



FEBRUARY 2010
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat \$25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, "This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties."

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, "I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1."

Chelsea said in response, "I'm sorry to hear that. We really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that."

On April 28, Pat called Chelsea and said, "I've worked out the problems with programs numbers 3 and 4. I'll deliver them to you on May 12."

Chelsea responded, "I've been meaning to call you. I'm going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don't owe you anything."

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name "ABC Legal Services LLP" ("ABC LLP"). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of \$1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at \$500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.
2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.
3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Question 3

Hank and Wendy married, had two children, Aaron and Beth, and subsequently had their marriage dissolved.

One year after dissolution of the marriage, Hank placed all his assets in a valid revocable trust and appointed Trustee. Under the trust, Trustee was to pay all income from the trust to Hank during Hank's life. Upon Hank's death, the trust was to terminate and Trustee was to distribute the remaining assets as follows: one-half to Hank's mother, Mom, if she was then living, and the remainder to Aaron and Beth, in equal shares.

Trustee invested all assets of the trust in commercial real estate, which yielded very high income, but suffered rapidly decreasing market value.

Hank, who had never remarried, died three years after establishing the trust. At the time of his death, the trust was valued at \$300,000. Subsequently, it was proved by DNA testing that Hank had another child, Carl, who had been conceived during Hank's marriage to Wendy, but was born following dissolution of the marriage. Wendy, Carl's mother, had never told Hank about Carl.

Wendy, Mom, Aaron, Beth, and Carl all claim that he or she is entitled to a portion of the trust assets.

1. At Hank's death, what claims, if any, do the trust beneficiaries have against Trustee? Discuss.
2. How should the trust assets be distributed? Discuss. Answer this question according to California law.

FEBRUARY 2010



California
Bar
Examination

Performance Test A

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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.

GALENA COUNTY RULES OF COURT

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.

1 Richard Penniman, Esq.
2 BOISELLE & PENNIMAN
3 1980 Armando Avenue
4 Wilson, Columbia
5 Attorneys for Plaintiff
6

7 **IN THE SUPERIOR COURT OF COLUMBIA**
8 **COUNTY OF GALENA**
9

10 Louise Oddo Ochoa,)
11 Plaintiff,)
12 vs.) **Case No. 03031955 KRB**
13 Columbia Mountain Heli-ski, LLC,) **PLAINTIFF’S EARLY NEUTRAL**
14 Defendant) **EVALUATION STATEMENT**
15 _____)

16 **SUMMARY STATEMENT OF CASE**

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

24 **LEGAL AND FACTUAL ISSUES**

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

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

- 1 (1) The validity and scope of the waiver are legally deficient.
- 2 (2) Waivers are void as to hazardous activities.
- 3 (3) Mr. Ochoa's signature was not effective because he could not and did not
- 4 understand the document. Defendant was aware that Mr. Ochoa could not read
- 5 English when he signed the waiver.

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

8
9 Dated: February 1, 2010

Respectfully submitted,
BOISELLE & PENNIMAN

11
12 by: Richard Penniman

13 Richard Penniman, Esq.
14 Attorneys for Plaintiff
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1 David Chemichen, Esq.
2 CHEMICHEN, STRAND & LUTZ
3 11819 Kiowa Street
4 Angeles, Columbia
5 Attorneys for Defendant

6 **IN THE SUPERIOR COURT OF COLUMBIA**
7 **COUNTY OF GALENA**
8

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

14 **SUMMARY STATEMENT OF CASE**

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

17 **ISSUES OF FACT AND LAW**

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

22 **DISCOVERY, SETTLEMENT, AND ENE PROCEEDING**

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

26
27 Dated: February 3, 2010

Respectfully submitted,
CHEMICHEN, STRAND & LUTZ

28
29 by: David Chemichen

30 David Chemichen, Esq.
31 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.

* * *

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

OCHOA v. CMH

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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

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

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 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*.)

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.

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 terms.

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.



FEBRUARY 2010
ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

- 1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;
- 2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;
- 3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him \$120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of \$120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the \$120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.
2. A partial taking? Discuss.

Question 6

Herb and Wendy, residents of California, married in 2001. Herb worked as an accountant. Wendy was an avid coin collector who hoped someday to turn her hobby into a profitable business. Prior to marriage, they had entered into a prenuptial agreement providing that each spouse's wages would be his or her separate property.

On Wendy's birthday in 2002, Herb gave Wendy a drawing by a famous artist. Herb paid for the drawing with \$15,000 that his parents had given him. Wendy hung the drawing in their bedroom.

In 2003, Wendy opened CoinCo, a shop specializing in rare coins. She capitalized the business with a \$10,000 inheritance that she had received when her grandfather died. Wendy worked at the shop alone every day. Customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at reasonable prices. Over time, Wendy learned that she had acquired a number of highly valuable coins. There was also a renewed interest in coin collecting due to the discovery of several boxes of old coins found buried in the area.

Although Wendy's services at the shop were worth \$40,000 per year, she took an annual salary of \$25,000. She also paid \$5,000 in household expenses from the business earnings each year.

In 2008, Herb and Wendy separated, and Wendy filed for dissolution of marriage. At that time, CoinCo was worth \$150,000, and the drawing was worth \$30,000.

In 2009, before trial of the dissolution proceeding, Wendy was disabled by a serious illness and had to be hospitalized. She closed CoinCo while she was in the hospital, and the value of the business fell to \$100,000 by the time of trial. Her hospital bill was not covered by health insurance.

In the dissolution proceeding, Wendy claims that the prenuptial agreement is valid and Herb claims that it is not.

What are Herb's and Wendy's respective rights and liabilities in:

1. The drawing? Discuss.
2. CoinCo? Discuss.
3. The hospital bill? Discuss.

Answer according to California law.

FEBRUARY 2010



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INSTRUCTIONS AND FILE

RETTICK v. FLOYD INDUSTRIES, LLC, et al.

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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.

1 Megan La Plante, Esq.
2 La Plante & La Plante, LLP
3 700 Williams Road
4 Green River, Columbia 99906
5 (555) 567-6700

6
7 Attorneys for Plaintiff
8 Orrin Rettick

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

11
12 ORRIN RETTICK,)
13 Plaintiff,) **No. 13-368**
14 v.) **COMPLAINT FOR DAMAGES:**
15 FLOYD INDUSTRIES, LLC, and) **PRODUCTS LIABILITY**
16 SANDRA FLOYD,)
17 Defendants.)
18)

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

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

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

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

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

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

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

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

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

20 9. Rettick's serious injury caused him loss in the amount of five million dollars
21 (\$5,000,000).

22 Wherefore, Rettick prays for judgment for costs of suit; for such relief as is fair,
23 just, and equitable; and specifically for damages in the amount of five million dollars
24 (\$5,000,000).

25 Date: December 28, 2009

La Plante & La Plante, LLP

26 by: Megan La Plante

27 Megan La Plante

28 Attorneys for Plaintiff Orrin Rettick

29

1 Bram Fenton, Esq.
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3 1660 Rhoades Boulevard
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7 Attorneys for Plaintiffs
8 Floyd Industries, LLC, and Sandra Floyd

9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
12

13 FLOYD INDUSTRIES, LLC, and)
14 SANDRA FLOYD,)
15 Plaintiffs,) **No. Civ. 203-489 KMB**
16 v.) **COMPLAINT FOR**
17 ORRIN RETTICK,) **PERMANENT INJUNCTION**
18 Defendant.)
19)

20
21 With the allegations that follow, Floyd Industries, LLC, and Sandra Floyd bring
22 this action to permanently enjoin Orrin Rettick (“Rettick”) from prosecuting a tort action
23 for products liability that he brought against Floyd Industries and Sandra Floyd in the
24 Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia, styled
25 *Orrin Rettick v. Floyd Industries, LLC, and Sandra Floyd*, No. 13-368 (hereafter “the
26 Tribal Court Products Liability Action”):

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

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

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

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

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

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

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

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

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

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

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

4
5 Date: January 26, 2010

Morris, Fenton & Suzuki, LLP

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7 by: *Bram Fenton*

8 Bram Fenton

9 Attorneys for Plaintiffs

10 Floyd Industries, LLC, and Sandra Floyd

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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
12
13

14 FLOYD INDUSTRIES, LLC, and)
15 SANDRA FLOYD,) **No. Civ. 203-489 KMB**
16 Plaintiffs,) **MOTION OF DEFENDANT**
17 v.) **ORRIN RETTICK TO DISMISS**
18 ORRIN RETTICK,) **OR, IN THE ALTERNATIVE,**
19 Defendant.) **FOR A STAY**
20)
21

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

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

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

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

3
4 Date: February 16, 2010

Respectfully submitted,
La Plante & La Plante, LLP

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7 by: *Megan La Plante*

8 Megan La Plante
9 Attorneys for Defendant Orrin Rettick

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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
11

12
13 FLOYD INDUSTRIES, LLC, and)
14 SANDRA FLOYD,) **No. Civ. 203-489 KMB**
15 Plaintiffs,) **MEMORANDUM OF POINTS AND**
16 v.) **AUTHORITIES IN SUPPORT OF**
17 ORRIN RETTICK,) **MOTION OF DEFENDANT ORRIN**
18 Defendant.) **RETTICK TO DISMISS OR, IN THE**
19) **ALTERNATIVE, FOR A STAY**
20

21 **I. Introduction**

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

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

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

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

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

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

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

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

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

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

1 But even if the *Montana* “rule” were applicable, the result would be no different.
2 By its own terms, the *Montana* “rule” contains two exceptions, one for claims based on
3 “consensual relationships,” the other for claims based on conduct that “threatens” a
4 tribe’s “political integrity, . . . economic security, or . . . health or welfare.” *Montana v.*
5 *United States, supra*. Each exception is satisfied here. As Floyd Industries and Sandra
6 Floyd have admitted, Rettick’s claim is based *both* on a contract under which “Rettick
7 bought and Floyd Industries sold certain handguns” *and also* on conduct that resulted in
8 “serious injury” to Rettick as “Chief of Police for the Taraconic Tribe.” Complaint ¶ 6.
9 By coming to the Silver Oak Reservation and by staying to enjoy its protection, Floyd
10 Industries and Sandra Floyd have subjected themselves to the jurisdiction of the
11 Taraconic Tribe.

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

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

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

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

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

28 **IV. Conclusion**

29 For the reasons stated, in light of the undoubted jurisdiction of the Tribal Court of
30 the Taraconic Tribe, this Court should grant Rettick’s motion and accordingly dismiss
31 Floyd Industries’ and Sandra Floyd’s action because their complaint fails to state a

1 claim upon which relief can be granted, or, in the alternative, should stay their action
2 because they have failed to exhaust their remedies in the Tribal Court.

3

4 Date: February 15, 2010

Respectfully submitted,
La Plante & La Plante, LLP

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by: Megan La Plante

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Megan La Plante

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Attorneys for Defendant Orrin Rettick

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RETTICK v. FLOYD INDUSTRIES, LLC, et al.

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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.