To: Commission
From: Vito J. Petitti
Re: Equine Activities Liability Act
Date: December 9, 2013

In response to the discussion of this project during and after the November Commission meeting, this Memorandum contains excerpts from *Hubner v. Spring Equestrian Center*, 203 N.J. 184 (2010). In an effort to avoid imposing on our Commissioners to review the approximately 25 page opinion in *Hubner* again, Section A below contains language used by the New Jersey Supreme Court in *Hubner* to discuss the risk and exception provisions of the statute, along with some brief background material from the case. An effort was made to collect all references by the Court to the risks of equine activity and the protections afforded to operators. Short excerpts from two unreported cases decided after *Hubner* are also included in the first section of this Memorandum.

Section B below contains excerpts from the relevant portions of the Minutes of meetings (September 15, 2011, September 20, 2012, and December 20, 2012) at which the Equine Activities Liability Act was discussed before our most recent meeting in November 2013.

Section C below contains drafting alternatives based on the comments and suggestions provided by Commissioner Bunn, Commissioner Long, and Commissioner Bell.

A. Excerpts from *Hubner* (and subsequent cases)

Plaintiff Hubner was injured in a fall from a horse during a visit to defendant Spring Valley Equestrian Center when the horse backed up and tripped over cavaletti[1] in the riding ring.

The trial court granted defendant's motion for summary judgment. It concluded that regardless of whether the plaintiff's injury was caused by the unpredictable behavior of the horse, or because the horse tripped over the cavaletti, the cause was one of the inherent risks of equine activity. As a result, it determined that the plaintiff's claim was barred by the Equine Act. "As part of that analysis, the court concluded that the statutory exception to immunity if the facility knowingly provides equipment or tack that is faulty, *N.J.S.A.* 5:15–9(a), was not applicable, because the cavaletti were not faulty, but were simply part of the riding ring." *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 190-191 (2010).

The Appellate Division reversed the grant of summary judgment and remanded the matter for further proceedings. In doing so, it focused not on the statutory definition of inherent and assumed risks (N.J.S. 5:15–2 and –3), but on the provisions of the Equine Act that create exceptions to the shield afforded to equine facility operators (N.J.S. 5:15–9(a) and (d)). In considering whether one of the exceptions to the Equine Act's immunity provisions applied, the Appellate Division relied heavily on the opinion of plaintiff's expert, concluding that it presented adequate evidence to withstand the summary judgment motion of defendant.

[1] Cavaletti are small jumps, originally made of wood, used for basic horse training.

> In particular, the panel determined that "placement of equipment in a position that creates an unnecessary risk of personal injury may, under some circumstances, 'constitute[ ] negligent disregard for the participant's safety' ... notwithstanding the assumption of risks for collisions and the conditions of tracks and rings…(quoting *N.J.S.A.* 5:15–9(d)). Rejecting defendant's argument that the Equine Act serves as a complete bar against liability for any injury resulting from an inherent risk of equine activities, the panel concluded that "the evidence [including the expert report] relevant to the placement and use of the training poles and movable steps is not sufficiently one-sided to permit a grant of summary judgment in favor of Spring Valley…[citations omitted]

Id. at 191-192.

The Supreme Court of New Jersey granted defendant's petition for certification. It began its opinion by explaining that the "Equine Act and its intended purposes are central to our consideration of this appeal." *Id*. at 193. The Court noted that the "Equine Act includes a section that expresses the Legislature's findings and its declaration of the purposes that it intended to achieve." *Id*. at 195. The statutory "declaration of the Legislature's findings expresses an overall intent to support and protect equine activities because of their importance to our economy and to open space preservation. Further, the findings demonstrate an intention to limit claims by participants, by defining those risks that the facility operator cannot effectively eliminate and that the participant assumes, and by precluding any recovery for an injury resulting from any of those assumed risks." *Id*. at 196.

The "Equine Act sets forth a non-exhaustive list of the 'inherent risks,' and defines them to be 'dangers which are an integral part of equine animal activity.' *N.J.S.A.* 5:15–2." *Id*. "Following the definitional section, with its non-exhaustive list of the inherent risks of equine activity, the statute provides that participants assume those risks along with "all other inherent conditions." *N.J.S.A.* 5:15–3. Moreover, that provision broadly describes the risks assumed by adding further language reflective of the expansive scope of the provision…" *Id*.

"In addition, the Equine Act specifies that *N.J.S.A.* 5:15–3, the section deeming inherent risks to be assumed, '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...comparative negligence [statute].' *N.J.S.A.* 5:15–5." *Id.* at 197. "The apparent breadth of the protections afforded to operators of equine facilities through the definition of inherent risks and the assumption of risk provisions is tempered, however, by a separate provision that sets forth a series of exceptions. Those exceptions create circumstances in which a facility's operator may be liable for a participant's injury. *N.J.S.A.* 5:15–9." *Id.*

The Court explained that "[a]lthough the words used by the Legislature in each part of the Equine Act appear plain, the manner in which they operate as a unified whole is not immediately apparent. That is because the words that define the risks assumed and the words that bar claims resulting from any of those risks are broadly preclusive, but the words chosen to delineate the exceptions to that bar also appear to be broad." *Id*. at 197.

Were the Court to "simply look to the words permitting a recovery notwithstanding the Equine Act's other provisions if the operator of the facility acted with 'negligent disregard for a

participant's safety,' that exception might operate to effectively swallow the Act's protections entirely." *Id.* "On their surface, the risk assumption and the exception provisions are in conflict, which reveals a latent ambiguity in the overall meaning of the statute. In order to understand the Equine Act as a harmonious whole and to effectuate the Legislature's intent, therefore, we are required to delve behind the particular words chosen." *Id.* at 197-198.

The Court briefly summarized some of the Legislative history of the Act, before explaining that "[a]lthough not recited as part of the legislative findings or the statements of the sponsor or the committee, the Equine Act is the third in a series of statutes that used assumption of risk principles to allocate responsibility for injuries sustained in inherently dangerous recreational activities. *See N.J.S.A.* 5:13–1 to –11 (Ski Act); *N.J.S.A.* 5:14–1 to –7 (Roller Skating Rink Safety and Fair Liability Act)." *Id.* at 198.

After briefly describing the history of the Ski Act, the Court referred to its decision in *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44 (1959), suggesting that "the explanation in *Meistrich* about how losses for inherently dangerous recreational injuries are allocated, bears consideration. Although referred to generally as an assumption of risk theory, this Court in *Meistrich* explained that there are two separate types of such claims, only one of which is barred." *Id*. at 200.

"In its simplest explanation, the 'primary' assumption of the risk refers to a known or obvious inherent risk, one as to which the operator of the recreational facility owes the participant no duty. A claim based on such a risk is barred because the operator has not breached a duty at all." *Id*. at 201. "The 'secondary' sense of assumption of risk arises where the operator has a duty, and has breached that duty, but asserts as an affirmative defense that plaintiff 'voluntarily exposed himself to a risk negligently created by the master.'"*Id.* "When the doctrine is used in its 'secondary' sense, therefore, it operates as if it were in the nature of a contributory negligence defense." *Id.*

The Court noted that much of its "focus in *Meistrich* was on the relationship between either type of assumption of risk and other principles of tort liability, including ordinary rules relating to contributory negligence and premises liability." *Id*. at 201. "The Court expressed, therefore, a concern that assumption of risk terminology, particularly when used in its 'secondary' sense, might mislead a jury into thinking that an assumed risk overcame the defendant's obligation to behave in a reasonably prudent manner, even in regard to those risks within the facility operator's control." *Id*.

"When viewed in the appropriate historical context, the Ski Act itself is consistent with the characterization of assumption of the risk in *Meistrich* but clarified its implications by defining both the duties of the operator, the breach of which can give rise to liability, and the risks assumed, for which claims are barred." *Id.* at 202. "In doing so, the Ski Act made clear the intent of the Legislature that its intervening enactment of the Comparative Negligence Act would not alter that analysis. *See N.J.S.A.* 5:13–6; *Statement to Assembly Bill No. 1650, supra,* at 3." *Id.*

The Roller Skating Rink Safety and Fair Liability Act "was patterned after the Ski Act, in that it defined the duties of the operator of a roller skating rink, *N.J.S.A.* 5:14–4, the breach of which would be subject to a comparative negligence analysis, *see N.J.S.A.* 5:14–7, and it fixed

the responsibilities of the skaters, *N.J.S.A.* 5:14–5, by defining those risks that the skater assumes and that operate as a complete bar to recovery, *N.J.S.A.* 5:14–7." *Id.*

"Although the organizational pattern and structure of the Equine Act does not precisely mirror the Ski Act and the Roller Skating Rink Act, all three statutes reflect an effort to protect operators of these recreational facilities from liability by maintaining an assumption of risk defense against injuries resulting from inherent conditions of the activity or the facility, while at the same time ensuring that operators manage the facility in a reasonable manner." *Id*. at 202-203. "All three, therefore, remain faithful to the 'primary' and 'secondary' analytical framework of this Court's *Meistrich* decision." *Id.* at 203.

According to the Court, the "Equine Act, like the Ski Act and the Roller Skating Rink Act, is designed to establish a dividing line between the known and inherent risks of the endeavor that are assumed by the participant, and those events or conditions that are within the control of, and thus are part of the ordinary obligations of, the facility's operator." *Id*. "In the Ski Act and the Roller Skating Rink Act, the Legislature specifically commented that it was listing the responsibilities of participants and operators in order to create certainty for purposes of insurance." *Id.*

The omission of a reference to insurance availability in the Equine Act "suggests that the Legislature had an enhanced concern for preserving and protecting these particular operations or facilities." *Id.* "Moreover, that expression of a protective policy goal demonstrates that the Legislature intended that the provisions expressing the scope of the risks assumed would be read broadly in favor of the operators, while the obligations of the operators would be narrowly construed if the two sections of the statute appear to conflict." *Id.* at 203-204. The Court explained that

> [u]nderstanding and harmonizing the statute's provisions requires us to see them in the context of an activity that has inherent risks and dangers that are beyond the ability of the operator to control. In trying to identify those inherent risks, the Legislature principally considered the nature of horses, their size, strength, unpredictable nature and propensities, all compounded by the presence of other participants and their horses. Similarly, the Legislature recognized that there are many dangers posed by the terrain over which the horses are ridden and the surface conditions of riding rings. The statute expresses the Legislature's decision that risks that are inherent and essentially uncontrollable, which it has attempted to define, are risks that the participant assumes. But in mandating that there can be no claims for an injury ascribed to any of those risks, the Legislature also sought to draw a line between the assumed risks and those matters that remain within the realm of duties of care owed to the participant by the operator of the facility.

Id. at 204.

"The statute reflects that notwithstanding the many and varied inherent risks of equine activities, the operator of the facility owes the participants certain ordinary duties of care, defined through the statute's expression of exceptions to the bar on claims for injuries resulting from any of the assumed risks. *N.J.S.A.* 5:15–9." *Id.* "Some of the exceptions are clear and need little

explanation. For example, if the operator assigns a first-time rider to a horse that the operator knows is particularly high-strung, fractious, or difficult to manage, a claim for a resulting injury would fall within the statute's exceptions. *N.J.S.A.* 5:15–9(b)…So, too, would the operator be required to answer for its intentional act that injured a participant. *N.J.S.A.* 5:15–9(e)." *Id.* at 204-205.

"Other exceptions, including the two on which the Appellate Division relied, are somewhat less clear, as this appeal illustrates. For example, the statute provides that if the facility knowingly provides the rider with faulty equipment that causes the injury, it will not escape liability. *N.J.S.A.* 5:15–9(a)." *Id.* at 205. "Thus, if the operator knows that a saddle has a badly worn girth strap that breaks and causes the rider to fall off the horse, or that a bridle has a faulty bit attachment that breaks so that the rider loses the means to control the horse, the exception will support a finding of liability." *Id.*

> The Legislature's expressed intent to protect and promote equine activities by defining the line between the inherent risks assumed by the participant and the ordinary duties of care owed to the participant by the facility's operator must inform our consideration of the exception principally relied on by the appellate panel, that is, "[a]n act or omission on the part of the operator that constitutes negligent disregard for the participant's safety." *N.J.S.A.* 5:15–9(d). Although that subsection of the statute includes language that could be read expansively, the historical background in which the Equine Act was adopted and the overall intention expressed by the Legislature demand that it be given a narrow reading. That is, we understand it to require that the plaintiff demonstrate that the injury was caused by the facility operator's breach of a recognized duty of care owed to the participant. Reading the exceptions in the Equine Act in this manner allows the statute to function as do the provisions in the Ski Act and the Roller Skating Rink Act, by separating those risks that are assumed from the statutorily-defined duties of care that the facility's operator owes to the participants.

Id. at 205-206.

"[O]nly an act or omission that rests on one of the duties that the operator owes to the participant" will support relief to a plaintiff. *Id.* at 206. It will not be "sufficient for a participant to characterize an injury caused by one of the expressly defined assumed risks in language designed to make it appear that in some fashion the injury arose through an act or omission of the operator." *Id.* A participant must instead "demonstrate that the injury arose not because of one of the inherent dangers of the sport, but because the facility's operator breached one of the duties it owes to the participant, as defined in the statute's exceptions." *Id.* "A contrary approach, in which the exceptions are read expansively, would threaten to upset the choice that the Legislature has made, because it would potentially permit the exceptions to extinguish the statute's broad protective scope." *Id.*

If an "operator permits the facility to fall into disrepair and a participant is injured because the door of a stall falls off of its rusted hinges onto him or her, the exception would apply because the operator has acted with negligent disregard by breaching its ordinary duty to make the premises reasonably safe." *Id.* at 206-207. If, however, a "horse is frightened by a loud

noise and runs head-long into the stall door, injuring the participant, the claim will be barred because the behavior of the horse, an assumed risk, was the cause." *Id.* at 207.

After examining the facts in *Hubner*, the Court concluded that "[n]othing in the record suggests that the operator had a duty of care embraced within the statute's exceptions that it breached, or that such a breach led to the injury about which plaintiff complains." *Id.* at 208.

Since the decision of the New Jersey Supreme Court in *Hubner,* New Jersey Courts have considered the Equine Act in other cases.

In *Klyashtorny v. Black Brook Stables, LLC,* 2011 WL 2694392 (App. Div. 2011), the defendant operated an equestrian facility that offered riding lessons and, after defendant's trainer rated plaintiff a "beginner," the plaintiff took three riding lessons on a what was characterized as "beginner" horse. The plaintiff was severely injured on May 26, 2007 during his third lesson. As the plaintiff described it "[t]here was a tractor working on the other side of the fence, gradually coming closer. And then I was asked to put the horse in a trot. And once the trotting horse reached the outside fence close to the tractor, it bolted and I fell off or was thrown off." *Id*. at 1.

The trial court granted the defendant's motion for summary judgment, determining that there was not a triable issue of whether the accident fell within the exceptions to the immunity provided by the Equine Act. The Appellate Division affirmed, explaining as it did so that the routine operation of the tractor by the defendant on its land did not alter the trial court's conclusion that the accident "resulted from a risk designated in the Equine Act as a risk assumed by plaintiff." *Id.* "Assumed risks include the propensity of an equine animal to behave in ways that result in injury; the unpredictability of an equine animal's reaction to sounds, sudden movement, and unfamiliar objects; and the potential of a participant to act in a negligent manner including failing to maintain control over the equine animal. *N.J.S.A.* 5:15–2a, b, and e." *Id.*

The Court noted that the "Equine Act also provides exceptions to the limitations on liability for operators, including '[a]n 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.' *N.J.S.A.* 5:15–9d." *Id.* at 2. Quoting *Hubner*, the Court said that a "plaintiff cannot establish liability by 'characteriz[ing] an injury caused by one of the expressly defined assumed risks in language designed to make it appear that in some fashion the injury arose through an act or omission of the operator'" *Id.*

The following year, in *Stroman v. Bell*, 2012 WL 4093578 (App. Div. 2012), the plaintiff appealed from the trial court's grant of summary judgment dismissing the complaint in which she sought damages for injuries she incurred when she was thrown from a horse at the Bells' farm. The Appellate Division disagreed, finding that the record contained a "written admission by Joan Bell that she was negligent in matching Stroman with the horse that threw her, based on what Bell knew about Stroman's riding experience and skills" and that this created a "genuine issue of material fact regarding whether an exception to the limitation of liability applied". *Id.* at 1.

The Court explained that it concluded that there remained a "genuine issue of material fact whether Stroman's injury 'arose not because of one of the inherent dangers of the sport, but

because the facility's operator breached one of the duties it owes to the participant, as defined in the statute's exceptions.' *Hubner, supra,* 203 *N.J.* at 206. The exceptions under both *N.J.S.A.* 5:15–9(b) and (d) are implicated." *Id.* at 5. The Court, quoting *Hubner* throughout its decision, said, that it did not

> adopt the trial court's view that "an operator cannot be held liable for simply allowing a rider to ride solo." As Bell admitted, there are inherent challenges to riding solo. Although experienced riders can handle it, inexperienced riders may encounter great difficulty. Granting Stroman all reasonable inferences, we conclude a jury could find that *N.J.S.A.* 5:15–9(b) applies.
>
> Alternatively, a jury could conclude that Bell's decision to match Stroman with Nicodemus for a solo ride was an "act or omission ... that constitute[d] negligent disregard for [Stroman's] safety, which act or omission cause[d] the injury[.]" *N.J.S.A.* 5:15–9(d).

Id. at 6.

B. Excerpts from Commission Meeting Minutes

September 15, 2011

At the September 15, 2011 Commission meeting, Legislative Law Clerk Benjamin explained that in *Hubner v. Spring Valley Equestrian Center*, 203 N.J. 184 (2010), the New Jersey Supreme Court considered the Equine Act and the level of protection afforded to the operators of equine activities. As indicated in the Minutes,

> Ms. Tharney explained that in an effort to address what the Supreme Court characterized as a "latent ambiguity" in the statute, Staff had made changes to the structure of the statute, rather than its substance. These structural changes condensed certain sections of the act and made the overall format more analogous to the Ski Act… Professor Bell said that taking up the project makes sense and suggested that, as a part of the research in this area, Staff look at best practices concerning equine activities. These best practices would consider the minimum standards used by stables and other similar horse-riding activities, and will be used by Staff to understand standard safety practices. Professor Bell suggested that, if done well, the Commission's report would complement the work done by the Supreme Court, since the Court, in rendering its opinion, cannot undertake that sort of detailed research possible for the Commission.
>
> Mr. Cannel explained compiling a list of safety practices is not necessarily an easy or noncontroversial approach, but that such an approach had been incorporated in the Roller Rink Act. Chairman Gagliardi suggested that there are associations that are in a position to assist Staff on this project and that it was appropriate for the Commission to attempt to improve the law in this area.

September 20, 2012

At the September 20, 2012 Commission meeting, Legislative Law Clerk Uche Enwereuzor explained that New Jersey Supreme Court had determined that the Equine Act contained a latent ambiguity as result of the interaction between the broad nature of the inherent risks and the acts that can result in operator liability. As a result, proposed language was drafted to be structurally similar to the Ski Act and the Roller Rink Act. It was a concern to Staff that a lack of clarity the latent ambiguity in the statute may arise in part from the current structure of the statute and that the Roller Rink Act and the Ski Act appeared to be less subject to misinterpretation, so this act was restructured to resemble them. It was also noted that an Appellate Division case decided the week of the meeting again dealt with the issue of an operator's exposure to liability and the type and level of risk that is assumed by a participant.

As indicated in the Minutes,

> In section 9, as currently drafted, the language can be interpreted to create an affirmative obligation on the part of the operator to eliminate all risks. This language is similar to that which appears in the Ski Act and was chosen after reading the initial language, which imposes liability on the operator if someone is injured because of a known latent condition that the operator did not eliminate.
>
> Ms. Tharney said that on page 5, subsection (a)(3), the standard may be have been expanded beyond a requirement to warn to include an obligation on the part of the operator to eliminate reasonably known dangerous latent hazards or to post warnings if they cannot be eliminated…
>
> Commissioner Bell said that he would add obligations to section 9. For example, operators should have a duty based on their knowledge of a horse's behavior to give notice of the peculiarities of a horse so that the rider has more information about whether or not he or she might want to try to ride that horse. This obligation would be in addition to the obligation currently in the law for the operator to match the horse with the patron's ability. He also said he was concerned about subsection 9 (a) (1). The Equine Act suggests language that does not imply any obligation to check regularly to make sure equipment is not faulty. The Roller Rink statute contains such an obligation and perhaps language could be added specifying that it is the responsibility of the operator, to the extent possible, to check equipment to make sure it is in good mechanical working order. Also, in the Roller Rink statute, there is a provision that requires posting the obligations of both the operator and the person who uses the equipment. Although there is a warning requirement in section 10, it is very broad and requires signs indicating that the operator is not responsible for someone's death because of the inherent risks of equine activity. Commissioner Bell said that it is unclear to a participant what is inherent and what is not.
>
> Ms. Tharney said that the statute defines inherent risk in subsection 3 and that language could be incorporated into the warning requirement. Commissioner Bell agreed that it would be appropriate to do so...

Ms. Tharney asked whether the Commission approved expanding the language and creating affirmative obligations as directed by Commissioner Bell. The Commission asked that a draft be prepared and sent informally to interested parties for comments.

December 20, 2012

As indicated in the Minutes,

Uche Enwereuzor explained the revisions to the Draft Tentative Report…made in response to Commission recommendations...[including]…a more comprehensive mandate that operators maintain and inspect equipment before allowing participants to engage in equine activities, and a requirement that the duties of operators and the assumed risks of participants appear on the same sign that now only advises participants of the operator's liability.

Mr. Enwereuzor informed the Commission that he had been doing some outreach and had been in contact with the president of the New Jersey Horse Council (NJHC), Ms. Shelly Liggett and the director of the NJHC, Ms. Patricia Ratner. He said that Ms. Ratner had expressed doubt about the effectiveness of the Act if adopted, suggesting that it was unlikely that operators or participants would read the statute. Mr. Enwereuzor said that Ms. Ratner had indicated support for the changes to the language in section 3 regarding the inherent risks associated with horse riding. With regard to section 9, Ms. Ratner expressed concern that the proposed language imposes a burden on operators and is inconsistent with the assumption that participants ride at their own risk. She suggested that there was no need to change the language since responsible operators already maintain and inspect equipment. Ms. Ratner also said that specifically identifying the duties of the operators and participants on warning signs could promote litigation.

Commissioner Bell said that he saw no harm in specifying the duties and responsibilities of operators, especially if those requirements were already implied. The Commission did not share Ms. Ratner's concern that the proposed changes to section 10 would create additional litigation.

Commissioner Bunn commented that the phrasing of section 9(b) appears to create operator liability without requiring a causal connection between the operator's actions and a participant's injury. He said the elements required to establish negligence and liability should be spelled out clearly. Commissioner Bunn also said that "liabilities" should be removed from the last sentence that was added to section 10 and that the phrase "duties and obligations" would be more appropriate in this context.

After this discussion, the "Commission unanimously approved the release of the Tentative Report, with the changes discussed, on motion of Commissioner Long, seconded by Commissioner Bunn."

C. Revision Options for Consideration

The following pages include three versions of Sections 5:15-3 and 5:15-9. The revisions to Section 5:15-3 shown below also reflect Staff's understanding of the two consensus changes directed by the Commission at the last meeting with regard to the substitution of "persons" for "equestrians" in a.(3) and the addition of "or other person" in a.(5).[2]

First, Commissioner Long asked, at the November meeting, why any draft language would bar action by a spectator and whether the Ski Act contains provisions pertaining to spectators. While the Equine and Roller Skating Acts provide definitions for "spectator," the Ski Act does not. It is noted that the Ski Act, Roller Skating Act, and the Equine Act define their participants and spectators differently.

In the Ski Act, "skier" "means a person utilizing the ski area for recreational purposes such as skiing or operating toboggans, sleds or similar vehicles, and including anyone accompanying the person. Skier also includes *any person in such ski area who is an invitee, whether or not said person pays consideration*. [emphasis added]" N.J.S. 5:13-2. The Ski Act does not define spectator or any similar term. In the Ski Act section pertaining to the responsibility of the operator, the language provides that "[n]o operator shall be responsible to any skier or other person because of its failure to comply with any provisions of subsection 3.a. if such failure was caused by…" N.J.S. 5:13-3 subsection b. In that same section, the Act provides that "[n]o operator shall be liable to any skier unless said operator has knowledge of the failure to comply with the duty imposed by this section or unless said operator should have reasonably known of such condition and…" N.J.S. 5:13-3 subsection d. It is noted that the section pertaining to the duties of skiers also contains duties imposed generally on a "person" as opposed to a skier. N.J.S. 5:13-3 subsections f., g., and h.

Instead of using the word "participant," the Roller Skating Act defines a "roller skater" as "a person wearing roller skates while in a roller skating rink for the purpose of recreational or competitive roller skating". "Spectator" means "a person who is present in a roller skating rink only for the purpose of observing recreational or competitive roller skating." N.J.S. 5:14-3.

In the Equine Act, "participant" "means any person, whether an amateur or professional, engaging in an equine animal activity, whether or not a fee is paid to engage in the equine animal activity or, if a minor, the natural guardian, or trainer of that person standing in loco parentis, *and shall include anyone accompanying the participant, or any person coming onto the property* of the provider of equine animal activities or equestrian area *whether or not an invitee or person pays consideration.* [emphasis added]" N.J.S. 5:15-2. A "spectator" is defined in the Equine Act as "a person who is present in an equestrian area for the *purpose of observing equine animal activities whether or not an invitee.* [emphasis added]" N.J.S. 5:15-2.

During a review of the Ski and Roller Skating Acts again in an effort to respond to Commissioner Long's questions, Staff noted differences in the three Acts' respective assumption of risk provisions. While the Ski Act and Roller Skating Act each contain provisions discussing an operator's violation of duties, The Equine Act provisions make no such reference, as shown

[2] Staff was not certain that both of these changes had been approved by the Commission, and will confirm this at the December meeting.

below. Staff has not yet determined whether modifying the Equine Act assumption of risk provision might be of assistance in clarifying the duties and responsibilities.

Ski Act – N.J.S. 5:13-6:

> The assumption of risk set forth in section 5 shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a skier 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, *unless an operator has violated his duties or responsibilities under this act, in which case* the provisions of P.L.1973, c. 146 shall apply. Failure to adhere to the duties set out in sections 4 and 5 shall bar suit against an operator to compensate for injuries resulting from skiing activities, where such failure is found to be a contributory factor in the resulting injury, *unless the operator has violated his duties or responsibilities under the act*, in which case the provisions of P.L.1973, c. 146 shall apply. [emphasis added]

Roller Skating Act – 5:14-7:

> The assumption of risk set forth in section 61 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 roller skater or spectator 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, *unless an operator has violated his duties or responsibilities under this act, in which cas*e the provisions of P.L.1973, c. 146 shall apply. Failure to adhere to the duties set out in sections 52 and 6 of this act shall bar suit against an operator to compensate for injuries resulting from roller skating activities, where such failure is found to be a contributory factor in the resulting injury, *unless the operator has violated his duties or responsibilities under the act*, in which case the provisions of P.L.1973, c. 146 shall apply. [emphasis added]

Equine Act – 5:15-5:

> 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.

With regard to the draft language shown below, the first version is an effort to incorporate the changes described by Commissioner Bunn, the second version is an effort to incorporate the changes described by Commissioner Long, and the third version is an effort to incorporate the changes described by Commissioner Bell. Staff acknowledges that these revisions are not complete. They are intended to provide a starting point for a direction that the Commission may select and any additional modifications or clarifications the Commission may propose at the December Commission meeting or thereafter.

The new revisions are shown in bold type.

Version 1 - changes described by Commissioner Bunn

The goal of this version was to follow the specific suggestions provided by Commissioner Bunn.

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 any other natural conditions pertaining to the surface or subsurface ground conditions, as well as risks created by conditions of trails, riding rings, training tracks, ***~~equestrians~~ persons***, and all other inherent 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.

5:15-9. *Responsibilities of operators;* ~~E~~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.~~
~~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 ***~~provided to participants~~ used in the 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) ~~*Eliminate all known dangerous latent hazards on the property owned or controlled by the equine animal activity operator or post and maintain warnings of hazards where physical removal of a hazard is not practicable*~~ *Remove as soon as practicable obvious, man-made hazards, remove or remediate known dangerous latent conditions on the property owned or controlled by the equine animal activity operator, and post warning signs when removal or remediation is not practicable;*

(5) Refrain from any act or omission that would constitute a negligent disregard for the participant's safety and causes injury **except as to the risks assumed under N.J.S. 5:15-3**;

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

~~b. Notwithstanding any provisions of N.J.S. 5:15-3 and N.J.S. 5:15-4 to the contrary, the failure of an operator to comply with subsection a. of this section shall constitute an exception to the limitation on liability for operators.~~

Version 2 - changes described by Commissioner Long

The goal of this version was to try to follow the guidance provided by Commissioner Long, and to make an effort to more clearly distinguish between the inherent risks of equine activities and the duties owed by operators. Some of the language that had been inserted in prior drafts was removed from 5:15-3 subsection a.(3) in an effort to do so. This was done in response to Commissioner Long's reference to the broadened scope of the language regarding "inherent risks" that was transferred from the definitions section in an earlier draft. In addition, the language pertaining to the responsibilities of operators in 5:15-9 subsection a.(4) was modified to more closely track the "standard" duties owed by proprietors to invitees.

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; ~~**Risks created by weather or any other natural conditions pertaining to the surface or subsurface ground conditions, as well as risks created by conditions of trails, riding rings, training tracks, *equestrians persons*, and all other inherent 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.

5:15-9. *Responsibilities of operators;* ~~*E*~~*e*xception 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.~~
~~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 ~~***provided to participants***~~ ***used in the 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) ~~*Eliminate all known dangerous latent hazards on the property owned or controlled by the equine animal activity operator or post and maintain warnings of hazards where physical removal of a hazard is not practicable* *Remove as soon as practicable obvious, man-made hazards, remove or remediate known dangerous latent conditions on the property owned or controlled by the equine animal activity operator, and post warning signs when removal or remediation is not practicable;*~~ **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 warning 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***

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

b. Notwithstanding any provisions of N.J.S. 5:15-3 and N.J.S. 5:15-4 to the contrary, the failure of an operator to comply with subsection a. of this section shall constitute an exception to the limitation on liability for operators.

Version 3 - changes described by Commissioner Bell

The goal of this version was to try to follow the guidance provided by Commissioner Bell. Commissioner Bell recommended the first couple of changes, which he described as minor, and recommended also the addition of the subsection marked with an asterisk which would incorporate a particular situation in the general statement regarding the duty to refrain from actions constituting negligence. The goal of this new subsection is to ensure, for instance, that the airhorn blowing situation discussed at the Commission meeting is covered, and to reconcile Section 3 and Section 9 in that set of instances. As Commissioner Bell explained it, normal sounds and necessary sudden movements that spook horses are a part of the inherent risk of equine activities, but inappropriate and unnecessary noise and sudden movements are not an inherent risk of such activities - at least when made by people the operator can control, by

disciplining them (employees) or excluding them from the property (others). He noted that retaining 9(a)(5) as it is and keeping 9(a)(1) – (4) & (6) best capture the views expressed in his initial email.

Commissioner Bell also explained that he would not limit the duties imposed on equine operators to those duties defined by statutes and generally applicable to everyone (like the duty to maintain property in a safe condition). He suggested a benefit of 9(a)(1) –(4) is that they provide specific guidance regarding the circumstances in which something that might otherwise be viewed as an inherent risk, is at least in part covered by a specific and well-defined duty of equine operators specifically. His added section seeks to do something similar - equine operators do have duties with regard to controlling things that might spook horses, but if they meet those duties, any other things that might spook horses are covered by the rider's assumption of the risk.

In the course of providing additional information to Staff to clarify the suggestions contained in his email regarding this project, Commissioner Bell also posed several questions:

- Don't equine operators use releases to release themselves from all liability like most adventure operators do?
- How does the Equine Act work in conjunction with releases?
- Is there a skate park statute (akin to the Roller Rink Act)? Skate parks have half pipes and other structures that allow some very dangerous moves by skateboarders. Commissioner Bell made mention of the *Hojnowski* case and asked whether, if there is no skate park statute, the Commission might wish to take this up?

It is Staff's understanding that equine operators do use releases in an effort to protect themselves from liability. Some of the cases mention releases.[3] Staff will engage in additional research in an effort to address the issue of the interplay between the statutory provisions and releases in response to Commissioner Bell's question.

With regard to the issue of whether there is a skate park statute in New Jersey, brief preliminary research suggests that there is not. A quick skim of the statutes did not reveal such a statute, the *Hojnowski* case did not mention one, and there are no subsequent case law references to such a statute either. An excerpt from the case is included below:

> In New Jersey, "[b]usiness owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation." *Nisivoccia v. Glass Gardens, Inc.,* 175 *N.J.* 559, 563…(2003). That is because business owners "are in the best position to control the risk of harm. Ownership or control of the premises, for example, enables a party to prevent the harm." *Kuzmicz v. Ivy Hill Park Apartments, Inc.,* 147 *N.J.* 510, 517…(1997) (citations omitted). It follows that in this case the risk of loss should fall on the party best suited to avert injury. *See Hopkins v. Fox & Lazo Realtors,* 132 *N.J.* 426, 447…(1993) (recognizing "salutary effect of shifting the risk of loss ... to those who should be able and are best able to bear them"). The operator

[3] See, for example, *Polechek v. Schina,* 2010 WL 5419072 (App. Div. 2010), which addresses injuries sustained in the equine context, involves a signed release, and refers to other cases, including *Hubner*.

> of a commercial recreational enterprise can inspect the premises for unsafe conditions, train his or her employees with regard to the facility's proper operation, and regulate the types of activities permitted to occur. Such an operator also can obtain insurance and spread the costs of insurance among its customers. Children, on the other hand, are not in a position to discover hazardous conditions or insure against risks. Moreover, the expectation that a commercial facility will be reasonably safe to do that which is within the scope of the invitation, *see Nisivoccia, supra,* 175 *N.J.* at 563…is especially important where the facility's patrons are minor children.

Hojnowski v. Vans Skate Park, 187 N.J. 323, 335-36 (2006). The *Hojnowski* Court also explained that

> the dissent below argued that invalidating parental releases of liability "is at odds with our Legislature's willingness to render participants solely responsible for injuries resulting from the inherent risks of similar activities." *Hojnowski, supra*, 375 *N.J.Super.* at 593…(Fisher, J., concurring in part and dissenting in part). That argument refers to legislative acts in the areas of skiing, *N.J.S.A.* 5:13–1 to –11; roller skating, *N.J.S.A.* 5:14–1 to –7; and equestrian activities, *N.J.S.A.* 5:15–1 to –12, which place the responsibility for injuries resulting from "inherent risks" of the sport on the participant. However, those statutes do not absolve an operator of a facility from liability for its own negligence. Instead, the statutes apply only to inherent risks, which, by their very nature, are those "that cannot be removed through the exercise of due care if the sport is to be enjoyed." *Brett v. Great Am. Recreation, Inc.,* 144 *N.J.* 479, 499…(1996); *see also Pietruska v. Craigmeur Ski Area,* 259 *N.J.Super.* 532, 537…(Law Div.1992) (finding that "[i]mproper operation of a ski lift is not an inherent risk of skiing since, with due care, it can be eliminated"). As such, inherent risks need not be the subject of waiver because "the general law of negligence has long recognized that a defendant has no duty with regard to such risks." *Brett, supra,* 144 *N.J.* at 499…; *see also Meistrich v. Casino Arena Attractions, Inc.,* 31 *N.J.* 44, 49…(1959) (stating that assumption of inherent risk "is an alternate expression for the proposition that defendant was not negligent"). Thus, a commercial enterprise is not liable for injuries sustained as a result of an activity's inherent risks so long as that enterprise has acted in accordance with "the ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances." *Rosania v. Carmona,* 308 *N.J.Super.* 365, 374…(App.Div.), *certif. denied,* 154 *N.J.* 609…(1998).

Id. at 340-41.

Staff will complete research regarding the issues raised. In the meantime, Commissioner Bell's changes are highlighted below.

5:15-3. Assumption of inherent risks

a. A participant and spectator are deemed to assume the inherent and unavoidable 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 unexpected 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; ~~**Risks created by weather or any other natural conditions pertaining to the surface or subsurface ground conditions, as well as risks created by conditions of trails, riding rings, training tracks, *equestrians persons*, and all other inherent 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.

5:15-9. *Responsibilities of operators;* ~~*E*~~*e*xception 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.~~
~~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 ***~~provided to participants~~ used in the 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) ~~*Eliminate all known dangerous latent hazards on the property owned or controlled by the equine animal activity operator or post and maintain warnings of hazards where physical removal of a hazard is not practicable* *Remove as soon as practicable obvious, man-made hazards, remove or remediate known dangerous latent conditions on the property owned or controlled by the equine animal activity operator, and post warning signs when removal or remediation is not practicable;~~ **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 warning 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***

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

*. The duty to refrain from any act or omission that would constitute a negligent disregard for the participant's safety in subsection (a)(5) above includes a failure to take reasonable efforts to prevent employees and other persons admitted to property owned or controlled by the equine animal activity operator from making inappropriate sounds or inappropriate sudden movements likely to cause an unexpected reaction of a horse.

b. Notwithstanding any provisions of N.J.S. 5:15-3 and N.J.S. 5:15-4 to the contrary, the failure of an operator to comply with subsection a. of this section shall constitute an exception to the limitation on liability for operators.