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September 10, 2002

THE *AF*TERMATH OF *COOPER*

The Colorado Supreme Court's recent ruling in *Cooper v. The Aspen Skiing Company, et al.* appears at first blush to have shaken the foundation on which liability protection for those engaged in equine activities rests. Time will tell how much. When all is said and done, however, *Cooper's* impact may prove to be more psychological than substantive.

In *Cooper*, the Court ruled for the first time that under Colorado law, a parent or guardian may not release a minor child's prospective (future) claims for negligence, or indemnify another for negligence committed against a minor child. The effect of the ruling, if it stands, is to void the liability protection thought to be offered by releases signed by parents or guardians on behalf of their minor children. The law already provides that minor children are not bound by releases they themselves sign unless they ratify them after they reach the age of 18. As such, *Cooper* leaves those who, when minors, signed a release themselves, or on whose behalf one was signed by their parents or guardians, free to assert negligence claims against those engaged in equine activities in Colorado.

The Foundation of Liability Protection

Until *Cooper*, liability protection for those engaged in equine activities in Colorado rested primarily on a three-part foundation - Colorado's inherent risk statute (Colorado Revised Statutes 13-21-119(1), et seq.); insurance; and releases/waivers. Each part of the foundation provides tools for managing and apportioning the risk of injury. For everyone but minor children, all three continue to provide protection. Where minors are concerned, only the inherent risk statute and insurance now apply. Of the three parts, however, the inherent risk statute has been, and remains, the most important tool for managing risk by those engaged in equine activities, and it is not affected by the Court's ruling in *Cooper*.

That said, it is important to remember that the inherent risk statute's purpose is to reaffirm certain inherent risks of equine activities and to apportion those risks between provider and participant in circumstances detailed in the statute. The statute is not a blanket grant of immunity from liability for injuries or losses associated with equine activities. It does not prevent or limit liability for equine activity sponsors, equine professionals or any other person if, for example, they:

(1) Provide equipment or tack which they knew or should have known was faulty, and the faulty equipment or tack caused the injury;

(2) Provide an animal and fail to make reasonable and prudent efforts to match the

rider's skill and experience to the animal, resulting in injury;

(3) Control land which is the site of the equine activity and on which there is a dangerous hidden condition about which they knew or should have known and for which warning signs were not posted;

(4) Commit an act or omission that constitutes willful or wanton disregard for the safety of a participant, and that act or omission causes the injury; and

(5) Intentionally injure a participant.

Moreover, the statute provides no liability protection, even for covered activities, unless a warning containing specifically required language is posted on the property in the manner required by the statute.

In short, careful, disciplined, consistent adherence to the inherent risk statute's requirements is necessary to obtain the liability protection it provides.

Now What?

The Court's ruling in *Cooper* notwithstanding, all three parts of the liability protection foundation remain important.

The Inherent Risk Statute. Be sure you are familiar with the statute and follow its requirements scrupulously:

! Who is afforded liability protection?
! What activities are protected?
! What are the exceptions to liability protection?
! What can you do to ensure that you do not fall within the exceptions?

There are excellent guides that can be used to help identify and correct potential hazards which, if not addressed, could result in liability. If you would like more information, contact Brian Kitchen, the Colorado Horse Development Authority's Executive Director, and he will help you. You can reach Brian by telephone at (303) 292-4981 or by e-mail at chda@chda.org.

Insurance. Liability insurance remains an essential element in providing protection. It is important to have, and to have enough of, the right kind of insurance, because it may both insulate you against personal loss and cover the cost of your defense against claims covered by the policy.

Releases/Waivers. Releases, if properly drafted, remain viable and enforceable against everyone but minor children. Even in the case of minors, it may make sense to continue to obtain a parent's or guardian's signature on behalf of the minor child while the *Cooper* ruling is explored in the courts, the Legislature, or both.

Finally, depending upon the nature of the equine activity engaged in, forming a limited

liability company or similar entity may make sense as a means of providing additional protection against personal liability.

Conclusion

While far from helpful, the Colorado Supreme Court's ruling in *Cooper* may prove to be less damaging than it now appears. A minor's prospective release, though important, is only one of the ways to manage the risk of equine activity. There are other, more important ones as described briefly above, but they require attention and discipline if they are to provide the protection they afford.

In its holding in *Cooper*, the Court noted that the Legislature may choose to reconsider the public policy question of whether parents or guardians should be permitted to release their minor children's prospective claims for negligence. It will be interesting to see if the Legislature does so.