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COMMENT

Saying “Neigh” to North Carolina’s Equine Activity Liability Act

I. OVERVIEW

Forty-four states have enacted equine activity liability statutes that grant qualified immunity from civil liability to certain classes of persons who are engaged in equine activities.¹ Why are these statutes so popular? One reason may be the impact of the horse industry on the national economy and the American quality of life.

According to the American Horse Council (AHC), the national trade association for the horse industry in Washington, D.C., there are almost seven million commercial and recreational horses in the United States.² Seventy-two percent are used for horseshows and other recreational activities.³ Eleven percent are used for racing or breeding.⁴ Over seven million Americans are involved in the horse industry, and almost two million Americans own horses.⁵

The economic and social impact of the horse industry is staggering to those unfamiliar with the industry. The AHC estimates that the horse industry contributes over twenty-five billion dollars in goods and services, and has a total impact of \$112.1 billion on the gross domestic product.⁶ The contribution to the gross domestic product is greater than the motion picture, railroad transportation, and tobacco industries, respectively.⁷

1. Washington enacted the first statute in 1989. Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997, 999-1000 (1995). The following states have similar statutes: Alabama, Arkansas, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

Statistics on equine activity liability statutes in other jurisdictions are based on generalizations of the statutes, with the focus on non-inherent risk provisions. See *infra* Part II(A) for an explanation of non-inherent risks. Statistics do not include West Virginia, Wisconsin and Wyoming because the statutes are so different from North Carolina’s Equine Activity Liability Act.

2. American Horse Council, *Horse Industry Statistics*, at <http://www.horsecouncil.org/ahc-stats.html> (last visited May 8, 2000).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

North Carolina joined thirty-seven other states in enacting equine activity liability statutes in 1997.⁸ The statutes became effective on January 1, 1998.⁹ There have been no appellate cases brought under the statutes in the few years that they have been in effect. Therefore, this paper will examine the statutes, including the history and purpose of the legislation. This paper will then analyze the effectiveness of the legislation and policy considerations that arise out of the legislation.

II. LEGISLATION

A. *The Equine Activity Liability Act*

The Equine Activity Liability Act. North Carolina's Equine Activity Liability Act (EALA) identifies equines as horses, ponies, mules,¹⁰ donkeys and hinnies.¹¹ The EALA is composed of three statutes. Section 99E-1 provides definitions of terms used in the EALA.¹² Section 99E-2 addresses the liability of equine sponsors, professionals and other persons engaged in equine activities.¹³ Finally, section 99E-3 imposes duties upon equine professionals and sponsors to warn persons engaged in equine activities that equine professionals and sponsors are not liable for injuries or deaths resulting exclusively from the inherent risks of equine activities.¹⁴ This paper will discuss the EALA by topic, rather than by statute.

Persons engaged in equine activities not liable. An equine activity sponsor, professional or any other person¹⁵ engaged in an equine activity is not liable for the injury or death of a participant as a result of the inherent risks of equine activities.¹⁶ A sponsor is a person who sponsors, organizes or provides facilities for equine activities.¹⁷ A sponsor may be an individual, group, club, partnership, corporation, operator or promoter of equine facilities.¹⁸ The equine activity may

8. N.C. GEN. STAT. §§ 99E-1 to -3 (1999).

9. Act of Aug. 6, 1997, ch. 376, sec. 1, 1997, N.C. Sess. Laws 962.

10. A mule is a half-ass, or, as compared to a hinny, a cross between a mare (female horse) and a jackass (male donkey). See *infra* text accompanying note 11. The American Council of Spotted Asses, Inc. (ACOSA), is dedicated to promoting and preserving the spotted ass (donkey and burro) and half-ass (mule and hinny). *The American Council of Spotted Asses*, at <http://www.spottedass.com> (last modified Nov. 3, 1999).

11. N.C. GEN. STAT. § 99E-1(2) (1999). Some states, such as Colorado and New Mexico, include dromedaries such as llamas and alpacas. A hinny is a half-ass, or, as compared to a mule, a cross between a jennet (female donkey) and a stallion (male horse). See *supra* note 10.

12. N.C. GEN. STAT. § 99E-1 (1999).

13. N.C. GEN. STAT. § 99E-2 (1999).

14. N.C. GEN. STAT. § 99E-3 (1999).

15. This paper will refer to persons in this group as "sponsors" or "defendants."

16. N.C. GEN. STAT. § 99E-2(a) (1999).

17. N.C. GEN. STAT. § 99E-1(4) (1999).

18. *Id.*

be for profit or not for profit.¹⁹ A professional is a person who receives compensation for: 1) instructing a participant; 2) renting equines for riding, driving or being a passenger; 3) renting equipment or tack to a participant; 4) examining or giving medical treatment to equines; or 5) shoeing or trimming hooves of equines.²⁰ Finally, a person is "engaged in an equine activity" when they participate in or assist a participant or a sponsor in an equine activity.²¹ This does not include spectators, unless the spectator places her or himself in an unauthorized area in immediate proximity to the equine activity.²²

Participants. A participant is a person who is engaged in an equine activity.²³ A participant may be an amateur or a professional.²⁴ The EALA applies whether the participant paid or did not pay to participate in the equine activity.²⁵

North Carolina courts may have to determine whether participants are immune from actions brought by other participants. A sponsor, professional or "any other person" engaged in an equine activity is not liable for injuries to a participant that result from the inherent risks of equine activities.²⁶ Although the EALA provides that "any other person" includes corporations and partnerships,²⁷ it does not otherwise define this protected class. Therefore, participants may be immune from liability if they are considered "any other person" under the EALA.

Louisiana courts have considered this issue. In *Gautreau v. Washington*,²⁸ the defendant and plaintiff were participants in a horse show. The entrance to the horse arena was crowded, so they waited in a less crowded area away from the entrance. When a passing horse brushed the defendant's stallion, the stallion reared and kicked the plaintiff in the hip. The court held that the defendant was "any other person" under the EALA,²⁹ and was therefore immune from liability for injuries to the plaintiff.³⁰ North Carolina courts may face a similar issue.

19. *Id.*

20. N.C. GEN. STAT. § 99E-1(5) (1999).

21. N.C. GEN. STAT. § 99E-1(1) (1999).

22. *Id.*

23. N.C. GEN. STAT. § 99E-1(7) (1999).

24. *Id.*

25. *Id.*

26. N.C. GEN. STAT. § 99E-2(a) (1999).

27. *Id.*

28. *Gautreau v. Washington*, 672 So. 2d 262 (La. Ct. App. 1996).

29. LA. REV. STAT. ANN. § 9:2795.1(B) (West 1999).

30. *Gautreau*, 672 So. 2d at 266. A telecommunications company is apparently not "any other person" for the purposes of claiming immunity under the statute. *Nielson v. AT & T Corp.*, 597 N.W.2d 434 (S.D. 1999) (applying principle of *eiusdem generis* to determine that telecommunications company was not "any other person" under South Dakota Equine Activities Act and therefore not immune from liability for death of rider whose horse tripped in cable trench).

Engage in equine activities. The EALA defines "engage in an equine activity" as participating or assisting a participant, sponsor or professional in an equine activity.³¹ "Equine activity" is defined as "any activity involving equines."³² Unlike the definitions in most EALAs, North Carolina's definition of equine activity is so broad that it includes recreational equine activities.³³

Inherent risks of equine activities. No participant or representative may bring an action against or recover from an equine activity sponsor, professional or any other person engaged in an equine activity for injury, damage or death resulting exclusively³⁴ from the inherent risks of equine activities.³⁵ This provision grants qualified immunity³⁶ to sponsors, professionals and persons engaged in equine activities.

"Inherent risks of equine activities" are dangers or conditions that are integral parts of equine activities.³⁷ These risks include the possibility that equine behavior will cause injury or death to persons around them.³⁸ They also include the unpredictability of equine reactions to sounds, sudden movements, unfamiliar objects, persons or other animals.³⁹

Non-inherent risks. The EALA identifies several acts, omissions or occurrences that: 1) are not inherent risks of equine activity; or 2) do not limit or prevent liability for the injury, damage or death of a participant. Because the EALA protects sponsors from liability for injuries caused by the inherent risks of equine activities, all acts, omissions or occurrences that are not protected by the EALA will be referred to as "non-inherent risks."

Section 99E-1(6)(b) provides that accidents involving motor vehicles are non-inherent risks.⁴⁰ Section 99E-2(b) identifies four additional acts or omissions that are non-inherent risks.⁴¹ First, a sponsor may be liable if he or she provides faulty tack or equipment,⁴² the sponsor either knew or should have known that the equipment or tack

31. N.C. GEN. STAT. § 99E-1(1) (1999).

32. N.C. GEN. STAT. § 99E-1(3) (1999).

33. Carl v. Resnick, 714 N.E.2d 1, 4 (Ill. App. Ct. 1999) (citing Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 Ky. L.J. 157, 177 (1995) (Connecticut, Wisconsin and Wyoming are "recreation states" that include recreational horseback riding in their EALAs)).

34. Most EALAs do not include "exclusively."

35. N.C. GEN. STAT. § 99E-2(a) (1999).

36. Early versions of the bill included "qualified immunity" in the purpose and findings, but the language was dropped after numerous revisions.

37. N.C. GEN. STAT. § 99E-1(6) (1999).

38. N.C. GEN. STAT. § 99E-1(6)(a) (1999).

39. N.C. GEN. STAT. § 99E-1(6)(b) (1999).

40. *Id.*

41. N.C. GEN. STAT. § 99E-2(b) (1999).

42. N.C. GEN. STAT. § 99E-2(b)(1) (1999).

was faulty,⁴³ and the faulty equipment or tack was the proximate cause of the injury, damage or death.⁴⁴ Second, a sponsor may be liable if he or she provides an equine to the participant without making reasonable and prudent efforts to determine the ability of the participant to safely engage in the activity or safely manage the equine.⁴⁵ Third, a sponsor may be liable for the willful or wanton disregard for the participant's safety.⁴⁶ Willful or wanton disregard may be an act or an omission.⁴⁷ The act or omission must be the proximate cause of the injury, damage or death.⁴⁸ Fourth, a sponsor or professional may be liable for negligent acts or omissions that proximately cause the injury, damage or death of the participant.⁴⁹ Finally, section 99E-2(c) provides that the EALA does not limit or prevent liability under products liability law.⁵⁰

Warning requirement. Sponsors must post and maintain warning signs and include warnings in all written contracts⁵¹ to be protected by the EALA.⁵² The warning, designed by the Department of Agriculture and Consumer Services,⁵³ must state: "WARNING[:] under North Carolina law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting exclusively from the inherent risks of equine activities. Chapter 99E of the North Carolina General Statutes."⁵⁴ This warning must be posted in a clearly visible location on or near the stable, corral, arena or area in which the equine activity occurs.⁵⁵ The writing on the sign must be in black letters at least one inch in height.⁵⁶ The warning in the contract must be clearly printed.⁵⁷

B. Legislative History

Unlike other states, North Carolina's EALA does not include a statement of the legislative purpose and findings.⁵⁸ This makes it diffi-

43. *Id.*

44. *Id.*

45. N.C. GEN. STAT. § 99E-2(b)(2) (1999).

46. N.C. GEN. STAT. § 99E-2(b)(3) (1999).

47. *Id.*

48. *Id.*

49. N.C. GEN. STAT. § 99E-2(b)(4) (1999).

50. N.C. GEN. STAT. § 99E-2(c) (1999).

51. N.C. GEN. STAT. § 99E-3(a) (1999).

52. N.C. GEN. STAT. § 99E-3(c) (1999).

53. The bill was amended to add Consumer Services.

54. N.C. GEN. STAT. § 99E-3(b) (1999).

55. N.C. GEN. STAT. § 99E-3(a).

56. *Id.*

57. *Id.*

58. See, e.g., MISS. CODE ANN. § 95-11-1 (1999) (legislative intent and findings); N.J. STAT. ANN. § 5:15-1 (West 1999) (legislative findings and declarations); N.M. STAT. ANN. § 42-13-2

cult to determine legislative intent when interpreting the statute. An examination of the amendments to the first EALA bill may help identify the purpose for this legislation.

The first equine activities bill appears to have been introduced into the North Carolina House of Representatives in early 1995 as "A Bill to Be Entitled 'An Act to Provide Immunity from Liability for Equine Activities.'"⁵⁹ This bill included a section that identified the purpose and findings of the General Assembly.⁶⁰ The General Assembly concluded that: 1) equine activities are risky and may result in injuries; 2) equine activities provide numerous personal and economic benefits to citizens; 3) equine activities preserve public peace, health and safety; and 4) the General Assembly intended to encourage equine activities by limiting civil liability of persons involved in equine activities.⁶¹ The Chairman of the House Judiciary I Committee removed this bill from the calendar because of its "complexity" and appointed a subcommittee to study the bill.⁶²

House Bill 176, the bill that the General Assembly eventually ratified,⁶³ was introduced almost two years later and was referred to the House Judiciary II Committee.⁶⁴ The bill was entitled, "An Act to Clarify Responsibilities for Equine Activities and to Provide Qualified Immunity from Liability."⁶⁵ The bill contained the same purpose and findings as the original House Bill.⁶⁶ However, the purpose and findings were not included in the Committee Substitute. There are, however, other legislative documents that might help identify the purpose of the EALA.

Visitor registration sheets in the Committee Meeting Minutes indicate that representatives from the North Carolina Department of Agriculture State Fair Horse Complex, the North Carolina Horse Council, and several local farms and stables, among other groups, attended the House Judiciary II Committee meetings.⁶⁷ The North Car-

(Michie 1999) (legislative purpose and findings); TENN. CODE ANN. § 44-20-101 (1999) (legislative findings and intent).

59. H. 61-BILL 2, Judiciary I Committee Substitute Favorable 03/15/95, Session 1995 (N.C. 1995).

60. *Id.* at 1, lines 9-17.

61. *Id.*

62. HOUSE JUDICIARY I COMMITTEE MINUTES, April 6, 1995 (N.C. 1995). A similar bill was introduced in the Senate on May 2, 1995 and referred to the Judiciary I Committee, but was not ratified.

63. Act of Aug. 6, 1997, ch. 376, sec. 1, 1997, N.C. Sess. Laws 962.

64. H. 176-BILL 1, Judiciary II Committee, Session 1997 (N.C. 1997).

65. *Id.*

66. *Id.* at 1, lines 9-17. *See supra* note 60.

67. HOUSE JUDICIARY II VISITOR REGISTRATION SHEET, March 11, 1997 (N.C. 1997). Legislative history from 1974 to date is available in the North Carolina General Assembly Legislative Library in the State Legislative Building, 300 North Salisbury Street, Raleigh, North

olina Horse Council (NCHC) presented statistics on the impact of the horse industry at the national⁶⁸ and state levels. According to the NCHC, there were 26,300 horse farms in North Carolina in 1996, with an average of five horses per farm.⁶⁹ The total value of horses in the state was \$533 million.

James A. Graham, the Commissioner of the North Carolina Department of Agriculture, also stressed the importance of the horse industry in the state in a memorandum to the Senate Judiciary Committee.⁷⁰ According to Commissioner Graham, the bill was important for the continuing growth of the horse industry in North Carolina.⁷¹ The state operated two major horse show facilities in 1997 and was scheduled to open two more. These facilities were competing with other states in booking major horse events.⁷² Commissioner Graham was concerned that, unlike thirty-seven states at the time, North Carolina would be at a disadvantage because it did not have an EALA to protect sponsors.⁷³ The EALA would allow managers to book the horse shows and events needed to collect revenues on which they so heavily depend.⁷⁴

In a second memorandum to the Senate Judiciary Committee three weeks later, the Commissioner identified other benefits of equine activities: preserving open spaces and generating income for grain and forage production.⁷⁵ North Carolina Department of Agriculture statistics from the memorandum provide additional support. In 1997, there were 132,000 horses⁷⁶ on 446,000 acres of land.⁷⁷ Approxi-

Carolina 27603-5926. The library is also accessible online at <http://www.ncga.state.nc.us/LegLibrary.html>.

68. The national statistics were taken from the survey used by the American Horse Council. See *supra* notes 2-7.

69. SENATE JUDICIARY COMMITTEE MINUTES, June 24, 1997 (N.C. 1997). Statistics were based on a limited 1996 survey by the North Carolina Department of Agriculture.

70. Memorandum from James A. Graham, Commissioner, North Carolina Department of Agriculture, to Senate Judiciary Committee I (June 18, 1997) (on file with the North Carolina General Assembly Legislative Library).

71. *Id.*

72. *Id.*

73. *Id.* Connecticut also cited this as a reason for enacting its EALA, though one author doubts the validity of the reason. Sharlene A. McEvoy, *The Rise of Equine Activity Liability Acts*, 3 ANIMAL L. 201, 214-15 (1975).

74. Memorandum from James A. Graham, Commissioner, North Carolina Department of Agriculture, to Senate Judiciary Committee I (June 18, 1997) (on file with the North Carolina General Assembly Legislative Library).

75. *Id.*

76. North Carolina Department of Agriculture and Consumer Services, *1996 North Carolina Equine Survey: Equine Inventory and Value by County*, at <http://www.ncagr.com/stats/equine/eqinvc.htm> (last modified Apr. 25, 1997).

77. North Carolina Department of Agriculture and Consumer Services, *1996 North Carolina Equine Survey: Narrative*, at <http://www.ncagr.com/stats/equine/equine.htm> (last modified Apr. 25, 1997).

mately 5900 horse operations had six or more horses, and approximately 600 operations had more than twenty-five horses.⁷⁸ Although there is no way to determine the exact legislative purpose and findings, it is clear that the North Carolina Department of Agriculture and the NCHC were the major driving forces behind this legislation.

After the General Assembly ratified House Bill 176, the president of the NCHC told the Greensboro News & Record that the group sought protection from liability to reduce the cost of liability insurance.⁷⁹ The group feared a rise in the cost of equine insurance because of claims by persons injured in equine activities.⁸⁰ This explanation is supported by bill drafts of the Roller Skating Rink Safety and Liability Act (Roller Skating Rink Act), a qualified immunity statute that was ratified with the EALA.⁸¹

The original bill of the Roller Skating Rink Act included the General Assembly's purpose and findings.⁸² One of these findings was that liability insurance was expensive and hard to maintain.⁸³ Insurance premiums increased as the number of insurance providers who were willing to provide insurance to roller skating rink operators decreased.⁸⁴ Most roller skating rinks in North Carolina were run by small, independent businesses that could not afford increasing liability premiums.⁸⁵ The inability to obtain liability insurance adversely affected operators and injured skaters.⁸⁶ Consequently, the General Assembly ratified the Roller Skating Rink Act to grant qualified immunity to operators who complied with the duties set out in the statute.⁸⁷

Other states have cited the high cost of liability insurance as a justification for granting qualified immunity to sponsors. The Michigan Court of Appeals found in a 1999 decision that at least one-third of Michigan's public stables closed in the 1990s because of rising insur-

78. North Carolina Department of Agriculture and Consumer Services, *1996 North Carolina Equine Survey: Number of Equine Operations, by Size*, at <http://www.ncagr.com/stats/equine/eqopsz.htm> (last modified Apr. 25, 1997).

79. *Horse Interests Seek Lawsuit Shield*, GREENSBORO NEWS AND RECORD, July 28, 1997, at B2.

80. *Id.*

81. N.C. GEN. STAT. §§ 99E-10 to -14 (1999).

82. H. 789-BILL 1, Judiciary I Committee, Session 1995 (N.C. 1995).

83. *Id.* at 1, lines 19-20.

84. *Id.* at 1, lines 21-23.

85. *Id.* at 2, lines 1-3.

86. *Id.* at 2, lines 4-6.

87. N.C. GEN. STAT. § 99E-14 (1999). Roller skaters and spectators are deemed to have knowledge of and assume the "inherent risks" of roller skating that are not caused by the operator's breach of duties under North Carolina General Statutes section 99E-13. See N.C. GEN. STAT. § 99E-11 (1999), for a list of operators' duties and N.C. GEN. STAT. § 99E-12 (1999), for roller skaters' duties.

ance premiums and the costs of maintaining horses.⁸⁸ The Detroit Free Press reported in 1993 that insurance carriers stopped writing policies from 1985 to 1988 for persons who rented horses.⁸⁹ The Michigan Horse Council lobbied to have the Michigan Legislature promulgate legislation that would protect commercial stable operators from civil liability.⁹⁰ The lobby was successful, and Michigan's EALA became effective on March 30, 1995.⁹¹

The theory that North Carolina's General Assembly may have promulgated the EALA to protect businesspersons engaged in equine activities from the high cost of liability insurance is also supported by statistics on horseback-related injuries. There were 339,462 horseback-related injuries in the United States between 1992 and 1996.⁹² Fractures accounted for over twenty-nine percent of these injuries.⁹³ In 1996, approximately eighteen percent of all injuries were head injuries.⁹⁴ Forty-three percent of injuries between 1992 and 1996 were suffered by persons under twenty-five years of age.⁹⁵ The severity and frequency of horseback-related injuries may have contributed to the high cost of liability insurance, and in some cases, caused insurance companies to refuse coverage for some equine activities.⁹⁶

Another factor that has caused liability insurance to increase in other states is the change in negligence law over the last few decades.⁹⁷ Almost all states are now comparative negligence states. This allows more injured persons to recover because contributorily negligence is not a complete bar to recovery. The effect on equine sponsors is that contributorily negligent participants may recover in comparative negligence states with EALAs that do not include simple negligence as an inherent risk of equine activity.

North Carolina, however, is one of the few remaining contributory negligence states.⁹⁸ Although simple negligence is a non-inherent risk under North Carolina's EALA,⁹⁹ a contributorily negligent partici-

88. *Amburgey v. Sauder*, 605 N.W.2d 84, 93 (Mich. Ct. App. 1999).

89. *Id.*

90. *Id.*

91. Act of Dec. 29, 1994, No. 351, 1994 Mich. Pub. Acts §§ 1-7 (enacting Equine Activity Liability Act).

92. *NEISS 1997 Horse Related Injuries*, 7 AM. MED. EQUESTRIAN ASS'N NEWS 2 (Aug. 1997), at <http://www.law.utexas.edu/dawson/amea/aug97nws.htm#neiss>.

93. *Id.*

94. *Id.*

95. *Id.*

96. E-mail from Evan Beauchamp, Vice President, Equine Insurance Specialists, to Karen A. Blum, author (May 9, 2000) (on file with author).

97. Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997, 998-99 (1995).

98. The other states are Alabama, Maryland, Virginia and the District of Columbia.

99. N.C. GEN. STAT. § 99E-2(b)(4) (1999).

pant will be barred from recovery if the defendant successfully raises contributory negligence as a defense. Thus, the recent change in negligence law should not cause the cost of equine liability insurance to increase in North Carolina.

Does North Carolina's EALA protect sponsors from liability? If so, to what extent? If the high cost of liability insurance is a major reason for protecting equine sponsors, how effective is the EALA in reducing the number of insurance claims and the cost of liability insurance?

III. EFFECTIVENESS OF THE NORTH CAROLINA EQUINE ACTIVITY LIABILITY ACT

Does North Carolina's EALA protect sponsors from liability to which they would be exposed in the absence of the EALA? The EALA grants sponsors immunity, but limits immunity by identifying non-inherent risks that render the EALA inapplicable. Therefore, immunity depends on the scope of the non-inherent risks.

A. *Limitations to the General Rule of No Liability: Non-Inherent Risks*

1. Negligence

North Carolina's EALA provides that negligence does not prevent or limit the liability of a sponsor.¹⁰⁰ The negligence must be the proximate cause of the injury, damage or death.¹⁰¹ EALAs that identify negligence as a non-inherent risk severely limit the immunity that the EALAs purport to afford sponsors. At least eighteen states have EALAs with such provisions.¹⁰² Half of these states also identify willful or wanton conduct and intentional acts or omissions as non-inherent risks.¹⁰³ In these states, EALAs offer little or no protection to sponsors because there is very little tortious conduct that is not negligent, willful or wanton or intentional.

100. *Id.*

101. *Id.*

102. These states are Arizona, Connecticut, Hawaii, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Utah, Vermont and Virginia.

103. These states are Arizona, Hawaii, Missouri, Montana, Nebraska, New Mexico, Oregon, Rhode Island, and Utah. Kentucky and Minnesota, like North Carolina, do not limit liability for negligent or willful or wanton acts, but are silent as to intentional acts. Maine, New Jersey and Virginia do not limit liability for negligent or intentional acts, but are silent as to willful or wanton acts. Connecticut, Michigan and Vermont do not limit liability for negligence.

Twenty-three states have EALAs that are silent as to simple negligence as an inherent risk.¹⁰⁴ Two states expressly identify gross negligence as a non-inherent risk.¹⁰⁵ Presumably, these states afford immunity to negligent sponsors. There are no appellate cases that expressly state that a negligent defendant is immune where the defendant's conduct does not fall into any category of non-inherent risk. However, the Arizona Court of Appeals in dictum suggested that this would be the case.

In *Bothell v. Two Point Acres, Inc.*,¹⁰⁶ a ten-year-old girl was injured while leading a horse out of a corral. The plaintiff sued based on negligent supervision. The Arizona EALA provides that an equine owner who allows another to take control of an equine is not liable for injuries if the person signed a release.¹⁰⁷ The EALA does not apply to equine owners who are grossly negligent or who commit willful, wanton or intentional acts or omissions.¹⁰⁸ The court held that the EALA did not shield the defendant from liability because the injury occurred during a non-riding activity.¹⁰⁹ In reaching this conclusion, the court examined legislative materials, including committee meeting minutes, to determine legislative intent. In a footnote, the court noted that a committee chairman inaccurately stated, "If it can be proven that an owner or agent was negligent, that person can still be liable."¹¹⁰ This suggests that, in Arizona and states with EALAs that are silent about negligence as a non-inherent risk, a defendant who is merely negligent may be immune from liability where the defendant would otherwise be liable. The significance of negligence as a non-inherent risk will be discussed later in this section.

2. Faulty Equipment and Tack

North Carolina's EALA provides that liability is not limited or prevented when a sponsor provides faulty equipment or tack and the sponsor knew or should have known the equipment or tack was

104. The states that are silent as to negligence are Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas and Washington. Every EALA that includes negligence as an inherent risk limits immunity by expressly excluding as a non-inherent risk intentional and willful or wanton acts or omissions. In other words, EALAs that protect negligent sponsors do not protect sponsors from exposure to liability for intentional acts or omissions, nor for willful and wanton disregard for a participant's safety.

105. The states that do not limit liability for gross negligence are Arizona and Hawaii.

106. *Bothel v. Two Point Acres, Inc.*, 965 P.2d 47 (Ariz. 1998).

107. ARIZ. REV. STAT. ANN. § 12-553(A)(2) (West 1999).

108. ARIZ. REV. STAT. ANN. § 12-553(D)(2) (West 1999).

109. *Bothell*, 965 P.2d at 54.

110. *Id.* at 53 n.8.

faulty.¹¹¹ The plaintiff has the burden of proving that the defendant knew or should have known that the tack was faulty, and that the faulty equipment or tack proximately caused that injury, damage or death.¹¹² The combination of this provision with other EALA non-inherent risk provisions renders the tack and equipment exception virtually useless. Because there have been so few cases brought under EALAs nationwide, a few hypothetical situations will help illustrate the effect of this exception on immunity.

First, a defendant *knowingly* provides faulty equipment or tack that causes an injury. The faulty item *qualifies* as "equipment" or "tack."¹¹³ In this case, the defendant would be exposed to liability because the injury resulted from the non-inherent risk identified in the provision for faulty equipment or tack.¹¹⁴ In the absence of this provision, the defendant could be liable under other EALA provisions. The defendant, for example, could be liable for willfully or wantonly disregarding the safety of the participant under section 99E-2(b)(3), for negligence under section 99E-2(b)(4), or liable under the products liability laws.¹¹⁵

Second, a defendant *knowingly* provides faulty "equipment" or "tack" that causes an injury. The faulty item *does not* qualify as "equipment" or "tack." In this case, the defendant would not be liable under section 99E-2(b)(1) for knowingly providing faulty equipment or tack, but could be liable for willfully or wantonly disregarding the safety of the participant under section 99E-2(b)(3), for negligence under section 99E-2(b)(4), or under the products liability laws under section 99E-2(c). Thus, the provision is unnecessary because other provisions in the EALA limit the defendant's immunity.¹¹⁶

Third, a defendant *unknowingly* provides faulty equipment or tack and has *no reason to know* that the equipment or tack is faulty. In this case, a defendant would be immune from liability because the EALA requires that the defendant know or should have known of the defect. The defendant would not be exposed to liability for negligence for the same reason. Finally, the defendant would not be exposed to liability for willful or wanton disregard for the participant's safety because the defendant's conduct was not an intentional and unreasonable act that was done in disregard of a known or obvious risk of such proportion

111. N.C. GEN. STAT. § 99E-2(b)(1) (1999).

112. *Id.*

113. This would have to be determined by the court because the General Assembly did not provide definitions for "equipment" or "tack."

114. N.C. GEN. STAT. § 99E-2(b)(1).

115. N.C. GEN. STAT. § 99E-2(c) (1999).

116. In the unlikely event that a court determines that intentional acts or omissions are protected under the EALA, the EALA would grant sponsors immunity where they would otherwise be liable.

that it was highly probable that harm would follow.¹¹⁷ These hypothetical situations illustrate that the tack and equipment provision is unnecessary because: 1) the failure to provide safe equipment or tack exposes the defendant to liability in other, broader non-inherent risk provisions in the EALA; or 2) the provision provides immunity where the defendant would not have been liable in the first place.

3. Reasonable and Prudent Efforts to Determine the Participant's Ability

Inherent risks do not include the failure to make reasonable and prudent efforts to determine the ability of the participant to: 1) safely engage in the activity; or 2) safely manage the equine.¹¹⁸ The General Assembly's use of "or" between the sponsor's failure to assess the participant's abilities is significant. As written, neither failure is dependent on the other. Therefore, a defendant could fail to do one or the other, and the conduct would fall outside the protection of the EALA.¹¹⁹

What impact does this provision have on the liability of sponsors under the EALA? The answer depends on other non-inherent risks identified by the Legislature. A brief return to some hypothetical situations illustrates the effect of this provision.

First, a sponsor makes reasonable and prudent efforts to determine the participant's ability to engage in the activity or manage the equine. The participant is injured. In this case, the sponsor is immune because

117. See *infra* Part III(A)(5) on the willful and wanton disregard for the safety of the participant.

118. N.C. GEN. STAT. § 99E-2(b)(2) (1999).

119. EALAs that have "and" between the defendant's failure to assess the ability of the participant to safely "engage in the activity" and to "manage the equine" could cause problems in determining whether both omissions must be present before the conduct falls outside the scope of inherent risks. Thirty-six EALAs have provisions that limit immunity when defendants fail to make reasonable efforts to determine a participant's ability. All but four of these EALAs (Arizona, New Hampshire, New Jersey and Oklahoma) limit immunity when defendants fail to make reasonable efforts to determine the ability of the participant to safely engage in the activity and to safely manage the equine. Of the thirty-two EALAs that have both provisions, all but six (Florida, Hawaii, Minnesota, New Jersey, North Carolina and Ohio) are worded such that immunity is limited only when a sponsor or professional fails to comply with both provisions.

Courts in these states must determine whether their legislatures intended the limitation to apply when a defendant fails to comply with one or both provisions. In *Hendricks v. JAFI, Inc.*, No. 966038, 1999 WL 1336069 (Mass. Super. Jan 20, 1999), a Massachusetts superior court held that, although the statute as written requires a breach of both duties for an equine professional to be liable, a professional has a continuing duty to determine whether the participant is able to safely engage in the activity. *Id.* at *3. This would prevent an equine professional from escaping liability by making reasonable efforts to determine the ability of the participant to engage in the activity, then failing to act upon subsequent dangerous behavior during the course of the activity. *Id.* at *2. The court held that the proper test is whether the horse's behavior during the activity would put a reasonable equine professional on notice that the participant does not have the ability to safely engage in the activity at that time. *Id.*

of the general rule of no liability. However, the EALA does not protect the sponsor from liability to which the sponsor would be exposed in the absence of the EALA. The sponsor was not negligent because the sponsor made reasonable and prudent efforts to determine the participant's abilities, and the tack and equipment did not fail. Furthermore, the sponsor did not willfully or wantonly disregard the participant's safety because the sponsor made reasonable and prudent efforts to determine the participant's abilities, and the sponsor did not intentionally refuse to carry out a duty. Finally, the sponsor did not intentionally injure the participant. In the absence of the EALA, it is hard to imagine any theories of recovery that would expose the sponsor to liability for the participant's injuries. In this case, the non-inherent risk provision is unnecessary because the sponsor is exposed to liability for the same conduct in other sections of the EALA.

Second, a sponsor fails to make reasonable and prudent efforts to determine the participant's ability to engage in the activity or manage the equine and the participant is injured. This omission is a specific example of negligence. Negligence is "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances."¹²⁰ The EALA provides that negligence is a non-inherent risk; therefore, the sponsor may be liable for negligence. This hypothetical situation illustrates that the "abilities" provision is unnecessary because it is a specific example of negligent conduct that is addressed in section 99E-2(b)(4) of the EALA.¹²¹

Third, the sponsor intentionally fails to determine the participant's ability to engage in the activity or manage the equine. The participant is injured. In this case, the sponsor may be liable for willful negligence because the EALA provides that willful and wanton disregard for a participant's safety is a non-inherent risk.¹²² Thus, the third example illustrates that the "abilities" provision is unnecessary because it is an example of willful or wanton conduct, which is addressed in section 99E-2(b)(3).

These hypothetical situations illustrate that the "abilities" provision is: 1) ineffective because it provides protection where the sponsor would not have been liable in the first place; or 2) unnecessary because it is an example of tortious conduct that is specifically addressed elsewhere in the EALA. This is not the case in states that grant immunity to negligent sponsors because the EALA protects sponsors who would be exposed to liability in the absence of the EALA. How-

120. BLACK'S LAW DICTIONARY 1032 (7th ed. 1990).

121. See *supra* Part III(A)(1) discussing negligence.

122. N.C. GEN. STAT. § 99E-2(b)(3) (1999).

ever, in these states, protection may be limited by narrow definitions of persons covered under the statute.

4. Products Liability

North Carolina and twenty-two other states¹²³ expressly provide that EALAs do not limit liability under products liability laws.¹²⁴ A thorough discussion of North Carolina's products liability laws is beyond the scope of this paper.¹²⁵ However, a brief and general discussion is useful to illustrate the limited scope of immunity offered by North Carolina's EALA.

Products liability refers to the liability of those who supply products and goods that are used by purchasers and bystanders for losses caused by defects in the products.¹²⁶ The majority of states recognize strict liability in tort in products liability actions;¹²⁷ North Carolina, however, does not.¹²⁸ Because the North Carolina Products Liability Act is derivative, the plaintiff must establish a theory of recovery such as negligence or breach of warranty.¹²⁹

To recover from a manufacturer for negligence, a plaintiff must prove that the product was defective when it left the manufacturer and that the manufacturer negligently: 1) designed the product; 2) selected the materials; 3) assembled the product; or 4) inspected the product.¹³⁰ The standard of care for the design and manufacture of a product is that of a reasonable person under similar circumstances.¹³¹ In states that have products liability statutes that impose liability on manufacturers that fail to adopt safer or more reasonable designs that would reduce the risk of harm to the consumer without rendering useless the product's purpose, a manufacturer may be liable for failing to

123. States with EALAs that do not limit liability under products liability laws are: Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah and Washington.

124. N.C. GEN. STAT. § 99E-2(c) (1999).

125. For an analysis of North Carolina's products liability laws, see CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 26 (2d ed. 1999).

126. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95, 677 (5th ed. 1984).

127. *Id.* at 694.

128. N.C. GEN. STAT. § 99B-1.1 (1999).

129. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 26.30 (2d ed. 1999).

130. *Cockerham v. Ward*, 262 S.E.2d 651 (N.C. Ct. App. 1980) (holding that plaintiff failed to prove that manufacturer negligently manufactured, designed, assembled or inspected rubber straps).

131. *Id.*

use safety features such as break-away stirrups on tack and equipment.¹³²

A seller is not liable for injuries or damages caused by a defective product if the product arrived from the manufacturer in a sealed container or if the seller did not have a reasonable opportunity to inspect the product.¹³³ However, the seller may be liable if the plaintiff proves—in addition to negligence or breach of implied warranty—that: 1) the seller damaged the product while in the seller's possession;¹³⁴ 2) the manufacturer is not subject to the jurisdiction of the State of North Carolina;¹³⁵ 3) the manufacturer has been judicially declared insolvent;¹³⁶ or 4) the seller fails to warn a foreseeable user of an unreasonably dangerous condition¹³⁷ that the seller knew or should have known posed a substantial risk of harm to a foreseeable user.¹³⁸

The products liability provision prevents manufacturers and sellers from escaping liability under the Products Liability Act by seeking refuge under the EALA. Thus, the products liability provision attempts to further limit the immunity of sponsors who sell or manufacture equipment or tack used in equine activities. However, even in the absence of the products liability provision, a seller or manufacturer seeking refuge under the EALA would probably not be shielded from liability because of the negligence provision.

5. Willful and Wanton Disregard for the Safety of a Participant

North Carolina's EALA provides that the willful or wanton disregard for the safety of a participant is not an inherent risk of equine activities.¹³⁹ "Willful and wanton" refers to an intentional and unreasonable act or omission by a defendant, done in disregard of a known or obvious risk of such proportion that it is highly probable that harm would follow.¹⁴⁰ The conduct is essentially negligent, rather than intentional.¹⁴¹ Because the EALA does not identify intentional tortious

132. Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997, 1020 n.182 (1995).

133. N.C. GEN. STAT. § 99B-2(a) (1999).

134. *Id.*

135. *Id.*

136. *Id.*

137. The statute provides an exception for open and obvious risks, or risks that are common knowledge. N.C. GEN. STAT. § 99B-5(b) (1999).

138. N.C. GEN. STAT. § 99B-5 (1999).

139. N.C. GEN. STAT. § 99E-2(b)(3) (1999).

140. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, 213 (5th ed. 1984).

141. *Id.* at 212-13.

conduct as a non-inherent risk,¹⁴² the question arises as to whether “willful or wanton” acts or omissions include intentional torts for the purposes of the EALA.

Willful, wanton and reckless are often used together.¹⁴³ However, North Carolina courts have attempted to distinguish the three.¹⁴⁴ Wanton conduct is an act that manifests a disregard for the rights and safety of others.¹⁴⁵ Reckless is a synonym for wanton.¹⁴⁶ Willful negligence is the “intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.”¹⁴⁷ Unlike an intentional act, a willful breach of duty may give rise to negligence.¹⁴⁸ Negligence is extinguished only when the injury is intentional.¹⁴⁹ The willfulness in breaching a duty is willful negligence, while the willfulness in causing an injury is intentional.¹⁵⁰ Constructive intent may provide the state of mind needed to prove an intentional tort.¹⁵¹ Contributory negligence is not a bar to the plaintiff’s recovery.¹⁵²

As early as 1838, North Carolina’s courts have construed statutes as written, without inquiring into the wisdom of the Legislature.¹⁵³ How-

142. Intentional acts were included in the original bill draft’s list of acts and omissions that are not inherent risks. The provision was later removed.

143. The three concepts “[inhabit] a twilight zone which exists somewhere between ordinary negligence and intentional injury.” *Pleasant v. Johnson*, 325 S.E.2d 244, 247 (N.C. 1985).

144. *Pleasant v. Johnson*, 325 S.E.2d 244, 248 (N.C. 1985); *see also Siders v. Gibbs*, 249 S.E.2d 858 (N.C. Ct. App. 1978).

145. *Pleasant*, 325 S.E.2d at 248; *see also Foster v. Hyman*, 148 S.E. 36 (N.C. 1929) (finding willful and wanton conduct where drunk defendant drove his car on wrong side of road at high rate of speed at night, struck plaintiffs’ car and caused it to collide with telephone pole).

146. *Pleasant*, 325 S.E.2d at 248.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Foster v. Hyman*, 148 S.E. 36 (N.C. 1929). In *Foster*, the Supreme Court stated that constructive intent to injure exists “where the wrongdoer’s conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent.” *Id.* at 38.

152. *Pearce v. Barham*, 156 S.E.2d 290, 294 (N.C. 1967) (quoting *Brendle v. R.R.*, 34 S.E. 634, 635 (N.C. 1899) (plaintiff passenger who was killed in an automobile accident was contributorily negligent in that she should have known that the driver was under the influence of alcohol, but could nevertheless maintain a negligence action against the driver and owner of the car)).

153. *State v. Manuel*, 20 N.C. 144 (1838) (upholding Act of 1831, which imposed fines on free Negroes and persons of color who had been convicted of criminal offenses, and declining to “supervise” the Legislature’s discretion). North Carolina courts have a long history of refusing to inquire into the wisdom of the Legislature absent a constitutional violation. *See Maready v. City of Winston-Salem*, 467 S.E.2d 615, 619 (N.C. 1996) (stating that “[t]he Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.”); *Nesbit v. Gill*, 41 S.E.2d 646, 653 (N.C. 1947) (finding no constitutional violation and refusing to consider whether the General Assembly acted wisely in granting exemptions to certain buyers and sellers of horses and/or mules).

ever, a court would probably apply a liberal construction to the EALA and include intentional tortious conduct in the non-inherent risk provision for willful and wanton conduct. This would be consistent with the legislative intent to limit sponsor immunity. It is well established that "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded."¹⁵⁴ A literal interpretation could expose sponsors to liability for negligent and willful and wanton acts or omissions, but shield them from liability for intentional conduct that causes injury, damage or death. This absurd result was almost certainly not intended by the Legislature.

The failure to tie a red ribbon around the tail of a horse that kicks apparently does not rise to the level of willful or wanton disregard for a participant's safety. Although North Carolina courts have not considered the issue, the few jurisdictions that have done so have held that the conduct is not willful or wanton either because the custom is not widespread¹⁵⁵ or because the custom has not been adopted by a governing body.¹⁵⁶ These jurisdictions have EALAs that include negligence as an inherent risk. This suggests that plaintiffs injured by "kickers" had to bring actions for willful and wanton disregard because the defendants were immune from liability for simple negligence. Thus, it is possible that the failure to tie a red ribbon around the tail of a kicker is negligent conduct that would expose a defendant to liability in North Carolina and other jurisdictions that identify negligence as a non-inherent risk.

B. *Failure to Comply with the Warning Requirement*

North Carolina's EALA requires sponsors to warn participants that sponsors are not liable for injuries resulting exclusively from the inherent risks of equine activities.¹⁵⁷ Sponsors must post and maintain

154. *State v. Barksdale*, 107 S.E. 505, 507 (N.C. 1921) (ordering new trial in case of salesperson convicted of selling flavoring extracts under statute prohibiting sale of mixtures of any kind that contained alcohol); see also *Frye Regional Medical Center, Inc. v. Hunt*, 510 S.E.2d 159 (N.C. 1999) (holding that gubernatorial approval process for State Medical Facilities Plans includes final authority to make substantive amendments to prevent stalemate).

155. *Lessman v. Rhodes*, 721 N.E. 2d 178, 181 (Ill. App. Ct. 1999) (finding no evidence of violation of statute, ordinance, regulation, or safety guideline officially adopted by fox hunting organizations).

156. *Muller v. English*, 472 S.E.2d 448, 454 (Ga. Ct. App. 1996) (finding no evidence that other sponsors required "kickers" to wear ribbons).

157. N.C. GEN. STAT. § 99E-3(a) (1999). Twenty-six states have EALAs that require warning signs in various locations. These states are Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Rhode

warning signs in clearly visible locations on or near places of equine activities.¹⁵⁸ Sponsors must also include warnings in clearly readable print in every written contract.¹⁵⁹ The EALA does not appear to impose a duty on sponsors to warn participants,¹⁶⁰ rather, it prevents sponsors who do not post warnings from claiming immunity.¹⁶¹ Although the failure to warn participants is not specifically identified as a non-inherent risk, it has the same effect because sponsors who do not post warnings fall outside the protection of the EALA.¹⁶²

North Carolina courts might have difficulty determining whether sponsors have complied with the warning requirement. An examination of cases in other jurisdictions will be helpful in interpreting North Carolina's EALA. The Michigan Court of Appeals interpreted the warning requirement in *Amburgey v. Sauder*.¹⁶³ In *Amburgey*, the plaintiff was injured when the defendant's horse bit her in the arm. The plaintiff was at the defendant's stables to watch a friend participate in a riding lesson. After the lesson, she entered the stables through a side entrance. The plaintiff was walking down the center aisle of the barn when another horse lunged over the stall door and bit her. The Michigan EALA requires sponsors to post warning signs "in . . . clearly visible location[s] in close proximity to the equine activity."¹⁶⁴ The defendant had placed warning signs in several locations, including the front entrance to the facility. However, the warning sign at the entrance through which the plaintiff entered had been eaten by a goat prior to the incident.¹⁶⁵

The court considered whether the defendant complied with the statutory duty to post warning signs by posting one sign at the main entrance. The court held that the posting was sufficient, even when the

Island, South Carolina, South Dakota, Tennessee, and Texas. Warning signs are optional in Vermont. Only six of these states have provisions stating that the failure to comply with the warning requirement prevents a sponsor, professional or owner from invoking the privilege of immunity. These states are Alabama, Georgia, Louisiana, Minnesota, North Carolina and South Carolina.

158. *Id.*

159. *Id.*

160. *But see* Terence J. Centner, *Modifying Negligence Law for Equine Activities in Arkansas: a New Good Samaritan Paradigm for Equine Activity Sponsors*, 50 ARK. L. REV. 637, 657 n.157 (1998) (EALAs intend to create duty to post warning sign). North Carolina's statutes on skier safety, which were enacted in 1981, are not ambiguous about whether they create duties. N.C. GEN. STAT. §§ 99C-1 to -5 (1999). The statutes impose duties on skiers, passengers and operators to act safely. N.C. GEN. STAT. § 99C-2 (1999). *See Freeman v. Sugar Mountain Resort, Inc.*, 516 S.E.2d 616 (N.C. Ct. App.), *rev'd based on dissenting opinion*, 522 S.E.2d 582 (N.C. 1999) (skier sued ski resort after he was injured by another skier who jumped off makeshift ramp). The violation of any duty constitutes negligence. N.C. GEN. STAT. § 99C-3 (1999).

161. N.C. GEN. STAT. § 99E-3(c) (1999).

162. *See Ford v. Bynum Livestock and Comm'n Co.*, 674 So. 2d 600 (Ala. Civ. App. 1995) (denying defendant's request for immunity because defendant failed to post warning signs).

163. *Amburgey v. Sauder*, 605 N.W.2d 84 (Mich. Ct. App. 1999).

164. MICH. COMP. LAWS ANN. § 691.1666 (West 2000).

165. *Amburgey*, 605 N.W.2d at 90.

participant entered through a different entrance.¹⁶⁶ The applicable test is whether the defendant made reasonable efforts to comply with the statute. If so, actual notice is not required under the EALA.¹⁶⁷ Requiring the defendant to post a sign at every entrance would "eviscerate" immunity.¹⁶⁸

In other jurisdictions, substantial compliance is the general rule. In *Muller v. English*,¹⁶⁹ the plaintiff alleged that the sponsor of a fox hunt did not comply with the warning requirement in failing to conspicuously post warning signs on the grounds. The Georgia EALA requires that sponsors post signs on or near stables, corrals or arenas where the sponsor conducts equine activities.¹⁷⁰ The defendant posted five signs in areas where the fox hunt frequently met because the hunt took place over miles of open country and the path of the fox could not be pre-determined. She also placed a sign on the windshield of a vehicle where the hunt started. The court held that substantial compliance with a statutory requirement was sufficient.¹⁷¹ North Carolina courts may have to resolve similar issues.

The warning requirement is unnecessary if the EALA does not protect sponsors from civil liability. A defendant who posts warning signs and includes warnings in contracts may be immune under the EALA, but not for negligent, intentional, or willful or wanton acts or omissions. However, a defendant who includes the statutory warning in contracts and includes a broad release clause that extinguishes liability for negligent acts should escape liability.¹⁷² The defendant in such cases should raise express assumption of risk, and not the EALA, as a defense.

C. *Strict Liability for Attacks by Dangerous Domestic Animals*

North Carolina's EALA is silent as to whether it supercedes common law strict liability for attacks by dangerous domestic animals. Thus, the EALA might provide immunity for owners of vicious domestic horses that injure participants.¹⁷³ If so, owners of vicious do-

166. *Id.* at 93.

167. *Id.*

168. *Id.*

169. *Muller v. English*, 472 S.E.2d 448 (Ga. Ct. App. 1996).

170. GA. CODE ANN. § 4-12-4(a) (1999).

171. *Muller*, 472 S.E.2d at 451 (citing GA. CODE ANN. § 1-3-1(c) (1999)).

172. *See B & B Livery, Inc. v. Riehl*, 960 P.2d 134 (Colo. 1998) (holding that summary judgment for defendant proper where plaintiff knowingly signed release, but did not know that release extinguished liability for any injury); *Muller v. English*, 472 S.E.2d 448 (Ga. Ct. App. 1996) (granting defendant's motion for summary judgment where experienced fox hunter signed release containing statutory warning and statement that fox hunting was very dangerous).

173. *But see* Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 159 (1995).

mestic horses may be immune from liability where owners of other vicious domestic animals would be liable.

Illinois courts have considered this issue. In *Carl v. Resnick*,¹⁷⁴ a horse owned by the defendant kicked the plaintiff and her horse when the plaintiff met the defendant on a trail. The Illinois Court of Appeals held that the owner could be liable under the Animal Control Act because the EALA did not apply to parties engaged in recreational equine activities.¹⁷⁵ The Animal Control Act imposes liability on the owner of an animal that attacks or injures a person without provocation if the person is lawfully on the premises.¹⁷⁶ The court held that the Equine Liability Act bars some actions that would be permitted by the Animal Control Act, such as those brought by a plaintiff who is injured while engaged in an equine activity.¹⁷⁷ However, in this case, the plaintiff was not engaged in an equine activity.

Michigan courts have also considered this issue. In *Amburgey v. Sauder*,¹⁷⁸ the court examined whether Michigan's EALA permitted an action against an owner under common law strict liability for injuries caused by dangerous domestic animals. To prove common law strict liability in Michigan, a plaintiff who has been attacked by an animal must prove that: 1) the defendant owned the animal; 2) the animal had dangerous propensities; and 3) the owner knew or should have known of the dangerous propensities.¹⁷⁹ In *Amburgey*, the horse that bit the plaintiff had a tendency to become agitated if disturbed while eating. The court held that the EALA supersedes common law strict liability for dangerous domestic animals because the legislature intended to limit claims against commercial stable operators.¹⁸⁰

North Carolina, like Michigan, recognizes common law strict liability for injuries caused by vicious domestic animals, and could face similar claims. The elements needed to establish a prima facie case are essentially the same as those in Michigan. To prove common law strict liability in North Carolina, the plaintiff must establish that: 1) the defendant owned or kept the animal;¹⁸¹ 2) the animal had vicious

174. *Carl v. Resnick*, 714 N.E.2d 1, 5 (Ill. App. Ct. 1999), *appeal denied*, 723 N.E.2d 1161 (Ill. 1999).

175. 745 ILL. COMP. STAT. 47/1 to /999 (West 2000).

176. 510 ILL. COMP. STAT. 5/16 (West 2000).

177. *Carl*, 714 N.E.2d at 5. See Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 159 (1995).

178. *Amburgey v. Sauder*, 605 N.W.2d 84, 93 (Mich. Ct. App. 1999). See *supra* Part III(B) on the failure to comply with the warning requirement.

179. *Amburgey*, 605 N.W.2d at 93; see also *Trager v. Thor*, 516 N.W.2d 69 (Mich. 1994) (stating elements of common law strict liability in action against house sitter as "keeper" of dog that bit and scratched child).

180. *Amburgey*, 605 N.W.2d at 93. The court also denied the plaintiff's motion to amend her complaint to include negligence, a theory under which the plaintiff could recover. *Id.* at 94.

181. *Swain v. Tillett*, 152 S.E.2d 297, 302 (N.C. 1967).

propensities;¹⁸² 3) the owner knew or should have known of the vicious propensities;¹⁸³ 4) the animal injured the plaintiff; and 5) the injury was a type likely to result from the animal's viciousness.¹⁸⁴ Although the plaintiff does not need to prove negligence,¹⁸⁵ the plaintiff must prove that a reasonable person who knew of the animal's past conduct would have foreseen that the unrestrained animal would cause injury or damage.¹⁸⁶ Thus, the standard of care is that of a reasonable person.¹⁸⁷

If North Carolina follows Michigan in determining that the EALA supersedes common law strict liability for domestic horses with vicious propensities, defendants would be immune under the EALA where they would otherwise be liable. However, immunity would be limited to sponsors whose conduct is neither negligent nor willful or wanton. If North Carolina courts decline to follow Michigan and determine that attacks by vicious domestic horses are not inherent risks, then sponsors would be exposed to the same liability to which they would be exposed in the absence of the EALA. Thus, the EALA would be ineffective in protecting sponsors from civil liability.

IV. POLICY CONSIDERATIONS

The provision that identifies negligence as a non-inherent risk¹⁸⁸ virtually swallows the general rule of immunity for sponsors. The EALA will shield a sponsor from liability where the sponsor would otherwise be liable in very few, if any, circumstances. The legislature could solve this problem by changing the non-inherent risk provision

182. See generally *Hill v. Moseley*, 17 S.E.2d 676 (N.C. 1941).

183. *Swain*, 152 S.E.2d at 301. In *Swain*, the plaintiff broke several bones when her neighbor's pet deer charged and attacked her. The plaintiff had told the neighbor that the deer frequently escaped its pen and chased her in her yard. The court held that the plaintiff did not have to prove that the owner knew of the deer's vicious propensities. Rather, it was sufficient that the owner should have known of the animal's vicious propensities. See also *Miller v. Snipes*, 183 S.E.2d 270 (N.C. Ct. App. 1971) (holding that minor who was kicked by pony did not have to prove owner's actual knowledge of vicious propensities; it was enough that the owner should have known).

184. *Cockerham v. Nixon*, 33 N.C. 269, 271 (1850).

185. *Lloyd v. Bowen*, 86 S.E. 797 (N.C. 1915). In *Lloyd*, a passer-by was seriously injured when the defendant's horse knocked him down on a city street. The defendant had left the horse tied to a tree limb and unattended all day. The North Carolina Supreme Court held that the trial court did not err in finding the defendant negligent. The plaintiff did not have to prove that the owner of the horse knew of the horse's vicious propensities in a negligence action. However, the court held that in cases where the owner was not negligent and the injuries were caused by the viciousness of the animal, the plaintiff must prove that the owner knew of the animal's viciousness. See also CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS §§ 19-21 (2d ed. 1999); Charles E. Daye, *Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina*, 18 CAMPBELL L. REV. 359 (1996).

186. *Sanders v. Davis*, 212 S.E.2d 554, 556 (N.C. Ct. App. 1975).

187. *Id.*

188. N.C. GEN. STAT. § 99E-2(b)(4) (1999).

from negligence to gross negligence. The question arises whether this would fulfill the purpose of the EALA.

If the purpose of the EALA is to protect sponsors from the high cost of liability insurance, a gross negligence provision would protect sponsors because there would be, in theory, fewer claims. North Carolina's EALA has been in effect for only a few years; therefore, statistics on the number of claims before and after the EALA are not readily available. Statistics on the cost of liability insurance before and after the EALA are also not available. If statistics eventually show that the number of claims was actually low prior to the EALA, then the justification for the EALA is questionable. In Kentucky, which has a similar EALA, one equine insurance company that writes approximately 150 policies per year indicated that it has received only one claim for equine-related injuries during the last twenty years.¹⁸⁹ If the same is true throughout North Carolina, then the number of claims would not be the root cause of the high cost of liability insurance. Thus, the countermeasure—the EALA—would not address the real problem.

If, however, statistics eventually show that the unavailability of liability insurance or the high cost of liability insurance has forced many sponsors out of business, then the purpose of the EALA seems justified. In Indiana, one insurance agency indicated that severe and frequent horseback-related injuries caused insurance companies to refuse coverage for some equine activities.¹⁹⁰ If this is the case in North Carolina, the question arises whether the EALA, as written, can achieve the purpose of protecting sponsors from tremendous expenses.

The answer is most certainly no. The non-inherent risk provision for negligence eviscerates any meaningful protection purportedly offered by the EALA. The General Assembly would do well to reconsider the non-inherent risk provisions. To prevent similar problems in the future, the General Assembly should also consider guidelines for enacting dangerous recreational activity statutes. The guidelines should include provisions for identifying legislative purpose and findings to give courts a better idea how to rule. This would be especially helpful in light of the ambiguous language of the EALA. Furthermore, the guidelines should identify criteria for granting statutory protection. This would help legislators determine which recreational activities need the most protection. Such guidelines would eliminate

189. Letter from Nina Hahn, Nina Hahn Equine Insurance, Inc., to Karen A. Blum, author (May 30, 2000) (on file with author).

190. E-mail from Evan Beauchamp, Vice President, Equine Insurance Specialists, to Karen A. Blum, author (May 9, 2000) (on file with author).

confusing and seemingly random legislation by ensuring "uniform" protection for persons engaged in the most dangerous or highly litigated recreational activities.

Consider the following problem. In 1997, a bill was introduced into the House of Representatives that sought to protect llama sponsors from liability for injuries and damages as a result of llama activities.¹⁹¹ The bill, which was not ratified, was nearly identical to the EALA, with "llama" substituted for "equine."¹⁹² At last count, there were approximately fifty llama farms in North Carolina.¹⁹³ Does North Carolina need such legislation?¹⁹⁴ A set of guidelines would help legislators answer this question.

V. CONCLUSION

North Carolina's EALA does not protect sponsors from liability to which they would be exposed in the absence of the EALA, with the possible exception of strict liability for attacks by vicious domestic animals. If the General Assembly wants to protect the 5900 horse operations in the state,¹⁹⁵ then the EALA must be written such that it is reasonably effective in protecting sponsors. Furthermore, with guidelines for enacting dangerous recreational activity statutes, the General Assembly could effectively target the groups that need the most statutory protection.

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191. H. 936-BILL 1, Judiciary II Committee, Session 1997 (N.C. 1997) (Llama Activities/Duties and Liability).

192. *Id.*

193. E-mail from Leanne Lyon, Crystal Coast Llama Farm, to Karen A. Blum, author (June 1, 2000) (on file with author).

194. On a side note, llamas are extremely effective guard animals. One llama can protect up to 2000 sheep. Although llamas cost more than dogs, they cost less to maintain because llamas eat the same food and receive the same vaccines as sheep. Llamapaedia, *Sheep Guarding*, at <http://www.llamapaedia.com/uses/guard.html> (last modified June 29, 1997).

195. North Carolina Department of Agriculture and Consumer Services, *1996 North Carolina Equine Survey: Equine Inventory and Value by County*, at <http://www.ncagr.com/stats/equine/eqinvc.htm> (last modified Apr. 25, 1997).

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