

Spring 1997

Treacherous Waters for White Water Rafters: Outfitters' Exculpatory Contracts and White Water Responsibility Acts

Sharlene A. McEvoy

Follow this and additional works at: <https://digitalcommons.fairfield.edu/nealsb>

Recommended Citation

McEvoy, Sharlene A. (1997) "Treacherous Waters for White Water Rafters: Outfitters' Exculpatory Contracts and White Water Responsibility Acts," *North East Journal of Legal Studies*: Vol. 5 , Article 4. Available at: <https://digitalcommons.fairfield.edu/nealsb/vol5/iss1/4>

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself. For more information, please contact digitalcommons@fairfield.edu.

13. Pub. L. No. 104-67 § 102.
14. Pub L. No. 104-67 § 101.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Pub. L. No. 104-67 § 301.
22. *Id.*
23. *Id.*
24. *Id.*
25. Pub. L. No. 104-67 § 201.
26. *Id.*
27. Jeffrey Taylor, *Congress Sends Business a Christmas Gift: Veto Is Overridden on Bill Curbing Securities Lawsuits*, Wall St. J., Dec. 26, 1995, at A2.
28. Pub. L. No. 104-67 § 201.
29. *Id.*

Treacherous Waters for White Water Rafters:
Outfitters' Exculpatory Contracts and
White Water Responsibility Acts

by

Dr. Sharlene A. McEvoy*

Introduction

White water rafting has become a popular form of risk taking adventure travel. Estimates are that two million Americans participate in the sport but there are no figures on the number of fatalities.¹ While many people safely enjoy guided rafting trips, many find their experiences more dangerous than anticipated. Because some participants have suffered injuries or death, lawsuits have been brought in some states.²

This article will discuss three important cases involving white water rafting accidents: *Saenz v. Whitewater Voyages, Inc.*³ which outfitters regard as significant⁴, and two West Virginia cases: *Krazer v. Mountain River Tours, Inc.*⁵ and *Murphy v. North American River Runners.*⁶ This article will also examine states' *White Water Responsibility Acts*.

In *Saenz v. Whitewater Voyages, Inc.*, Saenz was a healthy 28 year old man who had been recruited to join a three day rafting trip from June 20-22, 1988 on the Middle Fork of the American River in California.⁷ Before beginning the trip, all participants including Saenz completed and signed "*Release and Assumption of the Risk Agreement*" which stated:

I am aware that certain risks and dangers may occur on any river with Whitewater. These risks include, but are not limited to, hazards of injury to person and property, while traveling in rafts on rivers, accidents or illness in remote places without medical facilities and the forces of nature...

I hereby assume all of the above risks and, except in cases of gross negligence, will hold Whitewater...harmless from any or all liability, actions, causes of action, debts, claims, and demands of every kind and nature whatsoever, which I now have, or which may arise out of, or in connection with, my trip or participation in any activities with Whitewater...⁸

The agreement also stated it operated as a release and assumption of the risk for his heirs.

Before the trip began, employees of the outfitter, Whitewater Voyages Inc., gave a safety talk which included what to do when thrown from the raft, how to get out from under it in a capsized, how to swim in the rapids, and a general discourse on the dangers of white water rafting. A guide also offered a sober reminder that "white water rafting is not a Disneyland ride" and told the participants that, "you can get hurt and even die."⁹ The guides also assisted all participants with adjustments to their life jackets and required that helmets be worn on all Class IV rapids.¹⁰

On the first day of the trip, Saenz' crew encountered two Class III and a Class IV rapid "Tunnel Chute", which was considered "to be the most difficult and dangerous rapid of the three day trip."¹¹ Before embarking on the latter, "all passengers were given the opportunity to scout the rough water in advance and the option of walking around it on the trail instead of running the rapid."¹² One guide, Butterfield, instructed the participants on how to enter the eddy so as not to become trapped and informed the group that the previous year a woman had been injured when she fell out of the boat and had gotten crushed against the wall of "Tunnel Chute."¹³

During the second day, Saenz experienced several Class III and Class IV rapids and a portage around an unrunnable stretch of river. He also had an opportunity to guide the raft during calm water. Although Saenz fell out of the raft at the bottom of "Menage a Trois", a Class IV rapid, he was pulled back in the boat after thirty seconds, suffering no injury.¹⁴

Before starting out on the third day, Thomas, a guide, taught Saenz how to swim a rapid by using small ripple rapids near camp as a practice site. He then reviewed the last Class IV rapid called "Murderer's Bar," but stated that running this rapid was optional. Butterfield reiterated that any participant could "go back with the vans" and not complete the trip.¹⁵

Everyone but Saenz scouted the rapid. He complained that he was tired, had sore legs and "wanted to get last rapid over with."¹⁶ Thomas, nevertheless, spent five minutes with him explaining the configuration of the treacherous "Murderer's Bar," including how the boats would approach it, and how the crew should maneuver. Thomas emphasized to Saenz the dangers of the rapids, particularly the hazards posed by a large rock and an eddy to the right of the rapid. In addition, Thomas reminded Saenz about how to swim if he were thrown out of the raft. Thomas twice asked Saenz if he wanted to run the rapid. Both times Saenz responded, "Let's get it over with. Let's do it."¹⁷

After these admonitions, the party set out to encounter "Murderer's Bar" where Saenz fell out of the raft and drowned. Saenz' heirs sued Whitewater Voyages, Inc. For wrongful death. The trial court entered summary judgment for the latter but the Court of Appeals held that Saenz expressly assumed the risks attendant to white water rafting and that this fact relieved the company of its duty of care to him. The court further noted that express assumption of the risk occurred when Saenz, expressly consented to relieve Whitewater Voyages, Inc. of an obligation of conduct toward him and to take his change of injury from a known risk. Thus, Whitewater was

under no duty to Saenz and could not be charged with negligence.¹⁸

The appeals court declared that Saenz signed a release, which was an express assumption of the risk, stating that he was aware of the risks and dangers that could occur on the river trip including the hazards of personal injury. The document also exonerated the outfitter and its employees from any claim arising out of the trip.

The court also stated that, although the release did not specifically mention it as a risk, death by drowning is a danger inherent in white water rafting apparent to anyone who embarks on such a trip.¹⁹

Furthermore, the court also pointed out that Whitewater Voyages was a private company and that there was no public policy in California opposing "private voluntary transactions to which, one party for a consideration, agrees to shoulder a risk which the law would have otherwise have placed upon the other party."²⁰ The court also declared that any contract that frees its drafter from any liability from his or her own future negligence "must clearly and explicitly express that this is the intent of the parties." The court declared that it applied the rule of strict construction when reading such agreements which requires that such contracts should not contain lengthy, convoluted sentences nor oversimplified language. A release will be invalid if a key word appears in the title but not in the text or if it is too lengthy or too general.²¹ The court said:

It suffices that a release be clear and unambiguous and explicit and it expresses an agreement not to hold the released party liable for negligence.²²

While conceding that the Whitewater release was not perfect, its plain language did state that Saenz was aware of the risks and dangers that could occur on a river trip and it expressed Saenz' consent to assume the risks of personal injury, accident and illness. In fact, everything short of gross negligence was covered by the document. Clearly, Whitewater Voyager and its agents did not perform negligently. Saenz was outfitted with a life jacket and provided with an initial orientation by the guides. Helmets were required when Class IV rapids were encountered. Advance scouting of difficult rapids was mandatory.

Moreover, prior to encountering the "Murderer's Bar" rapid in which he drowned, Saenz was advised that he did not have to participate. Five minutes were spent explaining the hazards to him and what the crew would need to do to negotiate the rapid. The guide, moreover, emphasized to Saenz the peculiar dangers of the large rock and the eddy. Since the outfitter took the appropriate steps to inform the deceased of the hazards before and during the trip, it could not be held liable.

Echoing the *Saenz* case was the decision in *Krazer v. Mountain River Tours, Inc.* which upheld a similar release.²³ In June, 1985, Dorothy Krazek, traveled from her home in Pennsylvania to West Virginia to take a white water rafting trip on the New River, conducted by Mountain River Tours, Inc.²⁴ She paid a fee and signed a document *RAFT TRIP RELEASE AND ASSUMPTION OF THE RISK*. The agreement provided:

I am aware that during the raft trip in which I am participating under the arrangement of Mountain River Tours, Inc. And its agents and employees and associates certain substantial risks and dangers may occur including, but not limited to, hazards of traveling on a rubber raft in rough river conditions, hiking in rough terrain, accidents, or illnesses in remote places without medical facilities, forces of nature and travel by automobile, bus or other conveyance.

In consideration of a part payment for the right to participate in such river trips or other activities and service and food if any arranged for me by Mountain River Tours, Inc., the agents, employee and associates, I have and do hereby assume all of the above risks and release and will hold harmless from any and all liability actions, causes of actions, debts, claim and demands of every kind and nature whatsoever which I now have, or which may arise out of or in connection with my trip or participation in any other activity.

The terms hereof shall serve as a release, indemnification and assumption of the risk for my heirs, executors, administrators and for all members of my family, including any minors accompanying me.²⁵

During the rafting trip, Krazek's group encountered a severe hail storm. Mountain River's guide, one Thompson, ordered rafters into the river to protect them from the hail. While in the river, Krazek was swept away in the current, thrown against the rocks, and injured. She filed a diversity action against Mountain River Tours in United States District Court alleging that Thompson's negligence resulted in her injury. She also argued that the release and the indemnification agreement she signed were not effective because they did not specifically waive her right to bring a negligence action.²⁶

The court stated that "as general rule of contract law, contracts which release a party from liability resulting from his own negligence are looked upon with disfavor and are strictly construed against the release."²⁷

Krazek had argued that any intent to release a party from his/her own negligence must be clearly expressed and, in fact, requires that the parties specifically uses the words 'negligent' or 'negligent act', citing two cases which applied standards similar to West Virginia's.²⁸ While those courts held that the releases signed by the users of those recreational facilities were insufficient to protect the businesses from their negligent acts, the court found those situations distinguishable from Krazek's.

O'Connell v. Walt Disney World involved a minor who was injured during a horse stampede at the Florida resort.²⁹ Prior to the child's boarding the ride, his father signed a release which, by its terms, freed the company only from liability for injuries arising out of dangers inherent in horseback riding. O'Connell's father signed a release which stated the following:

"I consent to the renting of a horse from Walt Disney World Co. by Frankie, a minor and to his or her assumption of the risk inherent in horseback riding. I agree personally and on his or her behalf to waive any claims or cause of action which he/she or I may have or hereafter have against Walt Disney Co., arising out of any injuries he/she may sustain as a result of that horseback riding and I will hold Walt Disney World Co. harmless against any and all claims from such injuries."

The Florida Court of Appeals held that the release did not bar a negligence claim because there was no language indicating an intent to release or indemnify Disney World for its own negligence. Such an intent would have had to have been stated in "clear and unequivocal terms" in order to exonerate Disney.

In *Rosen v. LTV Recreational Development*,³⁰ the injured plaintiff had purchased a season pass to a ski resort and by doing so agreed to be bound by its rules and regulations. One of the regulations was:

"I understand that skiing is a hazardous sport and that hazardous obstructions, some marked and some unmarked, exist on any ski area. I accept the existence of such dangers and that injuries may result from the numerous falls and collisions which are common in the sport of skiing including the charge of injury resulting from the negligence and carelessness of the part of fellow skiers."³¹

The court held that this statement did not bar Rosen's negligence action against the ski resort because there was no express consent to free the ski area from its negligence. The only negligence covered in the statement was injuries resulting from that of fellow skiers. All Rosen did was acknowledge that such hazards were inherent in skiing.³²

The release Krazek signed was far broader than those signed in *O'Connell* and *Rosen* because it covered *negligence* as well as the dangers inherent in white water rafting. The second paragraph, clearly stated that Krazek waived her right to bring *any* action of any kind. In response to another of Krazek's arguments, the court said that it was not necessary that the "magic" words "negligence" or "negligent acts" be included in such an agreement.³³

While the plaintiffs in the above cases fared poorly, in *Murphy v. North American River Runners*, the outcome was different. In August, 1987, Kathleen L. Murphy went white water rafting on a tour operated by North American River Runners, Inc., a licensed commercial white water outfitter. The trip also took place on the New River. The guide operating the raft in which Murphy was riding attempted to rescue another raft that had become stuck among rocks in the rapids. While trying to dislodge the other raft *by deliberately bumping it*, Murphy was thrown about in the raft, seriously injuring a knee and an ankle.³⁴

Before embarking on the trip, Murphy had signed a release but she brought a personal injury against North American claiming that its guide "negligently, carelessly and recklessly caused her injuries." Murphy also argued that the release she signed was void and contrary to public policy

because commercial outfitters are regulated by law and thus cannot require customers to sign such a release.

Raft Trip Release Assumption of the Risk and Permission:

...during the raft trip in which I am participating under the arrangements of North American River runners, Inc., a corporation, or West Virginia River Adventures, Inc. a corporation, their agents and employees, certain risk and dangers exist or may occur including but not limited to, hazards of traveling on a rubber raft in rough river conditions, using paddles or oars and other raft equipment, hiking in rough terrain, being injured by animals, reptiles, or others becoming ill in remote places without medical facilities available and being subject to forces of nature,...

In consideration of the right to participate in such river trip, including transportation, meals and other activities and services arranged for me by North American River Runners, Inc. Or West Virginia River Adventures Inc., or both their agents, and employees.

I UNDERSTAND AND HEREBY AGREE TO ASSUME ALL OF THE ABOVE RISKS WHICH MAY BE ENCOUNTERED ON SAID RAFT TRIP, INCLUDING ACTIVITIES PRELIMINARY AND SUBSEQUENT THERETO.

I do hereby agree to hold North American River Runners, Inc. and West Virginia River Adventures, Inc. Their agents and employees harmless from any and all liability actions, causes of actions claims, expenses, and damages on account of injury to my personal property, even injury resulting in damages which I now have or which may arise in the future in connection with my trip or participation in any other associated activities.

I expressly agree that this release as an indemnity agreement is intended to be as broad and inclusive as permitted by the law of the State of West Virginia and that if a portion thereof is held invalid, it is argued that the balance shall, notwithstanding continue in full legal force and effect. This release contains the entire agreement between the parties hereto and the terms of this release are contractual and not a mere recital.

I hereby state that

I HAVE CAREFULLY READ THE FOREGOING RELEASE AND KNOW THE CONTENTS THEREOF AND SIGN THIS RELEASE AS MY OWN FREE ACT.

This is a legally binding document which I have read and understood.³⁵

Murphy opposed North American's motion for summary judgment by filing an affidavit from an experienced white water rafting guide who stated that there were ways to rescue a stuck raft

without making the dangerous maneuvers that resulted in harm to Murphy and others.

Murphy also raised the issue that she was never informed that a rescue operation would be attempted if necessary during a rafting trip or that it would involve the bumping of crafts.

Murphy claimed in her affidavit that she did not understand that the release applied to intentional acts. She said that she believed that the document applied only to ordinary negligence in the form of piloting mistakes associated with a "normal" trip down the river.³⁶ Despite these arguments, the trial court granted North American summary judgment.

In overturning the lower court, the appeals court cited the *Restatement (Second) of Torts*, "Generally in absence of applicable safety statutes, a plaintiff, who expressly and under the circumstances clearly agrees to accept risk of harm arising from the defendant's negligence of reckless conduct, may not recover for such harm unless the agreement is invalid or contrary to public policy."³⁷ If such an express agreement is freely and fairly made between parties in equal bargaining position and there is no public interest at risk a release will generally be upheld.³⁸

The court noted however, that in order for an agreement to assume a risk to be effective, it must appear that participant has given assent to the terms of the agreement and that this is especially important in a situation when the release was prepared by one of the parties. In such a situation, the Court said, "it must appear that the terms were in fact brought home to, and understood by (the participant)..."³⁹

More importantly, the court declared that for an agreement to assume the risk to be effective, its terms must apply to the particular activity which caused the harm. The court refused to construe the general claim in this release which exonerated North American from liability for "negligence" to include: "intentional or reckless misconduct" or gross negligence.⁴⁰

Citing *Krazek*, the court noted, that a release is not defective even though its language does not explicitly use the term "negligence" or "negligent act or omissions."⁴¹ But the court distinguished *Krazek* from the *Murphy* case because the former did not deal with the issue of reckless conduct by the outfitter.

Murphy also addressed another issue that did not exist in *Krazek*, the validity of a waiver of a tort claim because of a breach of a statutory safety standard. On March 12, 1987, prior to Murphy's trip, the West Virginia legislature passed the *White Water Responsibility Act*.⁴² The purpose of the law was to define those areas for which commercial white water outfitters are liable for loss, damage or injury. The legislators conceded that it is impossible for outfitters to eliminate the "inherent risks" in such activities.⁴³

The law imposes certain duties upon commercial white water outfitters and guides, while immunizing them from tort liability to participants in white water rafting trips for harm resulting from the risks inherent in such expeditions, which are essentially impossible to eliminate even if the outfitter takes all possible safety measures.⁴⁴ The court also noted that the law requires

commercial white water guides to conform to the standard of care expected of members of the profession.

The court thus concluded the release that purported to exempt North American from liability to Murphy for its guide's failure to conform to the standard of care expected of members of the profession was unenforceable.⁴⁵ It found that there was a reasonable alternative to the type of rescue operation that the guide used which would have posed no risk of harm to Murphy's raft and so judgment for the defendant should not have been granted. The court simply did not believe that the legislature intended to free commercial white water outfitters and guides from liability for intentional reckless misconduct or gross negligence.⁴⁶

THE WHITE WATER RESPONSIBILITY ACT

The West Virginia legislature passed the *White Water Responsibility Act* in response to concerns voiced by outfitters about being held liable for injuries sustained by passengers on white water rafting trips. The legislature noted that the tourist trade is of "vital importance" to the state participated in "every year in rapidly increasing numbers by both residents and nonresidents." It also stated in the "legislative purpose" that the commercial white water outfitters and guides "significantly contribute to the economy" of the state.⁴⁷

The law defines not only the areas of responsibility for outfitters and guides but also the duties of participants. In fact, the emphasis in the statute is on the *duties of the passengers*, who are charged with the responsibility to act as "reasonably prudent persons when engaging in recreational activities offered by the outfitters."⁴⁸ The legislation then lists the rules for passengers: They may not participate on a river expedition while under the influence of alcohol, drugs, or even non-alcoholic beer. The passenger must advise the trip leader or guide of any known health problems or medical disabilities and any medications prescribed to treat these health problems during a rafting trip. A passenger may not engage in harmful conduct or willfully or negligently engage in any conduct or injury which causes injury to person or property or perform any act which interferes with safe operation of the trip. A participant must also use the safety equipment provided by the outfitter and follow the trip leader or guide's instructions with regard to safety. A passenger also cannot fail to notify a guide or leader of personal injuries that occur during the expedition and must leave personal identification if such injury or illness occurs.⁴⁹

The list of duties required of participants is far longer than those of outfitters. In fact, the section of the law entitled "Liability of *Commercial White Water Outfitters and Commercial White Water Guides*" imposes relatively few responsibilities on businesses that operate these expeditions.

The section states that it recognizes white water expeditions as hazardous *regardless of all feasible safety measures* which can be taken. (Emphasis supplied) the Act further states:

No licensed commercial white water outfitter or guide in the course of his employment is liable to a participant for damages or injuries to such participant

unless such damage or injury was directly caused by the failure of commercial white water outfitter or guides to comply with the duties placed on him by Article Two 20-2-1 et seq.⁵⁰

Clearly the legislation is designed to shield the commercial operations that conduct white water excursions from liability, but it did not bar liability in the Murphy case.

There are those who believe that the passage of laws like West Virginia's are in fact detrimental to businesses who engage in white water rafting. While West Virginia obtains economic benefits from persons who visit the state to engage in recreational activities like rafting, the state has a law which purports to deny recovery to injured participants. Colorado,⁵¹ Maine,⁵² and Pennsylvania⁵³ have passed similar laws.

What effect will these laws have on the responsibilities of outfitters? If the Murphy case is any guide, relatively little, if the outfitter or its agents do not operate using the safest possible procedures at all times. Outfitters should not be lulled into a false sense of security believing that this legislation will shield them from liability. But there are several procedures that outfitters can follow to minimize their exposure to liability.

Reservation forms should ask participants about any medical conditions, allergies or medications that might compromise their ability to participate safely on the trip. Outfitters should take care to document maintenance procedures for rafts and other equipment so that it will be easier to counter a claim based on faulty equipment.⁵⁴ Outfitters should also keep a daily activity log of each rafting trip including such information as who led the trip, the weather conditions, and what first aid was given. This log can be used as an aid to reconstructing the events surrounding an accident should the outfitter be sued.⁵⁵

Perhaps the most important feature of an outfitter's preparation for a rafting trip is the safety lecture. Outfitters should prepare an exhaustive lecture covering the inherent dangers of the activity: including the temperature of the water and the risks of hypothermia as well as other conditions that may occur on the trip. It is vital to include explicit instructions on how to behave if one falls from the raft. It is also essential to inform participants of the level of physical involvement required and to learn if anyone has any medical or physical conditions that will impair their ability to participate.⁵⁶

The safety talk will normally be delivered by those who will guide the raft trip so it is essential that those hired to guide the trip are competent and well trained. One of the most common claims in lawsuits is that the guide's negligence caused the injury. Obviously, an experienced guide who is licensed and trained with an organized, complete orientation lecture is the best protection against liability.⁵⁷

A comprehensive orientation, experienced guides, well-maintained equipment, and a well-written release are effective tools in minimizing accidents and the lawsuits that inevitably follow. But outfitters cannot assume that these steps are enough.

Outfitters must have in place procedures for emergencies including evacuation routes, location of telephones, designation of which staff member will be responsible for first aid, securing rescue, etc. It is also essential for outfitters to see that the accident victim and witnesses are interviewed.⁵⁸

While these basic steps should be followed to insure as safe a trip as possible, another procedure for the outfitter to follow is to employ spotters along the rafting route. These employees would be trained in rescue operations and stationed at the most critical points along the river with equipment at the ready to make a rescue if needed. Such a program would however add to the expense of these operations and would be passed along to the customers, which might put the cost of such ventures beyond the reach of many participants. Even the presence of such "rescuers" would not necessarily eliminate every injury or fatality.

Finally, the outfitter should require that each participant read and sign or on behalf of a minor child, a comprehensive release which explicitly describes the risks inherent in white water rafting.

What is the effect of exculpatory provisions in white water rafting agreements? As the Krazek case proved, such waivers can be upheld even where negligence has been proven. The *Murphy* case illustrates that even a comprehensive waiver, along with the statutory protection of outfitters, will not exonerate a commercial operation from liability when gross negligence is proven.

What is the value of the waiver to the commercial outfitter? The release form that participants sign is cautionary in nature. Invariably such forms contain the phrase "inherent hazards" in describing these adventure trips to impress on would-be participants that danger is a built-in aspect of the sport.⁵⁹ Outfitters want participants to know that white water rafting trips are not comparable to an amusement park ride and that the condition of the river and the rocks encountered cannot be controlled even by use of the best equipment and the most highly-trained guides. If the raft turns over, a limb may be broken or a life may be lost. Those are the inherent risks of such ventures.

The only opportunity for recovery a participant may have is if the outfitter has knowingly used faulty equipment, hired untrained guides, or as in *Murphy's* case when an imprudent rescue operation is undertaken.

While statistics reveal that the degree of danger in guided river raft trips is relatively low,⁶⁰ there is an undeniable element of risk. Passengers must know that they assume these risks and cannot ordinarily successfully sue the white water rafting company. If the latter uses narrowly drawn releases and provides a safety-minded orientation prior to the trip along with careful instruction for participants along the way, passengers will have a difficult time in winning a case.

The only way for a participant to be absolutely safe is to avoid the rough waters of the river and the shoals of exculpatory contracts.

ENDNOTES

1. Betsy Wade, "How Much Risk Do Adventure Seekers Assume?" Travel Section, *The New York Times*, 1990, at 4.
2. Amy Engeler, "On A Rafting Trip, Running Into Trouble," Travel Section, *New York Times*, July 31, 1994 at 31.
3. 326 Cal. App. 758, 276 Cal. Rptr. 672 (Cal. App. 1Dist. 1990).
4. Betsy Wade, "Waivers: More Than a Warning," Travel Section, *The New York Times*, August 22, 1993 at 3 (herein after "Waivers: More than a Warning").
5. 884 F. 2d 163 (4th Cir. 1989).
6. 412 S.E. 2d 504 (W. VA. 1991).
7. *Saenz v. Whitewater Voyages, Inc.*, 326 Cal. App. 758, 276 Cal. Rptr. 672.
8. *Id.* at *Id.*
9. 674.
10. White water rapids are classified according to their complexity Class I through Class V. The larger the number the more difficult the rapids.
11. 276 Cal. Rptr. 672 at 673.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 674.
16. *Id.* at 675.
17. *Id.*
18. *Id.* at 673.
19. *Id.*
20. *Id.* at 676.

-
21. Id.
 22. Id.
 23. 884 F. 2d 163, (4th Cir. 1989).
 24. Id. at 164.
 25. Id. at 165.
 26. Id. at 165.
 27. Id.
 28. Id.
 29. 413 So. 2d 444 (Fla. App. 1982).
 30. 569 F. 2d 1117 (10th Cir. 1978).
 31. 884 F. 2d 163 at 166.
 32. Id.
 33. Id.
 34. 412 S. E 2d 504, at 508.
 35. Id.
 36. Id.
 37. Id. at 509 quoting 496 (B) 1963, 1964 (express assumption of the risk).
 38. Restatement (Second) of Torts 496 B comment b.
 39. 412 S. E 2d 504 at 510.
 40. Id.
 41. Id.
 42. West Va. Code 20-3B-1. 20-3B-5 (1987).
 43. 20-3B-1.
 44. 20-3B-3.
 45. 412 S. E 2d 504 at 512.
 46. Id. at fn 10.
 47. 20-3B-1.
 48. 20-3B-4.
 49. Id.
 50. 20-3B-5.
 51. C.R.S.A. 33-32-101.
 52. M.R.S.A. 7361 (1989).
 53. 71 P.S. 510-4.
 54. Risk Management Manual, Worldwide Outfitter and Guide Association, 1992, at 7-8 and 17-18. Courtesy Worldwide Outfitter and Guides Association, Trade Association and Industry Advocate. Information provided by William Leverette; Affiliation of Risk Managers for Organized Recreation, and East coast Branch Office of Worldwide Outfitter and Guide Association. The Association is a non-profit Utah corporation operating as a Risk Retention "Purchasing Group" under the Risk Retention Act of 1986, P.L. 97-45.
 55. Id at 19-20.
 56. Id at 21-22.
 57. Id at 15-16.
 58. Id at 27-30.
 59. "Waivers: More Than a Warning," supra note 4.
 60. David Brown, Executive Director of America Outdoors of Knoxville, Tennessee, a trade association of over three hundred members, says that the risk of death is 1 in 300,000 to 1 in 900,000. For example, one million persons have rafted the Ocee River in Tennessee since 1977 with only one fatality. The Ocee is a moderate Class III river with a few Class IV or "difficult rapids." By contrast, the National Ski Patrol Associations places injuries at 4.5 for each 1,000 skiers. Id. 60. Betsy Wade, "How Much Risk Do Adventure Seekers Assume?" Travel Section, *The New York Times*, 1990, at 4.
 60. Amy Engeler, "On A Rafting Trip, Running Into Trouble," Travel Section, *New York Times*, July 31, 1994 at 31.

60. 326 Cal. App. 758, 276 Cal. Rptr. 672 (Cal. App. 1Dist. 1990).

60. Betsy Wade, "Waivers: More Than a Warning," Travel Section, *The New York Times*, August 22, 1993 at 3 (herein after "Waivers: More than a Warning").

60. 884 F. 2d 163 (4th Cir. 1989).

60. 412 S.E. 2d 504 (W. VA. 1991).

60. Saenz v. Whitewater Voyages, Inc., 326 Cal. App. 758, 276 Cal. Rptr. 672.

60. *Id.*

60. *Id.* at 674.

60. White water rapids are classified according to their complexity Class I through Class V. The larger the number the more difficult the rapids.

60. 276 Cal. Rptr. 672 at 673.

60. *Id.*

60. *Id.*

60. *Id.*

60. *Id.* at 674.

60. *Id.* at 675.

60. *Id.*

60. *Id.* at 673.

60. *Id.*

60. *Id.* at 676.

60. *Id.*

60. *Id.*

60. 884 F. 2d 163, (4th Cir. 1989).

60. *Id.* at 164.

60. *Id.* at 165.

60. *Id.* at 165.

60. *Id.*

60. *Id.*

60. 413 So. 2d 444 (Fla. App. 1982).

60. 569 F. 2d 1117 (10th Cir. 1978).

60. 884 F. 2d 163 at 166.

60. *Id.*

60. *Id.*

60. 412 S. E 2d 504, at 508.

60. *Id.*

60. *Id.*

60. *Id.* at 509 quoting 496 (B) 1963, 1964 (express assumption of the risk).

60. Restatement (Second) of Torts 496 B comment b.

60. 412 S. E 2d 504 at 510.

60. *Id.*

60. *Id.*

60. West Va. Code 20-3B-1. 20-3B-5 (1987).

60. 20-3B-1.

60. 20-3B-3.

60. 412 S. E 2d 504 at 512.

60. *Id.* at fn 10.

60. 20-3B-1.

60. 20-3B-4.

60. *Id.*

60. 20-3B-5.

60. C.R.S.A. 33-32-101.

60. M.R.S.A. 7361 (1989).

60. 71 P.S. 510-4.

60. Risk Management Manual, Worldwide Outfitter and Guide Association, 1992, at 7-8 and 17-18. Courtesy Worldwide Outfitter and Guides Association, Trade Association and Industry Advocate. Information provided by William Leverette; Affiliation of Risk Managers for Organized Recreation, and East coast Branch Office of Worldwide Outfitter and Guide Association. The Association is a non-profit Utah corporation operating as a Risk Retention "Purchasing Group" under the *Risk Retention Act of 1986*, P.L. 97-45.

60. *Id* at 19-20.

60. *Id* at 21-22.

60. *Id* at 15-16.

60. *Id* at 27-30.

60. "Waivers: More Than a Warning," supra note 4.

60. David Brown, Executive Director of America Outdoors of Knoxville, Tennessee, a trade association of over three hundred members, says that the risk of death is 1 in 300,000 to 1 in 900,000. For example, one million persons have rafted the Ocee River in Tennessee since 1977 with only one fatality. The Ocee is a moderate Class III river with a few Class IV or "difficult rapids." By contrast, the National Ski Patrol Associations places injuries at 4.5 for each 1,000 skiers. *Id*.

THE LIFE INSURANCE TRUST: A "NO-BRAINER" FOR SAVING ESTATE TAXES *

by

Martin H. Zern**

Introduction

Life insurance is a unique asset. In essence, it is a contractual arrangement whereunder an insurer pays a stipulated amount to a named beneficiary upon the insured's death in exchange for premium payments while the insured is alive. It is unique in that its value (face amount) is born only upon someone's death. Before that event, the policy may have no value, as in the case of term insurance, or some value, as in the case of whole life (permanent) insurance. The value of permanent insurance while a person is alive is commonly referred to as its cash surrender value or more accurately its interpolated terminal reserve value.¹ Regardless of what value, if any, a life insurance policy has while the insured is alive, when he² dies, the policy immediately is worth whatever is set forth on its face. No other asset increases in value from one moment to the next, life to death, so much as life insurance does. Fortunately, the amount received under a life insurance contract, whether in a single sum or otherwise, generally is excluded from income taxation if it is paid by reason of the death of the insured.³ This exclusion also means that there is no income tax on the internal buildup of income while the insured is alive. Unfortunately, however, there is no automatic exclusion of the proceeds of a life insurance policy from federal estate taxation. Quite to the contrary, without proper planning, the proceeds of life insurance are includible in the gross estate of the insured and consequently could be subject to the federal estate tax.⁴ Moreover, the estate tax rates are significantly higher than the income tax rates, effectively beginning at 37% and topping out at 55% where and to the extent the taxable base exceeds \$3,000,000.⁵ If a state (such as New York) imposes an estate tax that is higher than the statutory credit allowed in computing the federal estate tax, the overall rate is even higher.⁶ However, as those somewhat familiar with estate taxation are aware, no federal estate tax is due unless the taxable base exceeds \$600,000.⁷ Inclusion of life insurance proceeds could bring an estate over this threshold, or increase the amount already subject

* © Copyright 1996, Martin H. Zern

** J.D., LL.M. (Tax), C.P.A., Associate Professor, Lubin School of Business, Pace University, Pleasantville, New York