence in causing another's land to burn. § 97-17-13(b). If a plaintiff proves gross negligence, the landowner or burner may be liable for fines, reimbursement of suppression expenses, and up to three months in the county jail. §§ 97-17-13(2), (3).

North Carolina

North Carolina's Prescribed Burning Act (the Act), which the legislature revised in 2023, provides that prescribed burning conducted in compliance with the Act "is in the public interest and does not constitute a public or private nuisance." N.C. Gen. Stat. § 106-967(a). The Act defines prescribed burning as "the planned and controlled application of fire to vegetative fuels under specified weather and environmental and other conditions while following appropriate precautionary measures that will confine the fire to a predetermined area and accomplish the intended management objectives." § 106-966(2).

Compliance with the Act involves four requirements.

1. Prescription Prepared by a Certified Prescribed Burner

In advance, a certified prescribed burner (CPB) must prepare and provide to the landowner a prescription for the prescribed burning. A prescription is defined as "a written plan establishing the conditions and methods for conducting a prescribed burn . . . [, including] starting, controlling, and extinguishing a prescribed burn[.]" § 106-966(3). The CPB must file the prescription with the North Carolina Forest Service. A copy of the prescription must be in the possession of the landowner and the CPB on site throughout the prescribed burn. Further, the prescription must include:

(1) The landowner's name and address;
(2) A description of the burn area;
(3) A map of the burn area;
(4) An estimate of fuel tons in the area;
(5) The objectives of the prescribed burn;
(6) A list of acceptable weather conditions and parameters sufficient to minimize smoke damage and fire escape;
(7) The CPB's name who is responsible for conducting the prescribed burning;
(8) A summary of methods that are adequate for the particular circumstances to start, control, and extinguish the burn, including firebreaks and sufficient personnel with firefighting equipment to contain the fire within the burn area; and
(9) A provision for reasonable notice to homes and businesses located adjacent to the burn site to avoid effects on health and property. § 106-968(a).

2. Burning Permit

In advance, the landowner or the landowner's agent must obtain an open-burning permit, which must remain in effect through the period of the prescribed burning. The prescribed burn must comply with the terms and conditions of the permit. § 106-968(c). The NC Forest Service open-burning permit system is available online here: https://www.ncforestservice.gov/burn_permits/burn_permits_main.htm.

3. Certified Prescribed Burner

If a landowner is burning a tract of 50 acres or less of their own land and follows all conditions of the prescription, the landowner need not be certified as a prescribed burner to be in compliance with the Act. Otherwise, a CPB must conduct the prescribed burning and be present on site and in charge of the burning "throughout the period of the burning." § 106-968(b). Information on certification for prescribed burning is made available here: https://www.ncforestservice.gov/fire_control/fc_howtobeacertifiedburner.htm.

4. Smoke Management and Related Rules and Regulations

The prescribed burn must comply with North Carolina's air pollution control statutes and applicable rules, local ordinances related to open burning, and smoke management guidelines and prescribed burning rules adopted by the North Carolina Forest Service. § 106-968(c). The NC Forest Service's smoke management guidelines are available here: https://www.ncforestservice.gov/fire_control/pdf/Smoke_Management_Program_Guidelines.pdf.

Civil Liability
North Carolina

In 2023, the legislature revised North Carolina's Prescribed Burning Act to protect against liability for damage caused by a prescribed burn, including from the reignition of a smoldering, previously contained burn, in the absence of **gross negligence**. That is, neither a landowner nor a landowner's agent, including a CPB, may be held liable in any civil action for negligence, nuisance, damage, or injury from fire or smoke unless the landowner or agent was grossly negligent in conducting the prescribed burn. §§ 106-967(b), 106-967(c). Additionally, the continued smoldering of a prescribed burn that results in a wildfire does not by itself constitute evidence of gross negligence, § 106-968(a)(8)(c), and fire spreading outside of the prescribed burn area on the day of the prescribed burn ignition also will not be taken as conclusive proof that that there was a lack of adequate firebreaks, personnel, or firefighting equipment, § 106-968(a)(8)(a).

The Act did not revise North Carolina's criminal statute regarding trespass, which defines negligence *per se* to include failing to provide advance notice to adjacent landowners when setting fire to woodlands. § 14-136. Although negligence per se would be insufficient on its own to constitute liability in a civil context under the Act, landowners and burners should be mindful that failure to provide notice could contribute to a finding of gross negligence.

Importantly, there is an **exception** to the gross negligence standard: The Act does not apply to "claims by public utilities resulting from damage to their equipment or facilities, where a prescribed burn proximately causes such damage." § 106-967(d). Because negligence continues to be the liability standard for utility damages, advance notice is recommended if public utilities are adjacent to or in close proximity to a prescribed burn.

Although no cases have been decided under the Act, some guidance is available on how courts will analyze negligence and gross negligence in the context of intentional fire from an old North Carolina Supreme Court case. In *Garrett v. Freeman*, which was decided in 1857, the court found that setting fire to a brush pile close to the property line (i) with a dead pine tree located between the fire and the fence line and (ii) without raking trash from around the brush pile in (iii) dry weather, constituted factors that "[a] prudent [person] would not permit."50 N.C. 78, 79 (1857). The court considered setting the fire in the morning in dry conditions to also constitute gross negligence because:

> there was reason to expect, at least, an *ordinary* wind, during the day. A prudent [person] would have waited until after a rain, or at all events, would have started the fire after night-fall, so that the dew would prevent the sparks from communicating fire to the dead pine, or the trash.

Id.

Criminal Liability
North Carolina

North Carolina criminal law prohibits the application of criminal liability for a negligently set fire so long as the landowner or burner complies with the Act *and* confines the fire to the landowner's property at the landowner's expense. N.C. Gen. Stat. § 14-137. Failure to do so with a showing of negligence in starting, controlling, or extinguishing the burn could result in a misdemeanor charge. *Id.* The law further provides for the assessment of a fine and misdemeanor charge for failing to extinguish a prescribed fire, § 14-138.1, and a fine for failing to keep and maintain a "careful watchman in charge of the burning." § 14-140.1.

The criminal statutes also assess misdemeanor charges for failing to give notice to adjoining landowners, failing to watch a fire while burning, and failing to extinguish before the fire reaches nearby or adjoining lands. § 14-136. In a case under this statute, a burner was held liable for injury to a child playing next door when the burner "knew or in the exercise of reasonable care should have known" that young children regularly played next door, failed to provide advance notice of the burns, and was engaged in conversation with someone else when the fire escaped. *Benton v. Montague*, 253 N.C. 695, 701, 117 S.E.2d 771, 776 (1961).

Oklahoma

Under Oklahoma's Forestry Code (the Code), a prescribed burn of vegetative fuels conducted as required by the Code is a property right and in the public interest. 2 Okla. Stat. § 16-28.2(F). Compliance with State law also prohibits liability for public or private nuisance. § 16.28.2(F).

The Code defines prescribed burning as the "controlled application of fire by the owner or designated agent of croplands, rangelands, or forestlands to naturally occurring vegetative fuel under specified environmental conditions and following appropriate precautionary measures intended to keep the fire confined to a predetermined area and accomplish land management objectives." § 16-2(11). Prescribed burning is lawful on croplands, rangelands, grasslands, forestlands, and other wild lands for purposes of: "(1) Managing and manipulating plant species present whether grass, weeds, brush, or trees; (2) Destroying detrimental or unwanted plants, plant parts, shrubs or trees on the [land]; and (3) Cedar tree eradication." § 16-24.1(A).

A lawful prescribed burn involves four requirements.

1. Prescribed Burn Notification Plan

The landowner must complete the prescribed burn notification plan made available by the Oklahoma Department of Agriculture, Food, and Forestry. *See* § 16-28.2(C); *see also* https://ag.ok.gov/prescribed-fires/. Upon completion, the notification plan must be submitted to the nearest rural fire department. If the land prescribed for burning is in a protection area, a copy of the plan also must be submitted to the local office of Oklahoma's Forestry Division. § 16-28.2(C). Oklahoma State University Extension makes a Burn Plan for Prescribed Burning template available with other resources here: https://extension.okstate.edu/fact-sheets/burn-plan-for-prescribed-burning.html.

2. Notice to Adjoining Landowners

Within sixty days of the date of the prescribed burn, the landowner must notify, orally or in writing, all adjoining landowners. § 16-28.2(B)(1). Additionally, although the statute permits oral notification, written notification with a copy in your records would better protect against liability if damage or injury occurs. Further, if the prescribed burn involves a large, consolidated tract with multiple adjacent owners, "only those owners with adjoining land within one (1) mile of the proposed burn area must be notified." § 16-28.2(B)(2). The notice must include the proposed date and location of the prescribed burn, and the telephone number where the landowner may be reached for information regarding the prescribed burn. § 16-28.2(B)(3).

3. Notice to Rural Fire Department within 48 Hours

The landowner—within 48 hours of conducting a prescribed burn—must notify the rural fire department receiving a copy of the prescribed burn notification plan that the burn will be conducted. § 16-28.2(E). Additionally, if the land prescribed for burning is in a protection area, the landowner must notify the local office of the Forestry Division at least four (4) hours in advance *and* receive verbal or written approval. § 16-28.2(E); § 16-28.1(A). As stated above, written approval would provide more protection if any claims arise.

4. Adequate Firelines, Manpower, and Equipment

For a burn to be lawful outside a protection area, the landowner must "take reasonable precaution against the spreading of fire to other lands by providing adequate firelines, manpower, and fire-fighting equipment for the control of the fire, watch over the fire until it is extinguished, and not permit fire to escape to adjoining land." § 16-28.1(A)(2).

Additionally, the Code explicitly prohibits the setting of any fire in a county during a "gubernatorially proclaimed extraordinary danger from fire" or an "extreme fire danger" resolution passed by the board of county commissions. § 16-26(A), (B). Under the latter, an agricultural producer may proceed with a prescribed burn so long as the requirements above are adhered to and (1) a prescribed burn plan is prepared as outlined in the statute, submitted to the local fire department at least 72 hours in advance, and a copy is available on site during the prescribed burn and (2) the county sheriff and local fire department's dispatch center are notified prior to conducting the prescribed burn. § 16-26(B)(4).

Oklahoma Controlled Burn Indemnity Fund

The Oklahoma Controlled Burn Indemnity Fund was "established for the benefit of landowners who perform controlled burns . . . [to] compensate landowners for losses incurred from a fire that spreads beyond the control of the burner, except for losses covered by insurance." 2 Okla. Stat. § 16-28.3(B).

To participate in the Fund, a landowner must:

1. Work with the local conservation district office and the Natural Resources Conservation Service of the United States Department of Agriculture to develop a controlled burn plan based on the United States Department of Agriculture Natural Resources Conservation Service guidelines; and

2. At the time of filing the completed plan, provide payment of One Hundred Dollars ($100.00) to the Conservation Commission.

§ 16-28.3(C). If a loss is incurred, the landowner must present a claim to the Conservation Commission with required evidence. § 16-28.3(D). The Commission has promulgated rules for eligible losses, claims, and deadlines. *See* Okla. Admin. Code 155:45-1-1 *et seq.* However, to date the Controlled Burn Indemnity Fund has not received any funding.

Civil Liability
Oklahoma

Compliance with the Code for lawful burning protects a landowner from criminal liability and limits recovery for civil liability to actual damages. Specifically, if damage or injury results from "accident or ordinary negligence," the landowner "shall only be civilly liable for actual damages.
§§ 16.24.1, 16-28.2(G)(1). Oklahoma statute provides for three levels of negligence—slight, ordinary, and gross—and defines ordinary negligence as a lack of "ordinary care and diligence." 25 Okla. Stat. § 6.

Criminal Liability
Oklahoma

A landowner found "to have committed gross negligence in conducting the prescribed burn" may be held civilly liable for actual damages *and* criminally liable, including a fine of up to $500 or imprisonment for no more than six months. 2 Okla. Stat. § 16-28.2(G)(2)-(3). Additionally, if a prescribed burn is "carelessly" allowed to burn the land of another, the imprisonment sentence may be as long as one year. § 16-25(B). Further, such carelessness permits the landowner or burner to be held liable for "reasonable costs and expenses" of suppression. § 16-32. If suppression costs and expenses are not paid within 90 days after a written demand by the Forestry Division, then the case may be referred to the district attorney for collection. *Id.*

Oklahoma case law defines gross negligence as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty or property of another." *Fox v. Oklahoma Mem'l Hosp.*, 1989 OK 38, 774 P.2d 459, 461. Although no decisions explore the application of this definition to prescribed fire, an intentional failure to adhere to the requirements above would be an important consideration for the judge or jury.

South Carolina

South Carolina's Prescribed Fire Act (the Act) recognizes prescribed fire conducted in accordance with the Act as a landowner's property right and in the public interest. S.C. Code § 48-34-40(B)(3). Prescribed fire is defined as "a controlled fire applied to forest, brush, or grassland vegetative fuels under specified environmental conditions and precautions which cause the fire to be confined to a predetermined area and allow accomplishment of the planned land management objectives." § 48-34-20(1).[16]

Compliance with the Act involves four requirements.

1. Accepted Purposes

The Act limits the acceptable purposes of prescribed fire to "(a) burning forest lands for specific management practices; (b) agricultural control of diseases, weeds, and pests and for other specific agricultural purposes; [and] (c) open burning of trees, brush, grass, and other vegetable matter for game management purposes." § 48-34-40(B)(3).

2. Written & Approved Prescribed Fire Plan

A written prescription plan must be prepared before any authorization to burn is issued by South Carolina's Forestry Commission. Further, the prescription must (1) comply with South Carolina's Smoke Management Guidelines, which the Commission makes available here: https://www.state.sc.us/forest/smg05.pdf, and (2) be on site and followed during the burn. § 48-34-40(B)(1). The Commission also must approve a prescribed burn in advance. Additional information is available at South Carolina's Forestry Commission website here: https://www.scfc.gov/protection/fire-burning/.

3. Notice & Precautions

Adherence to South Carolina's notice and precautions requirements for starting a fire in woodlands, grasslands, and elsewhere also is required, including: **(a)** Proper notification to the State Forester, including all information required by the State Forester; **(b)** Sufficient clearing around the burn area in advance and the availability of equipment and personnel to secure the fire and prevent its spread; and **(c)** The person who starts the burn must supervise the burn carefully and not leave the burn area until the fire is under control. § 48-35-10.

4. Certified Prescribed Fire Manager

At least one certified prescribed fire manager (CPFM) must be present personally supervising the burn "from ignition until the [CPFM] determines the burn to be safe." § 48-34-40(B)(2). During and after the burn the CPFM must "fully consider both fire behavior and related smoke management issues[.]" § 48-34-40(B)(2). The Forestry Commission certifies prescribed fire managers; available trainings are posted here: https://www.state.sc.us/forest/cpfm.htm.

The Act explicitly allows prescribed fire to be conducted without a certified prescribed fire manager present. § 48-34-60. However, the absence of a CPFM means that the landowner or burner may be more vulnerable to liability.

The State Forester may prohibit fires at any time when deemed necessary for public safety. § 48-35-50. Additionally, South Carolina law prohibits burning when the Governor has declared an emergency related to forest fires. § 48-35-40.

[16] South Carolina explicitly adds that "controlled burn" is synonymous with prescribed fire. *Id.*

Civil Liability
South Carolina

If damage, injury, or loss occurs from a prescribed fire conducted by a South Carolina Certified Prescribed Fire Manager pursuant to the Act, a landowner or burner will not be liable for consequences of the fire—except for smoke—without a showing of negligence. For smoke damage, injury, or loss, a plaintiff must show gross negligence or recklessness. S.C. Code § 48-34-50.

Although no cases have been determined under the Act, the South Carolina Supreme Court previously analyzed the applicability of negligence for a prescribed fire that escaped to a neighbor's property. *Gregory v. Layton*, 36 S.C. 93, 15 S.E. 352, 353 (1892). In *Gregory*, the burners were "clearing off a bottom [and] were burning briars and brushes." When the fire was ignited, "the weather was quiet," but some hours later, "the wind arose." The burners attempted to prevent the fire from spreading but without success. The trial court advised the jury that the burners could not be liable without a showing of negligence—specifically, that the natural and probable consequence of the burn would damage the neighbor's property. *Id.* at 93, 15 S.E. at 354–55. The jury found an absence of negligence and the neighbor appealed. The Supreme Court affirmed the trial court's jury instruction, holding that "the mere fact that the [prescribed burn] causes inconvenience to [a] neighbor is not sufficient" for liability. *Id.* at 93, 15 S.E. at 355. Only if the prescribed burn was conducted negligently would liability for damages arise. *Id.*

Criminal Liability
South Carolina

South Carolina law also allows a misdemeanor charge for the negligent or careless spreading of fire to another's property. S.C. Code § 16-11-180. If found guilty, a conviction carries a sentence of no less than five days and no more than thirty days in prison or a fine of no less than $25 and no more than $200. The sentencing increases for a second or subsequent conviction. *Id.* The statute was first codified in 1962, but no published case law exists.

Tennessee

Tennessee's Prescribed Burning Act (the Act) recognizes prescribed burning as a public interest if conducted in accordance with the Act. Tenn. Code § 11-4-1003(b)(6). Tennessee specifically defines prescribed burning as "the controlled application of fire to naturally occurring vegetative fuels for ecological, silvicultural and wildlife management purposes under specified environmental conditions and the following of appropriate precautionary measures which cause the fire to be confined to a predetermined area and accomplishes the planned land management objective." § 11-4-1002(2).

Compliance with the Act involves five requirements.

1. Certified Prescribed Burn Manager

Prescribed burning must involve the preparation and oversight of a certified prescribed burn manager (CPBM). The CPBM prepares the prescription plan as described below, "personally direct[s], observe[s], and coordinate[s] the lighting of the initial fire to begin the burn operation," and supervises the burn. Tenn. Comp. R. & Regs. 0080-07-06-.08; § 11-4-1003(b)(1)-(4). At least one CPBM must be on site and supervising burns. § 11-4-1003(b)(3). The Tennessee Prescribed Fire Council makes available a list of CPBMs at their website here: https://www.tn.gov/tnwildlandfire/prescribed-fire/tn-prescribed-fire-council.html.

2. Written Prescription

The CPBM must prepare, sign, and follow a written prescription using a form made available by the Forestry Division.

The Act defines the written prescription as a "plan for starting and controlling a prescribed burn to accomplish ecological, silvicultural and wildlife management objectives." §§11-4-1003(b)(1), 11-4-1002(3). The prescription must be maintained in the CPBM's records and in the possession of the CPBM on site during all prescribed burnings. *Id.* Additionally, the CPBM must keep the prescription on file for at least three years following the date of the burn. R. & Regs. 0080-07-06-.07. The current form is available at the Forestry Division's Wildland Fire website here: https://www.tn.gov/tnwildlandfire/prescribed-fire.html.

3. Burning Permit

If a burn is prescribed between October 15 and May 15, a burning permit must be issued by the Division of Forestry. § 11-4-1003(b)(5); *see also* § 39-14-306(a)(1).

4. Notice to Adjoining Landowners

Tennessee law also requires that any fire ignited in woods must involve at least two days' notice to anyone that owns adjacent land. § 68-102-146.

5. Approved Priming Materials

Tennessee's air pollution regulations restrict priming materials for open burning to "#1 or #2 grade fuel oils, wood waste, or other ignition devices approved by the Technical Secretary." Tenn. Comp. R. & Regs. 1200-03-04-.04.

The Act authorizes the Division of Forestry to promulgate rules and regulations for prescribed burning, which have been published in Tennessee's Rules Governing Prescribed Burning at 0080-07-06-.01 *et seq.* The rules address CPBM training, certification, and continuing education, and otherwise track the requirements listed above, adding that the CPBM "shall assure that burn operations are conducted according to the [written prescription] plan." R. & Regs. 0080-07-06-.08(5).

Civil Liability
Tennessee

The Act immunizes landowners and burners from claims for public or private nuisance if a prescribed burn is conducted in accordance with the Act, state air pollution control statutes, and the Forestry Division's prescribed burning rules. § 11-4-1003(b)(6). The Act also limits liability for damage, injury, or loss from fire and smoke unless a plaintiff proves negligence in conducting the prescribed burn. § 11-4-1003(a).

Criminal Liability
Tennessee

Tennessee assesses criminal liability for failing to acquire a permit during high fire hazard periods. § 39-14-306. Igniting a prescribed burn between October 15 and May 15 without a permit—or during other periods as determined by the state forester—may result in a misdemeanor charge. *Id.* Further, if the Commissioner of Agriculture or the Division of Forestry have issued a burning ban, initiating a burn during the ban is punishable as a misdemeanor. *Id.*

Texas

The Texas Prescribed Burn Act (the Act) affirms a landowner's right to conduct burns on their own property, but "does not modify the landowner's liability for property damage, personal injury, or death resulting from a burn that is not conducted as provided" by the Act. Tex. Nat. Res. Code §§ 153.002, 153.003. However, the Act offers substantial protection from liability for prescribed burns conducted in accordance with the statute. § 153.081.

The Act delegates the establishment of standards for conducting prescribed burns—save for minimum standards announced by the Act—to a Prescribed Burning Board, which operates under the Texas Department of Agriculture and in conjunction with the Texas Commission on Environmental Quality (TCEQ). §§ 153.047, 153.048. Regulations promulgated by the Department and TCEQ are located in the Texas Administrative Code in Title 4 and Title 30, respectively. *See* 4 Tex. Admin. Code §§ 225.1 *et seq.*, 30 Tex. Admin. Code §§ 111.219, 111.221; *see also* 30 Tex. Admin. Code § 111.203 (defining "[p] rescribed burn" as "[t]he controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions and confined to a predetermined area, following appropriate planning and precautionary measures.").

The Act protects landowners from liability for injury or damages that result from a prescribed burn if the burn is conducted under the supervision of a certified and insured prescribed burn manager (CIPBM) and the CIPBM carries sufficient liability coverage. §§ 153.081, 153.082; *see also* 30 Tex. Admin. Code § 111.203(1) (defining a CIPBM as "A person with ultimate authority and responsibility for a prescribed burn, who has been certified by the Prescribed Burning Board of the Texas Department of Agriculture.").

That is, private landowners in TX are immune from liability if the landowner complies with the statute by having the burn conducted by a CIPBM with sufficient insurance coverage.

The Prescribed Burning Board (Board) publishes requirements for certification. *See* 4 Tex. Admin. § 226.1 *et seq.* In general, a completed application requires submission of the Board's form with payment of the applicable fee, documentation of training and experience, and proof of insurance.

Note that in Texas, landowners and burn bosses who are not licensed CIPBMs may still legally conduct prescribed burns, regardless of their level of training, experience, use of a burn plan, or insurance. Prescribed burning by unlicensed individuals is authorized for "forest, range and wildland/wildlife management, and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning," 30 Tex. Admin. Code § 111.211(1), so long as "structures containing sensitive receptors [are not] negatively affected by the burn." *Id.*

To comply with the Act, a CIPBM must adhere to six categories of requirements.

1. Minimum Insurance

The CIPBM must carry "at least $1 million of liability coverage" for each single occurrence of damages to person or property and "a policy period minimum aggregate limit of at least $2 million." 4 Tex. Admin. Code § 227.1(a). The Board also requires documentation of such coverage with proof submitted on an annual basis and immediate notice of any changes. *See* 4 Tex. Admin. Code §§ 227.1(b)–(f).[17]

2. Written Prescription

The CIPBM must prepare a written prescribed burn plan in advance that provides "reasonable assurance that the prescribed burn will be confined to the predetermined area and conducted in a manner that will accomplish the land management objectives." 4 Tex. Admin. Code § 228.1(a). At a minimum, the written prescribed burn plan must include:

(1) Purpose of burn;
(2) Location and description of the area to be burned;
(3) Personnel required for managing the fire;
(4) Type and amount of vegetation to be burned;
(5) Area (acres) to be burned;
(6) Fire prescription and firing techniques, including smoke management components;
(7) Safety and contingency plans addressing escaped fires and smoke management; and a
(8) Written checklist of criteria the certified and insured prescribed burn manager will use for making burn/no burn decisions.

3. Proof of Insurance

On request, the CIPBM must provide proof of current certification and sufficient insurance to the landowner or landowner's agent. § 228.2(a)(2).

4. Notice

The CIPBM must "provide written notification to the residents, owners, occupants or operators of structures containing sensitive receptors if they are located within 300 feet of and in the general direction downwind from the prescribed burn." § 228.2(a)(1). Advance notice to the local county dispatch office and the Texas A&M Forest Service central dispatch office also is required as well as to any persons or entities required by local ordinance. 4 Tex. Admin. Code §§ 228.2(a)(3), 228.2(b); 30 Tex. Admin. Code § 111.217(2).

5. Presence of CIPBM

The CIPBM with the minimum required insurance coverage must be present during an active prescribed burn as determined by the CIPBM. Further, the CIPBM is responsible for ensuring sufficient staffing for the written prescription plan. 4 Tex. Admin. Code § 228.3.

Categories continued on page 42

[17] The Board amends regulations applicable to prescribed burning within Title 4 under Part 13. Landowners engaged in prescribed burning should be familiar with all regulations adopted by the Board, including record retention requirements for CIPBMs. *See* 4 Tex. Admin. Code § 227.4(d).

6. Adherence to TCEQ Regulations

TCEQ additionally requires the following for allowable outdoor burning by a CIPBM. *See* 30 Tex. Admin. Code § 111.217.

- Burning must be outside the corporate limits of a city or town unless the city or town has enacted ordinances allowing for burning consistent with the Texas Clean Air Act.
- Burning shall be commenced and conducted only when wind direction and other meteorological conditions are such that smoke and other pollutants will not cause adverse effects to any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s).
- If at any time the burning causes or may tend to cause smoke to blow onto or across a road or highway, it is the responsibility of the person initiating the burn to post flag-persons on affected roads.
- Burning shall commence no earlier than sunrise and completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.
- Burning shall not be commenced when surface wind speed is predicted to be less than five miles per hour (mph) (four knots) or greater than 23 mph (20 knots) during the burn period.
- Burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.
- Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.
- Additional rules apply to prescribed burns conducted during county burn bans. *See* 4 Tex. Admin. § 228.2(b).

Unlicensed landowners and burn bosses in Texas

Unlicensed individuals must adhere to the following ten TCEQ regulatory requirements. 30 Tex. Admin. Code § 111.219.

- The Texas Forest Service must be notified in advance of any prescribed or controlled burning for forest management purposes. Notification to the regional Texas Commission on Environmental Quality office, when possible, is recommended, but not required. 30 Tex. Admin. Code § 111.211(1).
- Burning must be outside the corporate limits of a city or town unless the city or town has enacted ordinances allowing for burning consistent with the Texas Clean Air Act.
- Burning may only be commenced and conducted when wind direction and other meteorological conditions are such that smoke and other pollutants will not adversely impact any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s).
- The burner is responsible for posting flag-persons on affected roads if at any time the burning causes—or may tend to cause—smoke to blow onto or across a road or highway.
- Prior written permission from the occupant of structures containing sensitive receptors on adjacent properties is required or, in the absence of permission, burning must be conducted downwind of or at least 300 feet (90 meters) from the structure(s).
- Burning shall commence no earlier than one hour after sunrise and completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.
- Burning shall not be commenced when surface wind speed is predicted to be less than six miles per hour (mph) (five knots) or greater than 23 mph (20 knots) during the burn period.
- Burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.
- Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.
- Additional special rules apply to coastal salt-marsh management burning, including advance registration with the regional office of the TCEQ and filing a map of the burn area at least 15 working days before the burn. *See* 30 Tex. Admin. Code § 111.211(2). On the day of the burn, but before any burning, notification to and authorization from TCEQ also are required. *Id.*

Importantly, unlicensed burners would not be protected under the Act, meaning that the common law standard of negligence would apply for claims arising from fire or smoke damage, or nuisance claims.

Note also that compliance with the Act—whether by a CIPBM or an unlicensed burner—does not excuse compliance with local ordinances, which may apply to open burning. Thus, it is important to know what the local ordinances require. *See* 30 Tex. Admin. Code § 111.221.

Civil Liability
Texas

As stated above, private landowners in TX are immune from liability if the landowner complies with the statute by having the burn conducted by a CIPBM with sufficient insurance coverage. Tex. Nat. Res. Code § 153.081(a). However, these protections do not apply to a CIPBM conducting burns on their own property. § 153.081(b).

The Act assesses liability to the "burn boss," defined as the "individual responsible for directing a prescribed burn under a written prescription plan." Tex. Nat. Res. Code § 153.083(b). If the burn boss is a CIPBM, and in the absence of gross negligence or intentionality, the burn boss is protected from liability for property damage, personal injury, or death caused by or resulting from smoke more than 300 feet from the burn. § 153.084(b-1). In the absence of certification, the common law standard of negligence would apply for claims from smoke damage.

A burn boss also is insulated from claims for damages from fire in the absence of gross negligence or intentionality—and will not be held liable for damages in excess of the minimum insurance requirements—so long as the burn boss (1) completes an accredited prescribed burning course approved by the Board; (2) satisfies the minimum experience requirements prescribed by the Board; and (3) carries the minimum insurance of $1 million per single occurrence and $2 million in aggregate. § 153.084(b). Again, in the absence of certification, the common law standard of negligence would apply for claims from fire damage.

Individuals other than the burn boss are protected from liability in the absence of gross negligence or intentionality. § 153.083(c). Note that if a burn boss is not the owner, lessee, or occupant of the burn site, the written prescription must include the signature of the burn boss or the owner, lessee, or occupant, and the parties must have a contract acknowledging liability. § 153.083(d).

Finally, the Act appears to eliminate—by omission—nuisance claims for burns conducted by a CIPBM. Such claims may still be viable for a nuisance that arises from a prescribed fire conducted by an unlicensed burner. Additionally, TCEQ defines an air quality nuisance as "discharge from any source whatsoever [of] one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property." 30 Tex. Admin. § 101.4. Although compliance with the Act should insulate landowners, CIPBMs, and burn bosses from the applicability of this regulation, particular attention to the TCEQ regulations for air quality likely are important to ensure this protection.

Criminal Liability
Texas

Texas' Act does not extend criminal liability to property owners or burners engaged in prescribed burning. But, a prescribed burn that fails to take reasonable precautions could be subject to Texas' penal code for reckless damage or destruction to another's property, a misdemeanor, or arson, a felony. *See* §§ 28.04; 28.02(b).

Virginia

In Virginia, a prescribed burn conducted in accordance with the Certified Prescribed Burn Manager Program Act (the Act), state air pollution control rules, and related regulations "shall be in the public interest and shall not constitute a nuisance." Va. Code § 10.1-1150.5(A). The Act defines prescribed burning as "the controlled application of fire or wildland fuels in either the natural or modified state, under specified environmental conditions, which allows a fire to be confined to a predetermined area and produces the fire behavior and fire characteristics necessary to attain planned fire treatment and ecological, silvicultural, and wildlife management objectives." § 10.1-1150.1.

Compliance with the Act involves four requirements.

1. Certified Prescribed Burn Manager

Prescribed burning must involve the preparation and supervision of a certified prescribed burn manager (CPBM). § 10.1-1150.4(1). The CPBM prepares the prescription plan as described below and directly supervises the prescribed burn to "ensure that the prescribed burning is in accordance with the prescription." § 10.1-1150.4(1)-(2). Virginia's Department of Forestry hosts trainings, which notices are posted to its website here: https://dof.virginia.gov/wildland-prescribed-fire/prescribed-burning/certified-burn-managers-program/. Additionally, other comparable training programs—or equivalent experience—plus passing the examination qualify for certification. § 10.1-1150.3.

2. Written Prescription

The CPBM must prepare a written prescription in advance of the burn that includes (i) the landowner's name, address, and telephone number, as well as the telephone number of the CPBM; (ii) a description of the objectives and burn area, along with a map; (iii) a summary of the methods to start, control, and extinguish the prescribed burn; and (iv) a smoke management plan based on the Virginia Department of Forestry's Smoke Management Guidelines and the U.S. Forest Service's Guide to Prescribed Fire in Southern Forests. § 10.1-1150.4(1). The Act defines the prescription as "a written statement defining the objectives to be attained by a prescribed burning and the conditions of temperature, humidity, wind direction and speed, fuel moisture, and soil moisture under which a fire will be allowed to burn. A prescription is generally expressed as an acceptable range of the prescription elements." § 10.1-1150.1. "A copy of the prescription shall be retained at the site throughout the period of the burning." § 10.1-1150.4(1).

3. Notice to Department of Forestry

The nearest regional office of the Virginia Department of Forestry must be notified prior to the burn. § 10.1-1150.4(3).

4. Approval by Virginia's Air Pollution Control Board

The State's air quality regulations permit open burning approved by the air pollution control board so long as the burning occurs at least 1,000 feet from an occupied building—or the building occupants have given prior permission—and the burn is attended at all times. 9 Va. Admin. Code 5-130-40, 5-130-50.

Virginia law also limits prescribed burning conducted between February 15 and April 30 of each year to the hours of 4:00 p.m. and 12:00 a.m. if the prescribed burn is to occur within 300 feet of a woodland, brushland, or field containing dry grass or other inflammable material. Va. Code § 10.1-1142(B). This restriction may be avoided if the above requirements are met, the State Forester prior to February 1 approved the written prescription, and the burn is being conducted for (i) the control of exotic and invasive plants, which cannot occur at other times during the year, (ii) wildlife habitat establishment and maintenance, which cannot occur at other times during the year, or (iii) management of natural heritage sources. § 10.1-1142(C).

Civil Liability
Virginia

Compliance with the above requirements protects landowners or burners from liability for nuisance claims and smoke damage absent a showing of negligence. § 10.1-1150.5. However, no corresponding liability protection exists under the statute for fire damage.

Virginia law provides some indication of negligence specific to prescribed fire. A landowner must use "all reasonable care and precaution, by having cut and piled [any woods, brush, logs, leaves, grass, debris, or other inflammable material] or carefully cleared around the same[] to prevent the spread of [] fire to lands" owned by others. § 10.1-1142(A). A landowner that fails to take "all reasonable care and precaution," or negligently or intentionally fails to prevent a prescribed fire's escape, shall be liable to the State or locality for suppression costs and any damages associated with the fire spreading beyond the landowner's borders. §§ 10.1-1148, 10.1-1141.

Criminal Liability
Virginia

Virginia also assesses criminal liability on a landowner or burner for (1) failure to adhere to the seasonal restrictions summarized above; or, if burning within the seasonally restricted time period, (2) failure to comply with the Act, including approval of the State Forester; or (3) failure to take "all reasonable care and precaution," including the piling or clearing described above. § 10.1-1142. Such violations carry a Class 3 misdemeanor charge for each separate offense and liability to the State for all suppression expenses. § 10.1-1142(E).

Prescribed Fire Liability Report for the Southern United States: A Summary of Statutes & Cases