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## A Practical Guide to Recovery for Injured Air Sport Participants

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# A PRACTICAL GUIDE TO RECOVERY FOR INJURED AIR SPORT PARTICIPANTS

LAURA J. PERKINS

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## I. INTRODUCTION

AIR SPORTS such as parachuting, ballooning, and ultralight flying continue to increase in popularity.<sup>1</sup> Not surprisingly, rising participation leads to an increase in the number of injuries associated with these sports. While some air sport injuries are unavoidable, others are a direct consequence of provider or equipment manufacturer error. But, recovery in negligence for the later type of injury is effectively nonexistent due to judicial tolerance for exculpatory contractual provisions between service providers and participants<sup>2</sup> and a legislative scheme that limits the liability of land owners.<sup>3</sup> Private insurance provides a less than satisfactory alternative because many policies contain aviation exclusions applicable to air sport activities.<sup>4</sup> In spite of comprehensive federal regulation of pilots and procedures, violations of those regulations which result in injury do not translate into a remedy for the injured participant.<sup>5</sup>

The grim reality for air sport enthusiasts and their families is that the legal system is uniformly disapproving of their activities. Consequently, they continue to bear the burden of serious bodily injury and death even where colorable claims of negligence exist against those who profit from the sports' wide appeal.<sup>6</sup> The challenge for personal injury practitioners is to carve new avenues of recovery from the current barriers.

The focus of this Comment is to aid the practitioner in meeting this challenge. Clearly, the successful pursuit of claims for

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<sup>1</sup> See Bill McNabb, *Are Sports Torts Now Par for the Course? The Reckless Disregard Standard for Sport Participation Liability*, 19 T. MARSHALL L. REV. 723 (1994).

<sup>2</sup> See, e.g., *Schutkowski v. Carey*, 725 P.2d 1057, 1062 (Wyo. 1986).

<sup>3</sup> See generally John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective Is the Protection?*, 24 IND. L. REV. 1587 (1991) (discussing recreational use statutes and changes in traditional land owner liability laws).

<sup>4</sup> See *Amatuzio v. United States Fire Ins. Co.*, 409 N.W.2d 278, 279 (Minn. Ct. App. 1987); *Cabell v. World Serv. Life Ins. Co.*, 599 S.W.2d 652, 653 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Pittman v. Lamar Life Ins. Co.*, 17 F.2d 370, 371 (5th Cir.), *cert. denied*, 274 U.S. 750 (1927).

<sup>5</sup> 1 PAUL S. DEMPSEY ET AL., *AVIATION LAW AND REGULATION* 4-15 (1992). "The Federal Aviation Act does not address or set forth rules of liability for personal injury or wrongful death . . . nor does it purport to preempt the law of torts in this area." *Id.* Likewise, this Comment does not purport to undertake a discussion of federal preemption issues. Although nearly every area of aviation activity involves some federally preempted matter, the issues surrounding tort recovery for air sport injuries are primarily a state concern at the present time. *Id.*

<sup>6</sup> Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 106 (1993).

air sport injuries is a complex endeavor involving many more issues than can be covered here. Thus, this Comment is offered simply as an overview of the most vexing problems facing the tort practitioner and some potential areas for investigation of and solutions to these problems.

The logical starting point in any discussion of aviation-related activities is the Federal Aviation Regulations (FARs). Because the FARs help to define the relevant actors and their relationships, the Comment will introduce the guidelines set by the FARs for parachuting,<sup>7</sup> ultralight flying,<sup>8</sup> ballooning,<sup>9</sup> and the pilots who make these sports possible.<sup>10</sup> To acquire an understanding of the permissible behavior, the case law regarding the practical effect of the regulations, as well as the judicial interpretation of the contractual arrangements of the parties, will be set forth in detail. The status of private insurance as an aid to compensation is included under the rubric of contractual arrangements.

The Comment will then examine the tort aspects of air sport activities and the consequences for participant recovery. In contrast to simple negligence, products liability for equipment manufacturers is presented as a more hopeful theory of recovery.<sup>11</sup> Next, it is necessary to discuss the effect of state legislation on land owner liability in order to flesh out the scope of the barriers to recovery as well as the niches where possibilities for recovery lie.

Finally, this Comment will not address air sport injuries which result in the absence of clearly identifiable negligence or other wrongdoing. No argument will be made in support of recovery for injuries that result from mere contact with the ground after an otherwise uneventful undertaking, for example, a broken ankle upon landing on an unremarkable surface. Indeed, the inspiration of the Comment comes from a recognition of the harsh results that occur for the participant who is injured as a result of negligence collateral to the risks ordinarily accompanying air sport activities.<sup>12</sup> Therefore, the guidance for practition-

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<sup>7</sup> 14 C.F.R. § 105 (1996).

<sup>8</sup> 14 C.F.R. § 103 (1996).

<sup>9</sup> 14 C.F.R. § 31 (1996); 14 C.F.R. § 101 (1996).

<sup>10</sup> 14 C.F.R. § 61 (1996).

<sup>11</sup> *See* *Prince v. Parachutes, Inc.*, 685 P.2d 83 (Alaska 1984).

<sup>12</sup> *E.g.*, *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (injuries sustained by parachutist in plane crash due to negligent failure of operator to supply adequate amount of gasoline for the flight).

ers is limited to recovery in clearly meritorious cases and is not intended to expand the number of cases filed.

## II. FEDERAL AIR REGULATIONS

### A. PILOT CERTIFICATION

Almost every aspect of air sport activities is governed by the FARs.<sup>13</sup> While these regulations prescribe individual pilot training,<sup>14</sup> they also include behavioral limits for activity participants in specific situations.<sup>15</sup> This section is intended to define the responsibilities and qualifications of those to whom participants entrust their safety.

Commercial pilots, those certified to transport passengers for monetary compensation, must meet tougher eligibility requirements than either recreational or private pilots.<sup>16</sup> The pilot must be at least eighteen years of age, speak English, hold a second-class medical certificate, and pass the written and oral examinations appropriate for the desired aircraft rating.<sup>17</sup> In addition, a commercial pilot with an airplane, rather than glider

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<sup>13</sup> See *supra* note 5 for the limitations of the regulations in the injury context.

<sup>14</sup> The regulations controlling certification of pilots and their ratings are found at 14 C.F.R. § 61 (1996). Certification requirements for recreational pilots, private pilots, and commercial pilots are found at 14 C.F.R. §§ 61.96-101 (1996), §§ 61.102-120 (1996), and §§ 61.121-141 (1996) respectively. Most cases of air sport injury will involve a commercial pilot who is the "pilot in command of an aircraft carrying persons or property for compensation or hire." 14 C.F.R. § 61.139 (1996). However, some cases will arise, especially in the products liability context, where the pilot is the injured participant and is subject to either the recreational or private pilot regulations.

<sup>15</sup> 14 C.F.R. § 105.13 (1996), for instance, proscribes the parachute jumper from engaging in a jump that "creates a hazard to air traffic or to persons or property on the surface."

<sup>16</sup> Compare 14 C.F.R. § 61.123 (1996) (commercial pilots) with 14 C.F.R. § 61.96 (1996) (recreational pilots) and § 61.103 (private pilots). As 14 C.F.R. § 61.129 (1996) makes clear, commercial pilot certificates are issued by the FAA only after the certified private pilot has, *inter alia*, at least 250 hours of flight experience. Presumably, the additional requirements for passenger carriers acting in a business capacity are intended to promote safety and fairness to consumers.

The test for determining the "commercial" status of any aeronautical activity requiring a commercial license states: "Where it is doubtful that an operation is for 'compensation or hire,' the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit." 14 C.F.R. § 1.1 (1996). Clearly, the typical parachute school, glider school, or balloon sight-seeing outfit should be staffed with properly certified commercial pilots.

<sup>17</sup> 14 C.F.R. § 61.123 (a)-(e).

or balloon rating, must log at least 250 hours of flight time.<sup>18</sup> The FARs require commercial pilots to acquire general knowledge in areas such as the National Transportation Safety Board accident reporting system, basic aerodynamics, and an understanding of the aircraft's operations and problem recovery techniques.<sup>19</sup> Commercial glider and balloon pilots are specifically required to be cognizant of the implications weather conditions may have for safe flight.<sup>20</sup>

## B. ULTRALIGHT VEHICLES

In contrast to the strict guidelines set for commercial pilots, ultralight operators "are not required to meet any aeronautical knowledge, age, or experience requirements to operate those vehicles."<sup>21</sup> Indeed, the craft itself need not meet airworthiness certification standards or even be registered.<sup>22</sup> An ultralight vehicle is defined in part as one that: "(a) [i]s used or intended to be used for manned operation in the air by a *single occupant*; (b) [i]s used or intended to be used for recreation or sport purposes only; [and] (c) [d]oes not have any U.S. or foreign airworthiness certificate."<sup>23</sup>

The safety implications of such lax regulations were hotly debated in the years immediately after the regulations were promulgated.<sup>24</sup> But both scholars and the Federal Aviation Administration (FAA) have shown a conspicuous lack of concern for the safety of the actual ultralight operator.<sup>25</sup> Thus, the air

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<sup>18</sup> 14 C.F.R. § 61.129. In recent years, the popularity of increasingly extreme sports has led to deviations from traditional air sports. Thus, it is now more likely that a parachutist or bungee jumper will alight from a hot air balloon. While balloon pilots need not meet the stringent airplane rating experience requirements, they are still bound by the parachute jumping provisions discussed in full *infra*, text accompanying notes 35-42. Gliders will probably not be involved in parachute incidents.

<sup>19</sup> 14 C.F.R. § 61.125(a) (1996).

<sup>20</sup> *Id.* § 61.125(c)(3), (e)(3) (1996).

<sup>21</sup> 14 C.F.R. § 103.7(b) (1996).

<sup>22</sup> *Id.* § 103.7 (a), (c).

<sup>23</sup> *Id.* § 103.1(a)-(c) (emphasis added).

<sup>24</sup> See, e.g., Richard H. Jack, *Ultralight Aircraft: A Need for Better Regulation Than 14 C.F.R. § 103*, 51 J. AIR L. & COM. 415 (1986) (discussing inadequacies of current regulations and how they increase danger to other aircraft); Sudie Thompson, *FAA Regulation of Ultralight Vehicles*, 49 J. AIR L. & COM. 591 (1984) (questioning whether minimal regulations and reliance on self-policing ensure proper safety level).

<sup>25</sup> Jack, *supra* note 24, at 415; Thompson, *supra* note 24, at 595 (quoting Bernard Geier, Manager of the General Aviation and Commercial Division of the FAA: "We consider this a sport. . . . The FAA is not responsible for protecting the

sport participant who enjoys light glider and other one-person aviation activities is free to do so without interference from the FAA. To the contrary, where a glider does not meet the ultralight classification because it is equipped to carry two persons, the pilot would be held to the standard glider regulations and requirements for certification.<sup>26</sup>

### C. FREE BALLOONS

In sharp contrast to ultralight regulations, the FARs prescribing the functions of free balloons are quite extensive.<sup>27</sup> The primary concern of Part 31 is airworthiness standards, and design and manufacture specifications and their compliance with safety guidelines.<sup>28</sup> A balloon "must be designed so that failure is extremely remote or so that any single failure will not jeopardize safety of flight."<sup>29</sup>

The concern with flight safety expressed in Section 31 is echoed in Section 101's regulation of operators and hazardous conditions.<sup>30</sup> The responsibility for conducting a safe flight lies exclusively with the operator. In addition, association with the operator defines the persons or class of persons to whom protection from hazards is extended.<sup>31</sup> But, in the specific situation of dropping objects from balloons, prohibition of endangering others is extended to all "other persons or their property."<sup>32</sup> Thus, while Part 101's concern with safety of operations does not appear to encompass operators or passengers, it does sug-

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pilot against himself; it is responsible for protecting the public and the airspace."); *Freeman v. United States*, 509 F.2d 626, 631 (6th Cir. 1975) (clear disavowal of any intent to protect the parachutist).

<sup>26</sup> See 14 C.F.R. § 103.1(a) (1996).

<sup>27</sup> 14 C.F.R. § 31; 14 C.F.R. § 101.

<sup>28</sup> Section 31.20 of the FAR requires "that the balloon is safely controllable and maneuverable during takeoff, ascent, descent and landing without requiring exceptional piloting skill." Clearly, the FAA intended to make sure that operations of free air balloons do not push the envelope of pilot skills. There is no indication that this requirement is restricted to commercial pilots. Thus, the solo balloon operator is protected from overextension of his own skill, caused by the design of the equipment, by regulations which are totally absent in ultralight operating situations.

<sup>29</sup> 14 C.F.R. § 31.25 (1996).

<sup>30</sup> 14 C.F.R. § 101.

<sup>31</sup> 14 C.F.R. § 101.33(e) (1996) prohibits only balloon flights which are hazardous "to persons or property *not associated with the operation*." *Id.* (emphasis added). This restriction represents another example of the FAA's lack of concern for participants. In the balloon context, 14 C.F.R. § 101.33 arguably strips protections from ground crews or even investors or family present to view the flight.

<sup>32</sup> 14 C.F.R. § 101.7 (1996).

gest protection for mere spectators.<sup>33</sup> Only Part 31 appears to give the operator or passenger a basis for complaining of injury. Clearly, this would be limited to situations involving manufacturer or product defects.<sup>34</sup>

#### D. PARACHUTE JUMPING

In addition to the pilot requirements laid down in Section 61 of the Federal Rules of Aviation, Section 105 addresses regulations for parachute jumping in more detail.<sup>35</sup> Notably, these regulations create a dual responsibility for pilot and parachutist to comply with the guidelines.<sup>36</sup> But, the burden continues to lie with the pilot in command to ensure that the technical details of the flight are managed properly.<sup>37</sup> The regulations do, however, hold the parachutist responsible for a considerable amount of technical knowledge.

For instance, the parachutist is deemed to know that jumps over airports without a functioning control tower are prohibited,<sup>38</sup> whether the nearest FAA facility has been notified of the jump at least one hour in advance,<sup>39</sup> that jumping through a cloud is forbidden,<sup>40</sup> and that jumping between sunset and sunrise requires special equipment.<sup>41</sup> It is unlikely the novice or casual parachute jumper possesses this level of knowledge. As such, the pilot should inform the jumper of these responsibili-

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<sup>33</sup> *Id.*

<sup>34</sup> See generally 14 C.F.R. § 31 (regulating airworthiness standards).

<sup>35</sup> 14 C.F.R. §§ 105.1-43 (1996). Section 105.1(b) defines a parachute jump as "the descent of a person, to the surface from an aircraft in flight, when he intends to use, or uses, a parachute during all or part of that descent." This description does not include a jump made in response to emergency conditions. *Id.* § 105.1(a).

<sup>36</sup> Each major area covered by 14 C.F.R. § 105 begins with the following language: "No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft . . . ." 14 C.F.R. § 105.

<sup>37</sup> See, e.g., *id.* § 105.14(a)(2) ("The pilot in command of an aircraft used for any jumping activity in or into controlled airspace *shall*, during each flight . . . [m]aintain . . . a continuous watch on the appropriate frequency of the aircraft's radio communications system . . . and [a]dvise ATC . . . when the last parachute jumper from the aircraft reaches the ground." *Id.* (emphasis added)).

<sup>38</sup> 14 C.F.R. § 105.17 (1996).

<sup>39</sup> 14 C.F.R. § 105.23 (1996).

<sup>40</sup> 14 C.F.R. § 105.29 (1996). See *Freeman*, 509 F.2d at 631 for a discussion of the level of responsibility of a parachutist for complying with pilot instructions.

<sup>41</sup> 14 C.F.R. § 105.33 (1996).



ties.<sup>42</sup> If the jumper does behave improperly, the logical conclusion, considering the regulations, is that the pilot is co-equally responsible for allowing a dangerous or non-regulation jump to take place.

Surprisingly, the FAA regulations do not provide protection, by way of redress from the instructor or pilot, to the air sport participants who pay for air sport services.<sup>43</sup> In fact, in *Jones v. Dressel*,<sup>44</sup> the Colorado Supreme Court indicated that non-conformance with FAA regulations does not affect a claim of negligence in the air sport context.<sup>45</sup> Because providers are often considered to be outside the class of service organizations which bear the burden of a statutory duty of care, participants who do business with air sport providers may not invoke the doctrine of negligence per se against the provider to prove negligence with respect to a violation of the Federal Aviation Regulations.<sup>46</sup>

### III. BARRIERS TO RECOVERY AND POSSIBLE SOLUTIONS

The Federal Aviation Administration Regulations regarding air sport activities do nothing more than help define the probable actors in a suit for negligence once an injury has occurred. For the most part, negligence cases will be brought by either the injured participant or his or her family against a properly licensed provider or pilot. Moreover, the usual case will involve

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<sup>42</sup> See *Hammerlind v. Clear Lake Star Factory Skydiver's Club*, 258 N.W.2d 590 (Minn. 1977) (Suggesting that the pilot is under no duty to ensure that the jumper is properly equipped or prepared. But, under state law, that duty does fall to a jump master or other member of the provider staff.).

<sup>43</sup> *DEMPSEY ET AL.*, *supra* note 5, at 4-15. 14 C.F.R. § 135.1 governs the applicability of the regulations on commercial operators. Specifically exempted from coverage are nonstop flights conducted within a 25 statute mile radius of the airport of takeoff carrying persons for the purpose of intentional parachute jumps. *Id.* § 135.1(5). Consequently, the extensive duties and operational requirements for commercial operators do not apply to parachute operations that work within these parameters.

<sup>44</sup> *Jones*, 623 P.2d at 370.

<sup>45</sup> *Id.* at 377. The court held that private air charter services are not under the duties of commercial operators as defined by the Code of Federal Regulations because carriage by air was incidental to the operator's principal business. *Id.* Remarkable as it may be that carriage of persons in the air is considered incidental to conducting a parachute jump, the court is supported indirectly by § 135.1 of the Federal Aviation Regulations.

<sup>46</sup> *Id.*; see, e.g., *Tedla v. Ellman*, 19 N.E.2d 987, 990 (N.Y. 1939) ("Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then . . . Failure to observe the standard imposed by statute is negligence, as a matter of law.").

an exchange of money for the services provided. That is, the provider is engaged in the sport for compensation.<sup>47</sup> The business arrangement between the provider and participant is the central focus of most air sport negligence cases.<sup>48</sup> Indeed, the contractual agreement is the biggest hurdle for tort practitioners seeking recovery for an injured client.

Because air sport providers invariably insist on the participant signing a contractual release agreement before getting into the air,<sup>49</sup> success in a negligence case will depend upon the exact provisions of the contract. Contrary to the general rule, many courts have held that the use of exculpatory clauses in these contracts does not establish the existence of an adhesion contract.<sup>50</sup> Courts extend a variety of rationales to support the propriety of exculpatory clauses in the air sports context. Yet, on the whole, the tone of judicial opinion suggests that courts feel these activities are simply unreasonably risky and unnecessary, and therefore unworthy of protection from generally disfavored liability limitations.<sup>51</sup>

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<sup>47</sup> Because the pilot will be carrying passengers for compensation, it may also be assumed that he holds a commercial pilot's license. 14 C.F.R. § 61.123 (1996).

<sup>48</sup> See generally *Falkner v. Hinckley Parachute Ctr., Inc.*, 533 N.E.2d 941 (Ill. App. Ct. 1989) (exculpatory clauses valid absent willful misconduct); *Schutkowski*, 725 P.2d at 1057 (signed release and indemnity agreement valid release of plaintiff's claims); *Jones*, 623 P.2d at 370 (accepting benefits of contract considered ratification).

<sup>49</sup> Most courts which address the contractual issues in negligence suits for air sports injuries rule that the lack of evidence that the services were available elsewhere under more favorable terms militates in favor of the provider. See, e.g., *Jones*, 623 P.2d at 374-75; see also Lynn Guissinger, *Exculpatory Clauses and Public Policy: A Judicial Dilemma*, 53 U. COLO. L. REV. 793, 798 (1982) (discussing necessity for legislative action to solve difficulty with exculpatory clauses). Practical experience, however, suggests that the vast majority of air sport providers, as well as providers of other risky recreational ventures, will refuse service unless and until the contract including the waiver of claims is signed by the participant. *Schutkowski*, 725 P.2d at 1058. The fact that liability insurance is difficult to obtain for the provider adds support to the assertion that negligence disclaimers are standard in the industry. See Marcia Chambers, *Whatever Happened to the Sandlot?*, NAT'L L.J., Apr. 22, 1991, at 15, 16.

<sup>50</sup> See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); Guissinger, *supra* note 49, at 801.

<sup>51</sup> For instance, the court in *Falkner*, 533 N.E.2d at 945, held that: "[S]ome risk of fatal injury is ordinarily attendant to the sport of parachute jumping . . ." Air sports are held out routinely as the quintessential example of foolish or unreasonable behavior. See, e.g., *Johnson v. Rapid City Softball Assoc.*, 514 N.W.2d 693, 700 (S.D. 1994).

## A. EXCULPATORY CLAUSES AND ADHESION CONTRACTS

In *Jones*, the court set forth a four-part test for determining the validity of an exculpatory clause.<sup>52</sup> The relevant considerations are: (1) whether a duty to the public exists; (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.<sup>53</sup> This standard has been widely followed in other jurisdictions and represents the leading approach in hazardous activity cases.<sup>54</sup>

The first determination is often resolved against the participant by application of the standard laid down in *Tunkle v. Regents of University of California*.<sup>55</sup> In *Tunkle*, the court stated that a duty to the public was to be found if the contract "concerns a business of a type generally thought suitable for public regulation. 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."<sup>56</sup> Although use of air space is a heavily regulated public concern,<sup>57</sup> courts have been very reluctant to adjudge air sport activities as "a matter of practical necessity."<sup>58</sup>

Not surprisingly, courts also hold uniformly that by their nature, air sports services are not "essential,"<sup>59</sup> and are therefore

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<sup>52</sup> *Jones*, 623 P.2d at 376; Judges, *supra* note 6, at 11.

<sup>53</sup> *Jones*, 623 P.2d at 376.

<sup>54</sup> See, e.g., *Paralift, Inc. v. Superior Court*, 29 Cal. Rptr. 2d 177 (1993); *Falkner*, 533 N.E.2d at 941; *Schutkowski*, 725 P.2d at 1057.

<sup>55</sup> 383 P.2d 441 (Cal. 1963).

<sup>56</sup> *Id.* at 445-46.

<sup>57</sup> For the reasons discussed *supra* in the text accompanying note 44, most courts do not rule on the "public regulation" aspect of the *Tunkle* test.

<sup>58</sup> *Schutkowski*, 725 P.2d at 1060. Donald P. Judges has attacked this approach to inherently risky behavior. Judges, *supra* note 6, at 1. Judges asserts that the current legal system is insensitive to the value of participation in physically dangerous endeavors. *Id.* at 11. In essence, "[r]isk minimization neglects the valuable experience of choosing, confronting, and overcoming risk; it unjustifiably infringes autonomy by imposing only one view of life well lived (and risks appropriately taken) on everyone." *Id.* at 9. While Judges's exploration of the differences among individuals in their levels of "risk-seeking" is beyond the scope of this Comment, his observations point out the possibility that there are those among us who truly need heightened levels of stimulation to be whole. *Id.* at 12-26. In addition, Judges feels that "there is little reason to suppose that judges—who by temperament are likely to be risk averse . . .—will be any more sensitive than juries to the value of risk choice." *Id.* at 82. Hence, the primarily negative judicial view of air sports may be understood as an improper exercise of judicial value judgment based upon personal preferences.

<sup>59</sup> *Schutkowski*, 724 P.2d at 1060.

not akin to services such as housing and utilities, where providers traditionally have been barred from limiting their own liability.<sup>60</sup>

Both the first and second elements of the *Jones* test involve an overriding determination of whether public policy demands that the exculpatory clauses be voided because of the nature or circumstance of the activity.<sup>61</sup> Most courts and state legislatures have determined that private recreational agreements do not support a public policy argument for voiding exculpatory clauses.<sup>62</sup> But some courts have held that allowing one party to be at the mercy of another's negligence is necessarily against public policy.<sup>63</sup>

Recently, one court has gone even further. The Vermont Supreme Court held in *Dalury v. S-K-I, Ltd.*<sup>64</sup> that the lack of an "essential public service does not resolve the public policy question in the recreational sports context. . . . [w]hen a substantial number of [recreational agreements] take place as a result of the [provider's] general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises."<sup>65</sup> In so holding, the court expressed serious concerns about the effect of exculpatory clauses on the level of care that recreational providers exhibit toward their paying customers.<sup>66</sup> This decision marks a significant step forward for injured air sport participants, in that it recognizes the cumulative effect private contractual arrangements have on the safety of entire industries. Moreover, because this decision arose in the

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<sup>60</sup> *Henriouelle v. Marin Ventures, Inc.*, 573 P.2d 465, 469-70 (Cal. 1978); cf. *O'Callaghan v. Waller & Beckwith Realty Co.*, 155 N.E.2d 545, 547 (Ill. 1958) (exculpatory clause valid).

<sup>61</sup> Thomas H. Winslow & Ernest J. Asprelli, Jr., *Negligence Disclaimers in Hazardous Recreational Activities*, 68 CONN. B.J., 356, 359-60 (1994). Because air sports activities do not represent a public duty and are not essential in nature, there is no public policy against liability limitation provisions in the service contracts. The public at large has no interest in being protected from such provisions. Therefore, unless the latter two elements of the *Jones* test are found to be lacking, these private agreements will be upheld. *Id.* at 360.

<sup>62</sup> See, e.g., *Mann v. Wetter*, 785 P.2d 1064, 1066 (Or. Ct. App. 1989) ("There is nothing inherently bad about a contract provision which exempts one of the parties from liability" for negligence.); *Gross v. Sweet*, 400 N.E.2d 306 (N.Y. 1979).

<sup>63</sup> *Hiatt v. Lake Barcroft Community Ass'n*, 418 S.E.2d 894, 897 (Va. 1992).

<sup>64</sup> *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995).

<sup>65</sup> *Id.* at 799 (discussing the issue in the alpine skiing context).

<sup>66</sup> *Id.* ("If defendants were permitted to obtain broad waivers of their liability, an important incentive for [providers] to manage risk would be removed with the public bearing the cost of the resulting injuries.").

hazardous sports context, there is no apparent reason to limit its effect to the ski industry in which it arose.<sup>67</sup>

The third element of the *Jones* formulation provides the injured party another opportunity to void the exculpatory clause. "Whether the contract was fairly entered into" involves an exploration of the circumstances surrounding the formation of the contract.<sup>68</sup> Courts generally consider the relative bargaining power of the parties, the opportunity to obtain the services elsewhere, and any alternatives to the contract provision in question.<sup>69</sup> In *Jones*, the court found that the clause barred recovery because there was no indication that the plaintiff did not understand the waiver or that the opportunity to parachute did not exist through other providers.<sup>70</sup> Moreover, even though the plaintiff was only seventeen at the time he signed the contract, the court found no disparity of bargaining power.<sup>71</sup>

This finding is based upon a presumption that a provider of non-essential services cannot take unfair advantage of the participant because the participant may always opt to avoid the activity rather than sign an objectionable contract.<sup>72</sup> In addition, the contract in *Jones* contained a provision that would have allowed the plaintiff to retain his rights to recovery for the payment of an additional sum. However, the provision was crossed out before being presented to the plaintiff. The court ruled that these facts did not imply that negotiations for a more advantageous contract were out of the question.<sup>73</sup>

*Jones* is typical of air sport negligence cases on this point. Courts appear to be uninterested in exploring the true, rather than assumed, circumstances of the bargaining process or extent to which it is possible to participate without signing the form contract. Again, because the service is not necessary, the courts feel comfortable holding the participant to the somewhat

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<sup>67</sup> A long list of "hazardous" recreational activities can be grouped together for purposes of analyzing the effect of exculpatory clauses. For example, scuba diving, ski racing, bungee jumping, rock climbing, and auto racing have all been labeled inherently "hazardous" or dangerous. Winslow & Asprelli, *supra* note 61, at 360; Judges, *supra* note 6, at 7; Christopher A. Love, *Law in the Pits: Lago v. Krollage and Contractual Limitation of Liability Under New York Law*, 8 J. SUFFOLK ACAD. L. 63 (1992).

<sup>68</sup> Guissinger, *supra* note 49, at 796.

<sup>69</sup> *Id.* at 798.

<sup>70</sup> *Jones*, 623 P.2d at 376.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 375.

<sup>73</sup> *Id.*

specious option of foregoing participation altogether. In contracts that deal with essential services or scarce resources, a "take-it-or-leave-it" approach to contract formation will often prompt the court to rule the contract one of adhesion, and therefore void. Yet where the party attempting to void the exculpatory provision had a reasonable opportunity to decline the contract, courts appear willing to allow private parties much more latitude.<sup>74</sup>

Finally, if the preceding elements of an exculpatory clause are present, the language of the clause is often the deciding factor in determining its validity.<sup>75</sup> Where the waiver provision does not make its effect abundantly clear, the court will likely resolve the ambiguity in favor of the injured party according to established canons of interpretation.<sup>76</sup> However, because of the general dislike for liability waivers, some courts have required a valid exculpatory clause to use the term "negligence" specifically.<sup>77</sup> Those courts that do not insist on the magic language will, nonetheless, require a clear statement of the extent of the waiver of liability.<sup>78</sup>

The majority view regarding the validity of exculpatory clauses in the recreational context presents the major obstacle to recovery for injured air sport participants. Because nearly all participants will gain access to the sport through a service provider, and nearly all service providers will require a contract which includes an exculpatory clause, the difficulty seems unavoidable. But, there is room within the contract framework for recovery.

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<sup>74</sup> Winslow & Asprelli, *supra* note 61, at 363-64.

<sup>75</sup> The provision in *Johnson v. Paraplane Corp.*, 460 S.E.2d 398, 400 (S.C. Ct. App. 1995) is an example of a clearly worded, valid exculpatory clause:

I hereby forever RELEASE AND DISCHARGE Paraplane (R) Corporation, its directors, agents, employees, instructors, pilots, and dealers; all powered parachute instructors, advisors and ground personnel, the owners of the aircraft and land utilized for Powered Parachute Flights Activities, their agents, employees and servants, (hereinafter collectively referred to as "Released Parties") from any and all liabilities, claims, demands or causes of action that I may hereafter have for injuries and damages arising out of my participation in Powered Parachute Flight Activities, including, but not limited to, losses CAUSED BY THE PASSIVE OR ACTIVE NEGLIGENCE OF THE RELEASED PARTIES (CJ) or hidden, latent, or obvious defects at the Flight Center or in the equipment used.

*Id.* at 400.

<sup>76</sup> *Schutkowski*, 725 P.2d at 1060; *Gross*, 400 N.E.2d at 309.

<sup>77</sup> *Gross*, 400 N.E.2d at 370.

<sup>78</sup> *Schutkowski*, 725 P.2d at 1060.

The foregoing should make clear that the level of resistance to negligence exculpatory provisions varies significantly from jurisdiction to jurisdiction. Virginia, Delaware, and a few other states have determined that negligence waivers are void as against public policy as a matter of law.<sup>79</sup> In these jurisdictions, the participant will not have to overcome the complete bar to recovery which valid negligence waivers command.<sup>80</sup>

In addition, there is case law that recognizes the possibility of a claim of negligence against actors other than the service provider. In *Freeman v. United States*,<sup>81</sup> the court found negligence on the part of the air traffic controller (ATC) who mis-identified the location of the parachute drop plane.<sup>82</sup> Clearly, the participants could not have contractually waived a claim of negligence against the air traffic controller. Moreover, because the ATC's negligence was independent of the Federal Aviation Regulations, the plaintiffs did not have to struggle with a negligence per se argument based upon those regulations.<sup>83</sup> Thus, the court affirmed the trial court's finding of negligence and allowed recovery.<sup>84</sup>

In addition to the possibility of air traffic controller negligence, *Springer v. United States*<sup>85</sup> establishes that affiliated services, such as the National Weather Service (NWS), may be held negligent in the performance of their aviation-related duties.<sup>86</sup> In *Springer*, information improperly coordinated and disseminated by the NWS and various FAA air traffic control organizations was found to be the proximate cause of the crash of a private airplane which resulted in the pilot's death.<sup>87</sup> Specifically, the court found "that in the absence of taking any steps to place the high winds information into the national weather system, so that it would be available to pilots through weather briefings . . . personnel had an affirmative duty to relay directly that information to a pilot . . . who would encounter the unusually

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<sup>79</sup> *Dalury*, 670 A.2d at 198-800; *Durrell v. Parachutes Are Fun, Inc.*, No. 85C-AU-82, 1987 WL 18117, at \*1 (Del. Super. Ct. Oct. 8, 1987).

<sup>80</sup> *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 756 (1993).

<sup>81</sup> 509 F.2d at 626.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 630-31.

<sup>84</sup> *Id.* at 634.

<sup>85</sup> 641 F. Supp. 913 (D.S.C. 1986), *aff'd*, 819 F.2d 1139 (4th Cir. 1987).

<sup>86</sup> *Id.* at 927 (ATC's negligence was compounded by "negligence of the NWS in failing to correct its forecast even after information became available that the existing forecast was inaccurate.").

<sup>87</sup> *Id.* at 936-37.

high winds,"<sup>88</sup> and "[g]iven that defendant undertook to provide a service that was necessary for the protection of Springer, and that Springer relied on that service, the court finds that defendant owed Springer the duty of reasonable care in operating its weather observation and aviation forecast system."<sup>89</sup>

Obviously, not every case will involve the negligence of a person not a party to the service contract. However, as indicated by the damages awarded in *Springer* for wrongful death (\$1.3 million),<sup>90</sup> searching beyond the immediate service provider for other negligent actors can prove to be a key step in obtaining adequate recovery for the participant. Thus, both *Freeman* and *Springer* illustrate the value to practitioners of exploring options that avoid the likely consequences of a suit against the service provider.

Finally, even where the participant has ratified a valid exculpatory clause, the provider cannot limit liability for gross negligence.<sup>91</sup> In *Durrell v. Parachutes Are Fun, Inc.*,<sup>92</sup> the trial court denied the defendants' motion for summary judgment because the plaintiff had raised a material issue of fact as to the claim of gross negligence.<sup>93</sup> Durrell had signed a clearly worded, valid exculpatory clause.<sup>94</sup> But, under the test set forth by the Maryland Supreme Court, the trial court ruled that the defendants' failure to "answer specific questions regarding basic parachuting techniques prior to a person's second jump could imply 'a thoughtless disregard of the consequences without the exertion of any effort to avoid them [sic].'"<sup>95</sup> Therefore, the plaintiff was entitled to a trial on that issue.<sup>96</sup>

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<sup>88</sup> *Id.* at 926.

<sup>89</sup> *Id.* at 936-37.

<sup>90</sup> *Id.* at 938.

<sup>91</sup> *Falkner*, 533 N.E.2d at 941; *Boucher v. Riner*, 514 A.2d 485, 487-89 (Md. Ct. Spec. App. 1986) (court declining to find gross negligence where air club employee failed to inform participant of the known hazard of nearby power lines). The definition of gross negligence varies by jurisdiction. The *Boucher* court, for instance, uses the terms "willful, wanton, reckless or gross conduct" as a single, descriptive phrase. *Boucher*, 514 A.2d at 488. Consequently, the standard used to establish gross negligence also varies. In *Falkner*, the court ruled that willful and wanton misconduct could be established by proof of a "conscious and knowing disregard of substantial risk." *Falkner*, 533 N.E.2d at 946.

<sup>92</sup> *Durrell*, 1987 WL 18117, at \*1.

<sup>93</sup> *Id.* at \*5.

<sup>94</sup> *Id.* at \*1.

<sup>95</sup> *Id.* at \*4.

<sup>96</sup> *Id.* at \*5.



Clearly, in jurisdictions such as Maryland that are unreceptive to recreational injury claims, the participant will have to battle the court to establish gross negligence.<sup>97</sup> Nonetheless, this particular claim is an encouraging prospect for recovery in cases where the injury resulted from negligent failure to warn of particularized hazards.<sup>98</sup> Because the provider is more likely to have knowledge of the drop zone and the surrounding area, as well as the technical criteria that defines safe jumping conditions, any failure to inform the participant of significant risks may be characterized as reckless or willful misconduct.<sup>99</sup> A proper pleading, with appropriate facts, should allow the participant to at least reach a jury—a significant improvement over a case of simple negligence.<sup>100</sup>

## B. INSURANCE

In the event that a participant cannot recover in either simple negligence, due to contractual bars, or gross negligence, due to poor facts, there remains the possibility of compensation through private insurance.<sup>101</sup> The possibility is limited, of course, by the exact terms and exclusions contained in the policy. Unfortunately for air sport participants, most insurance policies contain aviation exclusions which deny coverage for all claims which result from “participating” or “engaging” in “aeronautics.”<sup>102</sup>

Cases attempting to interpret the meaning of these terms to determine if all air activities are excluded reveal a wide disparity

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<sup>97</sup> See *Boucher*, 514 A.2d at 488. The *Boucher* case points out the importance of knowledge on the part of the tortfeasor. The terms “willful” and “reckless disregard” carry, by definition, an element of knowledge of the danger to others. BLACK’S LAW DICTIONARY 1270, 1599 (6th ed. 1990). Clearly, an air sport participant must prove this element to prevail on a gross negligence claim.

<sup>98</sup> See generally *Boucher*, 514 A.2d at 487.

<sup>99</sup> See *supra* note 42 and accompanying text; *Durrell*, 1987 WL 18117, at \*4.

<sup>100</sup> In *Falkner*, 533 N.E.2d at 946, the court held that “[a]llegations of defendants’ conscious and knowing disregard of a substantial risk support a sufficient pleading of . . . wilful [sic] and wanton misconduct.” Thus, at least in Illinois, the standard for gross negligence may itself constitute proper pleadings.

<sup>101</sup> The majority of cases in this area involve comprehensive life insurance policies. See, e.g., *Hanover Ins. Co. v. Showalter*, 561 N.E.2d 1230 (Ill. App. Ct. 1990); *Cabell*, 599 S.W.2d at 652; *Bew v. Travelers Ins. Co.*, 112 A. 859 (N.J. 1921).

<sup>102</sup> Aviation exclusions have been around since the beginning of flight. GEORGE W. LUPTON, JR., CIVIL AVIATION LAW 140 (1935) (“When the terms . . . were first introduced into insurance contracts, the science or art was in its experimental stage.”) (quoting *Gregory v. Mutual Life Ins. Co.*, 78 F.2d 522, 524 (8th Cir. 1935), *cert. denied*, 296 U.S. 635 (1935)).

of opinion.<sup>103</sup> The plaintiff is generally aided by the interpretive canon that requires construction to favor the insured where ambiguity exists in the language of the policy.<sup>104</sup> But, a successful bid to defeat the exclusion will depend largely on the type of air sport activity in question.<sup>105</sup>

Air sports which involve a significant level of control over the airborne instrument typically are interpreted as involving participation or engagement.<sup>106</sup> For instance, both hang-gliding and para-planeing (a form of parachuting) require the pilot to steer a course and control the lift of the instrument.<sup>107</sup> By contrast, in *Hanover Insurance Co. v. Showalter*,<sup>108</sup> the court found for the insured because simple descent by a non-sport parachute was held to be distinguishable from the more active forms of parachuting.<sup>109</sup>

The *Engel* court took an entirely different approach. Instead of struggling with the nature of the sport instrument itself, the court referred to the parachutist's presence in the airplane used to ascend to jumping height to justify holding that his claim was excluded.<sup>110</sup> This reasoning suggests that because "the act of parachuting is so intimately associated with the use of the airplane as to be inseparable from it"<sup>111</sup> and because use of an air-

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<sup>103</sup> See *Irwin v. Prudential Ins. Co. of America*, 5 F. Supp. 382, 384 (E.D. Mich. 1933) (finding pilot of glider to have "engaged in aviation operations"); *Bew*, 112 A. at 861 (holding that a passenger participates); but see *Missouri State Life Ins. Co. v. Martin*, 69 S.W.2d 1081, 1083 (Ark. 1934) (where deceased was a mere invited passenger, no participation may be found); *Engel v. Credit Life Ins. Co.*, 377 N.W.2d 342, 346 (Mich. Ct. App. 1985) (holding that policy's "while leaving any kind of aircraft" clause did not encompass parachuting within the meaning of the contract).

<sup>104</sup> *Engel*, 377 N.W.2d at 345; *Irwin*, 5 F. Supp. at 383.

<sup>105</sup> Note the surprising conclusion in *Pittman*, 17 F.2d at 370, that a passenger killed by contact with the propeller after the end of an airplane ride was "participating" in "aeronautic activity." *Id.* at 370-71.

<sup>106</sup> See *Totten v. New York Life Ins. Co.*, 696 P.2d 1082 (Or. 1985); *Cabell*, 599 S.W.2d at 652.

<sup>107</sup> See *Cabell*, 599 S.W.2d at 652.

<sup>108</sup> *Hanover*, 561 N.E.2d at 1230.

<sup>109</sup> *Id.* at 1232. Notably, there appears to be no case on record that resorts to the FAR definition of parachute jump, *supra* note 35, to aid in interpretation. The FAR definition uses the term "descent" rather than "flight," suggesting that parachuting is distinguishable from other types of "aviation." See *supra* note 35. But, the definition also makes clear that the parachutist is leaving an "aircraft in flight," doing damage to any argument that no "flight" is involved. *Supra* note 35.

<sup>110</sup> *Engel*, 377 N.W.2d at 344-45.

<sup>111</sup> *John Deere Ins. Co. v. Penna*, 416 N.W.2d 820, 824 (Minn. Ct. App. 1987).

plane can be seen as participation,<sup>112</sup> coverage may be denied for injuries sustained by "passive" as well as "active" participation in air sports. Cases that follow this logic seem to take the basic "danger" involved in airplane flight into consideration.<sup>113</sup> This is somewhat unjustified when the modern state of technology and safety advancements are factored into the assessment.<sup>114</sup> Moreover, when seen in connection with negligence suits such as *Jones v. Dressel*, which denied recovery for collateral acts of negligence, it becomes apparent that the parachutist will be virtually unable to protect himself or herself against the unforeseen event of an airplane crash.

The practitioner's dilemma lies in the nature of insurance litigation. In spite of the interpretive canons favoring the insured,<sup>115</sup> there is no sure way to predict how a court will view the air sport activity in light of the language of the policy exclusion. Moreover, there is no way to overcome the logical conclusion that hang-gliding and ultralight piloting<sup>116</sup> constitute participa-

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<sup>112</sup> See *id.* at 823; *Bew*, 112 A. at 860 (insured was a mere passenger in a private plane).

<sup>113</sup> *Safeco Ins. Co. v. Husker Aviation, Inc.*, 317 N.W.2d 745 (Neb. 1982); see *Jones*, 623 P.2d at 370.

<sup>114</sup> "These implements of the air have been developed from the stage of the dangerous experiment to a well recognized standard means of . . . transportation . . . . The terms [used in insurance contracts] must be considered in the light of these known revolutionary changes and developments in the art." LUPTON, *supra* note 102, at 140-41 (quoting *Gregory*, 78 F.2d at 524). This early twentieth century observation carries even more force in the 1990s.

<sup>115</sup> In truth, there are two canons at work in insurance cases. First, ambiguous language in a policy must be interpreted in favor of the insured and against the insurer, the drafter of the exclusion. *Irwin*, 5 F. Supp. at 383. Courts intent upon denying coverage often eschew any ambiguity to avoid the difficulty presented by the canon. "Contract terms are not ambiguous simply because the parties do not agree on their meaning." *Hanover*, 561 N.E.2d at 1231. Second, terms in insurance documents are to be given their plain and ordinary meaning when the term is not defined in the policy itself. *Cabell*, 599 S.W.2d at 654. In the parachuting context, this canon denies the plaintiff the benefits of the FAR definition. Further, the canon has not prevented close distinctions between types of parachutes in interpreting the term "participation in aviation."

<sup>116</sup> Under a policy such as that in *Engel*, 377 N.W.2d at 343, perhaps the only air sport participant who would have no clear argument for coverage would be the ultralight pilot. The exclusion provides no benefits for injuries sustained "while in or on, or entering or leaving any kind of aircraft, except as a passenger in a duly licensed passenger aircraft . . . and flown by a pilot duly licensed to operate such aircraft." *Id.* Because ultralights are defined as solo aircraft, there is no pilot to depend upon, as there might be in a hang gliding incident. Moreover, the FARs do not require licensing of ultralights. 14 C.F.R. § 103.7(b). This insurance provision highlights the particular vulnerability of ultralight participants.

tion in aeronautics. Clearly, the most optimistic cases involve the casual balloon ride or tandem training jump, where the participant has absolutely no control.<sup>117</sup> The better option for the control-intensive sports participant lies in a products liability claim against the sports or safety equipment manufacturer.

### C. PRODUCTS LIABILITY

#### 1. *Introduction*

Products liability cases against equipment manufacturers hold a few distinct advantages over negligence and insurance claims. First, the standard exculpatory clause will likely not be effective to exclude claims in strict liability. Second, in circumstances where a release is ineffective, the participant is then free to prove liability without the need to prove fault, one of the major evidentiary differences in strict products liability cases. Third, the traditional defense of assumption of the risk has been given less weight in products liability cases. Finally, the products liability arena provides some distinctively helpful theories of recovery that do not come into play in the negligence context. Therefore, the opportunities for recovery in products liability are some of the most encouraging to be found.

#### 2. *Exculpatory Clauses*

The typical exculpatory clause used by air sport providers will often not bar a suit in products liability. Because many of the clauses do not address the area of manufacturing or design defects, the canon which demands interpretation against the drafter will usually work to allow products liability actions if not specifically waived by the release.<sup>118</sup> Therefore, where a release merely limits negligence suits and does not include the manu-

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<sup>117</sup> In *Coleman v. Charlesworth*, 623 N.E.2d 1366 (Ill. 1993), the plaintiffs, provider and estates of the deceased, sought coverage for a \$4.4 million judgment obtained from the trial court for the deaths and injuries sustained in a balloon accident. The battle with the insurance company over the terms was for indemnity on the judgment. Thus, *Coleman* represents the rare scenario of insurance denial in spite of a bona fide tort recovery.

<sup>118</sup> *Deidrich v. Wright*, 550 F. Supp. 805, 808 (N.D. Ill. 1982) ("Such a clause, however, must be strictly construed against the party seeking immunity from liability, and the intentions of the parties should be delineated 'with the greatest of particularity.'") (quoting *Berwind Corp. v. Litton Indus.*, 532 F.2d 1, 4 (7th Cir. 1976)).

facturer<sup>119</sup> or defects within the class of protected people or occurrences, a court would likely rule in favor of the participant's right to suit.<sup>120</sup> Where, however, the exculpatory clause is carefully drafted to include these elements, there exists the chance that a court may deem the release adequate as to product defects.<sup>121</sup>

Even where the exculpatory clause is worded clearly enough to alert the participant to the totality of the rights waived, there is a second, and more powerful argument against the validity of an exculpatory clause with regard to strict products liability causes of action. In *Westlye v. Look Sports, Inc.*,<sup>122</sup> the court stated that "there is a strong policy against allowing product suppliers to disclaim liability for injuries caused by defects in the products they place on the market."<sup>123</sup> In fact, the entire area of products liability came about in response to manufacturers' attempts to contractually limit their liability to the detriment of the public at large.<sup>124</sup> This public policy against product manufacturer immunity from liability is just the sort of public policy which traditionally voids an exculpatory clause.<sup>125</sup> Thus, the exculpatory

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<sup>119</sup> See *Benson v. American Aerolights, Inc.*, No. 83 C 1457, 1985 WL 965, at \*4 (N.D. Ill. Apr. 25, 1985), which states: "Because [the manufacturer] has offered no evidence to suggest that it was a party to the contract, and the contract itself makes no mention of [the manufacturer], we find . . . that under Illinois' strict construction rule, [the manufacturer] cannot rely on the release in denying liability to the plaintiff."

<sup>120</sup> *Deidrich*, 550 F. Supp. at 809 (ruling that the release at issue not only did not bar a strict liability claim, but did not bar suit in negligence due to lack of clearly expressed terms).

<sup>121</sup> See *Johnson*, 460 S.E.2d at 398. The clause at issue in *Johnson* waived claims on all "hidden, latent, or obvious defects." *Id.* at 402. The court resolved the interpretive issue as follows:

Design defects are one type of defect, whether they are hidden, latent, or obvious. Accordingly, defects arising from the negligent design of the equipment clearly come within this exclusion, as would design defects based on strict liability or warranty theories. . . . When we strictly construe the waiver, this conclusion is nevertheless inescapable.

*Id.*

<sup>122</sup> 22 Cal. Rptr. 2d 781 (Cal. Ct. App. 1993).

<sup>123</sup> *Id.* at 799.

<sup>124</sup> *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 737 (D. Haw. 1993).

<sup>125</sup> See *Winslow & Asprelli*, *supra* note 61. The *Wheelock* court perhaps stated the concept best when it noted that:

The doctrine of strict liability is based not only on the public policy of discouraging the marketing and distribution of defective products, but also on the reasoning that a manufacturer is in a far better

clause may often be significantly less powerful in the products liability context than in the case of negligence suits.

### 3. *Evidentiary Benefits*

An additional benefit of the strict liability case is the lack of a need to prove fault or a breach of a duty of care on the part of the defendant manufacturer or equipment designer.<sup>126</sup> This basic distinction allows for a different evidentiary standard that, under certain circumstances, may make proving the plaintiff's case somewhat easier than in a basic negligence suit.<sup>127</sup>

For instance, in *Sanderson v. Steve Snyder Enterprises*,<sup>128</sup> the Supreme Court of Connecticut held that the rule barring evidence of design modifications undertaken subsequent to the injury at bar<sup>129</sup> in negligence cases is inapplicable to strict liability suits.<sup>130</sup> The court noted that the policy which underlies the rule—to encourage and not to punish the remedy of defects—is

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position than individual consumers to insure against the risk of injury and to distribute costs among consumers.

*Wheelock*, 839 F. Supp. at 737.

<sup>126</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product . . .

See *Freeman v. Beech Aircraft Corp.*, Nos. 80-11-0119, 80-11-0120, 80-11-0121, 1983 WL 4495 (Ohio Ct. App. 1983) [hereinafter *Freeman II*] (assigning error to addition of "reasonable care" standard to jury instruction on strict liability); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (noting that manufacturer's liability for injuries caused by defective products "is not one governed by the law of contract warranties but by the law of *strict liability in tort*." *Id.* (emphasis added)); see also JAMES A. HENDERSON, JR., ET AL., *THE TORTS PROCESS* 535 (4th ed. 1994) ("In contrast to negligence, strict liability makes no distinction based on the presence or absence of fault on the part of the defendant.").

<sup>127</sup> The non-applicability of the exclusionary rule in products liability cases is not a universal holding. The majority of federal courts continue to exclude evidence of subsequent modifications, while many, if not most, state courts feel that Rule 407 is limited to cases of negligence. See MCCORMICK ON EVIDENCE 469-70 (John W. Strong et al. eds., 4th ed. 1992). The United States Supreme Court has recently submitted a proposed amendment to Fed. R. Evid. 407 which would codify the federal majority opinion and secure the exclusion of this type of evidence in federal cases.

<sup>128</sup> 491 A.2d 389 (Conn. 1985).

<sup>129</sup> See FED. R. EVID. 407 which states: "evidence of the subsequent measures is not admissible to *prove negligence or culpable conduct* in connection with the event." *Id.* (emphasis added).

<sup>130</sup> *Sanderson*, 491 A.2d at 396.

not a significant factor in products liability cases.<sup>131</sup> The court went on to note:

Given the strong economic influences on the conduct of a designer or manufacturer created by the existence of the strict liability theory, it is unlikely that any evidentiary use of subsequent remedial measures will discourage a designer or manufacturer from taking them. It is unnecessary therefore to bolster the tendency to take such measures through the use of the exclusionary rule applicable in negligence actions. "In the products liability area, the exclusionary rule . . . does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability."<sup>132</sup>

Because there is no risk in a products liability case of a false determination of fault based upon the subsequent modifications, the strict liability theory not only dispenses with the need to establish a duty of care, but may also allow the introduction of evidence which would otherwise be barred in a fault-based action such as negligence.

One of the preeminent cases in the air sport-products liability area can be used as an example of the potential power of subsequent modification evidence. In *Prince v. Parachutes, Inc.*,<sup>133</sup> the participant brought a suit based upon a theory of failure to warn of the dangers of the parachute for lower skill levels.<sup>134</sup> The admissible evidence suggested that the dangers were unappreciated by both the parachutist and the safety officer consulted on the issue.<sup>135</sup> The court reversed a summary judgment for the defendant based upon this evidence.<sup>136</sup> But, under the reasoning of *Sanderson*, the plaintiff could have significantly strengthened his theory that the existing warnings were inadequate by the introduction of any subsequent warnings instituted by the manufacturer. In an area as hostile to recovery as air sports injury, an evidentiary advantage such as this should be utilized in all appropriate cases.<sup>137</sup>

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<sup>131</sup> *Id.* at 394.

<sup>132</sup> *Id.* at 395-96 (quoting *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (1974)).

<sup>133</sup> 685 P.2d at 83.

<sup>134</sup> *Id.* at 83.

<sup>135</sup> *Id.* at 86.

<sup>136</sup> *Id.*

<sup>137</sup> It perhaps goes without saying that the use of this evidentiary strategy requires attention at the pleading stage by the court in which the action is filed (preferably state court, see *supra* note 126) and the parties named as defendants. In order to preserve the possibility of using the evidence of a subsequent modifi-

#### 4. *Affirmative Defense of Assumption of the Risk*

Strict products liability cases are more plaintiff-friendly in yet another respect, namely in the area of affirmative defenses. Actions in both negligence and products liability are open to attack by the doctrine of assumption of the risk. While usually fatal to a negligence cause of action if proven,<sup>138</sup> the situation is more hopeful in a defective product case.

In *Freeman v. Beech Aircraft Corp.*,<sup>139</sup> the Court of Appeals of Ohio refuted the use of the doctrine of assumption of the risk on the facts of that case.<sup>140</sup> In *Beech Aircraft*, four passengers of a twin-engine aircraft manufactured by Beech were killed in a crash due to an alleged design defect in the airplane. However, the defendants put forth the claim that the plaintiff assumed the risk of injury by "undertaking a potentially hazardous training flight in an overloaded airplane not equipped with fully functioning dual controls."<sup>141</sup> In response, the court noted that assumption of the risk doctrine has three basic elements: (1) one must have full knowledge of a condition; (2) such condition must be patently dangerous to him; and (3) he must voluntarily expose himself to the hazard created.<sup>142</sup> Therefore, even where some other conduct on the part of the injured *might* have caused injury, if the injuries are proven to be "due to a design defect in the [product] unknown to [the] parties, assumption of risk is not a defense available to the manufacturer of the [product] in a suit . . . claiming liability for negligent design"<sup>143</sup> or other strict liability theories.

Similarly, in *Diedrich v. Wright*,<sup>144</sup> the defendants argued that because the "plaintiff was fully aware of the hazards inherent in skydiving, she assumed the risk of any injury."<sup>145</sup> The court did not agree and stated that "[t]he relevant inquiry is not whether plaintiff recognized the hazards of skydiving, rather, the ques-

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cation, it might become necessary to join one or more non-diverse parties to a state action in order to prevent removal to a relatively more hostile federal court. See FED. R. Civ. P. § 1441(a).

<sup>138</sup> This discussion is undertaken with the understanding that the doctrine of assumption of the risk has been declining in favor in recent years. See Judges, *supra* note 6, at 89 for a discussion of the shortcomings of the doctrine.

<sup>139</sup> *Freeman II*, 1983 WL 4495, at \*1.

<sup>140</sup> *Id.* at \*11.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> 550 F. Supp. at 808.

<sup>145</sup> *Id.* at 807.



tion is whether she knew that the parachute was defective.”<sup>146</sup> Thus, where it can be proven that the plaintiff was not aware of the defective condition, the defense of assumption of the risk is inapplicable as a matter of law.<sup>147</sup>

In spite of these decisions, the air sports participant must bear in mind that knowledge by the participant of the design or manufacturing defect may allow the defendant to use the assumption of the risk doctrine to its advantage. For instance, in *Benson v. American Aerolights, Inc.*,<sup>148</sup> the plaintiff alleged that the ultralight aircraft in question was generally defective due to its design.<sup>149</sup> The court, therefore, held that because the plaintiff was not alleging a “particular production flaw” and it appeared that he had some familiarity with the aircraft before the injuries occurred, he was not entitled to summary judgment against the defendant on the issue.<sup>150</sup> Thus, *Benson* stands for the proposition that even in a products liability case, the plaintiff may have to prove lack of knowledge or experience with the product in order to avoid the affirmative defense of assumption of the risk.

##### 5. *Dangerously Defective Product Theory and the Consumer Expectation Test*

The final, and perhaps most important advantage to a suit in products liability for air sports injuries, is the availability of the theories of “dangerously defective” products and the “consumer expectation test.” These two theories essentially work to turn the barriers to recovery in negligence on their heads in the products liability context. Instead of allowing the service provider to take shelter behind the basically hazardous nature of the activity, these theories hold the equipment manufacturer responsible for injuries due to a hazardous product being on the market. Hence, the air sport participant is not deemed the sole responsible party for the serious injuries which often accompany parachuting, hang-gliding, and other air sports.

One of the most cogent explanations of the concept of a dangerously defective product is found in *Laing v. American Honda Motor Co.*,<sup>151</sup> a case involving an all terrain-vehicle. According to the Louisiana Court of Appeals, there are at least two ways of

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 1985 WL 965, at \*3.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*2 (contrasting the instant case with *Diedrich*, 550 F. Supp. at 805).

<sup>151</sup> 628 So. 2d 196 (La. Ct. App. 1993).

determining if the vehicle was unreasonably dangerous due to its design: "(1) a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the usefulness of the product . . . or [(2)] although the utility of the product outweighs its danger-in-fact, there was a feasible way to design the product with less harmful consequences."<sup>152</sup> Thus, in an air sports context, a jury would have to determine if the utility of the parachute, ultra-light vehicle, or other equipment, as designed, was outweighed by the dangers posed by its use. Clearly, in the case of air sports, the danger posed by using poorly designed equipment is almost always serious injury or death. Given that, it would be the rare product indeed whose utility would outweigh its risks. Hence, the air sports context is ripe for use of this doctrine.

If the reasons for denial of recovery put forth in Part III are examined carefully, they become less daunting when viewed in conjunction with the dangerously defective product theory. For example, the prevailing judicial opinion that air sports are so inherently dangerous that any participant must accept the risks involved<sup>153</sup> carries less force if the equipment (used to keep the participant airborne) is designed so as to increase the risk of falling. In such circumstances, the danger-in-fact of falling now outweighs the utility of the product for recreation. Under the dangerously defective product theory, the participant would be entitled to recovery, rather than barred because of the inherent risks of the sport. Moreover, the product manufacturer now would be the one who must bear the burden of placing faulty air sports equipment on the market.<sup>154</sup>

Closely analogous to the defectively dangerous design theory is the consumer expectation test used in *Freeman v. Beech Aircraft Corp.*<sup>155</sup> In *Freeman*, the court determined that a product design is defective if "it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."<sup>156</sup> When using this test, the focus shifts from the reasonableness of the activity for which the product is used to the reasonableness of the user in expecting the product to perform at a given level. For instance, if the product at issue is a

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<sup>152</sup> *Id.* at 201.

<sup>153</sup> See cases discussed *supra* note 51.

<sup>154</sup> See *Wheelock*, 839 F. Supp. at 737.

<sup>155</sup> *Freeman II*, 1983 WL 4495, at \*1.

<sup>156</sup> *Id.* at \*8 (quoting syllabus of *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 815 (Ohio 1982)).

parachute, the question becomes whether the ordinary consumer would expect the parachute to open and retard the descent of the user. If the parachute does not so open, and a jury finds that it is not unreasonable for the parachutist to expect that from the product, the parachutist might well be entitled to recover from the parachute manufacturer.<sup>157</sup>

A practitioner should keep in mind that there are defenses to both the dangerously defective product theory and the consumer expectation test for a defective product. For example, in *Laing*, the defendants attempted to introduce a "comparative risk analysis" to refute the determination that its all terrain-vehicle was dangerously defective.<sup>158</sup> The defendant asserted that the risk of an all terrain-vehicle must be "compared with other encountered recreational activities such as snowmobiling, skateboarding, parachuting, and the like."<sup>159</sup> The court, however, felt that the introduction of such an analysis would obscure the relevant issues of the case, and therefore excluded the proffered evidence.<sup>160</sup> In spite of the positive ruling in the *Laing* case, this determination is a discretionary one by the trial judge and should be prepared for in advance by the plaintiff.<sup>161</sup>

The foregoing should indicate the significant advantages that a suit in strict products liability may have when compared to a suit for negligence in the air sports context. At least under some circumstances, the practitioner may avoid the exculpatory clause, the exclusion of evidence which is probative of liability, or the affirmative defense of assumption of the risk. In addition, the defectively dangerous product theory and consumer expectation test are better suited to recovery for injuries sustained from hazardous activities than a negligence theory.

However, these advantages can only be utilized where there is a plausible argument for a product defect or inadequate warning. Strict products liability will not help cure all of the

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<sup>157</sup> The rewards for finding a theory that works can be considerable. In *Gray v. Lockheed Aeronautical Sys. Co.*, 880 F. Supp. 1559 (N.D. Ga. 1995), the plaintiff recovered a judgment in excess of \$4 million in a defective design suit for wrongful death. The theory was bolstered by a showing that the manufacturer failed to meet government specifications for military equipment. *Id.* at 1567.

<sup>158</sup> *Laing*, 628 So. 2d at 202.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (The "vehicle . . . must be judged and evaluated on its own merits, not in regard to snowmobiles, or bungee jumping apparatus, go-carts or any other remotely analogous recreational activity.").

<sup>161</sup> See *id.*; see also FED. R. EVID. 403 (limiting introduction of relevant but possibly prejudicial or misleading evidence).

problems that a plaintiff may encounter. In particular, where the injuries are sustained due to contact with a dangerous condition on land, the participant must deal with a whole host of new barriers to recovery.

#### IV. LIMITATION OF LAND OWNER LIABILITY

The subject of land owner liability for injuries sustained thereon has been the subject of numerous articles in recent past.<sup>162</sup> Treatment of the subject here is not intended to reflect the full range of concerns which can or perhaps should be addressed. Instead, the topic is broached in an effort to briefly highlight the ways in which land owner liability can have an impact on the air sport participant in search of compensation for injuries with the basic understanding that circumvention of the recreational use statutes discussed below may decrease the total recreational opportunities available, and therefore, do more harm than good to participants' interests. But, it should be acknowledged that there are ambiguities in these statutes that may provide for the chance of recovery from injuries sustained on recreational lands. Nonetheless, where appropriate, attempts have been made to provide a bridge to those materials which deal with different perspectives in more depth.<sup>163</sup>

##### A. COMMON LAW CONCEPTS

Prior to the statutory reforms instituted in the 1950s and 1960s,<sup>164</sup> landowner liability for injuries sustained by others on the property was ascertained by reference to the common law's "status" rules.<sup>165</sup> The landowner owed different levels of care depending on the entrant's status as either: (1) a trespasser—one who enters the land without an invitation to do so; (2) a licensee—one who enters by way of the owner's express or implied permission for his own purposes; or (3) an invitee—one

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<sup>162</sup> See, e.g., Judges, *supra* note 6, at 93-99; Cathy Hansen & Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND & WATER L. REV. 149 (1993); Alexander T. Pendleton, *Wisconsin's Recreational Use Statute*, 66-MAY WIS. LAW. 14 (1993); John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective Is the Protection?*, 24 IND. L. REV. 1587 (1991); N. Linda Goldstein et al., *Recreational Use Statutes—Time for Reform*, PROB. & PROP., July/Aug. 1989, at 6, 7.

<sup>163</sup> Notably, Donald P. Judges has presented a thoughtful analysis of "risk choice" and the effects of recreational use statutes on that perspective. Judges, *supra* note 6, at 93-99.

<sup>164</sup> Becker, *supra* note 162, at 1587.

<sup>165</sup> *Id.*; see Goldstein et al., *supra* note 162, at 8.

who enters for the owner's purposes.<sup>166</sup> Generally, the owner owes the invitee the greatest level of care, which includes the duty to inspect for and warn of dangerous conditions upon the land.<sup>167</sup> The licensee is owed at least a duty of warning of dangerous conditions, while the trespasser is due no more than to be free of willful or intentional acts which cause harm to person or property.<sup>168</sup> The burdens of determining a given entrant's status, as well as the burden of policing lands for dangers, put the landowner at risk of incurring significant liability without reasonable means of avoiding the risks.<sup>169</sup> Concurrently, there was an increase in the demand for recreational space which was not capable of being filled by public lands alone.<sup>170</sup> Thus, in 1965, the Model Recreational Use Statute was developed to encourage private land owners to open lands to the public by simplifying and, in most cases, limiting the owner's liability for injuries sustained by the entrant.<sup>171</sup> Today, forty-nine states have adopted some form of the model statute.<sup>172</sup>

#### B. RECREATIONAL USE STATUTES

The relevance of recreational use statutes to the subject of air sport injury recovery may at first appear somewhat obscure. Indeed, the greatest likelihood of injury from participation in parachuting, ballooning, or hang gliding would seem to stem from the airborne nature of these sports. However, the participant must takeoff and land somewhere, and the condition of the land may have serious consequences for the safety of those events. So much so, in fact, that a number of states have included air sports by name in their definition of "recreational activities" or "recrea-

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<sup>166</sup> Goldstein et al., *supra* note 162, at 8.

<sup>167</sup> *Id.*; Becker, *supra* note 162, at 1587.

<sup>168</sup> See Becker, *supra* note 162, at 1587; Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294 (1983).

<sup>169</sup> Becker, *supra* note 162, at 1588; Goldstein et al., *supra* note 162, at 8.

<sup>170</sup> Goldstein et al., *supra* note 162, at 7-8.

<sup>171</sup> 24 SUGGESTED STATE LEGISLATION 150-51 (1964) provides:

An act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith. . . . "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

<sup>172</sup> Goldstein et al., *supra* note 162, at 7.

tional purpose.”<sup>173</sup> Thus, while the recreational use statutes might not pose as serious a barrier to recovery as the realities presented above, an understanding of their coverage and limitations may aid recovery in proper circumstances.<sup>174</sup>

Most of the issues that arise in connection with recreational use statutes revolve around the definition of the actors and circumstances which trigger the limitations on liability.<sup>175</sup> The following represents a survey of the most commonly controverted elements of the statutes.

### 1. *Who Is an Owner?*

Under the 1965 Model Act, the term “owner” is intended to cover “a possessor of a fee interest in property or a lesser interest.”<sup>176</sup> The definition has been extended to others by judicial decision in many jurisdictions.<sup>177</sup> The most intriguing issue related to ownership is the status of governmental entities, or owners of public lands. Decisions have varied considerably and research into any given jurisdiction is necessary to determine if a suit against a governmental entity can be maintained.<sup>178</sup>

### 2. *What Is a Recreational Activity or Purpose?*

Admittedly, each state defines its recreational purpose differently, although most conform to the basic format of the 1965 Model Act.<sup>179</sup> This means that in addition to a list of specific activities that are to be considered “recreational,” the statute will employ some catch-all language in an attempt to avoid a determination that the list is exclusive.<sup>180</sup> Nonetheless, there is endless case law concerning all manner of activities resulting in

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<sup>173</sup> See, e.g., CONN. GEN. STAT. § 52-557f(4) (1995) (including hang gliding, sport parachuting, and hot air ballooning); WIS. STAT. ANN. § 895.52(1)(g) (West Supp. 1995) (including ballooning and hang gliding).

<sup>174</sup> For instance, in a case such as *Hammerlind*, 258 N.W.2d at 590 (decided on other grounds), where the plaintiff drowned after parachuting into a lake, the estate might have sued the landowner because of the danger posed by the condition of the land.

<sup>175</sup> See Pendleton, *supra* note 162, at 14.

<sup>176</sup> Becker, *supra* note 162, at 1596.

<sup>177</sup> *Id.* at 1597.

<sup>178</sup> See, e.g., *Ravell v. United States*, 22 F.3d 960, 962-63 (9th Cir. 1994) (holding that United States is not liable under California's recreational use statute); *Pensacola v. Stamm*, 448 So. 2d 39, 41 (Fla. Dist. Ct. App. 1984) (declining to interpret statute to limit liability of United States).

<sup>179</sup> See Becker, *supra* note 162, at 1591, 1600.

<sup>180</sup> See, e.g., COLO. REV. STAT. ANN. § 33-41-102(5) (West 1990) (“‘Recreational purpose’ includes, but is not limited to, . . .”).

injury.<sup>181</sup> In addition to the status of a specific activity, there is significant debate over the approach to interpretation.<sup>182</sup>

### 3. What Constitutes a "Charge" for Use of the Land?

The 1965 Model Statute, as well as the state versions, limits application of the statute to landowners who do not make pecuniary gain from those who take advantage of its use.<sup>183</sup> The issue then becomes what constitutes a charge amounting to impermissible gain?<sup>184</sup> The language of the Model Statute implies that any amount charged will expose the landowner to liability. But case law and legislation have lessened the severity of such an interpretation.

For example, the Wisconsin statute allows pecuniary benefit so long as "the aggregate value of all payments received by the owner . . . during the year in which the injury occurs [does not] exceed[ ] \$2,000."<sup>185</sup> The Wisconsin appellate court has ruled, in interpreting the statute, that the legislature intended "to find liability for profit-making uses, whether the profit results from direct charges for the recreational activity, or indirectly, from a pecuniary benefit accruing to the owner from the recreational activity."<sup>186</sup> Similarly, in Mississippi, the legislature has specifically provided that "operation of a concession stand by a landowner on the recreational area will prevent the application of the statute."<sup>187</sup> Hence, the landowner who is offering the land in a truly gratuitous manner is clearly shielded from liability.

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<sup>181</sup> See, e.g., *Sievert v. American Family Mut. Ins. Co.*, 528 N.W.2d 413, 417 (Wis. 1995) (holding that walking on dock in order to greet a neighbor was not "recreational activity" as per WISC. STAT. ANN. § 895.52(1)(g)); *Rapid City Softball Ass'n*, 514 N.W.2d at 693, 696 (reasoning that softball was dissimilar enough to the listed activities to be outside of the statute's intent); *Fisher v. United States*, 534 F. Supp. 514, 516 (D. Mont. 1982) (holding school sponsored picnic was "recreational" in nature because commonly so considered).

<sup>182</sup> See *Schneider v. United States of America Adacia Nat'l Park*, 760 F.2d 366, 368 (1st Cir. 1985) (using an objective approach); *Gerkin v. Santa Clara Valley Water Dist.*, 157 Cal. Rptr. 612, 615-16 (Cal. Ct. App. 1979) (ruling on literal approach to listed activities that walking a bicycle is not hiking).

<sup>183</sup> Liability is to be limited to "situations in which [owners] are compensated for the use of their property." 24 SUGGESTED STATE LEGISLATION 150 (1964) (emphasis added).

<sup>184</sup> See, e.g., *id.* § 2(d) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.).

<sup>185</sup> WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1983).

<sup>186</sup> *Douglas v. Dewey*, 453 N.W.2d 500, 505 (Wis. Ct. App. 1990).

<sup>187</sup> *Becker*, *supra* note 162, at 1603-04; see MISS. CODE ANN. § 89-2-7 (Supp. 1991).

Those who attempt to mix profits with pleasure apparently do so at their own risk.

#### 4. *What Are the Limits of the Term "Invitation"?*

Under the language of most statutes, the landowner is immune from liability for injury if he or she "directly or indirectly invites or permits without charge any person to use [his or her land]."<sup>188</sup> Some questions have arisen, however, as to whether the landowner may escape liability for injuries to persons who were not invited in any way.<sup>189</sup> In *Gibson v. Keith*,<sup>190</sup> one of the leading cases on the question, the court determined that the statute's protection was forfeited when a landowner attempted to limit access to the property, such as by posting "No Trespassing" signs.<sup>191</sup> In contrast, in *Verdoljak v. Mosinee Paper Corp.*,<sup>192</sup> the defendant owner had "granted permission to the public to enter its land for certain recreational purposes" and "left an apparent unrestricted entry" to the property.<sup>193</sup> The court ruled that even though the defendant had characterized the plaintiff in its answer as a trespasser, indicating lack of invitation, the requisite consent to entry was to be inferred from conduct.<sup>194</sup> So, one attempting to sue a landowner may be able to circumvent the liability limitation if the landowner unequivocally attempted to prevent the public from entering the lands.

#### 5. *What Constitutes Willful and Malicious Conduct?*

The final issue of serious concern with the statutes involves the prohibition against willful, wanton, or malicious acts by the landowner which is contained in every state statute.<sup>195</sup> As in the context of exculpatory clauses,<sup>196</sup> there is room for play in the terms, and the case law reflects changing sympathies toward al-

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<sup>188</sup> 24 SUGGESTED STATE LEGISLATION 150, at § 4.

<sup>189</sup> See Judges, *supra* note 6, at 93. Judges points out that the results of cases in this area seem to punish rather than reward those who attempt to go beyond the statutory duty of care.

<sup>190</sup> 492 A.2d 241 (Del. 1985).

<sup>191</sup> *Id.* at 246.

<sup>192</sup> 531 N.W.2d 341 (Wis. Ct. App. 1995), *aff'd*, 547 N.W.2d 602 (Wis. 1996).

<sup>193</sup> *Id.* at 345.

<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., N.D. CENT. CODE § 53-08-05 (1989 & Supp. 1995) which states: "Nothing in this chapter limits in any way any liability which otherwise exists for: 1. Willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . . ."

<sup>196</sup> See *supra* text accompanying notes 91-100.



lowing recovery on this basis.<sup>197</sup> Clearly, a pleading of willful or malicious conduct is worth pursuing if the landowner's failure to warn of or to correct a dangerous condition is done with knowledge or is otherwise particularly shocking.

The above review should make clear that there is substantial room for recovery within the nooks and crannies of the average recreational use statute. The success of any given suit will depend largely on the jurisdiction's approach and the specific wording of the statute. Air sports injuries that are due to nothing more than simple contact with the earth will likely not undergird a suit against a private landowner. But, where any of the uncertainties explored above are at issue, the air sport participant may be able to receive compensation for injuries sustained on recreational lands.

## V. CONCLUSION

The unique challenges facing the injured air sport participant seeking recovery for another's wrongful behavior are numerous, and in some cases insurmountable. The current FAA regulations, the standard exculpatory clauses used by providers, the aviation limitations utilized in most insurance policies, and the recreational use statutes found in nearly every state serve to protect almost every party except the injured. Nonetheless, as this Comment should help make clear, there are ways to defeat the most typical barriers to recovery. An understanding of the tools available will not only ease the burdens on the practitioner at trial or in negotiations, but may also allow for some cogent preventive advice to the client who is a known air sports enthusiast.

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<sup>197</sup> See, e.g., *Termini v. United States*, 963 F.2d 1264, 1269 (9th Cir. 1992) (holding that United States Forest Service had committed willful and malicious act when it constructed and maintained road which ended at drop off without any warning).