CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

It Still Aint Fun and Games!! Update on Emerging Sports & Recreation Risks

A. Current Status of Head Injury / Concussion Issues

American football: One of the country's favorite pastimes is also one of the most dangerous. Characterized by hard tackles and intense hits, the sport produces a number of serious injuries. The one that has received a substantial amount of attention is traumatic brain injury and concussions. The football helmet was originally introduced in the late 1800s, after 18 players died from skull fractures sustained during play. In 2012, the National Football League (NFL) experienced a total of 189 concussions during their regular season, translating to more than 11 concussions each week.

College players experience an average of 2.5 concussions for every 1,000 game-related exposures. 25,000 players between the ages of 8 and 19 are taken to emergency rooms for concussions each year. Health experts have referred to this football trend as the "concussion epidemic."

Although the current controversies surrounding head injuries in the National Football League ("NFL") have come to light in recent years, the deleterious effects of multiple blows to the brain have been known anecdotally for almost a century. The first published report dates back to 1928, when New Jersey pathologist Harrison S. Martland described "punch drunk" boxers' bizarre speech patterns, unsteady gait, and progressive loss of cognitive function.

A concussion can be caused by either a blow to the head or when the head is intensely shaken. This movement causes the gelatinous brain to move back and forth, which contacts the inner wall of the skull.

After an individual sustains a concussion, the symptoms are usually temporary. Depending on which area of the brain has been damaged, patients can experience confusion, headaches, dizziness, nausea and more. These symptoms often subside within a few days.

Numerous studies have found that concussions raise the risk for memory and attention deficits later on in life, and multiple brain injuries of this type can greatly increase a football player's risk of chronic

traumatic encephalopathy (CTE) is a degenerative brain disease that can lead to memory loss, impaired judgment, depression and eventually, progressive dementia.

Although helmet-to-helmet hits are banned by both the NFL and the NCAA, as tackling has grown more aggressive over the years, concussions continue to occur.

The stories of NFL players experiencing great success on the field only to face great psychological difficulties off it, sometimes leading to violent death, has placed the NFL at the center of this controversy. Equally disturbing are the cases of young, non-professional athletes who develop brain injuries. In 2010, Owen Thomas, a captain of the University of Pennsylvania football team, hanged himself in his off-campus apartment. Thomas had never been diagnosed with a concussion. An examination of his brain, however, indicated trauma induced disease. By some estimates, boys high-school football results in between 60-75 concussions per athletic exposure (one athlete participating in one organized high school athletic practice or competition, regardless of the amount of time played).

B. Risks to Manufacturers and Distributors of Sports Equipment

As evidenced by a stream of recent lawsuits against manufacturers of sports equipment, most notably football helmets, manufacturers and distributors of sports equipment are faced with a multitude of risks and could potentially face millions of dollars in damages. Among these risks, liability related to head injuries, clearly ranks among the highest. Players of many sports, but most prominently football, appear to be especially vulnerable in this area.

Various efforts have been undertaken to make the game of football safer, including the manufacture of new and improved football helmets. The science behind these apparent advancements in helmet technology is not always clear, however. Leading football helmet manufacturer Riddell is currently facing a lawsuit, styled Thiel v. Riddell, Inc., et al. Case 1:13-cv-07585, recently filed in the United States District Court, District of New Jersey, centered on the company's "concussion reduction technology" found in its top of the line helmets. The questions to be determined in that and similar cases are simple. Does the technology actually work? And has the manufacturer made proper representations regarding the efficacy its product?

Product Liability

The term "product liability" refers to the responsibility of manufacturers, distributors, and sellers of products to the public, to deliver products free of defects which harm an individual, and to make whole those individuals who are harmed by defective products. Of the three major types of product liability claims, design defect and failure to warn (also known as marketing defect) claims are the most relevant to a discussion on the potential exposure to sports equipment manufacturers such as Riddell.

The key element in a products liability claim, based on defective design for example, is that a person who suffers harm need not prove negligence, since the negligence is "presumed" and the result is "strict liability" on the seller, distributor, and manufacturer. Design defects occur where the product design is inherently dangerous or useless (and hence defective) no matter how carefully manufactured. This may be demonstrated by either showing that the product fails to satisfy ordinary consumer expectations as to what constitutes a safe product, or that the risks of the product outweigh its benefits.

In addition to the above common law claims, many states have enacted consumer protection statutes providing for specific remedies for a variety of product defects. One of the claims in the Theil matter is a cause of action for violation of New Jersey's Consumer Fraud Act.

Specific Risks to Sports Equipment Manufacturers Including Potential Liability for Claims of Concussion Mitigation

Sports equipment manufacturers face specific and unusual risks in the context of products liability. Football is obviously brutal sport and violent collisions are inevitable. It's been estimated that 5 to 10 hits in any NFL game are of concussion caliber. Of central importance to the Thiel matter and similar lawsuits is helmet manufacturer's claims of concussion mitigation through the use of innovations such as Riddell's "concussion reduction technology."

According to Riddell, each product Riddell releases follows approximately two years of research and development. One of Ridell's newest helmets, the "Revolution," allegedly reduces the incidence of concussion, by up to 31%. The "Revolution" model was introduced in 2002 and was the first football helmet specifically designed for "concussion resistance." In fact, in July of 2008, Riddell presented a PowerPoint presentation to the NFL which claimed that the Revolution was "the only helmet shown to reduce the risk of concussion on the playing field." Riddell also issued a press release in March of 2009 stating "the Riddell Revolution helmet is the standard against which all football helmets are measured…" These and similar claims have been prevalent in Riddell's general marketing materials, according to various lawsuits.

Riddell's claims relied heavily on a 2002-204 self-commissioned study by the University of Pittsburgh Medical Center ("UPMC") comparing concussion rates and recovery times for athletes wearing the Riddell Revolution helmet compared to those wearing traditional helmets. Via several lawsuits, consumer plaintiffs and industry competitors have raised several issues with this study including: (1) the fact that the age of the helmets that comprised the non-Riddell group is unknown; (2) the sample size of the injury group of athletes was too small to be statistically relevant; (3) the age group of the Riddell group was older than the age of the non-Riddell group; and (4) the fact that Riddell provided a grant for the study and one of the authors was a Riddell employee.

The cost of a Revolution helmet is approximately $400. A basic helmet, in contrast, can cost in the range of $300. The plaintiffs in Thiel contend that consumers were subjected to and relied on Riddell's marketing scheme, which emphasized improved safety, and paid a premium price for helmets with no material difference in concussion reduction than traditional lower-priced football helmets. The plaintiffs claim that the marketing of the Revolution helmet was intended to and did create the perception among purchasers that the helmet more effectively reduced the chance of concussion than lower priced helmets. Plaintiffs also contend that Riddell negligently relied on the UPMC study to make their safety claims.

These types of allegations place Riddell in a precarious position as it attempts to market a safer football helmet, while at the same time potentially exposing it to future liability based on its claims and representations of improved safety.

The Future of Sports Equipment Manufacturing and Concussion Awareness

While it is generally acknowledged and accepted that equipment alone cannot solve the problem of head injuries in contact sports, manufacturers such as Riddell can take certain steps to reduce exposure. Making more reasonable and well-researched claims regarding their products is a clear first step. In the Theil litigation, Riddell may very well be held liable for disseminating favorable results from flawed studies. To avoid such liability manufacturers in this area must be held to a high standard. Consumers must be warned candidly and adequately about the risks of traumatic brain injury, which is inherent to contact sports. Another step is fostering proper education on this subject. To that end, Riddell has partnered with Chartis Insurance, a well-known property-casualty insurer, to support the USA Football "Protection Tour" to educate players, parents, and coaches on equipment fitting, tackling skills, and

concussion awareness. A review of the lawsuits in this area clearly demonstrate how an insurer and a potential defendant, such as Riddell, would have a strong interest in taking steps to reduce head injuries in contact sports. Their benefits are clearly aligned on this important issue.

The depth and severity of the problem of head injuries in all levels of sport is only now coming to light. Litigation in these areas has a short history and we have likely only observed the tip of the iceberg at this early juncture. Courts, consumer protection agencies, and even Congress are now weighing in on this critical issue. Given the high stakes and national scrutiny now connected with this subject, it is likely that a strong public policy favoring the mental health of both amateur and professional athletes over the economic gains of equipment manufacturers will develop.

Schutt Sports, a rival football helmet manufacturer, has implemented new warnings about its own "safer" helmets, which state that "[s]cientists have not reached agreement on how the results of impact absorption tests relate to concussions. No conclusions about a reduction of risk or severity of concussive injury should be drawn from impact absorption tests." Schutt's warning goes on to offer a sobering, but realistic and succinct assessment of the issue – "No helmet system can protect you from serious brain injury. To avoid these risks, do not engage in the sport of football." Thankfully, football does not appear to be disappearing any time soon. Injuries will be inevitable, but it is exciting to see that concrete strides are being made from both an equipment and clinical management perspective. Sports equipment manufacturers must participate and embrace such measures to mitigate future risks.

C. Emerging Risks from Extreme Sports

Extreme Sports burst onto the scene in the early 1990s. Bungee jumping, hang gliding and paintball were a few of these new sports which took hold. The expansion and diversion of these sports has continued at a frantic pace. While these early versions of extreme sports are still popular, they now share the landscape with base jumping, wakeboarding, snowboarding, mixed martial arts and wing suit flying to name a few. The attention paid to these ever changing sports has resulted in increasing their visibility through the media. The X Games, Ultimate Fighter Network and the Extreme Sports Channel are all evidence of the popularity these sports continue to demonstrate.

Because these sports tend to focus on speed, inherent danger and changing weather conditions they present an unusual set of variables when viewed form the insurance landscape. Are these risks insurable? If so, how are they priced in the marketplace? When and where does assumption of risk become a controlling factor. Since some of the equipment used in these sports is both unique and tailored to the participant, what is the impact on Product Liability exposures?

This session will focus on potential new and emerging risks emanating from this dangerous and increasingly popular series of sports. Real life examples of cases and risks insured will be used during the presentation.

D. Current Status of Express/Implied Waiver, Parental Waivers and Primary Assumption of Risk

What courts consider to be a valid release varies from state to state. Given the disfavor with which such exculpatory clauses are generally viewed under the law, even the majority of states that recognize them to be enforceable impose exacting requirements for the clauses to be upheld.

Overview

Generally speaking, because exculpatory clauses are disfavored, the majority of state courts strictly construe the terms and conditions against the party seeking to enforce them, and require that the contract "clearly set out what negligent liability is to be avoided." (*See Ingersoll-Rand Co. v. El Dorado Chem.Co.*, 373 Ark. 226, 231–232 (2008).) This generally means that the courts require the release/assumption of a risk/exculpatory clause to be clear and unambiguous. It has been stated that "[t]he release must '*clearly*, explicitly and comprehensibly set forth to an ordinary person untrained in the law [] the intent and effect of the document.'" (*See Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471, 481 (2008).) Some courts require that the word "negligence" be included and that the waiver explicitly state the type of negligence being waived to distinguish between losses resulting from inherent risks and those resulting from fault or wrongdoing *See Slowe v. Pike Creek Court Club, Inc.*, 2008 Del. Super. LEXIS 377 (2008). Courts have also looked to the complexity of the language, the length of the waiver and the point size and location within the document to determine if an "ordinarily prudent and knowledgeable individual would have understood the provision as a release from liability for negligence." (*See Hall v. Woodland Lake Leisure Resort Club*, 1998 Ohio App. LEXIS 4898, 15 (1998).) In addition, because some states have adopted laws regarding contributory negligence, the terminology also varies. For example, Idaho has eliminated the term "assumption of risk" and states that the correct terminology for this defense is "consent." (*See Davis v. Sun Valley Ski Educ. Found.*, 130 Idaho 400, 405 (1997).) Courts will also examine the waiver to see if it is consistent with public policy.

Several states cite to California's *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92 (1963) for the criteria that cause a provision to be void as against public policy. In *Tunkl*, six criteria were established to identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy: ". . . [1] It 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 member of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least 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 services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract or exculpation, and makes no provision whereby a purchaser may pay additional 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 seller or his agents." *Tunkl v. Regents of the University of California*, 60 Cal. 2d at 98-101, 32 Cal. Rptr. at 37-38, 383 P. 2d at 445-446.

Generally, if the waiver is valid, it will apply only to ordinary negligence; "the vast majority of decisions state or hold that such agreements generally are void on the ground that public policy precludes enforcement of a release that would shelter *aggravated misconduct*." (*City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 760 (2007).) It should be noted, however, that Connecticut, for example, "does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability." But the courts there have nevertheless limited the application of the releases to instances where considerations relating to public policy and good conscience are not implicated. (*See Hanks v. Powder Ridge Restaurant Corporation et al*., 885 A.2d 734, 748 (2005).)

In addition, state statutes affect the applicability of an exculpatory clause/waiver. For example, New York will not allow express assumption of risk/waiver in the proprietary entertainment and recreation context (e.g., where the plaintiff paid a fee to use the facility) because of NY GOL § 6-326, and New Jersey has found that a release signed by a decedent "with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death . . . was void as against public policy" because of its Wrongful Death Act.

Notable Exceptions

Arizona has held that, by statute, "the validity of an express contractual assumption of risk is a question of fact for a jury, not a judge." (*See Phelps v. Firebird Raceway, Inc*., 210 Ariz. 403, 410 (2005).)

Virginia "universally prohibits" any "provision[] for release from liability for personal injury which may be caused by future acts of negligence" and only allows releases of liability for property damage. (See Virginia, *infra*.)

Louisiana has a statute that states that "'[a]ny clause is null' that limits liability based on intentional fault or gross fault or for physical injury." (*See Ostrowiecki v. Aggressor Fleet. Ltd*., 2008 U.S. Dist. LEXIS 62713 (2008).)

Montana similarly prohibits exculpatory clauses that purport to release a party from negligence. In Montana, "it is statutorily prohibited for any contracts to have as their object, directly or indirectly, the exemption of anyone from responsibility for their own fraud, for their willful injury to the person or property of another, or for their willful or negligent violation of the law. § 28-2-702, MCA. The Haynes Court held that this statute rendered illegal any exculpatory clause or release of liability clause seeking to relieve a tortfeasor from liability for negligent conduct. *Haynes*, 517 P.2d at 377." (*Thompson v. Simanton*, 2004 ML 3736 (2004).)

Release by Parent or Guardian on Behalf of Minor

Numerous states and federal courts have addressed the propriety of a parent or guardian's execution of a pre-injury release on behalf of a minor child.[1]

---

[1] *See, e.g., Johnson v. New River Scenic Whitewater Tours, Inc*., 313 F. Supp. 2d 621 (S.D.W.Va. 2004) (finding a parent could not waive liability on behalf of a minor child and also could not indemnify a third party against the parent's minor child for liability for conduct that violated a safety statute such as the Whitewater Responsibility Act); *Meyer v. Naperville Manner, Inc*., 262 Ill. App. 3d 141, 634 N.E.2d 411, 199 Ill. Dec. 572 (Ill. App. Ct. 1994) (finding a parental pre-injury waiver unenforceable in a situation where the minor child was injured after falling off a horse at a horseback riding school); *Doyle v. Bowdoin Coll*., 403 A.2d 1206, 1208 n.3 (Me. 1979) (stating *in dicta* that a parent cannot release a child's cause of action); *Smith v. YMCA of Benton Harbor/St. Joseph*, 216 Mich. App. 552, 550 N.W.2d 262, 263 (Mich. Ct. App. 1996) ('It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the parent's child.'); *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 901 A.2d 381, 383 (N.J. 2006) (finding that where a child was injured while skateboarding at a skate park facility, 'a parent may not bind a minor child to a preinjury release of a minor's prospective tort claims resulting from the minor's use of a commercial recreational facility'); *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (extending the law that a parent could not execute a pre-injury release on behalf of a minor child to a mentally handicapped twenty-year-old student who was injured while training for the Special Olympics at a YMCA swimming pool); *Munoz v. II Jaz, Inc*., 863 S.W.2d 207 (Tex. App. 1993) (finding that giving parents the power to waive a child's cause of action for personal injuries is against public policy to protect the interests of children); *Hawkins v. Peart*, 2001 UT 94, 37 P.3d 1062, 1066 (Utah 2001) (concluding that 'a parent does not have the authority to release a child's claims before an injury,' where the child was injured as a result of falling off a horse provided by a commercial business); *Hiett v. Lake Barcroft Cmty. Ass'n*., 244 Va. 191, 418 S.E.2d 894, 8 Va. Law Rep. 3381 (Va. 1992) (concluding that public policy prohibits the use of pre-injury waivers of liability for personal injury due to future acts of negligence, whether for minor children or adults); *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (Wash. 1992) (holding that the enforcement of an exculpatory agreement signed by a parent on behalf of a minor child participating in a ski school is contrary to public policy). Interestingly, in the context of voluntary or nonprofit endeavors, there are jurisdictions where pre-injury releases executed by parents on behalf of minor children have been found enforceable. These decisions typically involve a minor's participation in schoolrun or community-sponsored activities. *See, e.g., Hohe v. San Diego Unified Sch. Dist*., 224 Cal. App. 3d 1559, 274 Cal. Rptr. 647 (Cal. Ct. App. 1990) (finding the pre-

Conclusion

Even setting aside the exceptions, it is virtually impossible to draft a release/waiver that is guaranteed to withstand judicial scrutiny in every state given the variations in standards for each state. Moreover, because state statutes can affect whether or not an exculpatory clause will be enforced – for example, whether it will be effective against one's heirs/assigns – a "one size fits all" approach is simply not feasible. A waiver/release that is clear, unambiguous and as thorough as possible may nevertheless be deemed sufficient for the large majority of the jurisdictions that favor enforceability.

E. Governmental/Recreational/Charitable Immunity Defenses

Those who defend sports and recreation claims should also consider making good use of various defenses that are available to certain governmental and private institutions. All 50 states have some form of sovereign or governmental immunity, and many states have recreational use or charitable immunity statutes that limit liability. Although there is typically a high standard of care that applies to recreation that occurs during school hours, many states limit a public school's tort liability, and many have more lenient rules for after-school recreation. This session will discuss risk management strategies that make us of these defenses.

---

injury release executed by the father on behalf of the minor child enforceable against any claims resulting from the child's participation in a schoolsponsored event); *Sharon v. City of Newton*, 437 Mass. 99, 769 N.E.2d 738 (Mass. 2002) (holding that a parent has the authority to bind a minor child to a waiver of liability as a condition of a child's participation in public school extracurricular sports activities); *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St. 3d 367, 1998 Ohio 389, 696 N.E.2d 201, 205 (Ohio 1998) (concluding that a parent may bind a minor child to a release of volunteers and sponsors
of a nonprofit sports activity from liability for negligence because the threat of liability would strongly deter 'many individuals from volunteering for nonprofit organizations' because of the potential for substantial damage awards).