

To: Commission
From: Vito J. Petitti
Re: Equine Activities Liability Act
Date: April 7, 2014

Upon the release of the Revised Tentative Report (RTR), as directed at the January 2014 Commission meeting, several commenters have provided feedback, some of it substantive and in opposition to the language in the RTR. For ease of review, sections of the statute below depict the latest version released by the Commission, modified to indicate commenters' feedback and proposed revisions (shown with italicized underlining for proposed additions and italicized strikeout for proposed deletions).

Proposed Revision 1

A member of the New Jersey Horse Council and practicing equine law attorney suggests that the project's title, "Equine Activities Liability Act," be made to conform with the title of N.J.S. 5:15-1 et seq., "Equestrian Activities Liability Act." Of note, in the first paragraph of the opinion, the *Hubner* court refers to the legislation as "The Equine Activities Liability Act."¹

Staff is unopposed to this proposed change to the project's title.

Proposed Revision 2

A representative of the Rutgers Equine Science Center providing updated statistics for and recommends replacement of Paragraph 2 of the Introduction, as follows:

I. Introduction

~~*The New Jersey equine industry plays a significant role in the state.² According to the American Horse Council, there are 83,000 horses in New Jersey, over 80 percent of which are involved in showing and recreation. Almost 60,000 New Jerseyans are involved in the equine industry as horse owners, service providers, employees, and volunteers. Even more participate as spectators. Little wonder that *Equus caballus* — the horse — is the New Jersey State Animal.*~~

According to the Rutgers Equine Science Center, the New Jersey equine industry, home to 42,500 horses, is valued at \$4 billion, producing an annual economic impact of approximately \$1.1 billion and 13,000 jobs. Horses are found on 7,200 facilities in every county statewide which maintain 176,000 acres of open space. Horse operations tend to be more sustainable than

¹ Hubner v. Spring Valley Equestrian Center, 203 N.J. 184 at 188 (2010)

² Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretations in Jurisdictions with Similar Limited Liability Laws, 12 Seton Hall J. Sports L. 65 at p. 67

other types of agricultural businesses, making the horse industry critical to the growth and land-use strategy of the state.

Staff has no objection to replacing Paragraph 2 as proposed by the commenter.

An attorney who submitted an amicus brief on behalf of one of the parties in Hubner believes that the proposed revisions in the RTR are “more formal than substantive” and do not go far enough to resolve the latent ambiguity issue raised in that court’s decision. Proposed Revisions 3 through 7 are submitted for the Commission’s consideration.

Proposed Revision 3

This commenter suggests adding language to N.J.S. 5:15-1 Legislative findings and declarations, as follows:

5:15-1. Legislative findings and declarations

The Legislature finds and declares that equine animal activities are practiced by a large number of citizens of this State; that equine animal activities attract large numbers of nonresidents to the State; that those activities significantly contribute to the economy of this State; and that horse farms are a major land use which preserves open space.

The Legislature further finds and declares that equine animal activities involve risks that are essentially impractical or impossible for the operator to eliminate; and that those risks must be borne by those who engage in those activities.

The Legislature therefore determines that the allocation of the risks and costs of equine animal activities is an important matter of public policy and it is appropriate to state in law those risks that the participant voluntarily assumes for which there can be no recovery- and that operators of equine animal facilities shall be liable only for their acts and omissions in accordance with the responsibilities of operators established herein.³

Proposed Revision 4

Although this commenter agrees with the Commission’s recommendation to relocate the language regarding inherent risks from N.J.S. 5:15-2 to 5:15-3 regarding assumed risks, a further revision is suggested by this commenter regarding N.J.S. 5:15-3, by adding a subsection c. as follows:

³ See N.J.S. 59:1-2, the Legislative Declaration section of the Jersey Tort Claims Act, which refers to the “public policy of this State that public entities shall only be liable for their negligence within the limitations of this act.”

5:15-3. Assumption of inherent risks

a. A participant and spectator are deemed to assume the inherent risks of equine animal activities, meaning those dangers that are an integral part of equine activity, including:

(1) The propensity of an equine animal to behave in ways that result in injury, harm or death to nearby persons;

(2) The unpredictability of an equine animal's reaction to such phenomena as sounds, sudden movement and unfamiliar objects, persons or other animals;

(3) Risks created by weather or certain natural hazards, such as surface or subsurface ground conditions;

(4) Collisions with other equine animals or with objects; and

(5) The potential of a participant or other person to act in a negligent manner that may contribute to injury to the participant or others, including but not limited to failing to maintain control over the equine animal or not acting within the participant's ability.

b. Each participant is assumed to know the range of his ability and it shall be the duty of each participant to conduct himself within the limits of such ability to maintain control of his equine animal and to refrain from acting in a manner which may cause or contribute to the injury of himself or others, loss or damage to person or property, or death which results from participation in an equine animal activity.

c. This section shall be liberally construed to protect and promote equine activities and to limit liability in accordance with the purposes of this act.

Proposed Revision 5

In the alternative to adding subsection c. to N.J.S. 5:15-3, above, the Commission may want to consider adding a separate section stating:

*This act shall be deemed to be remedial and its provisions relating to assumption of inherent risks of equine animal activities shall be liberally construed in furtherance of public policy to protect and promote equine activities in this State.*⁴

⁴ See N.J.S. 2A:53A-10, noting that the Supreme Court opinion in *Hubner* supports a "remedial" interpretation of the Act with "broad" construction of its provisions regarding assumption of inherent risks. See 203 N.J. at 195, 203-204.

Proposed Revision 6

The first sentence of N.J.S. 5:15-5 should be revised as follows:

5:15-5. Assumption of risk as bar to suit or complete defense

The assumption of risk set forth in section 3 of this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a participant for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.) relating to comparative negligence. ~~Failure of a participant to conduct himself within the limits of his abilities as provided in section 3 of this act shall bar suit against an operator to compensate for injuries resulting from equine animal activities, where such failure is found to be a contributory factor in the resulting injury, unless an operator's violation of his responsibilities under this act caused the participant's injuries, in which case the provisions of P.L.1973, c. 146 shall apply.~~⁵

Proposed Revision 7

It is suggested that the title of N.J.S. 5:15-9 should be limited to “Responsibilities of operators.” The reference to “Exceptions to limitations on operator liability” is confusing and ambiguous. It is inaccurate to describe or refer to operators’ responsibilities as “exceptions” to the assumed risks – they are not, according to this commenter.

In addition, subsection a. (5) should be reworded as indicated below.

In this commenter’s opinion, subsection b. is unnecessary, at best, and reintroduces confusion with respect to the relationship between assumed risks and risks caused by an operator’s breach of his or her responsibilities as stated above. The commenter would instead reiterate the basic point that the risk assumption provisions should be broadly construed and the “exceptions” narrowly construed by replacing subsection b. as indicated below. This is more consistent with the approach approved by the Supreme Court in *Hubner* and best reflects the legislative intent.

5:15-9. Responsibilities of operators; ~~Exception to limitations on operator liability~~

a. It shall be the responsibility of the operator, to the extent practicable, to:

~~a. Knowingly providing equipment or tack that is faulty to the extent that it causes or contributes to injury.~~

⁵ The addition of the phrase “unless an operator’s violation of his duties or responsibilities under this act caused the participant’s injuries, in which case the provisions of P.L.1973, c. 146 shall apply” brings the language of this Act closer to that of the Ski Act, which contains similar language at N.J.S. 5:13-6. The Ski Act is one of the acts the Court examined regarding legislative intent. See *Hubner*, supra at 198-204.

- ~~b. Failure to make reasonable and prudent efforts to determine the participant's ability to safely manage the particular equine animal, based on the participant's representation of his ability, or the representation of the guardian, or trainer of that person standing in loco parentis, if a minor.~~
- ~~c. A case in which the participant is injured or killed by a known dangerous latent condition on property owned or controlled by the equine animal activity operator and for which warning signs have not been posted.~~
- ~~d. An act or omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury, and~~
- ~~e. Intentional injuries to the participant caused by the operator.~~

(1) Maintain in good condition all equipment and tack used in equine animal activities;

(2) Inspect all equipment and tack on a regular basis to insure the equipment and tack are in good condition;

(3) Make reasonable and prudent efforts to determine the participant's ability to manage the particular equine animal, based on the participant's representation of his ability, or the representation of the guardian, or trainer of that person standing in loco parentis, if a minor;

(4) Make reasonable inspections of the property owned, controlled, or used by the equine animal activity operator for equine animal activity, in order to: discover dangerous conditions on that property, eliminate the dangerous conditions or post warnings signs when elimination is not practicable, maintain the property in a reasonably safe condition, and refrain from creating conditions that would render the property unsafe;

(5) Refrain from *any act or omission that would constitute a negligent disregard for the participant's safety and causes injury; and acts and omissions in violation of a recognized duty of reasonable care owed to participants that causes injury.*⁶

(6) Refrain from causing intentional injuries to the participant.

b. Nothing in N.J.S. 5:15-3 and N.J.S. 5:15-4 should be read to insulate an operator from any of the obligations imposed upon the operator by this section. Nothing contained in this section should be read to impose liability upon an operator for injuries caused by risks voluntarily assumed by participants as set forth in N.J.S. 5:15-3 and N.J.S. 5:15-4.

⁶ See *Hubner*, supra, at 206.

Proposed Revision 8

The Revised Tentative Report added a new provision in N.J.S. 5:15-10 that requires operators to list the duties of participants, spectators, and operators beneath the capitalized print. One commenter, the aforementioned member of the New Jersey Horse Council and equine law attorney, expresses concern that requiring such a list would result in more lawsuits against equestrian activities operators, and that inadvertently omitting a particular duty or responsibility could cause more harm to the equine industry than having no list at all.

The additional passage derived from section 4(a) of the Roller Skating Rink Act, which requires operators to “post the duties of roller skaters and spectators and the duties, obligations, and liabilities of the operator.” Adopting similar language here was intended to clearly notify all participants as to what qualifies as an inherent risk. The commenter argues that “there is not enough room on any sign to list all of the possibilities.” For instance, roller rinks are very similar to each other but equestrian facilities vary in terms of acreage, terrain, the presence of ponds, etc., and it would be impossible to list every form of risky behavior exhibited at equestrian events, such as walking too closely behind horses with baby strollers. The same commenter notes that spectators are already covered by existing business invitee law.

The commenter’s proposed revision is as follows:

5:15-10. Posting of warning signs

All operators shall post and maintain signs on all lands owned or leased thereby and used for equine activities, which signs shall be posted in a manner that makes them visible to all participants and which shall contain the following notice in large capitalized print:

“WARNING: UNDER NEW JERSEY LAW, AN EQUESTRIAN AREA OPERATOR IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN EQUINE ANIMAL ACTIVITIES RESULTING FROM THE INHERENT RISKS OF EQUINE ANIMAL ACTIVITIES, PURSUANT TO P.L.1997, c.287 (C.5:15-1 et seq.)”

~~*All such signs shall, underneath the capitalized print, list the duties of participants and spectators and the duties and obligations of the operator as set forth in N.J.S. 5:15-3 and N.J.S. 5:15-9.*~~

Individuals or entities providing equine animal activities on behalf of an operator, and not the operator, shall be required to post and maintain signs required by this section.