ALASKA'S PUBLIC DUTY EXCEPTION: RESTRAINTS UPON THE RIGHT TO CONTRACTUAL INDEMNITY

I. INTRODUCTION

Many of Alaska's businesses and industries participate in activities which involve considerable risk of harm to persons and property. Not surprisingly, therefore, many parties contractually seek to insulate themselves from liability arising from their negligence by requiring that the injured party or a third party bear the costs of injuries resulting from these activities. Although Alaska courts have enforced some of these "hold harmless" agreements, such enforcement tends to discourage the protected party from exercising an appropriate degree of care. In situations involving the public, this lack of diligence may have catastrophic results. Accordingly, the Alaska Supreme Court has recognized an exception to the enforcement of these agreements when the subject matter of the contract at issue involves a duty to the public. Lawyers and laypersons must comprehend the extent of this public duty exception if they are to make appropriate provisions for the costs of negligent acts and omissions.

Two types of "hold harmless" agreements exist: exculpatory clauses and indemnity provisions. The distinction between these types of agreements turns not on the wording of the clause, but rather on its operation in a particular factual situation. With an exculpatory clause, one party seeks to prevent the other party to the contract from recovering against him. An exculpatory clause bars the potential causes of action that an injured party may have against the party whose negligence caused the injury.

With an indemnity provision, one party attempts to have the other party bear the cost of any damages suffered as a result of the first party's negligence. Indemnity situations typically involve three parties: the injured party, the party who caused the injury and seeks indemnity, and the party obligated to indemnify, or pay the injured party's damages. In this situation, the provision does not bar the injured party from recovering, but merely shifts the burden of paying for the injury to another party. An indemnity agreement may, however, function as an exculpatory clause when the injured party and the in-

demnitor are the same party. In this "two-party" situation, enforcement of the provision precludes the injured party from recovering.

The Alaska Supreme Court's most significant statement on the public duty exception, *Kuhn v. State,*[1] shed light on the extent of the exception, but many issues demand further resolution. Does the exception apply in both indemnity and exculpatory situations, or, as in several states, only in the latter situation? What specific factors should courts consider in determining the existence of a public duty? Should a court balance these factors when they conflict? Finally, in which factual situations does the exception apply?

In examining these issues, this note will analyze the development of the public duty exception in Alaska. The note will explore the *Kuhn* decision and its impact upon the state's ability to protect itself contractually from liability arising from services provided to the public. Finally, refinements in the Alaska approach designed to increase predictability for practitioners will be suggested, drawing primarily from California law.

II. DEVELOPMENT OF THE PUBLIC DUTY EXCEPTION IN ALASKA

Kuhn is one of several cases in which the Alaska Supreme Court has applied the public duty exception to indemnity clauses.[2] The first Alaska Supreme Court case to apply the exception was *Manson-Osberg Co. v. State.*[3] That case, however, drew heavily from cases decided by the United States Court of Appeals for the Ninth Circuit.[4] To provide an understanding of the background of the public duty exception in Alaska, this section first examines the two Ninth Circuit opinions which applied the exception prior to any statement by the Alaska Supreme Court on the subject.

A. The Ninth Circuit Cases: Discovering the Alaska Public Duty Exception

1. *Air Transport Associates, Inc. v. United States.* The first Ninth Circuit case to apply Alaska law on the subject of the public duty exception was *Air Transport Associates, Inc. v. United States.*[5] *Air*

1. 692 P.2d 261 (Alaska 1984).

2. The Alaska Supreme Court's most recent application of the public duty exception is Rogers & Babler, Div. of Mapco Alaska, Inc. v. State, 713 P.2d 795 (Alaska 1986), discussed *infra* at notes 85-93 and accompanying text.

3. 552 P.2d 654 (Alaska 1976).

4. Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966); Air Transp. Assoc., Inc. v. United States, 221 F.2d 467 (9th Cir. 1955). *Manson-Osberg* relied heavily upon *Northwest Airlines,* which relied upon *Air Transport.*

5. 221 F.2d 467.

Transport involved a contract by which the United States leased to the plaintiff, an air transportation company, the use of an airfield that the United States operated in Anchorage.[6] The controversy developed when one of Air Transport's planes struck a government-owned truck, which was stalled on the runway. When Air Transport sued the United States to recover for the damages to its plane, the government defended on the basis of an indemnity provision in the contract. The indemnity clause provided that Air Transport would "forever release and discharge the United States, its agencies, agents" from all liability arising out of any "act, omission, negligence . . . or any cause whatsoever" in connection with Air Transport's use of the airfield.[7]

Air Transport involved questions of both Washington and Alaska law because the contract was executed in Washington, but performed in Alaska.[8] The Ninth Circuit found that under both Washington and Alaska law the operation of this passenger airport was a public enterprise.[9] In considering the validity of the release, the court acknowledged that Washington had accepted the version of the public duty exception expressed in the RESTATEMENT (FIRST) OF CONTRACTS, which states:

> A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if . . . (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.[10]

Because the contract clearly sought to limit liability for the negligence of the operator of the airfield, and the airfield was a public enterprise, the clause was invalid under Washington law as reflected in the Restatement formulation.[11] Recognizing that Alaska had adopted the common law and that the Washington approach was consistent with

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6. *Id.* at 469.

7. *Id.* at 469 n.1.

The clause involved in this case was an exculpatory clause or a "release" instead of an indemnity clause. However, this does not make a significant difference in the Alaska Supreme Court's analysis of these issues. This case is cited as authority in later cases which involve provisions labeled "indemnity" clauses. *See, e.g., Northwest Airlines,* 351 F.2d at 256; Kuhn v. State, 692 P.2d 261, 264 (Alaska 1984).

8. *Air Transport,* 221 F.2d at 471-72.

9. *Id.* at 472-73.

10. *Id.* (quoting RESTATEMENT (FIRST) OF CONTRACTS § 575(1) (1932)).

The RESTATEMENT (SECOND) OF CONTRACTS § 195(1)(b) preserves this requirement that the service be one for which compensation is paid. *But see* Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 103, 383 P.2d 441, 448, 32 Cal. Rptr. 33, 40 (1963) (reasoning that there should be no distinction between cases where compensation is paid or promised and cases involving no compensation).

11. *Air Transport,* 221 F.2d at 472.

the common law, the court believed that the same result would be reached under Alaska law.[12]

2. *Northwest Airlines, Inc. v. Alaska Airlines, Inc.* The second Ninth Circuit case to address the public duty exception under Alaska law was *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*[13] Northwest Airlines, under a lease agreement with the United States, agreed to hold Shemya Airport open for public use.[14] Northwest then contracted to allow Alaska Airlines to use the airfield. Under the terms of the contract, Alaska Airlines agreed to indemnify Northwest for claims against Northwest arising out of the services provided to Alaska Airlines under the lease.[15]

After an accident involving one of its planes, Alaska Airlines sued Northwest for the resulting damages, alleging that the accident was solely the result of Northwest's negligence.[16] Northwest instituted a separate action seeking a declaratory judgment that the indemnity provision in the contract barred Alaska Airlines's action.[17] The Ninth Circuit held that the indemnity provision was unenforceable because the subject matter of the contract was a public facility, and thus the provision was against the policy interests of the general public.[18] The court also noted, but did not base its opinion on, the fact that there was an inequality of bargaining power between the contracting parties. Northwest controlled the only airport in the region; therefore, it was

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12. *Id.* at 472-73.

13. 351 F.2d 253 (9th Cir. 1965).

14. *Id.* at 254-55.

15. *Id.* at 255. The indemnity clause provided that:

> Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damages to, loss of, or destruction of any property of Alaska, its officers, agents. . . and the property of any other person or persons which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement.

16. *Id.* Six other suits were brought against Northwest for damages from the deaths of Alaska Airlines crew members.

17. *Id.*

18. *Id.* at 256-57.

The provision in controversy in *Northwest Airlines* required Alaska Airlines to "hold harmless and *indemnify* Northwest." *Id.* at 255 (emphasis added). Nonetheless, the Ninth Circuit used as controlling authority its decision in *Air Transport,* which concerned an exculpatory clause. *See supra* note 7. Once again, enforcing the indemnity provision would have not only released the indemnitee from financial responsibility, but it also would have barred the injured plaintiff from recovering. In fact, in *Northwest Airlines,* the two words, "indemnity" and "exculpation" are used almost interchangeably. For example, at the end of its opinion, the court stated: "We hold only that the exculpatory and indemnity provision, insofar as it is sought to be enforced to spare 'Northwest' from liability for its own negligence, being against public policy and invalid, is unenforceable." 351 F.2d at 258.

in a position to force the inclusion of the indemnity provision upon Alaska Airlines.[19]

B. Alaska Supreme Court Decisions on the Public Duty Exception

1. *Manson-Osberg Co. v. State.* Eleven years after the Ninth Circuit's decision in *Northwest Airlines,* the Alaska Supreme Court decided *Manson-Osberg v. State,*[20] its first case involving the public duty exception. Manson-Osberg, the contractor on a bridge-building project, had agreed to indemnify the state for any liability related to the state's negligence in safeguarding the project. Due to Manson-Osberg's failure to provide sufficient safety devices and training to its employees, a Manson-Osberg employee fell from the bridge and was killed.[21] The employee's estate sued the state for failure to exercise proper care in supervising the contractor.[22]

The state brought a third-party claim against Manson-Osberg to recover under the indemnity clause. This clause required that "[t]he contractor . . . hold harmless the government and all of its representatives from all suits, actions, or claims of any character brought on account of any injuries or damages sustained by any person or property in consequence of any neglect in safeguarding the work."[23] The trial court found the state liable for the employee's death, but because of the indemnity clause, held Manson-Osberg responsible for the judgment.

On appeal, the Alaska Supreme Court adopted the trial court's finding that the state had breached its duty to "safeguard the work and to exercise reasonable care to compel Manson-Osberg to carry out its contractual responsibilities."[24] The court then held that the indemnity clause covered the state's liability, and that, accordingly, Manson-Osberg had to indemnify the state for the amount that the decedent's estate had recovered from the state.[25]

The court embraced the view that a party may enforce an indem-

19. *Id.* at 257 n.2 (citing Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)); *see* Jacksonville Terminal Co. v. Railway Express Agency, Inc., 296 F.2d 256 (5th Cir. 1961), *cert. denied,* 369 U.S. 860 (1962).

20. 552 P.2d 654 (Alaska 1976).

21. *Id.* at 655 n.1.

22. *Id.* at 657 n.2 (citing RESTATEMENT (SECOND) OF TORTS § 414 (1965)). That section of the Restatement states that:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

23. *Manson-Osberg,* 552 P.2d at 657.

24. *Id.*

25. *Id.* at 659-60.

nity clause against its own negligence,[26] but noted that courts will not enforce indemnity clauses which "[tend] to promote breach of a duty owing to the *public at large.*"[27] The court found no breach of a public duty and, therefore, no public policy objection to enforcing the indemnity agreement against Manson-Osberg.[28] The court, however, did not suggest what kinds of activities do involve a duty to the "public at large."[29]

Two further points of *Manson-Osberg* bear emphasis. First, apart from its holding that it will not enforce an indemnity provision when the provision tends to promote the breach of a duty owed to the public, the court cited a footnote from *Northwest Airlines* which referred to the importance of considering the relative bargaining power of the parties in applying the exception.[30] Second, *Manson-Osberg* involved three parties—the injured party, the negligent party (the state), and the indemnifying party (Manson-Osberg). The Alaska Supreme Court was concerned solely with the relationship between the indemnitee and the indemnitor, not with the injured party.[31] The injured party would recover regardless of the outcome of the appeal. In *Manson-Osberg,* the clause functioned as a true indemnity clause, not as an exculpatory clause where the injured party would be forced to absorb a loss due to someone else's negligence. In contrast, in the Ninth Circuit cases, *Northwest Airlines* and *Air Transport,* the negligent parties founded their defenses on indemnity clauses that, if enforced, would have functioned as exculpatory clauses.

This pattern of decisions reveals that the court might emphasize the ability of the *injured party* to recover his damages. The court may treat the "two-party" indemnity situation, where enforcing the clause eliminates recovery by the injured party, differently from the "three-party" action in which the injured person is not a party to the indemnity clause and recovers from the negligent party whether or not the court enforces the clause between the indemnitee and the indemnitor.

2. *Post*-Manson-Osberg *Refinement of the Public Duty Exception.* The distinction between three-party and two-party indemnity cases

26. *Id.* at 659.

27. *Id.* at 659-60 (emphasis added) (citing *Northwest Airlines,* 351 F.2d 253; *Air Transport,* 221 F.2d 467; and Otis Elevator Co. v. Maryland Casualty Co., 95 Colo. 99, 33 P.2d 974 (1934)).

28. *Manson-Osberg,* 552 P.2d at 660.

29. *Id.*

30. *Id.* (citing *Northwest Airlines,* 351 F.2d at 257 n.2).

31. In a later opinion, Rogers & Babler v. State, 713 P.2d 795 (Alaska 1986), the Alaska Supreme Court confirmed this approach of concentrating solely on the relationship between the parties to the contract. *See infra* notes 86-93 and accompanying text.

was indirectly addressed by the Alaska Supreme Court in *Amoco Production Co. v. W. C. Church Welding & Contracting, Inc.*[32] In that case, a Church Welding employee was injured while working on an off-shore drilling platform and sued Amoco, the owner of the platform. Church Welding had agreed to indemnify Amoco for injuries to Church's employees occurring as a result of the two parties' operations under their agreement.[33] On the basis of this provision, Amoco filed a third-party claim to force Church Welding to bear the costs of the employee's injuries.

The supreme court held that, absent a showing of unconscionability or unequal bargaining power, the indemnity clause was enforceable.[34] The *Amoco* court did not directly address the public duty exception, because the contract did not involve any duties affecting the public.[35] The importance of *Amoco* lies in the court's emphasis on Amoco's ability to secure liability insurance against the claim.[36] Unlike exculpatory clauses, which preclude the injured party from recovering, indemnity provisions in the "three-party" situation function much like liability insurance. By acknowledging this fact, the court may have implicitly distinguished between the two types of clauses and supplied a basis for the argument that the public duty exception can be applied differently in the two situations.

In *Burgess Construction Co. v. State,*[37] the supreme court shed additional light on the parameters of the public duty exception. *Burgess* involved a suit by the state to recover on an indemnity clause in a contract with Burgess for the construction of a section of road.[38] While doing work related to the contract, two of Burgess's employees were killed. The accident resulted from the negligence of the state and one of the deceased employees.[39] Having agreed to indemnify the state for damages resulting from the state's negligence, Burgess argued that the public duty exception prevented enforcement of the indemnity clause. In response, the court articulated the two principles underlying the Alaska version of the public duty exception:

> The first is that those to whom the exception applies should guard against the consequences of their negligence at all times; indemnity

32. 580 P.2d 697 (Alaska 1978).

33. *Id.* at 698. The contract provided that Church Welding would indemnify Amoco for injuries to Church Welding employees "arising out of this contract and whether or not such losses, costs, expenses and causes of action are occasioned by or incidental to or the result of the negligence of [Amoco]."*Id.*

34. *Id.*

35. *Id.* at 698 n.2. The court found that the contract did "not involve any question of a duty to the public at large."

36. *Id.* at 698.

37. 614 P.2d 1380 (Alaska 1980).

38. *Id.* at 1381.

39. *Id.*

> agreements, or prospective releases, are thought to eliminate their incentive to do so. The second is that it is thought unfair to allow public service entities to impose liability-avoiding agreements on those they are supposed to serve, since the latter has no choice but to accept such agreements.[40]

The court upheld the indemnity clause because neither of these underlying principles applied. The first of these principles restates the holding in *Manson-Osberg* that indemnity provisions should not be enforced when they tend to promote breach of a duty owed to the public.[41] In this case, the court found that the indemnity provision only affected the state's duty toward a limited class of persons involved in a particular undertaking. Since the state was relieved from liability only for injuries related to the operations of the construction company, there was "no general disincentive to the State to perform its duty to the traveling public."[42]

The second principle reflects the suggestion articulated in *Northwest Airlines* and indirectly in *Manson-Osberg* that the court should not enforce indemnity provisions if there is an inequality of bargaining power, especially where public service providers can insist on indemnification from the public which they are supposed to serve.[43] In *Burgess,* the court found no such inequality of bargaining power, observing that "Burgess was not compelled to contract with the state as customers of public service organizations are."[44]

Burgess demonstrates the court's concern with ensuring recovery for the injured party. *Burgess,* like *Manson-Osberg* and *Amoco,* involved a "three-party" indemnity situation in which the injured party recovered for his injuries. The question in *Burgess* involved apportioning the cost of that recovery between the parties to the contract. Enforcing this indemnity clause did not function to exculpate the negligent party, leaving the injured party to absorb his own loss.

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40. *Id.* at 1381-82 (footnotes omitted).

41. *See supra* text accompanying notes 26-29.

42. *Burgess,* 614 P.2d at 1382. The court noted that:

> The State owes a duty to the public to maintain its highways in a safe condition. That duty, however, is not significantly affected by the indemnity clause in this case for it only shifts liability for injuries sustained "on account of the operations of the said Contractor." There is no general disincentive to the State to perform its duty to the traveling public.

Id. (footnote omitted).

43. *Northwest Airlines,* 351 F.2d at 287 n.2; *Manson-Osberg,* 552 P.2d at 660 (citing *Northwest Airlines,* 351 F.2d at 257 n.2).

The *Burgess* court also cites Williston's treatise for this proposition. *Burgess,* 614 P.2d at 1382 n.3. The section referred to states that "a relation often represents a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantages of the relation." 15 WILLISTON ON CONTRACTS § 1751 at 148-49 (3d ed. 1972) (footnote omitted).

44. *Burgess,* 614 P.2d at 1382.

Each of the Alaska Supreme Court decisions that dealt with the public duty exception prior to *Kuhn* involved true "three-party" indemnity situations. In each case, the injured party recovered, and the court enforced the indemnity agreement because it did not affect a duty owed to the public. The dispute in these cases involved indemnity agreements between the state and the injured party's employer; thus, the agreement did not affect the injured party's cause of action for negligence.[45]

On the other hand, *Air Transport* and *Northwest Airlines* involved "two-party" indemnity situations in which the injured party was also the indemnitor, the party agreeing to the release. Had the indemnity provision been upheld in those cases, the injured party would not have recovered for his injuries. In both of those cases, the contractual provision was struck down because the court found that it tended to promote the breach of a duty owed to the public.[46] The pattern established by these cases is consistent with a formal distinction between indemnity and exculpation cases, with the restrictions of the public duty exception being applied only to the former group.

III. *KUHN V. STATE:* APPLYING THE PUBLIC DUTY EXCEPTION AS DEVELOPED IN ALASKA

A. Legal and Factual Background

Donald Kuhn leased his semi-tractor, along with his services as operator, to Drilling Mud Haulers, Inc. for commercial use on the Dalton Highway.[47] The Department of Transportation issued a per-

45. *See supra* text accompanying notes 20-31, 37-44. *See also* Stephan & Sons v. Municipality of Anchorage, 629 P.2d 71 (Alaska 1981) (following the holding in *Burgess* that indemnity contracts are enforceable where they do not tend to breach a duty owed to the public and there is no inequality of bargaining power similar to that between public service companies and their customers).

46. *See supra* text accompanying notes 5-19. It should be noted that *Northwest Airlines* involved both indemnity and exculpation issues.

47. The Dalton Highway is the only highway between Fairbanks and Prudhoe Bay on the Arctic Ocean. To encourage commercial development of the North Slope region, the legislature has required the Department to maintain the highway for year-round industrial and commercial use. The statute under which the highway is maintained provides as follows:

> ALASKA STAT. § 19.40.010. Declaration of policy. (a) The legislature finds and declares that there is an immediate need for a public highway from the Yukon River to the Arctic Ocean and that this public highway should be constructed by the State of Alaska at this time because
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> (1) it will assist in the fulfillment of the Constitution of the State of Alaska, art. VIII, § 1, in which it is provided that it is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with public interest;
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> . . . .

mit to Kuhn authorizing him to use the highway.[48] The permit required that its holder indemnify the state for any injuries related to its use. Kuhn was injured when he lost control of his vehicle on a steep slope, allegedly due to the state's negligent failure to gravel the road properly.[49]

Kuhn sued the state for damages, and the state moved for summary judgment, asserting that the Department regulation requiring the indemnity provision in the permit precluded Kuhn's action.[50] Kuhn opposed the state's motion, claiming that the indemnity provision was invalid because the state's maintenance of the Dalton Highway was a public duty. The superior court rejected Kuhn's argument and entered summary judgment for the state, finding that the indem-

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(4) it will benefit local and interstate commerce because the area north of the Yukon River is rich in natural resources but is inaccessible at the present time because of the lack of roads and this inaccessibility prohibits the successful use of the natural resources of this area;

(5) it is consistent with the Constitution of the State of Alaska, art. VIII, § 2, in which it is provided that the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people, because the highway will benefit not only local and interstate commerce but will augment the revenues of the state and result in conservation of natural resources, for example, by facilitating a system of forest fire suppression.

ALASKA STAT. § 19.40.010 (1981).

48. Kuhn v. State, 692 P.2d 261, 263. *See also* ALASKA ADMIN. CODE tit. 17, § 30.010 (Apr. 1986). This section provides as follows:

> Permits Required. No vehicle, except an emergency vehicle, may use or travel upon the Dalton Highway, as defined in [ALASKA ADMIN. CODE tit. 17, § 30.070(4) (Mar. 1984)], without a permit issued to the owner or operator of the vehicle by the commissioner or his designated representative.

49. *See* Brief of Appellant at 3, *Kuhn*, 692 P.2d 261.

50. *Kuhn*, 692 P.2d at 263. The indemnity provisions included on the permit itself were also codified in Department of Transportation regulatory rules:

> Conditions and Enforcement. (a) Permits issued under this chapter will include conditions and provisions which the commissioner or his designated representative determine to be necessary to protect the health, safety, and welfare of the public and travelers on the road. Permittees must agree to comply with these conditions and provisions as well as all applicable state and federal laws by signing the permit.
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> (b) The permittee shall indemnify and hold harmless the state and its representatives, agents and employees from all suits, actions or claims of any character brought because of any injuries or damages sustained by a person or property in consequence of any act or omission, in any way related, directly or indirectly, to the issuance or use of the permit, of the permittee, its representative, agents or employees, or of the State of Alaska, its representatives, agents, or employees, or any other person. Each permit will include this provision in its terms and the provision must be accepted by the permittee by execution of the permit.

ALASKA ADMIN. CODE tit. 17, § 30.050 (Apr. 1984).

nity provision was enforceable.[51]

In Kuhn's appeal, the Alaska Supreme Court initially affirmed the superior court, but later withdrew that opinion and ruled in favor of Kuhn on rehearing. In its first opinion, the court considered whether the indemnity provision in Kuhn's permit precluded his suit.[52] The court set out the statutory and regulatory provisions governing the maintenance and use of the Dalton Highway.[53] The court then considered the applicability of the "public duty exception" to this indemnity provision. Justice Compton, writing for the court, cited *Manson-Osberg v. State*[54] for the proposition that Alaska courts will not enforce indemnity contracts "where the indemnity clause tends to promote breach of duty owing to the public at large."[55]

The court distinguished *Kuhn* from *Manson-Osberg,* because the earlier case had not involved an indemnity provision imposed by law. According to the Alaska Supreme Court's first *Kuhn* decision, "[t]he public duty exception has only been applied to contractual indemnity provisions and not to indemnity provisions required by law."[56] Therefore, the court held that "the public duty exception cannot be applied

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51. *Kuhn,* 692 P.2d at 263. Kuhn argued that the indemnity provision was invalid for two additional reasons. He claimed he did not know that the indemnity provision was in the permit and if he had known, he would not have consented to its inclusion. He also claimed that the provision was a contract of adhesion and, therefore, he should not be bound by it. The court rejected both of these arguments. *Id.*

52. *Kuhn v. State,* No. 6833; No. 7080, slip op. (Alaska Aug. 5, 1983).

53. *Id.* at 5.

The statutory authority for state maintenance of the Dalton Highway is provided in chapter nineteen of the Alaska statutes:

> Sec. 19.40.100. Use of the highway by industrial or commercial traffic. (2) The department shall maintain the highway and keep it open to industrial or commercial traffic throughout the year.
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> . . . .
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> (b) "Industrial or commercial travel"
> (1) means travel necessary and related to resource exploration and development or to support of these activities, if the individual engaged in these activities has all necessary permits; or
> (2) travel necessary and related to access by legal residents to their property; or
> (3) motor carriers engaged in commerce which are common carriers or contract carriers regulated by the Alaska Transportation Commission . . .
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> . . . .
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> Sec. 19.40.110. Public use of a portion of the highway. The department shall maintain the section of the highway between the Yukon River and Dietrick Camp and shall keep that section of the highway open to use by the public between June 1 and September 1 each year.

ALASKA STAT. § 19.40.100-.110 (1981).

54. 552 P.2d 654 (Alaska 1976). *See supra* text accompanying notes 20-31.

55. *Kuhn,* slip op. at 11 (quoting *Manson-Osberg,* 552 P.2d at 659-60).

56. *Id.* at 11.

to invalidate an otherwise valid law requiring a person under certain circumstances to agree to an indemnity and hold harmless provision."[57] Accordingly, the court initially affirmed the superior court's decision.

The court suggested, however, that the Department's regulatory provision might be inconsistent with its statutory duties and therefore invalid.[58] The court cited an Alaska statute providing that when a state agency is legislatively authorized to interpret or implement a statute, no regulation adopted by the agency is valid unless it is consistent with the statute and reasonably necessary to achieve the statute's purpose.[59] The court, however, could not address this argument because Kuhn had not raised it in either the supreme court or the superior court.[60]

Kuhn petitioned for rehearing, arguing that the court's discussion of the state law requiring the indemnity provision raised an issue new to the case. The court granted a rehearing with instructions for both parties to brief the issue of the effect of the public duty exception on a preexisting law.[61]

Kuhn argued on rehearing that the regulation on which the indemnity clause in his contract was based was invalid.[62] Under Alaska

57. *Id.* at 12.

58. *Id.* at 13.

59. *Id.* (quoting ALASKA STAT. § 44.62.030 (1984)).

60. *Id.* at 13.

61. *Kuhn*, No. 6833; No. 7080 (Aug. 16, 1983) (order granting rehearing).

62. In his supplemental brief, Kuhn made a two-part argument. He first stated that "the more persuasive line of cases hold[sic] that courts may invalidate [governmental] regulations if against public policy and if no specific legislative authority for the creation of such regulations in derogation of the common law is present." Supplemental Brief for Appellant at 4 (citations omitted). Second, Kuhn argued that the Department of Transportation's indemnity requirement was not an "otherwise valid existing law."*Id.* at 8. He cited Alaska Statutes section 44.62.030 (1984) for the proposition that "no regulation is valid or effective unless consistent with the purpose of the statute."*Id.* Kuhn noted that the Alaska Supreme Court has construed that statute to require a two-part review of regulatory provisions. First, the court determines whether the regulation is "reasonably necessary to carry out the purposes of the statutory provisions."*Id.* Second, the court must decide whether the regulation is "reasonable and not arbitrary." *Id.* (citing Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971)).

Kuhn then asserted that the regulation under consideration failed both parts of this test. He claimed that instead of carrying out the purposes of the statute the regulation was actually a disincentive for the state to perform its statutory duty to maintain the highway. Finally, he argued that the regulation was arbitrary and unreasonable because:

> it is in derogation of the common law prohibition against exculpatory agreements in matters concerning public duty; and because it arbitrarily eliminates common law action for redress for injury to those drivers who are owner/operator employees while leaving intact such actions for those drivers who are mere employees.

statute:

> [I]f, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.[63]

In the leading case interpreting this statutory language, *Kelly v. Zamarello,*[64] the supreme court outlined a two-part test for determining the validity of administrative regulations:

> First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rulemaking authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.[65]

To apply these standards to the regulatory provision in controversy, the reviewing court looks first to the legislative enactment.[66] In the Dalton Highway legislation, the legislature directed the Department to adopt regulations "necessary to accomplish the purposes" of the Act.[67] Kuhn argued that, while the statute grants the Department the authority to make rules concerning the use and maintenance of the highway, the indemnity provision contained in the Alaska Administrative Code and in Kuhn's permit was inconsistent with the state's statutory duty to maintain the highway. According to Kuhn, the indemnity provision created a disincentive to the state's exercise of proper care in the construction and maintenance of its highways.[68]

B. Opinion on Rehearing

In its opinion on rehearing, the supreme court apparently adopted *sub silentio* Kuhn's argument that the indemnity provision was not a valid law.[69] The invalidation of the regulation did not, how-

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Supplemental Brief at 8, 9.

63. ALASKA STAT. § 44.62.030 (1984).

64. 486 P.2d 906 (Alaska 1971). *See also* Union Oil Co. v. State, 574 P.2d 1266, 1271 (Alaska 1978) (noting that an administrative regulation carries the presumption of validity); Alaska Int'l. Indus., Inc. v. Musarra, 602 P.2d 1240, 1245 (Alaska 1979) (noting the proper standard of review as "within its scope of authority" and "in a reasonable and not arbitrary manner"); Kingery v. Chapple, 504 P.2d 831, 834-35 (Alaska 1972).

65. *Kelly,* 486 P.2d at 911.

66. *Id.* at 912.

67. ALASKA STAT. § 19.40.065 (1981).

68. *See* Supplemental Brief of Appellant at 8-9; *see also* Brief of Amicus Curiae Alyeska Pipeline Service Co. at 5-7.

69. The court necessarily reached this conclusion because, if the regulation were valid, it would take precedence over a common law rule, such as the public duty

ever, remove the issue of indemnity from the case, because the indemnity provision remained in Kuhn's permit.[70] By signing the permit, Kuhn was still contractually bound to the terms of the provision, unless the common law or some other statute invalidated it.[71] Thus, the court finally confronted the issue of whether the public duty exception invalidated the indemnity provision in the permit.

As a preliminary conclusion, the court assumed that if the Dalton Highway were open to the general public year-round the indemnity provision would be unenforceable because it would tend "to promote breach of a duty owing to the *public at large.*"[72] The *Kuhn* court concluded that "[t]he provision at issue here can thus be found valid only if, as the state argues, the public duty exception is inapplicable when a duty is owed to less than the entire public."[73] The state contended that the public duty exception should not apply because the Dalton Highway was open only to specified users, not to the "public at large," during the period in which Kuhn was injured.[74]

The court disagreed with the state and held that " 'public at large' must only mean those persons for whom public services and facilities are performed and maintained, in this case authorized users of the Dalton Highway."[75] The court then, applying the principles underlying the public duty exception set forth in *Burgess,* invalidated the indemnity provision in Kuhn's permit.[76] Specifically, the court held:

> The purposes of the exception, as expressed in *Burgess,* support its application in this case. First, the state must be required to guard against the consequences of its negligence. Even though its duty

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exception. ALASKA STAT. § 01.10.010 (1982) ("Applicability of common law not inconsistent with the Constitution of the United States *or with any law passed by the legislature of the State of Alaska* is the rule of decision in this state." (emphasis added)).

70. *See* ALASKA ADMIN. CODE tit. 17, § 30.050 (Mar. 1984). *See also Kuhn,* 692 P.2d at 263.

71. In this case, the "Statement of Vehicle Owner or Agent," which declared that the signor had read all provisions of the permit, was signed by an employee of Kuhn's lessee, Drilling Mud Haulers, rather than by Kuhn himself. *Kuhn,* 692 P.2d at 263. On first hearing, Kuhn argued that he should not be bound by the indemnity provisions because he did not sign the permit, did not know of the provisions, and would not have consented to them had he known. The court dismissed this argument, holding that Kuhn was bound under principles of agency by estoppel. *Kuhn,* slip op. at 11.

72. *Kuhn,* 692 P.2d at 264 (citing Manson-Osberg Co. v. State, 552 P.2d 654, 659-60 (Alaska 1976)). *See also* Burgess Constr. Co. v. State, 614 P.2d 1380, 1382 (Alaska 1980) ("The State owes a duty to the public to maintain its highways in a safe condition.").

73. *Kuhn,* 692 P.2d at 264.

74. Supplemental Brief of Appellee at 15 n.10. *See also* ALASKA STAT. § 19.40.100-.110 (1981), *quoted supra* at note 53.

75. *Kuhn,* 692 P.2d at 266.

76. *See infra* text accompanying notes 41-44.

> runs only to a specified segment of the population, the state is statutorily required to maintain the highway year-round, and the indemnity provision tends to eliminate the incentive for doing so nonnegligently. . . . Second, as noted in *Burgess,* it may be unfair to allow the state to impose "liability-avoiding agreements on those [it is] supposed to serve, since the latter have no choice but to accept such agreements." Kuhn and other authorized users of this public highway in fact have no choice in the matter. They must use this highway. They must accept this indemnity provision.[77]

Two additional points about *Kuhn* should be noted. First, the holding does not conflict with the principle of sovereign immunity. The state's action in failing to gravel the Dalton Highway properly was not a "discretionary act," protected by the state's right to immunity.[78] Second, the court's holding in *Kuhn* does not threaten the state's ability to protect itself from liability in cases like Donald Kuhn's. The state has at least two alternatives: (1) The legislature could provide in the statute itself that a user of a highway must agree to indemnify the state; or (2) the legislature could, by statute, authorize the Department to adopt any necessary regulations, "including, but not limited to," a requirement that a user of a highway indemnify the state against liability. In either case, the statutory provision would

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77. *Kuhn,* 692 P.2d at 266.

78. *See* Freeman v. State, 705 P.2d 918 (Alaska 1985). In *Freeman,* the court held that the state was immune from tort liability in an action resulting from a policy decision by the Department of Transportation not to implement dust control measures. *Id.* at 919. The court noted that the decision was one that involved "basic political, social or economic factors." *Id.* at 920. Therefore, the Department's decision in *Freeman* was immune from liability under the "planning-operational test" which had been adopted in State v. Abbott, 498 P.2d 712 (Alaska 1972). According to the *Freeman* decision:

> Under the planning-operational test, decisions that rise to the level of planning or policy formulation will be considered discretionary acts immune from tort liability, whereas decisions that are operational in nature, thereby implementing policy decisions, will not be considered discretionary and therefore will not be shielded from liablity.

Freeman, 705 P.2d at 920 (quoting Johnson v. State, 636 P.2d 47, 64 (Alaska 1981)). *See generally* Note, *Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act,* 2 ALASKA L. REV. 99 (1985).

In *Freeman,* the court distinguished *Kuhn* because in *Kuhn* the state did not argue that the acts involved were immune from liability as discretionary acts. *Freeman,* 705 P.2d at 920. In *Kuhn,* it was clear that the department had a statutory duty to maintain the highway for use by certain persons. *See supra* note 53 and accompanying text. Using the political-social-economic criteria set forth above, it is logical to place an economically-based decision, like that involved in *Freeman,* not to implement dust control procedures, under the protection of sovereign immunity because of the decision's "planning" characteristics. The failure to gravel a highway *properly* is much more clearly an "operational" function and thus is not protected by sovereign immunity.

be controlling, and the public duty exception would not apply.[79]

In *Kuhn,* as in *Northwest Airlines*[80] and *Air Transport,*[81] the injured party was an indemnitor, and enforcement of the indemnity provision would have barred the injured party's suit. In each case, the court invalidated the indemnity provision, concluding that the subject matter of the contract concerned a public duty. In *Kuhn,* however, it is arguable that the contract did not involve a public duty. In finding a public duty in activities which are essentially private in character, *Kuhn* takes a step beyond the Ninth Circuit cases. The lease in *Northwest Airlines,* for example, required that the airport be available "to the aeronautical public on a non-discriminatory basis."[82] In *Air Transport,* the airport was "available for use to commercial planes."[83] In both cases there was a clear duty to the public. In *Kuhn,* however, the public duty exception was held to cover an indemnity provision which affected only three discrete groups of statutorily identified "industrial or commercial" users.[84] The fact that the court was willing to stretch the definition of "the public at large" in this case may indicate that it implicitly distinguishes between exculpation and indemnity situations and applies the public duty exception more willingly in the former situation.

IV. POST-*KUHN:* FURTHER DEVELOPMENTS, FURTHER QUESTIONS

In its most recent opinion on the public duty exception, *Rogers & Babler, a Division of Mapco Alaska, Inc. v. State,*[85] the Alaska Supreme Court confirmed that the principles stated in *Burgess* constitute the proper rationale behind the public duty exception. *Rogers & Babler* involved a contract for the construction of a state highway. The contract required that the contractor indemnify the state for actions brought against it arising out of the contruction work.[86] During

79. *See supra* text accompanying notes 58-68 (explaining why the regulatory provision did not carry the authority of statutory law).

80. *See supra* notes 13-19 and accompanying text.

81. *See supra* notes 5-12 and accompanying text.

82. 351 F.2d at 255.

83. 221 F.2d at 469.

84. ALASKA STAT. § 19.40.100 (1981); *see supra* note 53.

85. 713 P.2d 795 (Alaska 1986).

86. *Id.* at 796.

The indemnity provision stated:

> *Responsibility for Damage Claims.* The Contractor shall indemnify and save harmless the Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons or property on account of the operations of said Contractor; or on account of or in consequence of any neglect in safe-guarding the work; or through use of

this construction work, a motorcycle rider was killed as a result of the alleged negligence of both the state and the contractor. The accident occurred when the rider struck a traffic "divider" which was normally guarded by reflective barricades. The state's negligence was aggravated by the fact that before the accident a state airport safety officer had noticed that the barricades were missing, but had taken no action to replace them.[87]

After settling with the personal representative of the motorcycle rider, the state sued Rogers & Babler for breach of the indemnity agreement. The contractor contended that the indemnity provision was unenforceable because of the public duty exception.[88] The Alaska Supreme Court found that the exception did not apply, emphasizing that the contract "remains a voluntary agreement entered into between two sophisticated parties who could allocate risks and costs through the bidding process."[89] Thus, the second part of the *Burgess* test did not apply because Rogers & Babler could have negotiated a different contract. Unlike Kuhn, Rogers & Babler had a choice as to whether to accept the provisions of the contract.

Aside from confirming the *Burgess* standard, *Rogers & Babler* developed the analysis of the public duty exception in two additional ways. First, and most importantly, the court emphasized that the second branch of the *Burgess* test focuses on the relationship *between the parties to the contract.*[90] The fact that the victim was a member of the public was not important to its determination. The contractual relationship was the important factor. By emphasizing this relationship, the court seems to require that the indemnity provision meet both parts of the *Burgess* test. In *Rogers & Babler,* although the court did not address the issue, the state obviously owed a duty to the public to maintain its roads properly.[91] The court noted that, because the pertinent relationship was that between the parties to the contract, "the fact that [the cyclist] was a member of the public is irrelevant."[92]

> unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of said Contractor.

Id. (footnote omitted).

87. *Id.*

88. *Id.* at 797.

89. *Id.* at 799.

The court also noted that, "[t]raditionally this court has held that the public duty exception does not apply to contracts between the state and a construction contractor." *Id.* (citing *Burgess,* 614 P.2d 1380 (Alaska 1980), and Stephan & Sons v. Municipality of Anchorage, 629 P.2d 71 (Alaska 1981)).

90. *Rogers & Babler,* 713 P.2d at 799 (emphasis added).

91. *See Burgess,* 614 P.2d at 1382. The *Burgess* court stated: "The State owes a duty to the public to maintain its highways in a safe condition." *Id.* (footnote omitted).

92. *Rogers & Babler,* 713 P.2d at 799.

Second, this case may also show the implicit recognition by the court of the distinction between indemnity and exculpation. In this case, as in *Manson-Osberg* and *Burgess,* enforcing the clause did not prevent the injured party from recovering. The court merely determined the allocation of the cost of the settlement amount among the parties to the indemnity contract. This case differs from *Kuhn* and the Ninth Circuit cases in which enforcing the exculpatory clause would have forced the victim to bear the costs of the negligent party's acts.[93]

The Alaska Supreme Court seems to have firmly settled upon a two-part standard for determining when the public duty exception will apply to invalidate indemnity contracts: (1) there must be a duty owed to the public and the indemnity provision must tend to reduce the incentive of the party who has that duty to guard against his own negligence, and (2) the relationship between the parties to the contract must give the indemnitee an unfair advantage in insisting upon the indemnity provision because the indemnitor is dependent upon the services the indemnitee offers.[94]

While the *Burgess* test is well established, the court has not clearly explained whether both parts of the test must be met for the exception to apply or whether the parts of the test should be balanced.

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93. The court also considered the effect of ALASKA STAT. § 45.45.900 (1980) upon the indemnity provision. That section states:

> Indemnification Agreements Contra to Public Policy. A provision, clause, covenant, or agreement contained in, collateral to, or affecting any construction contract which purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects or (4) any other loss, damage or expense arising under (1), (2), or (3) of this section arising from the sole negligence or wilful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; *however, this provision does not affect the validity of any insurance contract, workers' compensation or agreement issued by an insurer subject to the provisions of* ALASKA STAT. §§ 21.03.010-21.90.110 (1984)].

ALASKA STAT. § 45.45.900 (1980) (emphasis added). The court held that the statute did not invalidate the indemnity provision. According to the court, "[ALASKA STAT. 45.45.900] should come into effect only when it is determined, as between the state and the contractors, that the state is *solely* negligent." *Rogers & Babler,* 713 P.2d at 798 (emphasis added). In this case, both the state and the contractor were sued for negligence and the state agreed to a settlement with the plaintiff before bringing this action against Rogers & Babler for breach of their agreement to indemnify. *Id.* at 796.

Alaska Statute section 45.45.900 invalidates indemnity clauses in construction contracts in which the purported indemnitee is found to be *solely* negligent. The section, however, does allow the indemnitee to secure insurance when indemnity provisions are not prohibited. The effect of the legislation is that parties to construction contracts may not seek indemnity for their sole negligence and should instead obtain liability insurance for damages resulting from such negligence.

94. *See Burgess,* 614 P.2d at 1382; *see also Kuhn,* 692 P.2d at 266. *See supra* notes 40-44 & 77 and accompanying text.

In *Burgess,* neither part of the test applied. The court found that while the state owed a duty to the public to maintain its roads, this duty was "not significantly affected" by the indemnity clause because the clause shifted liability for only a limited number of people and did not reduce the state's incentive to maintain the highways properly for the "traveling public."[95] The second part of the test did not apply because "Burgess was not compelled to contract with the State as customers of public service organizations often are."[96]

In *Kuhn,* on the other hand, both parts of the *Burgess* test applied. The court found that the state owed a duty to the public to maintain the Dalton Highway and that there was a customer-public service entity relationship between Kuhn and the state.[97] Thus, in neither of these cases did the court actually have to decide whether a strong showing on only one part of the test could trigger the exception.

Finally, in *Rogers & Babler,* the very circumstances of the accident indicate that the state did not properly guard against the consequences of its own negligence. Since the indemnity provision absolved the state from the responsibility to pay damages, the clause may well have removed some of the state's incentive for care. But, the second part of the *Burgess* test was not satisfied because of the relatively equal bargaining positions of the two parties. The court's holding that the exception did not apply may indicate that the most important part of the test is the second part or, at least, that both parts must always apply to trigger the operation of the public duty exception.

In sum, the Alaska courts have only begun to suggest the parameters of the public duty exception. As a result, it is not clear under what circumstances courts will deem parties to have a public duty that will render liability-avoiding clauses in their contracts unenforceable. On the basis of existing Alaska Supreme Court and Ninth Circuit decisions, the public duty exception applies to operators of public airfields and to the state when it owes a duty to the public to maintain a high-

95. The clause only shifted liability for "injuries sustained on account of the operations of the said Contractor." *Burgess,* 614 P.2d at 1382.

96. In *Rogers & Babler* the court noted three important differences between *Kuhn,* in which the public duty exception did apply, and *Burgess,* in which it did not apply:

1. The relationship between Kuhn and the state was "that of one who furnishes public services to one who uses them.";
2. Users of the Dalton Highway were compelled to contract with the state; and,
3. Highway users cannot pass on insurance costs to the state like a construction contractor may do through the bidding process.

Rogers & Babler, 713 P.2d at 799 (citations omitted). All of these distinctions address the relationship between the contracting parties, which is the subject of the second part of the *Burgess* test.

97. *Kuhn,* 692 P.2d at 266.

way. Dicta in *Burgess* suggests it will apply "to public utilities and common carriers."[98] Practitioners cannot now predict with certainty the identity of other parties whom the exception covers. Additionally, Alaska courts have not expressly stated whether the exception applies to true three-party indemnity situations as well as exculpatory situations. Finally, the courts have not decided whether a particular situation must satisfy both of the *Burgess* factors in order to trigger the operation of the exception. Other jurisdictions, however, have much more experience with the public duty exception. This note next explores California law as a suggestive model for the future development of Alaska law.

V. THE PUBLIC DUTY EXCEPTION IN CALIFORNIA

The California courts have developed a systematic method of dealing with the public duty exception and an extensive body of case law which illustrates how the exception is applied. For these reasons, California jurisprudence provides a useful reference for the development of Alaska law on the public duty exception.

A. Distinguishing Between Indemnity and Exculpation

The California courts expressly differentiate between indemnity provisions and exculpatory clauses and apply the public duty exception only to the latter. This approach reflects the basic policy differentiation between the two arrangements: "An [exculpatory clause] may deprive a victim of compensation for injuries but an agreement to indemnify a person who may be responsible for a loss is additional assurance that the loss will be compensated."[99]

As argued above, the Alaska Supreme Court and Ninth Circuit decisions discussed previously may have implicitly accepted the distinction between indemnity and exculpation in applying the public duty exception. In each of the cases involving an attempted exculpation, *Air Transport, Northwest Airlines,* and *Kuhn,* the courts have struck down the clause in controversy. In each of the cases involving a true indemnification, *Manson-Osberg, Amoco, Burgess* and *Rogers & Babler,* the courts have upheld the indemnity clause. It is submitted that accepting the formal distinction between indemnity and exculpation clauses will create more predictability in the resolution of future cases and allow for the development of a more logical body of jurisprudence on the subject.[100]

98. *Burgess,* 614 P.2d at 1381.

99. Lemat Corp. v. American Basketball Ass'n., 51 Cal. App. 3d 267, 278, 124 Cal. Rptr. 388, 395-96 (1975).

100. Not all jurisdictions treat indemnity clauses and exculpatory clauses differently in applying the public duty exception. In Northern Natural Gas Co. v. Roth

The major rationale for providing more stringent standards for exculpatory clauses than for indemnity clauses is to assure that the injured party recovers for his injury. If Alaska chooses to follow this distinction, the injured party will recover from the negligent party in the exculpatory clause cases in which the public duty exception applies. The injured party will also recover in the indemnity cases, leaving the legal dispute to be resolved between the indemnitee and indemnitor. Courts can handle this dispute by resort to general contract principles such as unconscionability and adhesion and by special statutory provisions.[101]

Packing Co., 323 F.2d 922 (8th Cir. 1963), the Eighth Circuit applied the Restatement (First) of Contracts standard on contracts for the exemption from liability for negligence to a "three-party" indemnity contract. *Id.* at 927-29 (citing RESTATEMENT (FIRST) OF CONTRACTS §§ 574-575 (1932)). *See supra* note 10 and accompanying text. In Otis Elevator Co. v. Maryland Casualty Co., 95 Colo. 99, 33 P.2d 974 (1934), the Colorado Supreme Court applied the public duty exception to an indemity clause under which an elevator repair company sought indemnity from the owners of a building. The building's patrons had sued the repair company after being injured in an elevator in that building. Finally, in the Ninth Circuit's *Northwest Airlines* decision, there was an indemnity provision under which Alaska Airlines was to defend and hold harmless Northwest Airlines from suits by those passengers injured due to the negligence of Northwest. The Ninth Circuit struck this indemnity clause under the same standard that it used to strike the exculpatory provisions included in that case. *Northwest Airlines,* 351 F.2d at 258; *see supra* notes 13-19 and accompanying text.

101. Alaska has adopted the Uniform Commercial Code, which provides as follows:

> (a) If the court as a matter of law finds the contract or a clause of the contract was unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or so limit the application of an unconscionable clause as to avoid an unconscionable result.
>
> (b) If it is claimed or appears to the court that the contract or any clause of the contract may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

ALASKA STAT. § 45.02.302 (1980). This section was applied in Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976), in which the court stated that "[i]t is incumbent on the courts of Alaska to enforce the provisions of the Uniform Commercial Code when applicable, including the doctrine of unconscionability embodied in [ALASKA STAT. § 45.05.072 (a prior codification of section 45.02.302)]." *Id.* at 292 n.43.

The court also cited with approval a standard for identifying cases in which a contract should be held unconscionable: "Unconscionablity has generally been recognized to include an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). *See also* City and Borough of Juneau v. Alaska Elec. Light & Power Co., 622 P.2d 954 (Alaska 1981) (holding that an indemnity agreement between the city and a utility company was not unconscionable where the terms were negotiated at arm's length and were fair to both parties).

Additionally, principles of adhesion may be applied to the indemnity contract.

Because enforcement of hold harmless agreements reduces the incentive of protected parties to exercise reasonable care, it may be argued that Alaska should apply the public duty exception to indemnity provisions as well as exculpatory clauses.[102] It is submitted, however, that the Alaska courts have already abandoned this rationale by implicitly distinguishing between indemnity and exculpation. In both *Burgess* and *Rogers & Babler,* the state had a duty to maintain its roads properly and the indemnity clause reduced the state's incentive to fulfill its duty. Yet, in both of those cases, the Alaska Supreme Court upheld the indemnity provisions.

B. Comparing the California Standards with the Alaska Approach

1. *The* Tunkl *Standards*. In *Tunkl v. Regents of the University of California,*[103] the California Supreme Court established a six-part test for determining whether the subject matter of a contract affects the "public interest." In that case, Hugo Tunkl was admitted to a hospital after signing a "release" which purported to exculpate the hospital from all liability for the negligence of its staff.[104] Tunkl later sued the

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These principles have received most recent judicial attention in reference to insurance contract litigation. *See* Stordahl v. Government Employees Ins. Co., 564 P.2d 63 (Alaska 1977) (noting that insurance policies may be considered contracts of adhesion because of the inequality of bargaining power between insurer and insured, and thus should be construed in favor of the policy holder); *see also* Weaver Bros., Inc. v. Chappel, 684 P.2d 123 (Alaska 1984).

Principles of adhesion have, however, been considered by the Alaska Supreme Court outside of the insurance context. In Burgess Constr. Co. v. State, 614 P.2d 1380 (Alaska 1980), the court refused to apply principles of adhesion to invalidate an indemnity provision in a contract between the state and a highway construction company. The court stressed that because the parties were of essentially equal bargaining power, the construction company could not claim that it was forced to accept the provision on a "take-it-or-leave-it" basis. *Id.* at 1383-84.

The *Burgess* court cited with approval a commentator who defines an adhesion contract as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Sybert, *Adhesion Theory in California: A Suggested Redefinition and Its Application to Banking,* 11 LOY. L. REV. 297, 301 (1978) (quoting Neal v. State Farm Ins. Co., 188 Cal. App. 2d 691, 694, 10 Cal. Rptr. 781, 784 (1961)).

Finally, specific statutory provisions may govern the enforcement of certain indemnity provisions. *See* ALASKA STAT. § 45.45.900 (1980), *quoted supra* at note 93; *see also* Rogers & Babler, Div. of Mapco Alaska, Inc. v. State, 713 P.2d 795 (Alaska 1986) (confining the application of section 45.45.900 to cases in which the party seeking indemnity is found to be solely negligent).

102. *See supra* note 100.

103. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

104. *Id.* at 94, 383 P.2d at 442, 32 Cal. Rptr. at 34. The document provides as follows:

> RELEASE: The hospital is a non-profit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged

hospital, claiming that he had been injured due to the negligence of two physicians employed by the hospital. At trial, the jury sustained the validity of the release finding no violation of California Civil Code section 1668, which governs exculpatory clauses.[105]

On appeal, the California Supreme Court noted that previous decisions interpreting section 1668 had consistently held that exculpatory clauses that affected "the public interest" could not be enforced.[106] The court held that the exculpatory clause in *Tunkl* affected the public interest and was therefore illegal under section 1668.[107]

In its opinion, the *Tunkl* court examined California precedent construing the meaning of "the public interest." Finding that "[n]o definition of the concept of public interest can be contained within the four corners of a formula,"[108] the court enumerated six situations which tend to concern "the public interest." Under the court's often-quoted analysis, an exculpatory clause which involves some or all of the following situational factors is invalid:

> (1) It concerns a business of a type generally thought suitable for public regulation.
> (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
> (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
> (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
> (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
> (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the

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> therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

Id.

105. CAL. CIV. CODE § 1668 (West 1985) provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of laws whether willful or negligent, are against the policy of law."

106. *Tunkl*, 60 Cal. 2d at 96, 383 P.2d at 443, 32 Cal. Rptr. at 35.

107. *Id.* at 101-104, 383 P.2d at 447-48, 32 Cal. Rptr. at 40-41.

108. *Id.* at 98, 383 P.2d at 444, 32 Cal. Rptr. at 36.

risk of carelessness by the seller or his agents.[109]

The court emphasized that only some of these characteristics must be established in order to invalidate an exculpatory clause. In *Tunkl,* the court found that the hospital's release exhibited each of the characteristics.[110]

2. Municipality of Anchorage v. Locker: *Limited Acceptance of the* Tunkl *Standards.* In a recent opinion, the Alaska Supreme Court has shown a willingness to look to the *Tunkl* standards in determining the validity of exculpatory clauses in contracts which involve a public duty — at least in some circumstances. *Municipality of Anchorage v. Locker*[111] concerned the validity of an exculpatory clause used by the publisher of a telephone directory. The telephone company attempted to limit its potential liability for errors and omissions made in the processing of advertisements in its "yellow pages" (commercial directory).[112] The clause purported to limit an advertiser's recovery to the cost paid for the particular advertisement.[113]

These facts presented the Alaska Supreme Court with another opportunity to apply the public duty exception analysis. Indeed, most courts that had considered the issue had examined the clause under such an analysis. Inexplicably, however, the court cited none of its prior decisions concerning the public duty exception; instead, the court applied a hybrid unconscionabilty test. First, citing *Tunkl,* the supreme court determined that the "publication of the Yellow Pages is *affected with a public interest.*"[114] The *Locker* court, however, only considered the first three *Tunkl* standards in making this determination.[115]

Then, because it determined that the contract was affected with a public interest, the court decided to "more clearly scrutinize" the interaction between the telephone company and its advertiser to determine whether the clause was an unconscionable part of the contract.[116] Applying reasoning expressed in previous Alaska unconscionability cases,[117] the court found that the clause was unconsciona-

109. *Id.* at 98-101, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38 (footnotes omitted).
110. *Id.* at 101, 383 P.2d at 447, 32 Cal. Rptr. at 39.
111. No. 3100 slip op. (Alaska Aug. 22, 1986).
112. *Id.* at 2-3.
113. *Id.* at 5.
114. *Id.* at 10-11 (emphasis added).
115. *Id.*

In *Tunkl,* the California Supreme Court noted that all of the standards in the test need not be met in each case in order for the exception to apply. *See supra* text accompanying note 110. The point here is that the Alaska Supreme Court did not even *consider* the final three *Tunkl* standards as a part of its analysis.

116. *Id.* at 11.
117. *See* Vochner v. Erikson, 712 P.2d 379 (Alaska 1986).

ble because it involved "a vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party."[118]

Although the Alaska Supreme Court's unconscionability analysis involves some of the same considerations as the latter three *Tunkl* standards, the form of the court's analysis differs significantly from that of California and other jurisdictions that apply the *Tunkl* standards. Both Alaska's unconscionability analysis and the latter three *Tunkl* standards require an evaluation of the relative bargaining power of the parties. The unconscionabilty analysis, however, looks beyond the bargaining power to scrutinize the terms of the exculpation. Under the *Tunkl* standards, as long as the court determines that the circumstances surrounding the exculpatory clause tend to implicate "the public interest," the court will invalidate the clause without examining its substantive terms. The Alabama Supreme Court took this approach in *Morgan v. South Central Bell Telephone Co.*,[119] a "yellow pages" case cited in *Locker*. That court simply applied the *Tunkl* standards and, finding that the standards were fulfilled, invalidated the exculpatory clause.[120]

Locker's significance in Alaska jurisprudence concerning the public duty exception is unclear because of the court's failure to refer to any prior Alaska decisions on the exception.[121] The situation in *Locker* is fundamentally indistinguishable from that in *Kuhn*. In both cases, the concerns expressed in Alaska cases on the public duty exception and in the *Tunkl* standards require that a court invalidate the exculpatory clause.[122] Yet in *Locker*, the Alaska Supreme Court, without explanation, departed from the analysis that it had used in *Kuhn* and other decisions. The *Locker* decision raises several ques-

118. *Locker*, slip op. at 11-15 (citing *Vochner*, 712 P.2d at 381-83); *see supra* note 101.

119. 466 So. 2d 107 (Ala. 1985).

120. *Id.* at 117-18.

This is also the way that the California Supreme Court applied its test in the *Tunkl* opinion itself. 60 Cal. 2d at 101-104, 383 P.2d at 447-48, 32 Cal. Rptr. at 39-41. The other two "yellow pages" exculpation cases cited in *Locker* did, however, apply a mixed public duty and unconscionability analysis in holding that the clause was unenforceable. *See* Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co., 117 Wis. 2d 587, 345 N.W.2d 417 (1984); Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 171 N.W.2d 689 (1969). The better approach is that taken by the Alabama Supreme Court, which stated in applying the *Tunkl* standards: "A review of the various methods by which other states have dealt with exculpatory clauses and their refusal to enforce them convinces us that the best rule, and the simplest in application, is that exculpatory clauses affecting the public interest are invalid." *Morgan*, 466 So. 2d at 117.

121. Because the Alaska Supreme Court did not apply its public duty analysis, nor cite its case law on the subject in deciding *Locker*, this note has not discussed the case as a part of the development of the public duty exception in Alaska.

122. *See infra* text accompanying notes 124-128.

tions. Is this case the Alaska Supreme Court's most recent statement on the public duty exception? Is the holding merely confined to exculpatory clauses and inapplicable to indemnity clauses? Is the holding confined to cases in the telephone directory advertising area?[123] In resolving these questions, the Alaska Supreme Court should adopt the *Tunkl* criteria and the traditional method of applying these criteria in all exculpation cases as a means of determining which factual situations involve a public duty. Application of the *Tunkl* criteria would not change the results of *Kuhn* and *Locker,* yet it would provide for more consistent and predictable analysis in future exculpation cases.

3. *Similarities Between the* Tunkl *Standards and the Traditional Alaska Approach.* The principles underlying the six-part test adopted in *Tunkl* parallel those of the Alaska approach to the public duty exception. The first three standards of the *Tunkl* approach essentially concern the existence of a public duty, the first element of the *Burgess* test. The last three *Tunkl* standards measure the equality of bargaining power of the two parties, the second *Burgess* factor. Accordingly, the two approaches may produce identical results in many cases.

For example, the clause struck down under the public duty exception in *Kuhn* would also have been unenforceable under the *Tunkl* test. (1) The Dalton Highway's maintenance is provided for in the state's statutes.[124] (2) The state, which sought the "indemnity," was engaged in an activity necessary to those members of the public who needed transportation between the Yukon River and Prudhoe Bay.[125] (3) The highway maintenance provided by the state was available to members of the public who met the statutory standards.[126] (4) The state had superior bargaining strength because the Dalton Highway was the only highway between the Yukon River and Prudhoe Bay available for Kuhn's use.[127] (5) The Department of Transportation regulation established the form of the permit; therefore, the terms were subject to no negotiation.[128] (6) Finally, because of these factors, Kuhn was under the control of the state and subject to the risk of its careless highway maintenance. The results of *Kuhn* would be identical under the Alaska and the California approaches to the public duty exception.

123. The cases cited in *Locker* as following the *Tunkl* standards each involved exculpatory provisions in telephone directory advertising contracts. *See Allen,* 18 Mich. App. at 632, 171 N.W.2d at 689, and *Morgan,* 466 So. 2d at 107.

124. *See* ALASKA STAT. §§ 19.40.010-.210 (1981).

125. *See* ALASKA STAT. §§ 19.40.100-.110 (1981); see *supra* note 53.

126. For a list of those persons allowed to use the Dalton Highway see *id.*

127. *Kuhn,* 692 P.2d at 262.

128. *Id.* at 262-263. *See also* ALASKA ADMIN. CODE tit. 17, § 30.050 (1984).

C. Advantages of the California Approach

Reference to California case law on the public duty exception would refine the Alaska courts' development of the exception in two ways. First, the six-part *Tunkl* test improves the ability of practitioners to distinguish factual situations in which the public duty exception will apply. Second, California's vast body of case law on the public duty exception illustrates specific situations, such as landlord-tenant or banking relationships, where the public duty exception applies.

1. *The* Tunkl *Distinctions.* The first part of the *Burgess* test can be broken down into the first three parts of the *Tunkl* test. Under the first part of the Alaska standard, there must be a duty owed to the public and the indemnity provision must tend to reduce the incentive of the party who has that duty to guard against his own negligence.[129] The California approach particularizes this standard making it easier to apply to actual problems, but the California approach does not change the basic principle adopted by the Alaska court. *Tunkl* also addresses the "public at large" question confronted in *Kuhn.*[130] The California court held that all members of the public did not need to qualify for the services of the hospital. The court stated that the party must "[hold] himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards."[131]

The final three parts of the *Tunkl* test have the same practical effect as the second part of the Alaska approach, which requires that the relationship between the parties to the contract must give the indemnitee an unfair advantage in insisting upon the indemnity provision because the indemnitor requires the services the indemnitee offers.[132] The California approach focuses specifically on, first, whether the proponent of the clause has superior bargaining power; second, whether the proponent exercises this power in confronting the other party with a standardized contract of adhesion; and finally, whether the execution of the contract submits the party to the risk of the proponent's carelessness.[133]

By applying the *Tunkl* standards, Alaska courts can remain true to the principles underlying the public duty exception set forth in *Burgess* and *Kuhn,* and yet more predictably specify those situations in

129. *See supra* note 94 and accompanying text.

130. *See Kuhn,* 692 P.2d at 266. The Alaska court stated: "We conclude that 'public at large' must only mean those persons for whom public services and facilities are performed and maintained . . . ." *Id.*

131. *Tunkl,* 60 Cal. 2d at 99, 383 P.2d at 445, 32 Cal. Rptr. at 37.

132. *See supra* note 94 and accompanying text.

133. *Tunkl,* 60 Cal. 2d at 99-101, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38.

which courts should apply the public duty exception. This particularization would aid courts, practitioners, and laypersons in determining when the exception would render exculpatory contract provisions unenforceable.

2. *The Case Law Under the* Tunkl *Standards.* During the years since the *Tunkl* decision, the California courts have developed a large body of case law applying this formulation of the public duty exception. This case law suggests the directions in which Alaska courts might proceed in applying the exception.

One California court applied the *Tunkl* test to strike an exculpatory clause, which was entitled an "indemnification," in a private lease agreement.[134] Under *Tunkl,* another court invalidated an exculpatory clause purporting to protect an irrigation district (an agency of the state of California) from liability arising as the result of flooding.[135] A California court relied upon the *Tunkl* standards to prevent enforcement of an agreement to exculpate a bank for its negligence in handling funds deposited in a night deposit vault.[136] On the other hand, courts have held that the *Tunkl* criteria do not affect exculpatory clauses where the subject matter of the contract is not a service necessary to any members of the public. For example, in one case, a California court held that a release signed by a participant in a motorcycle race was valid. The court stated that "by no means other than a most strained construction could the exculpatory instrument in issue involve the public interest."[137]

The holdings in cases arising outside of California in which courts have applied the *Tunkl* standards also identify situations in which the exception might be applied. The Tennessee Supreme Court applied these standards to prevent the enforcement of a clause by which a physician sought to exculpate himself from liability for his potential negligence in performing an abortion.[138] The Alabama Supreme Court used the standards to invalidate an agreement under which a telephone company sought to be released from liability for errors and omissions occurring in its customer directory.[139] Finally, the Montana Supreme Court applied the *Tunkl* standards to prevent enforce-

134. Henrioulle v. Marin Ventures, 20 Cal. 3d 512, 515-18, 573 P.2d 465, 468-69, 143 Cal. Rptr. 247, 249-50 (1978).

135. Salton Bay Marina, Inc. v. Imperial Irrigation Dist., 172 Cal. App. 3d 914, 218 Cal. Rptr. 839 (1985).

136. Vilner v. Crocker Nat'l Bank, 89 Cal. App. 3d 732, 152 Cal. Rptr. 850 (1979).

137. McAtee v. Newhall Land & Farming Co., 169 Cal. App. 3d 1031, 216 Cal. Rptr. 265 (1985); *see also* Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985) (parachuting).

138. Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977).

139. *Morgan,* 466 So. 2d 107.

ment of an exculpatory clause under which a county sought to be released from negligence in its operation of county fair facilities.[140] On the other hand, courts have enforced exculpatory clauses where the contract was one for recreational services that were not necessary to the public.[141]

Despite the *Tunkl* court's admonition that not all of the standards need be met in each case in order for the exception to apply, the analysis of cases in which some of these factors are missing necessarily involves a balancing approach. The court must balance the absence of some of the standards against those factors that are present to determine whether the exculpatory clause is enforceable. One California case provides guidance for this balancing. In *Cregg v. Ministor Ventures,*[142] a California court of appeals held that an exculpation of a landlord from liability for his negligence toward one of his tenants was valid under *Tunkl.* In the lease, the landlord specifically provided that in return for payment of a slightly higher rent he would purchase insurance for the tenant's property.[143] While courts have invalidated exculpatory clauses in other private leases,[144] the court enforced this clause because the lease was not a contract of adhesion. The lease arrangement did not place the tenant under the landlord's control, or subject the tenant to the risk of the landlord's carelessness or to an abuse of the landlord's superior bargaining power.[145] *Cregg* shows that the balancing of factors under the *Tunkl* standard involves a case-by-case determination.[146]

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140. Haynes v. County of Missoula, 517 P.2d 370 (Mont. 1973).

141. Jones v. Dressel, 623 P.2d 370 (1981) (skydiving); Schlobohm v. SPA Petite, Inc., 326 N.W.2d 920 (Minn. 1982) (health spa membership).

142. 148 Cal. App. 3d 1107, 196 Cal. Rptr. 724 (1983).

143. *Id.* at 1109, 196 Cal. Rptr. at 725.

144. *See supra* text accompanying note 134.

145. *Cregg,* 148 Cal. App. at 1111, 196 Cal. Rptr. at 726.

146. Courts in other jurisdictions which have adopted the *Tunkl* standards also apply a balancing approach when less than all of the factors are present. For example, in Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977), the Tennessee Supreme Court stated, "We think these criteria are sound and we adopt them. *It is not necessary that all be present in any given transaction,* but generally a transaction that has *some* of these characteristics would be offensive." *Id.* at 431 (emphasis added).

Additionally, in Jones v. Dressel, 623 P.2d 370 (Colo. 1981), the Colorado Supreme Court used the *Tunkl* standards to find that "the duty to the public factor" was not present. *Id.* at 376. *Jones* involved an exculpatory clause in a contract for the use of skydiving facilities. *Id.* at 372. The court found that the use of the facility was not a practical necessity for any member of the public, the operator of the facilities did not possess superior bargaining power, and the contract was not one of adhesion. *Id.* at 377-78. The court held that "[w]hile it is not necessary for a contract to embody all of the characteristics set forth in *Tunkl* . . . to meet the test, we conclude that an insufficient number of the characteristics are present in the instant case to establish that the contract . . . affected the public interest." *Id.* at 377.

VI. CONCLUSION

In the wake of *Burgess* and *Kuhn,* Alaska courts applying the public duty exception currently rely upon a two-part test in both exculpatory and indemnity situations. Courts deem a clause that fulfills this test unenforceable because it affects a public duty. It is, at this point, very difficult to tell what, if any, impact the *Locker* opinion will have on this analysis. There are three problems with the test as presently applied. First, the two-part test does not provide adequate guidance in determining which factual situations call for the application of the exception. Second, because of the very limited number of cases in which the Alaska courts have applied the exception to this point, courts may draw upon very little precedent in applying the exception. Finally, the Alaska Supreme Court has not expressly recognized a distinction between indemnity and exculpatory clauses.

The Alaska courts' adoption of standards similar to those used in the California analysis of the public duty exception, and mentioned in the narrow context of the *Locker* opinion, would provide a solution to these problems. As this note has shown, the *Tunkl* six-part test and the two-part test established in *Burgess* address the same concerns. The *Tunkl* test, however, provides a more precise tool for predicting when the public duty exception will apply. Accordingly, its adoption would benefit courts, lawyers, and contracting parties.

Additionally, the case law implementing the *Tunkl* standards constitutes a valuable source of illustrations of the proper application of the public duty exception. Because of the similarity between the Alaska approach and the *Tunkl* standards, Alaska courts may refer to this case law even if the courts do not adopt the *Tunkl* standards themselves. Finally, the Alaska Supreme Court should adopt the view, adhered to in California, that courts should examine indemnity clauses and exculpatory clauses under different standards. Adopting an express distinction between the treatment of the two types of clauses will create more predictability and facilitate more rational analysis in these cases. In sum, California law on the public duty exception and the *Tunkl* standards, along with cases from other jurisdictions applying those standards, provide an excellent source of precedent and analysis for Alaska courts as they continue to apply the exception in different situations.

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