THE STATE BAR OF CALIFORNIA
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PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2010 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2010 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

Contents

FEBRUARY 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

FILE

OCHOA v. CMH

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF CASTRO AND RUZ
713 Pasado
Vista, Columbia

MEMORANDUM

To: Applicant
From: Kristina Castro
Date: February 23, 2010
Re: ***Ochoa v. CMH*** **Early Neutral Evaluation Proceedings**

I was asked by the court to serve as the evaluator in the pending action of *Ochoa v. CMH*, a wrongful death case. Early Neutral Evaluation (ENE) is one of our court's alternative dispute resolution procedures in which the parties and their counsel receive a nonbinding evaluation by an experienced lawyer.

It turns out that the dispositive issue is the enforceability of a waiver of liability the plaintiff's deceased husband signed. If the waiver is unenforceable, the case could approach the $10 million plaintiff seeks. If not, the defendant may not even pay 1% of that. Mr. Ochoa, the plaintiff's deceased husband, was a successful businessman from Mexico, but he was neither fluent in, nor could he read, English.

At the conclusion of the ENE session, both parties agreed that, pursuant to ENE Rule 5-2(c), I should provide them with a written opinion on the enforceability of the waiver. I have concluded that the waiver is enforceable in view of its validity and scope, whether or not Mr. Ochoa read or understood the waiver.

Please prepare my opinion for the parties consistent with ENE Rule 5-2(c). To be effective the ENE opinion must persuade the parties that it reflects the probable outcome if the case were to proceed through discovery and to trial. An opinion that says "on the one hand this and the other hand that" and that does not reach a conclusion will not lead the parties to appraise their chances realistically and negotiate sensibly.

5. EARLY NEUTRAL EVALUATION RULES

5-1. Description.

In Early Neutral Evaluation (ENE) the parties and their counsel make compact presentations of their claims and defenses, including key evidence, and receive a nonbinding evaluation by an experienced neutral lawyer with subject matter expertise.

5-2. The ENE Session.

(a) At least ten days before the ENE session, each party shall file an ENE Statement that describes briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence.

(b) At the ENE session, the evaluator shall:

(1) permit each party, orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

(2) help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments.

(c) If requested by one or more of the parties, within 10 days after the session, the evaluator shall provide a written opinion that:

(1) includes a statement of facts that carefully selects only the facts pertinent to the legal and factual issues evaluated in the opinion;

(2) states the legal and factual issues presented to the evaluator;

(3) assesses the relative strengths and weaknesses of the parties' contentions and evidence, and explains carefully the reasoning that supports the evaluator's assessments; and

(4) draws a conclusion as to the likely outcome in the pending litigation on each legal and factual issue presented to the evaluator and requested to be addressed in the opinion.

(d) The ENE session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses.

5-3. Confidentiality. The court, the evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as "confidential information" the contents of the written ENE Statements, anything that happened or was said, any position taken, any view of the merits of the case formed by any participant in connection with any ENE session, and any opinion or assessment of the evaluator.

Richard Penniman, Esq.
BOISELLE & PENNIMAN
1980 Armando Avenue
Wilson, Columbia
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF COLUMBIA
COUNTY OF GALENA

Louise Oddo Ochoa,	)	
Plaintiff,	)	
vs.	)	**Case No. 03031955 KRB**
Columbia Mountain Heli-ski, LLC,	)	**PLAINTIFF'S EARLY NEUTRAL**
Defendant	)	**EVALUATION STATEMENT**
_____	)	

SUMMARY STATEMENT OF CASE

This action is for damages ($10,000,000) arising from the negligence of the defendant that resulted in the death of Alfredo Ochoa. The Plaintiff is the widow of Alfredo Ochoa. Mr. Ochoa was killed along with eight other people by an avalanche after the defendant helicopter skiing company Columbia Mountain Heli-ski, LLC (CMH) decided to take clients onto an avalanche path known as Bay Street in the Sierra Sonora, Columbia. The events leading up to the avalanche and its aftermath are described in the Coroner's Report.

LEGAL AND FACTUAL ISSUES

This is an action for negligence, arising from an accident which occurred while highly trained professionals were responsible for the lives of their clients. The accident occurred because CMH failed in that responsibility. The issue is: Was that failure the result of an unreasonable error of judgment or lack of skill?

CMH's Answer alleges that this action is precluded because Mr. Ochoa signed a liability and claim waiver before he participated in defendant's heli-ski operation. Contrary to CMH's allegations, the waiver is not valid or enforceable on several grounds:

(1) The validity and scope of the waiver are legally deficient.

(2) Waivers are void as to hazardous activities.

(3) Mr. Ochoa's signature was not effective because he could not and did not understand the document. Defendant was aware that Mr. Ochoa could not read English when he signed the waiver.

At the evaluation session, we will present the Plaintiff, Louise Oddo Ochoa, Mr. Ochoa's surviving wife.

Dated: February 1, 2010 Respectfully submitted,

BOISELLE & PENNIMAN

by: Richard Penniman

Richard Penniman, Esq.
Attorneys for Plaintiff

David Chemichen, Esq.
CHEMICHEN, STRAND & LUTZ
11819 Kiowa Street
Angeles, Columbia
Attorneys for Defendant

IN THE SUPERIOR COURT OF COLUMBIA
COUNTY OF GALENA

Louise Oddo Ochoa, Plaintiff,	)	
vs.	)	**Case No. 03031955 KRB**
Columbia Mountain Heli-ski, LLC,	)	**DEFENDANT'S EARLY**
Defendant	)	**NEUTRAL EVALUATION**
_____	)	**STATEMENT**

SUMMARY STATEMENT OF CASE

The Coroner's Report referred to in plaintiff's Early Neutral Evaluation (ENE) is an acceptable summary of the incident for the ENE proceeding.

ISSUES OF FACT AND LAW

This case will be resolved on the basis of the attached Release of Liability, Waiver of Claims, and Assumption of Risks signed by Mr. Ochoa. It is settled law in Columbia that waivers in sports and recreational activities do not violate Civil Code section 1668. The waiver is clear and unambiguous.

DISCOVERY, SETTLEMENT, AND ENE PROCEEDING

Before considering the difficult, time-consuming, and contentious issues in this case, the ENE should focus exclusively on whether the waiver precludes further proceedings.

Dated: February 3, 2010 Respectfully submitted,
CHEMICHEN, STRAND & LUTZ
by: David Chemichen
David Chemichen, Esq.
Attorneys for Defendant

COLUMBIA MOUNTAIN HELI-SKI, LLC (CMH)

RELEASE OF LIABILITY, WAIVER OF CLAIMS, AND ASSUMPTION OF RISKS. PLEASE READ CAREFULLY. BY SIGNING THIS DOCUMENT, YOU WILL WAIVE YOUR LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE.

ASSUMPTION OF RISKS AND COVENANT NOT TO SUE: I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in skiing, certain additional dangers and risks, some of which include:

1. AVALANCHES - which can frequently occur in the mountain terrain used for helicopter skiing and may be caused by natural forces including steepness of slopes, snow depth, instability of the snowpack or changing weather conditions, or by skiers, the helicopter, or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur;
2. MOUNTAINOUS AND STEEP TERRAIN - where a fall may cause injury or death. The areas used by CMH have steep or vertical slopes, overhangs, and cornices that in their natural state are inherently dangerous.
3. WEATHER - which can be extreme and change rapidly, without warning.
4. HELICOPTER - additional risks are posed by mechanized travel due to mechanical failure, operational error or changeable weather.

I understand that the risks from helicopter skiing are varied and difficult to anticipate. I intend this release of liability, waiver of claims, and assumption of risks to include ALL RISKS, even if the risks or cause of injury are not identified in this document or known to me at the time of signing.

I AM AWARE OF THE RISKS ASSOCIATED WITH HELICOPTER SKIING ("HELI-SKIING") AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS, AND HAZARDS. I AGREE NOT TO SUE FOR ANY INJURY RESULTING FROM RISKS OF HELICOPTER SKIING.

RELEASE OF LIABILITY: In consideration of allowing me to participate in helicopter skiing activities, I hereby agree as follows:

I WAIVE ANY AND ALL CLAIMS I MAY HAVE AGAINST, RELEASE FROM ALL LIABILITY, AND AGREE NOT TO SUE CMH, ITS SKIING GUIDES AND EMPLOYEES FOR ANY PERSONAL INJURY, DEATH, PROPERTY DAMAGE OR LOSS SUSTAINED BY ME AS A RESULT OF MY PARTICIPATION IN ANY HELI-SKIING TRIP WITH CMH DUE TO ANY CAUSE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, NEGLIGENCE ON THE PART OF CMH OR ITS STAFF.

I HAVE READ AND UNDERSTAND THIS RELEASE AND WAIVER.

Signed this 10th day of January, 2009.

Miguel Mendez — Witness

Alfredo Ochoa — Signature of Participant

GALENA COUNTY CORONER
Coroner's Report
Judgment of Inquiry
Department of Public Safety
Into the Death of ALFREDO OCHOA

SUMMARY OF EVENTS:

On March 12, 2009, at approximately 1630 hours, the Galena County Sheriff Detachment was advised that there had been an avalanche in the Torre Mountain area of the Sierra Sonora, and that there were numerous burials and losses of life. Search and rescue efforts had been underway since 1600 hours. When outside help arrived the rescue effort was almost complete.

Those involved in the avalanche accident were guides and clients of Columbia Mountain Heli-ski, LLC (CMH). Ten people had been descending a steep ski run on the mountainside when they triggered an avalanche. All ten people were involved in the avalanche; nine died of asphyxiation before they could be rescued.

CMH is a lodge-based backcountry heli-skiing company located in the Sierra Sonora Mountain range. The company caters to experienced clientele who want a physically challenging skiing experience. The area is accessible only by helicopter.

INVESTIGATIVE FINDINGS:

1. Alfredo Ochoa, age 48 years, of Medina, Mexico, was killed along with 8 other people by a large avalanche while heli-skiing in the Sierra Sonora. The accident occurred on March 12, 2009 on a run known as Bay Street. Nine skiers and their guide, Joyce Long, were beginning the last run of the March 12 afternoon.

2. CMH ski guides Hans Moser and Joyce Long put together two groups of skiers of twelve and ten respectively for the last ski descent of the day. Mr. Moser's group of twelve was flown to the top of Bay Street. Bay Street is a 2500 foot run on Torre Mountain.

3. Bay Street is made up of three bowl shaped features, converging about midway down the slope into one large pathway to the bottom. All three bowls have been skied in the past. CMH had not skied the run this season. Mr. Moser led his group of guests down the run. He found the run to be excellent skiing.

4. Ms. Long arrived at the helicopter landing and instructed her group to follow her into Bay Street, and to ski down and regroup about ten turns down. She stopped about 100 yards down the slope.

5. Ms. Long testified that as she was watching and waiting for the last skiers to join the group she suddenly felt the snow move under her skis. There was no warning sound. There was no time to even move and ski out. The snow enveloped Ms. Long. She, along with the nine other skiers, was swept down the slope. Ms. Long was the sole survivor. In the circumstances, her survival with only very minor injuries defied all odds.

6. A textbook rescue was undertaken within moments. All of the nine skiers' bodies were located within 45 minutes. It was clear from the way in which they were found that the impact of the snow and obstacles and suffocation had killed them.

7. The history of the winter snow pack in the Sierra Sonora Mountains is an important aspect of the accident. In mid to late November 2008 a rain storm created a weak layer in the snow pack that remained throughout the winter. This November rain crust layer was seen as a serious threat throughout the ski industry. The Columbia Avalanche Association issued a Bulletin on February 17, 2009, that warned of "a complex and unusual snow pack for the mountains of Columbia. Be vigilant about avoiding those big steep alpine faces. Any avalanche triggered on the older weaknesses may propagate extensively into a large and dangerous avalanche event."

8. Investigation of the site after the avalanche found that the November rain crust layer was the cause of the avalanche.

9. CMH was well aware of the February 17, 2009 avalanche warning. However, as a result of its own assessment of the snow stability, the CMH guides were confident that there was no deep layer instability as a result of the November rain crust in the Torre Mountain area as of March 12, 2009.

10. Hans Moser, the leader of the first group to ski Bay Street, is the owner of Columbia Mountain Heli-ski. He is a heli-skiing guide with 25 years of experience, skiing and guiding almost every day from December to May on every slope that has ever been skied in the Torre Mountain area. Ms. Long, the guide of Mr. Ochoa's group, has worked as a heli-ski guide in the Sierra Sonora for 10 years for CMH. Ms. Long holds the highest certification of "Alpine Guide" issued by the International Federation of Mountain Guides Association (IFMGA). All CMH guides have taken every course on avalanche analysis and prediction offered by the Columbia Avalanche Association and hold Emergency First Responder Certification (First Aid) from the Columbia Red Cross.

CONCLUSION

I find that ALFREDO OCHOA died on March 12, 2009, in the area known as Torre Mountain, Columbia. The cause of death was determined to be asphyxiation, due to being buried in snow following an avalanche. I classify this death as accidental.

Dated this 23rd day of September 2009.

Charles H. Purse

Charles H. Purse, Coroner
Galena County, Columbia

LAW OFFICES OF CASTRO AND RUZ
713 Pasado
Vista, Columbia

KRISTINA CASTRO'S NOTES FROM OCHOA v. CMH ENE SESSION OF FEBRUARY 22, 2010

9:15 am. I opened by stating ground rules: no cross-exam; questions/arguments addressed to evaluator, not opposing counsel; no transcript; all evidence, arguments, concessions stay here and may not be used later in case. Informed counsel that first I wanted to hear positions on the waiver Alfredo Ochoa signed.

OPENING STATEMENTS

For Plaintiff:

Plaintiff is aware that the defendant will attempt to avoid responsibility for its negligence because of the waiver. Plaintiff does not dispute that Alfredo Ochoa signed a waiver for his heli-ski trip in March of 2009. However, the signed waiver is a sham. The waiver is not binding on several grounds:

(1) Waiver is unenforceable because not valid and its scope is ambiguous and inadequate:

-It is contrary to Civil Code §1668, which provides that contracts intended to exempt anyone from responsibility for injury to another person "whether willful or negligent, are against the policy of law."

-Waiver is ineffective because a reasonable person would not understand the word "negligence" to mean that it absolves defendant from failing to take measures available and understood to be necessary for safety of its clients, which was purpose of hiring CMH and its professional heli-ski guides.

(2) Even if waivers in beneficial recreational activities may not violate Civil Code §1668, a waiver cannot exempt responsibility for negligence in ultra-dangerous activities such as helicopter skiing. A defendant who intentionally and for profit places others, who are in its care, at great risk does not deserve absolute legal shield from its own negligence.

(3) Most important, a waiver cannot bind someone who could not read it. CMH has overreached, and Alfredo Ochoa is excused from the waiver's terms because CMH knew that Ochoa was neither fluent nor literate in English, and knowing that Ochoa did

not read English, no one from CMH bothered to translate the waiver for Ochoa or to have any of the people available to CMH translate the waiver for Ochoa. One fact is not disputable, and it is determinative: Mr. Ochoa could not understand the waiver.

For Defendant:

Alfredo Ochoa and his estate are bound by the waiver. The validity of waivers, even as to risky recreational activities, is not open to question. CMH's waiver is simple and clear.

Ochoa knew or had every reason to know that the waiver he signed on January 10, 2009, affected his legal rights. He well knew the risks of heli-skiing. Absent fraud or excusable neglect, one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

Ochoa heli-skied with CMH in the Sierra Sonora three times, in 2007, 2008, and 2009. Each time he went he was asked to sign a waiver of liability in essentially the same terms. He complied each year. If Ochoa could not read it, he could have had it read or explained to him. Contents of the waiver were either known or immaterial to him. The evidence will show that either way, he was prepared to be bound by it.

WITNESSES

Plaintiff Louise Ochoa: (General Comments) The death of Alfredo Ochoa left her without a husband, six children without a father, and the family without its only provider. Louise Ochoa experienced a devastating loss. Her marriage was an exceptionally good one. She shared most aspects of her husband's life, both business and pleasure. Mr. Ochoa was clearly closely involved with his children. He was a loving, giving parent who took pride in his children's accomplishments. He included his children and his wife as often as possible in his many activities. He cycled, sailed, skied, swam and socialized with an enthusiasm which was matched by his enthusiasm for business. He had plans for his children which included attending top universities and business careers. Ochoa himself did not attend high school or university. He was a self-made man, who appreciated the advantages of an education. His older children, though still young at his death, were in awe of their father, inspired by him and proud of him. When he died, the older children were left rudderless, no less so because they quickly moved from Mexico to Louise Ochoa's family's home in Santo Diego, Columbia. There was no business left for them to grow into as had been planned by their father. Louise Ochoa has had to cope with the loss, not only of a beloved husband with whom she shared

most of her activities in their life, but the rock on which her children's future was dependent. She is still a young, vibrant woman, but coping with six children, the three oldest boys who were adolescents at the time of their father's death, has been difficult. The children are traumatized by the loss of their father.

Ochoa was a highly resourceful, successful entrepreneur in the steel industry. He was among the top three in that industry in Mexico. His business expanded, primarily by his efforts, ranging from selling scrap steel from a bicycle at the age of 17, to owning a partnership with his brother and occasionally others, in a steel remanufacturing business, a steel distribution business, and other related businesses such as trucking. At the time of his death he was working on the construction of a steel mill costing over $100,000,000 in Guadalajara, Mexico. Ochoa's business interests took him all over the US and to Europe. He attended trade shows, conferences, and conventions relating to his business. He purchased large machinery and developed business relationships with U.S. companies.

Ochoa also vacationed frequently in the United States. In addition to visiting regularly in Santo Diego with his parents in-law and Louise Ochoa's brothers, he skied regularly at Vail, Aspen, and other popular ski resorts either with his family or with friends.

It is Ochoa's signature on the CMH waiver, dated 1/10/09, but Louise does not recall seeing it before. She is certain he never asked her to translate it for him. The witness signature is that of Miguel Mendez, Ochoa's bilingual secretary.

Q (by ENE EVALUATOR KRISTINA CASTRO): How would you describe Mr. Ochoa's English skills and understanding?

LOUISE OCHOA: He understood quite a lot of spoken, conversational English. He could understand most American TV, but he wouldn't go to English theatrical performances and would put on Spanish subtitles when we'd watch a movie at home.

Q: Did Mr. Ochoa ask you to translate documents that were in English?

LOUISE OCHOA: Sometimes, but not a complete document, just a specific phrase or

sentence in a contract, something like that. He was very, very limited in reading English.

Q: Can you recall any business deal that Mr. Ochoa did not pursue because of his language limitation?

LOUISE OCHOA: No, never. He did whatever he had to, to get a deal done. By one means or another he understood others and made himself understood in order to participate fully. He'd seal deals with just a handshake, and have contracts sent to his office, where Mr. Mendez could review them.

Q: When in the US, could he shop or order in a restaurant?

LOUISE OCHOA: Oh, yes, even when we dined out, he never seemed to find his language limitations a barrier.

Q: What about recreational activities, any that he didn't participate in because of his limited English proficiency?

LOUISE OCHOA: No, he did everything he wanted.

Q: And that included vacation activities in the US, such as skiing, hunting, fly-fishing?

LOUISE OCHOA: Yes. A few years ago, Alfredo went big game hunting in Montana, and on other years, he'd go quail hunting in Texas.

Q: And he handled business negotiations and participation in hunting and skiing without any translation services?

LOUISE OCHOA: Almost everything except written English, yes.

***

Hans Moser: (General Comments) Owner of CMH. Heli-skiing in Sierra Sonora 25 years. Heli-skiing is an inherently dangerous sport. Even if everything possible is done to make it safe, significant risks remain. People who ski at this level are aware of the risk. Alfredo Ochoa was a highly skilled and experienced skier who was spending a week of guided skiing at CMH. He and the other clients would rely on the decisions made by their guide to give them the best skiing experience possible, balanced against the risk involved. At CMH no one skis, even gets taken on helicopter to lodge without signing the waiver. Waiver has changed, but it has been the same for the last 8 years.

Q (by KRISTINA CASTRO): What is your understanding of what waiver means?

MOSER: It protects us in case, despite our best efforts, we make a mistake.

Q: But what if, instead of a mistake, a CMH guide did not take the usual precautions that you follow for safety, say from risks such as avalanches, would you understand the waiver to protect CMH then?

MOSER: Certainly not. That would be reckless. We would never do that.

Q: But if a guide did, would you expect the waiver to cover that situation?

MOSER: I've never thought of that. I don't know, but every client has a right to believe that we will use our best judgment, experience and training to provide the safest experience possible.

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Jonathan Ripka: (General Comments) Investigator for CMH's insurer. Flew to the lodge day after March 12th accident. The ski clients were still at the lodge, and Ripka interviewed most of them. He summarized interviews of Tom Weaver, Oscar de la Pena, and Jaime Gomez:

Tom Weaver. CMH "greeter" and Galena contact person. The Mexican group comes every year, organized by one of them, Oscar de la Pena. Weaver's responsibilities include putting together a folder on each client, and assuring that each has filled out the application, made deposit and final payment, and that there is a signed/witnessed waiver from each. Waivers are usually sent to clients to be signed and returned with final payment. Weaver recalls Ochoa. Ochoa's first trip with group came about because someone else in the group canceled. Ochoa's total payment came in late and without application and waiver. CMH's practice is to list clients who had not returned a properly executed waiver and require them to sign the waiver at hotel and have it witnessed. Signing was a condition of going to lodge and skiing. Weaver recalls contacting Ochoa at the hotel in Galena on February 10, 2007 through de la Pena. De la Pena himself had executed such waivers on the previous 5 or 6 occasions he went skiing with CMH. He is fluent in both English and Spanish. In Weaver's presence, de la Pena asked Ochoa to sign the waiver and de la Pena witnessed it. De la Pena probably spoke in Spanish to Ochoa, since most of them in the Mexican group spoke Spanish among themselves. Weaver can "get by" in Spanish. He did not translate the waiver in Spanish for Ochoa or any of the Mexican group. Why

not? Never thought that necessary. He can recall speaking to Ochoa and the others in English. He had to make all of the arrangements for each of them for transportation to helicopter, often change flights home, help with lost bags, arrange rentals of anything they didn't have. He does not recall any problems communicating with Ochoa in English.

Oscar de la Pena. Organizer of Mexican group. De la Pena did not recall witnessing Mr. Ochoa sign the first waiver, dated February 10, 2007, although it is his signature as a witness. De la Pena had read the document or one similar to it in earlier years and he understood that when he signed it, he was waiving legal rights to risks of

heli-skiing. His understanding did not seem to extend beyond this. He asked no questions and not only signed such documents himself regularly, but assisted in having others of his Mexican ski group sign them. De la Pena emphasized that since heli-skiing at CMH cost about $1,200 a day, each skier in the Mexican group is a successful business person with considerable contact with the English language in relation to either his education, his business, or his recreation.

At the end of the first week of skiing at CMH in 2007, Ochoa signed up for heli-skiing for the next year. On the last day at the lodge, February 18, 2007, Ochoa along with the other members of the Mexican ski group signed another waiver form which was witnessed by a fellow skier from Mexico who was fluent in English, Jaime Gomez.

Jaime Gomez. Was with the group again in 2009, and acknowledged his signature as the witness on the waiver that Ochoa signed on February 18, 2007. Gomez had no recollection of witnessing this document. He can read English and probably had read the big print in the waiver. Gomez is sure he didn't translate waiver to Spanish for Ochoa ("I would have remembered that"). As to Gomez' understanding of the waiver, he thought that he could not sue in case of an accident. As to why he signed, he said he thought he had to sign the document in order to participate in the activity. As with all vacation documents he does not bother to read them, he just signs them so he can enjoy his vacations.

Ripka said that this attitude of Gomez was typical among the Mexican group he interviewed. None of the Mexican group suggested that there was any time pressure or salesmanship applied by CMH to any of the Mexican group in order to obtain their signatures. Gomez and de la Pena said that Ochoa seemed to understand instructions in English from the CMH guides and personnel, although both knew that Ochoa could not read English very well, if at all. Both also said that all the Mexicans, including Ochoa, talked in English with the other skiers at the lodge although sometimes one of them would ask another how to say a particular word or phrase.

The third waiver was signed by Ochoa at his place of business in Mexico. It was sent to him there by CMH, in a package with a request for final payment, a waiver form, and a trip cancellation insurance form for completion. This package was in English as was all correspondence sent to Mr. Ochoa by CMH. All the correspondence received back from Mr. Ochoa was likewise in English, possibly prepared and sent by Ochoa's bilingual secretary. CMH received the waiver, the final payment, the completed insurance form, and a completed and witnessed waiver.

Ripka interviewed others from the Mexican group at the lodge. All described Ochoa as self-confident, resourceful, and without inhibition in asking for and getting what he wanted.

Q (by KRISTINA CASTRO): Did you locate anyone at lodge or at CMH who said that CMH waiver was read or translated into Spanish for Ochoa at any time?

RIPKA: No, no one thought that was necessary.

After leaving lodge, Ripka contacted Montana and Texas hunting and Jackson Hole fly fishing operations visited by Ochoa. Each required waiver of liability, and had on file waivers signed by Ochoa before he participated.

CLOSING CONFERENCE WITH COUNSEL

Plaintiff's counsel insists that the waiver is invalid. Plaintiff asserts even defendant's investigator could find no evidence of a knowing waiver. Further across-the-board-waivers should not absolve a tortfeasor in an activity that cannot be made safe. Liability will easily be established, and only real question is the amount of damages.

Defendant disagrees. However, both agreed that my conclusion on enforceability of waiver would move the case forward.

FEBRUARY 2010

California
Bar
Examination

Performance Test A

LIBRARY

LIBRARY

Randas v. YMCA of City of Angeles

Columbia Court of Appeal (1998)

In this personal injury action, plaintiff-appellant appeals from an adverse summary judgment and contends the release she signed was invalid because it was against public interest and because she couldn't read it. The facts are simple and undisputed. The issue is one of law. As plaintiff implicitly concedes, if the release she signed is valid, summary judgment was properly awarded to defendant.

Plaintiff Lemonia Randas, literate in Greek but not English, enrolled in a swimming class at a local YMCA. She was provided a Release and Waiver of Liability and Indemnity Agreement that she signed. After her swimming class, she slipped and fell on the wet poolside tile, injuring herself.

1. THE RELEASE DOES NOT AFFECT THE PUBLIC INTEREST AND IS NOT INVALID UNDER CIVIL CODE SECTION 1668.

The section reads: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

If an exculpatory provision, such as the subject release, involves "the public interest" it is invalid under Civil Code section 1668. (*Tunkl v. University Regents*, Col. Sup. Ct., 1963). In *Tunkl*, the seminal case, the Columbia Supreme Court stated: "no definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl* instead listed characteristics,[1] some or all of which characterize invalid

[1] "It 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. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. 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. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a

exculpatory provisions. It held that the hospital-patient contract clearly falls within the category of agreements affecting the public interest.

This court has not been apprised of any case, applying the *Tunkl* factors, that voided a release on public interest grounds in the sports and recreation field. For example, the following activities have been found *not* to involve a public interest: an international bicycle racing competition, “motocross” races, operating a dirt-bike park, and commercial river rafting. See generally *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990. Swimming, like other athletic or recreational activities, however enjoyable or beneficial, is not "essential" as a hospital is to a patient or a repair garage is to a Columbia motorist. *Buchan, supra.*

Moreover, there is good reason *not* to invalidate such releases because the public as a whole receives the benefit of such waivers so that groups such as the YMCA, as well as the Boy and Girl Scouts, Little League, and parent-teacher associations, are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of adults and children benefit from the availability of recreational and sports activities. Those options are steadily decreasing -- victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. No public policy forbids the shifting of that burden.

We reject plaintiff’s attempt to distinguish the sports and recreational cases on the ground that they involved "death defying" activities. *Tunkl* fails to include dangerousness as a relevant characteristic, and releases have been upheld in moderate sports, such as bicycle riding and aerobics, as well as to hazardous activities, including skydiving, motorcycle races, and mountain climbing. See generally *Hulsey v. Elsinore Parachute Center*, Col. Ct. App., 1985.

2. THE RELEASE IS CLEAR AND UNAMBIGUOUS.

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purchaser may pay additional reasonable fees and obtain protection against negligence. 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, supra*.)

An agreement exculpating the drafter from liability for his or her own future negligence must clearly and explicitly express that this is the intent of the parties. We first note that whether a contract provision is clear and unambiguous is a question of law.

The subject release is captioned in bold lettering: "Release and Waiver of Liability and Indemnity Agreement." Its one-page text states: "The undersigned hereby releases the YMCA from all liability to the undersigned for any loss or damage on account of injury to the undersigned caused by the negligence of the YMCA . . . ." It further states: “The undersigned hereby assumes full responsibility for and risk of bodily injury due to the negligence of the YMCA."

We find the release neither unclear nor ambiguous.

3. THE RELEASE IS NOT INVALID EVEN THOUGH PLAINTIFF COULD NOT READ IT.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

On the record here, there is no indication of fraud or overreaching by defendant. Nor did plaintiff claim that defendant had reason to suspect she did not or could not read the release she had signed and which in full captions above and below her signature stated: "I Have Read This Release."

Absent bad faith or misrepresentation, ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him. One who signs an instrument when for some reason, such as illiteracy or blindness, he cannot read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation. The signer should have had the instrument read to him.

The judgment is affirmed.

Allan v. Snow Summit, Inc.

Columbia Court Of Appeal (1999)

Plaintiff Gary Allan sued defendant Snow Summit for injuries he allegedly suffered during a ski lesson. The trial court granted summary judgment in favor of Snow Summit on the basis of a release and waiver Allan had signed.

Allan paid for skiing lessons. Snow Summit gave Allan a card in connection with the skiing lessons. The first side of the card contained information about the date and times of the ski lessons. The second side contained a statement entitled "Agreement and Release of Liability." Although he averred he did not remember reading or signing the card, Allan acknowledged that he did print his name in the indicated blank and that it is his signature at the end. The second side reads as follows:

> Agreement and Release of Liability. I Gary Allan have voluntarily enrolled in a ski lesson offered by Snow Summit, Inc. I am aware that my participation in the ski lesson and the sport of skiing involves numerous risks of injury, including, but not limited to, falls, loss of control, collisions with other skiers and natural and man-made objects and I freely assume those risks.
>
> As lawful consideration for being permitted to enroll, I agree to release from any legal liability and agree not to sue Snow Summit, Inc., their owners, officers, directors, members, agents and employees, for any and all injuries caused by or resulting from any participation in the ski lesson or the sport of skiing whether or not such injury or death was caused by alleged negligence.
>
> I Am Aware That This Contract Is Legally Binding and That I Am Releasing Legal Rights by Signing It. Signed: Gary Allan.

Snow Summit assigned Shawn Oldt, a professional ski instructor, to conduct the lesson. Allan told Oldt that he was a novice skier. The lesson, which took place in the beginners' area, apparently went well. The next day, Allan returned for another lesson. After a period of time in the beginners' area, Oldt told Allan that he was ready to go to

the "top of the mountain." Allan was nervous and reluctant to leave the beginners' area. Oldt told Allan he could not ski on the beginners' slope forever, and that the only way to learn to ski properly was to be aggressive and "go after the challenge."

Allan went to the ski run at the top of the mountain. He found he could not turn as he could in the beginners' area. Each time he attempted to turn, he fell. The ski run was icy. The ice made it difficult to turn and felt hard. Allan fell numerous times during the run. Oldt continued to encourage Allan to get up and keep trying after each fall. When Allan finally reached the bottom of the run, Oldt remarked that the top portion of the mountain was frequently icy, and that many people jokingly referred to the icy conditions as "Summit Cement."

After he had finished skiing, Allan felt pain in his back. Allan sought treatment; he was informed he had sustained herniated discs in his lumbar spine.

Allan filed this action against Snow Summit and Oldt, apparently on the theory that, despite the Agreement and Release of Liability, Snow Summit continued to owe him a duty of care which Allan characterizes as a duty not to increase the risks inherent in the sport because of the instructor/pupil relationship.

Snow Summit successfully moved for summary judgment on grounds that (1) Allan expressly assumed the risk of injury from skiing, and (2) the release agreement expressly bound Allan not to sue, even if Snow Summit was negligent. The court based its ruling exclusively on the release and did not consider Allan's contentions that Snow Summit or Oldt had somehow increased the risks inherent in the sport of skiing.
On appeal after a summary judgment has been granted, we review the matter de novo to determine whether there are any triable issues of material fact.

It is undisputed that Allan signed the Agreement and Release of Liability as a condition to enrolling in the ski school. Allan stated he did not remember seeing or signing the document, although he acknowledged he received it and that it is his signature. He alleges there is a disputed issue of fact as to whether or not he agreed to its terms. However, it is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the

ground that he failed to read the instrument before signing it. This principle has been extended even to cases where the person who signs the contract is illiterate -- in such cases, the individual has a responsibility to have the contract read to him. See *Randas v. YMCA*, Col. Ct. App., 1998.

Allan suggests that his neglect in not reading the contract was "excusable," since he was given the contract only a few moments before the lesson and therefore had no time to read it thoroughly. However, Allan could have taken the time to read it. Notably he does not say that he was precluded from taking the time to read it; and there is no evidence that he did not do so, only that he does not recall reading it. Also, Allan conceded that he had signed similar releases at his fitness gym, and when taking yoga classes, renting roller blades, and participating in recreational running races. Whether he read it or not, he knew or had every reason to know that the document affected his legal rights.

Allan contends that the ski instructor's misrepresentations concerning his abilities to ski from the summit constitute bad faith or misrepresentation. However, Allan misconstrues the court's decision in *Randas*. The fraud or misrepresentation must be as to the contents of the waiver.

The Agreement and Release of Liability states plainly on its face that skiing is a dangerous activity, and that in consideration of receiving ski lessons, the student must agree to hold Snow Summit and its employees harmless and not to sue for any injury caused by participation in the hazardous activity, even if Snow Summit or its employees were negligent.

Allan admits he signed the Agreement and Release of Liability, in which he agreed not to sue Snow Summit, or its employees, even if he suffered injury or death, and even if the injury or death was caused by Snow Summit's or Oldt's negligence. A release or waiver could hardly be more clear.

The general principle remains unaltered that there is no public policy which opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. Only exculpatory clauses affecting the public interest are invalid (*Tunkl v. University Regents*,

Col. Sup. Ct, 1963), and exculpatory agreements in the recreational sports context do not implicate the public interest. See generally, *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990.

Allan here expressly agreed, for a consideration, to "shoulder the risk" that otherwise might have been placed on Snow Summit. The defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public, and the business was not a matter of practical necessity for members of the public.

Here, the release provisions were prominent, including large, bold type. Allan had to look at the release agreement at least long enough to fill his name in the indicated blank and to sign at the end. Notification was plain and clear. The effect of an adequate notice, of course, is simply to alter preexisting expectations. Allan cannot avoid the effect of the notice on his reasonable expectations simply by not reading the contracts he is given to sign.

The summary judgment is affirmed.

Pritikin v. Billy's Fitness Club and Spa

Columbia Court of Appeal (2005)

Plaintiff and appellant Tom Pritikin was a member of a health club. Defendant Billy's purchased the health club and renamed it Billy's Fitness Club and Spa. Billy's required each existing member to sign a new membership agreement. Pritikin signed a two-page, single-spaced membership agreement. The membership agreement is comprised of eleven itemized paragraphs, and included subjects such as fees, right to change fees, transferability, and termination. In the introductory paragraph, Billy's offered members "[t]he use of its services and facilities in conformance with the terms and conditions set forth below." Paragraph 7 is entitled "Waiver of Liability." It contained three paragraphs in the same type and type size as the remainder of the agreement. In an initial paragraph on waiver, the member "acknowledges and understands that he/she is using the facilities and services of the club and spa at member's own risk." The next waiver paragraph was as follows: "[t]he club and spa and their owners, officers, employees, agents, contractors and affiliates shall not be liable, and the member hereby expressly waives any claim of liability, for personal/bodily injury or damages, which occur to any member, or any guest of any member, or for any loss of or injury to person or property. This waiver is intended to be a complete release of any responsibility for personal injuries and/or property loss/damage sustained by any member or any guest of any member while on the club and spa premises, whether using exercise equipment or not."

Pritikin was injured at the health club prior to beginning his regular workout. Pritikin intended to use an elliptical training machine that ordinarily faced a television set suspended on a rack above head level. The television set was facing away from the elliptical training machine. In an attempt to return the television set to its normal position, Pritikin touched the rack on which the television lay, and the television slid off the rack over Pritikin's head. Pritikin attempted to hold the television in place; however, he was unable to bear the weight of the television and injured his knee.

The trial court granted summary judgment, concluding the written release clearly and unambiguously defeated Pritikin's lawsuit.

An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. A release may negate the duty element of a negligence action. Contract principles apply when interpreting a release, and normally the meaning of contract language, including a release, is a legal question. It therefore follows that we must independently determine whether the release in this case negated the duty element of plaintiff's cause of action.

To be effective, such a release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. The release need not achieve perfection. We note that the waiver of liability signed by Pritikin does not expressly include the term "negligence." Pritikin contends that the release is ineffective on this basis. However, the inclusion of the term "negligence" is simply not required to validate an exculpatory clause. Whether the exculpatory clause bars recovery against a negligent party is controlled by the intent of the parties as expressed in the written agreement. A waiver of liability in a health or fitness club membership agreement necessarily releases the health club from liability for its negligence, since there is no other liability to release.

The determination of whether a release contains ambiguities is a matter of contractual construction. An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter.

The scope of a release is determined by the express language of the release. The express terms of the release must be applicable to the particular negligence of the defendant, but every possible specific act of negligence of the defendant need not be spelled out in the agreement. It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given. The issue is not whether the particular risk of injury is inherent in the recreational activity to which the release applies, but rather the scope of the release.

An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release. Thus, a release given in connection with scuba diving activities was applicable to the death of a scuba diving student who was inadequately supervised and who drowned; similarly, releases given in connection with fitness activities were applicable to a slip and fall on a slide exercise mat during exercise class or while using weightlifting equipment under supervision of a personal trainer.

The release Pritikin signed was clear, unambiguous, and explicit. It released Billy's from liability for any personal injuries suffered while on Billy's premises, "whether using exercise equipment or not." Pritikin contends the release should be interpreted to apply only to injuries suffered while actively using Pritikin's exercise equipment. In this regard, Pritikin first contends the release cannot bar his action because, as a matter of law, a health club release is not effective to release claims for injuries arising out of circumstances unrelated to fitness. He argues that the negligence released must be reasonably related to the purpose of the release, i.e., fitness. This assertion is incorrect.

Pritikin's fitness-related argument is not a semantically reasonable interpretation of the release; indeed, it is contrary to the express language of the release. Given its unambiguous broad language, the release reached all personal injuries suffered by Pritikin on Billy's premises, including the injury Pritikin suffered because of the falling television.

In determining the purpose for which the release was signed, courts look at the language of the release and the agreement in which it is included, and not the inherent risks of the underlying recreational or sports activity. The release signed by Pritikin unambiguously, clearly, and explicitly released Billy's from liability for any injury suffered on the fitness club premises, whether using exercise equipment or not. The purpose of the release included access to and entry on Billy's facilities; the injury suffered by Pritikin was, therefore, reasonably related to the purpose of the release.

Thus, we conclude that the release would be effective to bar Pritikin's action, if it was executed and signed by Pritikin. Pritikin does not challenge that his membership form

bears his signature. He now alleges, however, there is a disputed issue of material fact as to whether or not he agreed to all of its terms.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. There is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. Where a party has signed a written agreement, it is immaterial to the question of whether he is bound by it that he has not read it and does not know its contents. In the usual commercial situation, there is no need for the party presenting the document to bring exclusions of liability or onerous terms to the attention of the signing party, nor need he advise him to read the document. In such situations, it is safe to assume that the party signing the contract intends to be bound by its terms.

However, limited situations may arise which suggest that the party does not intend to be bound by a term. In *Leon v. Sienna Resort Hotel*, Col. Ct. App., 1998, the plaintiff, who was injured when a sauna bench collapsed beneath him, had signed a 2-page admission form for a single day use of the defendant hotel's fitness room. The exculpatory clause was inconspicuously buried in small print on the reverse side of the admission form; defendant's employee watched plaintiff sign the form in a hasty, informal way, without reading, let alone understanding, the document given its length and the amount of small print on its reverse side. The *Leon* court concluded that the exculpatory clause was not sufficiently conspicuous to be enforceable. In these special circumstances, there was a duty on defendant to take reasonable measures to bring the onerous exclusion clause in question to the plaintiff's attention.

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important if it runs contrary to the party's normal expectations. Patrons of recreational facilities are accustomed to exculpatory clauses limiting liability for use of exercise equipment and are aware or should be aware signing releases affects their legal rights. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person

should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

The key is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances, where the agreement has been induced by fraud, misrepresentation, or where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its items.

Here, Pritikin's claim is that he signed the form after Billy's acquired the fitness center as part of his membership renewal and that he was not aware of the new release terms. However, neither party presented evidence in the summary judgment proceeding of the circumstances concerning execution of the membership release form. For example, Pritikin never testified that he had not read the form, nor that he was not given time to read the form. Billy's did not attempt to show that steps were taken to bring the release terms to the attention of Pritikin or other members.

The determination that a party who signs a waiver may be excused from its consequences requires a close examination on the totality of the circumstances surrounding the waiver's content, its execution, the parties' expectations, experience, and notice of the legal rights affected. However, there is simply no record before us, and on that basis we reverse the summary judgment and return the case for further proceeding on the issue.

Answer 1 to Performance Test A

IN THE SUPERIOR COURT OF COLUMBIA

COUNTY OF GALENA

Louise Oddo Ochoa,	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 03031955 KRB**
	)	**Early Neutral Evaluation**
Columbia Mountain Heli-Ski, LLC,	)	**Evaluator's Written Opinion**
Defendant	)	
	)	
_____	)	

STATEMENT OF FACTS

Alfredo Ochoa was a successful father, entrepreneur, and sports enthusiast. At the time of his death, Ochoa worked in a very successful steel remanufacturing business in Guadalajara, Mexico. His work at the business required him to frequent Europe and the United States for business, often attending trade shows, conferences, and conventions. Despite not being fluent in English, Mr. Ochoa understood quite a lot of spoken, conversational English and never let any lack of English skills prevent him from engaging in the business he wanted to engage in. Mr. Ochoa frequently had to enter into deals in English and any lack of ability to understand English did not prevent him from engaging in these business transactions. Additionally, Mr. Ochoa surrounded his business with individuals who were bilingual, most notably his secretary, who could help him with any lack of English knowledge or skill.

Outside of work, Mr. Ochoa was an active sports enthusiast. He enjoyed cycling, sailing, skiing, and swimming. Since 2007, Mr. Ochoa made annual trips to Columbia Mountain Heli-Ski, LLC ("CMH") in the Sierra Sonora mountains in Columbia, USA, to engage in the highly dangerous sport of heli-skiing. Heli-skiing is a highly dangerous sport whereby experienced skiers go by helicopter to ski in remote areas that are not

accessible otherwise. These annual trips to CMH were organized by Oscar de la Pena and were always with a large group of Mexican tourists. If Mr. Ochoa had any lack of grasp of the English language regarding the risks involved in these sports, he did not show it. He was accustomed to signing waivers of liability through the recreational activities he engaged in, and typically surrounded himself with individuals who had more knowledge of the English language than himself.

CMH is a company that specializes in providing these experienced skiers with a heli-skiing experience. Because of the inherent dangers and risks involved in heli-skiing, for the past 8 years, CMH has required every skier who skis with them to sign a waiver of liability before CMH. This waiver provided that the signer would not sue CMH for both the usual dangers and risks inherent in skiing as well as any additional dangers and risks in skiing, including avalanches, mountainous and steep terrain, weather, and helicopter risks.

On March 12, 2009, Mr. Ochoa, along with 8 other skiers, were killed by a large avalanche while heli-skiing with CMH in the Sierra Sonora. Mrs. Louise Oddo Ochoa has brought a wrongful death suit against CMH, asserting that CMH was negligent in the operation of its heli-skiing business and that the waiver of liability for this negligence was invalid.

LEGAL AND FACTUAL ISSUES PRESENTED TO THE EVALUATOR

The parties have both agreed that the determination of whether the waiver signed by Mr. Ochoa is valid and enforceable is dispositive in this case. Accordingly, during the Early Neutral Evaluation Session on February 22, 2010, the parties largely limited themselves to presentation of evidence surrounding the waiver's applicability and enforceability to this action. This written opinion will be limited to a discussion of whether this waiver is enforceable against Mr. Ochoa and thus bars CMH liability for negligence in Mr. Ochoa's death.

STRENGTHS & WEAKNESSES OF PARTIES' CONTENTIONS AND EVIDENCE

Plaintiff asserts that the waiver signed by Mr. Ochoa is unenforceable on three grounds: (1) the validity and scope of the waiver is insufficient; (2) waivers limiting liability are void for hazardous activities; and (3) Mr. Ochoa's signature is not effective because he could not and did not understand the document. Plaintiffs assertions on each of these grounds, however, are contrary to law and fact. Each argument's shortcomings will be discussed in turn below.

A. The Waiver Signed by Mr. Ochoa is Valid and its Scope is Clear and Unambiguous

"An agreement exculpating the drafter from liability for his or her own future negligence must clearly and explicitly express that this is the intent of the parties." *Randas.* In determining whether a waiver is "clear and unambiguous," the courts of Columbia will look to the description in the text of the waiver, as well as the visual impact of the waiver. *See Randas.* When a waiver is in large, bold type and is prominent, Columbia courts have frequently found that these waivers are clear and unambiguous. *See Randas, Allan.* Here, the waiver signed by Mr. Ochoa is written in plain and unambiguous language. The waiver has several boxed off portions of bolded, capitalized text which plainly indicate that "by signing this document, you will waive your legal rights" and "I agree not to sue for any injury." The waiver is not written in legalese, nor does it use language that a lay person cannot understand. It very clearly states that the individual signing the waiver is not going to be allowed to sue CMH. Further, this waiver not only plainly discusses waiver of the "usual dangers and risks inherent in skiing," but also specifically references specific types of risks that CMH will not have liability for. These types of risks are not written in bold but are capitalized and include the risk of avalanches. The gist of the waiver is very clear by simply glancing at it, as the boxed bolded, and capitalized portions of the waiver direct the reader's attention to the important part of the waiver. From the face of the waiver, then the scope of the waiver and the risks that it guards against are very clearly articulated to the signing party.

In determining what the scope of the waiver is, the courts of Columbia look to "the intent of the parties as expressed in the written agreement." *Pritikin.* Further, "the scope of a release is determined by the express language of the release." *Pritikin.* The courts of Columbia have frequently upheld waivers that explicitly mention a prohibition against liability for "negligence." *See Randas* (holding waiver clear and unambiguous when waiver explicitly waived responsibility for negligence and victim alleged negligence against exculpating party). The courts of Columbia have also upheld waivers that do not explicitly reference "negligence" but where a waiver of liability for negligence is clearly the intent of the parties. *See Pritikin.* Here, the waiver specifically disclaims CMH's liability for negligence. The last bolded boxed portion of text expressly states that "negligence on the part of CMH or its staff" is waived. Thus, on its face, this waiver releases CMH's liability for negligence.

Plaintiff argues that a reasonable person would not understand what negligence means. While this argument may have teeth in the context of other waivers in Columbia, that cannot be said to be the case here. The waiver signed by Mr. Ochoa not only explicitly Disclaims liability for "negligence," but under the avalanches section specifically describes what could constitute negligence -- "or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." Thus, this waiver uses the legal word -- negligence -- as well as a layperson description of failure of care to describe the types of activities and risks that are specifically disclaimed through the waiver.

It is important to note that the waiver signed by Mr. Ochoa specifically guards against the exact type of harm that led to Mr. Ochoa's death. Under the "Avalanches" section of the waiver, there is explicit reference to the instability of the snow pack and the lack of precision in predicting when that snowpack will cause an avalanche. In *Pritikin,* where the waiver did not expressly reference "negligence," the Court of Appeals paid close attention to the fact that the type of injury suffered by the plaintiff necessarily had to be the type of injury waived by the waiver. Here that basis is even stronger because the waiver signed by Mr. Ochoa specifically references negligence and the type of negligence that CMH was trying to disclaim.

Because the waiver signed by Mr. Ochoa clearly and unambiguously disclaims liability for both "the usual dangers and risks inherent in skiing" but also specifically "Avalanches" because the waiver specifically describes the exact type of harm which led to Mr. Ochoa's untimely death and waives it, and because the intent of CMH in having the waiver was to disclaim liability.

B. A Waiver Can Limit Liability for Hazardous Activities

Waivers of liability are generally accepted ways to limit liability. The only exception to the premise is if the waiver is a violation of public policy under Columbia Civil Code Section 1668. The Columbia Supreme Court has interpreted that provision to be that a waiver can validly limit liability for activities as long as such activities do not involve "the public interest." *See Tunkl.* Whether the activity is in the public interest is the only relevant consideration. To determine whether an activity involves the "public interest," a number of factors must be considered, including whether the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public or if the party is holding himself out as willing to perform a service for any member of the public who seeks it. *Tunkl.* After *Tunkl,* there have not been any cases in Columbia that have voided a release on public interest grounds in the sports and recreation field. *See Randas.* In *Randas,* the Columbia Court of Appeals refused to invalidate a waiver signed by a plaintiff who slipped and fell at a swimming class at the local YMCA. In so doing, the court noted that "[s]wimming, like other athletic or recreational activities, however enjoyable or beneficial, is not 'essential' as a shospital is to a pratient or a repair garage is to a Columbia motorist".

Here, Mr. Ochoa was engaged in a highly dangerous recreational activity that has no "great importance to the public." While some individuals, including Mr. Ochoa, may have considered heli-skiing and other recreational activities essential to their annual vacations, these types of recreational activities do not rise to the level of necessity of a "public interest." Because recreational activities, like heli-skiing, cannot be considered in "the public interest," waivers which limit liability in these situations cannot be invalidated on grounds that they are contrary to public policy under Columbia Civil Code Section 1668.

The public interest exception for liability despite waivers under *Trukl* cannot be extended to situations involving high dangerous activities. *Tunkl* is clear that the only limitation on liability of waivers under Columbia Civil Code 1668 is when a waiver is against public policy because the activity is the public interest. *Tunkl* expressly does not include dangerousness of an activity as a relevant consideration in determining whether a waiver violates the public interest. In *Randas* the Columbia Court of Appeals refused to hold that waivers that do not involve "death defying" activities are held to a lower standard than that expressed in *Tunkl* because *"Tunkl* fails to include dangerousness as a relevant characteristic." Here, too, the court will not consider the dangerousness of heli-skiing in determining if a waiver of liability for heli-skiing is against the public interest. The only relevant consideration under Civil Code Section 1668 is whether heli-skiing is a public interest activity, which it is not.

In summary, the only exception to a waiver limiting liability is if that waiver purports to waive a public interest activity. Heli-skiing is not a public interest activity; thus its degree of dangerousness has no bearing in determining whether liability can be waived for heli-skiing.

C. Despite not Reading or Understanding the Document, a Signature on a Waiver is Valid

Despite Mr. Ochoa's inability to be fully literate in English, the facts and circumstances of his signing this waiver indicate that he had to know that he was signing a document which affected his legal rights and that CMH had no way of knowing that he did not fully understand the scope of the waiver. Relevant facts and circumstances in making this determination are discussed below.

Even if Mr. Ochoa could not understand English, the Columbia Court of Appeal has not invalidated a waiver of liability on illiteracy grounds. In *Randas,* the Columbia Court of Appeal held a English language written waiver of liability valid when it was signed by a plaintiff who was only literate in Greek and not in English. "[I]n the absence of fraud, overreaching or excusable neglect, … one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." *Randas.* Plaintiff here was not alleged that there is any fraud or overreaching on the

part of CMH. Thus, even if it was Mr. Ochoa's custom to not read the document and just sign it, as testified [by] Mr. Gomez, Mr. Ochoa would be charged with knowing what was in the specific waiver.

While excusable neglect can be found if the party signing the waiver "only [had] a few moments" to sign and those moments did not constitute enough time to read the waiver, *see Allan,* there is no evidence that Mr. Ochoa was pressed for signing the waiver here. In fact there is contrary evidence by Mr. Gomez that Mr. Ochoa and the rest of the Mexican ski vacation ground had as much time as they needed to sign the waiver presented to them by CMH. Additionally, CMH would send the waivers to the individuals in advance for them to sign. This advance requirement would have afforded Mr. Ochoa all the time he needed to confer with anyone if he had any apprehensions about signing a document in English. The presence of Mr. Ochoa's bilingual secretary – who served as his witness for the last waiver -- makes this fact all the more in favor of finding validity of waiver. If Mr. Ochoa had any types of questions about what he was signing, he would have consulted with his secretary.

In determining whether waivers are effective against individuals, Columbia courts also have considered whether the individual has signed other similar releases. *See Allan.* In *Allan*, for example, the Court of Appeals noted that the plaintiff had signed similar releases in several types of activities and that because he had signed similar releases on similar occasions, even if he did not read the release at issue in the case, he had to know that the release affected his rights. Mr. Ochoa has been an avid sports enthusiast for years. His wife testified that he has cycled, sailed, skied, and swarm throughout his life and that he particularly was a regular skier who frequented not only CMH but other resorts with his family and friends. Further, Mr. Ochoa had signed waivers on file at Montana and Texas [for] hunting and Jackson Hole fly fishing operations visited by Ochoa. Most notably, Mr. Ochoa has gone to CMH on three occasions and signed waivers of his rights three time s with CMH. Mr. Ochoa also has experience in signing business documents that affect his legal rights. As an intelligent businessman and sports enthusiast, Mr. Ochoa had to know that he was signing something that affected his legal rights. It is also probable that given the amount of documents he had signed in this life, he could recognize the word "legal" or "waiver."

It is only a very limited situation whereby a party proffering the waiver of liability "must take reasonable steps to bring it to the other party's attention." *See Pritikin.* This only occurs when the party proffering has reason to know that the individual signing the waiver will not be aware of its existence. Here, however, this is not the case, and all the facts point to the CMH staff not being aware of Mr. Ochoa's English language shortcomings. The impression that Mr. Ochoa gave to both the business and sports would was that he was a worldly successful intelligent businessman. Mr. Ochoa has gone to CMH on three occasions and signed waivers of his rights three times with CMH. Mr. Ochoa also has experience in signing business documents that affect legal rights. The Plaintiff testified that Mr. Ochoa did not let his English shortcomings affect either his business or recreational participation in activities. Further, the individuals at CMH saw Mr. Ochoa interact on at least three occasions with other Spanish speakers who would speak Spanish among themselves but would speak English with the staff of CMH. The CMH staff further believed that Mr. Ochoa could understand instructions from the guides and personnel.

Plaintiff points to the fact that Mr. Ochoa was not fluent in English and would not watch television in English. This activity, however, occurred in the privacy of Mr. Ochoa's home. The impression Mr. Ochoa represented to the staff of CMH was very different than a man who was confused by the English language. Plaintiff also argues that the CMH staff, even if Mr. Ochoa could speak English sufficiently, knew that he could not read English sufficiently. While this distinction may have some merit if Mr. Ochoa were travelling alone, the fact that CMH saw Mr. Ochoa travelling with bilingual speakers and that he had a bilingual secretary makes it reasonable to believe that the staff believed Mr. Ochoa would consult with those English speakers if he had difficulty with written English. Although no one at CMH translated the waiver to Mr. Ochoa in Spanish, none of them realized they needed to, likely because they saw that Mr. Ochoa could always consult with another Spanish speaker if he needed assistance.

Because Mr. Ochoa has signed documents – in both the business and recreational worlds – that have affected his legal rights, it is improbable to think that he did not understand the gravity of signing the CMH waivers. Mr. Ochoa was an intelligent man who was very successful in business and seemed to know his limits of grasp of the English language. If he had any questions about what the CMH waiver would have

meant, he would have asked one of the individuals with him who knew more English to explain the document to him. "If he cannot read, he should have it read or explained to him. One who signs an instrument when for some reason, such as illiteracy or blindness, he cannot read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation." *Randas.* Accordingly, because Mr. Ochoa acted as if he fully understood the gravity of what he was signing. CMH cannot be held to knowing whether or not he could fully understand the waiver of liability and had no duty to make sure that Mr. Ochoa understood the full ramifications of his actions.

CONCLUSION AS TO LIKELY OUTCOME ON EACH LEGAL & FACTUAL ISSUE

Because Mr. Ochoa signed a waiver which validly excused CMH of liability for negligence in heli-skiing generally, and the type of harm that specifically threatened Mr. Ochoa, the waiver will be valid and CMH will not have liability for Mr. Ochoa's death. Heli-skiing is not an activity in the public interest; accordingly the waiver is not void for public policy under Columbia Civil Code Section 1668. Accordingly, even though Mr. Ochoa may not have fully understood the waiver because he was not literate in English, he acted as if he understood the waiver through his conduct and thus will be charged with the contents therein. Mr. Ochoa, although not a fluent English speaker, was a sophisticated business man who had experience in signing English documents affecting both his business and recreational life. Because he gave that impression to the individuals at CMH and had surrounded himself with bilingual speakers, it is unreasonable to charge CMH with knowing his English shortcomings, and accordingly they had no duty to translate the waiver to Spanish for it to be valid.

Answer 2 to Performance Test A

Ochoa v. Columbia Mountain Heli-ski, LLC Early Neutral Evaluation Opinion

Plaintiff Louise Ochoa and Defendant Columbia Mountain Heli-ski, LLC (CMH) appeared before the undersigned on February 22, 2010 for an Early Neutral Evaluation. At the request of the parties, the undersigned is providing this opinion on the enforceability of the waiver that Defendant is invoking.

Statement of Facts

Alfredo Ochoa, the deceased husband of Plaintiff, heli-skied and Defendant on three occasions: in 2007, 2008 and 2009. Heli-skiing is physically challenging and, as such, Defendant catered to experienced clientele. Ochoa was experienced at skiing.

Ochoa signed a waiver on each of the three occasions in which he skied with Defendant. The waiver stated in large, bold font at the top: "By singing this document, you will waive your legal rights, including the right to sue." The waiver begins with an acknowledgement that helicopter skiing has the usual risks and dangers associated with skiing, as well as additional risks, which include avalanche. Avalanche is the first listed additional risk and the paragraph on avalanche provides that they can frequently occur and may be caused by natural forces or "the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." On January 10, 2009, Ochoa signed the waiver, with Miguel Mendez, his bilingual secretary, as his witness.

Ochoa was fluent in Spanish and although he was limited in reading English, he could speak and understand spoken English. On occasions where he did not understand a word or phrase, he would ask his wife or others around him for the English translation. In general, he did not request his wife to translate entire documents for him, but just specific phrases or sentences in contracts. Ochoa generally had contracts sent to his office, where Mendez could review them.

On March 12, 2009, Ochoa and eight other skiers followed CMH ski guide Joyce Long down the Bay Street run. A sudden avalanche occurred and although rescue efforts began immediately, the nine skiers, including Ochoa, died of suffocation from the impact of the snow.

Legal and Factual issues Presented to the Evaluator

1. Validity and Scope of Waiver

Strengths and Weaknesses of Parties' Contentions and Evidence

Validity

Plaintiff contends that the waiver is unenforceable because it is contrary to Civil Code sec. 1668, which provides that contracts intended to exempt from liability for injury to another are against public policy. Defendant responds that the validity of waivers is not open to question.

Civil Cod sec. 1668 invalidates exculpatory provisions that involve the "public interest." *Randas.* In the seminal case on sec. 1668, the Columbia Supreme Court did not define "public interest," but listed characteristics that would lead to a finding of a public interest. *Tunkl.* the characteristics include a business of a type that is generally suitable for public regulation; the performance of a service of great importance to the public; the party providing the service holds itself out as willing to provide the service for any member of the public who seeks it; the party invoking exculpation has an advantage of bargaining strength against anyone seeking its services; and the person seeking the services is placed under the control of the provider of services, subject to the risk of the provider's carelessness. *Tunkl.* The court *Tunkl* found that a hospital-patient contract clearly falls within the public interest. Exculpatory agreements in the recreational sports context do not implicate the public interest. *See Allan, Buchanan.*

Here, unlike a hospital, a recreational mountain ski company is not a business that is generally suitable for public regulation. Defendant's company does not perform a service of great importance to the public, as it provides ski tours for only that portion of the public that is experienced and adventurous enough to heli-ski. Defendant caters

only to experienced clientele and, as such, does not hold itself out as willing to perform services for all members of the public. Defendant did condition its services on the signing of waivers, placing it at a position of bargaining strength for those clients who desired to ski with them. This, in turn, would place clients under the control of Defendant, subject to the risk of Defendant's negligence. However, the balance of these characteristics weigh heavily against a finding of public interest. The characteristics pertaining to bargaining power will be found in any contract where a waiver of liability is required before services will be rendered. As the case law suggests, such contracts include those for sports and recreation activities, in which releases of liability are generally upheld. *See Randas, Hulsey, Allan, Pritikin.* Although Plaintiff may be able to meet the final two characteristics pertaining to bargaining power, Plaintiff will not be able to meet any of the other *Tunkl* characteristics because Defendant's business is not one that falls within the public interest. Unless Plaintiff can meet the *Tunkl* characteristics, Civil Code sec. 1668 will not apply and will not invalidate the waiver. As Columbia courts have held, waivers for recreational sports do not implicate the public interest.

Scope

Plaintiff also contends that the waiver is unenforceable because a reasonable person would not understand "negligence" to mean that the waiver absolves Defendant from failing to take measures available and understood to be necessary for the safety of its clients. Defendant asserts that its waiver is simple and clear.

The Columbia court of Appeal has found that waivers need not achieve perfection, but must be clear and unambiguous. *Pritikin.* The scope of a waiver is determined by the express language of the waiver, which should be applicable to the particular negligence of the defendant, but need not list every possible specific act of negligence. *Pritikin.* The alleged negligence resulting in injury to the plaintiff must be reasonably related to the object or purpose for which the waiver is given. To determine the purpose of a waiver, courts look at the language of the waiver and not the inherent risks of the underlying activity. *Id.* Where a waiver stated that it applied to injures suffered while on the fitness center's premises, "whether using exercise equipment or not," defendant's liability for plaintiff's injury from a falling TV was deemed validly waived. *Id.*

In this case, the waiver stated that the signer assumed the risk of avalanches, which may be caused by natural forces or by the "failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." The coroner's report indicated that ski guide Hans Moser and a group of twelve skiers preceded Ochoa and his group of skiers down the same run, finding it to be in excellent condition. Ski guide Joyce Long accompanied Ochoa and the eight other skiers down the run and testified that the snow suddenly shifted below her skis. There was no warning sound and no time to move and ski out. Although the Columbia Avalanche Association issued a bulletin on February 17, 2009 warning of a weak layer in the snow caused by rain that could lead to a dangerous avalanche event, CMH guides conducted their own assessment of the snow stability and determined that there was no instability.

Plaintiff is arguing that Defendant failed to take necessary measures for the safety of its clients, and thus Defendant's actions in this case are not covered by the scope of the term "negligence" in the waiver. However, the facts indicate that CMH conducted an assessment and determined the runs to be safe. This is evidenced by the fact that the same guides who conducted the assessment were themselves willing to ski down the Bay Street run, and did in fact ski it on the same day as Ochoa. Defendant's guides failed to predict the avalanche and failed to ascertain the danger of skiing down the run that day. Defendant's waiver clearly and unambiguously provided that clients waived their right to sue regarding death or injury resulting from avalanche that could be caused by CMH's failure to predict the safety of the terrain or the occurrence of an avalanche. This is precisely the negligence that Plaintiff is asserting here. By the plain language of the waiver, Plaintiff waived his right to sue for Defendant's inability to adequately assess or predict the occurrence of an avalanche.

Conclusion

In conclusion, Defendant has a very strong argument for the enforceability of the waiver as to its validity and scope. There is little to no legal or factual support for Plaintiff's argument on this issue.

2. Voidability of Waivers as to Hazardous Activities

Strengths and Weaknesses of Parties' Contentions and Evidence

Plaintiff next contends that the waiver is voidable because waivers cannot exempt responsibility for negligence in ultra-dangerous activities like helicopter skiing. Defendant responds that the validity of waivers as to risky recreational activities is not open to question.

In *Randas,* the Columbia Court of Appeal pointed out that no case applying the *Tunkl* factors had found sec. 1668 public interest grounds in the sports and recreation field that would require invalidating a waiver. Further, the court rejected plaintiff's arguments that "death defying" activities should be treated differently from other sports activities. The court found that dangerousness is not a T*unkl* characteristic and that releases had been upheld in both moderate and hazardous sports. *Randas.* Releases have been upheld as to skydiving, motorcycle racing, and mountain climbing. *See Randas and Hulsey*.

Here, the facts indicate that helicopter skiing is an inherently dangerous sport, as only helicopters can access the spots for skiing. Defendant's ski guide Moser asserted that even if everything possible is done to make the sport safe, there are still significant risks that remain. He stated that people who ski "at this level are aware of the risk." Although Plaintiff attempts to point to these inherent dangers in asserting that the waiver is voidable, there is simply no legal support for this contention. The Columbia case law is clear that participants in even hazardous sporting activities, such as skydiving, can validly waive their right to sue for injury. The hazardousness of the activity does not affect the validity of the waiver.

Conclusion

In conclusion, Columbia law and the facts of this case support Defendant's contention that the waiver is valid, despite the existence of a hazardous activity.

3. Plaintiff's Inability to Read English as Precluding Waiver

Strengths and Weaknesses of Parties' Contentions and Evidence

Plaintiff's final argument is that the waiver is not binding because Ochoa had a limited ability to read in English and CMH knew that Ochoa was not literate in English. Plaintiff asserts that Defendant's failure to translate the waiver for Ochoa renders it nonbinding. Defendant responds that Ochoa knew the risks of heli-skiing and signed three different waivers that affected his legal rights. Defendant contends that, absent fraud or excusable neglect, Ochoa could not set aside the waiver on the basis that he did not read it.

It is widely accepted that a party that has signed a written agreement cannot later disclaim the agreement by arguing that he did not read it or does not know its contents. *See Pritikin, Randas, Allan.* The party signing the waiver has a duty to read the agreement or to have it read to him. *See Pritikin, Randas, Allan.* This principle extends even to situations where a party is illiterate. *Randas.*

Here, Ochoa's limited ability to read English will not preclude the validity of the waiver, as Columbia case law places the burden on the signing party to discover the contents of the agreement he is signing. Under Columbia law, Ochoa had a duty to read the document, or have it read to him.

The issue here is whether this case falls within the limited circumstances where a defendant has a duty to inform the signing party of the exculpatory provisions in an agreement. These limited circumstances arise where an agreement is induced by fraud, misrepresentation, or where the party seeking to enforce the waiver knew or had reason to know of the other's mistake as to its terms. *See Pritikin, Allan, Randas.* The fraud or misrepresentation must be as to the contents of the waiver. *Allan.* In addition to fraud or misrepresentation, a plaintiff can set aside a waiver on the basis of excusable neglect, such as under circumstances where the plaintiff is precluded from taking the time to read the agreement. *Allan.*

In certain narrow instances, a defendant may have a duty to inform the plaintiff of an exculpatory clause. For instance, where a plaintiff signed a 2 page admission form for a single day use of a fitness room and the exculpatory clause was inconspicuously buried in small print on the back of the form, plaintiff's hasty and informal signing of the document was excusable. *Leon.* In such circumstances, the defendant should know that the plaintiff does not intend to sign what he is signing, and the defendant has a duty to bring the exculpatory clause to the attention of the signer. This duty may arise where the effect of the clause is contrary to the parties' normal expectations; the length and format of the contract is not conducive to the time available for reading and understanding it. *Pritikin.* The waiver of liability in recreational activities is customary and patrons of recreational activities should be aware that signing a release affects their legal rights. *Id.*

In this case, Plaintiff does not appear to be asserting fraud or misrepresentation. Even if Plaintiff were asserting these claims, the facts do not support a finding of either fraud or misrepresentation on the part of Defendant, as there is nothing to indicate that Defendant attempted to hid the contents of the waiver from its clients. On the contrary, every client was required to sign the waiver, with large and legible print, before every excursion with Defendant.

However, Plaintiff is asserting that Defendant knew Ochoa could not read English and this precluded Ochoa from understanding what he was signing. The facts of this case indicate that Ochoa could speak English reasonably well and that he and his Mexican group mates generally spoke English with Defendant's staff. Tom Weaver, Defendant's "greeter," did not recall any problems communicating with Ochoa in English. Weaver generally makes transportation and any other arrangements for clients and was able to speak to Ochoa and the rest of the group in English. Although the Mexican group generally spoke Spanish among themselves, none of Defendant's employees felt it necessary to translate the waiver for them because the group generally spoke English with Defendant's staff. Additionally, each member of the group, Ochoa included, was a successful businessman with considerable contact with the English language. Plaintiff, Ochoa's wife, admitted that Ochoa spoke English reasonably well and always managed to "get by." Thus, there is nothing in the facts to indicate that Defendant knew, or should have known, that Ochoa did not know English sufficiently well to sign the waiver.

Even if Defendant had reason to know that Ochoa was limited in English proficiency, the following considerations weigh against the imposition of a duty on Defendant to inform Plaintiff of the exculpatory provisions.

Here, Defendant did not present Ochoa with a lengthy form to be signed in a short amount of time. On the contrary, the waiver is only one page long, with large font, and was sent to Ochoa's office prior to the ski trip for his review. Defendant's policy is to mail the waiver to clients and the waiver is to be returned with payment. This process ensures that clients have ample time to review and understand the waiver before choosing to join the ski group. The exculpatory provisions are not in small font, or buried in any manner. The exculpatory provisions are actually bolded and in larger font then the rest of the waiver, putting all clients on notice that they are waiving their legal rights. Ochoa had plenty of time to review the document himself, or find someone, like Miguel, to read the document to him.

Additionally, Columbia case law provides that the waiver of liability in recreational activities is customary and patrons of recreational activities should be aware that signing a release affects their legal rights. This is true here, as Ochoa was a vociferous patron of recreational activities and signed waivers in most, if not all, of them. Ochoa went hunting in Montana and Texas and fly fishing in Wyoming. Each of these activities required a waiver of liability, and each recreational facility had on record a waiver of liability signed by Ochoa before he participated. Ochoa had previously signed two waivers for Defendant before participating in the same heli-ski tour as the one in the instant case. Thus, it cannot be said that Ochoa did not understand what document he was signing or that he was waiving legal rights.

Conclusion

In conclusion, Defendant has a very strong argument that the waiver is enforceable. Columbia case law places the burden on the plaintiff to read the agreement, or have it read to him, and Defendant did not have a duty to inform Plaintiff of the exculpatory provisions.

ENE Opinion Conclusion

The probable outcome if this case were to proceed to discovery and trial would be judgment in favor of Defendant, CMH.

FEBRUARY 2010

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

FILE

RETTICK v. FLOYD INDUSTRIES, LLC, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Applicant

From: Bram Fenton

Date: February 25, 2010

Re: **Rettick v. Floyd Industries, LLC, et al.**

We represent Floyd Industries, LLC, a manufacturer and seller of firearms, and Sandra Floyd. Floyd Industries is a limited liability company formed under Columbia law and located here in Columbia. Sandra Floyd is its owner.

Floyd Industries and Sandra Floyd were sued in the Tribal Court of the Taraconic Tribe by Orrin Rettick, the Tribe's Chief of Police, for products liability after one of Floyd Industries' handguns misfired and injured him. Ms. Floyd authorized us to seek a permanent injunction in federal district court to prohibit Rettick from prosecuting his products liability action in the Taraconic Tribal Court. Although she happens to be a member of the White Eagle Tribe, she didn't want to litigate in the Taraconic Tribal Court. Rettick is a prominent and popular member of the Taraconic Tribe, whose claim, in her view, is bogus or at least highly inflated, based on the misfiring of one of five handguns sold to a police force numbering more than 50 officers.

Rettick has filed a motion in federal district court, with a supporting memorandum of points and authorities, asking the court to dismiss or stay our action for a permanent injunction. Please draft a memorandum of points and authorities in opposition to Rettick's motion, making sure to follow the firm's instructions. Present our best arguments, and rebut each of Rettick's arguments, including any of his unsupported legal or factual assertions.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Associates

From: Executive Committee

Date: March 1, 2007

Re: **Memoranda of Points and Authorities for Motions**

All memoranda of points and authorities in support of, or in opposition to, motions must include the following sections and conform to the following guidelines.

The *introduction* must state the nature of the motion to be supported or opposed, and must briefly summarize the argument to be presented.

The *factual background and procedural history* must (1) contain the facts supporting our client's position and take account of the facts supporting our opponent's position, dealing with all such facts persuasively, in our client's favor, and (2) concisely indicate the major procedural events.

The *argument* must analyze the applicable law and bring it to bear on the facts, urging that the law and facts support our client's position. It must respond to, or anticipate, the attacks that our opponent has made, or may reasonably be expected to make, against our client's position. It must display a subject heading summarizing each claim and the outcome that it requires, such as, "Because Smith's Statement Is Hearsay and Does Not Come Within Any Exception, It Is Inadmissible," and should *not* state a bare conclusion, such as, "Smith's Statement Is Inadmissible."

The *conclusion* must state, in simple fashion, that the court should grant our client's motion, or deny our opponent's motion, for the reasons set forth in the argument.

Each memorandum of points and authorities will have its cover, table of contents, and table of authorities prepared by clerical and non-attorney staff prior to filing.

Megan La Plante, Esq.
La Plante & La Plante, LLP
700 Williams Road
Green River, Columbia 99906
(555) 567-6700

Attorneys for Plaintiff
Orrin Rettick

IN THE TRIBAL COURT OF THE TARACONIC TRIBE
SILVER OAK RESERVATION, STATE OF COLUMBIA

ORRIN RETTICK,	)	
Plaintiff,	)	**No. 13-368**
v.	)	**COMPLAINT FOR DAMAGES:**
FLOYD INDUSTRIES, LLC, and	)	**PRODUCTS LIABILITY**
SANDRA FLOYD,	)	
Defendants.	)	
_____	)	

Orrin Rettick ("Rettick") hereby complains in tort against Floyd Industries, LLC, and Sandra Floyd, for products liability, alleging as follows:

1. Rettick is a member of the Taraconic Tribe, resident on the Silver Oak Reservation in the State of Columbia. He holds the position of Chief of Police for the Taraconic Tribe, overseeing the operations of a police force numbering more than 50 officers. In addition, he sits on the Tribal Council of the Taraconic Tribe as one of its five members.

2. Floyd Industries is not a member of the Taraconic Tribe, but is a limited liability company, formed under the law of the State of Columbia, and with its principal place of business in this state, engaged in the manufacture and sale of firearms. On information and belief, the owner of Floyd Industries is Sandra Floyd, who, on information and belief, is a member of the White Eagle Tribe.

3. In 2008, on land owned by the Taraconic Tribe within the Silver Oak Reservation, Rettick, as Chief of Police for the Taraconic Tribe, and Floyd Industries, through Sandra Floyd, entered into a contract under which Floyd Industries agreed to sell and Rettick agreed to buy five (5) nine-millimeter (9 mm.) semi-automatic handguns styled the "Model 9." Immediately thereafter, Floyd Industries, through Sandra Floyd, delivered

the handguns that were the subject of the contract to Rettick on land owned by the Taraconic Tribe within the Silver Oak Reservation.

4. On or about May 1, 2009, on land owned by the Taraconic Tribe within the Silver Oak Reservation, Rettick was seriously injured in the course of performing his duties as Chief of Police for the Taraconic Tribe when a Model 9 he attempted to fire exploded in his hand.

5. Floyd Industries and Sandra Floyd knew that the Model 9 would be bought and used without inspection for defects.

6. When it left the control of Floyd Industries and Sandra Floyd, the Model 9 was defective in design and/or manufacture.

7. At the time of Rettick's serious injury, Rettick was using the Model 9 in the manner intended by Floyd Industries and Sandra Floyd.

8. Rettick's serious injury was proximately caused by Floyd Industries and Sandra Floyd's defective design and/or manufacture of the Model 9.

9. Rettick's serious injury caused him loss in the amount of five million dollars ($5,000,000).

Wherefore, Rettick prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and specifically for damages in the amount of five million dollars ($5,000,000).

Date: December 28, 2009 La Plante & La Plante, LLP

by: *Megan La Plante*

Megan La Plante

Attorneys for Plaintiff Orrin Rettick

Bram Fenton, Esq.
Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906
(555) 357-1010

Attorneys for Plaintiffs
Floyd Industries, LLC, and Sandra Floyd

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and SANDRA FLOYD, Plaintiffs,	)	**No. Civ. 203-489 KMB**
v.	)	**COMPLAINT FOR**
ORRIN RETTICK, Defendant.	)	**PERMANENT INJUNCTION**

With the allegations that follow, Floyd Industries, LLC, and Sandra Floyd bring this action to permanently enjoin Orrin Rettick ("Rettick") from prosecuting a tort action for products liability that he brought against Floyd Industries and Sandra Floyd in the Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia, styled *Orrin Rettick v. Floyd Industries, LLC, and Sandra Floyd*, No. 13-368 (hereafter "the Tribal Court Products Liability Action"):

1. This Court has subject matter jurisdiction over this action for permanent injunction under 28 U.S.C. § 1331, inasmuch as it arises under the law of the United States bearing on the sovereignty of the Taraconic Tribe.

2. Venue in this District is proper under 28 U.S.C. § 1391(b) because Rettick resides herein.

3. Floyd Industries is a manufacturer and seller of firearms, formed as a limited liability company under the law of the State of Columbia and maintaining its principal place of business in this state, and is not a member of the Taraconic Tribe.

4. Sandra Floyd is the owner of Floyd Industries and a resident of the State of Columbia, and is not a member of the Taraconic Tribe.

5. Rettick is a member of the Taraconic Tribe, and resides within this District on the Silver Oak Reservation in the State of Columbia.

6. Rettick brought the Tribal Court Products Liability Action against Floyd Industries in the Tribal Court of the Taraconic Tribe, alleging, among other things, that: (a) Rettick held the position as Chief of Police for the Taraconic Tribe and sat on the Tribal Council of the Taraconic Tribe as one of its five members; (b) on information and belief, the owner of Floyd Industries is Sandra Floyd; (c) on information and belief, Sandra Floyd is a member of the White Eagle Tribe; (d) Rettick and Floyd Industries entered into a contract, on land owned by the Taraconic Tribe within the Silver Oak Reservation, pursuant to which Rettick bought and Floyd Industries sold certain handguns; and (e) Rettick suffered serious injury, on land owned by the Taraconic Tribe within the Silver Oak Reservation, as a result of a defect in one such handgun.

7. Because Floyd Industries and Sandra Floyd are not members of the Taraconic Tribe, the Tribal Court of the Taraconic Tribe lacks jurisdiction over the Tribal Court Products Liability Action.

8. Because the Tribal Court of the Taraconic Tribe clearly lacks jurisdiction over the Tribal Court Products Liability Action, Floyd Industries and Sandra Floyd have not presented the question of jurisdiction to the Tribal Court for its consideration.

Wherefore, Floyd Industries and Sandra Floyd request this Court, in the exercise of its equitable powers, to:

a. Permanently enjoin Rettick from prosecuting the Tribal Court Products Liability Action; and

b. Award Floyd Industries the costs of bringing this action for permanent injunction, as well as other and additional relief as this Court may determine to be just and proper.

Date: January 26, 2010 Morris, Fenton & Suzuki, LLP

by: Bram Fenton

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Orrin Rettick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and	)	
SANDRA FLOYD,	)	**No. Civ. 203-489 KMB**
Plaintiffs,	)	**MOTION OF DEFENDANT**
v.	)	**ORRIN RETTICK TO DISMISS**
ORRIN RETTICK,	)	**OR, IN THE ALTERNATIVE,**
Defendant.	)	**FOR A STAY**
_____	)	

Orrin Rettick moves this Court to enter an order against Floyd Industries, LLC, and Sandra Floyd, as follows:

1. To dismiss Floyd Industries and Sandra Floyd's action for permanent injunction because their complaint fails to state a claim upon which relief can be granted; or, in the alternative,

2. To stay Floyd Industries and Sandra Floyd's action for permanent injunction because they have failed to exhaust their remedies in the Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia.

This motion is supported by the pleadings on file and by a memorandum of points and authorities submitted herewith.

Date: February 16, 2010

Respectfully submitted,
La Plante & La Plante, LLP

by: Megan La Plante

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Attorneys for Defendant Orrin Rettick

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and	)	
SANDRA FLOYD,	)	**No. Civ. 203-489 KMB**
Plaintiffs,	)	**MEMORANDUM OF POINTS AND**
v.	)	**AUTHORITIES IN SUPPORT OF**
ORRIN RETTICK,	)	**MOTION OF DEFENDANT ORRIN**
Defendant.	)	**RETTICK TO DISMISS OR, IN THE**
	)	**ALTERNATIVE, FOR A STAY**

I. Introduction

In this action, Floyd Industries, LLC, a manufacturer and seller of firearms, and Sandra Floyd, its owner, are seeking to prevent Orrin Rettick ("Rettick"), the Chief of Police for the Taraconic Tribe and one of the five members of the Tribal Council of the Taraconic Tribe, from obtaining relief in the Tribal Court for the serious injury they have caused him. Floyd Industries and Sandra Floyd's claim is that, notwithstanding the tribe's inherent sovereignty, the tribal court lacks jurisdiction.

Because, as will appear, Floyd Industries and Sandra Floyd's claim is meritless, Rettick now moves this Court to dismiss Floyd Industries and Sandra Floyd's action because their complaint fails to state a claim upon which relief can be granted, or, in the alternative, to stay their action because they have failed to exhaust their remedies.

II. Factual Background and Procedural History

In 2008, on land owned by the Taraconic Tribe within the Silver Oak Reservation in the State of Columbia, Rettick, the Tribe's Chief of Police, entered into a contract with Floyd Industries, through its owner Sandra Floyd, to buy five Model 9 semi-automatic 9- mm. handguns that Floyd Industries manufactured, and received delivery of the handguns there immediately thereafter.

Floyd Industries and Sandra Floyd have not denied that the Model 9 handgun was defective in design and manufacture.

On or about May 1, 2009, also on land owned by the Taraconic Tribe, Rettick was seriously injured in the course of performing his duties as the Tribe's Chief of Police when a Model 9 handgun manufactured and sold by Floyd Industries and Sandra Floyd exploded in his hand and caused him serious injury, resulting in $5 million in damages, as he attempted to fire the weapon. As the Tribe's Chief of Police, Rettick was, and is, responsible for the safety of all persons within the Silver Oak Reservation, both members and nonmembers of the Taraconic Tribe. He also sat, and sits, on the Tribal Council of the Taraconic Tribe as one of it five members.

Floyd Industries and Sandra Floyd have not denied that the design and manufacturing defect tainting the Model 9 caused Rettick's serious injury and resulting substantial damages.

On December 28, 2009, Rettick filed an action in the Tribal Court of the Taraconic Tribe seeking $5 million in damages for the serious injury caused by Floyd Industries and Sandra Floyd's defective Model 9.

On January 26, 2010, unable to deny their liability but attempting to avoid it, Floyd Industries and Sandra Floyd filed this action seeking a permanent injunction to prohibit Rettick from prosecuting his action in the Tribal Court of the Taraconic Tribe, claiming that the Tribal Court lacks jurisdiction.

Because Floyd Industries and Sandra Floyd's claim is specious, Rettick has today filed a motion to dismiss, or at least stay, their action.

III. Argument

A. This Court Should Dismiss Floyd Industries' Action for Failure to State a Claim Because the Tribal Court Unquestionably Has Jurisdiction.

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss an action for "failure [by the plaintiff] to state a claim upon which relief can be granted."

The Taraconic Tribe possesses "inherent power as a sovereign." *Montana v. United States* (U.S. Sup. Ct., 1981). As a consequence, it enjoys "inherent adjudicatory authority." *Nevada v. Hicks* (U.S. Sup. Ct., 2001). Its authority is broadest where the claim in question arises on tribal land and involves members of the tribe. *Cf*. *Nevada v. Hicks*, *supra* (implying that authority is limited as to nontribal members).

In their complaint in this Court, Floyd Industries and Sandra Floyd have admitted: (1) Floyd Industries' owner, Sandra Floyd, is a member of a tribe; (2) Rettick is a member of a tribe; and (3) Rettick's claim arose on tribal land.

In light of Floyd Industries' and Sandra Floyd's admissions, the Tribal Court of the Taraconic Tribe unquestionably has jurisdiction over Rettick's claim against them. In all of its particulars, Rettick's claim arose on tribal land—specifically, land owned by the Taraconic Tribe within the Silver Oak Reservation—and involves members of a tribe—specifically, Rettick and Sandra Floyd, in entering into the contract for the purchase of the Model 9, in receiving delivery of the Model 9, and causing and suffering serious injury through the Model 9.

Floyd Industries and Sandra Floyd may be expected to invoke the so-called rule of *Montana v. United States* in an attempt to argue against the Tribal Court's jurisdiction, but any such attempt is doomed to failure.

Given a reasonable reading, the *Montana* "rule" is that tribal courts lack jurisdiction over claims arising on nontribal land and involving non-tribe members. Certainly, the Supreme Court has never held—contrary to what Floyd Industries and Sandra Floyd may be expected to argue—that a tribal court lacks jurisdiction *whenever* a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal land. *See Smith v. Salish College* (U.S. 15th Cir. Ct. App., 2004).

As such, the *Montana* "rule" is inapplicable to the claim here, which arose on tribal land and involves members of a tribe.

But even if the *Montana* "rule" were applicable, the result would be no different. By its own terms, the *Montana* "rule" contains two exceptions, one for claims based on "consensual relationships," the other for claims based on conduct that "threatens" a

tribe's "political integrity, . . . economic security, or . . . health or welfare." *Montana v. United States*, *supra*. Each exception is satisfied here. As Floyd Industries and Sandra Floyd have admitted, Rettick's claim is based *both* on a contract under which "Rettick bought and Floyd Industries sold certain handguns" *and also* on conduct that resulted in "serious injury" to Rettick as "Chief of Police for the Taraconic Tribe." Complaint ¶ 6. By coming to the Silver Oak Reservation and by staying to enjoy its protection, Floyd Industries and Sandra Floyd have subjected themselves to the jurisdiction of the Taraconic Tribe.

In sum, because Floyd Industries and Sandra Floyd have effectively conceded the jurisdiction of the Tribal Court of the Taraconic Tribe, they have necessarily failed to state a claim upon which relief can be granted.

B. At The Very Least, This Court Should Stay Floyd Industries' Action Because It Failed to Exhaust Its Remedies in the Tribal Court.

Because the Taraconic Tribe possesses "inherent power as a sovereign," *Montana v. United States*, *supra*, Floyd Industries and Sandra Floyd must present their claim denying the jurisdiction of the Tribal Court of the Taraconic Tribe to the Tribal Court itself in the first instance. *See National Farmers Union Ins. Cos. v. Crow Tribe* (U.S. Supreme Ct., 1985); *cf*. *Nevada v. Hicks*, *supra*.

Not only have Floyd Industries and Sandra failed to exhaust their remedies in the Tribal Court, by their own admission, they have admittedly not even invoked those remedies. Complaint ¶ 8.

It follows that, at the very least, Floyd Industries' and Sandra Floyd's action must be stayed. *See National Farmers Union Ins. Cos. v. Crow Tribe*, *supra*; *cf*. *Nevada v. Hicks*, *supra*.

IV. Conclusion

For the reasons stated, in light of the undoubted jurisdiction of the Tribal Court of the Taraconic Tribe, this Court should grant Rettick's motion and accordingly dismiss Floyd Industries' and Sandra Floyd's action because their complaint fails to state a claim upon which relief can be granted, or, in the alternative, should stay their action because they have failed to exhaust their remedies in the Tribal Court.

Date: February 15, 2010

Respectfully submitted,

La Plante & La Plante, LLP

by: Megan La Plante

Megan La Plante

Attorneys for Defendant Orrin Rettick

FEBRUARY 2010

California
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Examination

Performance Test B

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Montana v. United States

United States Supreme Court (1981)

By a tribal regulation, the Crow Tribe of Montana ("Tribe") sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on land within the reservation owned by nonmembers. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by nonmembers within the reservation.

To resolve the conflict between the Tribe and the State of Montana, the United States, proceeding as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment establishing that the Tribe has sole authority to regulate hunting and fishing within the reservation. The District Court denied relief. The Court of Appeals reversed. We granted certiorari and now reverse.

Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or its members, it has no power to regulate fishing and hunting by nonmembers of the Tribe on land within the reservation owned by nonmembers.

The Tribe's "inherent sovereignty" does not support its regulation of nonmember hunting and fishing on nonmember land within the reservation. Through their original incorporation into the United States, the tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers. Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.

As a general proposition, the inherent sovereign powers of a tribe do not extend to the activities of nonmembers. To be sure, tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over nonmembers on their reservations, even on nonmember land. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members. A tribe may also retain inherent power to exercise civil authority over the

conduct of nonmembers on nonmember land within its reservation when that conduct threatens the political integrity, the economic security, or the health or welfare of the tribe.

No such circumstances, however, are involved in this case. Nonmember hunters and fishermen on nonmember land do not enter into any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such nonmember hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.

Reversed and remanded.

National Farmers Union Ins. Cos. v. Crow Tribe

United States Supreme Court (1985)

Leroy Sage ("Sage"), a Crow Tribe minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot. The school is located on land owned by the State of Montana within the boundaries of the Crow Reservation. Through his guardian, Sage initiated a lawsuit in the Crow Tribal Court against the School District, a political subdivision of the State, alleging damages of $150,000.

Thereafter, the School District and its insurer, National Farmers Union Insurance Companies, petitioners herein, commenced this litigation in the District Court for the District of Montana seeking an injunction. That court was persuaded that the Crow Tribal Court had no jurisdiction over a civil action against a nonmember and entered an injunction against further proceedings in the Tribal Court under 28 U.S.C. § 1331, which grants district courts jurisdiction over actions "arising under" federal law. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction.

We granted certiorari to consider whether the District Court properly entertained petitioners' request for an injunction under § 1331.

We agree with the District Court that § 1331 encompasses the federal question whether the Tribal Court exceeded the lawful limits of its jurisdiction. Since petitioners contend that federal law has divested the Tribe of its power to compel a nonmember property owner to submit to the civil jurisdiction of the Tribal Court, it is federal law on which petitioners rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.

Although the District Court was right in its understanding of the scope of its jurisdiction under § 1331, it was wrong to exercise that jurisdiction when it did. As a matter of comity, exhaustion of Tribal Court remedies is required before petitioners' claim may be entertained by the District Court. The existence and extent of the Tribal Court's

jurisdiction should be determined in the first instance by the Tribal Court. It follows that the federal action should be stayed pending the development of the Tribal Court proceedings.

Reversed and remanded.

Nevada v. Hicks

United States Supreme Court (2001)

This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

Hicks is a member of the Fallon Paiute-Shoshone Tribes of western Nevada and lives on the Tribes' reservation.

After game wardens of the State of Nevada executed state court and tribal court search warrants to search Hicks's home for evidence of an off-reservation crime, he filed suit in the Tribal Court against the game wardens, in their individual capacities, and the State of Nevada, alleging trespass and abuse of process. The Tribal Court held that it had jurisdiction over the claims, and the Tribal Appeals Court affirmed.

Nevada and the game wardens then sought, in Federal District Court, a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The District Court granted Hicks summary judgment on that issue and held that the game wardens would have to exhaust their qualified immunity claims in the Tribal Court.

The Ninth Circuit affirmed. It concluded that the fact that Hicks's home is on tribe-owned reservation land was sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land.

Having granted certiorari, we conclude that the Ninth Circuit erred.

First, the Tribal Court did not have jurisdiction to adjudicate the game wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. As to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. The rule of *Montana v. United States* (U.S. Supreme Ct., 1981)—that, where nonmembers are concerned, "the exercise of tribal power" is limited to "what is necessary to protect tribal self-government or to control internal relations"—

applies both to the land belonging to the tribe or its members and also to land that belongs to nonmembers. The land's ownership status is only one factor to be considered in determining whether the protection of tribal self-government or the control of internal relations calls for the exercise of tribal power. While tribal ownership of land may sometimes be dispositive, it is not alone enough to support regulatory jurisdiction over nonmembers. The ultimate question always remains, in *Montana*'s words, whether "the exercise of tribal power" is "necessary to protect tribal self-government or to control internal relations." The answer here is plain: Tribal authority to regulate state officers in executing process related to the off-reservation violation of state laws is not essential to tribal self-government or internal relations. The State's interest in executing process is considerable, and it no more impairs the Tribes' self-government than federal enforcement of federal law impairs state government. We hasten to add that our holding is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general.

Second, the game wardens were not required to exhaust their qualified immunity claims in the Tribal Court before bringing them in the Federal District Court. Because under the facts presented the Tribal Court's lack of jurisdiction is clear, adherence to the tribal exhaustion requirement of *National Farmers Ins. Union Cos. v. Crow Tribe* (U.S. Supreme Ct., 1985) would serve no purpose other than delay and is therefore unnecessary.

Reversed and remanded.

Smith v. Salish College

United States Court of Appeals for the Fifteenth Circuit (2004)

This case arises from a one-vehicle rollover. James Smith was a student at Salish College ("the college"), a community college operated by the Salish Tribe of the Flathead Reservation (“the tribe”) as a tribal entity, and was not a member of the tribe. One day, he was driving a college dump truck, as part of a college vocational course, on United States Highway 93, a public road on nontribal land, as it ran through the Flathead Reservation. At the unfortunate time, for reasons still unclear, Smith caused the dump truck to veer sharply left. With great presence of mind and agility of body, Smith leapt from the truck unharmed. The truck was not as lucky, ending up a total loss after rolling over several times.

The college brought an action against Smith in tribal court, claiming that he negligently drove the dump truck.

In advance of trial in tribal court, Smith moved for dismissal of the college’s action against him on the ground that the tribal court lacked jurisdiction.

At the same time, Smith filed suit in the United States District Court for the District of Franklin, seeking an injunction against the college’s prosecution of its claim against him in the tribal court on the same lack of jurisdiction ground.

The tribal court subsequently denied Smith’s motion to dismiss, concluding it had jurisdiction.

The federal district court proceeded to dismiss Smith’s suit, arriving at the same conclusion.

Smith appealed from the federal district court’s dismissal. We reverse.

Any time a tribal court wishes to exercise jurisdiction over a nonmember of the tribe, the framework in *Montana v. United States* (U.S. Supreme Ct., 1981) must be satisfied. *See Nevada v. Hicks* (U.S. Supreme Ct., 2001). A tribal court's adjudicative authority is,

at most, only as broad as the tribe's regulatory authority. *Hicks*. Thus, while *Montana* dealt with a tribe's regulatory authority, it applies equally to a tribe's adjudicative authority.

Thus, *Montana* sets the framework: The general rule is that tribal courts lack jurisdiction over claims against nonmembers. There is an exception for claims against nonmembers who enter into consensual relationships with the tribe or its members. There is another exception for claims against nonmembers based on conduct that threatens the tribe's political integrity, economic security, health, or welfare. Albeit rebuttable by proof of one of these two exceptions, the presumption is that a tribal court does *not* have jurisdiction.

In *Hicks*, the Supreme Court's reasoning implies that *Montana*'s general rule that tribal courts lack jurisdiction over claims against nonmembers applies *whenever* a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal land. To be sure, the *Hicks* Court limited its "*holding*" to the "question of tribal court jurisdiction over state officers enforcing state law." But the fact that the *Hicks* Court chose not to hold that the *Montana*'s general rule applies *whenever* a claim is asserted against a nonmember does not mean that we are powerless to do so. We are confident when the Supreme Court revisits the question, it will give the same answer as we do here.

With that said, *Montana*'s first exception is inapplicable here. To be sure, Smith may be deemed to have entered into a consensual relationship with the tribe by enrolling in the college, a tribal entity. But the focus of the inquiry is not so much whether Smith had entered into a consensual relationship with the tribe, but whether the claim against him—negligently driving a dump truck—is contractual in nature. It is not. Instead, it sounds in tort, specifically the tort of negligence.

Montana's second exception is also inapplicable. We do not disagree that the tribe's health and welfare requires maintaining public safety. But the conduct that the college alleges against Smith in its claim—negligently driving a dump truck—seems hardly capable of threatening public safety other than minimally. Were it otherwise, any tort claim against a nonmember would come within a tribal court's jurisdiction, and the exception would swallow the rule. Nor do we disagree that the tribe's political integrity

is a matter of highest moment to the tribe. But to require the college to sue Smith, if at all, outside of tribal court would not erode the tribe's political integrity. The college's claim against Smith presents a simple tort issue and nothing more.

Reversed.

Answer 1 to Performance Test B

Plaintiffs Floyd Industries and Sandra Floyd's Memorandum of Points and Authorities In Opposition to Defendant Orrin Rettick's Motion to Dismiss the Injunction Action

I. Introduction

Defendant Rettick's motion to dismiss or stay Floyd Industries' action for a permanent injunction should be denied, and the court should proceed to a full hearing on the injunction. Mr. Rettick's motion should be denied because the Taraconic Tribe has no adjudicatory civil authority over nontribe members Floyd Industries or Sandra Floyd, and because the claim at issue neither arises out of a consensual contractual relationship, nor does it affect the Tribe's ability to regulate its own politics, health, safety or welfare. Furthermore, a stay should not be granted because the facts clearly show that the Taraconic Tribe lacks jurisdiction, and a stay to bring the issue in tribal court would only cause undue delay.

II. Factual Background and Procedural History

Facts

Plaintiff Floyd Industries, LLP is a manufacturer and seller of firearms, formed in the state of Columbia, and having its principal place of business in Columbia. Defendant Sandra Floyd is the president of Floyd Industries. Sandra Floyd is a member of the White Eagle Tribe, which is a different tribe from the Taraconic Tribe. Neither Floyd Industries nor Sandra Floyd are members of the Taraconic Tribe. The only member of the Traconic Tribe in this case is defendant Rettick, who is the Chief of Police for the tribe, and also sits as one of five members on the tribal council (Rettick Complaint in Tribal Court).

Underlying this injunction suit is a products liability claim by Rettick against Floyd Industries. Rettick contracted to purchase five handguns from Floyd Industries, for a

tribal police department with over 50 members (*Note - we should secure an affidavit from Sandra Floyd for this fact and attach it to this memo, as it wasn't in our complaint for an injunction). Based on the alleged malfunction of only one of the five handguns, Rettick has made a products liability claim in Taraconic Tribal Court. Rettick alleges the contract was executed on Tribal Land, but as of yet has provided the court no substantive proof of this fact (Rettick Tribal Court Complaint).

Rettick asserts in his Motion to Dismiss that Floyd has admitted that the contract did indeed occur on tribal land (Floyd Complaint for Injunction). However, this is factually untrue as can be determined by Floyd's Complaint, which does not mention this issue at all (Floyd Complaint for Injunction). Rettick also points out that Floyd has not denied any of Rettick's product liability claims. But this is simply because Floyd contests the Tribal Court's jurisdiction, and so has not answered the complaint in tribal court (Floyd Complaint for Injunction).

Procedural History

Rettick's Complaint for products liability was filed in Taraconic Tribal court on Dec 28, 2009. Based on the fact that the Tribal court lacks jurisdiction, Floyd's complaint for permanent injunction was filed in this District Court on Jan 26, 2010. Rettick's motion to dismiss or stay the motion for injunction was filed on Feb 16, 2010, along with a memorandum of point and authorities. Floyd now opposes Rettick's motion to dismiss.

III. Argument

A. Because the Taraconic Tribe has no civil adjudication jurisdiction over nonmembers Floyd Industries or Sandra Floyd, the Court should deny Rettick's motion to dismiss the action for an injunction

Generally the inherent sovereign powers of a tribe do not extend to nonmembers, for both the regulatory authority of the tribe (Montana v. US, US Supreme Ct.) and civil adjudication (Nevada v. Hicks, Smith v. Salish). A reasonable reading of "nonmembers" includes members of other tribes, as membership in another tribe logically has no more

connection to jurisdiction by a foreign tribe than being a citizen of one state has connection to jurisdiction by a different state. Suggesting that "all tribes are the same" for jurisdictional purposes would be an offensive, discriminatory, and incorrect reading of Montana. And in all of the cases relevant, the persons the court considered "tribe members" were members of the same tribe (Montana, Hicks, Smith). When a claim is against a nonmember, it raises a presumption that the Tribal Court lacks jurisdiction, and the party claiming jurisdiction bears the burden of rebutting this presumption (Smith v. Salish, US Court of Appeals, 15 Circuit). The fact that the claim arose on tribal land will not be sufficient in itself to support jurisdiction (Nevada v. Hicks). This rule applies to a claim against a state government official (Nevada v. Hicks), and has been persuasively extended to a nonmember private citizen (Smith).

In this case, neither Floyd Industries nor Sandra Floyd is a member of the Taraconic Tribe. The fact Sandra Floyd is a member of the White Eagle Tribe is not relevant under a reasonable reading of "nonmembers" – White Eagle Tribe is a completely distinct tribe from the Taraconic. Though Floyd Industries and Sandra Floyd are private parties, the Montana rule applies to private parties, as extended by Smith, which is the only persuasive authority on point. This raises a presumption that the Tribal Court lacks jurisdiction, and plaintiff Rettick bears the burden of defeating this presumption.

Rettick has alleged in the Tribal Court complaint that the contract was executed on tribal land. Rettick argues in his memorandum of points and authorities that Floyd has admitted that the contract occurred on tribal land, but upon examination of Floyd's complaint for an injunction, this factual assertion is revealed to be false. Floyd admitted no such fact in its complaint. Additionally, even if the transaction occurred in tribal land this will not in and of itself meet Rettick's burden of establishing Tribal Court Jurisdiction. Under Hicks (extended to private parties by Smith), the fact the claim arose on tribal land is not enough to establish jurisdiction when a nonmember is involved in the claim.

Because Sandra Floyd and Floyd Industries are not members of the Taraconic tribe, the Tribal Court lacks jurisdiction over them.

A1. Because the products liability claim against Floyd arises out of tort, and not contract, the Tribe does not have jurisdiction under the "consensual relationship" exception to the Montana Rule

A tribe may regulate the activities on nonmembers who enter into consensual relationships with the tribe (Montana). However, contrary to what Rettick asserts in his Memorandum of Points and Authorities, the focus of consensual relationship inquiry is not whether a contract was made, but whether the claim was contractual in nature (Smith). The Smith court found that the consensual relationship exception didn't apply because the claim at issue in that case was the tort of negligence. In Smith, a state college brought an action against a tribe member for negligent destruction of a college truck. Though the use of the property arose out of a contract between the tribe member and the College, the court held that the consensual relationship exception did not apply because the underlying claim was a negligence tort claim.

In this case, a contract to buy handguns was formed between Floyd Industries and Rettick. However, Rettick's complaint does not arise from this contract, but rather is a classic tort complaint alleging strict liability for a defective product (Rettick Tribal Court Complaint). The fact a contract was made is not even essential to this claim, as products liability applies equally to all foreseeable plaintiffs, even those not in privity. Thus, like the negligence claim in Smith, this claim is a "simple tort issue and nothing more."

Because Rettick's claim is a tort claim, consensual relationship jurisdiction doe not exist.

A2. Because a rare handgun defect does not affect the Tribe's political integrity, economic security, or health and welfare, the self-regulation exception to the Montana Rule does not apply

In an exception to the Montana rule, a tribe may exercise civil authority over nonmembers when that conduct threatens the political integrity, the economic security, or the health or welfare of the tribe (Montana), or is "necessary to protect tribal self-government or control internal relations." (Hicks). For a tort claim, there must be more

than a minimal threat to public safety, or else jurisdiction over torts would be unlimited. For example, the negligent driving of a dump truck does not pose a sufficient threat to create tribal jurisdiction (Smith). Nor does the fact that a police officer is involved in the claim create a sufficient basis to find an exception for public safety (Hicks).

In this case, the tort claim alleges only the failure of one of five handguns sold to a police force with over 50 members. The fact that one of five handguns may be defective has minimal effect on the ability of the police force to regulate tribal safety. It is rare that police officers even have to draw guns, let alone use guns. Even if [it] became common knowledge that one gun out of five guns sold to a police force of 50 officers was defective, it would have no discernable effect on crime. Thus, this is just the type of "minimal threat" to public safety that the Smith court worried would extend nearly unlimited jurisdiction if it was sufficient basis for the Tribal Court to hear the claim.

Secondly, the fact that the Tribal Chief of police has been injured [does not] affect tribal self-government or control over internal relations. The Taraconic Tribal police force is large – with over 50 members, and certainly there is a deputy chief that can take over any of Rettick's duties while he recovers from his injuries. Policing is an inherently risky profession, and police departments are well trained in how to continue effective operations even when commanding officers have been injured.

Lastly, the fact that Rettick allegedly sits as one of five members on the tribal council does not affect the tribe's control over self-regulation. From Rettick's complaint, which states that Rettick still sits on the council, it appears Rettick can still perform his duties. Even if not, there are four other members of the council, and surely there are other members of the tribal government who can sit in Rettick's place. Like the tribal police department, the tribal government must have procedures in place to deal with the illness or injury of a tribal council member without compromising tribal government.

Because the alleged tort does not pose a threat to public safety or to the Tribe's self-government, Rettick cannot claim the Tribal Court has jurisdiction under the self-regulation exception to the Montana Rule.

B. Because the facts are clear that the Taraconic Tribe lacks jurisdiction, the court should deny defendant's motion for a stay

In some cases, exhaustion of remedies in the Tribal Court are required before a party can bring a claim in Federal Court (National Farmers Union v. Crow Tribe). However, when the facts are clear that the Tribal Court lacks jurisdiction, the exhaustion requirement of Farmers v. Crow does not apply, and would serve no purpose but to delay (Nevada v. Hicks). Unlike the first holding in Hicks on tribal court jurisdiction, this second holding was not expressly limited to state police. And, regardless, Smith persuasively extends the holdings of Hicks to private actors.

The Hicks exception is met as the facts in this case are clear that the Tribal Court lacks jurisdiction. Because Floyd Industries and Sandra Floyd are not tribe members, a presumption arises that the Tribal Court lacks jurisdiction. Defendant Rettick has merely alleged the contract was formed on tribal land, and even if this fact was true, this alone is not sufficient to meet Rettick's burden or [for] proving jurisdiction. The "consensual relationship" exception does not apply as this is a tort action, not a contract action, and the malfunction of one handgun and injury to one police officer does not affect the Tribe's ability to govern itself.

Because the facts clearly show the Tribal Court lacks jurisdiction, the court should deny defendant Rettick's motion to stay the action pending resolution by the Tribal Court.

IV Conclusion

Because the Taraconic Tribal Court generally lacks jurisdictions over nonmembers, and neither the consensual relationship exception nor the self-regulation exception applies, the court should deny defendant Rettick's motion to dismiss the complaint for an injunction. Because the facts are clear that the Tribal Court lacks jurisdiction, the court should also deny defendant Rettick's motion to stay the action pending resolution in Tribal Court. The court should proceed promptly to a full hearing on plaintiff Rettick's complaint for an injunction.

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Attorneys for Plaintiffs Floyd Industries, LLC, and Sandra Floyd

Memorandum of Points and Authorities in Opposition of Defendant's Motion to Dismiss or, in the Alternative, for a Stay
No. 203-CV-489 (KMB)

I. Introduction

Orrin Rettick ("Rettick"), the Chief of Police for the Taraconic Tribe and one of the five members of the Tribal Council, moves this court to dismiss the motion for a permanent injunction filed by Sandra Floyd ("Floyd") and Floyd Industries, LLC ("Floyd Industries") or, in the alternative, for a stay. Floyd and Floyd Industries now files its opposition to Rettick's motion. Specifically, Floyd and Floyd Industries (collectively "the plaintiffs") maintain that the complaint states a claim for relief because the Taraconic Tribal Court lacks jurisdiction over the products liability action filed by Rettick. In addition, the plaintiffs argue that due to the clear lack of jurisdiction in the Tribal Court, exhaustion of remedies in front of the Tribal Court was unnecessary. Accordingly, the plaintiffs respectfully request that this court deny the motion to dismiss and the motion for a stay.

II. Factual Background and Procedural History

Rettick is a member of the Taraconic Tribe, serving as the Chief of Police for the Tribe as well as a member of the Taraconic Tribal Council. Rettick is a resident of the Silver Oak Reservation in the State of Columbia. Floyd Industries is a limited liability company, formed under the law of the State of Columbia, involved in the manufacture and sale of firearms. Sandra Floyd is the owner of Floyd Industries. Neither Floyd

Industries nor Floyd is a member of the Taraconic Tribe. Neither Floyd Industries nor Floyd is a resident of the Silver Oak Reservation. In 2008, within the Silver Oak Reservation and within the state of Columbia, Rettick, as Chief of Police, entered into a contract with Floyd Industries, represented by Floyd. The contract involved the sale of five nine-millimeter semi-automatic handguns in the style "Model 9." In compliance with its contractual duties, Floyd Industries immediately delivered the handguns to Rettick. On or about May 1, 2009, Rettick was seriously injured during the course of performing his duties as Chief of Police. He alleges that his injury occurred while attempting to fire his Model 9 handgun. Rettick was the only individual injured during this incident.

On December 28, 2009, Rettick filed his complaint agains Floyd Industries and Floyd in the Tribal Court of the Taraconic Tribe. See Rettick v. Floyd Industries, LLC and Sandra Floyd (No. 13-368). Specifically, Rettick alleged that the Model 9 handgun was defectively designed and manufactured by Floyd Industries. Rettick seeks damages in the amount of $5,000,000 (five million dollars). Before any action was taken by the Tribal Court, on January 26, 2010, Floyd Industries and Floyd filed its complaint for a permanent injunction in this court, the U.S. District Court for the Western District of Columbia. Specifically, the plaintiffs have requested that this court permanently enjoin Rettick from prosecuting this products liability action in the Tribal Court and award other relief that the court determines to be just and proper. On February 15, 2010, the defendant, Rettick, filed a motion to dismiss the plaintiffs' complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. In the alternative, Rettick request that this court stay the injunction proceedings until the plaintiffs had exhausted their remedies before the Tribal Court.

III. Argument

This court had jurisdiction over this case pursuant to 28 U.S.C. 1331, which grants federal district courts jurisdiction over actions "arising under" federal law. Because the issue before this court involves resolution of the question of whether the Tribal Court has jurisdiction over the products liability action filed by Rettick, jurisdiction before this court is proper. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe.* There are two motions

before the court at the present time: a motion to dismiss and a motion to stay. Both should be denied.

A. *Because Neither Floyd nor Floyd Industries is a Member of the Taraconic Tribe, the Tribal Court Lacks Jurisdiction Over Rettick's Complaint.*

The Taraconic Tribal Court lacks jurisdiction over the products liability action filed by Rettick because neither Floyd Industries nor Floyd is a member of the Taraconic Tribe. "As a general proposition, the inherent sovereign powers of a tribe do not extend the activities of nonmembers." *Montana v. United States.* This is the general rule set forth by the Supreme Court in 1981 in *Montana v. United States.* Although *Montana* discussed a tribe's regulatory authority, the court further held in *Nevada v. Hicks* that a tribe's adjudicative authority extends only as far as its regulatory power. Thus, the same limit to a tribal court's regulatory authority applies to its adjudicative authority.

Here, the case brought by Rettick is against two parties – Floyd Industries and Floyd. Neither entity is a member of the Taraconic Tribe. The defendant argues that his claim involves "members of a tribe – specifically, Rettick and Sandra Floyd." This is misleading. Floyd is a member of the White Eagle Tribe – an entirely unrelated and different tribe to the Taraconic Tribe. The fact that Floyd is a member of a tribe is immaterial to this inquiry. The issue is whether the Taraconic tribe has the "inherent sovereignty" to exercise jurisdiction here. Just as that sovereignty generally cannot be exercised over a nontribal member it cannot be exercised over the member of a wholly different tribe. The inherent sovereignty of one tribe is not coextensive with the inherent sovereignty of every other tribe. There are absolutely no allegations in any of the defendant's pleadings of any involvement whatsoever of the White Eagle Tribe in this matter. The focus of this inquiry must be whether the litigants are members of the particular tribe exercising jurisdiction over the case. As a result, since Floyd is not a member of the Taraconic Tribe, she is a nonmember just as Floyd Industries. Accordingly, the "presumption" remains that the Tribal Court does not have jurisdiction over Rettick's action. *Smith v. Salish.*

The defendant argues that the rule as articulated by *Montana* does not mean that the tribal court lacks jurisdiction whenever a claim is asserted against a nonmember. He contends that the Supreme Court has not foreclosed the possibility of tribal jurisdiction over a claim that arises on tribal land and, accordingly, the *Montana* rule is inapplicable. Although the court did reserve judgment on the issue of whether a tribal court could exercise jurisdiction over nonmembers in general, the plaintiffs maintain that its reasoning in *Montana* and *Hicks* implies that an exercise in jurisdiction based entirely on where the claim arose would be improper. *Smith.* In *Montana,* the court articulated the general rule, subject to two exceptions further discussed below, that the powers of a tribe do not extend to activities of nonmembers. The implication of its holding is that the rule applies whether the claim arose on tribal or nontribal land. *Smith.* In fact, in *Hicks,* the court specifically reversed the Ninth Circuit's finding that the fact that the Hicks home, where the search warrant was executed, was on tribe-owned land was insufficient to support tribal jurisdiction over civil claims against nonmembers. Although the court limited its holding in *Montana,* the implication from *Montana* and *Hicks* is clear. *Smith* ("We are confident when the Supreme Court revisits this question, it will give the same answer as we do here."). Accordingly, the plaintiffs urge this court to hold that the Tribal Court cannot exercise its jurisdiction over nonmembers even when the claim arose from incidents on tribal land.

However, even without such a finding by this court, the rule articulated in *Montana* is still dispositive. The defendant argues in his motion papers that the tribe's "authority is broadest where the claim in question arises on tribal land and involves members of the tribe." However, there is absolutely no legal authority for such a claim. As he must, the defendant cites to contrary Supreme Court authority which indicates that the tribe's jurisdiction is limited as to nontribal authorities. Specifically, the court in *Montana* held that "the exercise of tribal power" is limited to "what is necessary to protect tribal self-government or to control internal relations." The exercise of jurisdiction beyond such matters is "inconsistent with the dependent status of the tribes." Twenty years after its decision in *Montana,* the Supreme Court held that the ownership status of the land is "only one factor to be considered" in whether a tribal court can exercise jurisdiction. *Hicks.* This element is not always dispositive of the question of jurisdiction. Rather the "[u]ltimate question … [is] whether 'the exercise of tribal power' is 'necessary' to protect

tribal self-government control internal relations." *Hicks.* As the court in *Smith* stated, "[a]ny time a tribal court wishes to exercise jurisdiction over a nonmember of the tribe, the framework in *Montana v. United States* … must be satisfied." (citations omitted). That framework is not satisfied here.

In this case, the defendant has made no argument that the exercise of jurisdiction over this products liability action is necessary for the tribe's self-government or internal relations control. This case involves the alleged accidental misfiring of a handgun sold by a nonmember to a member of the Tribe. It does not implicate any internal tribal relation issues. In fact, no other member of the Tribe, other than Rittick, was injured during this incident. Again, the fact that Floyd is a member of the White Eagle Tribe is irrelevant. In fact, her membership in a tribe necessarily creates an inter-tribal issue and not an internal one. In addition, issues of self-government are not present. Simply because Rettick sits on the Tribal Council does not implicate issues of self-government. The sale of five handguns to the Taraconic Tribe does not threaten or impede the ability to the Tribe to govern itself in any way. Rather, Rettick's claim "presents a simple tort issues and nothing more." *Smith.* The exercise of tribal power is not essential [to] the tribe's ability to self-govern or control internal relations. As a result, the presumption remains that the tribal court does not have jurisdiction. See *Smith.*

Accordingly, the defendant's assertions that Floyd Industries and Floyd have not denied that the handgun was defective in design and manufacture or that it caused Rettick's injuries is irrelevant. The plaintiffs have no reason to deny these allegations before the Tribal Court. Since the Tribal Court is without jurisdiction and the proceedings before this court do not involve the merits of Rettick's action, no such denials are necessary. Rather, denials of any such allegations are proper only in a court with jurisdiction. That court, as argued above, is not the Taraconic Tribal Court.

1. *Because Rettick's Claim Sounds in Tort, the Consensual Relationship Exception to the Montana Rule is Inapplicable.*

The Supreme Court in *Montana* articulated two exceptions to the presumption of lack of jurisdiction. First, tribal courts maintain jurisdiction over nonmembers who enter into

consensual relationships with the tribe or its members. *Montana.* This exception, however, is inapplicable to Rettick's claim.

The Fifteenth Circuit in *Smith* held that this inquiry focuses not on whether a consensual relationship existed between the parties, but rather whether the claim asserted against the nonmember arises from such a relationship. In *Smith,* the court held that although the defendant had a consensual relationship as a student of the plaintiff-college, the claim asserted against the defendant was not "contractual in nature." Rather, the court held that the claim, negligent driving, sounded in tort. That analysis is highly relevant to the inquiry before this court. Although the plaintiffs do admit that they consensually entered into a contract with Rettick and the tribe for the sale of five handguns, there is no allegation that that contract was breached in any way. In fact, the contract between the parties was entirely complete at the time of the incident. Rather, Rettick brings a products liability action against Floyd and Floyd Industries, arguing that the handguns were defectively designed and manufactured. This is a classic tort action. To establish a prima facie case for this tort does not require proof of any consensual relationship between the parties. In fact, if Rettick were to have sold this gun to a third party, that third party could allege the same suit against Floyd and Floyd Industries without the existence of any such consensual relationship. A contractual relationship between Rettick and Floyd and Floyd Industries is not an essential element to the tort action brought by Rettick. In reality, it is wholly irrelevant. As a result, it cannot justify the exercise of jurisdiction by the Tribal Court in this matter.

2. *Because the Sale of Five Guns Does Not Threaten the Health, Safety or Political Integrity of the Tribe, the Second Exception to the Montana Rule is Inapplicable.*

The court carved out a second exception in its decision in *Montana.* The court found that a tribal court may exercise jurisdiction over "the conduct of nonmembers on nonmember land within its reservation when the conduct threatens the political integrity, the economic security, or the health or welfare of the tribe." *Montana.* The defendants argue that the sale of the handguns by Floyd Industries threatens the "health or welfare

of the tribe." However, as described below, this exception is inapplicable to the case at bar.

Although Rettick suffered "serious injury", the injury to one Tribe member by the alleged acts of a nonmember cannot be sufficient for the exercise of jurisdiction. The exception carved out in *Montana* permits tribes to maintain public safety. However, the sale of five handguns is not a threat to public safety or the health and welfare of its members. There are 50 officers in the Tribal Police department. Each officer presumably carries a gun. Floyd Industries sold only five handguns to Rettick and only one of those five allegedly misfired. The resulting injury affected one tribal member. Rettick appears to argue that, because he is "responsible for the safety of all persons within the Silver Oak Reservation," that the health and safety of the Tribe is implicated by his injuries. However, this is not the logical extension of the exception articulated by the Supreme Court. Rettick's status as a police officer for the Tribe, and the Chief at that, does not inherently implicate the health and safety of the entire Tribe. If this argument were correct, it would mean that any time the Chief of Police was injured by any action of a nonmember, the health and safety of the Tribe would be threatened. Moreover, as stated above, Rettick is one of 50 police officers on the Tribe's police force. Each one of the remaining 49 officers was available to keep order and safety in the Tribe. In fact, there are no allegations that the Tribe suffered any safety or health injuries. In fact, the Tribe itself suffered no injuries whatsoever. Rettick was the only individual injured by the alleged misfiring of the gun. The connection to the health and welfare of the Tribe to the incident at issue is tangential at best. In fact, Rettick's claim "seems hardly capable of threatening public safety other than minimally." *Smith.*

Furthermore, just as the Fifteenth Circuit articulated in *Smith,* if this exception permitted any tort claim to be brought against a nonmember, then the exception would certainly "swallow the rule." *Smith.* If every time a piece of equipment purchased by a tribal member from a nonmember breaks or is allegedly faulty, according to Rettick, a claim could be brought against the nonmember. Every time any tribal member was injured by any act taken by a nonmember, that claim could be brought in tribal court. Such a result is not sustainable given the court's jurisprudence in *Montana* and *Hicks.* Although admittedly the injury to Rettick is more serious than any property damage to a dump

truck as in *Smith,* the analysis in *Smith* is still applicable. The injury was to one individual -- it was not inflicted on a mass scale and it did not affect the Tribe in any way other than to impact one of its members. As articulated by *Smith,* that the Tribe is impacted by injury in a minimal way -- in this case by injury to one of its members – cannot be sufficient to justify the exercise of jurisdiction by the Tribal Court. Given the lack of any overall threat to the health or safety of the Tribe, the plaintiffs maintain that the second exception is likewise inapplicable to this case.

Although not explicitly argued in his brief, Rettick appears to implicitly argue that as a member of the Tribal Council his injury threatened the political integrity of the Tribe. This argument must fail for the same reason the health and safety argument does. Rettick's status as a Tribal Council member does not give rise to a threat against the political integrity of the Tribe. The injury to Rettick was completely unrelated to his activities as a member of the Tribal Council. The ability of the Tribal Council to retain political control over the Tribe was not threatened in any way. Although the Tribal Council has only five members, the injury to one Council member can certainly not threaten the political integrity of the entire Tribe. Such an argument is wholly unsupported by law or the facts of this case. Accordingly, it must be rejected.

The arguments presented by the defendant with regards to the first and second exceptions are not sufficient to rebut the presumption that the Tribal Court does not have jurisdiction. This presumption operates to deprive the Tribal Court of jurisdiction. Accordingly, the plaintiffs respectfully request that the defendant's motion to dismiss be denied.

B. *Because the Tribal Court's Lack of Jurisdiction is Clear, Exhaustion of the Plaintiffs' Remedies Before the Tribal Court is Not Required.*

In the alternative, the defendant requests that this court stay the proceedings before it until the plaintiffs have exhausted their remedies before the Tribal Court. In *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* the Supreme Court held that, although the District Court had jurisdiction pursuant to section 1331, the court should not have exercised its jurisdiction over the matter before it. Rather, the court held that the Tribal

Court should, in the first instance, determine whether it has jurisdiction over the claim. As a result, as a matter of comity, the court found that litigants seeking declaratory or injunctive relief in federal court based on jurisdictional grounds must first exhaust their remedies before the Tribal Court.

The defendant contends that the exhaustion requirement is applicable here. However, Rettick fails to mention the court's decision in *Hicks* and its alteration to the exhaustion requirement. There, the Court held that, if the lack of jurisdiction by the Tribal Court is clear, the litigants need not adhere to the exhaustion requirement articulated in *National Farmers.* Specifically, the court held that mandating such exhaustion, even when the result is clear, "would serve no purpose other than delay and is therefore unnecessary." *Hicks.*

As articulated in paragraph 8 of the plaintiffs' complaint, the plaintiffs did not exhaust their remedies in Tribal Court because that court clearly lacks such jurisdiction. As articulated above, the Tribal Court cannot properly exercise jurisdiction in this case. The defendant urges this court to ignore the *Montana* rule, but the *Montana* rule is essential to the court's inquiry. It is not necessary for this court to find that the Tribal Court is deprived entirely of jurisdiction over a nonmember. Rather, this court's decision need only rest on the issue of whether the exercise of jurisdiction implicates notions of self-government and internal relations. As stated above, it clearly does not. Furthermore, the only way the Tribal Court can exercise jurisdiction is if the defendant provides sufficient evidence to rebut the presumption of nonjurisdiction. The defendant utterly fails to do so in this case. First, the products liability claim brought by Rettick is not based on any consensual relationship between the parties. It is an action sounded only in tort -- there is absolutely no allegation that Floyd Industries or Floyd breached its contract to Rettick. Second, the misfiring of one gun injuring one member of the tribe is insufficient to constitute a threat to the "health and safety" or political integrity of the Tribe. Accordingly, the presumption against the exercise of jurisdiction remains in place.

The record is clear in this case. The Tribal Court has absolutely no basis by which to assert jurisdiction over this matter. The defendant's arguments to the contrary are

unavailing for the reasons stated above. As a result, the plaintiffs are under no obligation to exhaust their claims before the Tribal Court. Accordingly, the plaintiffs respectfully request that the defendant's motion for a stay be denied.

IV. Conclusion

For the reasons stated above, the plaintiffs respectfully request that the court deny Rettick's motion to dismiss or, in the alternative, for a stay.

Date: February 25, 2010.
Respectfully submitted,

Bram Fenton, Esq.