

THE UNLEVEL PLAYING FIELD
Releases, Waivers & Assumption of Risk
in Sports' Premises Cases
William B. Smith
Jeffrey R. Smith
Abramson Smith Waldsmith, LLP
San Francisco, CA

I. Introduction

The deck is stacked against plaintiffs in sports' premises cases. In many situations, the signing of a release or liability waiver is a prerequisite to participation. Many clients forget they have even signed such an agreement. Exculpatory agreements often include a waiver of jury trial forcing a plaintiff to arbitration. A well-drafted agreement will prevent a plaintiff from pursuing a negligence case; and, even if the release is overcome, the case may have to be tried before an arbitrator.

The purpose of this article is to discuss techniques for attacking a release or waiver of liability at the beginning of your case and avoid losing it at summary judgment or at trial. Also included are approaches to beating primary assumption of risk. Once you understand these issues, you can use the provided "game plan" checklist in every sports' premises case to help determine whether or not to accept the case and how to win it if you take it. Remember that these cases are very challenging and you can expect to deal with a lot of law and motion and a summary judgment in virtually every one of them. Even if you survive all the legal challenges, you still will have to deal with the ever present primary assumption of risk defense. To borrow a sports analogy, you are often faced with a "sudden death" situation in these cases.

II. Attacking the Waiver of Liability

A. The Four Corners of the Release/Waiver:

1. Ambiguity

It is the well-established rule that the language of an exculpatory agreement prepared by the party relying on it must "clearly and explicitly" express the intent of the parties. *Celli v. Sports Car Club of America* (1972) 29 Cal.App.3d 511. It also must be "unambiguous." *Bennett*

v. U.S. Cycling Federation (1987) 193 Cal.App.3d 1485; *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733; *Leon v. Family Fitness Center* (1998) 61 Cal.App.4th 1227. Waiver and release forms are strictly construed against defendants attempting to use them to avoid liability. *Lund v. Bally's Aerobic Plus, Inc., supra*. See also Civil Code §1654. For example, releases that use general language to avoid liability do not protect defendants from their own acts of negligence. *Vinnell Co. v. Pacific Elec. Ry. Co.* (1959) 52 Cal.2nd 411 (release for “any and all ...liability”); *Woodall v. Wayne Steffner Products* (1962) 201 Cal.App.2nd 800 (release agreement referring to “any and all responsibility, liability or claims”); *Celli v. Sports Car Club of America, supra* (release agreement from liability “resulting from any accidents or other occurrence”); *Leon v. Family Fitness Center, supra* (release agreement “for any claim, demand, cause of action of any kind whatsoever”).

If defendants clearly state in their releases that the participant is waiving any rights to sue for negligence, California has upheld such releases. *Lund v. Bally's Aerobic Plus, Inc., supra*. However, see *Sanchez v. Bally's Total Fitness* (1998) 68 Cal.App.4th 62, 67, where the court stated that the inclusion of the term “negligence” is not required to validate an exculpatory release. The court held that the waiver of liability in a health and fitness club membership agreement necessarily releases the club from liability for its negligence since there is no other liability to release.

2. Breadth and Scope

If releases are clear, explicit and unambiguous, the courts have broadly upheld them in the context of recreational sports. This is true even when the risks extend beyond what one would normally expect with the inherent risk of the activity. In *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, plaintiff was barred from suing a health club when a TV mounted on an elliptical training machine fell when he attempted to reposition it. The release did not include the term “negligence” but the plaintiff did not contend the release was ineffective for that reason. In *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, the court held that a health club member who signed a broad release and fell on slippery algae growing on a pool deck was barred from suing the club for negligence.

Contrast these holdings with *Leon v. Family Fitness Center, supra*, where a plaintiff who

was injured when a sauna bench collapsed, was allowed to sue his club for negligence because the release language was found to be ambiguous. Likewise, in *Zipusch v. L.A. Workout, Inc.* (2007) 207 Cal.App. LEXIS 1652, the court held that a health club release was ambiguous because its language only contemplated injuries arising “from the negligence or other acts of anyone else using L.A. Workout.” It did not clearly contemplate exculpating the club for its *own* alleged negligence in failing to inspect and maintain a treadmill which had a sticky substance on it, causing the plaintiff’s fall.

In *Bennett v. U.S. Cycling Federation* (1987) 193 Cal.App.3d 1485, plaintiff signed a release for a bicycle race that released the promoters and sponsors “from and against any and all liability arising out or connected in any way with any participation in said event, even though that liability may arise out of the negligence or carelessness on the part of the persons or entities mentioned above.” The promoters and sponsors were specifically mentioned in the release. This was to be a closed course race but somehow an automobile entered the course and plaintiff collided with it. In its analysis, the court cited *Prosser and Keeton* on Torts, highlighting the following sentence:

It is also necessary that the expressed terms of the agreement be applicable to the particular misconduct of the defendant. *Id.* at p. 1491.

The court went on to state that someone signing the release had to be aware of foreseeable hazards like a collision with other bicyclists, bad road surfaces, etc., but it was doubtful whether a participant would have appreciated the risk of colliding with a car on a closed race course. It reversed the summary judgment and stated that a triable issue of material fact existed. The release itself appeared to be no more ambiguous than others that have been upheld but the court permitted the plaintiff to get beyond it by focusing on foreseeable hazards. This is akin to claiming that the risk may not have been inherent in the activity. So in cases where a risk is not inherent, *Bennett* provides an argument for overcoming a release which otherwise may appear unambiguous.¹ The first attack on a release should be ambiguity but it is also wise to consider

¹The court in *Madison v. Superior Court of Los Angeles* (1988) 203 Cal.App.3d 589 (a scuba diving case), disagreed with this analysis and refused to follow *Bennett*. It held that

arguing that the scope of the release was not intended to apply to a risk that was not inherent or not within the scope of the activity.

A related but separate breadth and scope argument arises in cases where the particular act of negligence resulting in the plaintiff's injury is not "reasonably related to the object or purpose for which the release is given." *Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1305. This argument was successfully made in *Sweat v. Big Time Auto Racing, Inc.*. In *Sweat*, plaintiff paid an extra admission fee and signed a release of liability to enter the restricted "pit area" at an automobile race. Average attendees of the race were not required to sign the release, and could only enter the restricted pit area after the completion of the race. During the race, the pit area bleachers upon which the plaintiff was seated collapsed due to a manufacturing or maintenance defect. Defendant argued that the release exculpated liability. The Court of Appeal explained that the injury suffered may be outside the release if it is not reasonably related to the purpose for which the release was given. The Court found that the purpose of the release was not only to provide access to the pit area, but also to "require the releasee to assume the risk of injury as a result of being in close proximity to the dangerous activity of automobile racing and any further risk that might result from the activity of observing such a race." *Id.* at p. 1307. Such an injury could include a tire separating from a race car, leaving the track and hitting a spectator, or a spectator being burned by a crash. The purpose of the release was *not* to require the plaintiff to assume the risk of injury due a defectively constructed or maintained bleacher. This was evident in the fact that general attendees of the race were not required to sign the release, even if they entered the pit area after the race and sat on the bleachers. Therefore, the breadth and scope of the *Sweat* release did not include plaintiff's injuries because they were not reasonably related to the purpose of the release.

A third breadth and scope argument applies in situations where not all of the defendants are mentioned in the release. In this situation, a careful examination of the language attempting to include categories of defendants is required. For example, consider a situation where a specific defendant is mentioned followed by descriptive terms like "promoters, sponsors and

knowledge of a *particular* risk is unnecessary when there is an expressed agreement to assume *all* risks.

advertisers.” These categories may or may not be sufficiently broad to release an unspecified defendant.

If you are faced with this issue, see *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, a ski binding case where the injured plaintiff sued the ski shop that rented the equipment (Klein’s Ski Shop) and the distributor of the equipment (Look USA, Inc.). Plaintiff signed a “disclaimer form” which released Klein’s and a non-party ski resort. Look USA, Inc. was not mentioned and there apparently was not a general category that applied to it. The plaintiff contended that the release did not apply to Look USA, Inc. and the language did not include or apply to products liability. The trial court granted a summary judgment to all defendants. The Court of Appeal reversed based on the following reasoning:

It is a basic rule of contract law that it is essential to the validity of a contract not only that the parties should exist, but that it should be possible to identify them. Here, the agreement specifies only Klein’s and its employees...as parties to be protected from liability. Nothing in the rental agreement identifies the distributor defendants as parties to be bound or benefitted by the agreement. Therefore, it is the burden of the distributor defendants to show some basis for extending the agreement to them. *Id.* at p. 1728.

The court noted that the distributor defendants did not make any legal argument to entitle them to invoke the contract. The court suggested that a third party beneficiary argument could have been made, although it did not indicate the merit of such an argument. It stated that while a contract need not identify the third party by name, the third party must show it was one of a class of persons for whose benefit the contract was made. One would think that at the very least the release should identify a category in which the defendant could fit to alert the signer of who was being released. Otherwise, any potential defendant could be released.

We finally have a long awaited answer to whether a release for ordinary negligence includes gross negligence. In July 2007 the California Supreme Court decided *City of Santa Barbara v. Superior Court of Santa Barbara County* (2007) 41 Cal.4th 747. This was a wrongful death case involving a fourteen year-old developmentally disabled girl. The girl’s mother enrolled her in a summer camp, operated by the City of Santa Barbara, and signed a release for “all liability...whether caused by any negligent act or omission of the releasees or

otherwise....” The girl had epilepsy and had suffered seizures in the camp the previous year so the City took special precautions by assigning a counselor to her for close observation. The girl suffered a seizure on the day of her death only an hour before. The counselor witnessed it and allegedly reported it. Nevertheless, the girl was allowed to continue her participation. She drowned shortly after diving into a pool. The counselor was looking in another direction for a period of only fifteen seconds after the dive. The issue was whether the scope of the release included gross negligence. The court’s clear holding was as follows:

We conclude, consistent with dicta in California cases and with the vast majority of out of state cases and other authority, that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy. *Id.* at p.750-1.

Therefore, sports and recreational releases are limited to ordinary negligence. Thus, if there is *any* basis for gross negligence, you should plead it and prove it to get around a release.

3. Conspicuity

A release is unenforceable if it is not readable. In other words, an exculpatory provision has to be conspicuous. *Conservatorship of Link* (1984) 158 Cal.App.3d 138. In *Link* a racing pit crewman was injured during a race and sued the race promoters. He had signed a release that included the negligence of the defendant and a summary judgment was granted on that basis. The court reversed the summary judgment because much of the exculpatory language was in five point type and buried in a convoluted 193 word sentence. The court noted that the important operative language should be placed in a position that “compels notice” and must be distinguished from other sections of the release. *Link* also stated that typeface smaller than 8 point is unsatisfactory.

Other later cases have discussed this issue and have concluded that a particular minimum typeface is not required. In *Bennett v. U.S. Cycling Federation, supra*, the court stated: “[w]e do not read *Link* as holding that every release printed in less than eight point type is unenforceable as a matter of law. We believe that the *Link* case should be read in the context of the facts it considered: a statement buried in the midst of a highly prolix sentence which was itself

surrounded with paragraphs of fine print.” *Leon v. Family Fitness Center, supra*, followed *Bennett* in holding that the print size is important but is only one factor to be considered in assessing the adequacy of a release. Therefore, take a close look at the form of the release to see if the waiver was obvious or conspicuous.

4. Unconscionability: The Adhesion Contract

Contracts that are unconscionable are unenforceable. Civil Code, Section 1670.5. Basically, this is a challenge that a release is an adhesion contract. *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333. An adhesion contract is “a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or respect it.” *Westlye v. Look Sports, Inc., supra* at p. 1735.

The *Westlye* decision provides a good summary of how the courts approach an argument that a release is an adhesion contract:

[T]o describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned. Thus a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules – legislative or judicial – operate to render it otherwise. *Id.* at p. 1736.

Westlye continued to identify two judicially imposed limitations on the enforcement of adhesion contracts:

- (1) A provision that does not fall within the reasonable expectations of the weaker or adhering party will not be enforced, and
- (2) Even if the provision is within the reasonable expectation of the parties, it will not be enforced if it is unduly oppressive or unconscionable.

Westlye did not find the ski binding rental agreement to be unconscionable.

Like *Westlye*, a release agreement was unsuccessfully challenged as unconscionable in *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606. In *Kurashige*, plaintiff dirt bike rider was injured while riding in defendant’s dirt bike park. Prior to his participation, plaintiff signed the “Indian Dunes Park General Release.” The Court of Appeal explained that though the

agreement was “one-sided” and plaintiff did not have the opportunity to negotiate, he did have the ability to obtain the services sought elsewhere. Further, the release was legible with important warnings highlighted. Finally, the allocation of risk, all of which was placed on the plaintiff, was clearly indicated and not unexpected. Thus, the release was not unconscionable. *Id.* at 613-5.

B. Authority of the Releasor to Sign the Release/Waiver

Can you challenge a release on the basis that someone other than the injured party signed it? The short answer in California is probably not, but it depends on the situation.

In the wrongful death area, see *Scoggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399; *Madison v. Superior Court of Los Angeles* (1988) 203 Cal.App.3rd 589. Both are scuba diving cases. Their different results were due to the wording of the release signed by the deceased divers. In *Scoggs* the surviving wife’s wrongful death case was dismissed by the trial court based on a release the decedent entered into with the defendant. The Court of Appeal reversed the trial court on the basis that the release contained no language indicating that the decedent intended to release all risk of the activity, including defendant’s negligence. Under these circumstances, it was improper to deprive the heir of her separate and distinct right to bring a wrongful death action. The court noted:

Contracts seeking to release in advance the right to bring a wrongful death action, are not binding on the decedent’s heirs and there is no compelling reason to create an exception in the case of so-called ‘sports risk’ cases. p. 1404.

However, in *Madison* where the diver signed a release that he was releasing the defendants of liability for negligence, the court determined that the release was a complete defense to a subsequent wrongful death action.

Does a parent have legal authority to waive a child’s own future cause of action for personal injuries resulting from third party negligence? *Hohe v. San Diego Unified School District* (1990) 224 Cal.App. 3d 1559, though not in the sports context, held that a parent can enter into a binding release of liability agreement for a child. In *Hohe*, a father signed a release with the school district allowing his daughter’s participation in a high school hypnotism show. She was injured when she slid from her chair several times while hypnotized. The parental

waiver was upheld. See *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive their Children's Tort Liability Claims*, 36 USF Law Review, 535 (2002).

At least one California case, in the sports context, has cited *Hohe* as authority for the proposition that parents can waive their children's rights through the execution of a release of liability. In *Aaris v. Las Virgenes Unified School District* (1998) 64 Cal. App. 4th 1112, a minor cheerleader was injured while performing a stunt during practice. The cheerleader's mother had signed a release of liability. The minor attempted to avoid the release, suggesting that her mother did not have the authority to waive her rights. The Court of Appeal found the release valid, explaining "[i]t is well established that a parent may execute a release on behalf of his or her child." *Id.* at p.1120.

Parents are bombarded with sports releases for everything from baseball to soccer. Not all states are in accord with California's *Hohe* and *Aaris* decisions, including the state of Washington. *Scott v. Pacific West Mt. Resort* (1992) 834 Pacific 2d 6, involved parents who signed a ski school application for their child. The Washington Supreme Court held that the parents did not have legal authority to waive their child's own future cause of action for personal injuries resulting from third party negligence. The court reasoned that since a parent cannot release a child's cause of action *after* an injury without court approval, "it makes little, if any, sense to conclude a parent has the right to release a child's cause of action *prior to* an injury. Furthermore, in situations where parents are unwilling or unable to provide for a seriously injured child, the child's only recourse against the negligent third party would be a lawsuit." (Emphasis added).

The Colorado Supreme Court found the public policy reasoning of *Scott* convincing and reached a similar holding in *Cooper v. The Aspen Skiing Company* (2002) 48 P.3d 1229. In *Cooper*, the Colorado Court held that a release signed by the mother of a seventeen year-old skier was unenforceable after the skier crashed during ski racing practice. The Court went on to provide a comprehensive list of states in agreement, including Pennsylvania, Connecticut, Tennessee, Maine and New Jersey.

In situations where the release appears to be clear and unambiguous and includes reference to negligence, a potential challenge could be based on the public policy reflected in

Scott and similar out-of-state cases and unconscionability arguments. *Scott's* reasoning is compelling. However, with California's *Hohe* and *Aaris* decisions, this would be a difficult road and probably would lead directly to an appeal from a summary judgment.

C. Illegality

Civil Code Section 1668 provides that contracts which directly or indirectly exempt anyone from responsibility for fraud, wilful injury or a violation of law, whether wilful or negligent, are against the policy of law. Of course, Section 1668 is not strictly applied because its prohibition of an exemption for future negligence does not prevent a release for future negligence *unless* the public interest is involved or a statute forbids it. *Buchan v. U.S. Cycling Federation* (1991) 227 Cal.App.3d 134; *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69. The key case analyzing the characteristics of what qualifies as an exculpatory clause which affects the public interest is *Tunkl v. University of California* (1963) 60 Cal.2d 92.

California courts have consistently held that although exculpatory clauses affecting the public interest are invalid, exculpatory agreements in the context of recreational sports *do not* involve the public interest. *Lund v. Bailey's Aerobic Plus, Inc., supra*. The plaintiff in *Westbye v. Look Sports, Inc., supra* (ski binding case) tried to overcome the California cases declaring that recreational sports do not constitute a public interest by arguing that recreation is not a frivolous activity but one which leads to longer, healthier and happier lives. The *Westbye* court rejected this argument and followed the other authority holding that recreational sports do not constitute a public interest under *Tunkl*. See other cases that have reached the same conclusion, including *Randas v. YMCA* (1993) 17 Cal.App.4th 158 (YMCA swimming class); and *Guido v. Koopman* (1991) 1 Cal.App.4th 837 (horseback riding).

D. There May Be No Release or Waiver

One of the first questions to ask when interviewing a potential client in a sports or recreational injury case is whether anything was signed. Ask for copies of the signed documents. If copies were not retained, have the client obtain a copy from the entity itself or an exemplar from a co-participant. You often will find that the alleged release or waiver is not an exculpatory agreement. It may only be a document that informs the participant of the risks of the activity and may not require a signature. In any event, you want to review any such writing before you file a

claim or lawsuit.

E. Pleading Strict Liability in Tort Against a Product Supplier

If your case involves a supplier of a product that was a substantial factor in causing the incident, sue that defendant for strict liability in tort. The law is clear that releases do not apply to strict liability in tort claims. *Westlye* supra at 1742. *Westlye* was a ski injury case involving a release that did not even name Look, the supplier of the bindings that allegedly failed. Nevertheless, the court held that releases do not exculpate product suppliers on public policy grounds based on the reason for imposing strict liability in tort.

III. Attacking Waiver of Jury Trial

Participation in sporting endeavors often requires participants to waive not only the liability of the defendant, but also the right to a jury trial. However, as stated above, such arbitration agreements can be attacked in instances where not all parties are properly identified by name or designation.

Though arbitration is “an accepted and favored method of resolving disputes . . . , there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . .” *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739, 744. In other words, only those parties identifiable within the arbitration agreement can be held to the terms of the agreement. It would be contrary to contract law for unidentified parties to be compelled to participate in an arbitration. See *Losson v. Blodgett* (1934) 1 Cal.App.2d 13 (husband who negotiated and received the benefits of wife’s execution of a lease was not liable on agreement since his name did not appear on the instrument.)

Improperly executed arbitration agreements failing to name all parties may also be ruled unenforceable to named parties based on a desire to avoid the possibility of inconsistent rulings and judicial economy. When parties are unnamed, a court may refuse to compel any arbitration pursuant to an agreement where “[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.” Code of Civil Procedure section 1281.2(c). See *Prudent Property & Casualty*

Ins. Co. v. Superior Court (1995) 36 Cal.App.4th 275 (trial court properly ordered uninsured motorist arbitration to be joined with trial court action.) Such a decision avoids the prospect of inconsistent decisions in the arbitration and corresponding trial, while advancing judicial economy.

When a potential case includes an arbitration agreement, carefully review the parties named and the language describing all potential parties to the agreement. The prospect of avoiding arbitration can be significant in determining whether to accept one of these difficult cases. The courts seem to be less willing to bind a plaintiff to an arbitration agreement than a release. Perhaps the issue of an uninformed waiver of the Seventh Amendment's right to a jury trial is a factor and certainly should be argued.

IV. Avoiding Primary Assumption of Risk

A. Defendants Have No Legal Duty to Protect a Plaintiff Against Inherent Risks in a Sport

In *Knight v. Jewitt* (1992) 3 Cal.4th 296, plaintiff was injured while playing in a co-ed touch football game during half-time of the Super Bowl. A fellow participant stepped on her hand. Plaintiff sued the player who caused the injury and the trial court granted a summary judgment. This was upheld on appeal based on assumption of risk grounds. The California Supreme Court took the case and held that primary assumption of risk barred the action. In doing so, the court clarified the difference between primary and secondary assumption of risk and provided some guidelines for assessing future sports and recreational cases.

In a nutshell, the Supreme Court made two important statements:

- (1) Defendants generally have no legal duty to eliminate or protect a plaintiff against risks *inherent* in a sport and
- (2) Defendants generally do have a duty to use due care *not to increase the risks* to a participants over and above those inherent in the sport. *Knight v. Jewitt, supra*, at pp. 315-316. (Emphasis added).

The Supreme Court posed the question about how courts in the future were to determine what careless conduct should be considered an inherent risk of a sport and assumed by the

injured participant as a matter of law. The court answered this question by saying that the defendant's duty depends heavily on the nature of the sport itself and defendant's role or relationship to the sport. The court noted that the California courts have concluded that it would be improper to hold a sport's co-participant legally liable for "ordinary careless conduct" during vigorous participation in a sporting event. This would likely chill vigorous participation in sporting activities and fundamentally alter the nature of the sport. For this reason, a co-participant should be held legally liable only for conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. Thus, the question of what is or is not *inherent* in a particular sport rests on whether the conduct is so reckless as to be totally outside the range of ordinary activity involved in the sport.

B. Establishing that the Defendant's Conduct is Not An Inherent Risk in the Sport or Activity

Of course, the first battle is trying to establish that the defendant's conduct was not "ordinary careless conduct" or was "entirely outside the range of ordinary activity involved in a sport." See CACI sections 408 and 409. There are cases on both sides. See *Cheong v. Antablin* (1997) 16 Cal.4th 1063 (skiing case); *Towns v. Davidson* (2007) 147 Cal.App.4th 461 (skiing case), as examples of cases holding that the conduct in issue was inherent.

There also have been cases that have concluded that the particular challenged conduct is *not* inherent in the sport. See *Capri v. L.A. Fitness International, supra* (slip and fall on algae on a pool deck); *Zipusch v. L.A. Workout, Inc.* (2007) 155 Cal.App.4th 1281 (sticky substance on a treadmill due to failure to adequately inspect and maintain); *Huff v. Wilkens* (2006) 138 Cal.App.4th 732 (ATV operation by a minor under 18 years of age); *Mammoth Mountain v. Graham* (2006) 135 Cal.App.4th 1367 (snowball fight while snowboarding) and *Hemady v. Long Beach Unified School District* (2006) 143 Cal.App.4th 566 (hit in the face with a golf club during a P.E. class).

C. Establishing that the Defendant's Conduct Increased the Risks of the Sport or Activity

If unable to convince a trial court that the conduct was not inherent in the sport, you must marshal the facts to argue that the conduct was so reckless that it increased the risks inherent in

the sport. Two recent cases are instructive.

In *Kahn v. Eastside Union High School District* (2003) 31 Cal.4th 990, a 14 year-old novice swimmer broke her neck when she dove into a shallow racing pool. The Supreme Court reversed the granting of a summary judgment on the basis that the defendant's coach failed to provide shallow water diving instruction and threatened to remove the girl from the competition if she did not execute the dive. The court held that this conduct raised a triable issue of material fact regarding recklessness, i.e., whether the coach had increased the risks inherent in competitive swimming.

The most recent California Supreme Court decision in *Shin v. Ahn* (2007) 42 Cal.4th 482, a golf case, is also interesting. After completing a hole, the plaintiff in *Shin* took a short cut to the next hole. He stopped to the front-left of the tee-box (40-45 degree angle) to get a bottle of water out of his golf bag and check his cell phone messages. He was about 20-25 feet from the defendant who had already teed up his ball. Plaintiff testified he made eye contact with the defendant but the defendant claimed not to have seen anyone ahead of him and did not know plaintiff's whereabouts. In any event, defendant hit plaintiff in the head with his tee-shot.

The trial court ultimately denied defendant's summary judgment motion concluding the triable issues of material fact existed. The Court of Appeal affirmed. The Supreme Court held that the primary assumption of risk analysis applies to golf but questions of fact existed as to whether defendant breached his limited duty of care not to increase the risk of a sport by being reckless.

D. Pleading Strict Liability in Tort Against A Product Supplier

Primary assumption of risk is not a defense against a supplier of a product in a strict liability in tort case. *Bunch v. Hoffman* (2004) 123 Cal. App. 4th 1278, 1301-2; *Milwaukee Electric Tool Corp. v. Superior Court of San Diego* (1993) 15 Cal. App. 4th 547; *Bjork v. Mason* (2000) 77 Cal. App. 4th 544. In *Bunch* an eleven year-old swimmer was rendered quadriplegic after diving into a four-foot-deep above ground swimming pool. The defendant, manufacturer of the replacement pool liner, cautioned against users diving into the shallow pool with a sticker. The Court of Appeal affirmed the trial court's decision against entering a directed verdict in favor of the manufacturer, holding that the primary assumption of risk doctrine was inapplicable

because the manufacturer had a duty to provide defect-free products.

In essence the *Bunch* court stated that the defective product increased the inherent risks of the sport of swimming. Other advantages to suing a supplier for strict liability in tort include better venue options and you can avoid the adverse effect of several liability for noneconomic damages of Civil Code 1431.2 (Proposition 51). Section 1431.2 does **not** apply in strict liability in tort cases because every supplier in the chain is vicariously liable. *Wimberly v. Derby Cycle Corp.*, 56 Cal. App. 4th 618, 633 (1997).

Beware of the "dominant purpose test" as a defense. Defendants often argue that they were an innocent end user who merely provided a "service" rather than a product. There are two cases to read on this subject: *Ferrari v. Grand Canyon Dories* (1995) 32 Cal. App. 4th 248 and *Ontiveros v. 24 Hour Fitness Corp.* (2008) 2008 DJDAR 18581.

Ferrari was a white water rafting injury case. Plaintiff hit her head against a metal frame in the raft. Strict liability in tort was plead against the rafting company and a product supplier. The rafting company was able to successfully avoid liability for strict liability because the court determined that the dominant purpose of the relationship with the plaintiff was to provide rafting services and the raft was only incident to that.

More recently, in *Ontiveros* a health club also was able to avoid strict liability for a treadmill incident with a similar argument that it was providing gym services and was not supplying a product. The case held that these cases depend heavily on the facts. If you can find that the service provider did more than make the product available you increase your chances for success. For example, if you can show a leasing or rental arrangement, it is easier to argue that the defendant is a product supplier.

V. Conclusion

To borrow yet another sports analogy, you have to take what the defense gives you and aggressively use it in your client's favor. This starts with the claim (public entity), the complaint, and continues into a thorough investigation to support bases to attack the release, followed by discovery to accomplish the same purpose. If you sit on your heels, you will be defeated. Attached to this article you will find a Game Plan which is a checklist to help you succeed.

Football coaches routinely use play checklists to succeed, and if you are going to handle sports and recreation cases, you need to adopt a similar approach.

The Game Plan: A Checklist

1. Is there a signed release or waiver?
2. If there is a signed release or waiver, examine it closely and ask the following questions:
 - Is the exculpatory language clear, explicit and unambiguous? Does it use general language or does it specifically include legal theories like “negligence”?
 - Does the exculpatory language mention ALL the defendants by name or category?
 - Is there a factual basis for pleading gross negligence?
 - Is the exculpatory language conspicuous or is it in small print without any title buried in the text?
 - Can the agreement be characterized as an unconscionable adhesion contract?
 - Who signed the release? Can you argue whether the person who signed it had the authority to bind the plaintiff?
 - Is there an arbitration agreement? If so, consider some of the preceding questions in addition to considering judicial economy and expense of having to litigate the case in two forums with the risk of inconsistent results.
3. Is there a basis for pleading fraud? You have to gather all the brochures, website information and advertising to assess this.
4. Was defendant’s negligent conduct inherent in the sport? If not, you have a good argument to avoid primary assumption of risk.
5. Even if defendant’s negligent conduct was inherent in the sport, did it breach its duty not to increase the risks inherent in the sport by reckless conduct? If so, you have a good argument to avoid primary assumption of risk.
6. Did a product contribute to the incident?