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Is Statutory Immunity For Spaceflight Operators Good Enough?

Maria-Vittoria “Giugi” Carminati

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Is Statutory Immunity For Spaceflight Operators Good Enough?

Cover Page Footnote

Space, Cyber & Telecommunications Law L.L.M. Thesis

IS STATUTORY IMMUNITY FOR SPACEFLIGHT OPERATORS GOOD ENOUGH?

OF STATUTES, COMMON LAW, AND EXCULPATORY PROVISIONS

MARIA-VITTORIA "GIUGI" CARMINATI*

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

Blackburn v. Dorta, 348 So. 2d 287, 292 (Fla. 1977).

The road to hell is paved with good intentions.

Proverb

- INTRODUCTION..... 36
- I. FEDERAL LAW 38
 - A. REGULATION OF COMMERCIAL HUMAN SPACEFLIGHT AT THE FEDERAL LEVEL..... 38
 - B. WHAT IS FEDERAL INFORMED CONSENT? 39
 - 1. SFPs 40
 - 2. CREW 41
 - C. HOW IS LIABILITY HANDLED AT THE FEDERAL LEVEL?..... 42
 - 1. STATE-TO-STATE LIABILITY AND INDEMNIFICATION AT THE INTERNATIONAL LEVEL..... 42
 - 2. LIABILITY AND RISK-SHARING AT THE U.S. NATIONAL LEVEL 43
- II. STATE LAW 44
 - A. SPACE ACTIVITIES STATUTES 44
 - B. STATUTES LIMITING LIABILITY 45
 - C. EXPRESS ASSUMPTION OF RISK..... 46
 - D. IMPLIED ASSUMPTION OF RISK..... 48
- III. STATE LAW IN THE SPACE FRIENDLY STATES..... 50
 - A. CALIFORNIA..... 50
 - 1. THE SPACE ACTIVITIES STATUTE 50
 - 2. STATUTES LIMITING LIABILITY 51
 - 3. EXPRESS ASSUMPTION OF RISK..... 52

* Space, Cyber & Telecommunications Law L.L.M. Thesis

4. IMPLIED ASSUMPTION OF RISK.....	57
B. COLORADO.....	64
1. SPACE ACTIVITIES STATUTE.....	64
2. STATUTES LIMITING LIABILITY.....	65
a. EQUINE ACTIVITIES.....	65
b. SKIING.....	67
3. EXPRESS ASSUMPTION OF RISK.....	71
4. IMPLIED ASSUMPTION OF RISK.....	79
C. FLORIDA.....	81
1. SPACE ACTIVITIES STATUTE.....	81
2. STATUTES LIMITING LIABILITY.....	82
3. EXPRESS ASSUMPTION OF RISK.....	85
4. IMPLIED ASSUMPTION OF RISK.....	90
D. NEW MEXICO.....	92
1. SPACE ACTIVITIES STATUTE.....	92
2. STATUTES LIMITING LIABILITY.....	93
a. EQUINE ACTIVITIES.....	93
b. SKIING.....	94
3. EXPRESS ASSUMPTION OF RISK.....	96
4. IMPLIED ASSUMPTION OF RISK.....	106
E. TEXAS.....	109
1. SPACE ACTIVITIES STATUTE.....	109
2. STATUTES LIMITING LIABILITY.....	111
3. EXPRESS ASSUMPTION OF RISK.....	113
4. IMPLIED ASSUMPTION OF RISK.....	117
F. VIRGINIA.....	120
1. SPACE ACTIVITIES STATUTE.....	120
2. STATUTES LIMITING LIABILITY.....	121
3. EXPRESS ASSUMPTION OF RISK.....	121
4. IMPLIED ASSUMPTION OF RISK.....	121
CONCLUSION.....	124

INTRODUCTION

Over the past decade, the commercial spaceflight industry has seen a growth never witnessed before. The likes of Virgin Galactic and Xcor are promising suborbital flights to anyone willing to pay the price. Golden Spike is selling tickets to the moon. And SpaceX was re-supplying the ISS as a commercial provider as of 2012. States have responded to this growth by trying to make themselves more attractive to these commercial providers of space services (hereinafter generally referred to as “spaceflight entities”). Attractiveness has become synonymous with overt efforts to decrease spaceflight entities’ liability from injuries to their spaceflight participants (“SFPs”). As a result, six

states (Virginia, New Mexico, Colorado, California, Texas and Florida, or the “Space Friendly States”) have passed statutes limiting spaceflight entities’ liability with respect to their customers (the “Space Activities Statutes”). However, though the legislature may pass laws, the courts must enforce them. This raises the following two overarching questions: 1) did the legislatures in the Space Friendly States actually decrease spaceflight entities’ liability exposure by enacting the Space Activities Statutes?; and 2) how robust is the common law of each state in limiting liability for operators of recreational activities? These questions are answered for each of the Space Friendly States below.

An analysis of statutes and case law limiting liability sits at the crossroads between tort doctrine, social values and beliefs regarding personal responsibility and fostering business, as well as “political and economic interests on the determination of the types of risks that are assumed and the allocation of accident costs when such risks lead to injuries.”¹ Much of the existing case law regarding statutes which purport to limit liability focuses on the equine and ski industries. Although this trajectory was dictated by the existence of equine liability statutes (“ELAs”) and ski liability statutes (“SLAs”) are readily comparable to Spaceflight Activity Statutes, these industries are similar to the spaceflight industry in other ways. All three industries and their related insurance industries “remain critically interested in how the cost of [. . .] accidents is apportioned.”² This interest has resulted in legislatures enacting statutes to protect those industries. However, as noted by scholars focusing on the skiing industry and illustrated below, “courts have varied widely in their interpretation of the statutes.”³ In some cases, like California, this has led to the curious result where courts have accommodated plaintiffs despite the absence of protective legislation.⁴ It is this surprising unintended consequence which drives the inquiry below.

Part I explains the federal law related to SFPs as it provides color and at times may significantly affect outcomes in courts applying state law. Part I explains: a) the informed consent framework in the United States Code (the “USC”) and b) the FAA’s implementation, by means of regulations (the “Regulations”), of the informed consent framework mandated by Congress. Part I also briefly addresses how liability is apportioned at the national and international levels.

¹ See Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 302 (2010).

² *Id.* at 302 (discussing the skiing industry only).

³ *Id.*

⁴ See Feldman, *supra* note 1, at 302–03.

Part II analyzes state law. Part II (A) provides context for the Space Activities Statutes and identifies the categories of information worthy of analysis. Part II (B) introduces statutes limiting liability for equine and skiing activities. These statutes are most appropriate for comparison to the Space Activities Statutes because they seek to limit operators' liability from risks inherent in dangerous recreational activities. Part II (C) explains state law on express assumption of risk ("EAR"), defined for these purposes as assumption of risk by contract. Part II (D) introduces the doctrine of implied assumption of risk and its two categories: primary assumption of risk ("PAR") and secondary assumption of risk ("SAR"). As a result, Part II (D) also establishes standardized terms to refer to the various types of implied assumption of risk.

Part III brings Parts I and II together. Part III(A)–(F) analyze each of the Space Friendly States individually. For each state, the analysis covers: 1) the Space Activity Statute, 2) statutes otherwise limiting liability for recreational activities and resulting case law; 3) application of EAR; and 4) application of implied assumption of risk. Part III looks at how courts in each of the six states have interpreted the liability limiting statutes, including trends to either limit or broaden their application, and courts' approaches to defining "inherent risks" under the statutes. Part III also attempts to predict how courts in the Space Friendly States will actually enforce the Space Activities Statutes, and whether the legislatures have addressed any limitations courts are likely to impose. The analysis of EAR looks at particular exculpatory provisions and how courts have interpreted them. This delineates the necessary criteria for an enforceable exculpatory clause in each of the Space Friendly States, and whether the legislatures took these into consideration when drafting the required "warning statements" in their respective Space Activities Statutes. The analysis of implied assumption of risk also attempts to predict how courts would apply assumption of risk to claims by SFPs against spaceflight entities if spaceflight entities cannot avail themselves of statutory immunity under the Space Activities Statutes. This, in turn, indicates whether the legislatures improved, worsened, or didn't affect liability exposure for spaceflight entities.

I. FEDERAL LAW

A. REGULATION OF COMMERCIAL HUMAN SPACEFLIGHT AT THE FEDERAL LEVEL

The Commercial Space Launch Act of 1984, codified as amended in

Chapter 509 of Title 51 of the United States Code (the “Launch Act”), authorizes the U.S. Department of Transportation (“DOT”) to issue licenses for non-governmental space activities.⁵ Such licenses include licenses to operate a launch site, to launch vehicles from Earth, and to for space vehicles to reenter the Earth’s atmosphere from space.

The DOT is the lead agency for regulatory guidance pertaining to commercial space transportation activities. However, the Secretary of Transportation delegated commercial space licensing authority to the Federal Aviation Administration (“FAA”). As a result, the FAA, through its Office of Commercial Space Transportation, is in charge of licensing commercial launches, reentries, and the operation of launch and reentry sites pursuant to the Launch Act.

In order to carry out its statutory duties, the FAA passed regulations implementing the Launch Act. The relevant regulations are codified at 14 C.F.R. Sections 415, 420, 431, and 435 (the “Regulations”). The first FAA-licensed launch was a suborbital launch of the Starfire launch vehicle on March 29, 1989. Since then, the FAA has licensed more than 200 launches and the operation of eight commercial spaceports.⁶ The first FAA reentry license was issued in December 2011 to SpaceX for reentry of the Dragon capsule.⁷

B. WHAT IS FEDERAL INFORMED CONSENT?

The Launch Act and its implementing Regulations impose different training, medical, and informed consent requirements for SFPs and crew for commercial space activities. Under the Launch Act, “crew” is any employee of a licensee or of a contractor or subcontractor of a licensee “who performs activities in the course of that employment directly relating to the launch, reentry, or other operation of or in a launch vehicle or reentry vehicle that carries human beings.”⁸ An SFP is “an individual, who is not crew, carried within a launch vehicle or reentry vehicle.”⁹ The provider of space transportation services is referred to as the “operator.” The term “spaceflight entity,” defined above, encompasses “operator.” But for purposes of discussing federal law, it is more precise to use the term operator.

⁵ Commercial Space Launch Act, Pub. L. No. 98-575, § 3, 98 Stat. 3055 (1984) (codified as amended at 51 U.S.C. §§ 50901–50923 (2006)).

⁶ *Launch Data and Information*, Office of Commercial Space Transportation, FED. AVIATION ADMIN., http://www.faa.gov/about/office_org/headquarters_offices/ast/launch_license/ (last visited Dec. 9, 2013).

⁷ Maria-Vittoria “Giugi” Carminati, *Breaking Boundaries by Coming Home: The FAA’s Issuance of a “Reentry License” to SpaceX*, 24 AIR & SPACE LAW., no. 2, 2011, at 8.

⁸ 51 U.S.C. § 50902(2) (2006).

⁹ *Id.* at § 50902(17).

GOOD ENOUGH?

1. SFPs

The Regulations do not create medical or training standards for SFPs. This is consistent with the FAA's overarching safety regime which limits itself to protecting the safety of the general or uninvolved public. In 2004, the FAA was given authority to create training and medical standards for SFPs three years after the passage of Commercial Space Launch Amendments Act ("CSLAA")¹⁰. However, the FAA has yet to do so. In addition, the Launch Act prohibits the FAA from proposing regulations governing the design or operation of a launch vehicle to protect the health and safety of crew and SFPs until October 1, 2015; or until a design feature or operating practice has resulted in a serious or fatal injury or contributed to an event that posed a high risk to crew or SFPs during a licensed commercial human spaceflight.¹¹

The Launch Act, however, does require that all SFPs provide written informed consent to the technical risks of human spaceflight. The Launch Act mandates that an operator may only launch or reenter a space vehicle if the operator: (1) "informed the [SFP] in writing about the risks of the launch and reentry, including the safety record of the launch or reentry vehicle type;" (2) informed the SFP "that the United States Government has not certified the launch vehicle as safe for carrying crew or SFPs;" and (3) "the [SFP] has provided written informed consent to participate in the launch and reentry."¹² The Regulations further flesh out these statutory requirements.

Under the Regulations, before agreeing to fly an SFP an operator must discuss the following six topics with the SFP: (1) the hazards associated with sub-orbital flights generally, (2) the lack of safety certification by the United States Government for carrying crew or SFPs, (3) the safety record of launch and reentry vehicles generally, (4) the safety record of the operators' particular vehicle, (5) the availability of additional information if the SFP desires it, and (6) an opportunity for the SFP to ask additional questions.¹³ As part of the process, the SFP must receive a written disclosure of the known hazards "that could result in serious injury, death, disability, or total or partial loss of physical and mental function" for each mission.¹⁴ Additionally, an SFP must be informed in writing that there are unknown hazards and that their participation in spaceflight may result in death, serious injury, or

¹⁰ Commercial Space Launch Amendments Act, Pub. L. No. 108-292, 118 Stat. 3974 (2004).

¹¹ 51 U.S.C. § 50905(c)(2)-(3), *amended by* Pub. L. No. 112-95, § 827, 126 Stat. 11 (2012).

¹² 51 U.S.C. § 50905.

¹³ 14 C.F.R. § 460.45 (2013).

¹⁴ *Id.*

total or partial loss of physical or mental function.¹⁵

When discussing the safety record of all launch or reentry vehicles, an SFP must receive the following information: (1) the total number of people who have been on a suborbital or orbital spaceflight and the total number of people who have died or been seriously injured on these flights, and (2) the total number of launches or reentries conducted with people on board and the number of catastrophic failures of those launches or reentries.

When describing the safety record of its vehicle to each SFP, the operator's safety record will include: (1) the number of vehicle flights, (2) the number of accidents and human spaceflight incidents, and (3) whether any corrective actions were taken to resolve these accidents and human spaceflight incidents.

Lastly, an operator must inform the SFP that the SFP can ask for additional information regarding accidents and human spaceflight incidents. In the same context, the SFP must be given an opportunity to ask additional questions. The final written consent must identify the space launch vehicle it covers, state that the SFP understands the risk and that their presence on board the vehicle is voluntary, and be signed and dated by the SFP.

2. CREW

Unlike the detailed informed consent requirements for SFPs, operators must only inform their crew that the U.S. Government has not certified the launch and reentry vehicle as safe for carrying flight crew or spaceflight participants.¹⁶ In addition, the Regulations' notification requirement requires only that an operator inform the crew that risks exist, not that it identify all potential operational and design hazards.¹⁷

The Regulations mandate that each member of a flight crew and any remote operator must execute a reciprocal waiver of claims with the FAA.¹⁸ There are no such mandatory cross-waivers for the benefit of licensed operators.¹⁹ The absence of mandatory cross-waivers means that crew and operators are entitled to, and should, address issues of liability contractually.²⁰

¹⁵ *Id.*

¹⁶ 14 C.F.R. § 460.9 (2007).

¹⁷ *Id.*

¹⁸ 14 C.F.R. § 460.19 (2013).

¹⁹ M. Mineiro, *Assessing the Risks: Tort Liability and Risk Management in the Event of a Commercial Human Spaceflight Accident*, 74 J. AIR L. & COM. 392 (2008).

²⁰ For an example of such cross-waivers, and possible contractual language, see App'x D, 14

C. HOW IS LIABILITY HANDLED AT THE FEDERAL LEVEL?

The “informed consent” procedure described above does not—as one might expect—create the basis for immunizing the government or the operator from liability for any injuries resulting from the space activities. Rather, the United States requires the SFPs and the operators to waive any claims against the U.S. Government, while leaving liability between the SFP and the operator up to the parties. It is this gap that state legislatures are attempting to fill. Further, in addition to liability between SFPs and operators, operators could be subjected to third-party liability both internationally and domestically.

**1. STATE-TO-STATE LIABILITY AND INDEMNIFICATION
AT THE INTERNATIONAL LEVEL**

At the international level, the United States is liable as a “launching state” under the Outer Space Treaty and the Liability Convention for damage caused by space objects. If the United States is liable under the Liability Convention it has a duty to indemnify other countries for damage or injury to their property and to their nationals. The Liability Convention defines “launching State” very broadly to potentially include multiple States. A launching State is: (1) a State that launches a space object; (2) a State that procures the launching of a space object; (3) a State from whose territory a space object is launched; or (3) a State from whose facility a space object is launched.²¹ Therefore, the United States could be liable for damage caused to third-parties by a space object if it meets any of the above criteria.

The Liability Convention also dictates the type of culpability used to apportion fault. If damage is done to the surface of the Earth by a space flight launch or reentry, the United States (or other launching state) is absolutely liable under a theory of strict liability. If damage is not on the Earth’s surface, i.e. in outer space, the Liability Convention imposes negligence liability.²²

Under the Liability Convention, the United States, and not individual operators, is liable for damage to non-U.S. parties, even if the space object was launched by a private U.S. operator without participation (other than licensing) by the U.S. Government.²³ However, nothing prevents the United States from, in turn, seeking to recover

C.F.R. § 440 *et seq.*

²¹ Convention of International Liability for Damage Caused by Space Objects art. I, Mar. 29, 1972, 24.2 U.S.T. 2389, 961 U.N.T.S. 187.

²² Convention of International Liability for Damage Caused by Space Objects art. III-IV.

²³ Convention of International Liability for Damage Caused by Space Objects art. II.

from the operators if one of the operators' vehicles causes damage to a third-party. In addition, the remedies under the Liability Convention are non-exclusive, so international plaintiffs may still bring suit directly against the U.S. operator foreign and domestic tort laws, analyzed below. In order to be more competitive and assuage some commercial concerns, the United States enacted a risk-sharing regime whereby it will indemnify operators for damages above a certain cap.

2. LIABILITY AND RISK-SHARING AT THE U.S. NATIONAL LEVEL

The Launch Act addresses the apportionment of risk at the national level.²⁴ The Launch Act creates a risk-sharing mechanism and requires execution of cross-waivers of liability for each licensed launch or reentry.²⁵ Under the no-fault reciprocal waivers of claims, each party assumes responsibility for losses or injuries to itself and to its employees.²⁶ Additionally, each launch participant agrees to bear their own losses.²⁷

First, each licensee must execute a reciprocal waiver of claims with the various commercial entities involved in the launch or reentry activity, including the licensee's contractors, subcontractors, and customers, and their respective contractors and subcontractors. Under this cross-waiver, each party must agree "to be responsible for property damage or loss sustained or for personal injury to, death of, or property damage or loss sustained by its own employees resulting from an activity carried out under the applicable license."²⁸ Second, the licensee, contractors, subcontractors, crew, SFPs, and customers of the licensee must enter into a similar cross-waiver of claims with the U.S. Government and its contractors and subcontractors, to the extent the amount of the claims exceeds the amount of insurance the licensee is required to obtain pursuant to its license.

As stated, the Launch Act requires crew and SFPs to waive claims against the U.S. Government. However, nothing in the Launch Act requires crew and SFPs to waive claims against the private parties involved in the licensed or permitted activity, including the launch provider, its contractors and subcontractors.²⁹ These entities are therefore not protected by federal law against claims by crew and SFPs,

²⁴ 51 U.S.C. § 50901.

²⁵ *Id.* at § 50915.

²⁶ *Id.* at § 50914(b).

²⁷ *Id.*

²⁸ 51 U.S.C. § 50914(b)(1) (2006).

²⁹ *See, e.g.,* Timothy R. Hughes & Esta Rosenberg, *Space Travel Law (and Politics): The Evolution of the Commercial Space Launch Amendments Act of 2004*, 31 J. SPACE L. 1, 62–64 (2005).

GOOD ENOUGH?

or their heirs, in the event of an accident. Liability that is not covered by the Launch Act protections must instead be addressed by State Space Activities Statutes, state common law, and contractual liability allocation.

II. STATE LAW

Only the six Space Friendly States have enacted laws that address liability issues in commercial spaceflight activities, but others are sure to follow in their footsteps. The following discussion analyzes state law in the Space Friendly States—Texas, Colorado, California, Virginia, New Mexico, and Florida—from four different perspectives: A) the language of the Space Activities Statutes themselves; B) statutes immunizing other activities and resulting case law; C) case law analyzing EAR; and D) case law analyzing implied assumption of risk, divided into PAR and SAR. These four perspectives, brought together, are currently the best indicators of a spaceflight entity's likely exposure to liability in the six Space Friendly States, both with and without the Space Activities Statutes.

A. SPACE ACTIVITIES STATUTES

The last few years have seen a tremendous development towards potential commercial spaceflight. From Virgin Galactic to SpaceX and XCOR, commercial companies are promising commercial flights for common citizens willing to pay between \$90,000 and \$200,000 each per flight. However, this relative commodification of spaceflight has raised concerns about liability. The concern by spaceflight entities, legislatures, and spaceflight enthusiasts is that SFP's might attempt to recover for injuries caused by spaceflight activities which resulted from dangers that cannot be eliminated because of the perilous nature of the activity itself.³⁰ Even if spaceflight entities exercise all due care and some risks simply cannot be eliminated particularly because of the tremendous energy and speeds required to reach orbital or suborbital trajectories as well as intense cold and rarified air typical of space itself. Suborbital flights cannot exist without those risks. As a result of these inherent risks, legislatures passed statutes limiting the liability of spaceflight entities to assist and protect the fledgling industry.³¹

³⁰ See, e.g., Sbandla, *California Governor Signs the Spaceflight Liability and Immunity Act*, COM. SPACEFLIGHT FED'N, available at <http://www.commercialspaceflight.org/2012/09/california-governor-signs-the-spaceflight-liability-and-immunity-act/> (last accessed Nov. 20, 2013).

³¹ See, e.g., T. Hoover, *Colorado Senate Bill Would Limit Spaceflight Companies' Liability*, THE DENVER POST (Feb. 7, 2012, 1:00 AM), http://www.denverpost.com/legislature/ci_19907396; P. Alp, *Limitations on Liability As To Space Tourists*, TORT TRIAL AND INS. COMMITTEE NEWS (Summer 2011), available at <http://www.crowell.com/files/2011-Limitations-On-Liability-As-To-Space-Tourists.pdf>.

Virginia's Space Flight Liability and Immunity Act of 2007³² grants conditional immunity from liability to companies providing human spaceflight services in the event of an injury resulting from the risks inherent in spaceflight. Virginia was the first state to enact such a measure. Florida, New Mexico, Texas, Colorado, and California soon followed Virginia's lead and adopted similar legislation.³³

The purpose of the limited liability laws is to create some security that spaceflight companies will not be sued by SFPs or their heirs for spaceflight activities undertaken at the SFPs' own risk. Nevertheless, the protection offered by the Florida, New Mexico, Virginia, California, Colorado, and Texas laws is not absolute and provides immunity only under certain circumstances. Consequently, the Space Activities Statutes are referred to as providing *limited* liability rather than immunity. The limitations imposed on immunity vary significantly from state to state. These limitations vary not by virtue of the language of each of the statutes, but by virtue of each jurisdiction's judicial interpretation of that statutory language.

B. STATUTES LIMITING LIABILITY

Five of the six Space Friendly States already have statutes limiting liability for certain activities. Colorado, Florida, New Mexico, and Texas have statutes limiting liability for operators of equine activities ("Equine Liability Acts" or "ELAs"). Colorado, New Mexico, and Virginia have statutes limiting liability for operators and organizers of skiing activities ("Ski Liability Acts" or "SLAs"). Judicial interpretation and enforcement of these statutes may indicate how these same courts will interpret and enforce space immunizing legislation, if and when the time comes to do so. However, the ELAs and the SLAs are not solely liability limiting statutes, which distinguishes them, across the board, from the Space Activities Statutes. The latter were passed to limit spaceflight entity liability in an effort to attract the various companies to each enacting state respectively. The ELAs and the SLAs have a more nuanced purpose. They usually list certain things ski and equine operators are required to do. And they also often list skier and equine participant responsibilities. This can, and should, always serve as a way to distinguish the SLA/ELA frameworks from the Space Activities Statutes, especially when courts take legislative intent into consideration.

³² VA. CODE ANN. §§ 8.01-227.10 (2007).

³³ See Meredith Blasingame, *Nurturing the United States Commercial Space Industry in an International World: Conflicting State, Federal, and International Law*, 80 MISS. L.J. 741 (2010) (showing an adoption of limited liability legislation by Virginia, Florida, New Mexico, Texas, Colorado, and California).

In several states, courts have to decide whether the injury to the plaintiff was the result of the inherent danger of the activity before deciding whether the operator is entitled to statutory immunity. If the injury resulted from an inherent risk, the statute applies. If the injury does not result from an inherent risk, the statute does not apply and the parties must apply common law negligence. Though the concept of "inherent risk" is determinative of whether there is immunity, historically it has been hard to define. Scholars attribute the difficulty of defining inherent risk to the fact that the term is not self-defining.

The idea of inherent risks is contested, in part because the concept is not self-defining. In some cases, inherent risks are defined as those that cannot be removed by due care, whereas in other cases, courts imply that even some risks that could be relatively easily remedied are inherent in skiing.³⁴

This is precisely the type of issue which will make the federal informed consent, with its list of expected risks, so important at the state level. Federal law requires a spaceflight operator to discuss the "hazards associated with sub-orbital flights generally" to an SFP. What each operator defines as "hazards associated with sub-orbital flights generally" for purposes of informed consent will most likely have a dramatic impact on any determination of immunity at the state level.

C. EXPRESS ASSUMPTION OF RISK

Express assumption of risk, despite being used in torts, is a creature of contract law. For EAR, the parties generally sign an exculpatory agreement in the form of a statement, a waiver, a release, an assumption, a warning or an agreement whereby the party incurring the risks releases the other party from liability for injuries resulting therefrom. Courts faced with these agreements find that they raise questions about enforcing agreements that are the result of unequal bargaining power, "The question raised by such cases is whether express agreements should be enforced or whether the unequal bargaining power of the parties negates the plaintiff's consent, regardless of the plaintiff's awareness of certain dangers and apparent choice to confront them."³⁵ The warning statements in Space Activities Statutes will no doubt raise the same issues thereby making courts' construction of exculpatory agreements relevant to determine whether the language required by legislatures in the Space Activities Statutes is sufficient, on its own, to

³⁴ Feldman, *supra* note 1, at 271-73.

³⁵ *Id.*

act as an exculpatory agreement.

EAR and its exculpatory provisions arise in court when defendants are unable to avail themselves of statutes limiting their liability and seek to enforce any warning statement signed by the plaintiff as an exculpatory provision. The analysis is particularly appropriate here because the Space Activities Statutes *require* spaceflight entities to obtain a signed warning statement from SFPs. When other immunizing statutes, such as SLAs and ELAs, require a signed warning defendants who lose statutory immunity—either because the injury is not the result of an inherent risk or because they breached the statutes—usually claim EAR, and use the signed warning statements as proof of exculpation. Spaceflight entities will likely do the same if, for some reason, the Space Activities Statutes do not immunize them. In addition, a review of the common law governing exculpatory agreements can guide spaceflight entities' drafting of exculpatory language in their contracts, thereby further allowing them to protect themselves from liability. In the future, such an analysis could also guide legislatures drafting warning statements for the Space Activities Statutes.

There are five categories of information useful to an analysis of the Space Activities Statutes warning statements:

1. **Nature of the Document.** Is the document a warning, an acknowledgment, a release, or a consent?
2. *Absence of Liability.* What is the SFP immunizing the space flight entity from? Inherent risks? Inherent injuries? Something else?
3. Degree of Culpability. Does the document talk about the degree of culpability? Gross negligence? Mere negligence?
4. Extent of Damages. Does the document list the types of injuries for which the SFP may not recover under state law? What do these include?
5. Informed Consent. Does the document refer to “informed consent”? Does it incorporate federal informed consent laws?

The formatting schemes (bold, italics, single underline, double underline, and dashed underline) associated with each category are used below to highlight corresponding language in the warning statements and exculpatory provisions.

D. IMPLIED ASSUMPTION OF RISK

Implied assumption of risk is a defense to common law negligence claims. If spaceflight entities cannot use the Space Activities Statutes (either because the incurred risk was not “inherent” or because they violated the statute), and their arguments to enforce the warning statements as “exculpatory agreements” fail, they will be left with the defenses available at common law in the Space Friendly States, which include the defense of implied assumption of risk. As discussed, each of the six states enacted the Space Activities States against an already-existing backdrop of negligence jurisprudence. The existence, application, and enforcement of negligence concepts on operators will be at the forefront of any litigation resulting from space activities. And courts have, and will continue to grapple with the extent to which the legislatures were trying to increase or decrease available common law remedies when they promulgated the Space Activities Statutes. This is where each legislature’s drafting should have taken into consideration the common law world of negligence in their respective jurisdictions; however, some legislatures did so only superficially.

Virginia, New Mexico, and California provide that the limitations on legal liability afforded by the space immunity statutes are “in addition” to any other limitations on liability available under state law.³⁶ Other states failed to address the issue altogether. The Texas, Colorado, and Florida statutes do not specify whether the immunity granted by the statute are in lieu of or in addition to already-existing claims and defenses under state law.³⁷

At the national level, up until the halfway through the 20th century most states used a “contributory negligence” regime whereby negligence by the plaintiff was a complete bar to her recovery.³⁸ The “contributory negligence” regime was slowly abandoned (only six states still apply it) and replaced with “comparative negligence” where negligence is apportioned and recovery is reduced by the amount attributable to the plaintiff’s own negligence.³⁹ Courts have since grappled with ways to incorporate “assumption of risk” in the comparative negligence regime.⁴⁰ The main difficulty comes from the fact that declaring that

³⁶ CAL. CIV. CODE § 2212(d) (West 2013); N.M. STAT. ANN. § 41-14-3(C) (2013); VA. CODE ANN. § 8.01-227.9(C) (2013).

³⁷ COLO. REV. STAT. § 41-6-101 (2013); FLA. STAT. § 331.501 (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001 (West 2013).

³⁸ Feldman, *supra* note 1, at 270.

³⁹ *Id.*

⁴⁰ *See id.* at 272 (describing the muddy waters of implied and express assumption of risk as applied by the courts).

a plaintiff “assumed the risk” harkens back to the abandoned theories of “contributory negligence.” But failing to recognize that sometimes plaintiffs *do* assume risks, whether reasonably or unreasonably, ignores reality and undermines the tort dispute resolution system.⁴¹

Courts and scholars have used the term “assumption of risk” in a variety of ways, creating confusion about its meaning. As noted by scholars, “this seemingly simple legal concept has been freighted with political and moral tensions for over a century, and it has been attacked as ‘sinister’ and ‘dangerously misleading.’”⁴² As Justice Felix Frankfurter insightfully noted:

The phrase “assumption of risk” is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.⁴³

In light of this, and given that analysis herein spans six states, it is inevitable that each state may have its own twist on the use of term. In order to address this, it is best to start from the academic definitions of “assumption of risk” as a standard and elaborate from there for each state. At common law, there are two types of assumption of risk: express and implied. Within implied, there are two subcategories: primary assumption of risk and secondary assumption of risk.

Primary assumption of risk, or PAR, means that the operator *has no duty* to the plaintiff. And such absence of duty is usually based on the relationship between the parties. Further, subsumed in this concept of “no duty” is often the idea that the defendant has no duty to decrease the “inherent risks” of the activity because doing so would fundamentally alter the nature of the activity. For example, a ski resort operator has no duty to protect a skier from the inherent risks of skiing, such as taking jumps and going downhill at high speeds. But it has a duty to not increase the inherent risks of skiing by, for example, creating a jump and negligently leaving a piece of snow plowing equipment in the landing site. If the defendant did increase the inherent risks of an activity, many courts proceed to application of “secondary assumption of risk” or SAR.

⁴¹ Feldman, *supra* note 1, at 271–73.

⁴² Feldman, *supra* note 1.

⁴³ *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

SAR is when the operator does have a duty to the plaintiff, breached that duty, but the plaintiff chose to go ahead with the activity that resulted in the injury. Using the example above, the ski resort operator breaches its duty by building a jump and negligently leaving a piece of snow plowing equipment in the landing site. The plaintiff takes the jump and injures herself. The plaintiff may or may not have known about the snow plowing equipment. This is SAR and triggers a comparative negligence analysis, comparing each of the parties' negligence (if any) and apportioning liability accordingly. These are generic definitions and each state may vary them slightly, but the above descriptions are mental constructs to broach the analysis.

III. STATE LAW IN THE SPACE FRIENDLY STATES

While similar, the six Space Activities Statutes are not identical. The most relevant features to compare and contrast the Space Activities Statute are: 1) the definitions for: spaceflight entity, participant, and spaceflight activity; 2) the harms for which the Space Activities Statute provides immunity; 3) the spread of entities to which immunity is granted; 4) the breadth of the immunity along the gradient of culpability; 5) how the Space Activities Statutes describe the risks for which immunity is granted; 6) what those entities have to do in order to benefit from the immunity; and 7) consequences for failing to abide by those requirements.

A. CALIFORNIA

1. THE SPACE ACTIVITIES STATUTE

California is an outlier with respect to the scope of its Space Activities Statute because it limits the definition of "spaceflight entity" solely to the FAA license holder.⁴⁴ The Space Activities Statute also *expressly excludes* manufacturers of parts or components that proximately cause injury to participants from the statute's immunity.⁴⁵ SFP is defined by referring to and incorporating the definition of SFP from the Launch Act.⁴⁶ Likewise, California defines a spaceflight activity by merely referring to, and adopting by reference, the definition of spaceflight activities in the Launch Act.⁴⁷

The California Space Activities Statute imposes an obligation on the spaceflight operator to obtain "informed consent," as that process

⁴⁴ CAL. CIV. CODE ANN. § 2210(d) (2010).

⁴⁵ *Id.* at § 2212(e).

⁴⁶ *Id.* at § 2210(c).

⁴⁷ *Id.*

is defined by federal law, and have the SFP sign a statutorily mandated warning statement.⁴⁸ The California Space Activities Statute does not impose obligations in addition to those imposed by federal law. If the spaceflight operator complies with the informed consent requirements, no one—whether next of kin, estate or participant themselves—is authorized to bring a suit against or recover from a spaceflight entity for “participant injury that resulted from the risks associated with space flight activities”⁴⁹ The California Space Activities Statute therefore does not limit immunity to inherent risks of a spaceflight activity. Rather, the California legislature adopted the broader term “risks associated with spaceflight activities.”⁵⁰

California provides no immunity if a spaceflight entity commits an act or omission that constitutes either gross negligence *or* willful or wanton disregard for an SFP’s safety.⁵¹ In addition, California does not provide immunity if the space flight entity knows or has reason to know of the dangerous condition that proximately causes the injury.⁵² In other California statutes, the expression “knows or has reason to know” refers to “wanton or willful misconduct.”⁵³ There is no California case law referring to the standard as representing mere negligence. Lastly, the California Space Activities Statute does not give spaceflight entities immunity for intentional acts.⁵⁴

2. STATUTES LIMITING LIABILITY

California sits on one end of the spectrum with respect to statutes limiting liability for operators of recreational activities. Aside from the Space Activities Statute, California does not have a single other statute limiting liability for organizers and operators of particular activities. Thus, when the legislature passed its Space Activities Statute it was enacting a first-of-its-kind law. However, the legislature did not provide spaceflight entities any more protection than they would have had at common law under this statute.

California courts have been markedly pro-defendant in cases

⁴⁸ *Id.* at § 2212(a).

⁴⁹ CAL. CIV. CODE ANN. § 2212(b).

⁵⁰ *Id.* at § 2212(a).

⁵¹ *Id.* at § 2212(c).

⁵² *Id.*

⁵³ *Henry J. Kaiser Co. v. Indus. Acc. Comm’n*, 185 P.2d 353, 358 (Cal. Ct. App. 1947) (“The test whether an act is *willful* misconduct as used in section 4553 is not that the employer knew that the act would, and intended that it should, harm an employee, but rather that the employer or his managing official representative knew or *should have known* that the performance of the act or its omission was *likely* to cause harm to an employee.”).

⁵⁴ CAL. CIV. CODE ANN. § 2212(c).

between injured skiers and ski resort operators for many years. In fact, scholars have noted that California courts, even in the absence of statutes immunizing defendants, have developed tremendously pro-defendant jurisprudence:

Why have the California courts, in the absence of a statute that codifies the assumption of risk doctrine, embraced a common law approach to assumed risk that is more favorable to defendants than the most narrowly tailored legislation?⁵⁵

This is even more surprising given that the reverse is true in states with specifically-tailored pro-industry legislation.⁵⁶ As a result, the California legislature's decision to enact the California Space Activities Statute is not necessarily a benefit to spaceflight entities.

3. EXPRESS ASSUMPTION OF RISK

Under California law, exculpatory agreements in the recreational sports context do not implicate the public interest and are therefore not void as being against public policy.⁵⁷ Further, a party can prospectively exculpate itself for its own negligence or misconduct.⁵⁸ But such a release has to be "clear, unambiguous, and explicit in expressing the intent of the subscribing parties" though "[t]he release need not achieve perfection."⁵⁹ When reviewing the language of a release, courts will find an ambiguity when a party can identify an "alternative, semantically reasonable, candidate of meaning of a writing."⁶⁰ Ambiguities as to the release's scope are normally construed against the drafter.⁶¹

As discussed above, California does not have ELAs, SLAs, or other statutes comparable to the Space Activities Statute. Given the absence of an ELA or an SLA, the best approach to predict what courts will do with the Space Activities' Statute warning statement is to compare it to other exculpatory provisions independently drafted by parties and subsequently interpreted by California courts.

⁵⁵ Feldman, *supra* note 1, at 298.

⁵⁶ *Id.* Speculation as to the reason behind this correlation is beyond the scope of this analysis, significant evidence of this trend is supported by case law.

⁵⁷ *Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471, 478 (Cal. Ct. App. 2008) (internal citation omitted).

⁵⁸ *Id.* at 478.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

The California Space Activities Statute refers to the SFP's understanding and acknowledgment of inherent risks, and broadly defines the latter as "death, emotional injury, and property damage":

**WARNING AND
ACKNOWLEDGMENT:**

I understand **and acknowledge** that, under California law, **there is limited civil liability** for bodily injury, including death, emotional injury, or property damage, sustained by a participant as a result of the *inherent risks associated with space flight activities* provided by a space flight entity. I have given my informed consent to participate in space flight activities after receiving a description of the *inherent risks* associated with space flight activities, as required by federal law pursuant to Section 50905 of Title 51 of the United States Code and Section 460.45 of Title 14 of the Code of Federal Regulations. The consent that I have given acknowledges that the *inherent risks associated with space flight activities include, but are not limited to, risk of bodily injury, including death, emotional injury, and property damage.* **I understand and acknowledge** that I am participating in space flight activities at my own risk. I have been given the opportunity to consult with an attorney before signing this statement.⁶²

Note the dissonance between the statute and the warning statements. Under the statute, spaceflight operators are given immunity for, "participant injury that *resulted from* the risks associated with space flight activities . . ."⁶³ But the warning statement refers to the SFP's understanding and acknowledgment of "inherent risks." Unfortunately, courts will have to resolve this ambiguity, a product of poor drafting. Additionally, there is no legislative history to provide insight about

⁶² CAL. CIV. CODE ANN. § 2211(a) (2013) (emphasis added).

⁶³ *Id.* at § 2212(b) (emphasis added).

GOOD ENOUGH?

any intentional causes for the discrepancy.⁶⁴ There is also no case law addressing this type of situation, making this a case of first impression in California.

An enforceable release must be clear, explicit, and comprehensible enough for a lay person to understand they are releasing the operator for the operator's own negligence.⁶⁵ This does not mandate the use of the word "negligence" or any particular verbiage. For example, in a 2008 California Court of Appeals decision, the word negligence appeared once in the release at issue, but it was used to refer to the *plaintiff's* negligence: "The word 'negligence' is used but once, and in a way that refers *only* to *appellant's* negligence, not that of respondent."⁶⁶ Further, the release needs to "inform the releasor that it applie[s] to misconduct on the part of the releasee."⁶⁷ The Space Activities Statute purports to immunize a spaceflight entity for its own negligence. But the warning statement does not explicitly say that. Nor does it indicate, implicitly or explicitly, the scope of culpability encompassed. The warning statement refers to "inherent risks" as including, but not being limited to, "bodily injury, including death, emotional injury, and property damage."⁶⁸ What the warning statement *does not* say is whether these risks include the spaceflight operator's negligence.

Third, with regards to the negligent act being exonerated, the express terms of the release must apply to the defendant's particular negligence, but the release does not have to include every possible specific act of negligence.⁶⁹ For example, if a plaintiff releases a defendant of "all liability" then the release also applies to "any negligence of the defendant."⁷⁰ The only qualifier is that the particular negligence had to be "reasonably related to the object or purpose for which the release is given."⁷¹ And when a release expressly releases the defendant from liability, the plaintiff does not need to have had "specific knowledge of the particular risk that ultimately caused the injury."⁷² This is theoretically a generous reading of release language and it should give parties broad latitude in limiting an operator's exposure. However, despite these generous standards, California courts have sometimes

⁶⁴ See Cal. Assembly Journal, 2011-2012 Reg. Sess., No. 243 (Aug. 28, 2012); Cal. Leg., S. Daily Journal, 2011-2012 Reg. Sess., at 199th Legislative Day (May 10, 2012).

⁶⁵ *Cohen*, 72 Cal. Rptr. at 481 (emphasis added) (citing *Ferrell v. S. Nev. Off-Rd. Enthusiasts, Ltd.*, 195 Cal. Rptr. 90, 96 (Cal. Ct. App. 1983).

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *Sanchez v. Bally's Total Fitness Corp.*, 79 Cal.Rptr.2d 902, 904 (Cal. Ct. App. 1998).

⁶⁸ CAL. CIV. CODE ANN. § 2211(a).

⁶⁹ *Cohen*, 72 Cal. Rptr. 3d at 478 (citations omitted).

⁷⁰ *Id.*

⁷¹ *Id.* (citations omitted).

⁷² *Id.* (citation omitted).

refused to enforce language that is seemingly in compliance with the above requirements.⁷³ In addition, the Space Activities Statute's warning statement does not speak in terms of "release of liability." Rather, it reflects the SFP's consent to the risks "inherent in spaceflight." But it does not release or waive claims against the spaceflight entity. Spaceflight entities therefore would have to supplement the warning statement with language that complies with the California courts' judicially pronounced requirements for exculpatory provisions.

Further, although California courts will find that release of "all liability" encompasses spaceflight entities' negligence, the Space Activities Statute does not use that language. In fact, the "Warning and Acknowledgment" merely says there is "limited civil liability" (highlighted in italics above) for injuries inherent in spaceflight activities – a far cry from releasing a spaceflight entity for "all liability."

Fourth, at common law, for purposes of exculpatory provisions, whether the injury-causing risk is "inherent" is irrelevant under California law, because the only thing that matters is whether the risk incurred is within the scope of the provision.⁷⁴ California courts do not inquire about "inherent risks" when analyzing a release because what matters is the *scope* of the release. But the warning and acknowledgment provided by the legislature expressly limits itself to "inherent risks" despite the Space Activities Statute purportedly granting immunity for risks "associated" with spaceflight activities. As a result, spaceflight entities cannot rely on the warning statement language to act as an exculpatory provision if the Space Activities Statute does not apply.

Fifth, if there are two reasonable interpretations of its language, a release is ambiguous. Given the basic canon of construction that ambiguities are resolved against the drafter of the instrument, ambiguities cannot be construed in the defendant's favor.⁷⁵ In *Vine v. Bear Valley* the plaintiff, a ski resort employee, was injured while snowboarding.⁷⁶ The defendant moved for summary judgment based on a release the plaintiff signed when she received her employee season pass.⁷⁷ The relevant terms of the release were as follows:

I understand and am aware that skiing
is a HAZARDOUS ACTIVITY involving

⁷³ See *infra* Section IV(A)(3) (citing and analyzing cases to that effect).

⁷⁴ *Cohen*, 72 Cal. Rptr. 3d at 478 (citation omitted).

⁷⁵ *Cohen*, 72 Cal. Rptr. 3d at 480 (citing *Benedek v. PLC Santa Monica, LLC*, 129 Cal. Rptr. 2d 197, 202 (Cal. Ct. App. 2002)).

⁷⁶ *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 378 (Cal. Ct. App. 2004).

⁷⁷ *Id.* at 378.

GOOD ENOUGH?

INHERENT AND OTHER RISKS of injury to any and all parts of my body. I further understand that injuries in the sport are a *COMMON AND ORDINARY OCCURRENCE*, and I freely **ACCEPT AND ASSUME ALL RISKS OF INJURY OR DEATH** that might be associated with my participation in this sport.

. . . To the fullest extent allowed by law, I agree to **RELEASE FROM LIABILITY, and to INDEMNIFY AND HOLD HARMLESS** Bear Valley Mountain Resort . . . from any and all liability on account of, or in any way resulting from, personal injuries, death or property damage, even if caused by NEGLIGENCE, in any way connected with my participation in this sport. I further **AGREE NOT TO MAKE A CLAIM OR SUE FOR INJURIES OR DAMAGES** in any way connected with my participation in this sport, *even if caused by NEGLIGENCE*.⁷⁸

The Court of Appeals held the release ambiguous because “‘skiing’ does not necessarily include snowboarding.”⁷⁹ In addition, the plaintiff in *Vine* was injured after the close of the season during an event organized by her employer.⁸⁰ The Court of Appeals also held that a reference in the pass to the 1999–2000 “season” did not unambiguously apply to the plaintiff’s injuries, because the employee event took place after the slopes closed for the season.⁸¹ Such strict construction of exculpatory agreements should raise concerns among spaceflight entities and encourage extremely careful—and broad—drafting. This case certainly indicates a spaceflight entity’s need to supplement the warning statement provided by the Space Activities Statute.

Sixth, the release must encompass the particular injury suffered by the plaintiff. In 2008 a California court of appeals decided *Cohen v. Five Brooks Stable*, where the plaintiff was injured when she fell from a horse during a guided trail ride provided by the defendant.⁸² The defendant

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Cohen*, 72 Cal. Rptr. 3d at 474.

moved for summary judgment based on PAR and on the “Visitor’s Acknowledgment of Risk” signed by the plaintiff. The exculpatory provision released liability for risks “not specifically identified herein.”⁸³ The Court of Appeals had to decide whether this phrase only exculpated the operator for the inherent risks of horseback riding or whether it included the risk of the defendant’s own misconduct which increased the inherent risks.⁸⁴ The Court of Appeals found the language referring to risks “not specifically identified herein” fatally ambiguous⁸⁵ because “risks not specifically identified” could—reasonably—refer to the risks *inherent* in horseback riding that were left unidentified by the phrase “some, but not all.”⁸⁶ But the words could also refer to risks arising out of the operator’s negligence that *increase* the inherent risks.⁸⁷ Then court concluded that such an interpretation would be “semantically reasonable.”⁸⁸ Therefore, given the existence of two reasonable interpretations, the release was held ambiguous and had to be construed against the drafter of the instrument, the operator.⁸⁹

Seventh, under California law an exculpatory provision only applies to entities that are parties to it.⁹⁰ The legislature did not address this issue at all in its warning language. This is likely a willful omission given that the California Space Activities Statute expressly excludes any entity *other* than the spaceflight entity from its limited liability. Spaceflight entities drafting exculpatory agreements should be mindful of this and find ways to include every entity they wish to protect in their language.

To conclude, although California courts do not view exculpatory provisions as contrary to public policy and approve of exculpatory provisions releasing a party for their own future negligence, spaceflight entities should not rely solely on the Space Activities Statute warning as a standalone exculpatory provision. Overall, the legislature could have drafted language that is clear, explicit, and comprehensible enough for a lay SFP to understand it is releasing the spaceflight entity from liability for its own negligence. This is especially true given California courts’ aggressive interpretation of ambiguities, as exemplified by *Vine*. The provided “Warning and Acknowledgment” statement creates a very narrow exculpation provision; indeed, it exculpates less behavior

⁸³ *Id.* at 478.

⁸⁴ *Id.*

⁸⁵ *Id.* at 480.

⁸⁶ *Cohen*, 72 Cal. Rptr. 3d at 479.

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *Benedek v. PLC Santa Monica, LLC*, 129 Cal. Rptr. 2d 197, 203 (Cal. Ct. App. 2002)).

⁸⁹ *Id.*

⁹⁰ *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 202–03 (Cal. Ct. App. 2003).

than is immunized under the Space Activities Statute itself.

4. IMPLIED ASSUMPTION OF RISK

Under California law, there are two types of implied assumption of risk: PAR and SAR.⁹¹ Under PAR—where the defendant owes no duty to protect the plaintiff—a plaintiff is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable.⁹² In fact, the plaintiff's reasonableness or subjective beliefs are also not part of the equation.⁹³ Under SAR—involving instances in which the defendant breaches a duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was *reasonable* rather than unreasonable.⁹⁴ For these reasons, California courts do not rely on the distinction between a plaintiff's reasonable or unreasonable actions because, “use of the ‘reasonable implied assumption of risk’/‘unreasonable implied assumption of risk’ terminology, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and those in which he or she is not barred, is more misleading than helpful.”⁹⁵

PAR applies to co-participants, organizers and operators, which makes it readily applicable to suits by SFPs or their families against spaceflight entities.⁹⁶ And under PAR, a defendant has no duty to eliminate (or protect plaintiffs) from risks inherent in the sport itself, although the defendant does have a duty to not increase the risks specific to the activity.⁹⁷ The overriding consideration in determining whether PAR should apply to an activity is whether “imposing a duty [. . .] might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.”⁹⁸ Indeed, the object of PAR is “to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in

⁹¹ *Knight v. Jewett*, 834 P.2d 696, 701, 709 (Cal. 1992).

⁹² *Id.* at 703–04.

⁹³ *Id.* at 709.

⁹⁴ *Id.* at 703–04.

⁹⁵ *Id.*

⁹⁶ *Amezcuva v. Los Angeles Harley-Davidson*, 132 Cal. Rptr. 3d 567, 577 (Cal. Ct. App. 2011) (citing *Ford v. Gouin*, 11 Cal. Rptr. 2d 30 (Cal. Ct. App. 1993)).

⁹⁷ *Knight*, 834 P.2d at 708 (citing Donald M. Zupanec, Annotation, *Liability for Injury or Death From Ski Lift, Ski Tow, or Similar Device*, 95 A.L.R.3d 203 (1979)); *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 380 (Cal. Ct. App. 2004) (quoting *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392 (Cal. Ct. App. 1995)); *Van Dyke v. S.K.I. Ltd.*, 79 Cal. Rptr. 2d 775, 779 (Cal. Ct. App. 1998).

⁹⁸ *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 203 (Cal. Ct. App. 2003) (citing *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 67).

the activity.”⁹⁹ Spaceflight entities could make a compelling argument that placing too many restrictions on an activity that consists of people being thrust into suborbital trajectories, reaching speeds of 1.4 km/s, being “weightless” for 3–6 minutes, and returning to earth would be “chilling.” This is further strengthened by California courts’ position that whether a duty exists is contingent on the *nature* of the activity and not the relationship of the parties. If the defendant does breach its duty to the plaintiff and increases the risks inherent in the sport, the analysis switches from PAR to SAR, which requires an apportionment of liability under comparative fault principles.¹⁰⁰

However, as noted above PAR does not entail “unbridled legal immunity.”¹⁰¹ Rather, there still remains a “duty to use due care *not to increase the risks to a participant over and above those inherent in the sport.*”¹⁰² For example, drinking alcoholic beverages is not an activity inherent in the sport of skiing.¹⁰³ On the other hand, “in various sports, going too fast, making sharp turns, not taking certain precautions, or proceeding beyond one’s abilities are actions held not to be totally outside the range of ordinary activities involved in those sports.”¹⁰⁴ In contrast, under PAR, a plaintiff’s suit will not be barred if a defendant’s actions are found to be “totally outside the range of ordinary activities involved.”

In *Cohen v. Five Brooks Stable*, the plaintiff sued a stable based on a horseback riding accident allegedly caused by a trail guide suddenly increasing his pace, thereby encouraging the plaintiff’s horse to do the same, causing her to fall.¹⁰⁵ The court reversed summary judgment for the plaintiff and held PAR did not apply because “the conduct of respondent’s trail guide was ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport’ in which appellant was engaged.”¹⁰⁶ The court added, “[a] spooked horse that throws a rider may be a horse acting as a horse, but a trail guide who unexpectedly provokes a horse to bolt and run without warning its rider is not in our opinion a ‘trail guide acting as a trail guide.’”¹⁰⁷

⁹⁹ *Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471, 489 (Cal. Ct. App. 2008) (citing *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 43 (2003)).

¹⁰⁰ *Knight*, 834 P.2d at 712; *Bush v. Parents Without Partners*, 21 Cal. Rptr. 2d 178, 181 (Cal. Ct. App. 1993).

¹⁰¹ *Moser*, 130 Cal. Rptr. 2d at 205.

¹⁰² *Id.* (internal citation omitted) (emphasis added).

¹⁰³ *Id.* at 206 (citing *Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 423 (Cal. Ct. App. 1994)).

¹⁰⁴ *Id.* at 206 (citing *Cheong v. Antablin*, 946 P.2d 817, 820 (Cal. 1997)).

¹⁰⁵ *Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471, 474–75 (Cal. Ct. App. 2008).

¹⁰⁶ *Id.* at 486 (citing *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992)).

¹⁰⁷ *Id.* at 484 (internal quotation marks omitted).

Determining whether a risk is inherent is a complicated inquiry with undefined contours. One California court held that “whether a particular risk is an inherent part of an activity ‘is necessarily reached from the common knowledge of judges, and not the opinions of experts.’”¹⁰⁸ The same court defined inherent risks as, “the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport.”¹⁰⁹ In *Amezcuca v. Los Angeles Harley-Davidson*, the court concluded that closing freeways to other traffic during the ride would alter the parade-like nature of riding in a motorcycle procession on a public highway.¹¹⁰ Under those circumstances, PAR barred recovery from Harley-Davidson, the defendant.¹¹¹ In *Nalwa* the court held PAR applicable to bumper cars in part because doing otherwise would destroy the activity.¹¹² Similarly, spaceflight entities can argue that suborbital flights are simply impossible if certain attributes, such as rapid acceleration, placing people in weightlessness, leaving the Earth’s atmosphere, and potentially exposing passengers to the risks associated with reentry into Earth’s atmosphere, are eliminated. Suits for injuries arising from those and any other necessary elements of a suborbital flight should therefore be barred under California’s PAR doctrine.

California courts will apply PAR to an activity if it, “is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.”¹¹³ Thus in the sports context duty is fashioned “in the process [of] defining the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport.”¹¹⁴ The court went on to note that the rule seemed to only apply “in a potentially dangerous activity or sport.”¹¹⁵

California courts will also apply PAR to an activity that, “entails some pitting of physical prowess (be it strength based [i.e., weight

¹⁰⁸ *Amezcuca v. Los Angeles Harley-Davidson*, 132 Cal. Rptr. 3d 567, 580 (Cal. Ct. App. 2011).

¹⁰⁹ *Id.* (internal citation omitted).

¹¹⁰ *Id.* at 581.

¹¹¹ *Id.*

¹¹² *Nalwa v. Cedar Fair*, 290 P.3d 1158, 1164 (Cal. 2012) (internal quotation marks omitted).

¹¹³ *Moser*, 130 Cal. Rptr. 2d at 205 (citing and quoting *Record v. Reason*, 86 Cal. Rptr. 2d 547, 554 (Cal. Ct. App. 1999)). See *Bush v. Parents Without Partners*, 21 Cal. Rptr. 2d 178, 181 (Cal. Ct. App. 1993) (citing *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992)).

¹¹⁴ *Bush*, 21 Cal. Rptr. 2d at 181.

¹¹⁵ *Id.* (citations omitted).

lifting], or skill based, [i.e., golf]) against another competitor or against some venue.”¹¹⁶ In *Shannon v. Rhodes* a California court concluded that being a passenger in a boat was “too benign” to be subject to PAR.¹¹⁷ In *Beninati v. Blackrock City*, another appellate court added a twist to the standard by holding that where an activity has an “obvious risk,” this will also weigh in favor of applying PAR.¹¹⁸ In *Beninati*, the plaintiff was at the Burning Man Festival. He approached the ceremonial fire to participate in the festivities and burnt himself. The court found that “[t]he risk of injury to those who voluntarily decide to partake in the commemorative ritual at Burning Man is self-evident. . . . [T]he risk of stumbling on buried fire debris . . . was an obvious and inherent one,”¹¹⁹ and therefore PAR applied.

California courts have used and refined the standard to determine which activities are subject to PAR, applying PAR to activities as varied as motorcycle riding, bicycle riding, and waterskiing.¹²⁰ In fact, PAR has been applied to: snow skiing, water skiing, touch football, collegiate baseball, off-roading, skateboarding, golf, lifeguard training, tubing behind a motorboat, wrestling, gymnastics stunt during cheerleading, little league baseball, cattle roundup, sport fishing, ice skating, football practice drill, judo, rock climbing, river rafting, and sailing.¹²¹ PAR explicitly does not apply to a boating passenger and recreational dancing.¹²² Some more recent California decisions have altered the standard yet again, holding that PAR applies to activities which involve “inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.”¹²³ This exact standard has since been repeated approvingly, notably in 2011 in *Amezcuca*.¹²⁴

SFPs currently go through fairly rigorous physical training (including centrifuge testing), and subject themselves to significant forces, as well as potentially to the atmospheric rigors of suborbital trajectories,¹²⁵ thereby indicating that suborbital flying will at least be considered for inclusion as an “activity” worthy of PAR. Also,

¹¹⁶ *Amezcuca*, 132 Cal. Rptr. 3d at 577.

¹¹⁷ *Id.* (citing *Shannon v. Rhodes*, 112 Cal. Rptr. 2d 217, 221 (Cal. Ct. App. 2001)).

¹¹⁸ *Beninati v. Black Rock City, LLC*, 96 Cal. Rptr. 3d 105, 111 (Cal. Ct. App. 2009).

¹¹⁹ *Id.* at 659.

¹²⁰ *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 205, 208 (Cal. Ct. App. 1999) (internal citations omitted).

¹²¹ *Moser*, 130 Cal. Rptr. 2d at 204–05 (citations omitted).

¹²² *Id.*

¹²³ *Beninati*, 96 Cal. Rptr. 3d at 109.

¹²⁴ *Amezcuca*, 132 Cal. Rptr. 3d at 577.

¹²⁵ See, e.g., Melchor Antunano, *Medical Considerations for Manned Commercial Spaceflight*, FAA Civil Aerospace Medical Institute (Oct. 26, 2004), available at http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/meeting_news/media/2004/october/Antunano.ppt.

GOOD ENOUGH?

spaceflight entities can take solace that certain activities, such as going “too fast,” or pushing the boundaries, could be considered risks inherent of the activity, thereby not giving rise to liability.

Lastly, under California law, PAR is *per se* not a proper subject for jury instruction. The California Supreme Court has made it clear that whether PAR negates a defendant’s duty to protect the plaintiff from a particular risk is a legal determination to be made by the court, not the jury.¹²⁶ This makes the matter suitable for summary judgment disposal.¹²⁷

California’s jurisprudence, as exemplified above, is expansive and generally protective of operators and organizers of recreational activities. The trend is confirmed in skiing cases, which generally protect the ski industry. The trend is so marked, in fact, that scholars have noted how surprising it is given the absence of legislation specifically protecting the industry:

Perhaps surprisingly, in the absence of the codification of assumed risk and without a clear statement from the legislature about the importance of shielding the ski industry from liability, California courts have been more vigorous in shielding the ski industry from liability than those in either Vermont or Colorado.¹²⁸

California case law about skiing is helpful because it illustrates how courts can be protective of an industry without legislative intervention.¹²⁹ If recreational operators fare better in states where there are no legislative attempts to protect them, this begs the question of whether the six Space Activities Statutes have aided, hindered, or merely reflect status quo for the industry.

The California Space Activities Statute does say that it is meant to supplement already-existing limits on liability, “[a]ny limitation

¹²⁶ *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 381 (Cal. Ct. App. 2004) (citing *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992); *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Cal. 2003)); *Nalwa v. Cedar Fair*, 290 P.3d 1158, 1164 (Cal. 2012).

¹²⁷ See *Nalwa*, 290 P.3d at 1164 (citing *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393–94 (Cal. 2006); *Kahn*, 75 P.3d at 43–44, 47; *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1177 n.5 (Cal. 2011) (court may consult published material on legal questions, including existence of a tort duty, without formally taking judicial notice)).

¹²⁸ *Feldman*, *supra* note 1, at 292–96.

¹²⁹ *Danieley v. Goldmine Ski Assocs.*, 266 Cal. Rptr. 749, 750–51 (Cal. Ct. App. 1990); *Connelly v. Mammoth Mountain Ski Area*, 45 Cal. Rptr. 2d 855, 857 (Cal. Ct. App. 1995).

on legal liability afforded by this section to a space flight entity is in addition to any other limitations of legal liability otherwise provided by law.”¹³⁰ This statement was presumably an attempt at prophylaxis, but its effect is unclear. The statement assumes there are inferior means to limit liability and that a spaceflight entity should be able to avail itself of those means as well as those in the statute. However, the common law regime for limiting liability of recreational operators is far superior to the Space Activities Statute. The two, in fact, don’t operate together. Recovery must be under either one or the other. So, the legislature’s “savings clause” seems to have no practical impact on liability exposure. Spaceflight entities will have to untangle the meaning of the phrase when defending themselves against claims. Given the state of PAR, spaceflight entities may be better off without the statute than with it.

In fact, this is true for manufacturers of recreational equipment, which the legislature expressly excluded from the Space Activities Statute. Because the statute excludes manufacturers from its liability regime, manufacturers can only rely on common law. California common law applies PAR to manufacturers of recreational equipment.¹³¹ Under California law, a recreational equipment manufacturer has a narrower duty “to not increase the particular sport’s inherent risks” or a duty to take “reasonable steps to minimize the particular sport’s inherent risks while not altering the nature of the sport.”¹³² This is the PAR standard.

A manufacturer’s duty hinges on the definition of “inherent risk” for the particular sport at issue.¹³³ An inherent risk is “a risk that, ‘if eliminated, would fundamentally alter the nature of the sport or deter vigorous participation.’”¹³⁴ In *Altman v. HO Sports Co., Inc.*, a case about a wakeboarding accident, the plaintiff had introduced evidence that the boot increased the inherent risk of ankle fracture because it created “an unsupported hinge at the weakest point of the lower extremities.”¹³⁵ Because this evidence suggested an increase in the inherent risk, the California district court denied summary judgment on the theory of PAR.¹³⁶ The Space Activities Statute expressly excludes manufacturers from its codification of PAR for spaceflight activities. Therefore, when the California legislature passed the Space Activities Statute, it actually offered fewer protections than were available to manufacturers of

¹³⁰ CAL. CIV. CODE § 2212(d).

¹³¹ *Altman v. HO Sports Co.*, 821 F. Supp. 2d 1178, 1183 (E.D. Cal. 2011).

¹³² *Id.* at 1191 (citing *Ford v. Polaris Indus., Inc.*, 43 Cal. Rptr. 3d 215, 227 (Cal. Ct. App. 2006)).

¹³³ *Id.* at 1191.

¹³⁴ *Id.* at 1191 (citing *Polaris Indus.*, 43 Cal. Rptr. 3d at 227).

¹³⁵ *Id.* at 1196.

¹³⁶ *Altman*, 821 F. Supp. 2d at 1196.

GOOD ENOUGH?

spaceflight equipment. To that end, manufacturers may be grateful they were excluded from the Space Activities Statute, because it means they can rely on the existing common law.

Under California law, spaceflight entities can raise the PAR defense. PAR is advantageous because it allows for dismissal of an SFP's action at summary judgment. In fact, as discussed above, California courts have generally taken pro-defendant positions (notably for ski operators) in the absence of statutes protecting those defendants. Given the existence of PAR, California's Space Activities Statute did very little to decrease spaceflight entities' exposure. As it turns out, the excluded manufacturers at common law are actually more protected than the spaceflight entities under the statute.

B. COLORADO**1. SPACE ACTIVITIES STATUTE**

The Colorado Space Activities Statute is unique because it has a legislative declaration of purpose. The legislative purpose lists reasons the spaceflight industry would benefit from Colorado's particular attributes (e.g. "Colorado's mile-high altitude affords significant advantages for spaceport activities") and reasons Colorado would benefit from the spaceflight industry (e.g. job and business creation).¹³⁷ Based on a laundry list of mutual advantages, the General Assembly announced its support of "horizontal spaceflight activities in Colorado" by "recognizing" that spaceflight entities and people who help foster spaceflight activities are entitled to some protection from liability, in that they "should reasonably expect some degree of protection in the event of an accident that might occur as a result of the inherent dangers of spaceflight."¹³⁸

In Colorado the term "space flight entity" includes the FAA license holder as well as manufacturers and suppliers reviewed by the FAA during the licensing process.¹³⁹ The definition of participant incorporates by reference the Launch Act's term SFP.¹⁴⁰ Colorado also adopts the definition of spaceflight activities as defined in the Launch Act wholesale.¹⁴¹

Colorado requires compliance with the federal informed consent

¹³⁷ S.B. 12-035, 2012 Leg., Ch. 126 § 1(1)(b), (f), (g) (Colo. 2012).

¹³⁸ Colo. S. Ch. 126 § 1(1)(2).

¹³⁹ COLO. REV. STAT. § 41-6-101(1)(b) (2013).

¹⁴⁰ *Id.* at § 41-6-101(1)(c).

¹⁴¹ *Id.* at § 41-6-101(1)(a).

process and SFP signature of a statutorily mandated warning statement.¹⁴² But it immunizes spaceflight entities for liability arising out of “injury to or death of a spaceflight participant resulting from the inherent risks of spaceflight activities”¹⁴³ Colorado therefore incorporates the concept of “inherent risk.” It does not, however, define the “inherent risks” of spaceflight activities.

Colorado provides no immunity if a spaceflight entity commits an act or omission that constitutes either gross negligence or willful or wanton disregard for an SFP’s safety.¹⁴⁴ In addition, the Colorado Space Activities Statute does not provide immunity if the space flight entity knows or has reason to know of the dangerous condition that proximately causes the injury.¹⁴⁵ In Colorado, in other contexts, the term “knows or has reason to know” describes “wanton conduct,”¹⁴⁶ or “wanton and reckless disregard.”¹⁴⁷ The Space Activities Statute does not provide immunity for intentional acts.¹⁴⁸

2. STATUTES LIMITING LIABILITY

a. EQUINE ACTIVITIES

Under Colorado law, interpretation of statutes is a question of law.¹⁴⁹ Any statute providing immunity, whether it be to government entities or equine operators, is strictly construed.¹⁵⁰ Colorado is a state ripe with case law because it has statutes immunizing operators and organizers for both equine and skiing injuries. This section will first look at the ELA and then at the SLA. Colorado courts enforce both statutes narrowly, resulting in pro-plaintiff decisions. If the courts similarly approach the Space Activities Statute, they may well render the Colorado legislature’s promise an empty one.

The ELA and the Space Activities Statute have several similarities. The ELA limits operators’ liability for injuries that results from certain inherent risks of equine activities because the state and its citizens derive economic and personal benefits from equine activities.¹⁵¹ This is also the case for the Space Activities Statute. The ELA did not create

¹⁴² *Id.* at § 41-6-101(2).

¹⁴³ *Id.*

¹⁴⁴ COLO. REV. STAT. § 41-6-101(2)(b).

¹⁴⁵ *Id.* at § 41-6-101(2)(b).

¹⁴⁶ *Miller v. Solaglas California, Inc.*, 870 P.2d 559, 568 (Colo. App. 1993) (citations omitted).

¹⁴⁷ *Tri-Aspen Const. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986).

¹⁴⁸ COLO. REV. STAT. § 41-6-101(2)(b).

¹⁴⁹ *Fielder v. Acad. Riding Stables*, 49 P.3d 349, 350 (Colo. App. 2002).

¹⁵⁰ *Clyncke v. Waneka*, 157 P.3d 1072, 1077 (Colo. 2007).

¹⁵¹ *Id.* (citing COLO. REV. STAT. §§ 13-21-119(1), (4)). *See also Fielder*, 49 P.3d at 350-51.

GOOD ENOUGH?

additional duties for individuals involved in equine activities.¹⁵² This is also the case for the Space Activities Statute. The ELA abrogated the former duties of the equine professional under common law.¹⁵³ This is also likely the case for the Space Activities Statute.

The ELA and the Space Activities Statute differ in two respects. First, the ELA creates substantive duties for equine operators while the Space Activities Statute does not. The ELA places a two-pronged duty on sponsors, holding that a sponsor may be liable when he fails to make reasonable efforts to determine either a participant's ability to engage in the equine activity or a participant's ability to manage a particular horse.¹⁵⁴ The Space Activities Statute merely requires the spaceflight operator to obtain a signed warning statement. Second, the ELA defines inherent risks. The Space Activities Statute does not define inherent risks, although it purports to immunize spaceflight entities from liability arising therefrom.

When Colorado courts determine whether an injury was caused by an inherent risk of the activity, they do not limit that analysis to the immediate cause of the injury. Rather, they engage in a broader causal analysis, finding a non-inherent risk in the chain of causation, and using it to exclude the injury from the statute, thereby depriving the operator of immunity. An example follows.

In *Fielder v. Academy Riding Stables*, the plaintiff was one of eighteen persons who rented horses from the defendant to ride on a guided tour who fell because an eleven-year old girl's screaming scared his horse.¹⁵⁵ Before the ride, all the participants reviewed a form that included the rules and regulations governing the guided tour.¹⁵⁶ On the form, the participants also indicated their level of experience with horses.¹⁵⁷ In the young girl's case, her father completed the form and indicated that she had no experience horseback riding.¹⁵⁸ The defendant's employees properly matched the young girl to an appropriate horse.¹⁵⁹ "Inherent risks," under the ELA include "[t]he unpredictability of the animal's reaction to . . . sounds," and "[t]he potential of a participant to act in a negligent manner that may contribute to injury to the participant

¹⁵² *Id.* (citing *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 468 (Colo. 2004)).

¹⁵³ *Id.* (citing *Shandy v. Sombrero Ranches, Inc.*, 525 P.2d 487 (Colo. App. 1974) (discussing common law duties of a wrangler when a rider is unable to control a horse)).

¹⁵⁴ *Id.* at 1073.

¹⁵⁵ *Fielder*, 49 P.3d at 350.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

or others, such as failing to maintain control over the animal.”¹⁶⁰ Arguably, these were the precise risks that caused the plaintiff’s injury. The horse reacted to the girl’s sound, and the girl’s negligent screaming contributed to the injury. However, the Colorado Court of Appeals interpreted the ELA as a *limit on* the universe of inherent risks for which an operator will be immune.¹⁶¹ As a result, it found that the horse throwing the plaintiff was not an inherent risk because the horse did so *as a result of* the girl’s screaming. In other words, the direct cause of the injuries was the negligence of the *wranglers* in failing to remove the child from the horse before it bolted.¹⁶²

Inherent risks of spaceflight are not defined in the Space Activities Statute. As it stands, the only risks that will be discussed with SFPs will be the hazards of spaceflight activities, as required by the federal informed consent process. There is no other guidance as to what risks will be described to SFPs. But whatever they may be, Colorado courts will be inclined to treat them as a limit on, rather than an example of, inherent risks. The legislature did not address this when it enacted the Space Activities Statute.

Overall, the legislature did not address Colorado courts’ narrow interpretation of liability-limiting statutes. The Colorado legislature could have made it clear that the statute is meant to be read broadly. Or it could have provided a list of inherent risks, clearly announcing that such a list was exemplary and not exhaustive. What is clear, based on Colorado case law, is that the summary description of general dangers—death and bodily harm—is not sufficient to limit spaceflight entity liability. And even if courts somehow rule it is, it would only result in a narrow immunity.

b. SKIING

Jurisprudence about Colorado’s SLA similarly strictly construes the statute. According to scholars, “Colorado judges and the Colorado state legislature have been sparring for three decades over the text of the Colorado Ski Safety Act of 1979 [the SLA].”¹⁶³ After passage of the SLA, Colorado courts issued several pro-plaintiff decisions.¹⁶⁴ In reaction to this, the legislature and the ski industry pushed to “redraft and strengthen the assumption of risk language in the statute” in

¹⁶⁰ *Felder*, 49 P.3d at 350–51 (quoting COLO. REV. STAT. § 13-21-119(2)(f)(II), (IV), (V) (2001)).

¹⁶¹ *Id.* at 351–52 (citing *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 519 (Colo. 1995); COLO. REV. STAT. § 33-44-103(3.5) (2001)).

¹⁶² *Id.* at 351.

¹⁶³ Feldman, *supra* note 1, at 286–92. See COLO. REV. STAT. §§ 33-44-101 to -114 (2006).

¹⁶⁴ Feldman, *supra* note 1, at 286–92.

GOOD ENOUGH?

1990.¹⁶⁵ However, post-1990 decisions continue to betray a strong pro-plaintiff bent. The Space Activities Statute does not adequately address this documented preference by Colorado courts. So, to the extent the Colorado legislature was trying to strengthen the protections afforded to spaceflight entities, it did not do so.

According to the Colorado Supreme Court, the SLA was enacted in 1979 “to establish reasonable safety standards and to define the relative rights and responsibilities of ski area operators and skiers.”¹⁶⁶ The SLA contains a legislative declaration explaining the purpose of the statute, which includes: 1) establishment of reasonable safety standards; 2) further definition of the legal responsibilities of ski area operators and their agents and employees; 3) the definition of the responsibilities of skiers using such ski areas; and 4) the definition of rights and liabilities existing between the skier and the ski area operator and between skiers.¹⁶⁷ Further, the SLA imposes several specific duties on ski area operators, and explicitly states that any violation of those duties is negligence.¹⁶⁸ There is no such provision in the Space Activities Statute.

As stated above, in 1990 the Colorado legislature amended the SLA. The 1990 amendments introduced a laundry list of “inherent dangers and risks of skiing” which does not include the ski resort operator’s negligence.¹⁶⁹ Despite the laundry list of “inherent dangers” in the SLA, Colorado courts, including the Colorado Supreme Court, have repeatedly engaged in a subjective inquiry of what the court perceives to be an inherent risk of skiing, rather than relying on the statutory list.

For example, in *Graven v. Vail Associates, Inc.*, the plaintiff suffered extensive injuries as a result of skiing off a ravine.¹⁷⁰ In his complaint, the plaintiff said he “moved toward the far left side of the ski run and began stopping in order to wait for his companions.”¹⁷¹ As he “was coming to a complete stop, he came upon some slushy snow and lost his edges, fell down, slid several feet, then plunged forty-fifty feet down an unmarked steep ravine or precipice”¹⁷² The plaintiff alleged he was “unable to stop until colliding with a cluster of trees at

¹⁶⁵ *Id.* (internal citation omitted).

¹⁶⁶ *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 517 (Colo. 1995).

¹⁶⁷ COLO. REV. STAT. § 33-44-102 (1995).

¹⁶⁸ *Graven*, 909 P.2d at 517 (citing COLO. REV. STAT. §§ 33-44-106 to -108 (1984); COLO. REV. STAT. § 33-44-104(2) (1984)).

¹⁶⁹ *Id.* at 518 (citing Ch. 256, §§ 2, 3, 7, §§ 33-44-103(10), -107(2)(d), -112, 1990 Colo. Sess. Laws 1540, 1541, 1543).

¹⁷⁰ *Id.* at 515.

¹⁷¹ *Id.*

¹⁷² *Id.*

the bottom of the Steep Ravine.”¹⁷³ He also alleged that the ravine was “immediately next to” the ski-run and the defendant failed to warn of a known dangerous condition.¹⁷⁴

The Colorado Supreme Court decided whether the ravine and the conditions that led to the plaintiff’s fall fit the description of an “inherent risk” of skiing.¹⁷⁵ The court noted that the list of inherent risks was also a list of the conditions that are an “integral part of the sport of skiing,” adding a qualifier to the concept of “inherent risk” which was not otherwise in the statute. The Colorado Supreme Court added this concept of “integral” sport as a **limitation** to the list of inherent dangers.¹⁷⁶ In other words, if a risk is inherent but not integral, it is not an inherent risk for purposes of the SLA and the ski operator loses immunity for injuries resulting therefrom. Although the word “including” follows the words “integral part of the sport of skiing,” indicating the list is not exhaustive, the court did not address that issue.

Rather than analyze the list of dangers or conditions in the SLA, the court engaged in a subjective analysis of what it perceived to be dangerous about the conditions encountered by the plaintiff. It first recalled that the plaintiff described the terrain which led to his injuries as “a steep ravine or precipice immediately next to the ski run.”¹⁷⁷ The court then used its **imagination** to make a determination, “[t] his description conjures up an image of a highly dangerous situation created by locating a ski run at the very edge of a steep dropoff.”¹⁷⁸ The court found that allowing ski operators to not warn against such “highly dangerous situations” would render “the ski area operator’s duty to warn under [the SLA] . . . essentially meaningless.”¹⁷⁹ Therefore, the court held that the SLA did not “include such a situation within the inherent dangers and risks of skiing as a matter of law.”¹⁸⁰ The court reversed and remanded for the trial court to resolve the conflict between the defendant’s and the plaintiff’s descriptions of the area.¹⁸¹

The Colorado Space Activities Statute does not contain a list of “inherent risks” which may have indicated to the Colorado courts that

¹⁷³ Graven, 909 P.2d at 515.

¹⁷⁴ *Id.* at 515.

¹⁷⁵ *Id.* at 518–19.

¹⁷⁶ *Id.* at 519 (emphasis added) (citing *Accord Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1044–45 (Utah 1991) (distinguishing between risks on the basis of whether they are an integral part of the sport of skiing)).

¹⁷⁷ *Id.* at 520.

¹⁷⁸ Graven, 909 P.2d at 520.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

GOOD ENOUGH?

they should not **limit** the universe of inherent risks. Nor does it contain language instructing Colorado courts about the scope or meaning of “inherent risks.” In light of the *Graven* decision, the Colorado legislature’s failure to address inherent risks is a significant oversight. If the Colorado legislature truly wants to increase spaceflight entities’ immunity, it has to address this issue.

Federal courts in Colorado interpreting the SLA have strayed from the Colorado state courts’ lead in *Graven*. In *Kumar v. Copper Mountain, Inc.* the plaintiff was skiing in an area where two “expert” runs converge.¹⁸² At that intersection, snow naturally accumulates and forms a feature called “Celebrity Cornice.”¹⁸³ The plaintiff approached Celebrity Cornice but did not see the edge of the drop-off.¹⁸⁴ He skied off the Celebrity Cornice, fell, and injured himself.¹⁸⁵ The court recognized that a ski operator can be liable under two theories. First, “a skier may recover if his injury did not result from an inherent danger or risk of skiing.”¹⁸⁶ If a skier is injured by something other than an inherent risk, the SLA does not apply, and the claim is governed by common-law.¹⁸⁷ Second, a ski area operator may be liable because it violated the SLA and the violation resulted in injury.¹⁸⁸

The Colorado federal court held that the cornice was an inherent danger under the statute because it was, at the very least, either “a snow condition as they exist or change” or a “variation of steepness or terrain,” both of which are listed as inherent risks.¹⁸⁹ As a result, the claim was governed by the SLA, which in turn abrogated the plaintiff’s common law claims.¹⁹⁰ The Colorado federal court also held that the defendant’s failure to mark the cornice could have been a “but for” cause of the accident. But because there could be several “but for” causes, including the cornice itself, and because the SLA does not restrict its application to claims resulting “solely” from the inherent dangers of skiing, the ravine was one of several “but for” causes of the plaintiff’s injuries, thereby barring his claim under the SLA.¹⁹¹

The Colorado legislature may have attempted to preempt the courts’ resistance with the Legislative Purpose statement in the Space

¹⁸² *Kumar v. Copper Mountain, Inc.*, 431 F. App’x 736, 737 (10th Cir. 2011).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 738.

¹⁸⁷ *Kumar*, 431 F. App’x at 738.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Activities Statute. But the legislature already tried this and failed with the SLA when it amended it in 1990. The SLA's Legislative Purpose states that the 1990 amendments were enacted to clarify the "confusion" created by the 1979 SLA as to whether "the skier accepts and assumes the dangers and risks inherent in the sport of skiing."¹⁹² To clear up this "confusion," the Colorado legislature pronounced that, "as a matter of public policy, no person engaged in that sport shall recover from a ski area operator for injuries resulting from those inherent dangers and risks."¹⁹³ Despite the clear directive by the legislature about the purpose of the statute, Colorado courts continue to issue pro-plaintiff decisions where the facts don't seem to support them. It is therefore unlikely that Colorado courts will pay more attention to the relatively muted Space Activities Statute language to the effect that spaceflight entities "should reasonably expect some degree of protection in the event of an accident that might occur as a result of the inherent dangers of spaceflight."¹⁹⁴

In light of the battle raging over the application of the SLA, it is surprising that the legislature did not preempt Colorado courts' potential resistance to the Space Activities Statute. The Space Activities Statute—as detailed above—has a very limited definition of "inherent risk." The Colorado Supreme Court reads inherent risks very narrowly, even when a laundry list of such inherent risks is included in the statute. The Space Activities Statute's failure to address this could be a hindrance to limiting spaceflight entities' liability.

3. EXPRESS ASSUMPTION OF RISK

Under Colorado law, exculpatory agreements are generally disfavored.¹⁹⁵ However, courts will enforce them so long as one party is not "at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence."¹⁹⁶ If the parties had even bargaining power, Colorado courts proceed to a multi-layer analysis of the exculpatory provision itself. Under Colorado law the sufficiency and validity of an exculpatory agreement are questions of law for courts to determine.¹⁹⁷

The Colorado ELA requires posting and signature of a warning

¹⁹² Laws 1990, S.B. 90-80, §§ 1, 9, and 10.

¹⁹³ *Id.*

¹⁹⁴ S. 12-035, 2012 Leg., Ch. 126 § 1(2) (Colo. 2012).

¹⁹⁵ *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998) (citing *Heil Valley Ranch v. Simkin*, 784 P.2d 781, 783 (Colo. 1989)).

¹⁹⁶ *B & B Livery*, 960 P.2d at 136 (citing *Heil Valley Ranch*, 784 P.2d at 783; W. KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 68, at 482 (5th ed. 1984)).

¹⁹⁷ *B & B Livery*, 960 P.2d at 136 (internal citation omitted).

statement which reads as follows:

WARNING

Under Colorado Law, an [equine] professional is **not liable** for an injury to or the death of a participant in [equine] activities resulting from the *inherent risks* of [equine] activities, pursuant to section 13-21-119, Colorado Revised Statutes.¹⁹⁸

Similarly, the Colorado SLA requires posting and signature of the following warning statement:

WARNING

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.*¹⁹⁹

The equivalent warning from the Colorado Space Activities Statute is:

Under Colorado law, there is **no liability** for any loss, damage, injury to, or death of a spaceflight participant in a spaceflight activity provided by a spaceflight entity if such loss, damage, injury, or death results from the *inherent risks* of the spaceflight activity to the spaceflight participant. Injuries caused by the *inherent risks of spaceflight activities may include, among others, death or injury to person or*

¹⁹⁸ COLO. REV. STAT. § 33-21-119 (2013) (highlighting added).

¹⁹⁹ COLO. REV. STAT. § 33-44-107.

property. I, the undersigned spaceflight participant, **assume** the inherent risk of participating in this spaceflight activity.

The SLA and the ELA differ in that the SLA elaborates by identifying injuries caused by the inherent risks of spaceflight. The ELA does not—probably because it defines inherent risks of equine activities elsewhere in the statute.²⁰⁰ The Space Activities Statute does not describe inherent risks anywhere.

The first sentence of the Space Activities Statute’s warning statement closely resembles the ELA warning statement. Specifically, both warning statements refer to lack of liability and succinctly refer to “inherent risks.” Also, neither warning statement refers to the defendant’s degree of culpability. In addition, both warning statements indicate that the participant “assumes” the “inherent risks” of participating in the activity. In other words, both the ELA and the Space Activities Statute’s warning statements state that: 1) the participant assumes; 2) the inherent risks of the activity; 3) which are not defined; and 4) for an unspecified degree of the defendant’s culpability.

The similarity is especially important given the Colorado Supreme Court’s holding in *B&B Livery, Inc. v. Riehl* that the ELA mandatory warning does not immunize the equine operator for its own negligence or from liability for non-inherent risks.²⁰¹ Because of the textual similarity, this Supreme Court holding about the ELA’s warning statement’s scope is authoritative, impactful, and easily applied to the Space Activities Statute.

Colorado courts analyze exculpatory provisions in three steps consisting of: 1) a four-factor analysis; 2) a public policy analysis; and 3) a legislative policy review. In addition, when interpreting exculpatory provisions for inherent risks of an activity, Colorado courts are willing to include operator negligence as an inherent risk, thereby exculpating an operator for its own negligence even though the exculpatory provision does not expressly say so.²⁰²

The first step of the analysis is the application of a four-factor test adopted in *Jones v. Dressel*,²⁰³ which in turn incorporated the four factors from the California Supreme Court decision *Tunkl*²⁰⁴ into Colorado law

²⁰⁰ COLO. REV. STAT. § 33-21-119(2)(f).

²⁰¹ *B & B Livery*, 960 P.2d at 137–38.

²⁰² *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 466 (Colo. 2004).

²⁰³ 623 P.2d 370 (Colo. 1981).

²⁰⁴ *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).

GOOD ENOUGH?

(note that these factors are also adopted by New Mexico, as described below). In Colorado the four factors are now called the *Jones* factors. The *Jones* factors determine the enforceability of an exculpatory provision based on: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.²⁰⁵ Whether the parties' intent is clear and unambiguous is subject to a little more elaboration.

The first *Jones* factor hinges on whether the operator is engaged in an activity of public necessity because such activities trigger a duty to the public.²⁰⁶ In *Hamill v. Cheley Colorado Camps*, a Colorado Court of Appeals recognized that a business engaged in a recreational activity that is not practically necessary, such as equine activities, is not performing services implicating a public duty.²⁰⁷ This is also the case for spaceflight activities and makes the first of the *Jones* factor weigh in favor of enforcing spaceflight exculpatory provisions.

The second *Jones* factor examines the nature of the service performed.²⁰⁸ In *Jones* the defendant provided recreational camping services, including horseback riding. The Court of Appeals looked at whether such services are "a matter of practical necessity for even some members of the public," and determined they were not because horseback riding is not "an essential service."²⁰⁹ The Court of Appeals also referred to the ELA, noting that because the ELA limits "civil liability of those involved in equine activities," such limitation "underscores the fact that horseback riding is a matter of choice rather than necessity."²¹⁰ The same can be said of spaceflight activities. Therefore, the second *Jones* factor would also weigh in favor of enforcing a release.

Under the third *Jones* factor "a contract is fairly entered into if one party is not so obviously disadvantaged with respect to bargaining power that the resulting contract essentially places him at the mercy of the other party's negligence."²¹¹ The Court of Appeals in *Hamill*

²⁰⁵ *B & B Livery*, 960 P.2d at 136 (quoting favorably from *Tunkl*, 383 P.2d at 444–46); *Chadwick*, 100 P.3d at 465–66 (Colo. 2004).

²⁰⁶ *Hamill v. Cheley Colorado Camps*, 262 P.3d 948, 949 (Colo. App. 2011) (citing *Chadwick*, 100 P.3d at 469).

²⁰⁷ *Hamill*, 262 P.3d at 949 (citing *Chadwick*, 100 P.3d at 469).

²⁰⁸ *Id.* (citing *B & B Livery*, 960 P.2d at 136; *Jones*, 623 P.2d at 376).

²⁰⁹ *Id.* (citing *Jones*, 623 P.2d at 377–78; see also *Chadwick*, 100 P.3d at 467; *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289, 294 (D. Colo. 1993) (noting that recreational equine services offered by the stable were not essential); *Stanley v. Creighton Co.*, 911 P.2d 705 (Colo. 1996) (finding that the residential lease was matter of public interest, and the exculpatory clause was void)).

²¹⁰ *Hamill*, 262 P.3d at 949 (citing *Chadwick*, 100 P.3d at 467–68).

²¹¹ *Id.* (citing *Heil Valley Ranch v. Simkin*, 784 P.2d 781, 784 (Colo. 1989); accord *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1111 (10th Cir. 2002) (the second and third prongs of *Jones* inquire

again relied on the non-essential nature of equine activities, “[b]ecause horseback riding is not an essential activity, [the plaintiff’s] mother was not ‘at the mercy’ of [the defendant’s] negligence when signing the agreement.”²¹² Likewise, because spaceflight activities are not an “essential activity,” nobody signing releases to participate is “at the mercy” of the spaceflight entity’s negligence when it chooses to sign. Also, it is unlikely that a person paying tens of thousands of dollars, sometimes hundreds of thousands of dollars, for a recreational activity is “at the mercy” of the provider. Therefore, the third *Jones* factor would also, in theory, weigh in favor of enforcing a spaceflight activity release.

Under the fourth *Jones* factor, a release must be written in simple, clear terms, and must not be “inordinately long or complicated.”²¹³ Language whereby a release encompasses “any and all liability, claims, demands, actions, or rights of action, which are related to or are in any way connected with [plaintiffs’] participation in this activity” increases likelihood of enforcement.²¹⁴ For example, in *Heil Valley Ranch v. Simkin*, the court held a release unambiguous because, among other things: “(1) the agreement was written in simple and clear terms that were free from legal jargon; (2) it was not inordinately long and complicated; (3) the plaintiff indicated in her deposition that she understood the release; (4) the first sentence of the release specifically addressed a risk that described the circumstances of the plaintiff’s injury.”²¹⁵ In the spaceflight context, the extensive federal informed consent requirements should dispose of any concerns the party signing the release does not understand the undertaken activity. In both *Chadwick v. Colt Ross Outfitters, Inc.* and *B&B Livery*, the agreement was three and a half pages and therefore not “inordinately long.”²¹⁶ Also, the legal jargon was minimal,²¹⁷ and the agreement identified many risks associated with camping activities, including horseback riding.²¹⁸

In *B&B Livery* the court only focused on the fourth *Jones* factor, whether the intention of the parties was expressed in clear and unambiguous

into the respective bargaining power of each party created by the “practical necessity” of the activity)).

²¹² *Hamill*, 262 P.3d at 949 (citing *Chadwick*, 100 P.3d at 469; see also *Mincin*, 308 F.3d at 1111 (because mountain biking was not an essential activity, no inferior bargaining power was identified); *Day*, 810 F. Supp. at 294 (defendants did not enjoy an unfair bargaining advantage in offering equine services)).

²¹³ Cf. *Brooks v. Timberline Tours, Inc.*, 941 F. Supp. 959, 962 (D. Colo. 1996); *Potter v. Nat’l Handicapped Sports*, 849 F. Supp. 1407, 1410–11 (D.Colo.1994).

²¹⁴ Cf. *Brooks*, 941 F. Supp. at 962.

²¹⁵ *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 138 (Colo. 1998) (citing *Heil Valley Ranch*, 784 P.2d at 785).

²¹⁶ *Hamill*, 262 P.3d at 951.

²¹⁷ *Id.*

²¹⁸ *Id.*

GOOD ENOUGH?

language.²¹⁹ The Colorado court found the release was “written in simple and clear terms,” “not inordinately long and complicated,” and that the plaintiff indicated in her deposition that she understood she was granting the defendant a release.²²⁰ The Colorado Supreme Court also addressed whether inclusion of broader language limiting liability for non-inherent risks made the entire exculpatory clause ambiguous.²²¹ The court held that inclusion of the additional language did not render the clause ambiguous.²²² According to it, the broader clause merely evinced the parties’ intent to extinguish all liability, including liability above and beyond that provided in the ELA.²²³ Here, the court found the intent “was clearly and unambiguously expressed not by the standard [ELA] warning” but as a consequence of the additional clause limiting liability “in the event of any injury or damage of any nature (or perhaps even death).”²²⁴ Although the legislature could have drafted better language, the Space Activities Statute and its mandatory language are not problematic under common law because the parties are free to supplement it without running the risk of having the entire clause declared ambiguous as a matter of law.

The agreement in *Hamill*, like that in *Chadwick*, also broadly stated the intent to release liability from “any injury,” and like the one in *B&B Livery, Inc.* it included all degrees of potential injury, including the “death” of the participant.²²⁵ This latter language is in the Space Activities Statute warning language.²²⁶ Further, the *Hamill* release covered “inherent and *other risks*,” noting that “[m]any, *but not all, of these risks are inherent*,” and stating that it was impossible to delineate a full list of risks, inherent or otherwise.²²⁷ In the case of spaceflight activities, the scope and extent of “inherent and other risks” will, in all likelihood, be covered in the informed consent statement required by federal law, and if not included, can be added for completeness.²²⁸

In *Chadwick* the plaintiff was injured during a back-country trip when he was thrown off a mule.²²⁹ The plaintiff had signed a release that contained the following language: “RELEASE FROM ANY LEGAL LIABILITY . . . for any injury or death caused by or resulting

²¹⁹ *B & B Livery*, 960 P.2d at 136.

²²⁰ *Id.* at 138 (internal citations omitted).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *B & B Livery*, 960 P.2d at 138.

²²⁵ *Hamill*, 262 P.3d at 951.

²²⁶ *Id.*

²²⁷ *Id.* (emphasis added).

²²⁸ *Id.*

²²⁹ *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 465–66 (Colo. 2004).

from [his] participation in the activities.”²³⁰ The Colorado Supreme Court ultimately upheld the release as barring claims for negligence, even though it did not contain the word “negligence,”²³¹ because it was “not inordinately long,” “uncomplicated[,] and was free from legal jargon.”²³² Further, the Colorado Supreme Court looked at the organization of the contract, including where the release was placed within the document.²³³ It held the placement made it “unrealistic” that the plaintiff had “missed or misunderstood” the release.²³⁴

In *Hamill* the exculpatory provision contained language to the effect that “[e]quipment used . . . may break, fail or malfunction” and that “counselors . . . may misjudge . . . circumstances.”²³⁵ An informed consent conversation under federal law would probably include such information about spaceflight activities. Notably, discussions of failures would include explanations of how near misses and catastrophic losses take place, and that human error has caused space-related loss, injury, and death. The Colorado Court of Appeals concluded that the breadth of the release demonstrated that the parties intended to disclaim legal liability for negligence claims,²³⁶ and that such negligence included the operator’s misjudgment of a situation, “[i]ndeed, misjudging a situation can amount to negligence.”²³⁷ This language is particularly helpful for spaceflight entities because it allows them to argue for application of releases to human error.

The second step of the analysis is a public policy review of the exculpatory provision. Colorado courts will declare an exculpatory provision void if it is against public policy. As a general rule, under Colorado law, exculpatory provisions involving certain businesses are automatically void as against public policy.²³⁸ These certain businesses are generally those suitable for public regulation, engaged in performing a public service of great importance, or even of practical necessity, offering a service that is generally available to any member of the public who seeks it and possessing a decisive advantage of bargaining strength, enabling them to confront the public with a standardized adhesion contract of exculpation.²³⁹ However, the Colorado Supreme

²³⁰ *Id.* at 466.

²³¹ *Id.*

²³² *Id.* at 468.

²³³ *Id.*

²³⁴ *Chadwick*, 100 P.3d at 468.

²³⁵ *Hamill*, 262 P.3d at 951.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Chadwick*, 100 P.3d at 467 (citing *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444–46 (Cal. 1963)).

²³⁹ *Id.* (citing *Jones*, 623 P.2d at 376; *Tunkl*, 383 P.2d at 444–46).

GOOD ENOUGH?

Court excludes businesses engaged in recreational activities, such as equine operators, from this bar on exculpatory provisions because equine activities are not practically necessary and the provider owes no special duty to the public.²⁴⁰ There is a strong argument that the same can be said of spaceflight activities as currently contemplated, which tend to be recreational or research based. As a result, precedent currently weighs in favor of enforcing exculpatory provisions for spaceflight activities. It also indicates that the public policy analysis should always weigh in favor of enforcing exculpatory provisions between SFPs and spaceflight entities.

The third step of the analysis is a legislative policy review. Colorado courts look to any related statutes limiting liability to determine whether the statutes should have an effect on their interpretation of exculpatory provisions. In cases involving equine activities, Colorado courts look at the ELA to confirm whether their decisions are consistent with the statutory framework created by the legislature. And whereas the New Mexico courts interpret immunizing statutes as limiting what operators can be exculpated from by agreement, the Colorado courts take the opposite view, declaring the statutes a floor—and not a ceiling—to operator exculpation.

What the Colorado Supreme Court was trying to do was determine whether allowing parties to increase the defendant's immunity for horseback riding activities was consistent with the legislative policy encapsulated in the ELA. The Colorado Supreme Court's starting point to determine legislative intent was the ELA's statement of purpose, which expressly included decreasing liability of equine activity operators.²⁴¹ The Colorado court focused on the fact that one of the stated purposes of the act was to limit equine operator's exposure. In addition, the court turned to the express scope of and limits on an equine activity operator's immunity as listed in Section 13-21-119 of the ELA. As a result, the Colorado Supreme Court held that the statute was a floor, not a ceiling, to immunity,²⁴² and operators were free to add language increasing immunity.²⁴³ This holding strengthens the effectiveness of the Space Activities Statute by creating a minimum liability exposure for spaceflight entities, but leaving intact spaceflight entities' and SFPs' freedom to further decrease that exposure.

Further giving spaceflight entities freedom to limit their exposure,

²⁴⁰ *Id.* (citing *Jones*, 623 P.2d at 377; *Barker v. Colo. Region-Sports Car Club of Am., Inc.*, 532 P.2d 372, 377 (Colo. App. 1974)).

²⁴¹ *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136-37 (Colo. 1998) (emphasis in original).

²⁴² *B & B Livery*, 960 P.2d at 137; *Chadwick*, 100 P.3d at 469.

²⁴³ *B & B Livery*, 960 P.2d at 137; *Chadwick*, 100 P.3d at 469.

Colorado courts encourage parties to draft broad exculpatory provisions because they are unlikely to invalidate them even if overbroad. If a release is “too broad on its face”—if, for example, it exculpates an operator for willful and wanton negligence—Colorado courts will nonetheless uphold the release to the extent allowable by law and ignore its overly broad elements.²⁴⁴

To summarize, under Colorado law a release is reviewed in three steps: 1) the *Jones* factors; 2) a public policy analysis; and 3) a legislative policy review. The Colorado courts’ interpretation of exculpatory provisions gives operators robust protections, which based on the analysis above, are also available to spaceflight entities. Of the four *Jones* factors, the one most under a spaceflight entities’ control is the drafting of an unambiguous warning statement. In order to do so a spaceflight entity has to make sure the agreement is: 1) written in simple and clear terms; 2) free from legal jargon; 3) short (three and a half pages or less); 4) indicates the plaintiff understands the release; 5) specifically addresses risks, which increases the likelihood that the plaintiff’s injury will be described in the release; 6) includes the statutory release for inherent risks, and 7) includes language releasing the defendant from any legal liability, possibly adding the word “negligence” which, although not required, would help. This is not covered by the Colorado Space Activities Statute and is entirely a creature of Colorado common law. As a result, under Colorado law, spaceflight entities would have been entirely able to protect themselves without legislative intervention by drafting adequate exculpatory provisions.

4. IMPLIED ASSUMPTION OF RISK

Colorado is unique with respect to assumption of risk because it is the only state that codified the defense. In fact, Colorado codified its entire negligence regime, which is a hybrid contributory-comparative negligence system. Contributory negligence survives in part because a plaintiff is barred from recovery if her negligence is greater than the defendant’s.²⁴⁵ But if her negligence is equal to or lesser than the defendant’s, any recovery will be reduced by that negligence.²⁴⁶ Colorado also codified the defense of assumption of risk for persons who voluntarily or unreasonably choose to expose themselves to an injury or danger with knowledge or appreciation of the danger involved:

²⁴⁴ *Chadwick*, 100 P.3d at 468–69 (internal citations omitted).

²⁴⁵ COLO. REV. STAT. § 13-21-111 (2013).

²⁴⁶ *Id.*

For the purposes of this section, a person assumes the risk of injury or *damage if he voluntarily or unreasonably exposes himself to injury or damage* with knowledge or appreciation of the danger and risk involved. In any trial to a jury in which the defense of assumption of risk is an issue for determination by the jury, the court shall instruct the jury on the elements as described in this section.²⁴⁷

The language above does not speak in terms of the defendant's duty but rather focuses on the plaintiff's assumption of a known risk, i.e. waiver. It is therefore a codification of SAR, because PAR hinges on a defendant's lack of duty, regardless of the plaintiff's knowledge, while SAR is based on a plaintiff's voluntary encountering of a known danger caused by a defendant's breach. As a result, there is no PAR defense under Colorado law. To the extent the Space Activities Statute codifies a PAR-light defense (providing something more than SAR, but not quite PAR) the Space Activities Statute is an improvement on the common law.

SAR under Colorado law encompasses "either a plaintiff's unreasonable exposure to a known risk or a plaintiff's voluntary but not necessarily unreasonable exposure to such risk."²⁴⁸ It is more difficult to raise SAR as a defense in Colorado than it is in other states because it requires the plaintiff to have actual knowledge and appreciation of the precise risk encountered.²⁴⁹ Not only that, assumption of risk requires both *knowledge* of the danger and *consent* to it.²⁵⁰ It does not merely require that the plaintiff be aware of the existence of a danger. Colorado law therefore incorporates both strict and qualified SAR. And this definition is difficult to satisfy. The few court decisions discussing SAR support this narrow interpretation of the defense. An SFP would have to know of the particular risk that injured her. In other words, the risk cannot develop after the SFP engages in the activity nor can it develop unbeknownst to the SFP, because under those circumstances it is unknown. In the context of spaceflight such a narrow definition makes it difficult for a spaceflight operator to ever obtain the benefit of SAR. The SFP must have known of the particular risk that caused

²⁴⁷ COLO. REV. STAT. § 13-21-111.7 (2013).

²⁴⁸ See generally *Harris v. The Ark*, 810 P.2d 226, 229 (Colo. 1991) (defining assumption of risk).

²⁴⁹ *Wark v. McClellan*, 68 P.3d 574, 581 (Colo. App. 2003).

²⁵⁰ *Carter v. Lovelace*, 844 P.2d 1288, 1289 (Colo. App. 1992) (citing *Summit Cnty. Dev. Corp. v. Bagnoli*, 441 P.2d 658 (Colo. 1968)).

the injury and decided to face it anyway. As an example, it seems that an SFP would have to know not merely of the *risk* that a seal would break on a space vehicle. But that it was *actually* faulty, and decided to fly anyway. This seems like an extreme application of SAR, leaving little room for its use as a defense. But the current statute would at least support such a reading. It is also difficult to gauge how accurate this reading of the statute is because case law applying it is scarce. And even in the available case law, the facts are distinguishable from those relevant to a dispute between an SFP and a spaceflight entity.²⁵¹

The legislature's decision to pass the Space Activities Statute did, in fact, improve spaceflight entities' status compared to what it would be under common law. The Colorado common law regarding assumption of risk can only be used in very specific sets of circumstances and does not include PAR. By codifying something more akin to PAR, the Colorado legislature did in fact move towards its goal of increasing protection for the spaceflight entities as compared to common law.

C. FLORIDA

1. SPACE ACTIVITIES STATUTE

Florida defines a "spaceflight entity" as the FAA license holder, and all manufacturers and suppliers reviewed by the FAA during the licensing process.²⁵² The Florida Space Activities Statute wholesale adopts the definitions of SFP and spaceflight activities as those terms are defined in the Launch Act.²⁵³

As expected, Florida requires a spaceflight entity to obtain the statutorily mandated warning statement signed by the SFP.²⁵⁴ But the Florida Space Activities Statute does not require compliance with the federal informed consent process.²⁵⁵ Once a spaceflight entity complies with the Space Activities Statute, the spaceflight entity will not be liable for injury to or death of an SFP resulting from the "inherent risks of spaceflight activities."²⁵⁶ Florida therefore uses the inherent risk concept, but it does not define it and it does not tie into the federal

²⁵¹ See generally *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991) (upholding the constitutionality of the assumption of risk statute but applying it to a slip and fall case); *Wagner Rents, Inc. v. Griffith Maint., Inc.*, No. 2004CV8553 (Colo. Dist. Ct. July 8, 2005) (applying assumption of risk as an exception to a waiver damage clause for a damaged draining pump).

²⁵² FLA. STAT. § 331.501(1)(c) (2013).

²⁵³ FLA. STAT. § 331.501(1)(a), (c). Some of the statutes refer to 49 U.S.C. § 70102, which was recodified in 2010 to 51 U.S.C. § 50902, without textual changes.

²⁵⁴ FLA. STAT. § 331.501(2)(a).

²⁵⁵ FLA. STAT. § 331.501(2)(a).

²⁵⁶ FLA. STAT. § 331.501(2)(a).

GOOD ENOUGH?

informed consent process where SFPs are informed of the hazards of spaceflight activities.

The Florida Space Activities Statute provides no immunity if a spaceflight entity commits an act or omission that constitutes either gross negligence *or* willful or wanton disregard for an SFP's safety.²⁵⁷ Florida also does not provide immunity if the space flight entity knows or has reason to know of the dangerous condition that proximately causes the injury.²⁵⁸ The term "known or should have known" is usually associated with negligence in Florida jurisprudence. For example, negligent entrustment requires a showing that the defendant knew or should have known that entrusting property or chattel to a third-party would injure them.²⁵⁹ Likewise, in the business invitee context, the same term also refers to mere negligence.²⁶⁰ Therefore, the Space Activities Statute likely does not immunize a spaceflight operator for its own negligence. Lastly, Florida does not immunize spaceflight entities for intentional acts.²⁶¹ Therefore, the Florida Space Activities Statute codifies a light version of PAR because, although it bars recovery for inherent risks, it excludes negligence from the scope of "inherent risk."

2. STATUTES LIMITING LIABILITY

When Florida courts rely on statutes in derogation of the common law, it is a "well-established rule" that such statutes must be strictly construed and if any doubt exists as to the legislature's intent, the doubt should be interpreted in favor of the injured party.²⁶² The question here is whether the Florida legislature removed any such "doubts." For example, it could have included an express statement about legislative intent—which it did not do. Or guidance about construing "doubts." The Florida legislature could have also clarified the position the Space Activities Statute has in the common law regime, rather than generically stating that the statute did not otherwise affect remedies at common law. These are measures the legislature either failed to take or chose not to take. But in either case, the omission may undermine the effectiveness of the Space Activities Statute's purported goal.

The Florida ELA contains a list of "inherent risks" of equine activities, which includes: (1) The propensity of equines to behave in

²⁵⁷ FLA. STAT. § 331.501(2)(b)(1).

²⁵⁸ FLA. STAT. § 331.501(2)(b)(2).

²⁵⁹ *Cantalupo v. Lewis*, 47 So. 3d 896, 899 (Fla. Dist. Ct. App. 2010) (citing RESTATEMENT (SECOND) OF TORTS § 390 (1965)).

²⁶⁰ *Delgado v. Laundromax, Inc.*, 65 So. 3d 1087, 1089 (Fla. Dist. Ct. App. 2011).

²⁶¹ FLA. STAT. § 331.501(2)(3).

²⁶² *McGraw v. R&R Invs., Ltd.*, 877 So. 2d 886, 890 (Fla. Dist. Ct. App. 2004) (citing *State ex. rel. Grady v. Coleman*, 183 So. 25 (Fla. 1938)).

ways that may result in injury, harm, or death to persons on or around them; (2) the unpredictability of an equine's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons or other animals; and (3) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.²⁶³ The statute does not apply if the operator fails to make reasonable and prudent efforts to determine the participant's ability to safely engage in the equine activity, or to determine the participant's ability to safely manage the particular equine based on the participant's representation of ability. And there is no limited liability for equine activities when the claim is based on, "an act or omission that a reasonably prudent person would not have done or omitted under the same or similar circumstances."²⁶⁴

This language, although not identical, appears to echo a similar provision in Florida's Space Activities Statute excluding a spaceflight entity from coverage if the spaceflight entity, "Has actual knowledge or reasonably should have known of a dangerous condition on the land or in the facilities or equipment used in the spaceflight activities and the danger proximately causes injury, damage, or death to the participant"²⁶⁵ Courts have applied the ELA limitation quite strictly. It is therefore possible they would do the same for the Space Activities Statute language.

Florida legislators attempting to attract spaceflight entities to Florida by enacting the Florida Space Activities Statute may not have been aware of the Florida courts' tendency to avoid relying on statutes to resolve disputes between operators and participants. Indeed, the three cases interpreting the Florida ELA evidence the courts' preference to either find exclusion from immunity (in two of the three cases) or rely on a contractual exculpation (in the third case) to limit an equine operator's liability.²⁶⁶

In *Raveson v. Walt Disney World Co.*, the plaintiff was injured during an organized ride in Disney's "Enchanted Forest."²⁶⁷ The defendant claimed both statutory immunity and exculpatory agreement. Rather than beginning its analysis with the statute, the Court of Appeals

²⁶³ FLA. STAT. § 773.01(6) (2013).

²⁶⁴ FLA. STAT. § 773.03(2)(d).

²⁶⁵ FLA. STAT. § 331.501(2)(b)(2).

²⁶⁶ *Raveson v. Walt Disney World Co.*, 793 So. 2d 1171 (Fla. Dist. Ct. App. 2001); *McGraw v. R&R Invs., Ltd.*, 877 So. 2d 886 (Fla. Dist. Ct. App. 2004).

²⁶⁷ *Raveson*, 793 So. 2d at 1171.

analyzed, and reached a holding on the exculpatory agreement alone.²⁶⁸ It then, in dicta, noted that the statute *could also* serve to release the defendant from liability, but declined to rely on it for its holding.²⁶⁹ Similarly, in 2010 another Florida Court of Appeals called to interpret the ELA avoided the ELA altogether by reading into the statute two *implicit* exclusions from coverage for the operator.²⁷⁰

The decision was *McGraw v. R and R Investments, Ltd.*,²⁷¹ where a horse trainer was thrown by a horse belonging to her employer.²⁷² The defendant prevailed at the trial level based on ELA statutory immunity.²⁷³ Under the ELA, although the operators are under a duty to post certain warnings, there are no provisions creating consequences for a sponsor's failure to do so.²⁷⁴ However, on appeal the plaintiff argued that the defendant's failure to post the statutorily required warnings deprived it of protection under the statute.²⁷⁵ Although the statute does not expressly say so, the Court of Appeals agreed with the plaintiff.²⁷⁶ The court noted that, although as a general rule courts do not ordinarily imply exceptions to the provisions of a statute, such exceptions may be supplied where they are *necessary* to give effect to the legislative intent.²⁷⁷ Finding such a need in this case, the court proceeded to read into the statute a loss of immunity for failure to comply with warning requirements.²⁷⁸ Legislators seeking to limit liability for spaceflight entities addressed this issue head on: the Florida Space Activities statute expressly conditions itself on the operator providing an SFP with the statutorily mandated signed waiver. But the point is not whether the failure to warn does or does not deprive an operator of limited liability. The issue is the court's willingness to read into a statute a limitation that, on its face, is not there. And—if that is the case—whether legislators took that into consideration when they drafted the Space Activities Statute. Nothing in the Florida Space Activities Statute provides language to guide (or more forcefully direct the courts) to immunize spaceflight operators from liability.

The Court of Appeals then gave another extra-textual ground for its holding. Under the ELA an operator loses immunity if it commits an

²⁶⁸ *Id.* at 1172–73.

²⁶⁹ *Id.* at 1173.

²⁷⁰ *McGraw*, 877 So. 2d 886.

²⁷¹ *Id.*

²⁷² *Id.* at 888.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *McGraw*, 877 So. 2d at 888.

²⁷⁷ *Id.* at 890 (citing 73 AM. JUR. 2D *Statutes* § 213 (2001)).

²⁷⁸ *Id.*

act “that a reasonably prudent person would not have done or omitted under the same or similar circumstances.”²⁷⁹ The court held that the defendant’s omission of not posting the warning signs was such an unreasonable omission, which alternatively could also deprive it of immunity under the ELA.²⁸⁰ The legislature, if aware of this language, could have included verbiage in the Space Activities Statute to the effect that a violation of the statute by an operator was not *per se* an act “that a reasonably prudent person would not have done or omitted under the same or similar circumstances.” What a plaintiff could argue, otherwise, is that not only does a spaceflight entities’ failure to provide the written warning under the Space Activities Statute deprive that entity of protection under the statute (which is a perfectly correct interpretation of the statute), but such actions are *unreasonable*, possibly buttressing a claim for negligent conduct by the operator. The legislature did not remove this judicially created weapon from SFPs’ arsenal and in doing so may have undermined the effectiveness of its own efforts.

In the third case, *McNichol v. South Florida Trotting Center, Inc.*, a race track owner created, and left, a two-foot mound of dirt that blocked access from the track to a grass infield.²⁸¹ The mound blocked exit by a horse that was out of control, making it impossible for the rider to regain control, leading to his fall and injury. During discovery the general manager testified that it was not reasonably prudent to maintain the mound on the inside of the track for any extended period of time.²⁸² In this case, the defendant’s owner and general manager testified that the mound was a hazard, that it created a dangerous condition, and that it was not good custom and practice to leave the mound in place for any extended period of time.²⁸³ Given the defendants’ admission of unreasonableness, the Florida Court of Appeals relied on the text of the ELA and found immunity because the claim was based on, “an act or omission that a reasonably prudent person would not have done or omitted under the same or similar circumstances.”²⁸⁴

The case law is admittedly sparse. But the Florida Space Activities statute does not seem to address judicial unwillingness to limit an operator’s liability. Indeed, the Space Activities Statute deprives a spaceflight entity of immunity for *any* degree of culpability, including negligence. These observations are not to say that Florida courts would

²⁷⁹ *Id.* (citing FLA. STAT. § 773.03(2)(d) (2002)).

²⁸⁰ *Id.*

²⁸¹ *McNichol v. S. Fla. Trotting Ctr., Inc.*, 44 So. 3d 253, 256 (Fla. Dist. Ct. App. 2010).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* (citing FLA. STAT. § 773.03(2)(d)).

GOOD ENOUGH?

always rule against spaceflight entities. Indeed, they could choose to interpret the Florida Space Activities Statute broadly. But given the case law available, it seems preferable for spaceflight entities to immunize themselves via exculpatory agreements, rather than merely rely on the Space Activities Statute. If that is the case, the legislature did not achieve its apparent goal of limiting liability for spaceflight entities in Florida.

3. EXPRESS ASSUMPTION OF RISK

Under Florida law, courts view contractual provisions exculpating a party for its own negligence as “not favored in the law.”²⁸⁵ They will, however, uphold them as “not violative of public policy” where the two parties to the contract are, “of equal bargaining power and the provisions are clear and unambiguous.”²⁸⁶ Florida courts, despite their distaste for exculpatory provisions, have enforced such agreements immunizing parties even for their own gross negligence.²⁸⁷ The only instance where a Florida court violated an exculpatory clause on public policy grounds was when it exempted a party for his own intentional torts.²⁸⁸ Under Florida law, exculpatory provisions only release a party from his own negligence when “the intention to be relieved from liability was made clear and unequivocal in the contract; wording must be so clear and understandable than an ordinary and knowledgeable party will know what he is contracting away.”²⁸⁹

Under its ELA, Florida requires equine operators to obtain a signed copy of, and post, the following language:

WARNING

Under Florida law, an equine activity sponsor or equine professional is not liable for an injury to, or the death of, a participant in equine activities resulting from the *inherent risks* of equine activities.²⁹⁰

²⁸⁵ *Hardage Enters., Inc. v. Fidesys Corp.*, 570 So. 2d 436, 439 (Fla. Dist. Ct. App. 1990).

²⁸⁶ *Id.* at 439 (citing *Mankap Enters., Inc. v. Wells Fargo Alarm Servs., Inc.*, 427 So. 2d 332 (Fla. Dist. Ct. App. 1983); *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205 (Fla. Dist. Ct. App. 1973), *cert. denied*, 289 So. 2d 731 (Fla. 1974)).

²⁸⁷ *Id.* at 439 (citing *Continental Video Corp. v. Honeywell, Inc.*, 422 So. 2d 35 (Fla. Dist. Ct. App. 1982), *rev. denied*, 456 So. 2d 892 (Fla. 1982); *Ace Formal Wear, Inc. v. Baker Protective Serv., Inc.*, 416 So. 2d 8 (Fla. Dist. Ct. App. 1982)).

²⁸⁸ *Id.*

²⁸⁹ *Raveson*, 793 So. 2d at 1173 (internal citations omitted).

²⁹⁰ FLA. STAT. § 773.04.

The Florida Space Activities Statute mandates the following warning statement:

WARNING: Under Florida law, **there is no liability for an injury to or death** of a participant in a spaceflight activity provided by a spaceflight entity if such injury or death results from *the inherent risks* of the spaceflight activity. Injuries caused by the *inherent risks* of spaceflight activities may include, among others, injury to land, equipment, persons, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are **assuming** the risk of participating in this spaceflight activity.²⁹¹

To summarize, the Florida Space Activities Statute warning statement refers to “inherent risks.” The statute, however, does not define “inherent risks.” The warning statement does describe the injuries *resulting from* the inherent risks of spaceflight, in a non-exhaustive list. The warning statement, however, does not refer to the spaceflight entities’ negligence, or any other degree of culpability. And the warning statement speaks of “assumption” of risk rather than waiver.

Unfortunately, finding similarities is currently academic because there is no case law interpreting the ELA warning. Therefore, this section focuses on how Florida courts have interpreted other exculpatory language limiting defendants’ liability. In *Raveson* a young girl was injured while horseback riding on Disney property. Prior to her riding, her parents signed the following statement:

RELEASE AND INDEMNITY
AGREEMENT

In consideration of the acceptance of my participation and/or the participation of my child or ward, in the renting of a horse from the Walt Disney World Company, and with the understanding that a horse may be startled by sudden movement, noise or other factors, and

²⁹¹ FLA. STAT. § 331.501(3)(b).

GOOD ENOUGH?

may shy suddenly, rear, stop short, bite, buck, kick or run with its rider, especially when the ride is conducted through a natural setting, as this ride will be, I AGREE TO ASSUME THE RISKS incidental to such participation including, but not limited to, those risks set out above, and, on my own behalf, on behalf of my child or ward, and on behalf of my child's or ward's heirs, executors and administrators, RELEASE and forever discharge the released parties defined below, of and from all liabilities, claims, actions, damages, costs or expenses of any nature, arising out of or in any way connected with my participation and/or the participation of my child or ward in such horseback riding and further agree to indemnify and hold each of the released parties harmless against any and all such liabilities, claims, actions, damages, costs or expenses, including, but not limited to, attorney's fees and disbursements. The released parties are the Walt Disney World Company and Lake Buena Vista Communities, Inc., their parent, related, affiliated and subsidiary companies, and the officers, directors, employees, agents, representatives, successors and assigns of each. I understand that this release and indemnity agreement includes any claims based on the negligence, actions or inaction of any of the above released parties and covers bodily injury and property damage, whether suffered by me, my child or ward before, during, or after such participation. I further authorize medical treatment for said child or ward, at my cost, if the need arises.²⁹²

This language led to summary judgment for the defendant because it

²⁹² *Raveson v. Walt Disney World Co.*, 793 So. 2d 1171, 1172 (Fla. Dist. Ct. App. 2001) (italics and bold formatting added).

“clearly [met] th[e] requirement” that:

the intention to be relieved from liability was made clear and unequivocal in the contract; wording must be so clear and understandable than an ordinary and knowledgeable party will know what he is contracting away.²⁹³

The Florida Court of Appeals provided no additional analysis of the language.

In *Cousins Club Cop. v. Silva* a 19-year old college student died as a result of his participation in an amateur boxing fight.²⁹⁴ The college student hurt his head during the fight but only received medical assistance forty-five minutes after leaving the ring.²⁹⁵ According to the plaintiffs’ expert medical testimony, the lack of medical attention allowed the hematoma caused by the initial impacts to get much larger and caused extremely high pressure to build up within the student’s cranial cavity.²⁹⁶ Before the fight, the student signed a “Release, Assumption of risk and Indemnification Agreement,”²⁹⁷ which stated,

In consideration of my participation in the above entitled event, and with the understanding that my participation in Monday Night Boxing is only on the condition that I enter into this agreement for myself, my heirs and assigns, I hereby **assume** the *inherent and extraordinary risks* involved in Monday Night Boxing and *any risks inherent in any other activities connected with this event* in which I may voluntarily participate.²⁹⁸

The Court of Appeals held that the release did not bar the plaintiffs’ lawsuit, because the student only assumed the risks inherent in the boxing match, and therefore, only released liability for injuries resulting from his voluntary participation in the boxing match.²⁹⁹ The injuries

²⁹³ *Id.* at 1173 (internal citations omitted).

²⁹⁴ *Cousins Club Corp. v. Silva*, 869 So. 2d 719, 720 (Fla. Dist. Ct. App. 2004).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* (italics and bold formatting added).

²⁹⁹ *Cousins Club Corp.*, 869 So. 2d at 721 (citing *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318 (Fla. Dist. Ct. App. 1984); *O’Connell v. Walt Disney World Co.*, 413 So. 2d 444, 447 (Fla. Dist. Ct.

GOOD ENOUGH?

he sustained—the lack of medical attention—were not inherent in the boxing match.³⁰⁰ Further, the Court of Appeals held that the release did not “clearly and unequivocally release” the defendant “from liability for injuries to the plaintiff as a result of its own negligence.”³⁰¹ As a result, while the plaintiff may have been precluded from recovering for injuries resulting from any dangers inherent in boxing, he was not barred from recovering for injuries resulting from the defendant’s negligence in failing to provide medical assistance.³⁰²

The release in *Raveson* was more extensive than the one in the Space Activities Statute. For example, it contained language releasing the defendant of, “all liabilities, claims, actions, damages, costs or expenses of any nature.”³⁰³ It also expressly applied to injuries, “arising out of or in any way connected with my participation and/or the participation of my child or ward in such horseback riding”³⁰⁴ This language, or similar language, does not appear in the Space Activities Statute. And the legislature may want to include it to strengthen the warning statement as a standalone exculpatory provision if it is trying to make itself the most attractive state for spaceflight entities.

In *Cousins Club Corp.*, the language was actually very similar to the language in the Space Activities Statute warning statement. It was an “assumption” of “inherent risks.” This language in *Cousins Club Corp.* did not stop the Florida Court from inquiring whether the injury was a result of an “inherent risk.” This means that a court interpreting the Space Activities Statute will likely do the same. As a result, the warning statement in the Space Activities Statute is not useful outside the context of the Space Activities Statute and cannot be relied on as a standalone exculpatory provision.

4. IMPLIED ASSUMPTION OF RISK

Neither SAR nor PAR exists under Florida law.³⁰⁵ The only type of assumption of risk that exists is EAR.³⁰⁶ EAR, under Florida law, comes in two types. One is contractual and analyzed above. The second is more accurately labeled “participatory EAR” and is where “actual consent exists [because] one voluntarily participates in a contact sport.”³⁰⁷

App. 1982)).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Raveson v. Walt Disney World Co.*, 793 So. 2d 1171, 1172 (Fla. Dist. Ct. App. 2001).

³⁰⁴ *Id.*

³⁰⁵ *Blackburn v. Dorta*, 348 So. 2d 287, 291–93 (Fla. 1977).

³⁰⁶ *Id.* at 290.

³⁰⁷ *Id.*

Theoretically, participatory EAR bars recovery when the injured party consented to a known risk.³⁰⁸

Participatory EAR only applies to a participant's assumption of the inherent risks of a *sport*, usually defined as a "contact sport."³⁰⁹ Spaceflight activities hardly qualify as a "contact" sport, given that Florida courts do not even consider horseback riding a "contact" sport for this purpose.³¹⁰ In addition, Florida courts will *not* apply participatory EAR to a plaintiff's aberrant conduct.³¹¹ Lastly, participatory EAR requires the plaintiff to have been *subjectively* aware of the particular risk that caused the injury and have assumed *that* particular risk.³¹² And juries, not judges, decide whether a risk is inherent in a sport, precluding pre-trial dismissal.³¹³ In other words, participatory EAR only applies when the plaintiff, participating in a *sport*, acts *reasonably*, was *subjectively* aware of the danger, and determination of application of the defense is a fact issue. Therefore, under Florida common law, spaceflight entities cannot expect to rely on PAR, SAR, or participatory EAR. But assuming participatory EAR is extended to spaceflight entities it would still provide meager comfort.

Florida participatory EAR is *not* like PAR because it is based on waiver, not on absence of duty by the defendant.³¹⁴ In other words, "[e]xpress assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances."³¹⁵ In Florida, this would mean a spaceflight entity has to show that the plaintiff had "subjective knowledge" of the risk and willingly encountered it. Of all of the requirements, the "subjective knowledge" requirement is the hardest to meet. And, for all practical purposes, forecloses use of the defense.

In *Mazzeo*, a plaintiff dove into a few feet of water and injured herself. The Florida Court of Appeals refused to bar the suit based on participatory EAR because the plaintiff did not dive "with the intention

³⁰⁸ *McNichol v. S. Fla. Trotting Ctr., Inc.*, 44 So. 3d 253, 257 (Fla. Dist. Ct. App. 2010) (citing *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983)).

³⁰⁹ *Ashcroft v. Calder Race Course*, 492 So. 2d 1309, 1311 (Fla. 1986); *Zalkin v. Am. Learning Sys., Inc.*, 639 So. 2d 1020, 1020 (Fla. Dist. Ct. App. 1994); *Nova Univ. Inc. v. Katz*, 636 So. 2d 729, 730 (Fla. Dist. Ct. App. 1993) (citing *Ashcroft v. Calder Race Course*, 492 So. 2d 1309, 1309 (Fla. 1986)).

³¹⁰ *McNichol*, 44 So. 3d at 257 (citing *Ashcroft v. Calder Race Course*, 492 So. 2d 1309, 1311 (Fla. 1986)) (holding that there was no express assumption of risk because "[r]iding on a track with a negligently placed exit gap is not an inherent risk in the sport of horse racing.").

³¹¹ *Mazzeo v. City of Sebastian*, 550 So. 2d 1113, 1116 (Fla. 1989); *McNichol*, 44 So. 3d at 257.

³¹² See, e.g., *Mazzeo*, 550 So. 2d at 1116-17; *Ashcroft*, 492 So. 2d at 1311.

³¹³ *McNichol*, 44 So. 3d at 257.

³¹⁴ See *Mazzeo*, 550 So. 2d at 1116-17.

³¹⁵ *LeNoble v. City of Fort Lauderdale*, 663 So. 2d 1351 (Fla. 1995) (citing *Meulners v. Hawkes*, 216 N.W.2d 633, 635 (Minn. 1974)).

GOOD ENOUGH?

of injuring herself” and “did not expressly agree to absolve the city of any liability if she did.”³¹⁶ In the 1993 Florida Court of Appeals decision *Nova University v. Katz*, a cheerleader injured herself by performing a stunt even though “she knew spotters were not present.”³¹⁷ The court held the cheerleader did not assume the risk of lack of proper instruction and supervision, and therefore refused to bar the suit based on participatory EAR.³¹⁸ Whether the plaintiff subjectively assumed a particular inherent risk is a fact issue, subject to determination by a jury.³¹⁹

As a result of the above, it is undisputable that the Space Activities Statute, which attempts to codify a version of the abolished PAR defense for spaceflight entities is at least slight progress towards the legislature’s goal of immunizing spaceflight entities.

D. NEW MEXICO

1. SPACE ACTIVITIES STATUTE

The New Mexico Space Activities Statute only applies to the FAA license holder, thereby excluding manufacturers and suppliers from the limited liability provided by statute.³²⁰ In early 2013 some New Mexico legislators agreed to amend New Mexico’s Space Activities Statute to expand its scope to include manufacturers and suppliers.³²¹ The expansion was encouraged by, among others, Virgin Galactic and opposed, among others, by the New Mexico Trial Lawyers Association.³²² Eventually, the two sides reached a compromise, and “[i]t took several months of tough negotiations but both parties have agreed to amend current state law.”³²³ The law would have also allowed SFP’s to sue for negligence and malintent, which they currently cannot do.³²⁴ The amendment stalled in the New Mexico Senate when it failed to garner approval of the Judiciary Committee.³²⁵ For now, there is no

³¹⁶ *Mazzeo*, 550 So. 2d at 1116–17.

³¹⁷ *Nova Univ. Inc. v. Katz*, 636 So. 2d 729, 729 (Fla. Dist. Ct. App. 1993) (emphasis added).

³¹⁸ *Id.* at 730 (citing *Ashcroft v. Calder Race Course*, 492 So. 2d 1309, 1311 (Fla. 1986)).

³¹⁹ *LeNoble*, 663 So. 2d at 1352.

³²⁰ N.M. STAT. ANN. § 41-14-2(C) (2013).

³²¹ Vanessa de la Vina, *NM legislators reach compromise on spaceport liability bill*, KVIA News (Jan. 24, 2013, 8:01 AM), <http://www.kvia.com/news/NM-legislators-reach-compromise-on-spaceport-liability-bill/-/391068/18255874/-/13aibv9/-/index.html>.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ James Monteleone, *Senate Committee Grounds Spaceport Liability Exemption*, ABQ JOURNAL (Feb. 7, 2012), <http://www.abqjournal.com/main/2012/02/07/abqnewsseeker/senate-committee-grounds-spaceport-liability-exemption.html>; J. Foust, *New Mexico Liability Law Update Stalled*, NEWSPACE JOURNAL, Feb. 8, 2012, available at <http://www.newspacejournal.com/2012/02/08/new-mexico-liability-law-update-stalled/> (last visited Mar. 14, 2013).

indication the amendment is close to passing.

The Space Activities Statute defines participant by adopting the Launch Act's definition of SFP.³²⁶ Likewise, the New Mexico legislature adopted the federal definition of spaceflight activities.³²⁷ Under the New Mexico Space Activities Statute, a spaceflight entity is not liable for injury to or death of a participant resulting from the "inherent risks" of spaceflight activities so long as the warning contained in the Space Activities Statute is distributed and signed as required.³²⁸ However, the statute also includes language whereby an SFP or an SFP's representative cannot sue a spaceflight entity for loss, damage or death "resulting *exclusively* from any of the inherent risks of space flight activities."³²⁹ This raises the issue of whether injuries resulting from both inherent and non-inherent risks are *not* covered by the statute because they are not "exclusively" caused by inherent risks. This is inartful drafting that creates an ambiguity and possibly a loophole to immunity when several causes converge to create an injury.

By enacting the Space Activities Statute, the New Mexico legislature sought to immunize spaceflight entities as long as they do not commit acts or omissions that constitute either gross negligence *or* willful or wanton disregard for an SFP's safety.³³⁰ In addition, the Space Activities Statute does not provide immunity if the space flight entity knows or has reason to know of the dangerous condition that proximately causes the injury.³³¹ The degree of culpability described by "knew or should have known" is ambiguous. In New Mexico, criminal negligence encompasses objective or subjective knowledge of the risk, *i.e.*, knew or should have known, *and* requires "reckless disregard" of a "substantial and foreseeable risk."³³² So the standard in the Space Activities Statute is not quite criminal negligence. However, the same standard is used in "negligent supervision," which is proven if an employer knew or reasonably should have known that some harm might be caused by the acts or omissions of the employee who is entrusted with such position.³³³ Therefore, at the very least, there is ambiguity about what degree of culpability is immunized under the statute. Lastly, New Mexico—like every other state—does not immunize injuries resulting

³²⁶ N.M. STAT. ANN. § 41-14-2(A).

³²⁷ N.M. STAT. ANN. § 41-14-2(B).

³²⁸ N.M. STAT. ANN. § 41-14-3(A).

³²⁹ *Id.* (emphasis added).

³³⁰ N.M. STAT. ANN. § 41-14-3; CAL. CIV. CODE § 2212(b), (c).

³³¹ N.M. STAT. ANN. § 41-14-3; CAL. CIV. CODE § 2212(c).

³³² *State v. Chavez*, 173 P.3d 48, 53 (N.M. Ct. App. 2007); *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, 276, *aff'd on other grounds*, 2013-NMSC-016, 301 P.3d 380.

³³³ *Los Ranchitos v. Tierra Grande, Inc.*, 861 P.2d 263, 269 (N.M. Ct. App. 1993).

from intentional acts.³³⁴

2. STATUTES LIMITING LIABILITY

a. EQUINE ACTIVITIES

Spaceflight entities attempting to gauge the effectiveness of the New Mexico Space Activities Statutes by looking at application of New Mexico's ELA will be disappointed. Only one New Mexico case, *Berlangieri v. Running Elk Corp.*, cites the ELA.³³⁵ And *Berlangieri* deals exclusively with the effectiveness of an exculpatory clause in light of the immunities granted by the statute.³³⁶ It does not apply the ELA *per se*. As a result, there is no guidance from New Mexico common law with respect to statutory limited liability.

b. SKIING

New Mexico's SLA provides a little more guidance. However, spaceflight entities reviewing New Mexico law should take SLA case law with a grain of salt. The SLA is admittedly more safety-oriented than the Space Activities Statute. And the SLA imposes affirmative duties on operators, while the Space Activities Statute does not. These two characteristics alone make it somewhat inappropriate to apply case law interpreting the SLA to predict interpretation of the Space Activities Statute. In fact, New Mexico courts have more so than others focused on the SLA's stated goal of increasing the safety of ski areas,³³⁷ and this has affected the way New Mexico courts interpret claims brought under it. Luckily for spaceflight entities this attenuates the ability to analogize it to the Space Activities Statute. Further, the case law is scarce and dates back to 1992, further making reliance on it tenuous.

The New Mexico Court of Appeals holds that, if applicable, the SLA is the sole avenue for deciding a plaintiff's claims.³³⁸ Therefore, a plaintiff can only recover under the SLA *or* under theories of negligence, but not both.³³⁹ If this applies to spaceflight entities, SFPs will clearly be limited in their potential recovery. Further, the New Mexico Court of Appeals holds that the SLA codified "primary assumption of risk" or PAR, whereby a defendant either has no duty or did not breach a duty owed to the plaintiff.³⁴⁰ But this codification is not without some

³³⁴ N.M. STAT. ANN. § 41-14-3; CAL. CIV. CODE ANN. § 2212(c).

³³⁵ See *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 343, 76 P.3d 1098, 1100.

³³⁶ See generally *id.* at 1100.

³³⁷ *Lopez v. Ski Apache Resort*, 836 P.2d 648, 656 (N.M. Ct. App. 1992).

³³⁸ *Id.* at 651.

³³⁹ *Id.*

³⁴⁰ *Id.* at 653-54.

qualifications.³⁴¹ In the New Mexico SLA, PAR is qualified in situations where a ski area operator is alleged to have breached a duty under the SLA.³⁴² As a result, the SLA does not prevent a court from apportioning liability among the ski operator and the skier using comparative negligence where there is a question as to whether both of them breached duties imposed on them by the SLA.³⁴³ This, in simpler terms, means that the court will engage in a negligence determination—which is fact intensive and not done as a matter of law—even if claims are brought under the SLA. The SLA will not, therefore, necessarily allow for pre-trial disposition claims. This curtails the advantages theoretically granted by statutory immunity.

Extending these concepts to the New Mexico Space Activities Act means that a New Mexico court could either aid or hinder the legislature in its efforts to limit a spaceflight entities' liability. If a New Mexico court simply decides to apportion liability under the Space Activities Statute—which precedent allows it to do—then spaceflight entities are no better off under the statute than they were under common law. The New Mexico courts' position that the SLA codified a "qualified" version of PAR can be reduced to a mere codification of SAR. This is presumably not the result the legislature intended when it passed the Space Activities Statute.

On the other hand, New Mexico courts could readily distinguish the SLA and the Space Activities Statute to the advantage of spaceflight entities. The reason the New Mexico Court of Appeals found PAR was qualified in the SLA was because the statute creates duties for the ski operators.³⁴⁴ The Space Activities Statute only requires a written warning. It does not create any additional duties, the way the SLA does, for example by requiring ski operators to correct specific hazards.³⁴⁵ As a result, a New Mexico court could find that the Space Activities Statute codifies PAR, but *does not* qualify it. If a court reaches that result, the legislature will have very effectively codified immunity for spaceflight entities. This is not a foregone conclusion, however. The legislature could have clarified its codification of PAR with explicit language, thereby removing uncertainty.

The New Mexico Courts of Appeals also view a determination of whether an operator violated the duties imposed by the SLA as a

³⁴¹ *Id.* at 651.

³⁴² *Lopez*, 836 P.2d at 651.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 655.

GOOD ENOUGH?

fact issue.³⁴⁶ In one particular case, *Lopez v. Ski Apache Resort*, the New Mexico Court of Appeals held that a ski tower (a massive, extremely common and indeed necessary object) was an “unusual” obstacle or hazard under the statute.³⁴⁷ And therefore a jury needed to determine whether it was “feasible” for the ski resort to warn or correct the hazard.³⁴⁸ Hopefully, this should not apply to Space Activities Statutes because they do not impose duties on spaceflight operators. But, if an issue arises about whether the SFP received an adequate warning statement—which is the only requirement under the Space Activities statute—is a fact issue, spaceflight entities will be further precluded from pre-trial disposition of the plaintiffs’ claims.

3. EXPRESS ASSUMPTION OF RISK

New Mexico courts will generally enforce exculpatory agreements, even for a party’s negligence, unless they are “violative of law or contrary to some rule of public policy.”³⁴⁹ And, as a general principle, New Mexico courts apply EAR when enforcing exculpatory agreements because it is a “means of effectuating an agreement between the parties.”³⁵⁰ This rule does not generally apply to reckless conduct.³⁵¹ The rule also does not apply under certain “other” circumstances, which include situations where public policy, furnished either through statute or common law, weighs against enforcement. This second issue raises issues relevant to spaceflight activities, and was tackled in *Berlangieri v. Running Elk Corp.* where a New Mexico court used the existence of the ELA to *invalidate* an exculpatory provision for horseback riding activities.

The New Mexico SLA does not contain language that the skier has to sign nor does it have specific language for warnings to be posted.³⁵² Similarly, the New Mexico ELA also does not have language to be signed, but it does, however, include an obligation to post a warning notice.³⁵³ The statute does not tell operators what language to use and it does not require the rider to sign a copy of the warning statement. Therefore, the following analysis looks at exculpatory provisions independently drafted by equine operators. The Space Activities Statute requires the following language to be signed by the SFP:

³⁴⁶ *Id.* at 656.

³⁴⁷ *Lopez*, 836 P.2d at 656.

³⁴⁸ *Id.*

³⁴⁹ *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 343, 76 P.3d 1098, 1104 (citing *Sw. Pub. Serv. Co. v. Artesia Alfalfa Growers’ Ass’n*, 353 P.2d 62, 69 (N.M. 1960); *accord Lynch v. Santa Fe Nat’l Bank*, 627 P.2d 1247, 1251 (N.M. Ct. App. 1981)).

³⁵⁰ *Id.* at 1106 (citing *Thompson v. Ruidoso–Sunland, Inc.*, 734 P.2d 267, 272 (N.M. Ct. App. 1987)).

³⁵¹ *Id.* at 1104 (citing *Baker v. Bhajan*, 871 P.2d 374, 377 n.1 (N.M. 1994)).

³⁵² See N.M. STAT. ANN. § 24-15-2 (1997).

³⁵³ N.M. STAT. ANN. § 42-13-5.

WARNING AND ACKNOWLEDGMENT:

I understand and acknowledge that under New Mexico law, there is no liability for injury to or death sustained by a participant in a space flight activity provided by a space flight entity if the injury or death results from the inherent risks of the space flight activity. Injuries caused by the inherent risks of space flight activities may include, among others, death, bodily injury, emotional injury or property damage. I assume all risk of participating in this space flight activity.

New Mexico courts engage in a two-step analysis to determine the validity of exculpatory provisions: 1) a linguistic analysis of the exculpatory clause; and 2) a public policy assessment of the provision.

The linguistic analysis encompasses determinations of the clause's conspicuousness and clarity. First, as is the case in many other states, exculpatory clauses are strictly construed against the drafter.³⁵⁴ The specific language of the release must be sufficiently clear and unambiguous to "inform the person signing it of its meaning."³⁵⁵ This "strict construction of liability releases" also requires "such clarity that a person without legal training [could] understand the agreement he or she [had] made."³⁵⁶ In addition to the language itself, "the words surrounding the portion being construed and the circumstances surrounding the agreement are relevant."³⁵⁷ Further, drafters of releases should "err on the side of using clear terms, understandable by the general public, rather than legal terminology."³⁵⁸

A clause is conspicuous, "[w]hen a reasonable person against whom a clause is to operate ought to have noticed it"³⁵⁹ For example, a release that is part of a "very short document" and is "appropriately

³⁵⁴ *Berlangieri*, 76 P.3d at 1107 (citing *Lynch*, 627 P.2d at 1249).

³⁵⁵ *Id.* (internal citations omitted).

³⁵⁶ *Id.* at 1108.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 1110 (citing *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289, 294–95 (D. Colo. 1993) (holding that a liability release was invalid because it did not explain the specific risks being assumed by the person who signed it).

³⁵⁹ *Berlangieri*, 76 P.3d at 1108–09 (citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993)).

GOOD ENOUGH?

labeled” is conspicuous.³⁶⁰ It also helps if the operator’s employees bring it to the participant’s attention and ask if she understood it.³⁶¹

In *Berlangieri v. Running Elk Corp.*, the plaintiff was injured during a horseback ride; prior to the ride, the plaintiff signed a release.³⁶² The release, which at the time of signing the plaintiff said she understood, included the following language:

Agreement for Release and Assumption of Risk

The undersigned, being over the age of 18, (or if under the age of 18, through my natural parent or legal guardian) hereby agree with THE LODGE AT CHAMA.

I acknowledge that I have been informed of, and that **I am otherwise aware of**, *the risks involved in fishing, horseback riding, hiking and shooting the sporting clays on the lands of THE LODGE AT CHAMA.* I hereby declare that I possess sufficient skills and experience in the above mentioned activities without causing injury to myself or other guests of THE LODGE AT CHAMA.

In consideration of being permitted to participate in the above mentioned activities and otherwise use the lands of THE LODGE AT CHAMA, I agree:

To use due care while engaging in the above mentioned activities on the lands of THE LODGE AT CHAMA, including, but not limited to, each and every risk resulting from negligent acts or omissions of any other person or persons, including employees and agents of THE LODGE AT CHAMA. **I further agree to exculpate and relieve** THE LODGE AT CHAMA and its employees, representatives and

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at 1101.

agents, from all liability for any loss, damage, or injury, whether to person or property which I may *suffer while engaging in activities and/or using the lands of THE LODGE AT CHAMA all whether or not resulting from the negligent act or omission of another person or persons.*³⁶³

The New Mexico court deemed most of the language in the release, “unintelligible and unhelpful.”³⁶⁴ The court then focused on the last sentence, starting with “I further agree . . .” and ending with “from the negligent act or omission of another person or persons.” The court held this sentence exceedingly long, “so long that a guest could forget what the first part of the sentence says by the time the guest reached the end of the sentence.”³⁶⁵ Despite its misgivings, the New Mexico Supreme Court determined that, reading it carefully enough, a guest would be able to understand its meaning.³⁶⁶ And that the sentence, on balance, only had one reasonable interpretation, “it [wa]s an agreement not to sue [the defendant] for injuries caused by the negligence of the [defendant’s] employees.”³⁶⁷ With respect to the title of the release, the court was unimpressed by the use of the words “Assumption of Risk,” finding the expression to be a legal phrase a lay person would not be expected to understand.³⁶⁸ And on its own, it would be wholly insufficient to uphold a release.³⁶⁹ But because it was part of the rest of the document, the term was a “helpful signal.”³⁷⁰

From this perspective, the Space Activities Statute warning statement seems to comply with New Mexico law on exculpatory provisions:

**WARNING AND
ACKNOWLEDGMENT:**

I understand and acknowledge that under New Mexico law, **there is no liability** for injury to or death sustained by a participant in a space flight activity provided by a space flight entity if the

³⁶³ *Id.* (highlighting added).

³⁶⁴ *Berlangieri*, 76 P.3d at 1108.

³⁶⁵ *Id.* at 1109.

³⁶⁶ *Id.* at 1108-09.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Berlangieri*, 76 P.3d at 1109.

³⁷⁰ *Id.*

GOOD ENOUGH?

injury or death results from the *inherent risks* of the space flight activity. Injuries caused by the *inherent risks of space flight activities* may include, among others, death, bodily injury, emotional injury or property damage. I **assume** all risk of participating in this space flight activity.

The warning statement does not contain legalese. Nor is it overly long (84 words). The New Mexico Supreme Court in *Berlangieri* paid little attention to particular words or whether the release was broad enough. The entire focus of the inquiry was clarity and conspicuousness. From that perspective, the Space Activities Statute satisfies both requirements. Obviously, spaceflight entities would have to be mindful of placement of the warning statement and should avoid burying it under pages of documents or inside another long document. But overall, there are no red flags—based on the available common law—with respect to the warning statement itself.

The second step for a New Mexico court's analysis of an exculpatory clause is based on public policy. And this is where the legislature committed a major oversight which could significantly hinder spaceflight entities' ability to immunize themselves if the Space Activities Statute does not apply to them. The New Mexico Supreme Court determined whether an exculpatory provision is unenforceable as against public policy by applying the *Lynch* factors.³⁷¹ The *Lynch* factors are not a balancing test but rather only indicators to guide whether "enforcement of the release would be unjust."³⁷² Under New Mexico law, public policy favoring invalidation of a release can be based in either statutory or common law.³⁷³

The ELA imposes duties on equine business operators to protect their patrons by expressly excluding certain acts or omissions from immunity.³⁷⁴ The New Mexico Supreme Court will look to statutes governing the particular activity (for example, the ELA) and determine whether the statute, "generally expresses a policy that the duty of ordinary care may not be disclaimed"³⁷⁵ Under New Mexico common law, if the legislature expressly excludes an operator's negligence from the statute's immunity, this indicates the legislature's

³⁷¹ *Id.* (citing *Lynch*, 627 P.2d at 1251–52).

³⁷² *Id.* at 1109–10.

³⁷³ *Id.* at 1109 (citing *Lynch*, 627 P.2d at 1251–52).

³⁷⁴ *Berlangieri*, 76 P.3d at 1110 (citing N.M. STAT. ANN. 1978, § 42–13–4 (1993) (emphasis added)).

³⁷⁵ *Id.*

intent that operators be held accountable for it.³⁷⁶

For example, in *Berlangieri*, the New Mexico Supreme Court looked at Subsections A, B, and C of the ELA and identified risks for which the operator did not have immunity.³⁷⁷ Subsection A of the ELA provides that operators are liable for equine behavior.³⁷⁸ Subsection B bars a cause of action *unless* the action is based on the operator's negligence.³⁷⁹ Subsection C provides specific causes of injury not intended to be excluded by either Subsection A or B.³⁸⁰ The New Mexico Supreme Court concluded that all of the examples of risks from which the operators are immune refer to acts by the horse, i.e. equine behavior.³⁸¹ Thus, according to the court, the ELA reflects a policy that operators *should* be held liable for their own negligence, but not for events beyond their control.³⁸² As a result, allowing operators to contractually exculpate themselves would run contrary to public policy.

In addition, if a statute only codifies common law, a "more reasonable interpretation of th[e] statute is that the Legislature intended to express in general terms a public policy that operators should be held accountable for their own negligence, recklessness, and intentional conduct."³⁸³ As a result, an operator's attempt to contractually protect itself for its own negligence is void as against public policy. In other words, under New Mexico law a statute limiting liability is a *ceiling* for exculpatory provisions, rather than a floor. Therefore, when the New Mexico legislature enacted the Space Activities Statute, it created a limit on spaceflight entities' ability to exculpate themselves by contract.

Given New Mexico's very pro-commercial-space stance, this is probably an unintended consequence. To remedy this, the legislature could try to increase the scope of culpability covered by the statute or, alternatively, explicitly state that the Space Activities Statute does not otherwise limit the scope of exculpatory agreements. The New Mexico Space Activities Statute does state that the limitation on legal liability it provides is "in addition to any other limitation of legal liability otherwise provided by law."³⁸⁴ This sentence has no effect on spaceflight entities' exculpatory provisions. The exculpatory provisions would have been *more* protective than the statute allows.

³⁷⁶ *Id.* at 1111-12.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Berlangieri*, 76 P.3d at 1111-12.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* at 1111.

³⁸⁴ N.M. STAT. ANN. § 41-14-3(C).

GOOD ENOUGH?

So it is unclear how the statute can be “in addition” to the exculpatory provisions. The problem is that the statement assumes the existence of other lesser forms of limitation on liability. But that is not the case (as seen above). Therefore, it is unclear what practical effect the statement has on *any* aspect of spaceflight entities’ liability.

In *Berlangieri*, the defendant tried to rely on the ELA’s “Legislative purpose and findings” because the latter states that the legislature’s purpose was to encourage operators’ engagement in equine activities by limiting liability for injuries resulting from equine behavior:

The legislature recognizes that persons who participate in or observe equine activities may incur injuries as a result of the numerous inherent risks involved in such activities. The legislature also finds that the state and its citizens derive numerous personal and economic benefits from such activities. *It is the purpose of the legislature to encourage owners, trainers, operators and promoters to sponsor or engage in equine activities by providing that no person shall recover for injuries resulting from the risks related to the behavior of equine animals while engaged in any equine activities.*³⁸⁵

The New Mexico Supreme Court rejected the defendant’s argument, finding such a reading of the text too narrow.³⁸⁶ Rather, the court held this language as an attempt to balance the competing interests of operators and participants.³⁸⁷ And that allowing participants to hold operators accountable for their negligence promoted such balancing.³⁸⁸

What is maybe worse for spaceflight entities is that a 2009 proposed text of the Space Activities Statute addresses each of the issues raised in *Berlangieri*.³⁸⁹ The 2009 text proposed by Clinton D. Harden has “Legislative Findings and Purpose,” much like the ELA.³⁹⁰ The

³⁸⁵ *Berlangieri*, 76 P.3d at 1112 (citing N.M. Stat. Ann. § 42-13-2 (1993) (emphasis added)).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ S. 37, 49 Gen. Ct. (N. M. 2009), available at <http://nmlegis.gov/Sessions/09%20Regular/bills/senate/SB0037.pdf> (last accessed Apr. 2, 2013)

³⁹⁰ *Id.*

Legislative Findings and Purpose include a statement that commercial human spaceflight has inherent risks which cannot be eliminated by the use of ordinary care, and therefore “justify the exculpation of ordinary negligence.”³⁹¹ One of the identified purposes of the Space Activities Statute would be to “permit the use of waivers and releases of liability for space flight entities that will exculpate them from the inherent risks of space flight activities *and their negligence*.”³⁹² That text did *not* make it into law. And courts may interpret that as legislative rejection of its contents, which is presumably worse than silence.

In addition to the public policy analysis above, described above, the New Mexico courts supplement their determination by applying the *Tunkl* factors, which are as follows:

- [1] The activity concerns a business of a type generally thought suitable for public regulation.
- [2] 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] The party holds himself [or herself] out as willing to perform this service for any member of the public who seeks it, or at least 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, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his [or her] services.
- [5] In exercising a superior bargaining power 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.
- [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the

³⁹¹ *Id.*

³⁹² *Id.*

GOOD ENOUGH?

seller or his [or her] agents.³⁹³

With respect to the first *Tunkl* factor, public regulation of the activity, the existence of a statute governing the activity, such as the ELA, in and of itself indicates “suitability for public regulation.”³⁹⁴ This would also be the case for spaceflight activities, in light of the Space Activities Statute.

In the case of horseback riding, the second *Tunkl* factor, pertaining to whether the defendant is “performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public,” weighs in favor of enforcement.³⁹⁵ Horseback riding is not a “public necessity.”³⁹⁶ It is recreational. The same can be said for spaceflight activities as currently envisioned. Later, when spaceflight activities provide point-to-point transportation, the analysis could change. But for now, providing trips to the ISS and suborbital flights—for tourism or research—is not a service of *public* necessity.

With respect to the third *Tunkl* factor, an equine operator generally holds himself out as “willing to perform this service for any member of the public who [sought] it, or at least for any member coming within certain established standards.”³⁹⁷ This would likely also be the case for spaceflight entities offering commercial flights to SFPs. So far, the various business models—such as Virgin Galactic’s—advertise to the public and invite all members of the population to fly.³⁹⁸

The fourth *Tunkl* factor relates to whether the defendant exercised “a superior bargaining power” against the plaintiff.³⁹⁹ The second and fourth factors are closely related because superior bargaining power is more likely to exist when the service offered is of public necessity.⁴⁰⁰ In *Berlangieri*, the court found there *was* an adhesion contract—evidence of superior bargaining power—but that the plaintiff was not obligated to go horseback riding, and therefore was not necessarily *subjected to* the superior bargaining power. In the spaceflight activity context, parties could negotiate their agreements. But even if they don’t, the parties seeking spaceflight services—at the moment—are paying close to \$200,000. The lowest quoted price for suborbital flights is \$90,000 per person. It is unlikely that individuals with such financial resources are

³⁹³ *Berlangieri*, 76 P.3d at 1109–10 (quoting *Tunkl*, 383 P.2d at 445–46).

³⁹⁴ *Id.* at 1112–13.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Booking*, VIRGIN GALACTIC, <http://www.virgingalactic.com/booking/> (last visited Apr. 5, 2014).

³⁹⁹ *Berlangieri*, 76 P.3d at 1113.

⁴⁰⁰ *Id.*

in a “weak” bargaining power. Further, given the investment required, this is most definitely an optional service. As a result, in the currently envisioned setting, spaceflight activities would not trigger the second and fourth *Tunkl* factors.

The fifth *Tunkl* factor, whether a participant is subjected to an adhesion contract and whether a provision allows him to purchase additional protection against the operator’s negligence, will weigh in favor of invalidation, if the defendant did not offer a way for the plaintiff to purchase additional coverage.⁴⁰¹ There is no indication as to whether spaceflight entities currently offer additional coverage, but they certainly are free to do so if they wish so. As a result, spaceflight entities could push this factor in favor of enforcing any release.

Lastly, the sixth *Tunkl* factor, whether a participant is subjected to operator’s risk of carelessness, can weigh in favor of invalidation if, by virtue of the release, the participant is “subject to the risk of [the defendant’s] carelessness.”⁴⁰² This last factor is problematic. If an entity triggers this factor—which favors invalidation of the release—merely by requiring a release for its “carelessness,” then the factor will always be triggered. The sixth factor becomes a self-fulfilling prophecy. The Space Activities Statute requires the following language:

WARNING AND
ACKNOWLEDGMENT:

I understand and acknowledge that under New Mexico law, there is no liability for injury to or death sustained by a participant in a space flight activity provided by a space flight entity if the injury or death results from the inherent risks of the space flight activity. Injuries caused by the inherent risks of space flight activities may include, among others, death, bodily injury, emotional injury or property damage. I assume all risk of participating in this space flight activity.

The text does not discuss the spaceflight entities’ culpability; it merely discusses “the inherent risks of space flight activity.” Courts will have to

⁴⁰¹ *Id.* at 1112–13.

⁴⁰² *Id.*

GOOD ENOUGH?

determine whether “the inherent risks of space flight activity” include negligence. If they do, the release triggers the sixth *Tunkl* factor. If they don’t, then the sixth factor is not triggered. Further, if the spaceflight entity requires only signature of the Space Activities Statute warning statement, then the analysis can go either way, but the spaceflight entity is then foreclosed from contractually immunizing itself for carelessness. This turns the exercise into a Catch-22.

The New Mexico legislature should take into consideration *Berlangieri* as New Mexico continues to court commercial space entities. The Space Activities Statute and the ELA, in this case, have significant similarities. Most of all, if the New Mexico Supreme Court read the Space Activities Statute as limiting an operator’s ability to exculpate itself by contract—even if the participant is fully informed and freely chooses to do so—the courts could perform the same after-the-fact undoing of exculpatory agreements between spaceflight entities and SFPs. The legislature should have, and still could, address the New Mexico Supreme Court’s use of a statute limiting liability as creating a limitation on an operator’s ability to contractually exculpate itself. As it stands, the Space Activities Statute could actually be a hindrance at common law. The New Mexico court could also try to include language in the Space Activities Statute to affect the *Tunkl* analysis and skewing it in favor of spaceflight entities, if that is its intention. However, in light of the analysis above, the *Tunkl* factors would otherwise weigh in favor of enforcing an exculpatory provision between a spaceflight entity and an SFP. Therefore, in that regards, the New Mexico Space Activities Statute does not provide any additional assistance to spaceflight entities and actually hinders spaceflight entities in the exercise of EAR.

4. IMPLIED ASSUMPTION OF RISK

Although New Mexico’s definitions of PAR and SAR are very similar to California’s, New Mexico’s approach to assumption of risk principles is anything but. New Mexico defines PAR in the standard way, “[PAR] is an alternative expression for the proposition that the defendant either owed no duty to the plaintiff or did not breach a duty.”⁴⁰³ But SAR, which in the words of the Supreme Court is nothing more than “contributory negligence,”⁴⁰⁴ was abolished in 1971.⁴⁰⁵

⁴⁰³ *Baldonado v. El Paso Natural Gas Co.*, 2008-NMCA-010, ¶ 11, 143 N.M. 297, 176 P.3d 286, *aff’d*, 2008-NMSC-005, 143 N.M. 288, 176 P.3d 277 (citing *Yount v. Johnson*, 1996-NMCA-046, 121 N.M. 585, 915 P.2d 341). *See also* *Moreno v. Marrs*, 695 P.2d 1322 (N.M. Ct. App. 1984) (describing the term “assumption of risk” as used in its “primary sense,” whereby there is no duty); *Thompson v. Ruidoso-Sunland, Inc.*, 734 P.2d 267, 271 (N.M. Ct. App. 1987).

⁴⁰⁴ *Baldonado*, 176 P.3d at 291 (internal citation omitted).

⁴⁰⁵ *Lopez v. Ski Apache Resort*, 836 P.2d 648, 653 (N.M. Ct. App. 1992). *See Williamson v. Smith*,

Under New Mexico law PAR exists in the context of contact sport, “where participants owe no duty of reasonable care as long as the game is played in the ordinary way,” because “the participants enter the field with an express or implied consent that duty will be defined narrowly as a matter of judicial policy.”⁴⁰⁶ And PAR itself, i.e. the declaration of no duty, is a matter of policy, “Policy determines duty.”⁴⁰⁷

As a matter of policy, more recent New Mexico Court of Appeals’ decisions evidence a move away from immunity. For example, in 1996 the New Mexico Court of Appeals summarized the state’s jurisprudential trend as, “mov[ing] forcefully towards a public policy that defines duty under a universal standard of ordinary care, a standard which holds all citizens accountable for the reasonableness of their actions.”⁴⁰⁸ It specifically identified this trend as a movement away from immunity in favor of holding everyone responsible for the safety of others. The New Mexico Court of Appeals reflected on the trend as follow, “The movement has been away from judicially declared immunity or protectionism, whether of a special class, group, or activity. The theme, constantly reiterated, is that ‘every person has a duty to exercise ordinary care for the safety of others.’”⁴⁰⁹ In addition to identifying and pronouncing a New Mexico policy contrary to the principles of PAR, the court also described the distinct advantages of comparative negligence.⁴¹⁰ Comparative negligence is SAR because a jury is allowed to apportion fault, “we are also reminded of the ‘ameliorative principles of comparative negligence, which strongly favor letting a jury determine the relative accountability of our citizens for an injury.’”⁴¹¹ In the court’s opinion comparative negligence is better suited for a determination because it, “‘provides the means for more subtle adjustments’ by the jury in the evaluating the vicissitudes of human behavior.”⁴¹² In this respect, the legislature improved the situation for spaceflight entities by enacting the Space Activities Statute. The Space Activities Statute both clearly gives spaceflight entities the benefit of PAR *and* sends a clear message about the legislature’s position regarding spaceflight entities’ immunity.

491 P.2d 1147 (N.M. 1971) (internal citations omitted); *Diaz v. MacMahon*, 819 P.2d 1346, 1348 n.2 (N.M. Ct. App. 1991) (recognizing the abolition of SAR and the viability of PAR as a defense after *Williamson*); *Thompson*, 734 P.2d at 271 (same).

⁴⁰⁶ *Yount*, 915 P.2d at 346–47 (N.M. Ct. App. 1996) (citations omitted).

⁴⁰⁷ *Id.* at 347 (citing *Torres v. State*, 894 P.2d 386, 389 (N.M. 1995)).

⁴⁰⁸ *Id.* at 342.

⁴⁰⁹ *Id.* at 342 (quoting *Lerma ex rel. Lerma v. State Highway Dep’t*, 877 P.2d 1085, 1087 (N.M. Ct. App. 1994)).

⁴¹⁰ *Yount*, 915 P.2d at 342–43 (quoting *Montoya v. AKAL Sec., Inc.*, 838 P.2d 971, 974 (N.M. 1992)).

⁴¹¹ *Id.* at 342–43 (quoting *Montoya v. AKAL Sec., Inc.*, 838 P.2d 971, 974 (N.M. 1992)).

⁴¹² *Id.* (citing 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* § 21.1 n.14, at 204 (2d ed. 1986)).

GOOD ENOUGH?

In 1987 the New Mexico Court of Appeals considered the case *Thompson v. Ruidoso-Sunland, Inc.*⁴¹³ where the plaintiff was riding on a horse track and got injured due to an “unguarded gooseneck rail” along the race track.⁴¹⁴ The defendant argued, among other defenses, PAR.⁴¹⁵ Relying on state law enacted by the New Mexico Racing Commission and a landowner’s common law duty to a business invitee, the court held that the defendant had a duty to exercise ordinary care to prevent injury to the plaintiff.⁴¹⁶ And that the defendant’s knowledge of the danger posed by the unguarded gooseneck rail and its failure to take adequate, available precautions to protect plaintiff supported the trial court’s finding of a breach of that duty.⁴¹⁷ *Thompson* exemplifies an extremely narrow application of PAR, making it virtually impossible to apply when there are other statutes involved, which may explain the scarcity of case law on the topic. With respect to spaceflight entities, *Thompson* raises the question of whether the New Mexico courts would read a duty into the Space Activities Statute precluding application of PAR. The legislature did not address this in the New Mexico Space Activities Statute. And although the Space Activities Statute does not, on its face, impose such duties and only talks about limiting liability for spaceflight entities it does not preclude *Thompson*-like analyses.

Further, the mere enactment of the Space Activities Statute as a tool of immunity will not support an argument by the spaceflight entities that PAR should be applied to spaceflight activities at common law. In a 1992 New Mexico Court of Appeals case, *Lopez* the plaintiff skied into a ski tower and sued the ski resort operator, among other defendants. The defendants argued that the New Mexico SLA codified PAR for ski resort operators.⁴¹⁸ To the contrary, the court found that the language of the SLA supported an application of comparative negligence.⁴¹⁹ The main thrust of the New Mexico court’s holding was that the SLA: 1) creates duties for ski resort operators and skiers; and 2) where it does codify PAR for ski operators, the SLA does so *subject to* the ski operator’s compliance with the SLA.⁴²⁰ This creates duties for both skiers and operators.⁴²¹ Under New Mexico law when both parties are alleged to have breached duties PAR does not apply.⁴²² In that case, the

⁴¹³ *Thompson v. Ruidoso-Sunland, Inc.*, 734 P.2d 267, 271 (N.M. Ct. App. 1987).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* (citing NMSA 1978, UJI Civ. 13.10 (Repl. Pamp. 1980)).

⁴¹⁷ *Id.*

⁴¹⁸ *Lopez v. Ski Apache Resort*, 836 P.2d 648, 653 (N.M. Ct. App. 1992).

⁴¹⁹ *Id.* at 653–54 (quoting and citing N.M. STAT. ANN. § 24-15-10).

⁴²⁰ N.M. STAT. ANN. § 24-15-10 (1997) (emphasis added).

⁴²¹ *Lopez*, 36 P.2d at 654–55.

⁴²² *Id.*

“fact finder is entitled to determine the negligence, if any, of each of the parties, and in the event both parties are found to have negligently violated a duty under the Act contributing to the skier’s injuries, to apportion fault and damages between the parties under comparative negligence principles.”⁴²³

The legislature, by limiting immunity under certain circumstances, may have hindered the sought after effectiveness of the Space Activities Statute more than it realized. The Space Activities Statute limits immunity if the spaceflight entity is grossly negligent, shows wanton or willful disregard, or knows or “reasonably should have known” of a danger that causes the injury. Further, as stated above, immunity is contingent on obtaining a signed warning statement from the SFP. These limitations can be interpreted as qualifiers, which would defeat the argument that the Space Activities Statute codifies PAR.

There are, however, two powerful counterarguments to this, which strongly support a reading that the statute incorporates PAR. First, the Space Activities Statute does not impose affirmative duties—the way they are imposed in the SLA—and therefore is consistent with PAR. Also, under PAR an operator cannot increase the inherent risks of an activity but it has no duty to decrease them. Stating that an operator cannot commit gross negligence or show wanton or willful disregard or act recklessly by encountering risks it knew of are merely other ways to say the same thing, further making the Space Activities Statute consistent with PAR. The limitation on an operator’s liability for risks he “knew of reasonably should have known about” may require more finessing. It is unclear whether this refers to recklessness or mere negligence. But either way, if it refers to non-inherent risks it is consistent with PAR: an operator cannot *increase* the inherent risks of an activity. If the language includes inherent risks, i.e. an operator knows or should have known of an inherent risk and did nothing about it, then the limitation is inconsistent with PAR. A spaceflight entity can make a very strong argument that the Space Activities Statute codifies PAR. If it codifies PAR, New Mexico has legislatively announced a policy of “no duty” for spaceflight entities. This was the lynchpin argument the defendant did not have in *Lopez* to support his contention that PAR should apply to the plaintiff’s injuries.

⁴²³ *Id.*

GOOD ENOUGH?

E. TEXAS

1. SPACE ACTIVITIES STATUTE

In Texas, the term “spaceflight entity” includes the FAA license holder, manufacturers and suppliers reviewed by the FAA during the licensing process.⁴²⁴ But Texas further expands the definition to include the employees, officers, directors, owners, stockholders, members, managers, and partners of manufacturers, FAA license holders, and suppliers.⁴²⁵

Texas incorporated the Launch Act’s definition of SFP word-for-word, without referencing the federal statute.⁴²⁶ With respect to spaceflight activities, the Texas legislature merged the equivalent of the federal definitions for “launch” and “launch services” in the definition of a single term “launch”:

- (1) “Launch” means a placement or attempted placement of a vehicle or rocket and any payload, crew, or space flight participant in a suborbital trajectory, earth orbit, or outer space, including activities involved in the preparation of a launch vehicle or payload for launch.⁴²⁷

And Texas’s definition of reentry is near-identical in form, and substantively identical to, the federal definition of “reenter and reentry.”⁴²⁸

Texas law also has the term “space flight activities,” which does not exist in federal law. Under Texas law, a “space flight activity” means everything done in preparation for “space flight” (an undefined term), and includes activities taking place between a launch and a reentry:

- (3) “Space flight activities” means activities and training in all phases of preparing for and undertaking space flight, including:
 - (A) the preparation of a launch vehicle, payload, crew, or space flight participant for launch, space flight, and reentry;

⁴²⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001(4) (West 2013).

⁴²⁵ *Id.*

⁴²⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001(6).

⁴²⁷ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001 with 51 U.S.C. § 50902(4), (6) (2010).

⁴²⁸ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001 with 51 U.S.C. § 50902(13).

- (B) the conduct of the launch;
- (C) conduct occurring between the launch and reentry;
- (D) the preparation of a reentry vehicle, payload, crew, or space flight participant for reentry;
- (E) the conduct of reentry and descent;
- (F) the conduct of the landing; and
- (G) the conduct of postlanding recovery of a reentry vehicle, payload, crew, or space flight participant.⁴²⁹

Items 3(A), (B), (D), and (E) are subsumed in the federal definitions of “launch,” “launch services,” and “reenter or reentry.”⁴³⁰ What is interesting, and expands the scope of Texas law, is its applicability to conduct occurring “between the launch and reentry,” which is not mentioned in 51 U.S.C. section 50902, and post-landing activities. The Texas legislature’s immunity therefore theoretically applies to a broader scope of activities than those envisioned by federal law. And for purposes of immunity, that is significant because if an operator causes damages between launch and reentry, or during recovery, and those damages affect another state, the operator may try to claim immunity under Texas law, but would be unable to obtain indemnity under federal law. This would make the immunity statute even more important for operators in Texas, and may be an advantage of Texas as compared to other states. Having said this, at this time, the federal and Texas language are a distinction without a difference. For purposes of suborbital flights, the end of the launch phase happens (almost) as soon as the re-entry phase begins. Which means that for all intents and purposes there is no “in-between” phase. But this might change as space activities progress towards providing trips to the ISS or point-to-point transportation using suborbital trajectories.

⁴²⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001.

⁴³⁰ 51 U.S.C. § 50902(4) (2010) (“activities involved in the preparation of a launch vehicle or payload for launch”), § 50902(6) (“activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for launch”), and § 50902(14) (“activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for reentry.”).

GOOD ENOUGH?

Under Texas law, a spaceflight entity avails itself of statutory immunity if the SFP signs the statutorily mandated language.⁴³¹ The statutory immunity applies to injuries or damage “arising out of the space flight participant injury”⁴³² The Space Activities Statute therefore broadly applies to any injury to a spaceflight participant, and does not limit its scope to “inherent risks” or even “risks arising out of spaceflight activities.” Lastly, Texas provides no immunity if a spaceflight entity acts with gross negligence, evidencing willful or wanton disregard for the safety of the SFP or if it acts intentionally.⁴³³ It does, by implication, provide immunity for a spaceflight entities’ negligence.

2. STATUTES LIMITING LIABILITY

As a general matter, Texas courts construe statutory limitations on operator liability broadly. This broad approach makes it easier for legislatures attempting to attract spaceflight entities to do so. Further, this broad approach was reaffirmed in 2011 by the Texas Supreme Court in *Loftin v. Lee*. If other courts adopt *Loftin* as a template for interpreting statutory limitations on liability in Texas, the judiciary will assist (rather than hinder) the legislature’s efforts to create a regime favorable to spaceflight entities.

In *Loftin* the Texas Supreme Court held that for purposes of the ELA, sponsor negligence is an “inherent risk” of equine activities, even though the statute does not say that.⁴³⁴ This is a tremendous concession to operators. The negligent operator in *Loftin* was the defendant. The plaintiff and the defendant, who were friends, decided to go horseback riding together.⁴³⁵ About an hour into the ride, the plaintiff and the defendant came to a “wooded, boggy area.”⁴³⁶ The plaintiff knew the low-lying area could be muddy.⁴³⁷ The defendant saw that it actually was⁴³⁸ Neither thought to avoid it.⁴³⁹ The defendant had also noticed vines hanging from the trees and knew that a horse might jump if something touched its flank.⁴⁴⁰ That is what happened, and the horse bolted injuring the plaintiff.⁴⁴¹ The trial court granted summary

⁴³¹ TEX. CIV. PRAC. & REM. CODE ANN. § 100A.003 (West 2011).

⁴³² TEX. CIV. PRAC. & REM. CODE ANN. § 100A.003.

⁴³³ TEX. CIV. PRAC. & REM. CODE ANN. § 100A.001(b).

⁴³⁴ *Loftin v. Lee*, 341 S.W.3d 352 (Tex. 2011).

⁴³⁵ *Id.* at 354.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Loftin*, 341 S.W.3d at 354.

⁴⁴⁰ *Id.* at 354–55.

⁴⁴¹ *Id.* at 355.

judgment for the defendant, holding that the ELA barred the plaintiff's claims.⁴⁴² The court of appeals reversed and remanded.⁴⁴³ The Supreme Court granted review.⁴⁴⁴

The Supreme Court rejected the proposition that a risk associated with equine activity must be inevitable to be inherent.⁴⁴⁵ The Supreme Court agreed that the plaintiff and the defendant could have avoided boggy, wooded trails or they could have gone riding in West Texas. Further, the court identified negligence on the defendant's part because she could have chosen a nearby trail free of the conditions that caused the plaintiff's fall.⁴⁴⁶ Even so, the Supreme Court reasoned, "the risks of such choices are inherent in riding any trail."⁴⁴⁷ And the risk inherent in trail riding is that, "a horse will be spooked by natural conditions, if not mud and vines, then birds or shadows."⁴⁴⁸ Instead of looking behind the reasons that caused the animal to spook, the Texas Supreme Court limited its inquiry as to whether the actual injury was caused by an inherent risk: an animal getting spooked, regardless of why.

It is important to note that the Colorado and Texas ELA's are quite similar. But contrary to the Colorado courts' tack, the Texas court read "inherent risk" in its ELA expansively. The Texas ELA contains five examples of "inherent risks," which echo those found in the Colorado ELA—animal propensities and unpredictability, land conditions, collisions, and other participants' negligence. And just like the Colorado list, the Texas list is "expressly non-exclusive."⁴⁴⁹ But in Texas, the Supreme Court read inherent risks broadly. And it did not inquire about the cause of the horse's reaction (a screaming girl or a vine).

There are, of course, ways to distinguish the two cases. In *Fielder* the animal was spooked because another rider made noise, not a natural occurrence, while in *Loftin* the animal was spooked by a vine, a natural occurrence. Nonetheless, the court in *Loftin* recognized a non-natural occurrence at play—the defendant was negligent—and chose to ignore it because the injury resulted from an inherent risk listed in the statute. This, rather than the natural v. non-natural nature of the cause, was the analytical pivot for the Supreme Court's holding.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Loftin*, 341 S.W.3d at 355.

⁴⁴⁵ *Id.* at 358.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Loftin*, 341 S.W.3d at 356.

GOOD ENOUGH?

The legislature enacted the Space Activities Statute to create a pro-spaceflight entity regime in Texas and given the recent Supreme Court decision, it may well have done so. Granted, the case law is scarce. But what is available indicates that Texas courts apply the letter of the law, with regards to statutes limiting liability, and are willing to dismiss suits on that basis.

3. EXPRESS ASSUMPTION OF RISK

Texas's ELA is actually a statute limiting liability for animal farm professionals and livestock show sponsors.⁴⁵⁰ This statute requires these sponsors to post specifically worded warnings,⁴⁵¹ but does not require signature of any particular statement. On the other hand, as discussed above, the Texas Space Activities Statute requires the following warning to be signed by the SFP:

Agreement and Warning

I **understand and acknowledge** that a space flight entity is **not liable** for any injury to or death of a space flight participant *resulting from space flight activities*. I understand that I have accepted all risk of injury, death, property damage, and other loss that may result from space flight activities.

Texas spaceflight entities will not be able to solely rely on the above warning statement for exculpation. But minor adjustments will give them the sought after immunity, given Texas's robust framework for the enforcement of exculpatory provisions. As a result, the Space Activities Statute was not necessary to protect spaceflight entities. However, the Texas legislature was the only one out of the six that addressed the issue of exculpatory provisions in its text. The Texas legislature included a provision stating that an exculpatory agreement between an SFP and a spaceflight entities is "effective and enforceable and is not unconscionable or against public policy."⁴⁵² This type of language can assist parties enforcing exculpatory provisions and shows foresight by the legislature as to the potential uses of the warning statement, beyond mere compliance with the Space Activities Statute.

Under Texas Rule of Civil Procedure 94, "release" is an affirmative

⁴⁵⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 87.005 (West 2011).

⁴⁵¹ TEX. CIV. PRAC. & REM. CODE ANN. § 87.001.

⁴⁵² TEX. CIV. PRAC. & REM. CODE ANN. § 100A.004 (West 2011).

defense.⁴⁵³ The effect of a release “is to relieve a party in advance of responsibility for its own negligence.”⁴⁵⁴ Texas courts deem the defense to “extinguish the claim or cause of action as effectively as would a prior judgment between the parties and is an absolute bar to any right of action on the released matter.”⁴⁵⁵ As a result, Texas courts will enforce releases, including releases for a party’s own future negligence, subject to “fair notice requirements.” “Because a pre-injury release of a party’s ‘own negligence is an extraordinary shifting of risk, [the Texas Supreme Court] has developed fair notice requirements which apply to these types of agreements.”⁴⁵⁶ The fair notice requirement has to satisfy two elements: conspicuousness and the express negligence rule.⁴⁵⁷

Texas Business and Commerce Code section 1.201(10) has a definition of “conspicuous.”⁴⁵⁸ A conspicuous term includes the following:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.⁴⁵⁹

The statute itself does not require a release to satisfy both subsections.⁴⁶⁰ Rather, these are just two possible ways for a release to be conspicuous.⁴⁶¹

⁴⁵³ TEX. R. CIV. P. 94.

⁴⁵⁴ *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 449–50 (Tex. App. 2011) (quoting *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507 (Tex. 1993)).

⁴⁵⁵ *Id.* at 450.

⁴⁵⁶ *Id.* (quoting *Dresser*, 853 S.W.2d at 507).

⁴⁵⁷ *Id.* (citing *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004)).

⁴⁵⁸ TEX. BUS. & COM. CODE ANN. § 1.201(10) (2005).

⁴⁵⁹ TEX. BUS. & COM. CODE ANN. § 1.201(10) (West 2005) (emphases added).

⁴⁶⁰ See TEX. BUS. & COM. CODE ANN. § 1.201(10) (West 2009); see also *Quintana*, 347 S.W.3d at 450.

⁴⁶¹ *Thom v. Rebel’s Honky Tonk*, 03-11-00700-CV, 2013 WL 1748798 (Tex. App.—Austin Apr. 17, 2013).

GOOD ENOUGH?

In addition, exculpatory provision can be conspicuous, even if not in strict compliance with the Tex. Bus. & Com. Code.⁴⁶² Conspicuousness, more broadly defined, is satisfied if the release is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”⁴⁶³ In addition, something is conspicuous if “attention can reasonably be expected to be called to it”⁴⁶⁴ or when “a reasonable person against whom a clause is to operate ought to have noticed it.”⁴⁶⁵ The burden of proving “actual knowledge” is on the party seeking release.⁴⁶⁶ Determination of whether a provision satisfies these requirements is done as a matter of law.⁴⁶⁷

For example, an exculpatory provision is conspicuous if: 1) the entire document is two pages long; 2) the word “release” is near the top of the second page, is in larger type than any other text on that page, and is bolded; 3) the release contains three paragraphs, for a total of twelve lines of text, followed by a blank for the plaintiff’s initials.⁴⁶⁸ Similarly, an exculpatory provision is conspicuous if it takes up an entire form, which is dedicated to the release and assumption of risk.⁴⁶⁹ Further, if the entire release “is wholly dedicated to warning . . . participants of the dangers, instructing participants on the necessary precautions, and informing participants of the rights they are waiving,”⁴⁷⁰ it is conspicuous.

The Texas Supreme Court also provides guidance as to what type of releases will fail the conspicuousness requirement. In *Littlefield v. Schaefer* the invalidated release was: 1) six paragraphs of; 2) minuscule type; 3) compressed into a 3” x 4.25” square; 4) in the lower corner of a registration form.⁴⁷¹ The heading of the *Littlefield* release was in four-point font and contained 28 characters per inch.⁴⁷² The main text was printed in even smaller typeface and contained 38 characters per inch.⁴⁷³ The Supreme Court described the text of the *Littlefield* release, as “illegible,” “too small,” and “containing minuscule print,” holding

⁴⁶² *Quintana*, 347 S.W.3d at 450; *Thom*, 2013 WL 1748798, at *5.

⁴⁶³ *Quintana*, 347 S.W.3d at 451 (citing *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 332–33 (Tex. App.—Hous. [14th Dist.] 2006, no pet.).

⁴⁶⁴ *Thom*, 2013 WL 1748798, at *5 (citing *Quintana*, 347 S.W.3d at 450); *Littlefield v. Schaefer*, 955 S.W.2d 272, 275 (Tex. 1997)).

⁴⁶⁵ *Thom*, 2013 WL 1748798, at *5 (citing *Dresser*, 853 S.W.2d at 511; *Quintana*, 347 S.W.3d at 451).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Quintana*, 347 S.W.3d at 450 (citing *Dresser*, 853 S.W.2d at 509).

⁴⁶⁸ *Quintana*, 347 S.W.3d at 451.

⁴⁶⁹ *Thom*, 2013 WL 1748798, at *4.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at *4 (citing *Littlefield v. Schaefer*, 955 S.W.2d 272, 274 (Tex. 1997)).

⁴⁷² *Id.*

⁴⁷³ *Id.*

that, “Where a party is not able to know what the contract terms are because they are unreadable, as a matter of law the exculpatory clause will not be enforced.”⁴⁷⁴ The Space Activities Statute provides no guidance about the conspicuousness of the warning statement. But spaceflight entities can confidently rely on the common law’s clear and specific guidance on the topic. The second element of the fair notice requirement is satisfaction of the “express negligence” rule.

The “express negligence rule” provides that “if a party intends to be released from its own future negligence it must express that intent in clear, unambiguous terms within the four corners of the contract.”⁴⁷⁵ The reason for having “the express negligence rule is to require scriveners to make it clear when the intent of the parties is to exculpate” a party for that party’s own negligence.⁴⁷⁶ Specific reference to “any negligent act of [the released party]” can be sufficient to define the parties’ intent.⁴⁷⁷

The express negligence rule is satisfied by language that specifically states the plaintiff “assumes ‘any and all liability’ for ‘damages of any kind’ ‘allegedly attributed to the negligent acts or omissions of’ [the defendant] and its employees.”⁴⁷⁸ In this case, the specific reference to the negligence of the defendant and its employees precludes the release from being insufficiently precise.⁴⁷⁹

Texas courts will rule an exculpatory provision unenforceable if the risk that causes the injury is outside the scope of the activity envisioned. For example, in *Jaeger v. Hartley* a couple was injured while traversing a canyon by car because the defendant’s employee was aware the car had defective brakes but decided to proceed with the tour anyway.⁴⁸⁰ The court held it reasonable to foresee an injury arising from traversing the wilderness or canyon by car.⁴⁸¹ But it was not reasonable to infer from the release that part of the tour would include being driven around in a car with defective brakes, and that the defendant’s employee would continue the tour knowing about the defect.⁴⁸² In other words, the court added a requirement that the injury be reasonably foreseeable from the

⁴⁷⁴ *Id.* (quoting *Littlefield*, 955 S.W.2d at 275).

⁴⁷⁵ *Quintana v. CrossFit Dallas*, 347 S.W.3d 445, 450 (Tex. App.—Dall. 2011) (citing *Storage & Processors v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 333 (Tex. App.—Hous. [14th Dist.] 2006, no pet.).

⁴⁷⁶ *Quintana*, 347 S.W.3d at 450 (citing *Atl. Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724, 726 (Tex. 1989)).

⁴⁷⁷ *Id.* (citing *Atl. Richfield Co.*, 768 S.W.2d at 726 (insertion in original)).

⁴⁷⁸ *Quintana*, 347 S.W.3d at 452.

⁴⁷⁹ *Id.* at 451–52.

⁴⁸⁰ *Jaeger v. Hartley*, 394 S.W.3d 794 (Tex. App.—Amarillo [Panel D] 2013).

⁴⁸¹ *Id.* at 794.

⁴⁸² *Id.*

GOOD ENOUGH?

text of the release.

To summarize, a spaceflight entity drafting an exculpatory provision for enforcement in Texas has to satisfy the conspicuousness requirement and the express negligence requirement. The Space Activities Statute addresses neither requirement. So from that perspective, it does nothing to ameliorate the common law. However, it also does nothing to diminish the robust common law enforcement of exculpatory provisions. Spaceflight entities should be able to avail themselves of Texas's generous law if they draft releases with reasonably-sized font, in a legible document, and consisting of two pages or less. To satisfy the express negligence requirement, spaceflight entities will have to modify the Space Activities Statute warning language to explicitly include the degrees of culpability for which they are being released.

4. IMPLIED ASSUMPTION OF RISK

Under Texas law, the assumption of risk defense can only be raised by a co-participant in a sport. This is because, according to the Supreme Court, Texas public policy demands that *participants* in athletic contests be allowed to obtain summary disposition when they can show that the injury resulted from a foreseeable and expected play to which all participants in the *sport* were deemed to have consented.⁴⁸³ Spaceflight activities are not a sport. Although Texas case law is scarce, the only activities where assumption of risk was allowed as a defense involved activities such as golfing and softball.⁴⁸⁴ And an SFP and the spaceflight entity are not co-participants. So it is unlikely that spaceflight entities can raise the defense of assumption of risk in response to a suit by an SFP or an SFP's family.

Further, the only defenses available are EAR and SAR.⁴⁸⁵ PAR was abolished.⁴⁸⁶ EAR comes in two flavors. The first flavor is when the plaintiff knowingly and expressly consents, either orally or in writing, to the dangerous activity or condition.⁴⁸⁷ The second flavor is when a party expressly consents to the conduct.⁴⁸⁸ Express consent, in the

⁴⁸³ *Davis v. Greer*, 940 S.W.2d 582 (Tex. 1996).

⁴⁸⁴ *See, e.g., Allen v. Donath*, 875 S.W.2d 438, 442 (Tex. App.—Waco 1994, writ denied) (applying assumption of risk to a golfing accident); *Davis*, 940 S.W.2d at 582–83 (applying assumption of risk to a softball injury).

⁴⁸⁵ *Allen*, 875 S.W.2d at 443 (citing *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975)).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*; *Thom*, 2013 WL 1748798, at *7; *Willis v. Willoughby*, 202 S.W.3d 450, 453 (Tex. App.—Amarillo 2006, pet. denied) (concluding that claimant contractually assumed risk of engaging in self-defense instruction, which she expressly agreed was inherently dangerous activity); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 718 (Tex. App.—San Antonio 1994, writ denied) (citing *Farley*, 529 S.W.2d at 758).

⁴⁸⁸ *Davis*, 940 S.W.2d 582 (citing *Farley*, 529 S.W.2d at 758).

context of sports, is evidenced by mere participation: “A participant in a competitive contact sport expressly consents to and assumes the risk of the dangerous activity by voluntarily participating in the sport.”⁴⁸⁹ Participation, however, does not assume the risk of reckless or intentional conduct.⁴⁹⁰

With respect to SAR, Texas courts *say* that Texas does not recognize the defense. And in fact, they use different terminology to describe the concept. But the case law evidences the continuing vitality of “qualified” SAR (i.e. implied assumption of risk when the plaintiff acts reasonably). For example, in *Allen v. Donath* the Court of Appeals attempted to distinguish what it referred to as “implied” assumption of risk, which it was applying in the case at bar, and “voluntary” assumption of risk, which—it conceded—the Supreme Court abolished. “This *implied* assumption of risk differs from the *voluntary* assumption of risk doctrine that has been merged into our system of comparative negligence.”⁴⁹¹ The court tried to explain the distinction as follows. Implied assumption of risk was not an affirmative defense, like voluntary assumption of risk, whereby a defendant sought to prove that it was relieved of a duty.⁴⁹² Rather, implied assumption of risk involved a situation where a plaintiff voluntarily encountered a known danger, but did not act unreasonably in doing so.⁴⁹³ The court of appeals was, despite its best intentions, using the term “voluntary assumption of risk” to describe PAR, and “implied assumption of risk” to describe SAR.⁴⁹⁴ And as a result, allowing “qualified” SAR to survive, while confirming the demise of PAR and of “strict or pure” SAR.

Under qualified SAR, a plaintiff assumes the “inherent” risks of an activity. Under Texas law, an “inherent” risk is “a *foreseeable* and *not uncommon* occurrence in [the activity].”⁴⁹⁵ The Supreme Court in part rejected a subjective standard because such a standard would focus on the defendant’s state of mind. And allowing this would make it too easy for a plaintiff to raise a fact question as to the defendant’s state of mind, thereby always foreclosing summary judgment.⁴⁹⁶ Using this standard, courts are not required to determine the defendant’s subjective state of mind, but instead concern themselves only with

⁴⁸⁹ *Id.* (quoting *Connell v. Payne*, 814 S.W.2d 486, 488–89 (Tex. App.—Dallas 1991, writ denied)).

⁴⁹⁰ *Davis*, 940 S.W.2d 582 (quoting *Connell*, 814 S.W.2d at 488–89).

⁴⁹¹ *Allen*, 875 S.W.2d at 442.

⁴⁹² *Id.* at 439–40.

⁴⁹³ *Id.*

⁴⁹⁴ *Allen*, 875 S.W.2d at 439–40.

⁴⁹⁵ *See, e.g., Allen*, 875 S.W.2d at 442 (applying assumption of risk to a golfing accident) (emphases added); *Davis*, 940 S.W.2d at 582–83.

⁴⁹⁶ *Davis*, 940 S.W.2d at 582.

GOOD ENOUGH?

the *objective* determination of whether the actions were foreseeable or expected in the course of the particular sporting event.⁴⁹⁷

This is a different standard than the one encountered in any other state reviewed so far. It is also arguably more flexible. It may, however, also be irrelevant. The Texas Space Activities Statute immunizes spaceflight entities' from liability for injuries "arising out of the space flight participant injury" (sic). Therefore, regardless of whether the injury is inherent or foreseeable, if it arises out of spaceflight activities, it is covered by the Texas Space Activities Statute.

Overall, Texas common law is not particularly advantageous to defendants. First, Texas abolished PAR, foreclosing disposal of claims at the summary judgment stage. Second, SAR is applied narrowly to contact and non-contact *sports*. Even though one case, *Jaeger*, applied the doctrine to a jeep tour, the case was otherwise incorrectly decided, and this could weigh against it being used as precedent.⁴⁹⁸ Further, Texas courts have largely applied SAR to co-participants. And although no case holds it improper to apply SAR to operators—indeed, SAR was applied to an operator-defendant in *Jaeger*—having better precedent to that effect would be superior evidence of Texas jurisprudence. Lastly, SAR has been applied to "contact" and "non-contact" sports. It is unclear whether spaceflight activities fit that definition, although arguably spaceflight activities are a non-contact sport. One good (although likely irrelevant) aspect of Texas law is its definition of "inherent" as foreseeable. This is an objective standard, which does not rely on the parties' state of mind. It is also broader than other definitions of "inherent" found in the other states reviewed. The Texas Space Activities Statute achieves the legislature's goal because it does decrease spaceflight entities' exposure to liability. Under the common law, spaceflight entities are not clearly entitled to raise the only available bar to recovery, which is participatory EAR. Therefore, codifying a version of PAR the way the Texas legislature did, does improve on the available common law.

F. VIRGINIA

1. SPACE ACTIVITIES STATUTE

In Virginia the term "space flight entity" includes the FAA license holder, as well as manufacturers and suppliers reviewed by the FAA

⁴⁹⁷ *Id.* at 582–83.

⁴⁹⁸ *Jaeger v. Hartley*, 394 S.W.3d 794 (Tex. App. — Amarillo [Panel D] 2013) (citing *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993)).

during the licensing process.⁴⁹⁹ Virginia succinctly adopts the Launch Act's definitions of SFP and spaceflight activities.⁵⁰⁰

Virginia requires a spaceflight entity to obtain informed consent under federal law and informed consent under its own Space Activities Statute.⁵⁰¹ Although the latter term is undefined, it is presumably fulfilled by obtaining the signed statutorily mandated warning statement.⁵⁰² If a spaceflight entity complies with these requirements, it is immune from suit by anyone attempting to recover for injuries "resulting from the risks of space flight."⁵⁰³ Virginia, therefore, also does not use the limited term "inherent risk" but rather adopts a broader approach to immunity.

Virginia does not extend immunity for a spaceflight entity that commits an act or omission that constitutes either gross negligence or willful or wanton disregard for an SFP's safety.⁵⁰⁴ And of course, Virginia does not immunize a spaceflight entity's commission of intentional acts.⁵⁰⁵

2. STATUTES LIMITING LIABILITY

Virginia statutory law is replete with statutes limiting liability for particular activities. The Virginia legislature has passed a Winter Sports Safety Act,⁵⁰⁶ an Agritourism Activity Liability,⁵⁰⁷ and a Marine Tourism Activity Liability,⁵⁰⁸ but Virginia has no case law interpreting these statutes. Therefore, despite their existence, they provide no guidance to interpreting the Space Activities Statute, and as far as Virginia courts' treatment of the Space Activities Statute goes, at this point anything is possible.

3. EXPRESS ASSUMPTION OF RISK

In Virginia, pre-injury exculpatory clauses for future negligence are unenforceable because *always* void as against public policy.⁵⁰⁹ The

⁴⁹⁹ VA. CODE ANN. § 8.01-227.8.

⁵⁰⁰ *Id.*

⁵⁰¹ VA. CODE ANN. § 8.01-227.9(A).

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ VA. CODE ANN. § 8.01-227.9.

⁵⁰⁵ *Id.*

⁵⁰⁶ VA. CODE ANN. § 8.01-227.12 (2012).

⁵⁰⁷ VA. CODE ANN. § 3.2-6402.

⁵⁰⁸ VA. CODE ANN. § 28.2-1107 (2009).

⁵⁰⁹ See *Hiett v. Lake Barcroft Cmty. Ass'n, Inc.*, 418 S.E.2d 894, 896 (1992); *Johnson's Adm'x v. Richmond & D.R. Co.*, 11 S.E. 829, 829 (Va. 1890); *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 641 S.E.2d 476, 479 (Va. 2007).

GOOD ENOUGH?

Virginia Supreme Court made its pronouncement in 1890 and reiterated it, unwaveringly, in 1992 and 2007.⁵¹⁰ In 1992, the Virginia Supreme Court emphasized that its invalidation of an exculpatory provision was based on the fact that “such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited “universally.”⁵¹¹ And in 2007, the Supreme Court reiterated the vitality of its previous holdings because “such provisions cannot be tolerated under an enlightened system of jurisprudence.”⁵¹²

A spaceflight entity will not be able to rely on an exculpatory provision to bar suits by SFPs seeking to recover from spaceflight entities in Virginia. Therefore, spaceflight entities will need to rely entirely on either the statute—for which there is no comparable case law—or the common law, where contributory negligence still exists.

4. IMPLIED ASSUMPTION OF RISK

Virginia is atypical because it is the only state, out of the six, and only one of six nationwide, that still has contributory negligence. Contributory negligence entirely bars a plaintiff’s recovery if the plaintiff was negligent. Such a showing would bar the suit altogether at the complaint stage, “where a plaintiff’s complaint shows on its face that the plaintiff is guilty of contributory negligence, the complaint should be dismissed on demurrer.”⁵¹³ Virginia also bars a plaintiff’s recovery if he assumed the risks inherent in the given activity.

Virginia courts view it as “axiomatic” that participation in certain sports or recreational activities necessarily involves the exposure of the participant to the risks of injury inherent in such activities.⁵¹⁴ Skiing and snow tubing are but a few examples of such recreational activities.⁵¹⁵ Indeed, in the context of snow tubing, the Virginia Supreme Court noted that, based on common experience, the known and accepted inherent risks of a particular recreational activity provide, in part, “the allure

⁵¹⁰ *Johnson’s Adm’x*, 11 S.E. at 829 (Va. 1890); *Hiett*, 418 S.E.2d at 895–96 (citing and quoting *Johnson’s Adm’x*, 11 S.E. at 829); *Estes Express Lines*, 641 S.E.2d at 479.

⁵¹¹ *Hiett*, 418 S.E.2d at 895–96 (citing and quoting *Johnson’s Adm’x*, 11 S.E. at 829).

⁵¹² *Estes Express Lines*, 641 S.E.2d at 479. For an outlier case, see *Morrison v. Star City Roller Skating Centers, Inc.*, 26 Va. Cir. 335 (Va. Cir. Ct. 1992). The plaintiff injured herself while roller skating. The defendant tried to enforce the release the plaintiff had signed, the trial court did so finding “no public policy reason” to deny enforcement. *Id.* at 335. This trial court level decision is included for completeness but has no precedential effect, given the clear Supreme Court holdings to the contrary.

⁵¹³ *Chilton v. Homestead, L.C.*, 79 Va. Cir. 708 (Va. Cir. Ct. 2008) (citing *Chesapeake & O. Ry. v. Swartz*, 80 S.E. 568 (Va. 1914)).

⁵¹⁴ *Nelson v. Great E. Resort Mgmt., Inc.*, 574 S.E.2d 277, 280 (2003).

⁵¹⁵ *Id.*

and thrill of participation in the activity.”⁵¹⁶ Under Virginia law, this is precisely the context in which the duty of care owed by the operator of a recreational facility to its invitee and participant in a particular activity is tempered, “by the common law principle *volenti non fit injuria*—one who consents cannot be injured.”⁵¹⁷ However, although this language seems to fully support—and even render obsolete—the legislature’s efforts in the Space Activities Act, implementation of these concepts by the courts in fact indicates that the Space Activities Act was a much needed improvement to spaceflight entities’ position.

Under Virginia law, the doctrine of assumption of risk differs from contributory negligence because the plaintiff must fully appreciate the nature and extent of the risk and voluntarily incur that risk.⁵¹⁸ In that sense, it is an affirmative defense premised on a primarily subjective test, rather than the objective reasonable person test applicable to contributory negligence.⁵¹⁹ The defendant has to show “what the particular plaintiff in fact sees, knows, understands and appreciates.”⁵²⁰ However, while the degree or scope of the injured participant’s consent is frequently an issue, under Virginia law, “the operator of a recreational facility is not an insurer of the safety of its invitees.”⁵²¹ Although the Virginia courts refer to this as “primary” or “implied” assumption of risk, it is more fairly labeled SAR.⁵²² And it is, in reality, “pure” or “strict” SAR because the plaintiff’s actions must have been blameless, i.e. reasonable.

The plaintiff in *Nelson v. Great E. Resort Mgmt., Inc.* was injured when she collided with another snow tubing ride. According to the Supreme Court, the issue of assumption of risk was patent from the factual circumstances established by the evidence. The plaintiff had assumed the risk of injury resulting from a ride down a steep incline.⁵²³ But the plaintiff was not injured as a result of the speed of her ride; she was injured by a collision with another rider.⁵²⁴ The Supreme Court held that the issue jury determination was whether the plaintiff subjectively assumed the risk of injury in that manner.⁵²⁵

The Virginia Space Activities Statute provides that any limitations

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* (citing *Landes v. Arehart*, 183 S.E.2d 127, 129 (1971)).

⁵¹⁹ *Nelson*, 574 S.E.2d at 280.

⁵²⁰ *Id.* (quoting *Amusement Slides Corp. v. Lehmann*, 232 S.E.2d 803, 805 (1977)).

⁵²¹ *Id.* (internal citation omitted).

⁵²² *Id.*

⁵²³ *Id.* at 281 (internal citation omitted).

⁵²⁴ *Nelson*, 574 S.E.2d at 281 (internal citation omitted).

⁵²⁵ *Id.*

GOOD ENOUGH?

on liability afforded under it are “in addition to any other limitations of legal liability otherwise provide by law.”⁵²⁶ This is an odd statement. The Space Activities Statute assumes there are other limitations on a spaceflight entities’ liability. But research uncovered none. Exculpatory provisions are unenforceable as a matter of law, so EAR cannot apply because Virginia courts don’t recognize it. PAR does not exist. And SAR is so narrowly construed that it would only apply in limited circumstances, which fall far below the Space Activities Statute on the scale of possible exculpation. As a result, the statement may have been meant as a “savings clause” but its effectiveness is dubious.

Virginia common law is only really protective of spaceflight entities if a plaintiff is negligent under contributory negligence. But in the absence of such negligence, a spaceflight entity would have to show the plaintiff was subjectively aware of the risk that caused the injury and chose to proceed anyway. This is more difficult to do. Indeed, in many cases, it will preclude application of assumption of risk. If that is the case, the parties would proceed to an apportionment of liability. The scarce case law on assumption of risk does not provide guidance as to the adequacy of the Space Activities Act. But given the subjective standard employed to determine a plaintiff’s actual assumption of a known and appreciated risk, the Space Activities Statute is an improvement on the common law, because it codifies PAR. PAR under the Space Activities Statute removes an operator’s duties to protect an SFP from inherent risks of spaceflight activities. And it does not require a subjective understanding of those risks. All it requires is a signed warning statement. The substitution of the common law subjective test with the statutory objective is conducive to actually achieving the legislature’s goal of limiting liability for spaceflight entities.

CONCLUSION

The Six Space Friendly States view and use statutes limiting liability in dramatically different ways. This is in large part because each jurisdiction views the statute as expressing a particular legislative policy. And each set of courts reacts to that actual or perceived policy differently. As an example, Colorado courts interpret immunizing statutes very narrowly and have fought the legislature on statutes like the SLA, resisting attempts to limit operator liability.

Further, the statutes vary slightly one from another, further creating room for creative differences among jurisdictions. In addition, the Space Activities Statutes themselves may present some

⁵²⁶ VA. CODE. ANN. § 8.01-227.9(C).

unanticipated challenges resulting from either internal inconsistencies or inconsistencies with the existing common law. For example, the California Space Activities Statute spaceflight operators are given immunity for, “participant injury that *resulted from* the risks associated with space flight activities”⁵²⁷ But the statutorily mandated warning statement refers to the SFP’s understanding and acknowledgment of “inherent risks.” Courts will have to tackle the inconsistency. The New Mexico Space Activities Statute seems to only immunize spaceflight entities if the injury results “exclusively” from the risks inherent to spaceflight activities, which is an odd limitation. Virginia states that the Space Activities Statute is “in addition to” any other limitation available at common law, but it is unclear whether any such limitation actually exists. In other words, the statutes do not necessarily remove ambiguities and in fact, in some cases, create them.

Further, although none of the Space Activities Statutes provide warning language enforceable as a standalone exculpatory provision, in some states the mere existence of the Space Activities Statute will negatively impact the way courts enforce independently drafted releases. This is the case in New Mexico, where the New Mexico Supreme Court interpreted the existence of an immunizing statute as creating a ceiling on the scope of independently drafted exculpatory provisions. At the opposite end of the spectrum, Colorado interprets the language of an immunizing statute as a floor on operator exculpation. And Texas, the standout state, specifically encourages courts to enforce spaceflight exculpatory provisions by legislatively pronouncing them enforceable, effective, and not against public policy.

In addition, in some states the Space Activities Statute is a gesture of goodwill towards spaceflight entities but it does not actually enhance a spaceflight entity’s defenses because the common law would likely have been protective enough. This is certainly the case in California, where courts—even in the absence of statutes immunizing operators of recreational activities—have historically been very protective of defendants. In Texas, courts enforce releases if they comply with the fair notice requirements, and do so even for a defendant’s negligence. In those circumstances, the Space Activities Statutes does not supplant, but neither does it really supplement the robust common law on releases. In Colorado, the Supreme Court already pronounced that the language of the ELA warning statement, which is near-identical to the Space Activities Statute’s warning language, does not protect an operator from liability for its own negligence, thereby sinking the

⁵²⁷ CAL. CIV. CODE § 2212(b) (emphasis added).

GOOD ENOUGH?

Space Activities Statute's warning statement before it is even used.

In some cases, being excluded from the Space Activities Statute has actually been a greater benefit than being included in it. In California, manufacturers of recreational activities can rely on the PAR defense to bar claims, because they are allowed to do so under the common law and they were specifically excluded from the Space Activities Statute. The Space Activities Statute would have weakened the manufacturers' position by only offering them immunity under certain circumstances and not incorporating the words "inherent risk" in the statute's scope.

Legislatures also failed to address known weaknesses of each of their common law regimes when they drafted their respective Space Activities Statutes. The following are just a few salient examples. In Virginia, courts do not enforce exculpatory provisions as a matter of law. The Virginia legislature could have attempted to remedy this. In Colorado, courts will reach back into the chain of causation to determine whether the inherent risk was the sole cause of the injury or whether something else cause the inherent risk to take place. The Space Activities Statute relies on the concept of inherent risk but doesn't define it. This shifts application and contouring of inherent risk to the federal informed consent process, where SFP's have to be informed of hazards associated with spaceflight activities. As discussed, New Mexico courts use statutes providing immunity as ceilings on exculpatory provisions. The New Mexico legislature did not address this. And unwittingly limited parties' freedom to contractually exculpate each other. The New Mexico legislature also did not clearly describe the degree of culpability for which it sought to immunize spaceflight entities. This is not a result of the language "knows or has reason to know," but rather of the New Mexico courts' murky interpretation of the term, and varied application in civil and criminal contexts.

In some states, the Space Activities Statute would have been very beneficial because the common law is not. Yet, the promise may remain unfulfilled. Florida, for example, would most benefit from a robust immunity statute because the common law is among the least advantageous to spaceflight entities. This is because Florida courts have been unenthusiastic about enforcing liability limiting statutes, have interpreted the term "inherent risk" narrowly, usually finding against exculpation, and Florida only recognizes participatory EAR as an assumption of risk defense, which only applies to situations that do not encompass spaceflight entities or spaceflight activities. But the Florida Space Activities Statute fails to immunize spaceflight entities for *any* degree of culpability. Thereby codifying something less than

PAR and leaving spaceflight entities only marginally better off than at common law.

This is not to say the Space Activities Statutes are not an improvement on the common law. In certain states, they clearly are. This is specifically the case where states abolished the PAR defense. Because although the Space Activities Statutes are not across the bar codifications of PAR, they are at least an attempt to codify a PAR-light defense. Texas is a notable, although not unique, example. Texas courts could only apply participatory EAR to spaceflight participants, because PAR and SAR don't squarely apply. And participatory EAR is very narrowly construed. In light of this, the Space Activities Statute is in fact an improvement on Texas law for spaceflight entities. This is also the case in Florida and Virginia where courts will only allow an assumption of risk defense if the plaintiff was subjectively aware of the precise danger encountered and chose to encounter it with that knowledge and subjective appreciation. States that only apply assumption of risk to sports or participants are also states where Space Activities Statutes are, at least to some degree, an improvement for spaceflight entities. In addition, states like Virginia where pre-injury releases are against public policy as a matter of law certainly create a more welcoming atmosphere by enacting the Space Activities Statute.

In conclusion, Space Activities Statutes are not the end all be all of immunity. They are more fairly characterized as imperfect attempts to attract spaceflight entities. And their relative success and utility is highly contingent on each state's jurisprudence and policy. Even where Space Activities Statutes are an improvement on the common law, they are a slight improvement. And could use revisions to truly fulfill the promise of limited liability. Indeed, in order for legislatures to obtain the sought after results, they will have to analyze judicial decisions and work backwards towards the legislative text. This will have to be done, of course, while balancing resistance and input from other stakeholders.

Finally, spaceflight entities should carefully consider whether to supplement statutorily mandated warning statements. None of the six Space Activities Statutes provide language sufficient to be enforced as a standalone exculpatory provision. To this end, spaceflight entities can take solace in case law from states that approve of parties supplementing statutorily mandated warnings, like Colorado. And take note of the Texas Space Activities Statute which expressly refers to the validity and enforceability of exculpatory provisions between SFPs and spaceflight entities

GOOD ENOUGH?

So to answer the question driving the inquiry, "Is Statutory Immunity for Spaceflight Entities Good Enough?" The answer is: No, with the qualifier that this assessment is based on prediction. And as all predictions go, it is only as good as the materials available at this time. Further, judges and policies change over time. And it may also be that, due to politics and economics, spaceflight entities may be able to encourage changes to the Space Activities Statutes or present strong arguments that public policy favors and justifies limiting their liability.