DID EQUINE LIABILITY ACTS SAVE THE HORSE INDUSTRY?

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There is an old cowboy saying that "it is not enough to know how to ride; he must also know how to fall." Although this saying is not meant to be literal, it maintains its applicability because it is true. Odds are, people who are around horses often—either for work or recreation—will at some time get hurt as a result of this interaction. Handling horses can be a dangerous activity. Horses, although considered domesticated, are still animals with minds of their own.[1] These animals maintain a strong herd mentality and a developed flight instinct at perceived dangers.[2] These instincts, combined with the fact that horses often weigh over one thousand pounds, run at speeds of up to forty miles an hour, and have an arsenal of dangerous reactions—including the ability to bite, kick, buck, rear, and trample—make equine activities a risky endeavor.[3]

It is estimated that, in the United States, there are 23,000 people under the age of twenty injured in equestrian related accidents each year.[4] The most

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1. *See* Heidi Walson, *Detailed Discussion of the Equine Activity Liability Act*, MICH. STATE UNIV. DETROIT COLL. OF LAW, ANIMAL LEGAL & HIST. CTR. (2003), http://www.animallaw.info/articles/dduseala.htm.

2. Jennifer Dietrich Merryman, *Bucking the Trend: Why Maryland Does Not Need an Equine Activity Statute and Why It May Be Time to Put All of These Statutes Out to Pasture*, 36 U. BALT. L.F. 133, 133 (2006).

3. *Id.*; Children's Safety Network, *Equestrian Safety Fact Sheet*, MARSH FIELD CLINIC, 1 (May 2005), http://www.marshfieldclinic.org/proxy/MCRF-Centers-NFMC-nccrahs-resources-factssheets-equestrianSafetyMay2005.1.pdf.

4. Children's Safety Network, *supra* note 3.

common injuries include cuts, fractures, sprains, internal injuries, and concussions.[5]

Considering the potential for danger, it may seem unwise to even approach a horse. There are only 5.6 injuries for every ten thousand equine participants under sixteen years old, however, only 3.9 for every ten thousand adult participants.[6] It is true that the severity of injuries in equine activities is higher than many other sports;[7] however, equine participants find that the benefits outweigh the risks.[8] Just like participants in other types of recreational activities that are associated with a high degree of risk—such as snowboarding, skiing, and white water rafting—most equestrians think that the experience is worth the potential injury.[9]

Proof that Americans are willing to overlook the danger is demonstrated by the fact that approximately thirty million people in the United States participate in equestrian activities each year.[10] The equine industry in the United States is not only widely enjoyed, it is also highly profitable.[11] Equestrian activities have a $102 billion effect on the United States economy annually.[12] Equine professions directly employ 460 thousand people full time.[13] The industry plays an important role in the national economy and in the lives of Americans.[14] As any industry with this sort of inherent danger, however, there are unavoidable accidents—often resulting in lawsuits.[15]

This note will examine the results of these inevitable equine lawsuits. The note will study the development of case law and the formation of equine liability laws that have been enacted to protect the industry. Part I of this note will look at the progression of liability that led to the formation of equine liability laws. Part II will observe the elements and application of successful equine liability laws including waivers, wording, posted signs, and common exceptions to

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5. *Id.*
6. *Id.*
7. *See id.*
8. *See National Economic Impact of the U.S. Horse Industry*, AM. HORSE COUNCIL, http://www.horsecouncil.org/national-economic-impact-us-horse-industry (last visited Sept. 28, 2011) [hereinafter AM. HORSE COUNCIL] (showing the size and popularity of the United States' horse industry).
9. Kathleen Tabor, *Benefits and Liabilities of Equine Industry*, 40 MD. B. J. 51, 54 (2007) [hereinafter *Benefits and Liabilities*].
10. Children's Safety Network, *supra* note 3.
11. *See* AM. HORSE COUNCIL, *supra* note 8.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See, e.g.*, *Benefits and Liabilities*, *supra* note 9, at 52–3 (discussing the law surrounding Maryland equine activity).

equine owner's limited liability. Finally, Part III examines problems with the current equine liability laws.

I. PROGRESSION OF LIABILITY THAT LED TO THE FORMATION OF EQUINE LIABILITY LAWS

Traditionally most states have handled equine liability under the tort law theories of contributory negligence and comparative negligence.[16] Contributory negligence barred recovery if the injured party's negligence contributed to his or her injury.[17] Under this negligence theory, the equine industry was protected from many frivolous lawsuits.[18] Contributory negligence categorized most equine accidents as occurring during an activity that employed "assumption of risk" principles.[19] "Assumption of the risk" means that a participant understands that equine activities are dangerous and that there exists the possibility of an accident when choosing to participate.[20] Thus, a participant under this theory cannot hold an owner responsible.[21] As such, the participant could only guarantee recovery by proving gross negligence.[22]

Gross negligence most often included a participant being injured by an animal that the owner knew had a "propensity" for violent behavior.[23] This propensity for violence did not include what courts deemed normal animal behavior—such as biting, rearing, kicking, and bucking—as a regular animal reaction.[24] For example, as early as 1894, and in what is still considered good case law today, the court in *Reed v. Southern Express Company* found that a horse owner who had tied his horse on the street was not liable to a passerby who walked too close and was bitten.[25] This court found that if the owner had known, or should have known, that the horse had a predisposition to bite then it would have been negligent to leave the animal unattended.[26] However, this horse had no prior incidents of biting passersby.[27] Therefore, in order to recover, the plaintiff would

16. Walson, *supra* note 1.
17. *Id.*
18. *See id.*
19. *See id.*
20. Merryman, *supra* note 2, at 134.
21. *See id.*
22. *Benefits and Liabilities*, *supra* note 9, at 53.
23. *See, e.g.*, Reed v. S. Express Co., 22 S.E. 133, 133 (Ga. 1899).
24. *See id.*
25. *Id.*
26. *Id.*
27. *Id.*

need to show that the owner of the animal knew the animal was abnormally violent or that the animal had a habit for the particular injurious behavior.[28]

This kind of tort law was beneficial to the horse industry and other activities that maintained a certain amount of inherent risk. In fact, if the general tort law had not been altered, there may have been no need for states to develop equine liability laws. This was not the case, however.[29]

From the 1950s to the 1990s, many states moved away from the traditional contributory negligence theory to a comparative negligence theory.[30] Comparative negligence is more generous in allowing a plaintiff to recover damages.[31] This tort theory allows the participant to recover a certain percentage even if the participant contributed to his or her own injury.[32] As a result of this new standard, equine litigation significantly increased as at fault participants hoped to recover due to the new more favorable standards.[33] The increased litigation led to higher insurance premiums for equine owners and participants, threatening the viability of the equine industry by making it a considerably more expensive business or hobby.[34]

Many states recognized that the equine industry was valuable to the state's economy and citizens.[35] In an attempt to help the threatened industry, forty-four states adopted equine liability laws in the 1990s.[36] The purposes of these acts are stated in the language of many state statutes. For example, the Colorado Act is representative of many equine liability acts, beginning:

> The general assembly recognizes that persons who participate in equine activities . . . may incur injuries as a result of the risks involved in such activities. The general assembly also finds that the state and its citizens derive numerous economic and personal benefits from such activities. It is, therefore, the intent of the general assembly to encourage equine activities . . . by limiting the civil liability of those involved in such activities.[37]

As the statute suggests, such acts are meant to shift the burden from the equine professionals back to the participant by reapplying the "assumption of the

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28. *See id.*

29. *See generally* Walson, *supra* note 1 (stating that the majority of U.S. States have modified the common law of equine liability by adopting equine liability acts, which limit liability to equine owners).

30. Merryman, *supra* note 2, at 136.

31. Walson, *supra* note 1.

32. *Id.*

33. *See* Merryman, *supra* note 2, at 136.

34. *Id.*; Walson, *supra* note 1.

35. *See id.*

36. *Id.*

37. COLO. REV. STAT. § 13-21-119(1) (2011).

risk" theory.[38] The new standards eased the burdens on many equine professionals, as was intended.[39] These professionals no longer had to worry about being held liable for many of the unavoidable injuries that were inherent in activities that involve somewhat unpredictable animals.[40] Equine statutes largely helped to alleviate some of the difficulties of the newly adopted comparative negligence standards.[41]

II. ELEMENTS AND APPLICATION OF SUCCESSFUL EQUINE LIABILITY LAWS

In practice, not all equine activity laws and interpretations have been consistent and some are considerably more effective than others. Equine liability acts are state laws and, as such, the elements included vary from state to state.[42] Effective equine laws contain many factors, including an understandable warning on a well-placed, well-worded sign.[43]

One mechanism that many equine liability acts do not require, but is important for guarding against liability, is a signed contract or waiver of liability.[44] These are beneficial in the event of a dispute. Although a handshake and oral agreement can suffice to settle disputes in the horse business, a written contract is helpful, and often preferred, in the event of a legal dispute involving an accident.[45]

Most of these waivers contain some sort of exculpatory clause.[46] An exculpatory clause is essentially a waiver of liability.[47] Courts have traditionally disfavored exculpatory clauses, holding that they are against public policy and are partially responsible for creating careless institutions.[48] In the equine indus-

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38. *See* 4 AM. JUR. 2D *Animals* § 82 (2009); *e.g.* COLO. REV. STAT. § 13-21–119(1) (2009).

39. Walson, *supra* note 1.

40. *Id.*

41. *See generally id.*

42. *See id.*

43. *See, e.g.*, IOWA CODE § 673.3 (2011); COLO. REV. STAT. § 13-21-119(5)(a) (2011).

44. Kathleen J.P. Tabor, *Mediation and Arbitration Clauses in Equine Contracts: the Importance of Resolving Conflicts While Maintaining Mutually Beneficial Relationships*, 22 ENT. & SPORTS LAW. 18, 18 (2004) [hereinafter *Mediation and Arbitration*].

45. *Id.* at 18, 23.

46. *Benefits and Liabilities*, *supra* note 9, at 54.

47. BLACK'S LAW DICTIONARY 566 (6th ed. 1990).

48. *See generally* Harris v. Walker, 519 N.E.2d 917, 919 (Ill. 1988) (stating that public policy strongly favors the freedom to contract, and therefore, exculpatory clauses that "shift the risks of one's own negligence to another contracting party . . . are not favored and must be strictly construed against the benefitting party.").

try, however, exculpatory clauses have been fairly successful.[49] To be effective these waivers should have "clear, unambiguous, and explicit" language.[50] This means that the language should be clear English devoid of excessive legalese so that non-legal minded participants can understand what he or she is signing.[51] This language should outline the specific risks involved in equine activities so that the participant is able to make an informed decision.[52] Although courts have recognized unclear exculpatory clauses that release stables and owners of liability, it is best if the clause is in a "stand alone" document rather then buried in a stack of legal paperwork.[53]

The waiver containing the exculpatory clause should contain six essential elements: (1) a document fewer than two pages; (2) a detailed explanation of the risks of the activity; (3) an indemnity clause stating the amount a party is to be compensated in the result of an injury; (4) "state specific" language; (5) the time-frame that the waiver will cover; and (6) separate waivers pertaining to adults and children.[54] Documents that follow these criteria are much more likely to stand up in court.[55] The more specific and detailed the waiver, the better, because the entire document hinges on the participants understanding what he or she signed.[56]

Case law demonstrates the mixed usefulness of liability waivers often depends on the specificity of the waiver and the individual rider.[57] When the rider who signs the waiver is knowledgeable, courts tend to uphold the waiver of liability.[58] For example, in *Harris v. Walker*, the plaintiff—an experienced rider—rented a horse from the defendant stable.[59] After being bucked from the horse, the plaintiff sued the owner.[60] The court found that, even when there is

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49. *See, e.g.*, Beehner v. Cragun Corp., 636 N.W. 2d 821, 827 (Minn. Ct. App. 2001) (holding that "Minnesota recognizes the validity of exculpatory clauses, but they are strictly construed against the benefitted party.") (citations omitted).

50. *See, e.g.*, Cohen v. Five Brooks Stable, 159 Cal. Rptr. 3d 471, 478 (Cal. Ct. App. 2008).

51. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. d (2000); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784–85 (Colo. 1989).

52. *See generally Benefits and Liabilities*, *supra* note 9, at 54.

53. *Id.* (defining a stand-alone document as a document of "no more than two pages," separate from the participation agreement, and only contains the exculpatory clause).

54. *Id.*

55. *See id.*

56. *See* Heil Valley Ranch v. Simkin, 784 P.2d 781, 784–785 (Colo. 1989); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. d (2000).

57. *See* Harris v. Walker, 519 N.E.2d 917, 919–20 (Ill. 1988).

58. *See, e.g., id.*

59. *Id.* at 918.

60. *Id.*

broad language in a release, a rider assumes the obvious risks of riding by signing the release.[61] The court further found that falling from a horse should be an obvious risk to all but the "most inexperienced riders."[62] As such, the court found that "'the plaintiff will not be heard to complain of a risk which he has encountered voluntarily, or brought upon himself with full knowledge and appreciation of the danger.'"[63] Similarly—a different court—in *Young v. Brandt*, found that a rider who was very experienced in equine activities had assumed the risk as a "matter of law."[64] The court found that the plaintiff, as an "experience[d] and capable" rider, knew that stallions had a propensity to be unpredictable and that horses have the capability to buck and kick.[65] As such, the defendant was not liable because the plaintiff was completely aware of the possible danger.[66]

It is less clear whether courts will uphold the liability waiver where the rider is a minor or inexperienced.[67] Thus, it is even more important in these cases to have a clear understandable waiver.[68] An example of a court not upholding such a waiver is in *Dilallo v. Riding Safely, Inc.*[69] The court found that the release did not expressly relieve the lessee ranch of liability, and the plaintiff, a young rider, had not adequately been informed that her horse could change speeds on its own initiative.[70]

Due to the variety of court interpretations it is important to draft waivers correctly.[71] The most important thing that an equine professional can do when drafting or having a waiver drafted, is to make sure that the language is as specific as possible while still being understandable.[72] The clearer the language of the waiver, the more likely the court will find that the participant actually understood the risk.[73] An equine professional or experienced rider may think that it is ridiculous or obvious to put in a waiver that a horse may buck or unexpectedly change

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61. *Id.* at 920.
62. *Id.*
63. *Id.* (citing Vanderlei v. Heideman, 403 N.E.2d 756 (Ill. Ct. App. 1980) (citations omitted)).
64. Young v. Brandt, 485 S.E.2d 519, 522 (Ga. Ct. App. 1997).
65. *Id.* at 522–523.
66. *Id.* at 523.
67. *See generally* Dialallo v. Riding Safety, Inc., 687 So. 2d 353 (Fl. Dist. Ct. App. 1997).
68. *See Benefits and Liabilities*, *supra* note 9, at 51.
69. *See Dilallo*, 687 So. 2d at 357.
70. *Id.* at 354–356.
71. *See Mediation and Arbitration*, *supra* note 44, at 18.
72. *See id.*
73. *Benefits and Liabilities*, *supra* note 9, at 51, 54.

speeds. Case law has demonstrated that it is better when drafting waivers to err on the side of caution, however, and include anticipated risks.[74]

Many states have stipulations in their statutes that require the posting of signs to inform equine participants of the risk that they are engaged in.[75] Many of these statutes also contain specific language of where and how the sign should be placed.[76] An example of such a sign is in the Michigan Equine Liability Act, which states:

> An equine professional shall post and maintain signs that contain the warning notice set forth in subsection (3). The signs shall be placed in a clearly visible location in close proximity to the equine activity. The warning notice shall appear on the sign in conspicuous letters no less than 1 inch in height.[77]

There are also exact specifications for what the sign should say. For example, in Michigan, the sign must say:

WARNING

> Under the Michigan equine activity liability act, an equine professional is not liable for an injury to or the death of a participant in an equine activity resulting from an inherent risk of the equine activity.[78]

Whereas under the Iowa Code, the sign must say:

WARNING

> **Under Iowa Law, a domesticated animal professional is not liable for damages suffered by, and injury to, or the death of a participant resulting from the inherent risks of domesticated animal activities, pursuant to Iowa Code Chapter 673. You are assuming inherent risks of participating in this domesticated animal activity.**[79]

These wordings are typical of many equine liability statutes signs and liability waivers.[80]

Some states choose to include a non-exclusive list of risks that the legislature has determined are inherent.[81] For example, the Colorado Statute states:

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74. *Id.*

75. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1666 (West 2000); IOWA CODE § 673.3 (2011); COLO. REV. STAT. § 13-21-119(5)(a) (2011).

76. *See, e.g.*, *supra* note 75.

77. *See, e.g.*, MICH. COMP. LAWS § 691.1666; COLO. REV. STAT. § 13-21-119(5)(b).

78. MICH. COMP. LAWS § 691.1666(3).

79. IOWA CODE § 673.3.

80. *See id.*; MICH. COMP. LAWS ANN. § 691.1666(3); MASS. GEN. LAWS ANN. Ch. 128, § 2D(4)(d)(2) (West 2002). For a state by state summary of equine liability laws, *see Legal Information by State*, EQUINE LAND CONSERVATION RESOURCE, http://elcr.org/index_info .php (last visited Sept. 28, 2011).

> [T]hose dangers or conditions which are an integral part of equine activities . . . as the case may be, including, but not limited to: (I) The propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them; (II) The unpredictability of the animal's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals; (III) Certain hazards such as surface and subsurface conditions; (IV) Collisions with other animals or objects; (V) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others . . . .[82]

Florida, Massachusetts, and Ohio have similar lists in their equine liability statutes.[83] Other states, such as Wyoming, opted not to include such lists[84]—instead leaving it up to the courts to determine what constitutes an "inherent risk of equine activities."[85]

There are pros and cons to the open ended statutes and the list statutes. The open ended statutes probably are more efficient in the equine industry because they do not depend on statute drafters foreseeing all the possible risks associated with equine activities. Open ended statutes do sacrifice some of the predictability that is inherent among list statutes. Horse behavior is by nature unpredictable, however, thus making equine activities risky.[86] Open ended statutes are more compatible with this unpredictability, leaving it to the courts to decide if the risk is inherent.[87]

In spite of having a valid waiver, there are exceptions where the owner may still be liable under certain circumstances. One of these exceptions is for gross negligence.[88] Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[89] In the equine industry, "willful and wanton" behavior on the part of the owner is usually considered gross negligence and cannot be contracted away.[90] This "willful and wanton" behavior can consist of faulty tack—including: broken saddles and bridals that the owner knew were in disrepair and did not fix[91]—facilities such as stables or

81. *See, e.g.*, COLO. REV. STAT. § 13-21-119(2)(f) (2011) (defining specific inherent risks that are associated with equine activities).

82. *Id.*

83. *See* FLA. STAT. ANN. § 773.01(6) (West 2005); MASS. GEN. LAWS ANN. ch. 128, § 2D(a); OHIO REV. CODE ANN. § 2305.32.1(A)(7) (West 2010).

84. *See* WYO. STAT. ANN. § 1-1-122 (2009); Sapone v. Grand Targheem, Inc., 308 F.3d 1096, 1101 (10th Cir. 2002).

85. *Sapone*, 308 F.3d at 1101.

86. *See Benefits and Liabilities*, *supra* note 9, at 54.

87. *See Sapone*, 308 F.3d at 1101.

88. *See Benefits and Liabilities*, *supra* note 9, at 53–4.

89. Jennings v. Southwood, 521 N.W.2d 230, 239 (Mich. 1994).

90. *Benefits and Liabilities*, *supra* note 9, at 53–4.

91. Terrill v. Stacey, No. 265638, 2006 WL 473799, at *1 (Mich. Ct. App. Feb. 28, 2006); *see also* Lawson v. Dutch Heritage Farms, Inc., 502 F. Supp. 2d 698, 699 (N.D. Ohio 2007).

jumps that are intentionally in disrepair, and deliberate behavior meant to spook a horse in order to injure the rider.[92]

Thus, the negligence must be very severe to qualify as gross negligence.[93] For example, in *Terrill v. Stacey* the plaintiff argued that a defective bit (which is a piece of tack or equipment) was the "proximate cause" of her injury and that the defendant was "grossly negligent" when he failed to fix it correctly.[94] The court found that "gross negligence" was not indicated in this case, however, as such, granted summary judgment for the defendants.[95] This demonstrates that it is difficult to prove gross negligence. In order to prove that the owner's actions *were* a "wanton and willful" disregard, a plaintiff would need to show evidence that the defendant provided what he knew was a still broken piece of equipment, or some proof that the failure to correctly fix the tack directly caused the injury.[96]

One situation that could be a drastic case of "wanton and willful" disregard of care is the act of lighting fireworks beside a mounted horse.[97] A court has recognized that—although a bucking horse is an inherent risk of equine activity—a horse that bucks as the result of a lit firework is not an inherent risk.[98] The court must not only look at whether the risk is inherent, but also whether it was caused by wanton and willful disregard for the participant.[99]

There is also another common liability exception within equine liability acts.[100] This exception is often referred to as a "suitability exception."[101] The exception allows for recovery if the participant's ability is not assessed by the stable owner or instructor.[102] A sustainability exception is applicable when the stable or horse owner did not take the time to make a "reasonable" effort to account for the rider's equine abilities and match those abilities with a proper

92. *See* Cooperman v. David, 214 F.3d 1162, 1167 (10th Cir. 2000) (discussing whether setting fireworks off beside a mounted horse, causing a rider to fall from their horse, constituted inherent risks associated with horseback riding).

93. *See Jennings*, 521 N.W.2d at 239.

94. *Terrill*, No. 265638, 2006 WL 473799, at *1.

95. *Id.*

96. *Id.*

97. *Cooperman*, 214 F.3d at 1167.

98. *Id.*

99. *Id.*

100. *See generally* Terence J. Centner, *Equestrian Immunity and Sport Responsibility Statutes: Altering Obligations and Placing them on Participants*, 13 VILL. SPORTS & ENT. L.J. 37, 53–6 (2006).

101. *Id.* at 53.

102. *Id.*

mount.[103] In order for this exception to be applicable, however, a court must find that the failure to assess ability is causally related to the accident.[104]

For example, in *Rutecki v. CSX Hotels, Inc.*, the court found that there was an issue of fact in the case because the stable owner had failed to determine the level of skill of the rider.[105] Because the rider had heightened equestrian ability, however, the lack of assessment was not causally related to the injury and, thus, the sustainability exception did not apply.[106] In *Sapone v. Grand Targhee, Inc.*, the court determined that there was a valid question of fact regarding the causal link between the injury and the assessment of the rider because the instructor failed to give adequate instructions, seated a young, inexperienced rider on a horse that was too large, and did not properly assess the difficulty of the ride.[107] Thus, the suitability exception can be difficult to prove, especially when an experienced riders in involved, because there must be a failure to determine the rider's skill set and that failure must be the reason for the injury.[108]

III. PROBLEMS WITH THE CURRENT EQUINE LIABILITY LAWS

Although most states have adopted equine liability laws some states have chosen not to enact these statutes.[109] Currently, Nevada, Maryland, New York, and California are the only states without equine liability laws.[110] Some of the various reasons for not having adopted specialized liability laws include: a state's use of contributory negligence rather than comparative fault, the belief that adopting an equine act would not affect the cost of liability insurance, or the belief that equine liability laws are inherently flawed.[111]

Maryland, for example, has found no need to adopt equine liability laws because the state still operates under the contributory negligence theory.[112] The argument is that it is better "to develop a sound framework of general tort principles instead of having various sport specific statutes."[113] Instead, Maryland applies a regular assumption of the risk standard—assuming that the participants in sports such as skiing, hockey, skateboarding and equine activities know and vol-

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103. *Id.* at 53, 55.
104. Rutecki v. CSX Hotels, Inc., 290 Fed. App'x 537, 541 (4th Cir. 2008).
105. *Id.* at 540.
106. *Id.* at 540–542.
107. Sapone v. Grand Targhee, Inc., 308 F.3d 1096, 1104 (10th Cir. 2002).
108. *See id.*; *Rutecki*, 290 Fed. App'x at 541.
109. *See Legal Information by State*, *supra* note 80.
110. *See id.*
111. Merryman, *supra* note 2, at 137, 143; *Benefits and Liabilities*, *supra* note 9, at 53.
112. *Benefits and Liabilities*, *supra* note 9, at 52.
113. Merryman, *supra* note 2, at 133–34.

untarily undertake, the risk involved in the activity.[114] Proponents of using the common law, rather than a specialized liability law, argue that there is no way to foresee the many risky and potentially dangerous activities that people will choose to participate in.[115] As such, the common law assumption of the risk doctrine is arguably a better way to deal with this then a series of statutes.[116]

Under Maryland's assumption of the risk doctrine, an equine owner's only responsibility is to not increase the inherent risk already associated with the activity.[117] A state like Maryland arguably does not need an equine liability statute because the tort theory does essentially the same thing as an equine statute would without the exceptions—thus rendering the equine liability statute obsolete.[118]

Another reason that states are hesitant to adopt equine liability laws is they perceive little benefit in the terms of insurance rates.[119] One of the primary reasons that equine liability laws were enacted in the 1990s, was that the change in the tort law made it very expensive, and sometimes impossible, to insure horse related activities because of the perceived increase in the amount of equine related lawsuits.[120] This panic on the part of the insurance companies, however, has begun to subside.[121] Alabama enacted an equine liability law in 1993, North Carolina enacted an equine liability law in 1997, and Virginia enacted an equine liability law in 1991; these states saw little change in equine insurance policies prior to and following the inaction of equine liability laws.[122] North Carolina may not have experienced any difference, however, because the state still uses contributory negligence as tort law and, as such, would have already had the common law "assumption of the risk" principles in place.[123]

Finally, many states choose not to adopt equine liability laws because of some of the flaws associated with these statutes.[124] Two of these flaws are the

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114. Kelly v. McCarrick, 841 A.2d 869, 880 (Md. Ct. Spec. App. 2004); Merryman, *supra* note 2, at 141.

115. *See, e.g.*, Merryman, *supra* note 2, at 134.

116. *See id.*

117. *Id.* at 139; *Kelly*, 841 A.2d at 882.

118. *See generally* Merryman, *supra* note 2.

119. *Id.*

120. Walson, *supra* note 1.

121. *See* Merryman, *supra* note 2, at 143.

122. ALA. CODE § 6-5-337 (LexisNexis 2005); N.C. GEN. STAT. § 99E (2009); VA. CODE ANN. § 3.2-6203 (2011); Merryman, *supra* note 2, at 133, 143.

123. *See* Whisnant v. Herrera, 603 S.E.2d 847, 850 (N.C. Ct. App. 2004); Karen A. Blum, *Saying "Neigh" to North Carolina's Equine Activity Liability Act*, 24 N.C. CENT. L. J. 156, 164–65 (2001).

124. *See* Merryman, *supra* note 2, at 143; *see also* Blum, *supra* note 123, at 164; *Benefits and Liabilities*, *supra* note 9, at 51, 53.

inconsistency and perceived false security that the statutes provide.[125] Equine liability laws fluctuate from state to state and as such some states laws are far more effective than other states. Compounding this problem is the fact that equine liability acts were largely enacted in the 1990s, so they are fairly new and, as such, have relatively little case law.[126] As a result of these two factors, lawsuits under equine liability laws have been somewhat inconsistent, especially in determining who is and is not covered by the statutes.[127] Also, many opponents of equine liability laws argue that instead of protecting equine owners they instill a false sense of security.[128] The result of this false sense of security is that owners do not place the proper importance on liability insurance or take the time to draft the best possible waivers.[129]

An example of the statutes' inconsistency is in *Lawson v. Dutch Heritage Farms*.[130] The court found that a horse drawn buggy that crashed, injuring the passenger, was an "equine activity."[131] The court also decided that a passenger riding such a buggy is, in fact, an "equine activity participant."[132] In *Freidli v. Kerr*, however, the judge decided that the defendant, who was the driver of an overturned buggy, could not claim immunity under the equine liability act of Tennessee, in part, because the passenger plaintiffs were not "equine participants" by riding in the carriage.[133] The obvious inconsistency in these two cases is that both cases involve horses, carriages, and accidents. These cases demonstrate some of the basic interstate inequities among the equine statutes—that while doing essentially the same activity, the results may inconsistent.

It is also questionable whether equine liability laws apply to spectators of equine activities.[134] While most equine liability statutes find that being a spectator by definition does not make that person an equine participant,[135] some states

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125. *See Benefits and Liabilities*, *supra* note 9, at 51, 53; *see also* George G. Johnson Jr., *Legal Trends Relating to the Recreational Use of Horses*, 26 WYO. LAW 30, 37 (2003).

126. *See* Walson, *supra* note 1.

127. *Id.*

128. Johnson, *supra* note 125, at 37.

129. *Id.*; *see Benefits and Liabilities*, *supra* note 9, at 54.

130. *See generally* Lawson v. Dutch Heritage Farms, 502 F. Supp 2d 698 (N.D. Ohio 2007).

131. *See id.* at 699, 707.

132. *Id.* at 707.

133. Freidli v. Kerr, No. M1999-02810-COA-R9-CV, 2001 Tenn. App. LEXIS 108, at *1 (Tenn. Ct. App. Feb. 23, 2001).

134. Merryman, *supra* note 2, at 141.

135. *See, e.g.*, TENN. CODE ANN. § 44-20-102(1)(B) (2007); ALA. CODE § 6-5-337(b)(1) (LexisNexis 2005); DEL. CODE ANN. tit. 10, § 8140 (a)(1)(b) (1999); MONT. CODE ANN. § 27-1-726(1) (2009); NEB. REV. STAT. § 25-21, 250(1) (2004).

find that spectators are in fact participants.[136] Tennessee takes the typical approach, finding that spectators are not equine participants.[137] The State Code lists that performance of "medical treatment, assisting a participant, and show management" are considered engaging in equine activities.[138] Yet the code expressly states that, "'[e]ngag[ing] in an equine activity' does not include being a spectator at an equine activity, except in cases where the spectator places such spectator's person in an unauthorized area and in immediate proximity to the equine activity."[139] The Ohio equine liability statute, however, specifically lists "being a spectator at an equine activity" as being an "Equine Activity Participant."[140] Still other statues make no mention as to whether an equine activity spectator is considered a participant in the activity or not.[141] This is another example of the wide variations between states that can be confusing when trying to apply an equine liability statute.

These inconsistencies demonstrate that both the case law and the statutory interpretations can be inconsistent and bewildering to equine owners. This confusion for activity owners and staff is exaggerated by the fact that the statutes are so different from state to state and that they are still relatively new.[142]

Another argued flaw of equine liability laws, is that they have the ability to lull horse owners into a false sense of security.[143] The problem is that "[o]ften, parties try to obtain more protection from the statutes than they provide."[144] Many are unaware of the exceptions for sustainability and faulty tack.[145] Furthermore, owners think that just because there is a statue, they are protected—resulting in a failure to properly contract with participants and obtain liability insurance.[146]

IV. CONCLUSION

Equine liability statutes obviously have some flaws. As demonstrated in this note, they arguably lack consistency, are sometimes difficult to interpret, and

136. *See, e.g.*, OHIO REV. CODE ANN. § 2305.32.1(B)(1) (LexisNexis 2010).
137. *See, e.g.*, TENN. CODE ANN. § 44-20-102(1)(B) (2007).
138. *Id.* § 44-20-102(1)(A).
139. *Id.* § 44-20-102(1)(B).
140. OHIO REV. CODE ANN. § 2305.32.1(b)(3)(g) (LexisNexis 2010).
141. *See, e.g.*, WIS. STAT. ANN. § 895.525 (West 2006).
142. *See Benefits and Liabilities*, *supra* note 9, at 52–3 (discussing the inconsistencies present in "Equine Activity Statutes").
143. *See* Johnson, *supra* note 125, at 37.
144. *Id.*
145. Blum, *supra* note 123, at 166–67.
146. Johnson, *supra* note 125, at 37; *Mediation and Arbitration*, *supra* note 44, at 18.

may be misleading.[147] They are also—for the most part—helpful to the equine industry, however.[148] Through their enactment, these statutes have provided a necessary life-raft to keep the multi-billion dollar industry afloat during what could have been devastating tort law reforms.[149] Although there is no way to escape liability from "wanton and willful" behavior, and there is no substitute for a good written contract, equine liability acts have done their share to keep insurance rates from skyrocketing.[150] Equine liability statutes are not perfect, but they do hold people accountable for their own actions relating to an activity with inherent risks. They accomplish this while helping to prevent equine professionals from going out of business in the large and popular horse industry.[151]

147. *See* Merryman, *supra* note 2, at 141; Johnson, *supra* note 125, at 37.
148. *See* AM. HORSE COUNCIL, *supra* note 8; *see also* Walson, *supra* note 1.
149. Walson, *supra* note 1*;* AM. HORSE COUNCIL, *supra* note 8.
150. Johnson, *supra* note 125, at 37.
151. *See* Walson, *supra* note 1.