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The Sports Chamber: Exculpatory Agreements Under Pressure

Mario R. Arango

William R. Trueba Jr.

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UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

ARTICLES

THE SPORTS CHAMBER: EXCULPATORY AGREEMENTS UNDER PRESSURE

MARIO R. ARANGO AND WILLIAM R. TRUEBA, JR.

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I. INTRODUCTION

"We are a nation of adventurers."¹ Since this country's inception, Americans have been characterized as rugged, adventurous, extremely competitive, and fiercely independent. These characteristics have led us to the exploration of the polar ice caps, the oceans depths, and several moon landings. We work hard and we play hard. We value our leisure time and place great emphasis on recreational pursuits. As a nation, we are involved in a variety of recreational activities ranging from camping, hunting, horseback riding, football, and skiing to scuba diving, sky-diving, hang-gliding, whitewater rafting, racing, mountaineering, and bungee jumping.

The individual desire to participate in a wide gamut of recreational activities has led to the establishment of businesses that cater to these particular interests, many of which require specific instruction and involve various degrees of risk. The increasing popularity of various sports creates the risk of increased litigation resulting from injuries that have occurred from individual participation in these sports. This litigation directly affects the industry operators that cater to these activities and brings up two questions. First, how are they to protect themselves from liability? Second, how can we, as a society, ensure that a proper standard of care is exercised?

In order to protect their interests, these industries have responded by implementing exculpatory agreements, including "release of liability," "assumption of the risk," "statement of understanding" and "consent not to sue" agreements. They are used in virtually every sport. Americans are under the false impression that the requirement of signing such forms is just a

1. Leslie Hastings, *Playing with Liability: The Risk Release in High Risk Sports*, 24 CAL. W. L. REV. 127, 127 (1988).

futile exercise by the provider to instill fear in the participant;² that these forms are invalid in the eyes of the law, and that the participants' rights remain intact after signing a release. However, in the context of recreational activities, many jurisdictions are upholding the validity of these exculpatory agreements. This article examines the courts' reasoning in various decisions involving exculpatory agreements. It also explores the consequences of these decisions, including which party undertakes the risk, which party bears the costs and whether the costs associated with the risks outweigh the individual's right to participate freely in the activity of their choice. Finally, the article proposes that if modern society values the right of its citizens to freely and voluntarily participate in recreational activities of their choosing, then it must assume responsibility for the economic consequences that are likely to result from such a right.

II. BACKGROUND OF EXCULPATORY AGREEMENTS

A. *Contract Versus Tort*

"[Exculpatory agreements] stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts."³ The dilemma places an individual's personal freedom to enter into a voluntary agreement (contract) against strong policy considerations that protect that individual from unreasonable risks (tort). Contract obligations are created to enforce promises of present and future intentions as opposed to tort obligations which are imposed by law on policy considerations to avoid some kind of loss to others.⁴

It has often been assumed that as between parties to a contract or bargaining transaction, tort as well as contract obligations can be disclaimed if this is clearly and unmistakably done so that the intent of both parties is clearly manifested . . . But since tort obligations are based on policy considerations apart from manifest intent, the extent to which such obligations can be impaired by contract depends a great deal on the relationship between the parties, the nature of the

2. Sometimes, these forms are viewed as a means of showing legal superiority over the person signing.

3. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472, 474 (D. Colo. 1992) (citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989)).

4. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 92, at 656 (5th ed. 1984).

bargaining transaction, and the type of loss for which liability is disclaimed.⁵

1. The Relationship of the Parties & the Nature of the Bargaining Transaction

In the context of recreational activities, the relationship of the parties and the nature of the bargaining transaction both lead to the conclusion that tort obligations can be disclaimed. In this arena, a relationship is created when an individual voluntarily chooses to participate in an activity that may be beneficial, but not essential. Usually, the provider - the party with the superior bargaining strength - makes the participant's involvement dependent upon the execution of an exculpatory agreement. This provides the participant only one option: go elsewhere if the contract is not satisfactory. Several jurisdictions have held that although these types of contracts are contracts of adhesion, they are enforceable subject to two limitations: (1) the contract or provisions fall within the reasonable expectations of the party with the inferior bargaining power and (2) the contract is not unduly oppressive or unconscionable.⁶

a. Reasonable Expectations

A participant in a recreational activity is made aware of the risks involved and the rights being waived when signing the contract.⁷ Consequently, the courts look to the terms of the waiver of liability or assumption of the risk to determine whether the provisions fall within the participant's expectations. In *Anderson v. Eby*,⁸ a case involving a snow-mobile, the court held that the "[p]laintiff's claim that her inexperience with snowmobiles prevented her from fully understanding the implications of the waiver is not relevant to [the] inquiry. Rather, we look only to the terms of the waiver itself."⁹ The court determined that "[i]t would be difficult to draft a more plain statement of a waiver" as the one used by the defendant provider.¹⁰ In *Wheelock v. Sport Kites*,

5. *Id.*

6. *Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1736 (Cal. Ct. App. 1993); *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 735 (D. Haw. 1993).

7. As discussed more fully below, many jurisdictions have barred defendants from the defense of exculpatory clauses where the clauses have been vague, inconspicuous, boiler plate, difficult to comprehend, or in small size lettering.

8. 998 F.2d 858 (10th Cir. 1993).

9. *Id.* at 862.

10. *Id.*

Inc.,¹¹ a paragliding case, the participant expressly and voluntarily assumed the risk of death or injury that may result from his participating in the activity.¹² The wife of the decedent brought the suit claiming that "while injury or death caused by treacherous winds, improper landings, or collision with an obstacle are 'apparent' risks, the risk which befell [the decedent] - the simultaneous breaking of all lines connecting him to the parachute - was not apparent."¹³ The court held in relevant part that:

The risk which befell [the decedent] was the risk of death. [The decedent] expressly assumed this risk. Plaintiff could characterize it in many different ways, but the fact is that [the decedent] assumed the risk of death. Moreover, the apparent cause of [his] fall and subsequent death - equipment failure - is an obvious risk in paragliding and other "air" sports.¹⁴

b. Unconscionability and Oppressiveness

Unconscionability and oppressiveness of the contract are the second factors which the courts look to in determining whether an adhesion contract is enforceable.

[U]nconscionability has both a procedural and a substantive element. The procedural element focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position. Substantive unconscionability inquires into whether the one-sidedness of an agreement is objectively justified. This component is tied to procedural unconscionability and requires a balancing test, such that "the greater the unfair surprise or inequality of bargaining power, the less reasonable the risk of reallocation which will be tolerated."¹⁵

Westlye v. Look Sports, Inc.,¹⁶ a 1993 California appellate court case, addressed the question of unconscionability where a skier

11. 839 F. Supp. 730 (D. Haw. 1993).

12. *Wheelock v. Sport Kites, Inc.*, 839 F.Supp. 730, 735-36 (D. Haw. 1993).

13. *Id.* at 735.

14. *Id.* at 736.

15. *Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1736 (Cal. Ct. App. 1993) (citing *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 613-614 (Cal. Ct. App. 1988)) (citations omitted).

16. 17 Cal. App. 4th 1715 (Cal. Ct. App. 1993).

signed a release agreeing to accept his equipment "as is" and assuming the risks associated with its use.¹⁷ The court determined that the agreement signed by the skier was not unconscionable because there were no facts that, when applied to the foregoing rules, would make the agreement unenforceable.¹⁸

The concept that "[t]he bargaining between the parties must be 'free and open'"¹⁹ has prompted courts to hold that exculpatory agreements, within the context of recreational activities, are not adhesion contracts.²⁰ For example, "Colorado defines an adhesion contract as 'generally not bargained for, but imposed on the public for a necessary service on a take it or leave it basis.'"²¹ However, although the provider may require acceptance of the agreement on a "take it or leave it basis" (many times as a prerequisite to insurance coverage), the agreement is not necessarily considered an adhesion contract. Colorado requires "a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation, or that [the] services could not be obtained elsewhere."²² Consideration of relative bargaining strength requires that the activity be deemed essential to the public. In *Banfield v. Louis*,²³ a Florida case in which a cyclist was injured while participating in a multi-city triathlon, the court held that:

The service provided herein can hardly be termed essential. It is a leisure time activity put on for people who desire to enter such an event. People are not compelled to enter the event but are merely invited to take part. If they desire to take part, they are required to sign the entry and release form. *The relative bargaining strengths of the parties does*

17. *Id.* at 1723.

18. *Id.* at 1737.

19. *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 96 (Ind. Ct. App. 1994).

20. *Banfield v. Louis*, 589 So.2d 441, 445 (Fla. Dist. Ct. App. 1991); *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472, 474-75 (D. Colo. 1992).

21. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472, 475 (D. Colo. 1992) (citing *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981)). The *Jones* court "held that the agreement was not an adhesion contract and that the party seeking exculpation did not possess a decisive bargaining advantage 'because the service provided . . . was not an essential service.'" *Jones*, 623 P.2d at 377-78 (citation omitted).

22. *Bauer*, 788 F. Supp. at 475 (quoting *Clinic Masters v. District Court*, 556 P.2d 473 (1976)). *But see Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1737 (Cal. Ct. App. 1993), where an injured skier sued the ski shop which had rented him the equipment. On appeal the skier claimed that "it was impossible for any skier in the United States to . . . rent bindings from a ski shop . . . without being required to sign an attempted disclaimer form." *Id.* The court did not address his contention, claiming that it was not raised at trial. *Id.*

23. 589 So.2d 441 (Fla. Dist. Ct. App. 1991).

not come into play absent a compelling public interest in the transaction.

The transaction raises a voluntary relationship between the parties . . . These are not the conditions from which contracts of adhesion arise.²⁴

B. Commonly Used Exculpatory Agreements

Exculpatory agreements are commonly referred to as a release. "A release is a contract in which one party agrees to abandon or relinquish a claim, obligation or cause of action against another party."²⁵ To date, at least thirty-six states have produced decisions upholding the validity of exculpatory agreements in a wide range of sporting activities.²⁶ The two most com-

24. *Banfield*, 589 So.2d at 444-45 (quoting *Okura v. United States Cycling Federation*, 186 Cal. App. 3d 1462, 1468 (Cal. Ct. App. 1986)).

25. *Boyce v. West*, 862 P.2d 592, 595 (Wash. Ct. App. 1993).

26. See *Barnes v. Birmingham Int'l Raceway, Inc.* 551 So. 2d 929 (Ala. 1989); *Witt v. Watkins*, 579 P.2d 1065 (Alaska 1978); *Frensey v. National Fire Ins. Co. of Hartford*, 856 F.2d 199 (8th Cir. 1988)(Arkansas); *Madison & Y.M.C.A. v. Superior Ct.*, 250 Cal. Rptr. 299 (Cal. Ct. App. 1988); *Hanover Ins. Co. v. American Dist. Telegraph Co.*, 1991 WL 269106 (Conn. Super. Ct. 1991); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989); *Theis v. J & J Racing Promotions*, 571 So. 2d 92 (Fla. Dist. Ct. App. 1990); *Bodyslimmer, Inc. v. Sanford*, 398 S.E.2d 840 (Ga. 1990); *Lee v. Sun Valley Co.*, 695 P.2d 361 (Idaho 1984); *Bien v. Fox Meadow Farms Ltd.*, 574 N.E.2d 1311 (Ill. App. Ct. 1991); *General Bargain Ctr. v. American Alarm Co.*, 430 N.E.2d 407 (Ind. Ct. App. 1982); *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746 (Iowa 1988); *Anderson v. Union Pacific R.R. Co.*, 790 P.2d 438 (Kan. 1990); *Jones v. Hnana*, 814 S.W.2d 287 (Ky. 1987); *Southwestern Sugar Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959)(Louisiana); *Boucher v. Riner*, 514 A.2d 485 (Md. 1986); *Minassian v. Ogden Suffolk Downs, Inc.*, 509 N.E.2d 1190 (Mass. 1987); *Valasquez v. Northwest Airlines, Inc.*, 757 F. Supp. 804 (E.D. Mich. 1989); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982); *Mayer v. Howard*, 370 N.W.2d 93 (Neb. 1985); *Chenauskay v. Chenauskay*, 509 A.2d 156 (N.H. 1986); *Wade v. Park View, Inc.*, 96 A.2d 450 (N.J. 1953); *Valuable Holding Corp. v. Midtown Vault Corp.*, 120 A.D.2d 356 (N.Y. 1986); *Rose v. Herring Tractor & Truck Co.*, 267 S.E.2d 717 (N.C. 1980); *Orlett v. Suburban Propane*, 561 N.E.2d 1066 (Ohio 1989) *Mann v. Wetter*, 785 P.2d 1064 (Or. 1990); *Gimpel v. Host Enterprises, Inc.*, 640 F. Supp. 972 (E.D. Pa. 1986); *Corrente v. Conforti & Eisele Co.*, 468 A.2d 920 (R.I. 1983); *Huckaby v. Confederate Motor Speedway, Inc.*, 281 S.E.2d 223 (S.C. 1981); *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854 (Tex. Ct. App. 1992); *Zollman v. Myers*, 797 F. Supp. 923 (D. Utah 1992); *Douglass v. Skiing Standards, Inc.*, 459 A.2d 97 (Vt. 1983); *Scott v. Pacifi W. Mountain Resort*, 834 P.2d 6 (Wash. 1992); *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163 (4th Cir. 1989)(West Virginia); *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 373 N.W.2d 65 (Wis. 1985); *Schutkowski v. Carey*, 725 P.2d 1057 (Wyo. 1986); See also Mark A. Hruska, Risk Management '96, Seminar at the Diving Equipment & Marketing Association Trade Show (Jan. 19, 1996) [hereinafter DEMA]; William Turbeville, II, Product Liability Problems (And Solutions) For Dive Store Owners, DEMA (Jan. 20, 1996).

monly used releases are the waiver of liability and the express assumption of risk.

1. Waiver of Liability

A waiver or release of liability is a written instrument in which the participant agrees not to hold the provider liable for any injuries or damages resulting from the provider's negligence.²⁷ The release need not be perfect,²⁸ but it must "constitute[] a clear and unequivocal waiver with specific reference to a [provider's] negligence [to] be sufficient . . . [It] must be clear, unambiguous and explicit in expressing the intent of the parties."²⁹ Moreover, "the law imposes no requirement that [the participant] have had a specific knowledge of the particular risk . . . ' Not every possible specific act of negligence by the [provider] must be spelled out in the agreement or discussed by the parties."³⁰

2. Assumption of Risk

The California appellate court has defined an express assumption of the risk as one "when the [participant], in advance, expressly consents ' . . . to relieve the [provider] of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the [provider] is to do or leave undone. . . . The result is that . . . being under no duty, [the provider] cannot be charged with negligence."³¹ In other words, the result is identical to the waiver of liability because the assumption of risk agreement exculpates by shifting the duty from the provider to the participant. Thus there can be no negligence where there is no duty.³² Although assumption of the risk releases presuppose that the participant assumes only known risks, other courts have held that not all risks must be known when the plaintiff elects to assume *all* risks. "[K]nowledge of a particular risk is

27. BLACK'S LAW DICTIONARY 1289 (6th ed. 1990).

28. *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 755 (Cal. Ct. App. 1993) (quoting *National & Int'l Bhd. of St. Racers, Inc. v. Superior Court*, 215 Cal. App. 3d 934, 938 (Cal. Ct. App. 1989)).

29. *Id.* at 755 (quoting *Madison v. Superior Court*, 203 Cal. App. 3d 589, 597-98 (Cal. Ct. App. 1988)). See also KEETON ET AL., *supra* note 4, § 68, at 484.

30. *Paralift, Inc.*, 23 Cal. App. 4th at 757 (quoting *Madison*, 203 Cal. App. 3d at 601 (Cal. Ct. App. 1988)) (citation omitted).

31. *Saenz v. Whitewater Voyages, Inc.*, 226 Cal. App. 3d 758, 764 (Cal. Ct. App. 1990) (internal citations omitted).

32. "Identical in result to a release of liability which exculpates for ordinary negligence if it occurs, express and primary implied assumption of risk exculpate by shifting the duty of care from the [provider] to the [participant], thus preventing negligence from occurring." *Boyce v. West*, 862 P.2d 592, 598 (Wash. Ct. App. 1993).

unnecessary when there is an express agreement to assume all risk; by express agreement a '[participant] may undertake to assume all of the risks of a particular . . . situation, *whether they are known or unknown to him.*'"³³

The concept of assumption of risk has been so fully embraced in the area of recreational activities that even where an exculpatory agreement has not been signed by co-participants in a sporting activity, such as a sandlot football game,³⁴ or where two friends go water-skiing,³⁵ the courts have recognized only a limited duty of care imposing liability "for ordinary careless conduct."³⁶ In *Knight v. Jewett*³⁷ and *Ford v. Gouin*,³⁸ both California Supreme Court cases, the court explained "that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct."³⁹ The same California court concluded that

[t]he overwhelming majority of the cases, both within and outside California, that have addressed the issue of co-participant liability in [team sports], have concluded that it is improper to hold a sports participant liable to a co-participant for ordinary careless conduct committed during the sport — for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game — and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.⁴⁰

"Additionally, imposing such liability might well deter friends from voluntarily assisting one another in such potentially risky sports."⁴¹

This concept falls within the doctrine of primary assumption of the risk. It occurs when: the [participant] voluntarily enters into some relation with the [provider], with knowl-

33. *Id.* at 598 (quoting *Madison v. Superior Court*, 203 Cal. App. 3d 589, 601 (Cal. Ct. App. 1988)(internal citations omitted)).

34. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

35. *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992).

36. *Id.* at 728 (citing *Knight*, 834 P.2d at 710).

37. 834 P.2d 696 (Cal. 1992).

38. 837 P.2d 724 (Cal. 1992).

39. 834 P.2d at 728 (citing *Knight*, 834 P.2d at 710).

40. *Knight*, 3 Cal. 4th at 318 (The court gave as an example, *Gauvin v. Clark*, 537 N.E.2d 94, 96-97 (Mass. 1989)).

41. *Ford*, 834 P.2d at 728.

edge that the [provider] will not protect him against one or more future risks that may arise from the relation. He may then be regarded as tacitly or *impliedly* consenting to the negligence, and agreeing to take his own chances.⁴²

In his concurring opinion, Justice Kennedy, in *Ford*, lends further support to the traditional approach to the concept of assumption of risk in general, and implied assumption of risk in particular, by stating in relevant part:

I adhere to the traditional approach to implied assumption of risk under which a [participant's] voluntary choice to confront a known risk will bar recovery in an action for negligence. The doctrine of assumption of risk recognizes that liberty implies responsibility and that respect for choices freely made is enhanced, not diminished, when one who voluntarily confronts a specific, known risk is precluded from shifting to another the costs of an injury that is the direct result of that choice.⁴³

C. Recreational Case Law

Exculpatory agreements have traditionally been disfavored.⁴⁴ Courts invalidated these agreements for a variety of reasons. Among these reasons are: as being against public policy, improper drafting, print size, ambiguity, and "legal-eze" language rendering the contract not understandable.⁴⁵

However, by 1988, the use and acceptance of exculpatory agreements was firmly established within the recreational sports arena. The industry learned from its prior mistakes by increasing type size and using easily understandable English instead of technical legal terms, thus removing any objection as to the clarity or ambiguity of the rights being waived. They printed pertinent clauses detailing the waiver of rights in larger boldfaced lettering drawing the participant's attention to the gravity of the waiver. In *Madison v. Superior Court*,⁴⁶ in which a nineteen year-old scuba diving student drowned while participating in defendant's training course, the court explained that "[a]s long as the release

42. KEETON ET AL., *supra* note 4, § 68, at 481.

43. *Ford*, 834 P.2d at 732.

44. *Bauer v. Aspen Highlands Skiing Corp.*, 788 F.Supp. 472, 474 (D. Colo. 1992) (citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 783 (Colo. 1989)).

45. *See Hastings*, *supra* note 1, *passim*.

46. 203 Cal. App. 3d 589 (Cal. Ct. App. 1988).

constitutes a clear and unequivocal waiver with specific reference to a [provider's] negligence, it will be sufficient."⁴⁷

Although the tide had changed, whenever these drafting deficiencies reemerged, courts quickly invalidated the agreement. As recently as 1993, a federal district court held that a release not specifically shifting responsibility from the defendant to the plaintiff cannot relieve the defendant from liability.⁴⁸ In *Ghoinis v. Deer Valley Resort Co.*,⁴⁹ the defendant ski resort operator moved for summary judgment based primarily upon a release agreement signed by the injured skier.⁵⁰ The court found that the words "as is" did not qualify as an express disclaimer of all implied warranties for the use of the ski equipment.⁵¹ Additionally, it found that the term, "as is," was not "conspicuous" as contemplated in Utah's code.⁵² Moreover, it held that the term was "slipped into paragraph 1, without any indication to the average consumer that they are words of art with distinct legal meaning."⁵³ Finally, the court held that the indemnity provision of paragraph 3 did not "provide protection to Deer Valley as it is capable of being read by a lay consumer as only obligating the renter to an indemnity obligation

47. *Id.* at 597. The court held the agreement signed by a scuba diving student valid and explained that

[i]t would be difficult to imagine language more clearly designed to put a layperson on notice of the significance and legal effect of subscribing to it. The emphasized references to the exemption and relief from "liability for personal injury, property damage or wrongful death caused by negligence" could not be more explicit.

Id. at 598. See also *Dombrowski v. City of Omer*, 502 N.W.2d 707, 710 (Mich. Ct. App. 1993), in which the court held the waiver was "written with sufficient clarity, particularly in view of the fact that it [was] captioned 'WAIVER OF LIABILITY,' to put a layman on notice that any right to bring a claim of liability for injury or damages arising out of participation in the event was being waived." *Id.*

48. *Ghoinis v. Deer Valley Resort Co.*, 839 F. Supp. 789, 793 (D. Utah 1993).

49. 839 F. Supp. 789 (D. Utah 1993).

50. *Id.* at 793. The first paragraph of the release agreement read, "I accept for use as is the equipment listed on this form, and accept full responsibility for the care of the equipment while it is in my possession." *Id.* at 792 n.2.

51. *Id.* Recall that in *Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1737 (Cal. Ct. App. 1993), the court held that the words "as is" were sufficient to exculpate the ski shop from liability for negligence.

52. *Id.* "[A]ll implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous." *Id.* at 793 n.5 (citing UTAH CODE ANN. § 70A-2a-214(3)(a) (1992)).

53. *Id.*

where a third party has been injured as a result of the use of the shop's equipment by the renter."⁵⁴

Notwithstanding the court's analysis in *Ghoinis*, the courts' focus generally shifted from an inspection of defective drafting to an analysis of public policy issues, the participant's required understanding of the inherent risks involved in the activity, and the intentions and expectations of the parties.

1. Public Policy Issues

In attempting to invalidate an exculpatory agreement, plaintiffs commonly argue that the agreement is against public interest. Courts have delineated six factors used to determine whether an exculpatory agreement violates public policy:

1. whether the agreement concerns a business of a type generally thought suitable for public regulation;
2. whether the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
3. whether the party holds themselves out as willing to perform this service for any member coming within certain established standards;
4. As a result of the essential nature of the service, in the economic setting of the transaction, whether the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the party's services;
5. In exercising a superior bargaining power, whether the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and
6. whether the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or the seller's agents.⁵⁵

54. *Id.* at 794 n.8. Paragraph 3 read, "I agree to hold harmless and indemnify the ski shop and its owners, agents and employees for any loss or damage, including any that results from claims for personal injury or property damage related to the use of this equipment, except reasonable wear and tear." *Id.* at 792 n.2.

55. *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134, 149 (Cal. Ct. App. 1991) (citing *Madison v. Superior Court*, 203 Cal. App. 3d 589, 598-99 (Cal. Ct. App. 1988) (quoting *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963))) (indented material paraphrased and listed for clarity).

In *Tunkl v. Regents of the University of California*,⁵⁶ the central issue involved the validity of a liability release a patient was required to sign prior to hospital admission.⁵⁷ The patient claimed that her injuries were a direct result of the physician's negligence.⁵⁸ The California Supreme Court held the release invalid as against public interest because the hospital was providing an essential public service that placed its users in a position of inferior bargaining strength.⁵⁹

Besides hospitalization, other courts have outlined banking transactions, escrow transactions, and activities involving common carriers as areas in which exculpatory agreements would be void as against public policy because the risks and numbers of participants involved would have a substantial impact on the public.⁶⁰ Additionally, exculpatory agreements have been overturned in areas of product liability where the agreement attempted to exempt the manufacturer of responsibility for injuries caused by defective products⁶¹ and in areas where the provider attempts to exempt himself from harm caused by his gross negligence.⁶² The First and Second District Courts of Appeal of Florida are an exception in that they have even gone as far as construing a release from liability for the provider's negligence as releasing the provider from liability for gross negligence.⁶³

56. 383 P.2d 441 (Cal. 1963).

57. *Id.* at 442.

58. *Id.*

59. *Id.*

60. *Buchan*, 227 Cal. App. 3d at 151; *Okura v. United States Cycling Fed'n*, 186 Cal. App. 3d 1462, 1467 (Cal. Ct. App. 1986).

61. *See, e.g., Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 737 (D. Haw. 1993). This concept is squarely at odds with strict liability doctrine. The doctrine of strict liability is based not only on the public policy of discouraging the marketing and distribution of defective products, but also on the reasoning that a manufacturer is in a far better position than individual consumers to insure against the risk of injury and to distribute costs among consumers. *Id.*

62. *Id.* at 736-37. In *Wheelock*, the court upheld the release, but held void as against public policy the portions which barred strict liability claims and "to the extent that it attempt[ed] to relieve defendants of liability for their gross negligence." *Id.* *See also Faulkner v. Hinckley Parachute Center, Inc.*, 533 N.E.2d 941 (Ill. App. Ct. 1989). "Generally, agreements exculpating from the results of wilful and wanton misconduct are illegal." *Id.* at 946.

63. In *Theis v. J & J Racing Promotions*, a race car driver died as a result of the gross negligence of the defendants. The court reasoned that

[t]he release and waiver signed by the decedent clearly excused [the racing promoters] from liability for acts or omissions resulting from their own negligence "or otherwise." Since the term "negligence" as used in the release is not limited, it must be construed as intended to encompass all

However, in the sports context, the courts are upholding exculpatory agreements as not against public policy focusing their analysis on both the sanctity of freedom to contract and the voluntary nature of the participant's involvement. In *Madison*, a California appellate court determined that "no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. . . ." ⁶⁴ The court went on to state that the decedent "entered into a private and voluntary transaction in which, in exchange for an enrollment in a class which he desired to take, he freely agreed to waive any claim against the defendants for a negligent act by them." ⁶⁵ The court concluded that "[t]his case involves no more a question of public interest than does motorcross racing, sky diving, or motorcycle dirt-bike riding." ⁶⁶

In *Banfield v. Louis*, ⁶⁷ a Florida case, a cyclist who was injured while participating in a triathlon event contested the validity of the waiver on the grounds that it should be declared void as against public policy. ⁶⁸ The cyclist reasoned that the waiver should be invalidated because it would encourage the sponsors to cut corners on safety and cause the sponsors to feel that they did not need to take adequate precautions to protect the participants, thus adversely affecting the public interest. ⁶⁹ The court, however, found that although the cyclist had expressed legitimate public safety concerns, "it is a matter of great public concern that

forms of negligence, simple or gross negligence, with only intentional torts not being held subject to such an exculpatory clause.

Theis v. J & J Racing Promotions, 571 So. 2d 92, 94 (Fla. Dist. Ct. App. 1990) (citing *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521 (Fla. Dist. Ct. App. 1984). *But see* *KEETON ET AL.*, *supra* note 4, § 68, at 484.

[O]n the basis either of common experience as to what is intended, or of public policy to discourage aggravated wrongs, such agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross, or to any conduct which constitutes an intentional tort.

Id.

64. *Madison v. Superior Court*, 203 Cal. App. 3d 589, 598 (Cal. Ct. App. 1988) (quoting *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446 (Cal. 1963)).

65. *Id.* at 599.

66. *Id.* (citations omitted).

67. 589 So.2d 441 (Fla. Dist. Ct. App. 1991).

68. *Id.* at 446.

69. *Id.*

freedom of contract be not lightly interfered with.”⁷⁰ It further warned:

Courts, therefore, should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, *unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris.*⁷¹

Additionally, in *Kotovsky v. Ski Liberty Operating Corp.*, a Pennsylvania case, the court upheld the validity of an exculpatory agreement signed by a downhill ski racer, barring his claim.⁷² The ski racer was seriously injured when he failed to make a turn and collided with a post situated along the side of the course.⁷³ The court explained that “[t]he releases also did not contravene public policy. They were contracts between private parties and pertained only to the parties’ private rights. They did not in any way affect the rights of the public.”⁷⁴

Similarly, an Indiana court focusing once again on the voluntary nature of the plaintiff’s involvement, upheld the release signed by a scuba diving student in *Marshall v. Blue Springs Corp.*⁷⁵ The student was injured when he slipped and fell on a dock.⁷⁶ The court explained that the plaintiff did not choose to take scuba diving lessons “for any reason other than his own enjoyment. He was under no compulsion by an outside force to do so.”⁷⁷ The court added that “[i]t is not the policy of the law to restrict business dealings or to relieve a party of his own mistakes of judgment. . . .”⁷⁸

A scuba diving student was injured as a result of a previously punctured eardrum during instruction given in a private swimming pool in *Baschuk v. Diver’s Way Scuba, Inc.*⁷⁹ The student

70. *Id.* (quoting *Bituminous Casualty Corp. v. Williams*, 17 So.2d 98, 101 (Fla. 1944)).

71. *Id.* at 446-47 (quoting *Bituminous*, 17 So.2d at 101-02) (emphasis added).

72. *Kotovsky v. Ski Liberty Operating Corp.*, 603 A.2d 663 (Pa. Super. Ct. 1992).

73. *Id.*

74. *Id.* at 665-66.

75. 641 N.E.2d 92 (Ind. Ct. App. 1994).

76. *Id.* at 94.

77. *Id.* at 96.

78. *Id.*

79. 618 N.Y.S.2d 428 (N.Y. App. Div. 1994). The plaintiff had read, filled out and signed a statement of medical history and a liability release form exempting the

claimed, among other arguments, that the liability release forms she signed at the beginning of her course should be held invalid as against public policy because a New York statute⁸⁰ forbade such agreements.⁸¹ The New York courts have held that the purpose of the statute was to prevent places of recreation from exempting themselves from liability for negligence by the paying public.⁸² Consistent with *Tunkl v. Regents of the University of California*,⁸³ the issue becomes one of public policy because pool operators hold themselves out as willing to perform the service for any member of the public who seeks to use it, and New York has determined that recreational facilities open to the public are a business thought suitable for regulation. In *Baschuk*, however, the court held that the defendant's swimming pool was used for instructional purposes, not recreational or amusement purposes, and that the instructional fee was not a use fee as contemplated by the statute, and therefore, fell outside the purview of the code.⁸⁴

In *Buchan v. United States Cycling Federation, Inc.*, a California case, a bicyclist was injured while participating in a race.⁸⁵ The court held that the activity "did not involve the public interest: defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public; . . . and defendants' customers did not place their persons under defendants' control."⁸⁶

2. Participant's Required Understanding of the Inherent Risks Involved

In addition to the public policy issues involved, a court's concern is with participants' understanding of the inherent risks involved. The focus is on the specificity of the release. The issue

defendant from all liability for personal injury to her during the course. *Id.* at 429. It was after submitting the forms that she first discussed her history of ear problems with the instructor, after which he requested she obtain a medical note from her doctor. *Id.*

80. N.Y. GENERAL OBLIGATIONS LAW § 5-326 (McKinney 1989). ("Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable . . .")

81. *Baschuk*, 618 N.Y.S.2d at 430.

82. *See, e.g., Meier v. Ma-Do Bars, Inc.*, 484 N.Y.S.2d 719 (N.Y. App. Div. 1985); *Geise v. Niagara County*, 458 N.Y.S.2d 162 (N.Y. App. Div. 1983).

83. 383 P.2d 441 (Cal. 1963).

84. *Baschuk*, 618 N.Y.S.2d at 430.

85. *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134 (Cal. Ct. App. 1991).

86. *Id.* at 150 (adopting the reasoning in *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 612 (Cal. Ct. App. 1988)).

is whether the participant is put on notice of the risks she is about to assume. Although every possible risk need not be expressed, the agreement must give the participant a general understanding of the inherent dangers involved.

The *Madison* court specifically rejected the idea "that every possible specific act of negligence of the defendant must be spelled out in the agreement or even discussed by the parties."⁸⁷ The court established the standard that it was "only necessary that the act of negligence, which results in injury to the releasor, be *reasonably related* to the object or purpose for which the release is given."⁸⁸ Recall that in *Madison*, a scuba diving student drowned as a result of the instructor's negligence. There, the court concluded that the instructor's negligent acts in failing to adequately supervise the student was "clearly so related."⁸⁹

In *National & International Brotherhood of Street Racers, Inc. v. Superior Court*,⁹⁰ a race car driver was injured after his car left the starting line in reverse gear and crashed into shipping containers. Upon being extricated from his car, the rescue personnel twisted his body in such a manner so as to leave him a quadriplegic.⁹¹ The court rejected the plaintiff's claim that the release he signed did not include risks not inherent to racing, i.e., being improperly rescued.⁹² The *Street Racers* court held that "[t]o be effective, a release need not achieve perfection; only on Draftsman's Olympus is it feasible to combine the elegance of a thrust indenture with the brevity of a stop sign. . . . It suffices that a release . . . express an agreement not to hold the released party liable for negligence."⁹³ The court stated that "[d]rafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness. . . . If short and to the point, a release will be challenged as failing to mention the particular risk which caused a plaintiff's injuries. . . . If . . . comprehensive, the release is attacked as unduly lengthy. . . ."⁹⁴

Similarly, in *Deboer v. Florida Offroaders Driver's Association*,⁹⁵ a Florida court held that "for a release to be effective, it is

87. *Madison v. Superior Court*, 203 Cal. App. 3d 589, 601 (Cal. Ct. App. 1988).

88. *Id.* (emphasis added).

89. *Id.*

90. *National & Int'l Bhd. of St. Racers, Inc. v. Superior Court*, 215 Cal. App. 3d 934, 936 (Cal. Ct. App. 1989).

91. *Id.* at 937.

92. *Id.*

93. *Id.* at 938.

94. *Id.*

95. 622 So.2d 1134 (Fla. Dist. Ct. App. 1993).

not necessary to list each possible class of releasor or each possible manner in which a releasor could be injured during an inherently dangerous event. The possibilities are endless.⁹⁶ In *Deboer*, a spectator at a car racing event was injured when she attempted to cross the race track after the race had commenced.⁹⁷ Admittance to the event entailed signing a release and paying the entrance fee.⁹⁸ The court held that “[a]bsent impaired mental faculties, one need not be an experienced spectator or competitor to recognize the potential for injury,” and because the release warned of the possible dangers inherent to certain “Restricted Area[s],” the release was upheld.⁹⁹

Compare the preceding holding with that in *Ghionis v. Deer Valley Resort Co.*,¹⁰⁰ where the court overturned the release due to the ambiguity of the words “as is.”¹⁰¹ In *Ghionis*, because the plaintiff was an attorney, the defendant, Deer Valley, requested that the court hold her to a higher standard than that of a layperson due to her professional knowledge.¹⁰² The court declined the request stating that where an operator intends to exculpate himself from liability using a form release, the language of the release must be clear and unambiguous enough for the average layperson to understand.¹⁰³

In *Paralift, Inc. v. Superior Court*,¹⁰⁴ a suit was brought after a skydiver was killed when he landed in the ocean instead of the intended inland drop zone; the defendant moved for summary judgment based on the risk release that the skydiver had signed.¹⁰⁵ The plaintiffs argued that the release should not be upheld because of the specific conditions present prior to the jump.¹⁰⁶ The California appellate court upheld the release deciding that the decedent had expressly assumed the risks of para-

96. *Id.* at 1136.

97. *Id.* at 1134. The race track was set up so that the spectators would have to cross the race track in order to use the facilities that were set up in the pit area. *Id.* at 1135.

98. *Id.* at 1134-35.

99. *Id.* at 1136.

100. 839 F. Supp. 789 (D. Utah 1993).

101. *Id.* at 793.

102. *Id.* at 793 n.6.

103. *Id.*

104. 23 Cal. App. 4th 748 (Cal. Ct. App. 1993).

105. *Id.* at 753.

106. *Id.* at 752. The original subject matter of the release involved Perris Valley Airport which was different from Del Mar Fairgrounds, where the sky diver met his death. *Id.* Additionally, “Paralift increased the risk of harm to the decedent by letting him out over cloud cover where the shore line was unknown.” *Id.* at 753.

chuting.¹⁰⁷ The release form required the decedent to sign or initialize at twenty-two different places.¹⁰⁸ Additionally, the decedent was shown a video tape which explained the liability release form, made him aware of the inherent risks involved in sky diving, and advised him not to sign the release until obtaining advice from independent counsel should he have any questions as to what he was signing.¹⁰⁹

3. Intentions and Expectations of the Parties

Since *Madison*, the most innovative approach to exculpatory agreement analysis centers on the subjective intentions and expectations of the parties. This is in addition to the express intent manifested by the signing of the release which takes the analysis one step beyond the "meeting of the minds" that is essential to the finding of a valid contract.

The *Madison* court imputed the decedent's intent from his express release of liability stating that, "[the decedent] expressly manifested his intent to relieve the defendants of any duty to him and to assume the entire risk of any injury."¹¹⁰ One year later, the Colorado Supreme Court went beyond the express wording of the agreement and looked to the experience of the plaintiff in order to determine whether she was capable of understanding the risks involved in horseback riding in *Heil Valley Ranch, Inc. v. Simkin*.¹¹¹ Simkin, the plaintiff, brought an action against Heil Valley Ranch to recover for injuries she sustained after the horse she was riding "reared up and fell backwards onto [her], injuring her severely."¹¹² The court looked to her experience and concluded that she was not a novice rider, and therefore the "risk that a horse could rear and injure her was reasonably foreseeable to someone with her experience."¹¹³

107. *Id.* at 757.

108. *Id.* at 752. Similar to the signature requirements in *Paralift*, the Professional Association of Dive Instructors (PADI), the largest scuba diving certification agency in the world, requires in their LIABILITY RELEASE AND EXPRESS ASSUMPTION OF RISK, that the student not only sign the release, but must also initial in seven different places specifically outlining the risks involved in the sport. See Appendix, Exhibit I.

109. *Id.* at 753.

110. *Madison v. Superior Court*, 203 Cal. App. 3d 589, 597 (Cal. Ct. App. 1988).

111. *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989)(en banc).

112. *Id.* at 783.

113. *Id.* at 785.

In *Falkner v. Hinckley Parachute Center, Inc.*,¹¹⁴ an Illinois case, a parachutist died after the lines of his parachute became entangled, not allowing the parachute to slow his fall.¹¹⁵ Similar to the court in *Heil Valley Ranch*, the *Falkner* court looked to factors external to the agreement, particularly the decedent's experience. The court concluded "that some risk of fatal injury is ordinarily attendant to the sport of parachute jumping and that the decedent, a former officer and pilot in the Army Air Corps, would have been aware of this risk."¹¹⁶

This bifurcated analysis is evident in subsequent cases. For instance, in *Buchan v. United States Cycling Federation, Inc.*, the court upheld the validity of the release, in part, because Buchan, an experienced cyclist, acknowledged "that falls and crashes are common occurrences in bicycle races and occur in about 75 percent of all races."¹¹⁷ In *Bien v. Fox Meadow Farms Ltd.*,¹¹⁸ an Illinois case, a horse back rider was injured while participating in a lesson in which she had signed an exculpatory agreement over a year and a half prior to the lesson.¹¹⁹ The participant did not want to ride the horse that eventually knocked her off because of his "tendency to thrash his head after a jump," but decided to do so in order to avoid riding another horse which she felt was "reckless and unpredictable."¹²⁰ After the first jump, the horse thrashed his head and the participant notified the instructor of the problem.¹²¹ After receiving her instructions to pull the reins tight after jumping, she attempted another jump after which the horse reacted the same.¹²² Upon receiving further instructions to pull the reins even tighter, the participant proceeded with a third jump after which her horse "began violently thrashing his head and ultimately threw [her] off his back."¹²³ The *Bien* court, relied on *Harris v. Walker*, another horseback riding case decided by the Illinois Supreme Court.¹²⁴ In *Harris*, a horseback rider was injured when her horse became frightened and threw her to the ground.¹²⁵

114. 533 N.E.2d 941 (Ill. App. Ct. 1989).

115. *Id.*

116. *Id.* at 945.

117. *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134, 148 (Cal. Ct. App. 1991).

118. 574 N.E.2d 1311 (Ill. App. Ct. 1991).

119. *Id.* at 1313-14.

120. *Id.* at 1313.

121. *Id.* at 1314.

122. *Id.*

123. *Id.*

124. *Id.* at 1315 (citing *Harris v. Walker*, 519 N.E.2d 917 (Ill. 1988)).

125. *Harris*, 519 N.E.2d at 917.

Analogizing the *Harris* court's reasoning, the *Bien* court found that she was not "the most inexperienced of horseback riders,"¹²⁶ and concluded that "[s]he, like the *Harris* plaintiff, could appreciate the risk of being thrown from a horse."¹²⁷ Consequently, the *Bien* court upheld the release and held that the injuries sustained by the participant were encompassed in its language.¹²⁸

This same analysis resulted in an adverse ruling in the West Virginia case, *Murphy v. North American River Runners*.¹²⁹ Here, the participant in a white-water rafting expedition was forcefully thrown and injured when the outfitter tried to rescue other rafters by intentionally bumping their raft into the other in an attempt to dislodge it.¹³⁰ The participant argued that because she was not informed that rescue operations of this manner would be performed while on the expedition, she did not contemplate this risk when she signed the release agreement.¹³¹ The court agreed with the participant, holding that "in order for the express agreement to assume the risk to be effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm."¹³²

In *Day v. Snowmass Stables, Inc.*,¹³³ a Colorado case, the plaintiff was participating in a horse-drawn wagon ride when the neck yoke ring on the rear wagon broke.¹³⁴ This allowed the wagon to move forward, bumping its team of horses, frightening them and causing them to bolt.¹³⁵ They, in turn, hit the forward wagon, on which the plaintiff was riding, causing her to be thrown and injured.¹³⁶ The release agreement referred "generally to the significant element of risk associated with outdoor activities and the inherent risks, dangers, and rigors involved in the activities."¹³⁷ However, the plaintiff argued "that risks created by faulty equipment are not 'inherent risks' involved in activities 'associated with the outdoors.'"¹³⁸ The defendant relied on *Heil Valley*

126. *Bien*, 574 N.E.2d at 1315 (quoting *Harris*, 519 N.E.2d at 917).

127. *Id.* at 1315.

128. *Id.*

129. *Murphy v. North Am. River Runners, Inc.*, 412 S.E.2d 504 (W. Va. 1991).

130. *Id.* at 508.

131. *Id.*

132. *Id.* at 510.

133. 810 F. Supp. 289 (D. Colo. 1993).

134. *Id.* at 291.

135. *Id.*

136. *Id.*

137. *Id.* at 294.

138. *Id.*

Ranch for the principle that when the language in a release is written broadly, it is reasonable to interpret "the intended coverage to be as broad as the risks that are obvious to experienced participants."¹³⁹ The court decided that this interpretation did not apply in the instant case because, "there is no evidence that [the plaintiff] had any experience with horse drawn wagons."¹⁴⁰

The analysis contained in the foregoing cases expresses the importance of distinguishing activities such as scuba diving and sky diving, where instruction is a prerequisite to participation and where the participant has little, if any, knowledge as to the inherent risks. In such sports, the specificity and clarity of the exculpatory agreement is crucial. Although not every risk need be included, particular attention must be given to outlining the major risks involved. This same specificity would not apply to advanced certifications or to situations where the participant has had prior experience, and thus has an understanding of the risks he is assuming.

III. THE PROBLEM WITH EXCULPATORY AGREEMENTS

At this point the reader should have an understanding of what exculpatory agreements are, how they are constructed and analyzed, and how they apply and are intertwined with recreational sports. The reader should also have an understanding of how contemporary courts are interpreting them and the major policy reasons why they have become generally accepted in the context of sports.

Whether dealing with a waiver of liability, a consent not to sue, or an express assumption of risk, a release of any kind implies a personal acceptance of responsibility; a conscious decision to accept the responsibility for the choices voluntarily made. This Note will now examine the practical ramifications of accepting that responsibility.

First, this Note will look at the problems involved with relieving the industry of responsibility and examine the consequences as they relate to the principles of tort law. In other words, if exculpatory agreements are to be upheld, how is the public to be assured that adequate safety precautions are being taken? The answers to this come from two distinct avenues: self-regulation by the industry, and where this fails as an acceptable option or due

139. *Id.* at 295 (quoting *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 785 (Colo. 1989)).

140. *Id.*

to practical necessities, state regulation by governmental authorities.

Next, this Note will examine the problem of what occurs if exculpatory agreements are not upheld. How can we ensure the survival of these industries? How can we ensure the perpetuation of these sports? Should we care? And if we don't, what happens to the individual's ability to participate in this wide range of activities?

Third, who ultimately absorbs the costs of this philosophy? In answering this question, this Note will go beyond the immediate results of a sports injury. Who insures against pain and suffering, loss of earning capacity, unemployment and disability? Who takes care of the children and the spouses of the participants injured or killed as a result of participation in the sports they decide to pursue? And if there is insurance available to cover some of these consequences, will the cost be prohibitive?

Fourth, if there is a choice as to when exculpatory agreements are to apply, is there some test or standard to evaluate this decision? Should the validity of the exculpatory agreement depend on the type of sport and ultimately the type of risk involved? If not, should their validity depend upon a question of public policy? And if so, should public policy have an impact in the sports context?

Finally, what is to be done about minors in regards to exculpatory agreements? Are they to be excluded and not be given the opportunities to participate in these activities? Are we to stifle their curiosity and bar the potential of enriching their lives as a result of participation in these activities? Or are the risks involved just too high?

A. Public Safety Considerations

Exculpatory agreements are disfavored in the law because they remove the deterrence that Tort Law provides against unreasonable risks. Thus, if these agreements are to be upheld, how is the public to be assured that adequate safety precautions are being taken? The economic theory suggests the industry will self-regulate to the point of optimizing their own economic benefit, i.e., bad reputation leads to lack of business. However, is reliance on this theory sufficient to guarantee the safety of participants?

1. Self-Regulation

This Note examines the scuba diving industry in order to determine whether self-regulation is sufficient to ensure the

safety of participants. Scuba diving provides an optimal model because of its increasing popularity worldwide. It is a sport that is exciting, adventurous, and carries some element of risk, but at the same time provides a fulfilling experience to those who choose to participate. The Professional Association of Diving Instructors, ("PADI"), the largest scuba diving certification agency in the world, will be used as an example of effective self-regulation.

Scuba diving can be, and is being, enjoyed by the entire family (12 years and older). However, safe participation requires education and training. PADI accomplishes this through a scuba certification course. Upon completion of the course the student receives a certification card ("c-card") which enables the student to fill his or her tanks with compressed air, rent equipment, and actually participate in the sport. Prior to instituting the certification requirements, there were increasing numbers of diving injuries and fatalities. These were a direct result of people engaging in the sport who were not aware of the inherent risks involved with breathing air at depth.

PADI began in 1966 and was the first certification agency to introduce minimum certification requirements.¹⁴¹ It was also the first to produce a "positive identification" c-card which included the diver's picture.¹⁴² This assured the dive operator that the person presenting the card was actually the person qualified to participate in the sport. In 1967, PADI was the first to introduce a continuing education system.¹⁴³ Prior to this, a student was taught everything in one lengthy course. This resulted in the student retaining only a portion of what he or she had learned. Consequently, a great number of injuries and fatalities continued to occur. By breaking down the training into different certifications, PADI permits the student to concentrate on the basic skills required for that particular level. As a result, the student retains a greater percentage of the knowledge, and thus masters the skills required at each respective level. The training courses also allow for a greater number of people to safely participate in the sport. As divers desire to pursue more demanding types of dives, he or she may then obtain additional training and go on to higher levels of certification. Divers may receive training and certification in specialty areas of diving, such as night diving, deep diving, drift

141. Barry Shuster, *The PADI Chronicles - A Quarter Century of The Undersea Journal Revisited*, UNDERSEA J., First Quarter, 1991, at 4.

142. *Id.*

143. *Id.*

diving, underwater photography, and cave diving. By participating in this step by step process, the diver applies the skills learned and perfects those skills under the watchful eye of an experienced certified instructor, thus developing the participant into a more confident, better qualified, and safer diver.

Among the many firsts PADI introduced to the dive industry was a national air analysis program in 1977, encouraging consistent high quality air standards for the industry;¹⁴⁴ it was the first organization to fund dive table research which established safer limits for its students; and in 1979, it established the first quality assurance department among certification agencies in the industry, enabling the strict enforcement of standards and ensuring a consistent, high quality level of education and training for PADI students.¹⁴⁵

PADI maintains five full-time employees in their Quality Assurance Department ("QA"), and has additional QA staff members in all of its international offices. The QA staff members poll standards violations, participate in enforcement of trademark and copyright, review all accidents and training reports, send out acknowledgment certificates to instructors who have displayed superior teaching skills, and resolve certification issues where students have not received their c-cards.¹⁴⁶ The QA staff members' administrative actions are detailed in a quarterly publication, *The Undersea Journal*, which is distributed to all PADI instructors. These actions range from counseling to termination or expulsion of members,¹⁴⁷ expulsion occurring where violations are more serious and the QA Department has determined that the individual is beyond retraining.¹⁴⁸ However, in the last five years their approach has focused on education and remediation. Other agencies are now following PADI's lead when it comes to quality assurance.

In 1969 PADI issued 25,000 certifications,¹⁴⁹ in 1994, it issued 625,487 certifications,¹⁵⁰ and 1995 figures exceeded 700,000 certifications in a single year.¹⁵¹ 1996 marks PADI's thir-

144. *PADI Celebrates its 30th Year!*, UNDERSEA J., First Quarter, 1996, at 6.

145. *Id.*

146. Interview with Peggy McCall, Manager of Quality Assurance for PADI, in New Orleans, La. at DEMA (Jan. 20, 1996); interview with Dana Stuart, Vice President of Operations for PADI, in New Orleans, La. at DEMA (Jan. 20, 1996).

147. The term "members" means dive instructors and dive masters.

148. *Id.*

149. Shuster, *supra* note 141, at 4.

150. *PADI Celebrates its 30th Year!*, *supra* note 144, at 5.

151. *Id.*

tieth year of involvement in the dive industry. With over 75,000 members, PADI is involved in scuba instruction in more than 175 countries and produces training materials in eighteen languages.¹⁵² PADI's outstanding risk management, quality control, continuing education program and general leadership in the industry have contributed significantly to a drastic reduction in diver fatalities from forty-five fatalities per 100,000 divers in 1975 to less than fifteen diver fatalities per 100,000 divers in 1993.¹⁵³

In the 1960's, "[d]iving instruction was haphazard, at best."¹⁵⁴ In 1991, John Cronin, CEO of PADI, wrote "[w]e're the most effective lobbying group in the recreational diving industry, protecting the interests of diving retailers, instructors and diving consumers."¹⁵⁵ He went on to state that his organization's members were "largely responsible for decreasing the rate of recreational diving fatalities to its lowest in 25 years."¹⁵⁶

PADI requires and strictly enforces the use of exculpatory agreements for all certification levels, specialty courses, and activities related to PADI sanctioned programs. This, in part, has enabled scuba instructors to carry the required liability insurance coverage at reasonable rates, which has, in turn, allowed the insurance industry to show support to store owners and resort operators.

Thus, in response to the question of whether self-regulation provides effective protection for the safety of diving participants, the answer is "yes." Self-regulation appears to be sufficient to ensure an acceptable level of safety while keeping government interference and regulation out of the industry.¹⁵⁷

2. State Regulation

State regulation is another means to assure that adequate safety precautions are being taken to protect the public. State regulation usually occurs if one or both of the following conditions exist: one, society is not comfortable with the safety precautions imposed by the industry, or two, the industry is not well organ-

152. Jeff Nadler, *Truly International*, UNDERSEA J., First Quarter, 1996, at 9.

153. *PADI Celebrates its 30th Year!*, *supra* note 141, at 7.

154. John Cronin, *The Way it Was and the Way it Is*, UNDERSEA J., First Quarter, 1991, at 11.

155. *Id.*

156. *Id.*

157. "When [PADI] control[s] and self-regulate[s] seventy-five percent of the market share effectively, the government has no reason to interfere." Interview with Dana Stewart, *supra* note 146.

ized, and its attempts to avoid liability has prompted state regulation. The latter condition is further complicated by economic incentives for the host state. In sports that attract many participants, the state's economic interests often compel regulation.

State regulation of sports has occurred in several states.¹⁵⁸ In Colorado, for instance, the second condition prompted state legislative action in the skiing industry. The Colorado state legislature, in its 1990 amendment to the Ski Safety Act of 1979, expressly stated that "despite the passage of the [act], ski area operators of this state continue to be subjected to claims and litigation involving accidents which occur during the course of the sport of snow skiing, which claims and litigation and threat thereof unnecessarily increase Colorado ski operators' costs."¹⁵⁹ The legislature explained that the purpose of the act was to

clarify the law in relation to skiing injuries and the dangers and risks inherent in that sport, to establish as a matter of law that certain dangers and risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent dangers and risks.¹⁶⁰

The Colorado Ski Safety Act also limits ski area operators' liability by capping damages at one million dollars.¹⁶¹ The Act and its

158. See, e.g., ALASKA STAT. § 05.45.010 (1995) (Alaska - skiing); IDAHO CODE § 6-1101 (1994) (Idaho - skiing); ME. REV. STAT. ANN. tit. 26, § 488 (West 1995) (Maine - skiing); MASS. ANN. LAWS ch. 143, § 710 (Law. Co-op. 1996) (Massachusetts - skiing); MICH. STAT. ANN. § 18-1234(44) (Callaghan 1994) (Michigan - sport shooting); MONT. CODE ANN. § 23-2-731 (1995) (Montana - skiing); *Id.* § 23-2-651 (Montana - snowmobiling); N.H. REV. STAT. ANN. § 225-A:24 (1994) (New Hampshire - skiing); N.M. STAT. ANN. § 24-15-2 (Michie 1995) (New Mexico - skiing); N.Y. GEN. OBLIG. LAW § 18-101 (Consol. 1995) (New York - skiing); N.D. CENT. CODE § 53-09-01 (1995) (North Dakota - skiing); OR. REV. STAT. § 30.975 (1994) (Oregon - skiing); 42 PA. CONS. STAT. ANN. § 7102(c) (1995) (Pennsylvania - downhill skiing); UTAH CODE ANN. § 78-27-51 (1995) (Utah - skiing); WASH. REV. CODE § 70-117-020 (1995) (Washington - skiing); W. VA. CODE § 20-3A-1 (1995) (West Virginia - skiing); WYO. STAT. § 1-1-123 (1995) (Wyoming - "any sport or recreational opportunity").

159. Amended Legislative declaration to Ski Safety Act of 1979, COLO. REV. STAT. ANN. § 1 (West 1995). The legislature also declared that large numbers of residents and nonresidents participated in skiing, "significantly contributing to the economy of [Colorado]." *Id.*

160. *Id.*

161. Ski Safety Act of 1979, COLO. REV. STAT. ANN. § 7, 33-44-113 (West 1995).

The total amount of damages which may be recovered from a ski area operator by a skier . . . who is injured . . . shall not exceed one million dollars, present value, including any derivative claim by any other claimant, which shall not exceed two hundred fifty thousand dollars, present value, and including any claim attributable to noneconomic loss or injury.

revisions clearly define the activity's inherent dangers and risks assumed by the participant, along with the ski area operators' duties.¹⁶² The skier assumes the risks due to weather and snow conditions on the slopes, including those made by snow machines.¹⁶³ The skier also assumes risks caused by surface conditions, including "bare spots, forest growth, rocks, stumps, streambeds, and trees, or other natural objects."¹⁶⁴ Under the Colorado statute the risk of collisions with these natural objects, impacts with lift towers, and any other man-made structures is also assumed by the skier.¹⁶⁵ Each lift ticket sold in Colorado must also warn the skier of the assumption of risk and what those risks include.¹⁶⁶

According to the Colorado Ski Safety Act, the ski area operator's duties are basically two-fold, a duty to warn and a duty to cover man-made obstructions. The duty to warn includes posting signs and notices signaling dangerous areas, man-made structures, and trails "which are not readily visible to skiers under conditions of ordinary visibility from a distance of at least one hundred feet."¹⁶⁷ It is also the ski area operators' duty to "adequately and appropriately cover such obstructions with a shock-absorbent material that will lessen injuries."¹⁶⁸ Although the area operators have the right to revoke a person's skiing privileges for "skiing in a careless and reckless manner," the statute specifically forbids interpreting that right to mean an "affirmative duty," thus absolving them from liability for such claims.¹⁶⁹

Id. The act allows these figures to be exceeded in limited circumstances. *Id.*

162. Ski Safety Act of 1979, COLO. REV. STAT. ANN. § 2, 33-44-103, § 3, 33-44-107 (West 1995). Skiing, according to Colorado law, encompasses the use of skis, a toboggan, a sled, a tube, a ski-bob, a snowboard, or any other device for the purpose of sliding downhill on snow or ice or for the use of other trails. *Id.* § 2, 33-44-103.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at § 3, 33-44-107. The following warning must be on each lift ticket sold and must also be posted in a clearly visible area where the lift tickets are sold:

Under Colorado law, a skier assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of skiing and may not recover from any ski area operator for any injury resulting from any of the inherent dangers and risks of skiing, including: Changing weather conditions; existing and changing snow conditions; bare spots; rocks; stumps; trees; collisions with natural objects, man-made objects, or other skiers; variations in terrain; and the failure of skiers to ski within their own abilities.

Id.

167. *Id.*

168. *Id.*

169. *Id.* at § 4, 33-44-108.

Vermont has also passed legislation regulating certain types of sports. The applicable Vermont Statute states in pertinent part, "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."¹⁷⁰ The United States Court of Appeals for the Second Circuit upheld the Vermont statute, applying its assumption of the risk effects to a lawsuit brought by one skier against another.¹⁷¹ The court, relying on the Senate Judiciary Committee Hearings, explained that the "legislature by enacting § 1037 sought to appease insurance industry concerns."¹⁷² This was further evident by testimony given before the "State Senate Judiciary Committee in contemplation of H. 417 - the bill that eventually became § 1037 - the drafters believed [a recently decided case] marked a change in Vermont law, the effect of which would be to subject ski area operators to a significant and undetermined increase in potential liability."¹⁷³ Following the decision of the case which prompted the State legislature to act, "the two primary ski area insurers threatened to withdraw from Vermont during 1978, effectively putting in jeopardy one of the state's major industries."¹⁷⁴ Once again, Vermont's economic interests, threatened by insurance companies, brought forth regulation outlining what duties ski area operators owed to the participating public.

Bungy jumping¹⁷⁵ provides an example of the first condition-disorganization within the industry. Bungy jumping became popular in the early 1990's, resulting in the addition of such attractions at many amusement parks. In Florida, bungy jumping, unlike other sports, has been classified as an amusement park attraction, and thus falls under the jurisdiction of the Florida Department of Agriculture.¹⁷⁶ In 1992, Florida's Agriculture Commissioner, Bob Crawford, used his state agency's power to temporarily close bungy jumping attractions across the state.¹⁷⁷ Some attributed the state's reaction to a fatal bungy jumping acci-

170. VT. STAT. ANN. tit. 12, § 1037 (1994).

171. *Dillworth v. Gambardella*, 970 F.2d 1113 (2nd Cir. 1992).

172. *Id.* at 1120.

173. *Id.* at 1117.

174. *Id.*

175. Bungy or bungee jumping involves jumping from a height and free falling toward the ground until an attached elasticized rope stretches to the point of ending the free fall. Bungy jumping is usually done from atop a crane or bridge.

176. FLA. ADMIN. CODE. ANN. r. 5A-1.0001(1) (1994).

177. Joanne Cavanaugh & Lyda Longa, *The Thrill is Gone: State Bans Jumps*, SUN SENTINEL (Ft. Lauderdale), July 12, 1992, at 1A.

dent in Michigan.¹⁷⁸ Although no severe accidents or deaths had been reported in Florida, the ban was ordered because the Agriculture Commissioner deemed bungee jumping to be an imminent danger to the public.¹⁷⁹ As a result, Florida promulgated an extensive regulation governing the operation of bungee jumping facilities.¹⁸⁰ This regulation, comprised of forty-six parts, detailed each aspect of bungee jumping operations including the design, maintenance, and operation of the amusement device.¹⁸¹ Consequently, many facilities closed, leaving only six facilities offering bungee jumping in Florida.¹⁸² Unlike Colorado's Ski Safety Act and other similar state legislation, Florida's bungee jumping regulations were enacted by a state administrative agency. Is society really deciding that state regulation is necessary because of inadequate industry-imposed safety precautions when a state administrative agency promulgates the changes?

B. Industry Survival

If exculpatory agreements are not upheld, how do we assure the survival of these industries? The answer to this question lies in the insurability of the industry. Will the instructor, outdoor guide, or store operator be able to acquire liability insurance to cover injuries resulting from his or her negligence? If the insurance is available, will its costs be prohibitive? Besides the liability for injuries, another determinative factor is the liability created by the staggering costs of litigation and the subsequent awarding of damages. Legal defense costs alone can be prohibitive. Mark Hruska, a partner at Hruska & Lesser, a law firm specializing in diving litigation, primarily defending the dive industry, stated, "the cost of defending a lawsuit can range anywhere between \$20,000 and \$600,000."¹⁸³ Notwithstanding legal fees, judgments against industry providers may also be excessive. Arguably, larger industries, such as scuba diving or skiing, can more easily absorb these costs and pass them on to the consumer. But, without insurance, single or private dive operators, sky diving opera-

178. *Id.*

179. *Id.* According to Commissioner Bob Crawford, "[i]t's just a matter of time before someone in Florida dies if this practice continues." *Id.*

180. FLA. ADMIN. CODE ANN. r. 5F-8.025 (1994).

181. *Id.* The regulation outlines proper materials, engineer certifications, personnel certifications, operation limits, disclosure requirements, and various other details. *Id.*

182. Patty Shillington, *Chills and Thrills*, MIAMI HERALD, July 30, 1994, at 1G.

183. Mark A. Hruska, *Defensive Retailing and Teaching*, DEMA (Jan. 19, 1996).

tors, outfitters, or small stable operators, will inevitably fold under the pressure of these costs.

What then, determines if an industry is insurable? Steve Vicencia, President of Vicencia & Buckley Insurance Services, Inc., which provides insurance for the dive industry, stated that factors they look at when determining insurability include, accident and fatality rates, safety records and overall risk management employed within the industry.¹⁸⁴ This opinion was reiterated by Gloria Nelson, broker for Black/White & Associates, who stated that insurability "depends on the internal risk management of the industry."¹⁸⁵ Moreover, she stated that rates were determined in large part by the losses experienced by the industry.¹⁸⁶

Black/White & Associates provides insurance to operators of a variety of outdoor recreational activities including, bicycle touring, boat rentals, canoeing, fishing, hunting, mountaineering, rafting, snowmobiling and trekking, among others. Both Black/White and Vicencia & Buckley require that the operators use exculpatory agreements as a prerequisite to insurance coverage.¹⁸⁷

Another factor pertaining to the overall risk management of an industry is the extent to which the state has limited its liability exposure.¹⁸⁸ "Certain state legislatures have enacted legislation to limit liability of the professional outfitter and guide, and those [limitations] certainly help the insured[, for instance, snow-mobiling in Montana; equestrian riding in Oregon, Idaho and Colorado, and all recreational sports in Wisconsin.] In those states [insurance brokers] allow rate credits for the reduced exposure."¹⁸⁹

184. Telephone interview with Steve Vicencia, Charter Property Casualty Underwriter (C.P.C.U.), Vicencia & Buckley Insurance Services, Inc. (Oct. 25, 1995).

185. Telephone interview with Gloria Nelson, Broker, Black/White & Associates/Insurance Brokers (Oct. 25, 1995).

186. *Id.*

187. Letter from Gloria Nelson, Broker, Black/White & Associates/Insurance Brokers, to Mario R. Arango (Oct. 26, 1995) (on file with the authors).

For most classes of business we will require that a client have all participants or users sign a specific release of liability (ROL). The ROL is designed to advise the participant of the inherent dangers of the activity and to let them know that if they choose to (voluntarily) participate, that they must take on those inherent, often hazardous, risks. We are, after all, insuring a "guide" who can lead the way but cannot change the course or nature of avalanches, rivers, horses, etc.

Id.

188. See State Regulation, *supra* part III.A.2.

189. Letter from Gloria Nelson, Broker, Black/White & Associates Insurance Brokers, to Mario R. Arango (Oct. 26, 1995) (on file with the authors).

Here the risk management is apportioned by the state which assures cost effective rates for the operator. The same results, however, can be achieved by self-regulation as in the scuba industry.

Those recreational industries with poor risk management records are in a precarious position. Saddle sports, for example, are presently uninsurable.¹⁹⁰ The skydiving industry has also been uninsurable for the past twelve years.¹⁹¹ If insurance was available, the costs would be so prohibitive that the whole exercise would be impracticable.¹⁹² According to the late Thomas D. Manning, President and Chief Instructor at Sky-Dive Miami, Inc., the impracticality of insuring the skydiving industry has been due to poor risk management by the American Parachuting Association.¹⁹³ Most air sports, like hang-gliding and parasailing, however, face a similar predicament.¹⁹⁴ To protect themselves against liability, Sky-Dive Miami requires a prospective student to sign an "assumption of the risk," "exemption of liability" and "covenant not to sue" after the student has viewed a video detailing the inherent risks associated with skydiving.¹⁹⁵ Additionally, the prospective student must sign an "Experimental Test Parachute Jumper Agreement," which requires that the student initial nineteen specific paragraphs detailing the waiver of risk, affirmations, and disclosures the student is agreeing to.¹⁹⁶ These exculpatory agreements serve as the only defense against potential liability and offer Sky-Dive Miami the only chance of remaining in business. In support of such a protective posture, the *Buchan* court reasoned that,

[i]n cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such

190. Interview with Gloria Nelson, Broker, Black/White & Associates/Insurance Brokers (Oct. 25, 1995).

191. Interview with the late Thomas D. Manning, President of Sky-dive Miami, Inc. (Oct. 24, 1995) (Thomas D. Manning died on May 25, 1997, in a tragic airplane crash when the plane stalled during a parachute jump.).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* The video presents the risks involved in skydiving including a dramatic reenactment of a parachuting accident which drives home the ultimate risk involved in parachuting, death by impact. See also Appendix, Exhibits II and III.

196. *Id.*

*actions without trial, many popular and lawful recreational activities are destined for extinction.*¹⁹⁷

C. *Who Absorbs the Cost?*

Superficially, the personal responsibility model advocated by the exculpatory agreement assumes that the person engaged in the activity bears the burdens created when he or she is injured. The very nature of human behavior informs a deeper analysis. Consequences resulting from an injury or death usually affect those closest to the participant. If a married participant is injured or dies, then the potential damages to the surviving spouse may include loss of consortium and loss of supporting wages. If minor children are present, the problem may be aggravated.¹⁹⁸ If the participant is maimed or seriously incapacitated, the problems become even more complex because the losses are two fold: first, the losses mentioned above may be present; and second, the participant herself may become a further burden if additional attention is required for her care. Even in the case of an unmarried participant, the loss of income or ability to work can produce extreme burdens. The question then becomes, who absorbs those burdens?

While it may be true that the majority of participants involved in these activities have some form of health and/or life insurance, these coverages do not adequately cover damages that include pain and suffering, loss of earning potential, loss of income, or loss of consortium. Most individuals do not or cannot insure against these types of losses. The answer to the question is that society absorbs these burdens. Specifically, a combination of private (i.e. friends and family) and public (i.e. the welfare system) assistance shoulders the weight. If society is carrying the burden, then what alternatives exist?

Some have suggested that self insurance may be a viable option. However, unless the sport commands a significant

197. *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134, 147 (Cal. Ct. App. 1991) (citing *National & Int'l Bhd. of St. Racers, Inc. v. Superior Court*, 215 Cal. App. 3d 934 (Cal. Ct. App. 1989)) (emphasis added).

198. The problem becomes aggravated not only because of direct economic multipliers, i.e. more children means more liability, but also because of indirect consequences. Loss of a spouse may mean the surviving spouse must spend more hours away from child rearing responsibilities in order to make up for the loss of the decedent's income. This situation has other ramifications including, cost of additional child care, cost to the children's well being, cost to society if child care is not accessible or affordable, and the potential loss of proper parental support and guidance.

number of participants, the implementation of such a scheme would be cost prohibitive.¹⁹⁹ There are three basic alternatives to self-insurance: (1) the Cash Flow Model, (2) the Captive Insurance Model, and (3) the End User Model.²⁰⁰

The Cash Flow Model in its basic form allows for losses to be paid directly from the provider's operating capital. This model is highly risky and requires that each operator maintain a substantial reserve. This would necessarily imply that the operator be highly successful so that in the event of a loss or multiple losses, he would have the ability to satisfy whatever claims may result. Although this may be feasible in areas where the risk is relatively low, it would be impractical in sports where the risk of injury is high. Realistically, a small operator could not meet this burden. In some instances, the operator establishes a corporation with minimal assets, thus limiting their exposure in the event of a large claim. However, the end result is that the operator goes out of business.

The Captive Insurance Model operates by way of a created company which handles the operation of an insurance fund. This fund is capitalized by its members, (the operators involved). The advantages with this model are two part: first, the burdens of risk are spread over several members rather than a single operator; and second, the insurance fund is "re-insurable," meaning that an insurance policy may be obtained to cover the inadequacies of the capitalized insurance fund.

Finally, the End User Model creates a fund whereby each participant pays a premium to cover the risk of injury to themselves. All claims for damages are satisfied by use of this fund. The main disadvantage is administrative in nature. How does one ensure that all of the members are paying proportionately into the fund? How does one coordinate an industry wide effort?

In all models, the number of participants is critical in determining the feasibility of capitalizing such funds. Sports with fewer participants would be prohibited from self-insuring because of the high capitalization costs. Consequently, they would find themselves in the same position that they are in today: where an exculpatory agreement is the only barrier that stands between

199. This insurance analysis is cursory at best. We do not intend for it to be an in-depth analysis on the level of insurability of any particular sport; we leave that to the actuary. Instead, we put forth what has occurred to date and possible answers to why self-insurance is difficult.

200. Telephone interview with Steve Vicencia, Charter Property Casualty Underwriter (C.P.C.U.), Vicencia & Buckley Insurance Services, Inc. (Mar. 8, 1996).

their survival and their extinction. Also critical to insurability are what type of injuries occur, how often injuries occur, and how much these injuries typically cost. As previously discussed, the legal defense costs can also be prohibitive.

D. Determination of Validity of Exculpatory Agreement

At some point, two important questions must be contemplated in relation to upholding the validity of exculpatory agreements. Should their validity depend on the type of sporting activity? And, when does a sporting activity cross the threshold of public interest, i.e. when do the burdens produced by participation outweigh the benefits reaped by society in general and by the participant in particular? This latter question is distinct from the initial public policy question discussed previously, in that the courts there examined whether the activity should initially fall within the purview of classic public interest, such as hospital care, banking, common carriers. Here, once the determination is made that the activity does not initially fall within that classification, the questions then become twofold: Is there a point at which the activity does become a public policy consideration? If yes, how is that threshold point determined? Finally, even if an activity is deemed to have crossed the public policy threshold, should it make a difference?

1. Should Validity Depend On Sporting Activity?

There are many differences among the various sporting activities. There are tangible differences: team versus individual participation, equipment required to participate, training required, environmental challenges, and proximity and availability of support services. There are also intangible considerations: social benefits, (e.g. promotion of health, aversion of aggressive tendencies, promotion of social camaraderie, promotion of family unity and diversion, promotion of self-confidence); economic benefits, (e.g. creation of industries and all its ramifications); likelihood of death or serious injury; numbers of participants; socio-economic level of participants; availability of education and training; and guidance or supervision required prior to and during participation.

In evaluating whether an exculpatory agreement should be upheld when applied to a particular sport, one can become hopelessly bogged down in a quagmire of confusion if one concentrates on all the subtle differences that exist between different sports.

For instance, baseball, soccer, and basketball do not involve the same degree of contact as football. With greater contact, the possibility of injury increases, and consequently the burdens resulting from those injuries. Does that mean that we should uphold exculpatory agreements for participation in football, yet make them invalid for participation in baseball, soccer or basketball; or, from a burden analysis, should they be upheld for baseball, soccer, and basketball? Since football carries a greater probability of injury, should we then invalidate the exculpatory agreement for football, yet allow it in the case of baseball, soccer or basketball? The 1994 National Safety Council Statistics for the Occurrence of Injuries in Various Sports reflect a 3.31 percent accident incident rate for football, as opposed to a 1.39 percent for baseball, a 2.67 rate for basketball and a 1.51 percent rate for soccer.²⁰¹ When the people participating in these sports are taken into account,²⁰² it is evident that the difference in incidents rates are insignificant regardless of the inherent differences among these sports. Compare this to scuba diving, a "high risk" sport, where the incident rate was 0.04 percent.²⁰³

When considering the higher risk sports, should the dependency on equipment or the dependency on proper instruction make a difference? Compared to traditional team sports, participation in scuba diving, sky diving, hang gliding, and skiing are all highly dependent on equipment. The failure of a regulator or gauge while scuba diving, a parachute failing to open during free fall, a strut giving way while hang gliding, or a defect in the skis while descending downhill, could all result in serious injury or death. Similarly, failure to be given proper instruction in all these areas could, and probably would, have the same results. However, the participant must understand and accept the possibility that the equipment on which they depend may fail at any given moment. It is one of the risks inherent in the sport. Although the exculpatory agreement would absolve the provider from liability for negligence, it would not be upheld in the product liability con-

201. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 92 (1994).

202. Participants in: football - 13.5 million, baseball and softball - 34.3 million, soccer - 10.6 million, basketball - 28.2 million. *Id.*

203. Drew Richardson, *An Assessment of Risk for Recreational Dive Instructors at Work*, UNDERSEA J., Second Quarter, 1995, at 15 (basing statistical data on NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1991)). Based on 1991 figures where 1044 injuries were reported out of 2.6 million participants. *Id.* 1994 rates were not available. "Higher risk" sports generally are activities in which there is a higher probability of serious injury or death.

text. A manufacturer, distributor, or retailer of defective equipment will still be liable regardless of the exculpatory clause.

Where instruction is concerned, unless it is conducted on a one-to-one basis, which often makes the cost prohibitive to many potential participants, there is always a possibility of a situation arising while the instructor's attention is diverted to another student. Although procedures can be, and are, established to reduce or control this risk, they can never be completely eliminated. Yet, it would it be unreasonable to hold exculpatory agreements valid only in one-on-one instructional situations and invalid where there is more than one student. Where instruction is necessary, but a participant decides to forgo that instruction, an exculpatory agreement would typically not be involved anyway. Only where the provider (e.g., a dive boat operator) is aware of a participant's limitations (e.g., certification level), and nonetheless, allows that participant to engage in the type of activity that they know is beyond that participant's skill level, could an argument be made for not upholding the release. However, in this situation, the provider's actions *should* be considered grossly negligent and *should* demonstrate a wanton and willful disregard for the participant's health and safety and thus, *should not* be protected by the release in the first place.

What about environmental challenges? Stormy conditions are no less dangerous to a scuba diver than the same high winds and poor visibility would be to a hang glider or parachutist, or black ice and poor visibility to a skier. Poor environmental conditions would create unacceptable risks to the participants of any sport. If a provider chooses to ignore these conditions when providing a service, then that provider's action should also fall into the same wanton and willful disregard for health and safety classification.

Given the unique differences between each sport, a uniform test cannot be developed that would generally apply; therefore, the threshold determination needs to be, and can only be, the voluntariness of the individual's participation. If the participant voluntarily chooses to engage in these activities, that person must understand the potential risks, accept those risks, accept responsibility for the choices he or she makes, and for the injuries that may result from those choices.

2. When Does an Activity Become a Public Policy Issue?

As previously discussed, the courts have relied heavily on the six factors brought out in *Tunkl*. Although the *Tunkl* factors seem to be the generally accepted criteria for such determination, very little analysis has been developed regarding application of those factors. Through 1995, one of the most in-depth arguments delivered came from the dissenting opinion of Judge Johnson in the *Buchan* case.²⁰⁴ The plaintiff, a full-time athlete competing for a position on the United States Olympic Team, was severely injured while competing in a qualifying bicycle race. In his discussion, Judge Johnson explains that in determining the validity of an exculpatory agreement, the focus should be on the factors upon which the *Tunkl* court relied, namely: “(1) Is the party seeking exculpation engaged in a service of great importance to the public? (2) Does providing this service give the provider a decisive advantage in bargaining strength over a person using this service?”²⁰⁵ The Judge’s analysis focused on interpreting the preceding questions.

a. *Is the Party Seeking Exculpation Engaged in a Service of Great Importance to the Public?*

Judge Johnson’s dissent claims that the situation in *Buchan* falls under the purview of public interest.²⁰⁶ Although he concedes that most sports do not meet the public interest threshold, Judge Johnson believes that the factual circumstances surrounding Ms. Buchan’s participation does.²⁰⁷ Specifically, he cited the final report of the President’s Commission on Olympic Sports, which concluded, “[t]he fact is that *we* are competing less well and *other nations* competing more successfully because other nations have established excellence in international athletics as a national priority.”²⁰⁸ Relying on *San Francisco Arts & Athletics v. United States Olympic Committee*,²⁰⁹ Judge Johnson maintains that the Amateur Sports Act of 1978, which created the United States Olympic Committee, established a public interest because “Con-

204. *Buchan v. United States Cycling Fed’n, Inc.*, 227 Cal. App. 3d 134, 155 (Cal. Ct. App. 1991).

205. *Id.* at 161 (citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446-47 (Cal. 1963)).

206. *Id.* at 155-65.

207. *Id.* at 162.

208. *Id.* (quoting 1 Final report of the Pres. Comm. on Olympic Sports 1975-1977 p. ix (1977)).

209. 483 U.S. 522 (1987).

gress has a [broad] public interest in promoting . . . the participation of amateur athletes from the United States in [the Olympic Games].”²¹⁰ He reinforced his argument that such activities fall under the public interest by quoting the purpose and goals of the United States Olympic Committee.²¹¹ In particular, the U.S.O.C.’s

objects and purposes [should] be to (1) establish national goals for amateur athletic activities and encourage the attainment of those goals; (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations; (3) exercise exclusive jurisdiction, either directly or through its constituent members or committees, over all matters pertaining to the participation of the United States

. . . .²¹²

This coupled with the U.S.O.C.’s sanctioning of amateur athletic competitions nationwide convinced Judge Johnson that the sport of bicycle racing as practiced in the *Buchan* case was “a matter of great importance to the public.”²¹³

b. Does the Provider have a Decisive Advantage in Bargaining Strength Over the Participant?

Critically important to Judge Johnson’s findings were the existing regulations. Unlike a participant who rides in an “open to the public event,” the race in *Buchan* required that participants reach a certain level of training after which a license was issued allowing the person to race.²¹⁴ Furthermore, the sole governing body, the United States Cycling Federation, Inc. (USCF), had a duty to ensure safety precautions were taken to protect the participants.²¹⁵ That duty was breached when the USCF allowed a novice to race with the more experienced licensed bicyclists, particularly when many elite racers, including Ms. Buchan, had notified race organizers about the novice’s behavior in the previous

210. *Id.* at 162-63 (quoting *San Fran. & Athletics v. U.S.O.C.*, 483 U.S. 522, 537 (1987)).

211. *Id.* at 163.

212. *Id.*

213. *Id.*

214. *Id.* at 157, 162.

215. *Id.* at 156. “The act imposes duties upon the Federation as the sole national governing body of Olympic amateur racing including the duty of ensuring safety precautions are taken to protect the athletes.” *Id.*

race.²¹⁶ Consequently, Judge Johnson argued that the exculpatory agreement signed by Ms. Buchan should be invalid as against public policy.²¹⁷

Although Judge Johnson's dissent identified a potential exception to the general rule that voluntary participation in sporting activities is not a matter of public policy, it is a very narrow application. Furthermore, what was the public interest or purpose in passing the Amateur Sports Act? If the purpose was to add incentive for potential amateur athletic participation, then holding exculpatory agreements invalid within the realm of such activities is, at best, a weak proposition. Most likely, a person wishing to compete in the Olympics will do so, regardless of her liability for potential injuries. Even in light of the dissent's determination, does it make sense to ignore the assumption of the risk analysis? Although an Olympic hopeful is an amateur participant, she is a highly skilled participant, and therefore has a greater appreciation than a novice participant for the risks involved. This was the basic analysis applied in both *Heil Valley* and *Snowmass*, which led those courts to opposite outcomes. Recall in *Heil Valley* that the exculpatory agreement was upheld due to the experience of the horseback rider on the premise that she should have understood the risks involved. Compare this to *Snow Mass*, in which, under the same analysis, because of the participant's lack of experience, she could not have had the requisite understanding to assume the risks involved. Does it make sense to make the novice assume the inherent risks of the sport while allowing the more experienced participant to escape the same assumption of the risk? The *Buchan* majority thought not:

Logic and common sense dictate that if releases are to be voided as a matter of public policy based on the skill level and dreams of participants, then the law should protect inexperienced participants as opposed to elite, experienced riders who are fully aware of and knowingly and voluntarily accept the risks inherent in participating in the sport.²¹⁸

Another threshold factor involved in the public policy issue as it relates to sports seems to be the number of participants involved. The *Banfield* court alluded to this when it stated that

[i]t seems that society, today, may be more aware than ever of the importance and fun of exercise. Yet, an infinitely

216. *Id.* at 159.

217. *Id.* at 160-65.

218. *Id.* at 154.

small percentage of the public appear to participate presently in triathlon races. At some future date, when cultural changes produce Monday Night Triathlon, this court may well find itself hard pressed not to conclude exculpatory clauses signed by triathlon participants void as a matter of public policy.²¹⁹

What then is this magic public policy number? The 1994 National Security Council Accident Statistics showed that 63.1 million people participated in swimming that year, 42.5 million participated in bowling, 26.5 million in roller skating, 22.1 million in volleyball, and 17.3 million in tennis.²²⁰ These sports had accident incident rates of 0.19 percent, 0.06 percent, 0.51 percent, 0.62 percent, and 0.18 percent, respectively.²²¹ Yet, none of these sports have been classified as activities falling within the realm of public policy. Society has determined that the number of injuries involved has not created a sufficient burden to warrant invalidating exculpatory agreements. However, it stands to reason that with increased participation in these sports, more injuries will occur. As the number of injuries increases so do the costs to society. At some point in the future, a sport may become so popular that the state may deem that activity within the realm of public policy. But should this matter?

3. Should an Activity's Classification as a Public Interest Matter?

Although the potential consequences resulting from the *Buchan* court's dissent which designated Olympic qualification events within the realm of public policy, are unclear, what is evident is that the reasoning of the majority opinion was flawed. Rather than relying upon a public policy analysis, the court should have based its opinion on the doctrine of gross negligence.²²² The USCF had previously been put on notice as to the danger that the novice cyclist, Ms. Mary Pieper, presented to the rest of the participants.²²³ Six days prior to the race in which the plaintiff in *Buchan* was injured, Pieper's actions had caused a

219. *Banfield v. Louis*, 589 So. 2d 441, 447 (Fla. Dist. Ct. App. 1991).

220. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 92 (1994). Compare this to scuba diving, which had a mere 2.6 million people engaged in the activity. Richardson, *supra* note 203 at 15.

221. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 92 (1994).

222. *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134, 137 (Cal. Ct. App. 1991).

223. *Id.* at 159.

group of riders to fall.²²⁴ “Although that day there were no serious injuries, a number of the cyclists, the *Buchan* plaintiff among them, approached the president and other officials of [the USCF] present at the race site and complained vigorously that Pieper did not belong in the World Trials and was a danger to the competitors.”²²⁵ Furthermore, “[o]n the morning of the . . . race, the complaints about Mary Pieper’s presence in the race were renewed and again ignored.”²²⁶ Although the court did not address the argument, the officials’ decision to ignore the complaints lodged by these experienced participants should have been deemed a willful or reckless disregard for the health and safety of the other competitors. As such, USCF should have been held accountable for their decision based on a gross negligence standard, thus overcoming the exculpatory agreement barrier.²²⁷ Of particular importance is the dissent’s finding that “[i]n an Olympic-level race, the elite racers know each other, rely upon each other’s experience and know what to do and what not to do in tight, pressure situations.”²²⁸ In the first race, the accident occurred as the competitors “sped downhill reaching a speed of 30 miles per hour.”²²⁹ Ms. Pieper was weaving in and out of the pack when her front wheel hit the rider in front of her causing the pack to fall.²³⁰ The same thing occurred in the second race after the pack had reached a speed of approximately 50 miles per hour.²³¹ Here, it was reasonably foreseeable that Ms. Pieper’s continued participation would result in serious injury.

Notwithstanding the contention that the decision was wrongly decided, under the *Tunkl* factors, a strong argument exists to hold Olympic trials within the realm of public policy.²³² The majority in *Buchan* relied on the *Okura v. United States Cycling Federation*, another California appellate decision, which held that “[t]here is no compelling public interest in facilitating

224. *Id.* at 158-59.

225. *Id.* at 159.

226. *Id.*

227. When signing an exculpatory agreement, a person is waiving her right to sue for the provider’s negligence. It is not a general waiver of all legal recourse. Agreements that purport to release the provider for gross negligence or intentional actions potentially violate the equal protection clause of many state constitutions and the United States Constitution. See *Brewer v. Ski-Lift, Inc.*, 762 P.2d 226 (Mont. 1988).

228. *Buchan*, 227 Cal. App. 3d at 158 (Johnson, J., dissenting).

229. *Id.* (Johnson, J., dissenting).

230. *Id.* at 159. (Johnson, J., dissenting).

231. *Id.* (Johnson, J., dissenting).

232. See *Buchan*, 227 Cal. App. 3d at 155 (Johnson, J., dissenting).

sponsorship and organization of the *leisure activity* of bicycle racing for public participation. . . . The service certainly cannot be termed one that 'is often a matter of practical necessity for some members of the public.'²³³ Moreover, when the *Buchan* plaintiff attempted to distinguish her situation because of her need to participate in the competition to qualify for the Olympic team, the court still found that her goal of reaching the Olympics

is commendable but that does not make bicycle racing a matter of great public importance or turn participation in such a race into a practical necessity for anyone. No matter how important it is to any individual, bicycle racing does not rise to the level of public importance as that of hospitals and hospitalization, escrow transactions, banking transactions, and common carriers.²³⁴

The court implied that, even if the ultimate goal was the Olympics, the voluntary nature of participation in such events would exempt it from the category of necessity, and therefore, from the category of public policy.

Similarly, in the ski industry cases, a strong argument can be made for the classification of the sport as a public interest. Uniform state regulation throughout the ski industry falls squarely within the parameters of the first *Tunkl* factor which states that the "agreement concerns a business of a type generally thought suitable for public regulation."²³⁵ As shown previously, most, if not all states in which downhill skiing exists have passed laws which regulate the industry, and thus skiing falls within the "generally thought suitable for public regulation" language of *Tunkl*. These regulations outline participant's duties, provider's duties, the inherent risks of the sport, and who will be liable for what.

Moreover, many of the statutes explain that the purpose for having passed the regulation was to protect the strong economic benefits reaped by the state.²³⁶ It can hardly be argued that this overriding economic interest as evidenced by the language of the statutes does not qualify as a public interest. By its very definition, a public interest is "[s]omething in which the public, the community at large, has some pecuniary interest, or some interest by

233. *Id.* at 151 (quoting *Okura v. United States Cycling Fed'n*, 186 Cal. App. 3d 1462, 1467 (Cal. Ct. App. 1986)) (emphasis added).

234. *Id.* at 151.

235. See *supra* note 55.

236. These benefits are ultimately reaped by the citizens of that state through employment for its citizens, tax revenues from foreign participants, and cash flow into its economy.

which their legal rights or liabilities are affected.”²³⁷ In these states which have enacted regulations, the community at large, through its political process, has voiced its pecuniary interest in perpetuating the ski industry. The regulations express the legislature’s intent to protect the provider, thus ensuring their continued existence. Although the economic interests involved in sports may pale in comparison to those of banking, when a state legislature decides to regulate an industry it considers of economic consequence, it is, in effect, finding some significant level of necessity to its existence. The question then becomes, when does that level of necessity cross the threshold of public interest? Arguably, the moment the state decides to regulate, the object of that regulation has crossed the threshold of public interest. Still, the courts have not been willing to accept this argument in relation to sports because of the voluntary nature of participation. Participation is based on an individual’s desire to get involved. The same cannot be said of banking.

Finally, an exculpatory agreement can be considered a form of adhesion contract. Although participation is voluntary, industry practices dictate that the participant accept the agreement on a “take it or leave it basis.” This condition exists regardless of how many operators the participant approaches. It creates an unfair bargaining advantage as outlined in *Tunkl*’s fourth factor, that “the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the party’s services.”²³⁸ Yet again, the courts have disregarded this argument within the context of sports because the activity is not deemed to be “essential,” implying the voluntary nature of participation.

What the above scenarios suggest is that *Tunkl*, as applied to sports, is dead, and should not be used as a measuring stick to determine when a sport falls within the purview of public policy. This view is supported by the majority in *Buchan*, which, in reliance on the *Madison* case, stated “that the concept of ‘public interest’ has no applicability to sports activities.”²³⁹

However, even in the unlikely event that at some future date sports become classified as a public policy interest, it should not matter where an exculpatory agreement is concerned. When soci-

237. BLACK’S LAW DICTIONARY 1229 (6th ed. 1990).

238. See *supra* note 55.

239. *Buchan*, 227 Cal. App. 3d at 149 (relying on *Madison v. Superior Court*, 203 Cal. App. 3d 589 (Cal. Ct. App. 1988)).

ety, through the political process, determines that the particular activity falls within the "public interest," what has changed in the analysis? The voluntary nature of the participation is not affected. The inherent risks involved in the sport are not diminished. The likelihood of injury is not lessened. The real change is in who is bearing the burden for losses. Specifically, the burden for losses is shifted from participant to provider. The consequences of shifting this burden to the provider will likely result in either prohibitive costs to participate in the activity, or extinction of the activity. Note, however, that this shifting of the burden, at best, mitigates the costs to society, (assuming the participant is awarded damages), but, by no means, does it eliminate such costs. Although this analysis may not apply well to traditional sports such as basketball, baseball and football, the shifting of the burden to the provider would have a devastating effect on the higher risk sports such as auto racing, scuba, skydiving, and hang-gliding, where the insurance companies require the use of exculpatory agreements as a prerequisite to coverage.

E. Minor Participation

Minors present a unique legal problem in respect to recreational sports industries, especially high risk sports. The predominant case law indicates that exculpatory agreements cannot serve as a complete bar against liability where minors are concerned.

In *Childress v. Madison County*,²⁴⁰ a Tennessee court concluded that the release signed by the mother of a mentally retarded student was effective to release the defendant from liability to the mother, but did not waive the rights of the student.²⁴¹ William Todd Childress was a twenty-year-old severely-retarded student, participating in training for the Special Olympics.²⁴² The training was being conducted at a YMCA swimming pool and three adults present were charged with the responsibility of supervising the students.²⁴³ At some point Childress slipped into the deep end of the pool and went unnoticed for an undetermined amount of time before being pulled out and revived by the lifeguard.²⁴⁴ He suffered injuries, requiring significant medical expenses.²⁴⁵ The mother had signed a release absolving the par-

240. *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

241. *Id.* at 8.

242. *Id.* at 2.

243. *Id.* at 3.

244. *Id.*

245. *Id.* at 2.

ties from all liability.²⁴⁶ The court reasoned that there “were good and logical reasons for giving effect to exculpatory agreements executed by parents on behalf of infants and incompetents.”²⁴⁷ The court stated that,

[r]isk is inherent in many activities that make the lives of children richer. A world without risk would be an impoverished world indeed. As Helen Keller well said, “security is mostly a superstition. It does not exist in nature, nor do the children of men as a whole experience it. Avoiding danger is no safer in the long run than outright exposure. Life is either a daring adventure or nothing.” Ultimately, this case is a determination of who must bear the burden of the risk of injury to infants and minors.²⁴⁸

However, the court concluded that “[t]he law [was] clear that a guardian cannot on behalf of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled.”²⁴⁹ Therefore, the court held that “Mrs. Childress could not execute a valid release or exculpatory clause as to the rights of her son against the Special Olympics or anyone else, and to the extent the parties to the release attempted and intended to do so, the release is void.”²⁵⁰

In reaching their holding, the Tennessee court reviewed the court decisions of a number of other states. The first was the Mississippi Supreme Court ruling in *Khoury v. Saik*,²⁵¹ which held that “[m]inors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them.”²⁵² The second was a ruling of the Connecticut Supreme Court, which held that a release signed by a minor’s parents “waiving the minor’s claims against a camp for damages in the event of an injury was ineffective to waive the rights of the minor against the defendant camp.”²⁵³ The third was a Maine Supreme Court ruling which held that “if the agreement in question were a release, it would be ineffective because a parent cannot release the

246. *Id.* at 3.

247. *Id.* at 7.

248. *Id.*

249. *Id.* 7-8.

250. *Id.* at 7.

251. 33 So.2d 616 (Miss. 1968).

252. *Id.* (citing *Khoury*, 33 So.2d at 618).

253. *Id.* (citing *Fedor v. Mauwehu Council, Boy Scouts of America, Inc.*, 143 A.2d 466, 468 (Conn. 1958)).

child's action."²⁵⁴ More recent decisions reviewed by the Tennessee court included cases from Colorado, Vermont and New Jersey.²⁵⁵

In the landmark case, *Scott v. Pacific Mountain Resort*,²⁵⁶ a twelve-year-old ski student sustained severe head injuries while skiing at a commercial ski resort.²⁵⁷ His mother had signed a release absolving the resort and the ski school of any liability.²⁵⁸ His mother further indicated that her son was an advanced skier.²⁵⁹ In evaluating the release, the court noted that "it is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child."²⁶⁰ The court reasoned that, "[i]n situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur."²⁶¹ Consequently, after finding that the language of the release was conspicuously clear and unambiguous, the court held that the parents' cause of action was barred, but not that of the child.²⁶²

In light of these decisions, the dive operator, instructor, etc. must now decide whether he or she is willing to assume the risk in the event of injury. Various industries have approached this dilemma in different ways. The parachute industry, for example, has excluded minor participation altogether. The same holds true for many other airborne sports, such as hang-gliding and parasailing. The scuba industry, while allowing the minor to participate at some advanced certification levels, has imposed depth limits for instructional dives and has placed restrictions on "junior" certifications.²⁶³ Some dive operators have prohibited minors from par-

254. *Id.* (citing *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 n.3 (Me. 1979)).

255. *See id.* at 7 ("Jones v. Dressel, (ratification by parent of contract executed by child does not bind child); *Whitcomb v. Dancer*, (guardian cannot settle personal injury claim for ward without court approval); . . . *Colfer v. Royal Globe Ins. Co.*, [same *Whitcomb v. Dancers*]." *Id.* (citations omitted)).

256. 34 P.2d 6 (Wash. 1992).

257. *Id.*

258. *Id.* at 8.

259. *Id.*

260. *Id.* at 11.

261. *Id.* at 12.

262. *Id.* at 16.

263. PADI, OPEN WATER DIVER COURSE INSTRUCTOR GUIDE 1-6 (1993).

Certification is open to students under the age of 15 through the PADI Junior Open Water Diver Certification.

ticipating on deeper dives. Additionally, the ski industry has limited certain minors to specific slopes.

Recreational sport industries are faced with a difficult dilemma. Are minors to be excluded from activities that can provide such positive, rich and fulfilling experiences in their lives? "It can be especially beneficial during the sometimes difficult teen years - fostering independence, trust, responsibility, self-confidence [and an] appreciation of nature."²⁶⁴ Are we to stifle their natural curiosity to learn new things, and what effect will this potential "chill" have on such an important aspect of their socialization? The defendants in the *Scott* case argued "that the invalidation of releases signed by parents to bar child's claims would make sports engaged in by minors prohibitively expensive due to insurance costs."²⁶⁵

Notwithstanding the courts' unwillingness to uphold exculpatory clauses regarding a minor's rights, operators are reluctant to ignore the economic clout that the youth market possesses. "[T]eenagers have money to spend and constantly search for new experiences. Teenagers constitute a group with few financial responsibilities, high disposable income and remarkable buying power. Last year, 28 million teens in the U.S. spent more than 99 billion dollars, two thirds of which was their own money."²⁶⁶ Ultimately, the decision to include or exclude minors must rest with the individual sports providers.

A Junior Open Water Diver is required to meet all requirements for Open Water Diver certification other than age. The Junior Open Water Diver is required to be 12 years old prior to the start date of the course. . . .

A Junior Open Water Diver is qualified to dive only when accompanied by another certified diver who is of legal age. Legal age is defined as an individual who is at least 18 years of age - unless a law in the area defines an older age; in this case the law becomes the guideline.

Id.

PADI, ADVANCED OPEN WATER DIVER PROGRAM INSTRUCTOR GUIDE (1991). Generally, to qualify for the Advanced Open Water training, an individual must have a PADI Open Water Diver certification or some equivalent rating, and must be at least fifteen-years-old. *Id.* at 1-10. However, since 1993, PADI has allowed Junior Open Water Divers to enroll in their advanced program. PADI, TRAINING BULLETIN/UPDATE 1 (Third Quarter, 1993). According to PADI, "[a]ll course requirements are the same. However, the depth limit for the deep dive must be limited to a maximum of 70 feet (21 meters) for the junior diver." *Id.*

264. Linda Lee Walden, *The Transition from Junior to Adult Diver*, DIVE TRAINING, Dec. 1995, at 53.

265. *Scott*, 34 P.2d at 12.

266. Mary K. Nesbit, *Expanding the Youth Market*, UNDERSEA J., Third Quarter, 1995, at 13.

For small operators and independent instructors, this decision will require serious consideration. The legal costs of defending a cause of action is not diminished due to the age of the parties and, depending on the jury, the awards may actually be greater in some instances.²⁶⁷ The *Scott* court stated that “[t]here are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract.”²⁶⁸ The defendant countered that, because under Washington law a parent was allowed to sue on the part of the minor, the parent should be allowed to release a cause of action as well.²⁶⁹

Although the *Scott* court ultimately rejected this argument on the basis of settled precedent, this reasoning should be further examined in relation to teenage participation in these sports. Perhaps the bar imposed on minor’s ability to contract should be lifted so that those over sixteen years of age may, with the consent of their parents, participate in potentially enriching experiences. This will settle the dilemma that operators face when confronted with teenagers who know the risks involved, are willing to assume them, and have parental approval to do so. Analogous to the plight of the sixteen-year-old scuba diver, is that of the sixteen-year-old automobile driver. Although the circumstances may be different, it would be a difficult task to find a sixteen-year-old who was not eager to obtain her driver’s license. Like the scuba diver, that teenager is aware of the risks, is willing to assume them, and probably has parental approval. The minor’s signing the application for a license is an implied contract whereby the driver promises to obey “the rules of the road” in exchange for the issuance of the license. While implicitly assuming the responsibilities involved, she concurrently assumes the risks associated with those responsibilities. While it may be true that the teenager is insured - and possibly under her parents’ coverage - that teenager is ultimately responsible for her own choices, whether that decision is to drive under the influence or pick up a hitchhiker.

IV. CONCLUSION

Exculpatory agreements continue to be upheld in the context of recreational sports. At some point, a person must be held responsible for the choices that person makes, especially when the

267.

268. *Scott*, 34 P.2d at 11.

269. *Id.*

choice is a voluntary one. Because of the unique characteristics of each activity, no uniform test exists which can be used to determine whether to uphold an exculpatory agreement. If a determination must be made, then, in the context of sports, the standard for gross negligence should be lowered, so as to exculpate providers for simple negligence, but hold the provider liable for its grossly negligent acts. In determining the threshold for negligence or gross negligence, the courts should look at the minimum standard of care established by the particular industry or, in the case of state regulation, by the state. The courts can then take into consideration the unique aspects of the particular sport and determine, within the context of that sport, if the actions of the provider were negligent or grossly negligent. Recall the example given previously, where a dive boat operator knowingly allows a participant to engage in an activity beyond the participant's experience level and that decision results in the injury or death of that participant. The courts should determine this act to be grossly negligent, and therefore, the act should fall outside of the protection afforded by the exculpatory agreement. Compare this to a situation in which a scuba instructor is teaching six students, and when his attention is diverted while assisting one student, an injury results to another student. This scenario should fall under the rubric of simple negligence, and therefore, should be covered by the exculpatory agreement. Again, recall the facts of the *Buchan* case, where the USCF was put on notice of the imminent danger posed by a novice cyclist in an Olympic trial. The USCF's decision to ignore the warnings made by the experienced cyclist should have constituted gross negligence, and therefore, the USCF should not have been extended the protection offered by the exculpatory agreement. By lowering the gross negligence threshold, however, a compromise can be achieved between the cases that should be covered by exculpatory agreements and those that should have been outside the protection of exculpatory agreements.

Society will ultimately have to absorb some of the costs involved in sporting accidents. The question that needs to be answered is, does this burden outweigh the individual's freedom to pursue, on a recreational basis, the sports they desire to become involved with? The authors propose that the only possible answer to this question, at least in our society, is that the burden to society will never outweigh this freedom. It is ingrained in the American psyche and in all persons that

[a] venturesome minority will always be eager to get out on their own, and no obstacles should be placed in their path: Let them take risks for Godsake, let them get lost, sunburnt, stranded, eaten by bears, buried alive under avalanches - that is the right and privilege of any free American.²⁷⁰

270. In the Matter of Gary Gentile, No. 951-193, U.S. Dept. of Commerce, National Oceanic and Atmospheric Admin., Office of the ALJ (Nov. 1989) (quoting James Huffman, *Wilderness and Freedom*, 16 IDAHO L. REV. 407, 420 (1980)).

APPENDIX

Exhibit I

PADI LIABILITY RELEASE AND EXPRESS ASSUMPTION OF RISK

1251 East Dyer Road #100 • Santa Ana, CA 92705-5605 USA • (714) 540-7234 • FAX (714) 540-2809

Please read carefully, fill in all blanks and initial each paragraph before signing.

I, _____, hereby affirm that I have been advised and thoroughly informed of the inherent hazards of skin diving and scuba diving.

Further, I understand that diving with compressed air involves certain inherent risks; decompression sickness, embolism, or other hyperbaric injuries can occur that require treatment in a recompression chamber. I further understand that the open-water diving trips, which are necessary for training and for certification, may be conducted at a site that is remote, either by time or distance or both, from such a recompression chamber. I still choose to proceed with such instructional dives in spite of the possible absence of a recompression chamber in proximity to the dive site.

I understand and agree that neither my instructor(s), _____, the facility through which I received my instruction, _____, nor International PADI, Inc., nor any of their respective employees, officers, agents or assigns, (hereinafter referred to as "Released Parties") may be held liable or responsible in any way for any injury, death, or other damages to me or my family, heirs, or assigns that may occur as a result of my participation in this diving class or as a result of the negligence of any party, including the Released Parties, whether passive or active.

In consideration of being allowed to enroll in this course, I hereby personally assume all risks in connection with said course, for any harm, injury or damage that may befall me while I am enrolled as a student of this course, including all risks connected therewith, whether foreseen or unforeseen.

I further save and hold harmless said course and Released Parties from any claim or lawsuit by me, my family, estate, heirs, or assigns, arising out of my enrollment and participation in this course including both claims arising during the course or after I receive my certification.

I also understand that skin diving and scuba diving are physically strenuous activities and that I will be exerting myself during this diving course, and that if I am injured as a result of a heart attack, panic, hyperventilation, etc., that I expressly assume the risk of said injuries and that I will not hold the above listed individuals or companies responsible for the same.

I further state that I am of lawful age and legally competent to sign this liability release, or that I have acquired the written consent of my parent or guardian.

I understand that the terms herein are contractual and not a mere recital, and that I have signed this document of my own free act.

IT IS THE INTENTION OF _____ BY THIS INSTRUMENT TO EXEMPT AND RELEASE

MY INSTRUCTORS, _____, THE FACILITY THROUGH WHICH I RECEIVED MY INSTRUCTION, _____, AND INTERNATIONAL PADI, INC., AND ALL RELATED ENTITIES AS DEFINED ABOVE, FROM ALL LIABILITY OR RESPONSIBILITY WHATSOEVER FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH HOWEVER CAUSED, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE.

I HAVE FULLY INFORMED MYSELF OF THE CONTENTS OF THIS LIABILITY RELEASE AND EXPRESS ASSUMPTION OF RISK BY READING IT BEFORE I SIGNED IT ON BEHALF OF MYSELF AND MY HEIRS.

Signature of Student

Date

Signature of Parent or Guardian (where applicable)

Date

Exhibit II

EXPERIMENTAL TEST PARACHUTE JUMPER ASSUMPTION OF RISK AGREEMENT

In consideration of SKYDIVE, INC. DBA Skydive Miami and The Uninsured Relative Workshop, Incorporated DBA Relative Workshop, hereinafter referred to as "Corporations," allowing me the privilege of utilizing a dual harness, dual parachute pack system owned by the Corporations for the purpose of my performing an intentional parachute jump, I agree that:

1. **REPRESENTATIONS, WARRANTIES AND ASSUMPTION OF RISK.** I understand that I will be performing a parachute jump or jumps in an EXPERIMENTAL TEST PROGRAM under a temporary exemption to the Federal Aviation Regulations, by which exemption was granted The Uninsured Relative Workshop, Incorporated DBA Relative Workshop and its representatives to develop safety standards and procedures for "tandem" parachute jumps by persons wearing a dual harness, dual parachute pack system. I know and understand the scope, nature and extent of the risks involved in the activities contemplated by this Agreement and voluntarily and freely choose to incur such risks, which include physical injury or even death.

2. **EXEMPTION FROM LIABILITY.** I exempt and release the Corporations, their officers, directors, agents, servants, employees, and shareholders and suppliers of aircraft airlift as well as the owners of land upon which the parachute jumping and related aircraft operations are conducted from any and all liability, claims, demands or actions or causes of action whatsoever arising out of any damage, loss or injury to me or my property while participating in any of the activities contemplated by this Agreement, whether such loss, damage, or injury results from the negligence of the Corporations, its officers, directors, agents, servants, employees or shareholders or from some other cause.

3. **COVENANT NOT TO SUE.** I agree never to institute any suit or action at law or otherwise against the Corporations, their officers, directors, agents, servants, employees, or shareholders or suppliers of aircraft airlift or against the owners of land upon which the parachute jumping and related activities are conducted, nor to initiate any or assist in the prosecution of any claim for damages or cause of action which I, my heirs, executors or administrators hereinafter may have by reason of injury to my person or to my property arising from the activities contemplated by this Agreement.

4. **INDEMNITY AGAINST THIRD PARTY CLAIMS.** I will indemnify, save and hold harmless the Corporations, their officers, directors, agents, servants, employees and shareholders and suppliers of aircraft airlift and the owners of land upon which these activities are conducted from any and all losses, claims, actions, or proceedings of every kind and character which may be presented or initiated by any other persons or organizations and which arise directly or indirectly by my activities or neglect while engaged in the activities contemplated by this Agreement. This duty to indemnify includes court costs and reasonable attorney's fees incurred in the defense of lawsuits.

5. **CONTINUATION OF OBLIGATIONS.** I agree and acknowledge that the terms and conditions of the foregoing EXEMPTION FROM LIABILITY, COVENANT NOT TO SUE, and INDEMNITY AGAINST THIRD PARTY CLAIMS shall continue in force and effect, now and in the future, at all times during which I participate, either directly or indirectly, in the activities of the Corporations and shall be binding upon my heirs, executors and administrators of my estate.

IN WITNESS WHEREOF, I have affixed my legal signature

this _____ day of _____, 1995.

EXPERIMENTAL PARACHUTE TEST JUMPER:

LEGAL SIGNATURE

Age: _____

Witness: _____

Exhibit III

The Uninsured Relative Workshop, Inc. d/b/a Relative Workshop
EXPERIMENTAL TEST PARACHUTE JUMPER AGREEMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. ALLOW YOURSELF SUFFICIENT TIME TO CAREFULLY READ AND UNDERSTAND THE ENTIRE DOCUMENT, BECAUSE BY SIGNING IT, YOU ARE AGREEING TO GIVE UP CERTAIN LEGAL RIGHTS. PLEASE READ EACH PARAGRAPH CAREFULLY. YOUR *INITIAL INDICATES YOU UNDERSTAND AND AGREE TO ALL OF THE INFORMATION AND TERMS CONTAINED THEREIN. *Initial

In consideration of the Uninsured Relative Workshop Inc., doing business as Relative Workshop, and Skydive, Inc. doing business as Skydive Miami, hereinafter referred to as "Corporations", allowing me the privilege of utilizing a dual-harness, dual container parachute pack assembly, designed, manufactured and/or assembled by the Uninsured Relative Workshop, Inc., d/b/a Relative Workshop, for the purpose of performing an intentional parachute jump, I agree that:

*Initial

1) **Representations, Warranties & Assumptions of Risk:** I understand that I will be performing a parachute jump or jumps in an experimental program under temporary exemption to the Federal Aviation Regulations, which exemption was granted the Uninsured Relative Workshop, Inc. d/b/a Relative Workshop to develop safety standards and procedures for "tandem" parachute jumps by persons wearing a dual-parachute pack. I also understand that parachute jumping will expose me to the risk of personal injury, property damage and/or death. I understand that the success of my jump is dependent upon the perfect functioning of the airplane from which I intend to jump and the parachute system, and that neither the airplane nor the parachute system can be guaranteed to function perfectly. I understand that the airplane and the parachute system are both subject to mechanical malfunction as well as operator error. I freely, voluntarily and expressly choose to assume all risks inherent in parachute jumping, including, but not limited to, risks of equipment malfunction and/or failure to function, including those which may result from some defect in design, assembly, and/or manufacture, as well as those risks arising from improper and/or negligent operation and/or use of the equipment, for the thrill of participating in this activity, understanding full well that those risks may include personal injury, property damage, and/or death.

*Initial

2) **Exemption and Release from Liability:** I exempt and release the following persons and organizations:

*Initial

(A) The Corporations and their officers, directors, agents, servants, employees, shareholders, and other representatives;

*Initial

(B) Manufacturers, designers, and suppliers of component equipment incorporated in the dual-harness, dual-container parachute pack assembly to which I will be attached during my intentional parachute jump;

*Initial

(C) Owners, suppliers and operators of aircraft from which I am to make my intentional parachute jump;

*Initial

(D) The owner of the dual-harness, dual-container parachute pack assembly, and any of its components, to which I will be attached during my intentional parachute jump;

*Initial

(E) The operator of the dual-harness, dual container parachute pack assembly to which I will be attached during my intentional parachute jump;

*Initial

(F) If I am making my intentional parachute jump at or near a parachuting/skydiving facility, the owners and operators of that facility, as well as their officers, directors, agents, servants, employees, shareholders, and other representatives;

*Initial

(G) The owners and leasees, if any, of land upon and from which the parachute jumping and related aircraft operations are conducted; and

*Initial

(H) Any other person and/or organization which is or may be liable for any loss or injury to me or my property, or my death, arising out of my participation in any of the activities covered by this Agreement (as defined below);

*Initial

From any and all liability, claims, demands or actions or causes of action whatsoever arising out of any damage, loss or injury to me or my property, or my death, whether occurring while I am training and/or preparing for my intentional parachute jump, while I am present in aircraft from which the jump is to be made, while I am making my intentional parachute jump, or while I am engaged in related activities (hereinafter referred to as "activities covered by this Agreement"), whether such loss, damage, injury, or death results from the negligence and/or other fault, either active or passive, of any of the persons and/or organizations described in paragraphs 2(A) - (H) above, or from any other cause.

*Initial

3) **Covenant Not to Sue:** I agree never to institute any suit or action at law or otherwise against any of the organizations and/or persons described in paragraph 2(A) through (H) above, or to initiate or assist in the prosecution of any claim for damages or cause of action which I may have by reason of injury to my person or property, or my death, arising from the activities covered by this Agreement, whether caused by the negligence and/or fault, either active or passive, of any of the organizations and/or persons described in paragraph 2(A) through (H) above, or from any other cause. I further expressly agree that I will never raise any claim against any of the organizations and/or persons described in paragraph 2(A) through (H) above for product liability, failure to warn, negligence, breach of warranty, breach of contract, or strict liability, regardless of whether my claims for damages or injuries are alleged to result from the fault or negligence of the parties released. I further agree that my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf, shall not institute any suit or action at law or otherwise against any of the organizations and/or persons described in paragraph 2 (A) through (H) above, nor shall they

EXCUSATORY AGREEMENTS UNDER PRESSURE

initiate or assist the prosecution of any claim for damages of cause of action which I, my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf may have by reason of injury to my person or property, or my death arises from the activities covered by this Agreement, whether caused by the negligence and/or fault, either active or passive, of any of the organizations and/or persons described in paragraph 2 (A) through (H) above, or from any other cause, I hereby so instruct my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf. Should any suit or action at law or otherwise be instituted in violation of this Agreement against any of the organizations and/or persons described in paragraph 2 (A) through (H) above, I agree that such organizations and/or persons shall be entitled to recover attorneys' fees and costs incurred in defense of such suit or action, including any appeals therefrom.

_____*Initial

4) Indemnity Against Claims: I will indemnify, save and hold harmless the organizations and/or persons described in paragraph 2(A) through (H) above from any and all losses, claims, actions or proceedings of every kind and character, including attorney's fees and expenses, which may be presented or initiated by any persons and/or organizations and which arise directly or indirectly from my participation in the activities covered by the Agreement, whether resulting from the negligence and/or other fault, either active or passive, or any of the organizations and/or persons described in paragraph 2(A) through (H) above, or from any other cause.

_____*Initial

5) Validity of Waiver: I understand that if I institute or anyone on my behalf institutes, any suit or action at law or any claim for damages or cause of action against any of the organizations and/or persons described in paragraph 2(A) through (H) above because of injury to my person or property, or my death, due to the activities covered by this Agreement, this Agreement can and will be used in court, and that such agreements have been upheld in courts in similar circumstances.

_____*Initial

6) Representations and Warranties as to Medical Condition: I represent and warrant that (a) I have no physical infirmity, except those listed below, am not under treatment for any other physical infirmity or chronic ailment or injury of any nature, and have never been treated for any other of the following: cardiac or pulmonary conditions or disease, diabetes, fainting spells or convulsions, nervous disorder, kidney or related diseases, high or low blood pressure; (b) I am not under any medication of any kind at the present time; and (c) I do/do not (strike one) wear corrective lenses. If I am prescribed corrective lenses, I agree to wear them during my intentional parachute jump.

(list infirmities, if none, state "none")

7) Waiver of Jury Trial/Applicable Law/Venue/Headings: I agree that the law of the State of Florida shall apply to issues involving the construction, interpretation, and validity of this Agreement, and that Florida law shall govern any dispute between the parties arising from the activities covered by this Agreement. In the event this Agreement is violated and suit is brought against any of the organizations and/or persons described in paragraph 2 (A) through (H) above, I waive my right to a jury trial, and agree that Volusia County, Florida shall be the sole venue for any suit or action arising from the activities covered by this Agreement. I agree that the headings and sub-headings used throughout this Agreement are for convenience only and have no significance in the

interpretation of the body of this Agreement.

_____*Initial

8) Severability/Multiple Waivers: I agree that should one or more provisions in this Agreement be judicially determined to be unenforceable, the remaining provisions shall continue to be binding and enforceable against me. If I have executed any other agreement containing provisions relating to the exemption and/or release from liability and/or covenant not to sue in connection with the activities covered by this Agreement, I agree that the agreement which provides the most protection from liability and/or suit to the Uninsured Relative Workshop Inc., d/b/a Relative Workshop shall be enforceable against me by the Uninsured Relative Workshop, Inc. d/b/a Relative Workshop.

_____*Initial

9) Continuation of Obligations: I agree and acknowledge that the terms and conditions of this Agreement shall continue in force and effect now and in the future at all times during which I participate in the activities covered by this Agreement, and shall be binding upon my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf. This Agreement supersedes and replaces any prior such agreement I have signed.

_____*Initial

10) Viewing of Videotape: I have viewed and I warrant that I fully understand the accompanying "Tandem Vector Waiver" video tape.

I freely and voluntarily agree to all of the above by signing this contract on the _____ day of _____, 1995 at the offices of Skydive, Inc., Homestead, Florida.

EXPERIMENTAL TEST JUMPER:

Please Print Neatly

Name: _____

LEGAL SIGNATURE

Driver's License #: _____

Age: _____ Birth Date: _____

Address: _____

Address: _____

Telephone #: (_____) _____

Witness: _____

* Please read each paragraph carefully. Your initial indicates you understand and agree to all of the information and terms contained therein.

Exhibit IV

ACKNOWLEDGMENT OF RISKS, and ASSUMPTION OF RISK AND RESPONSIBILITY

WARNING: There are significant elements of risk in any activity associated with outdoor adventures, including but not limited to bicycling, camping, climbing/hiking/trekking, fishing, hunting, skiing, sledding, swimming, wilderness lodges, and the presence or use of animals, watercraft, firearms or other weapons and the use of any related equipment (referred to herein as "activity"). Although we have taken reasonable steps to provide you with appropriate equipment and/or skilled guides so you can enjoy an activity for which you may not be skilled, we wish to remind you this activity is not without risk. Certain risks cannot be eliminated without destroying the unique character of the activity. The same elements that contribute to the unique character of the activity can be causes of loss or damage to your equipment, or accidental injury, illness, or in extreme cases, permanent trauma or death. We do not want to frighten you or reduce your enthusiasm for this activity, but we do think it is important for you to know in advance what to expect and to be informed of the inherent risks.

ACKNOWLEDGMENT OF RISKS: I acknowledge that the following describes some, but not all, of those risks: 1) Falling; 2) Cold weather and heat related injuries and illnesses including frostnip, frostbite, heat exhaustion, heat stroke, hypothermia, and dehydration; 3) An "act of nature" which may include avalanche, rock fall, inclement weather, thunder and lightning, severe and/or varied wind, temperature or weather conditions; 4) River crossings, fordings, portaging, or travel including travel to or from the activity; 5) Risk associated with crossing, climbing or down-climbing of rock, snow and/or ice; 6) Equipment failure and/or operator error; 7) Discharge of weapons; 8) Risks typically associated with watercraft including change in waterflow or current; submerged, semi-submerged and overhanging objects; capsizing, swamping or sinking of watercraft and resultant injury, hypothermia, or drowning; 9) My sense of balance, physical coordination, and ability to follow instructions; 10) Attack by or encounter with insects, reptiles, or animals; 11) Accidents or illnesses occurring in remote places where there are no available medical facilities; 12) Fatigue, chill and/or dizziness, which may diminish my/our reaction time and increase the risk of accident.

I understand the description of these risks is not complete and that unknown or unanticipated risks may result in injury, illness or death.

EXPRESS ASSUMPTION OF RISK AND RESPONSIBILITY: I am aware that this activity entails risks of injury or death to myself and minor children for which I may be responsible. I agree to assume responsibility for the risks identified herein and those risks not specifically identified. My/Our participation in this activity is purely voluntary. No one is forcing me/us to participate and I/we elect to participate in spite of the risks. I am (We are) physically and mentally capable of participating in the activity and/or safely using the equipment. *I accept that wearing a U.S. C. G. approved personal flotation device for waterborne activities is a basic safety precaution.* I assume full responsibility for the risks of personal injury, accidents or illness, including but not limited to sprains, torn muscles and/or ligaments; fractured or broken bones; eye damage; cuts, wounds, scrapes, abrasions, and/or contusions; dehydration, oxygen shortage (anoxia), exposure and/or altitude sickness; head, neck, and/or spinal injuries; animal or insect bite or attack; injury caused by discharge of any weapon; shock, paralysis, drowning, and/or death; and any resultant expenses from any of the foregoing risks. I also assume responsibility for damage to or loss of my/our personal property as the result of any accident that may occur.

COVENANT OF GOOD FAITH: I recognize that you, as provider of goods and/or services, will operate under a covenant of good faith and fair dealing, but that you may find it necessary to terminate an activity or refuse or terminate the participation of any person for the safety of myself and/or other participants. I acknowledge that no guarantees have been made with respect to achieving objectives. **AUTHORIZATION:** I hereby authorize any medical treatment deemed necessary in the event of any injury while participating in the activity. I either have appropriate insurance or, in its absence, agree to pay all costs of rescue and/or medical services as may be incurred on my/our behalf.

"In consideration of the services of _____, their officers, agents, employees, and stockholders, and all other persons or entities associated with those businesses, I agree as follows:

I certify that I am fully capable of participating in this activity. Therefore, I assume and accept full responsibility for myself, including all minor children in my care, custody, and control, for bodily injury, death, loss of personal property, and expenses as a result of those inherent risks and dangers identified herein and those inherent risks and dangers not specifically identified, and as a result of my/our negligence in participating in this activity."

I have read the foregoing acknowledgment of risks, assumption of risk and responsibility.

Participant's Name (printed) Age Signature _____

In an emergency, notify (print): _____ Phone: () _____

List known allergies to medications, plants, or insects: _____

Advise if under a doctor's care or using any prescription medications: _____

If the Participant is under 18, the Parent or Legal Guardian must also sign: _____

AOR(12-95)