

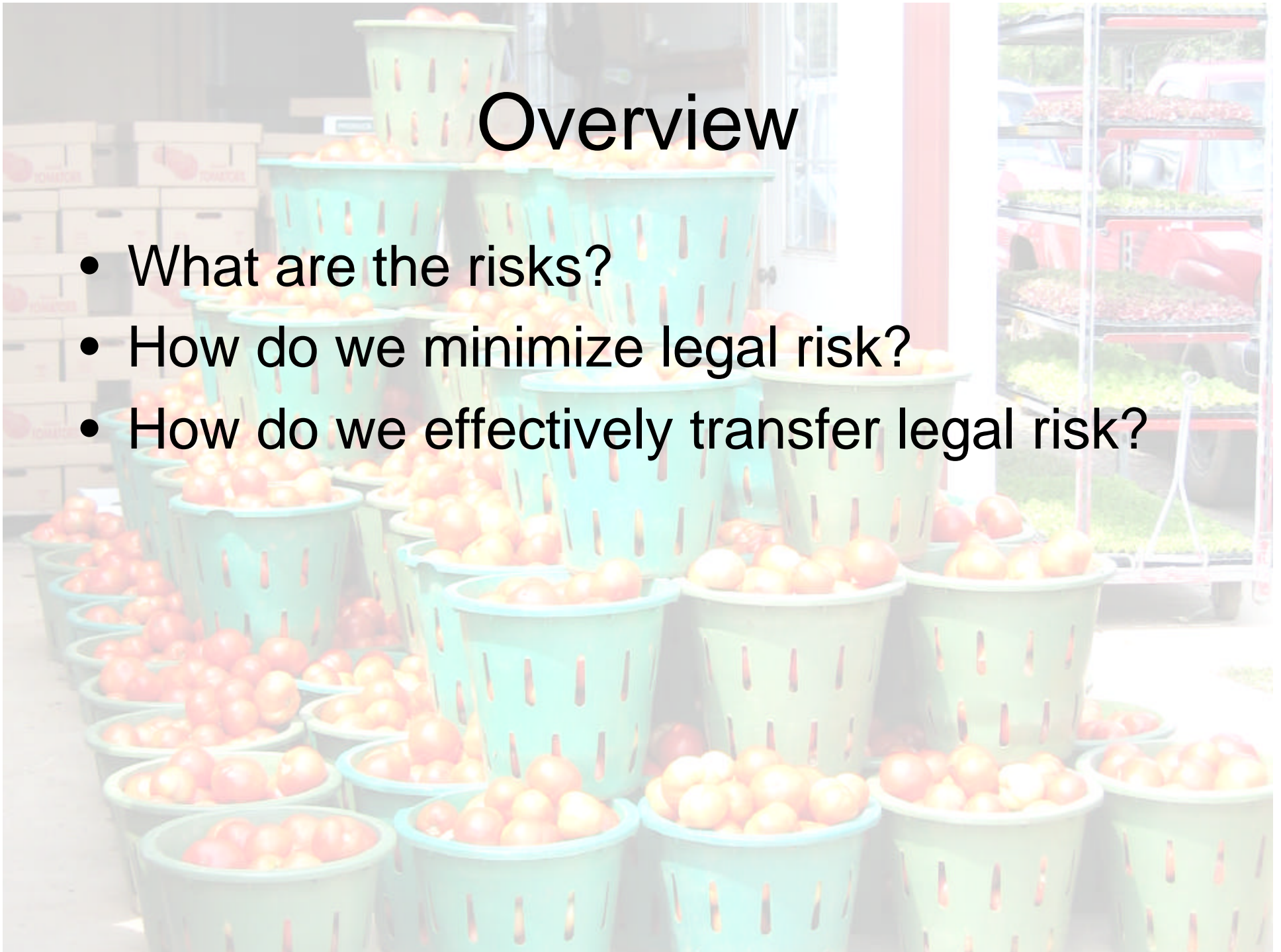


Legal Risk for Fruit and Vegetable Farmers

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Overview

- What are the risks?
- How do we minimize legal risk?
- How do we effectively transfer legal risk?



Approaches to Risk Generally

- Avoid the risk- if activity is too dangerous, don't do it
- Minimize the risk- take safety precautions
- Transfer the risk- insurance
- Accept the risk- self insure or just accept; rarely occurs with minimizing
- This presentation focuses on minimizing and transferring legal risk

Legal Risk Generally

- **Contracts-** oral or written
- **Civil Liability-** private wrongs not involving contracts
- **Criminal Liability-** involve criminal penalties like jail time or fines
- **Environmental Liability-** manure spills, etc.
- **Employee liability-** wrongful discharge, workers' compensation, etc.

Civil Liability

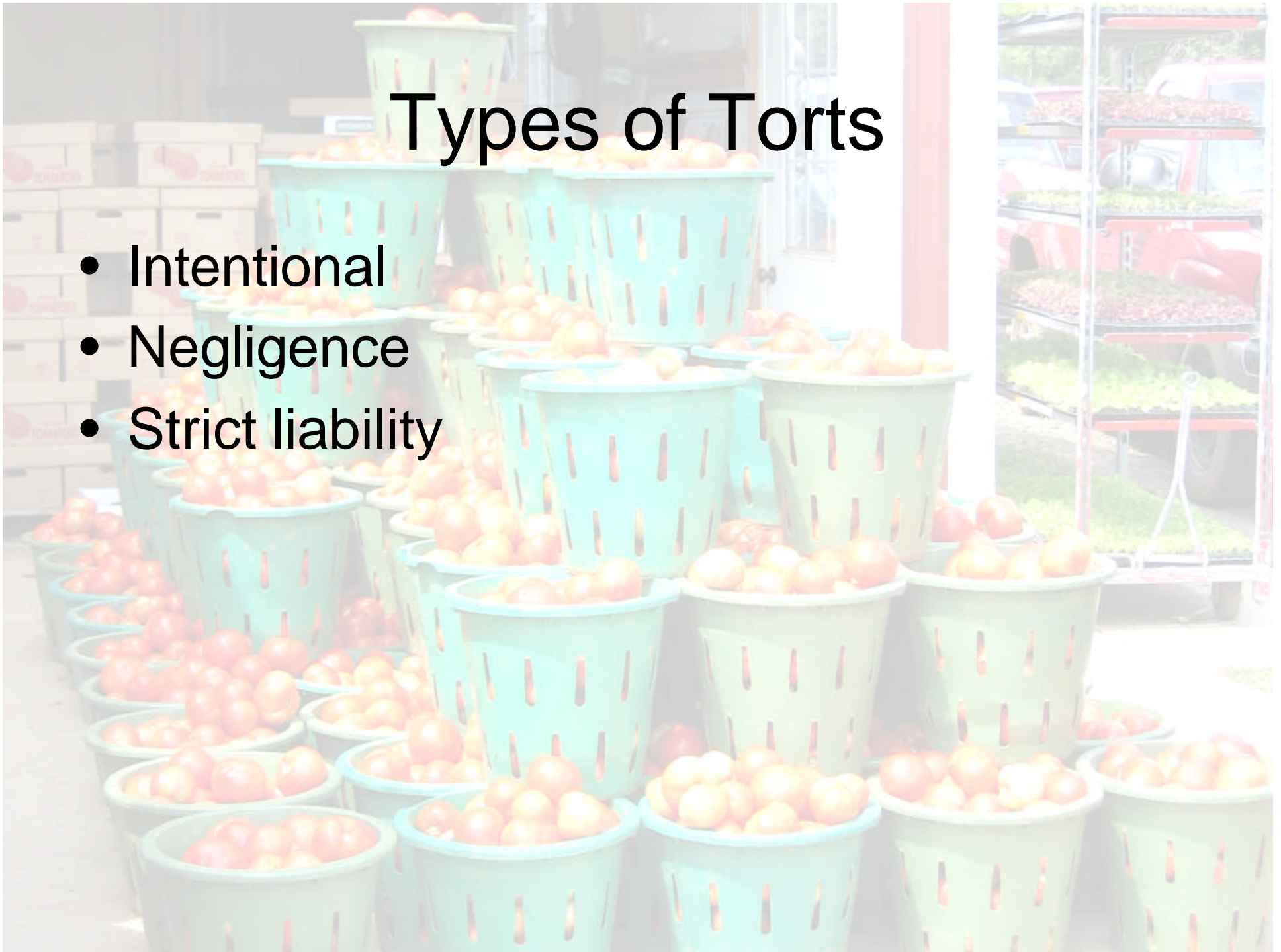
- This presentation focuses on civil liability
- “Torts”: a Latin term referring to a non-contractual private (as opposed to criminal which is public) wrong
- Example of a tort: automobile accident

Anatomy of a lawsuit

- To win a lawsuit, one must have four elements: duty, breach causation damages
- However, even if case has no merit, if you are sued you must defend the case
- Attorneys fees for simple cases may easily amount to \$10,000
- Difficult cases can cost hundreds of thousands of dollars in attorneys' fees
- Could your operation survive these fees?

Types of Torts

- Intentional
- Negligence
- Strict liability

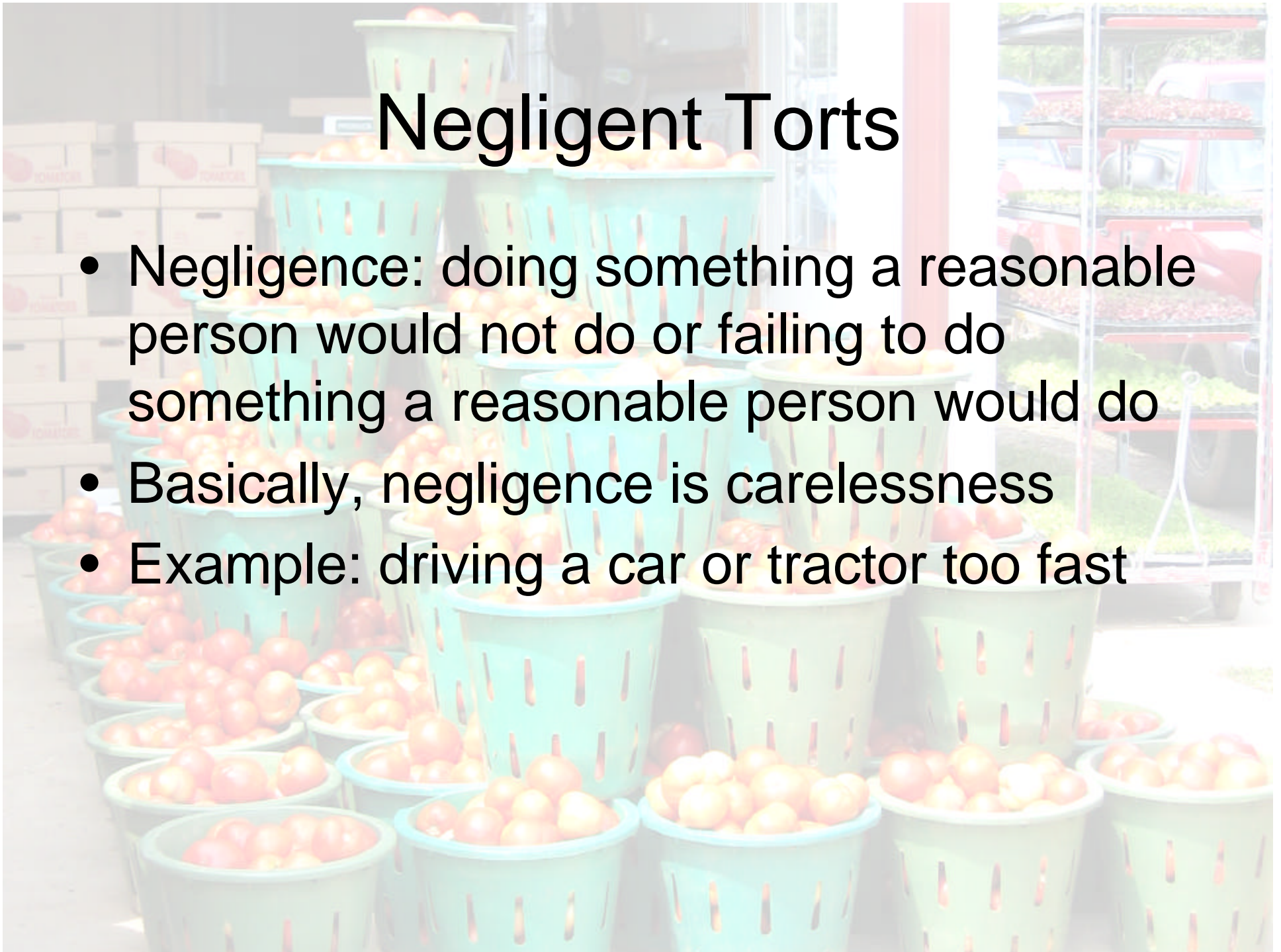


Intentional Torts

- You intended to do what you did
- Example: tearing down a fence
- If your intentional actions of, for example, running your farm, unreasonably interfere with the use of your neighbors' property you could be liable for nuisance- an intentional tort in this example

Negligent Torts

- Negligence: doing something a reasonable person would not do or failing to do something a reasonable person would do
- Basically, negligence is carelessness
- Example: driving a car or tractor too fast



Strict Liability Torts



- The law considers some activities so dangerous that it imposes liability without fault (i.e., you can be very careful, but if something happens, you are still liable)
- Strict liability torts differ from state to state, but commonly include products liability (discussed later), aerial application of pesticides and blasting

Potential Liability



- Persons on your property (with or without permission)
- Employees
- Persons injured due to acts of you or employees

Liability as a Landowner

- Duty to someone on your property depends on type of person
- Three classifications: trespasser, licensee and invitee
- Special category: children



Definitions of Different Persons

Trespasser: one who goes upon the legal premises of another without any legal right to do so and w/o invitation, authority or consent

Licensee: one who enters the premises of another for his own convenience, benefit, or pleasure, w/the knowledge and express or implied consent of the occupant

Invitee: one who visits the premises lawfully at the express or implied invitation of the occupant, other than for a social purpose or for her own convenience

Duty to Invitee

- Invitee includes customers- by operating business you “invite” them onto your property
- *Invitee* has right to assume that the premises are reasonably safe for his visit, unless the invitee knows or should know of an unsafe condition or invitee exceeds the scope of her invitation
- Invitee is trespasser if he exceeds the scope of invitation

Duty to Licensee

- Licensee includes a social guest; duty is somewhat less
- Duty to use ordinary care to make condition safe or duty to warn of unsafe conditions if:
 - knows or should know of an unsafe condition;
 - knows or should know that it involves an unreasonable risk of harm to licensee;
 - knows or should know that a licensee will not discover or realize the unsafe condition; and,
 - a licensee does not know or have reason to know of the unsafe condition and the risk involved

Duty to a trespasser

- Trespasser is someone on the property without permission or who has been prohibited from coming on to the property
- Duty to not willfully or wantonly cause injury (spring gun not allowed)
- Duty to warn or protect the trespasser if you know or should know of a danger not open or obvious to the trespasser (mean dog or bull)

Duty to Children

- “Attractive nuisance” doctrine
- Common attractive nuisances are ponds and tractors
- Does not matter whether child’s parent was careless or not



Duty to Children (Cont'd)

- If you:
 - have a dangerous object on the property, the dangerous nature of which is not obvious to children; and,
 - know or should know that the premises are easily accessible to young children; and,
 - know or should know that children are frequently on or near the premises;
- Then
 - duty to use ordinary care to protect the safety of those children from the dangerous object (even if the child is a trespasser)

Recreational Use Statutes

- Many states have laws that attempt to limit the liability of landowners if they allow people to, for example, hunt or fish on their property **WITHOUT CHARGE**
- The laws basically gives the landowner the duty towards the hunter or fisher as if they were trespassers
- Generally ineffective, as the courts are hesitant to enforce

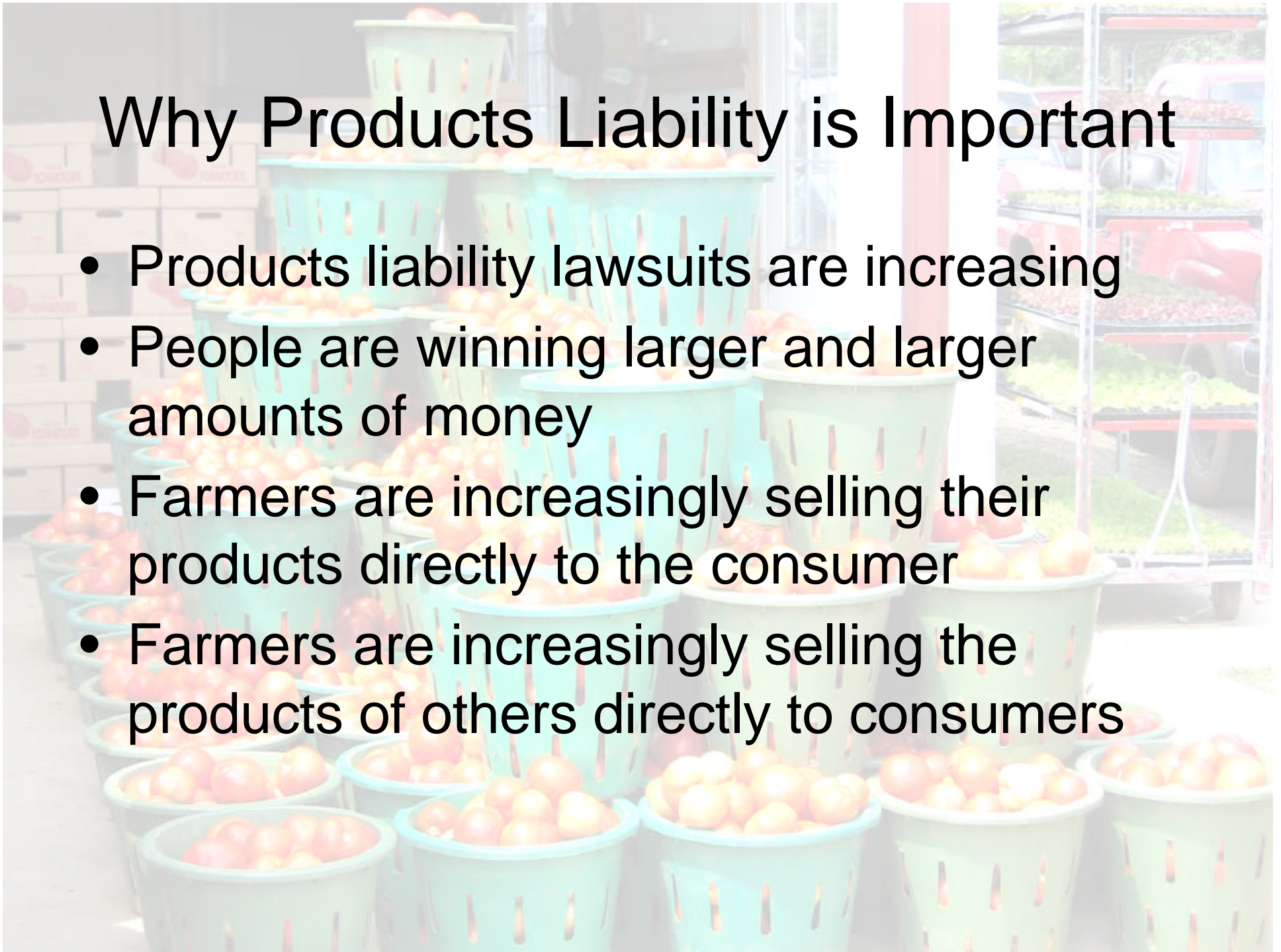
Products Liability



- If someone gets sick from eating a fruit, vegetable or product produced OR sold by you, you are potentially liable for those injuries
- Most states impose strict liability!
- Everyone in the chain is potentially liable: producer, wholesaler, retailer, etc.

Why Products Liability is Important

- Products liability lawsuits are increasing
- People are winning larger and larger amounts of money
- Farmers are increasingly selling their products directly to the consumer
- Farmers are increasingly selling the products of others directly to consumers



Minimizing Liability

- Best way to minimize legal liability is to proactively promote safety on the farm
- “An ounce of prevention is worth a pound of cure”
- Plan NOW for accidents that MAY occur later
- Don't want until an accident happens- too late!

Thirteen Steps to Minimize Liability

(1) Develop a proactive liability audit program

- periodically inspect the property for problems

- watching for problems should be part of every employee's job

(2) Use contracts- always use **WRITTEN** contracts

Steps 3 and 4 to Minimize Liability

(3) Develop a safety routine for your operation and stick to it.

- use checklists to help employees ensure that aisles are kept clear
- make safety a key word every day

(4) Use release of liability forms

- these forms are generally not legally binding, but may discourage lawsuits

Steps 5 & 6 to Minimize Liability

- (5) Use safety latches and locks to secure areas not open to the public, remove keys from tractors and other dangerous equipment, and keep dangerous items out of reach of the public.
- (6) Keep walkways, aisles, driveways, etc. clean and free clear of obstacles, snow, ice, etc.

Steps 7 & 8 to Minimize Liability

- (7) Post signs (with pictures) to warn customers of potential risks and hazards- remember some can't read English or can't read
- (8) Set up your facility specifically for your activity- if you are doing hayrides, layout the area to make it safe for hayrides

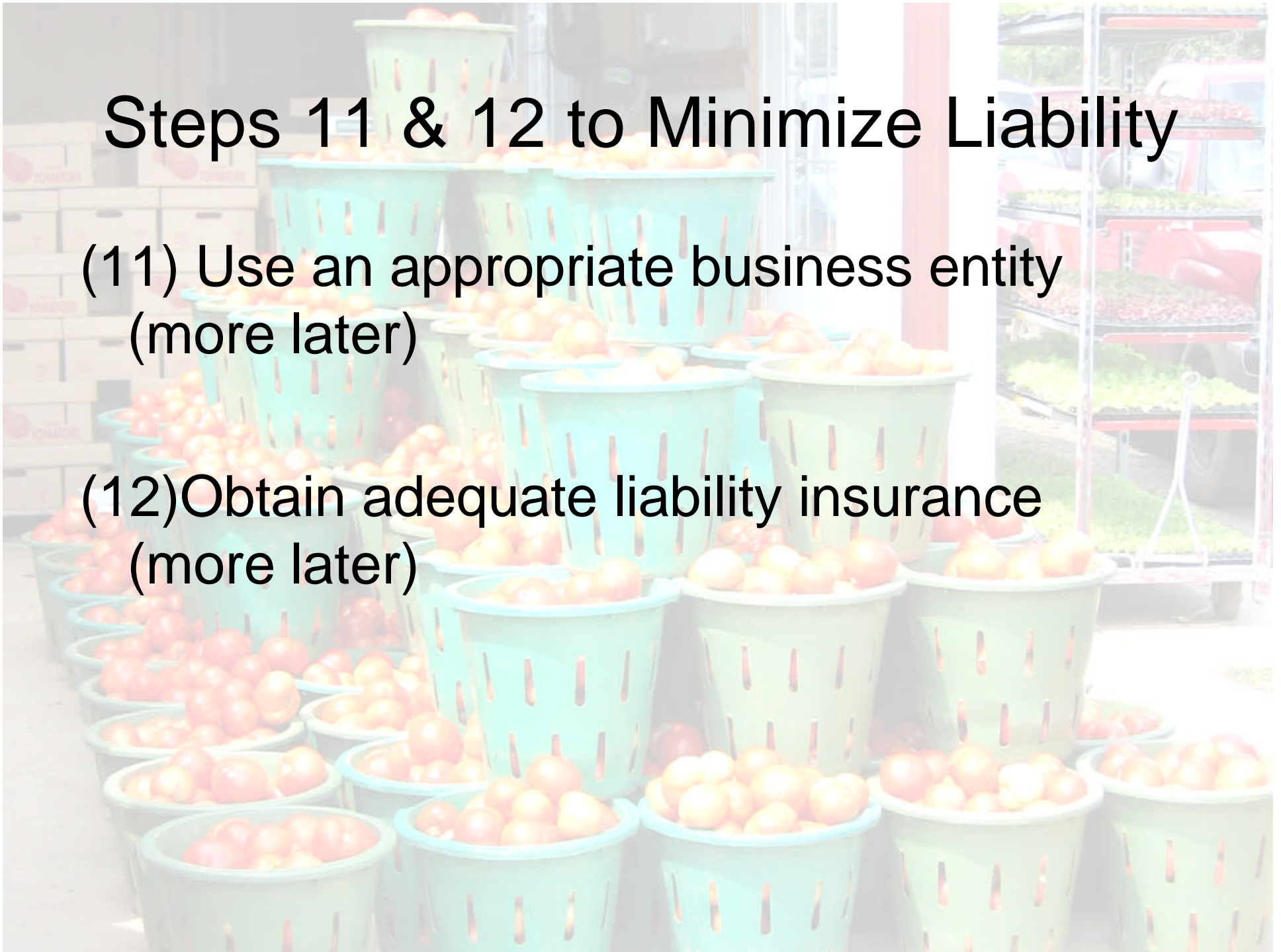
Steps 9 & 10 to Minimize Liability

- (9) Use equipment appropriate to your activity- if you are doing hayrides, have a wagon that has rails, etc. and use an appropriate tractor to pull the wagon
- (10) Minimize or eliminate contact between animals and customers- not only may animals bite or kick, but contact may spread disease from the animal to food, etc.

Steps 11 & 12 to Minimize Liability

(11) Use an appropriate business entity
(more later)

(12) Obtain adequate liability insurance
(more later)



Step 13 to Minimize Liability

(13) When an accident occurs, be kind and attentive to the injured person, but never say that you are sorry.

- Saying “I’m sorry” admits that you were negligent.
- Employees should be prepared for an accident and know what to do.
- should you pay the injured person’s medical bills? Could be an admission, but could prevent a lawsuit.

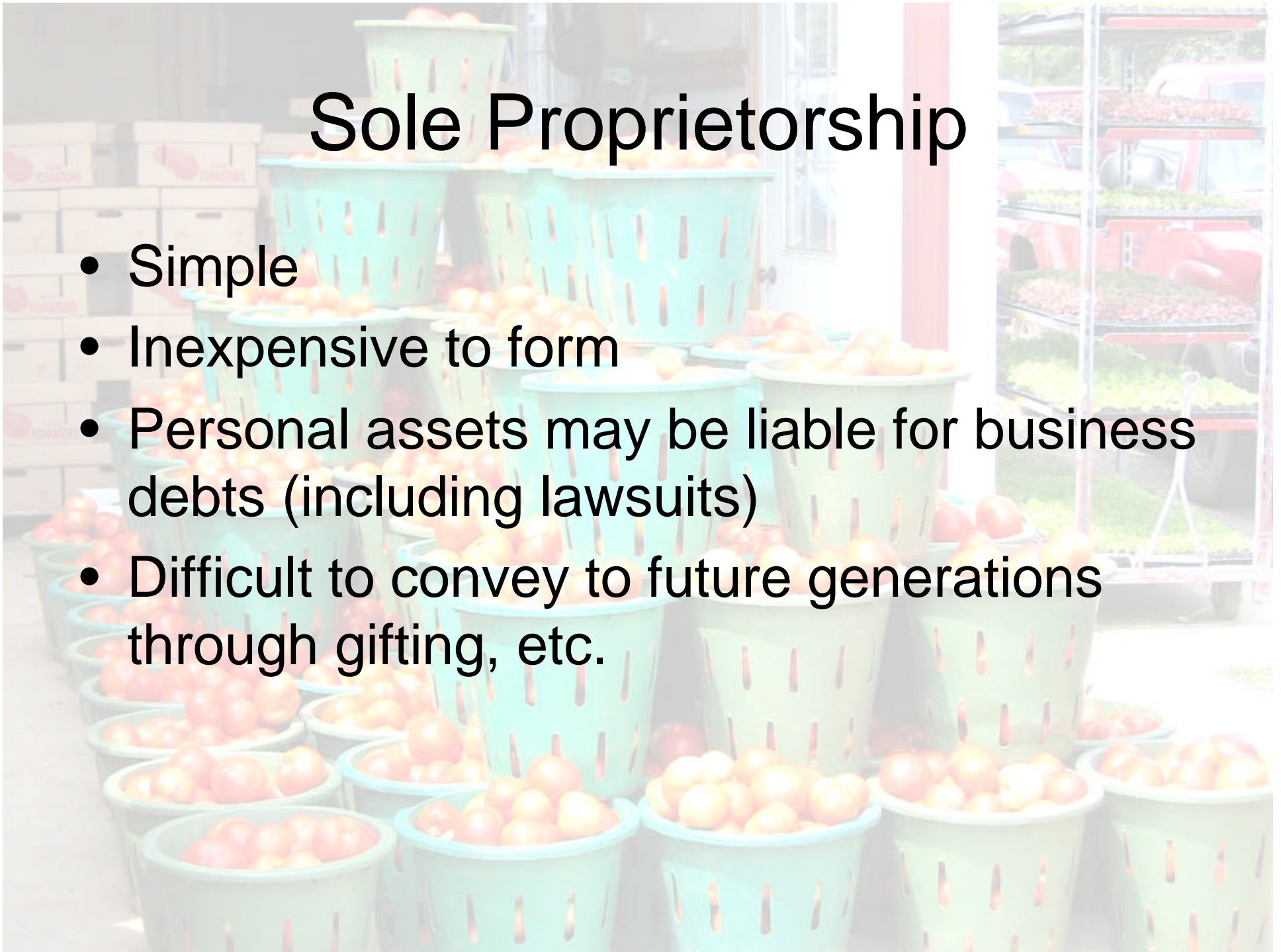
Choice of Business Entity- Introduction

- Sole Proprietorship
- Partnerships
 - General Partnerships
 - Limited Partnerships
 - Limited Liability Partnerships
- Corporations
 - Sub Chapter-C corporation
 - Sub Chapter-S corporation
- Limited Liability Companies
- Cooperatives



Sole Proprietorship

- Simple
- Inexpensive to form
- Personal assets may be liable for business debts (including lawsuits)
- Difficult to convey to future generations through gifting, etc.

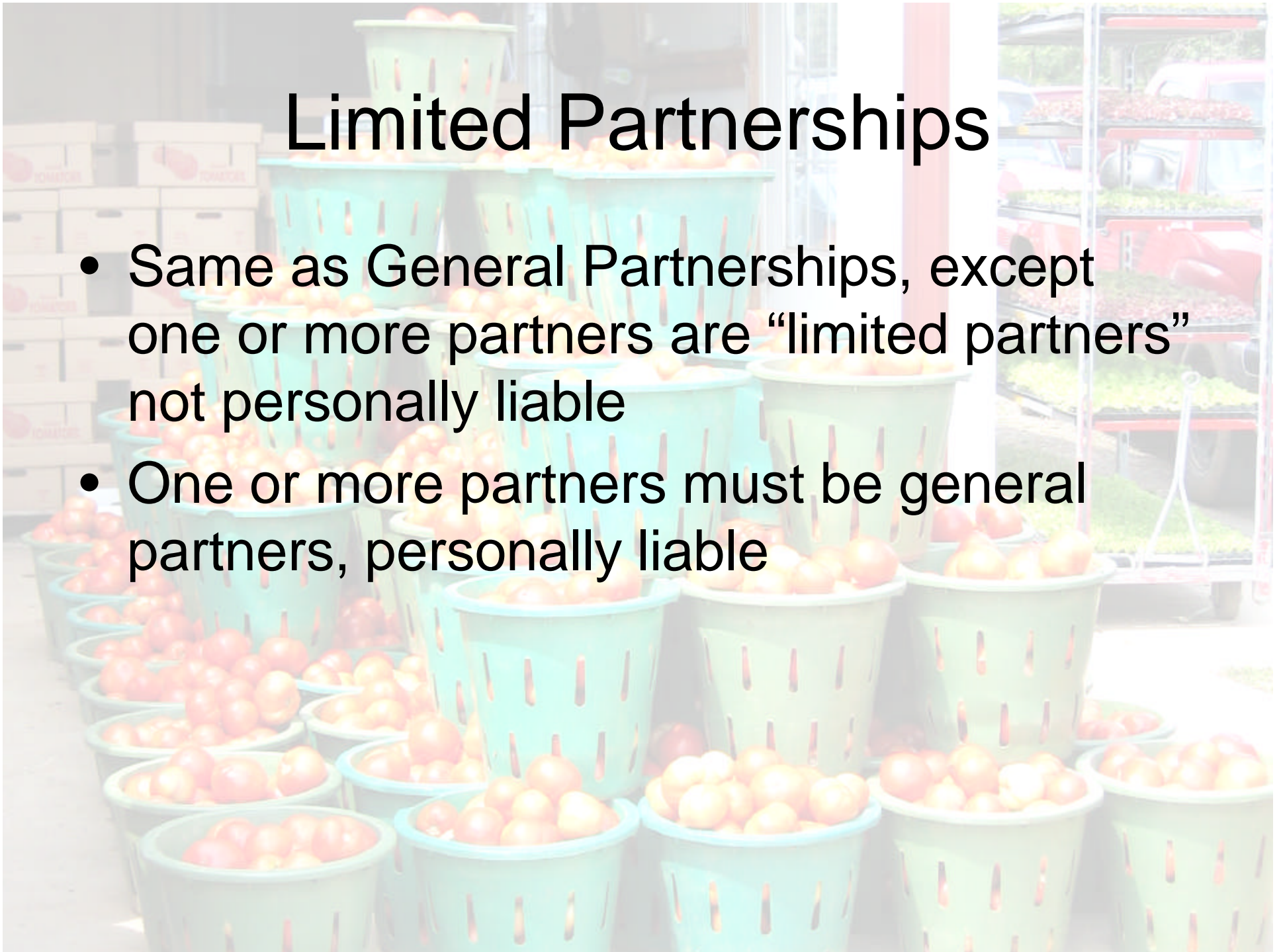


General Partnerships

- Relatively simple
- Relatively inexpensive
- Taxed at only at individual level
- Each partner **PERSONALLY** liable for debts incurred or accidents of other partner (example: if partner buys expensive tractor or has accident, your personal assets can be liable!)

Limited Partnerships

- Same as General Partnerships, except one or more partners are “limited partners” not personally liable
- One or more partners must be general partners, personally liable



Sub Chapter-C Corporations

- Owners liable only to the extent of their investment- personal assets not at risk
- Some nice fringe benefit options- fully deductible health insurance, pension plans, etc.
- Double tax on earnings- taxed at corporate level and then at individual level when distributed to owners
- Do NOT own land in a Sub Chapter-C corporation! Double tax!

Sub Chapter-S Corporations

- Designed to avoid the double tax problem of Sub Chapter-C corporations
- Same liability protections
- Limits on numbers of shareholders, etc.
- However, a glitch in the rules means you may pay double tax on appreciated land in the corporation
- Do NOT own land in a Sub Chapter-S corporation!

Limited Liability Companies

- A corpnership or partneration- cross between partnership and corporation
- No double tax, but liability protection for owners
- Fringe benefits are becoming very similar to corporations

Cooperatives

A photograph of a market stall with many baskets of tomatoes. The baskets are arranged in rows, and the tomatoes are bright red. In the background, there are stacks of cardboard boxes and a red truck parked outside.

- Customers share profits- like Southern States
- Some farmers are forming cooperatives to buy feed in bulk, etc. or to market their products
- Complex and rarely used but may fit particular circumstances

Choice of Business Entity- How to Choose

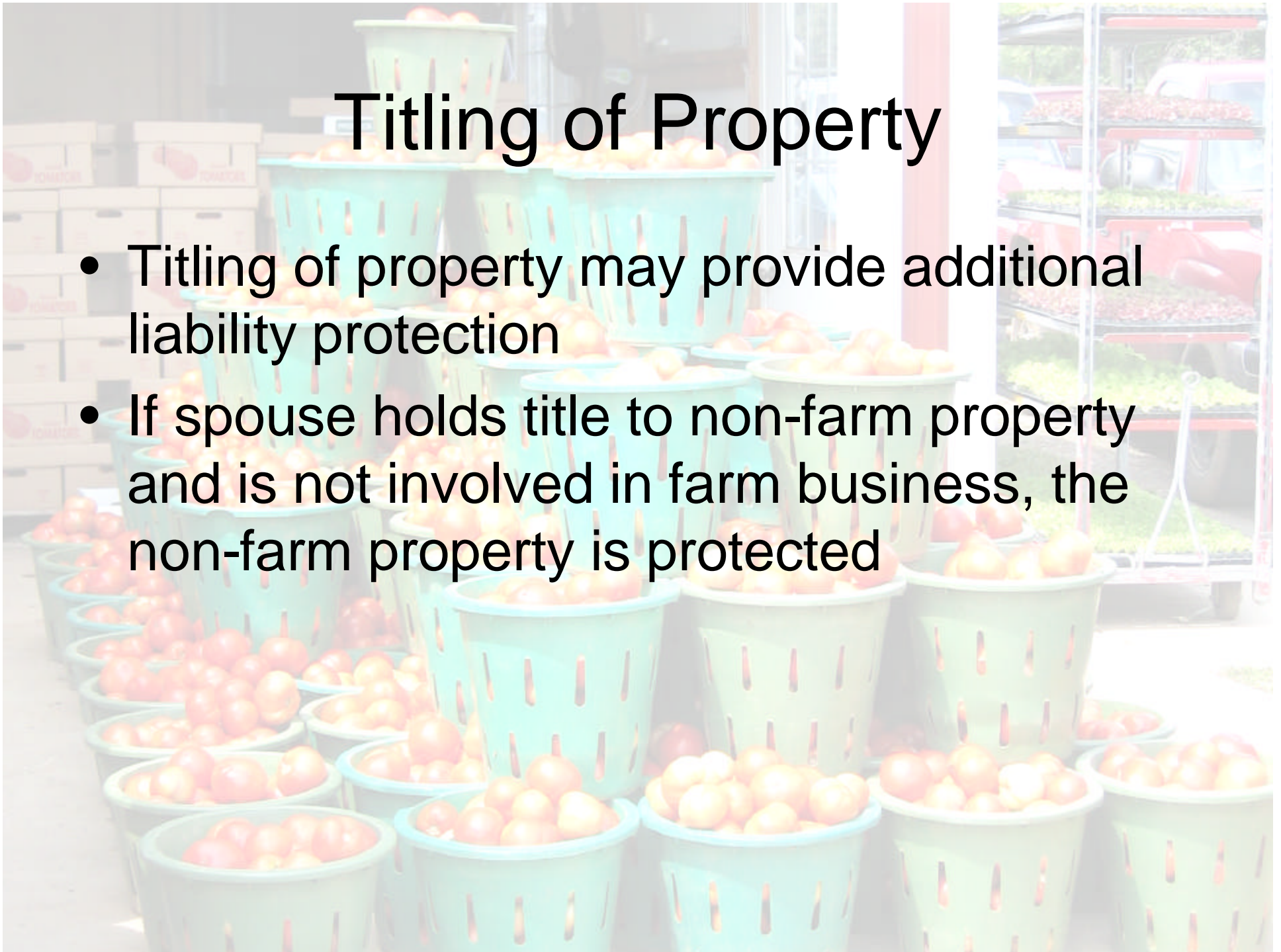
- Choice of business entity or entities depends upon tax consequences, fringe benefits and liability protection
- Liability protection provides only so much however. If land (primary asset for many) is in the entity, it is subject to liability claims
- For most, tax and fringe benefits will dictate choice

Choice of Business Entity- Multiple Entities

- Consider using multiple entities
- For example, limited liability company could hold land and lease to Subchapter C corporation who operates business
- Off farm heirs could have interest in LLC but not corporation, which is held solely by on farm heirs
- Provides some additional liability protection

Titling of Property

- Titling of property may provide additional liability protection
- If spouse holds title to non-farm property and is not involved in farm business, the non-farm property is protected



Leasing

- Leasing may add additional liability protection
- Leased land can add to cash flow, but is normally not subject to liability claims
- However, be careful when drafting leases
- Always have a written lease
- Consult an attorney

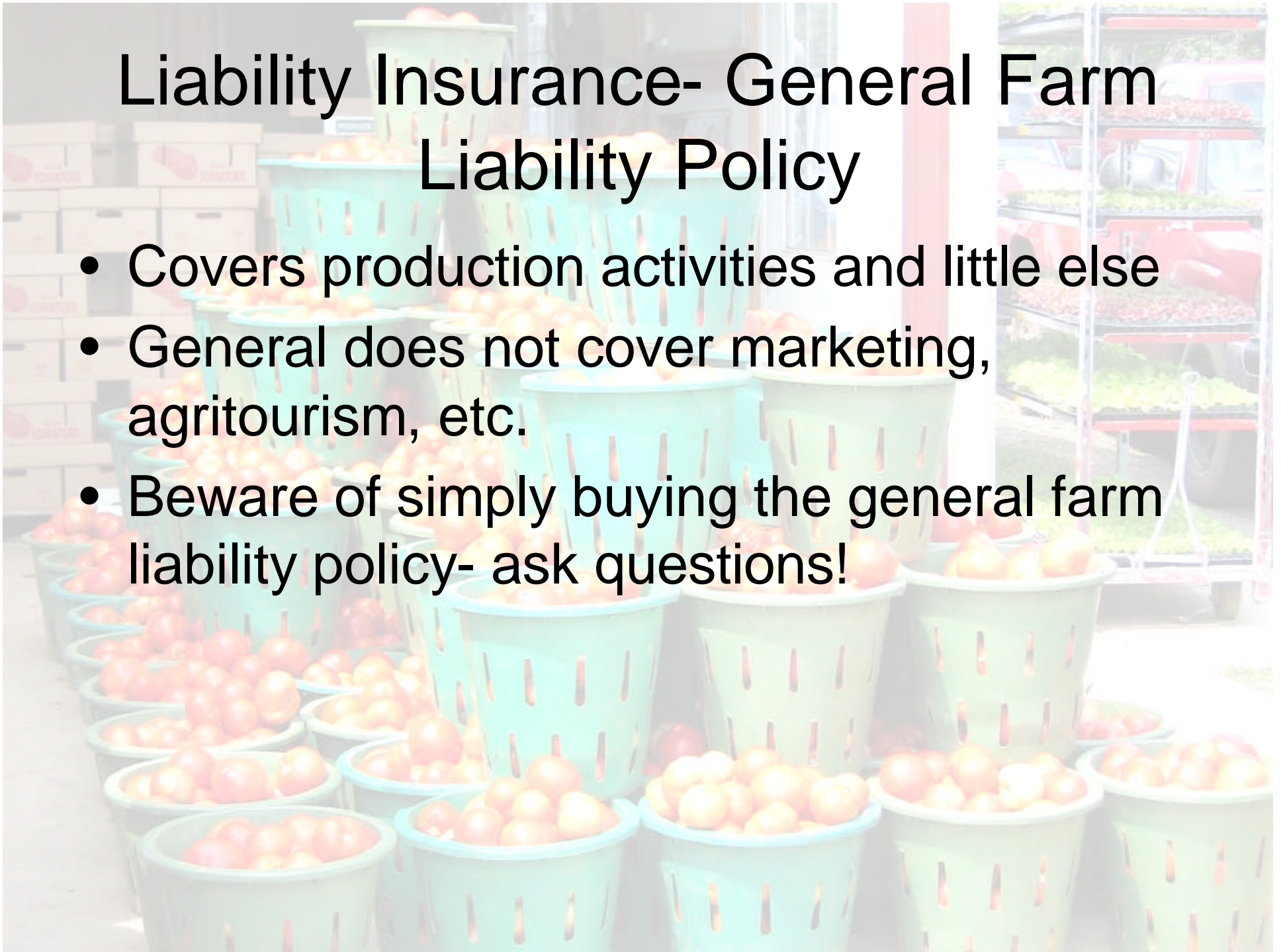
Liability Insurance

The background of the slide is a photograph of a grocery store's produce section. In the foreground, there are several rows of light green plastic baskets filled with ripe, red and yellow tomatoes. In the background, a red shopping cart is visible, and there are more produce displays and cardboard boxes stacked on the left side.

- Liability insurance is KEY for liability protection
- Transfers liability for covered risks to insurance company
- Pays attorneys' fees and other costs of defending the lawsuit, which could easily amount to tens or hundreds of thousands of dollars

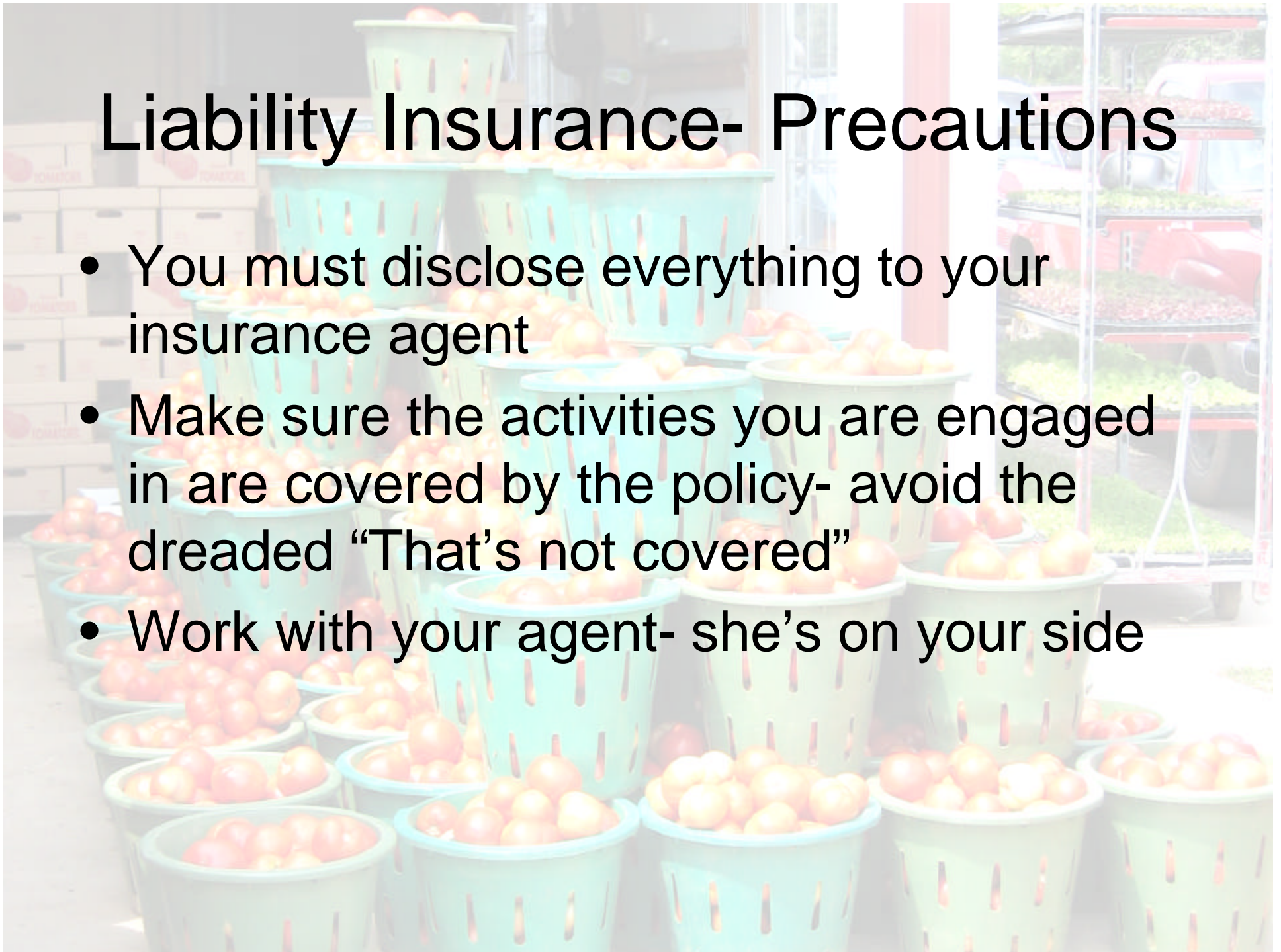
Liability Insurance- General Farm Liability Policy

- Covers production activities and little else
- General does not cover marketing, agritourism, etc.
- Beware of simply buying the general farm liability policy- ask questions!



Liability Insurance- Precautions

- You must disclose everything to your insurance agent
- Make sure the activities you are engaged in are covered by the policy- avoid the dreaded “That’s not covered”
- Work with your agent- she’s on your side



Liability Insurance- Coverage

- What the large print giveth, the small print taketh away
- How much is enough? Compare cost of different levels of coverage
- One million dollars in coverage is probably the minimum comfortable level

Liability Insurance- Special concerns for Fruit and Vegetable Growers

- If you have a farm market or sell to consumers, make sure those activities are covered
- You may also wish to get products liability coverage
- If you conduct special activities like hay rides on the property, you need additional coverage

Public Relations and Legal Liability

- Good public relations can minimize liability
- Assemble your team NOW- attorney, cooperative extension agent, financial planner, insurance agent, etc.
- Plan for accidents- what will you do?
- Be proactive- don't wait until the accident happens
- Be the person with the white hat on

Conclusions

- The best way to minimize legal liability is proactively making safety part of your everyday operation
- Purchase liability insurance
- Planning is a key- business entity, titling of property, etc.
- Do it today!