# Commission Meeting

of

## RECREATIONAL SPORTS AND LEISURE ACTIVITIES LIABILITY STUDY COMMISSION

"Testimony from R. Wayne Pierce, Esq."

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LOCATION: State House
Room L-103
Trenton, New Jersey

DATE: March 29, 1995
10:00 a.m.

## MEMBERS OF COMMISSION PRESENT:

Lary I. Zucker, Esq., Acting Chairman
Senator Robert W. Singer
Roy Gillian
Kenneth G. Andres, Esq.
Philip Kirschner, Esq.
Anthony T. DiSimone
Jack Samuels, Ed.D.
Todd Dinsmore (aide to Senator John H. Adler)

## ALSO PRESENT:

Craig B. Bleifer, Esq.
Secretary to the Commission





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# TABLE OF CONTENTS



pkm: 1-58

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**LARY I. ZUCKER (Acting Chairman):** Alex Drago asked me to step in for him as Chairman of today's Commission hearing because Alex is unavailable. I think he's on trial in New York at the present time. I'll be Chairing this Commission hearing today.

Do you want to start off, Craig? As secretary do you have some comments to make?

MR. BLEIFER (Secretary to the Commission): Yes. Just briefly, on behalf of Alex, I wanted to apologize on his behalf. He wasn't able to be here today, as you've heard, he is in the midst of a trial.

He wanted me to pass on one piece of information. I know we don't have complete attendance today, but at least if we could discuss amongst those that are present today, April 26, which is a Wednesday, has been proposed by Alex as our next meeting here to take testimony from Mike Larkin, a representative of TIG Insurance, who would be able to provide us with some insight into what the insurance carriers go through in New Jersey, and I guess elsewhere, in trying to underwrite the kinds of risks we're talking about in this Commission. Does anyone know if the 26th is good or bad for any particular reason? I guess we're talking about 10 o'clock again.

MR. GILLIAN: What day is it?

MR. BLEIFER: That's a Wednesday, April 26.

MR. GILLIAN: Could we at least say 10:30 a.m. because I have a bank meeting every Wednesday and they moved-- The whole board came in 15 minutes earlier for me today to get away, and I shot out early. Another half hour I can -- 10:30 a.m. would be the time.

MR. ZUCKER: Anybody have any problems?

MR. GILLIAN: Does everybody come in late? It's quarter after now.

MR. ANDRES: Well, it's professional secretary's day. I don't know if I can do it. (laughter) If that's okay with everybody.

MR. BLEIFER: I guess that's all right. We'll send out a letter notice.

MR. ANDRES: Make it 11:00 a.m. if that's easier for you.

MR. GILLIAN: Well, 10:30 a.m. I can make.

MR. BLEIFER: Other than that, just before we get started, I think it's the first item on the agenda for today which is underneath-- It's the last page of the minutes of the meeting of last time. This was to approve the minutes of last time, just as a formality.

MR. ZUCKER: Does anybody have any objection to the minutes as submitted? (no response) No objection, the minutes are accepted as prepared.

Do you have anything else, Craig?

MR. BLEIFER: No, I don't have anything else.

MR. ZUCKER: I'd like to--

MR. GILLIAN: Mr. Chairman, before you start could I read this into the record, because I think it's important. I wanted to show you.

MR. ZUCKER: Okay, you have something you wanted to show us I guess--

MR. BLEIFER: If you have an extra copy, we can also provide it to the transcribers so they can get it in, as well.

MR. GILLIAN: I didn't bring any. This is the only copy I have.

Since I'm the only operator actually represented on the Board, I think this is-- This is what I normally get. Last year my insurance went up $45,000. So this is the letter I got this year.

"Dear Policyholder: "In order to comply with State insurance law and regulations, we must notify you that one of the following may occur when your policy expires on May 2, 1995.

"1) We will be unable to renew your policy and coverage will terminate on the above date.

"2) If we are able to provide renewal, the renewal will increase by over 20 percent and/or the coverage provided will decrease.

"3) We will be able to provide renewal coverage at the terms, conditions, and rate as currently written, and if a premium increase occurs, it will be less that 20 percent.

"If at all possible, it is our desire to provide you with a renewal quotation. If you do not receive a renewal quotation prior to the above expiration date, please contact your insurance agent."

This is from the company that carries us. I've been with them probably seven or eight years. Last year I didn't have any abnormal amount of problems, but this is normal. This is what I get every year, and you expect an increase every year. So, I think, again, why I want this here is this is what it's all about. The numbers keep going up each year.

MR. ZUCKER: Well, if you can give us a copy of that, we can mark that into the record and make it part of the record of this Commission.

MR. GILLIAN: Should I give that to you?

MR. ZUCKER: Sure.

I would like to introduce Wayne Pierce, who is going to be the Commission's first witness. It was my suggestion to ask Wayne to testify before the Commission, for a very special reason; Wayne is an attorney. He practices in Baltimore, Maryland. He is also the Secretary and Treasurer of the International Amusement and Leisure Defense Association.

But it's not his association with the IALDA that makes him unique. Wayne has spent the last several years compiling,

summarizing, outlining, and annotating every amusement ride, tramway, and ski lift safety standard in the world. I doubt if anyone has ever undertaken the project before, and after Wayne's job, I doubt if anybody will undertake it again.

It gives Wayne a unique perspective on what the other states, and indeed, foreign countries are doing with regard to regulating the amusement industry and the recreation risks that we are concerned with in this Commission. I thought that Wayne could give us an overview of what the other states are doing, with particular emphasis on California and Wisconsin, which is basically the mandate that we all have in the legislation.

So I'd like to introduce Wayne Pierce. I think what Wayne would like to do-- Well, he can explain to you better than I, but what Wayne wants to do is open up with a statement, make a presentation, and then certainly open the floor for questions.

**R. W A Y N E P I E R C E, ESQ.:** Thank you. I'd just like to say I'm quite honored to be able to be here and to be able to testify.

I would like to amplify a few items in my background that will help you understand where I'm coming from and the basis for my testimony. I have specialized in the representation of amusement and recreational insureds in my area for approximately the last 10 years; that's Maryland, I get down into the District, and into Virginia, as well.

Lary's talking about my book. You will see that a lot of my testimony is going to bear on the amusement ride industry and the skiing industry, as a result of having spent as much time on that as I have.

By virtue of doing this, one of the things that we did that was unusual is I got a free donation of time from the WESTLAW, which is a -- for some of you who may not know -- that's a company that has a computer service that puts on statutes and case decisions and things of that sort. We ran up

a huge bill, and I'm deeply indebted for them because it was all donated time from them. We ran various research topics through the computer in order to be able to put together this compilation.

I've also-- We are on the verge of completing this -- this is a draft copy of something that we call a uniform rider safety act, which we hope to promulgate and make available to states. I have, sort of, become a focal point nationally for the rider safety question.

It started with five or six articles of mine that have appeared in a number of trade journals. Mr. Gillian just handed me one earlier today that I wasn't even aware had come out. I've received calls from a number of states, probably close to two dozen now, from people that are in various stages of trying to do things on this topic across the country.

I've also spoken on the question of rider responsibility approximately half a dozen times. I've been very involved in my state's efforts to do this sort of thing. Part of my investigation, for what we have been undertaking in Maryland, was having some rather extended in-depth telephone interviews of approximately 16 individuals who are recognized as leading safety experts in their respective fields. So that, if you are a water park operator, amusement operator, a go-cart facility operator, these 16 individuals in those industries are the names that are recognized as the most knowledgeable when it comes to safety for each of those respective industries.

What I would like to do is there are, sort of, basically three parts to what I wanted to cover. The first part is to, sort of, set the stage for where I think the country is. That will have implications for where your Commission fits into things. I refer to this as just the history and current statutes of the law in this area that I would like to outline. Then I would like to come back and talk about common elements that you see in this type of legislation and give you a sense of

the scope of where this Commission may want to go with its investigation.

There are, probably, six to eight recreational activities that are common subjects for legislative or regulatory control. The two, by far, that are the most heavily regulated are the amusement ride industry and the aerial passenger tramway or ski lifts. Probably a distant third to them is the equestrian or horseback riding activities. There are a few states that regulate other recreational activities that I will mention to you: Montana happens to have a snowmobiling statute; Montana and West Virginia happen to have river rafting statutes, but those as a rule are very uncommon. The other three are definitely the activities that are most heavily regulated currently.

I would like to focus on the amusement ride and the ski lift or passenger tramway areas, use that as a case history, in part, because that's my background. That is what I know the most, and also, as a recognition, that is the area in which the law is most heavily developed and from which the most benefit can be gained by studying what has occurred in those respective areas.

In the amusement ride and passenger tramway areas, state regulation really started in 1945 with a famous circus tent fire in Hartford, Connecticut. Connecticut adopted a statute within a year of that. Over the years, through the '50s, '60s, and '70s, there has been a snowball effect. New Jersey was approximately the seventh state to regulate amusement rides, by statute or by regulation. They were approximately the same year, 1975, approximately, 16th or 17th to regulate the ski lift industry.

What you see is that in those early days-- By the way I'm tipping my hat to your State, because the very next year my state, Maryland, wantonly stole your statute when we adopted ours in 1976. What you see is that in those early days in the

'60s and '70s -- and here I'm drawing primarily on my interviews of people who were safety officials then -- that, in a large extent, regulation of those industries was in its infancy.

There weren't really any recognized schools where the industry could go to get training in safety. There was not any meaningful regulation. So that, for example, if a traveling carnival started the winter in Florida and worked its way up the east coast, probably none of those states were regulating those carnivals, at least not on a state level. There may have been something locally, but not on the state level.

What has happened since then, and by the way, in the individuals that I've talked to, the problem, the area where injuries were occurring -- it was really, very much so a mechanical type of problem. The rides would fly apart. Any, you know, various horrendous things that would get a lot of publicity, tended to be multiple injuries.

It's really changed in the last 20 years. Now what you see is that there are several recognized safety schools. There is an association. It used to be referred to as -- there are a lot of initials that go along with this -- American Recreational Equipment Association, which started a safety school for amusement rides 20 years ago. They have now been superseded by the Amusement Industry Manufacturers and Suppliers Limited. They've been teaching their school for 20-some years.

Each of the various trade groups has a dynamic and vibrant safety committee. So that the travelling shows, the amusement park association, the World Water Park Association, the go-cart association, the National Ski Association, the manufacturers association, and the family entertainment center association all have safety committees that are vibrant, ongoing, dynamic contributors to the process. Each of those organizations has a trade publication that they use on a periodic basis to disseminate safety information.

There is a committee within two groups. One is American Society of Testing and Materials that is focused on amusement ride safety. It's a dedicated permanent committee of 24. There is a dedicated permanent committee within the ANSI, American National Standards Institute B77.1, that is dedicated to ski lift or passenger tramway safety.

Insurance companies, as a rule, although not all of them-- As a rule, most insurance companies in these areas tend to have annual inspections of their insureds that they use as part of their loss control mechanisms. Some of the insurance companies issue periodic safety bulletins. As they see a recurrent problem, they will send something out to their insured.

The Federal level has gotten into it so that the Consumer Product Safety Commission has been somewhat active in the area. They tend to be reactive, rather than proactive, and to get involved in problem areas that they believe are recurrent problems. There are now 40 states that have some form of amusement ride specific legislation or regulation. That includes every state on the east coast, so that carnival now wintering in Florida and making its way up to Maine is now inspected in 14 states. The other 10 states that do not have a state-level program, very often, still do have general application statutes, such as electrical codes, building codes, health codes, that are applied. In some of those states there are very effective local inspection programs. For example, the City of Las Vegas, Nevada has a very good local program.

What has happened if you-- It's very hard to get meaningful statistics in this area. I've seen some correspondence which would suggest that you are going to try to do that. I wish you good luck, because it's very hard to find that sort of thing. The witnesses that I've talked to and the people who I consider the most experienced experts in the field indicate that the safety question has now evolved, and it's no

longer a matter of mechanical problems. It's really now a problem of the human element: the participants creating their own problems or the actual jockey/ride operator who is pushing the buttons. So that what you see, for example, in my state in 1994, our Department of Licensing and Regulation's statistics for the end of the year-- We have a reporting requirement that is essentially identical to your requirement here for amusement ride incidents. There were 24 reported amusement ride incidents. Out of those 24, 20 were investigated and attributed to patron error, 1 was attributed to operator error, and 3 were attributed to maintenance problems.

That is consistent with the three studies that I'm aware of. One of them was done by K & K Insurance Company. They studied 399 go-cart accidents in a series from 1990 through 1993. They determined that 80 percent of their go-cart incidents were caused by driver error; for example, rear ending, losing control, going into a guard rail, collisions, that sort of thing; and that only 20 percent were related to operator error; for example, equipment malfunction, poor padding, spilled fuel, something of that nature.

A similar study was done eight to ten years ago by the American Recreational Equipment Association and similar results were obtained. I have been informed, but I have not actually read the report, of a study that was done in Britain regarding water slide accidents. There is a gentleman named Jay DeMarco who is an enforcement official with the Consumer Products Safety Commission who has testified many times over. The reason why I cite to him is that his is the only national agency that has the ability to look at this comprehensively.

They, as part of their charge, regularly compare and gather data -- injuries statistical or epidemiological data regarding incidents. It is his opinion -- and he's had that position since 1986 -- in the amusement ride context: 75 percent to 80 percent of all injuries are now rider caused; 15 percent,

he believes, are operator caused; and approximately 5 percent are design or manufacturer type of problems.

The same, evolution has occurred in the ski industry. The ski industry is very important because for all practical purposes it was the ski industry that really took the bull by the horns and has led in the area of participant responsibility. Before 1977, there were three states that had some sort of legislation regulating participant activity: New Hampshire, New Mexico, and another that I can't think of off the top of my head.

Those started in 1969 and early '70s. It all came to a head, it all galvanized in 1977, when a Vermont jury returned a one and a half million dollar verdict against a ski operator in a famous case called Sunday v. Stratton Corporation. It shook the ski industry to its very core. The reason why it got so much attention is that the Vermont Supreme Court ruled that no longer--

Vermont's adoption of a Comparative Negligence Statute was held to have effectively overruled or abandoned common law assumption of the risk. I'll have some more to say about that later. The important part of this is that within three weeks the National Ski Association had drafted a model bill. Within four years it had been adopted in 17 states. It is currently on the books in 24 states. There are another five states that have an inherent risk-- Those 24 states have passenger responsibility provisions for passengers riding aerial tramways to the top of the hill. There are another five states that have an inherent risk statute regulating downhill skiing injuries.

The ski legislation, if you look at it historically, has been the genesis for all meaningful participant responsibility legislation in the last 20 years. That has become the feeding ground for the genesis of amusement ride regulation. It is the basis of equestrian regulation and all the other various activities.

There are now-- I refer to the ANSI's ski committee and the ASTM's amusement ride committee -- both of those committees have adopted as a permanent part of their respective codes rider responsibility or passenger responsibility provisions. The ski provisions have been on the books for many years. The amusement ride passenger responsibility provisions are approximately a year and a half old.

The ASTM amusement ride standard has recently been sent into subcommittee at their Tampa meeting in early February. There are approximately 13 individuals. I know, I'm involved, and some of the other members of our defense group are involved in that also. We're going to be looking at that in a comprehensive way.

One of the things that is important about the ANSI and the ASTM standards is that each of those standards have been incorporated by reference into more than two dozen states. So that it is, in a real sense, true that some states have passenger or rider responsibility provisions and they don't even know it because of the virtue of having incorporated it from somewhere else.

Now, that's my-- Well, actually, let me summarize one other thing. There are now 10 states with some form of amusement rider responsibility provisions. There are approximately 10 states to 11 states that are actively in the hunt, that are pursuing it to some degree.

Now, I'm going to summarize common types of legislation that you will see, because I understand that one of the issues that you are going to address is whether to do this comprehensively or to do it by piecemeal. There are four precedents that I will cite to you of various states trying to do this comprehensively or across the board.

The first is Wisconsin. Wisconsin has a Recreational Safety Act that was passed in 1987. It is, for all meaningful purpose, a simplified version of a ski passenger responsibility

statute. It has two components: one is an inherent risk assumption portion, the other is a standards of conduct provision. You have to obey the signs, you have to act within the limits of your ability, and several other provisions.

Wyoming has an Assumption of Risk Statute that applies for all recreational activities. That's basically just an inherent risk statute.

Idaho has a statute that was passed in 1972 that applies to all places of amusement or resorts. The thrust of that statute is that you are obligated to abide by all signs posted in the English language, and failure to abide by a posted sign carries a criminal penalty of 10 days and $100, as I recall.

The fourth and final across-the-board example that I will give to you is Vermont. You will recall that Vermont was the genesis for this in a very meaningful sense. Vermont, what they did was by statute. It's a one-liner, and what it says is that participants in all sporting activities assume obvious and necessary risks. It is just simply that single sentence.

There is a scoping question inherent in each of those -- what I'm calling across the board. If you look at how they define recreational activity, for example, in Wyoming, you could make a strong argument that the inherent risk statute in Wyoming applies to sporting activities such as mountaineering, hiking, camping, and things of that sort. It would not apply to activities involving fixed or defined courses, such as an amusement ride where you may have a roller coaster that's on a track.

There is a distinction between amusement rides and sporting activities. There is a real argument that the Wyoming statute would not include amusement rides. A similar argument could be made regarding the Vermont statute. To my knowledge it has not reached the Appellate Courts. I can't tell you whether or not it will, in fact, be interpreted that way. I'm just

suggesting that there is a scoping question inherent in those statutes.

It is, by far, much more common to see legislation and regulation that is industry specific. Probably in comparison to those four states that I have just cited that have across the board legislation, I would say that there is probably a hundred that have industry specific provisions. So that, for example, in the amusement ride area, I'll bring several to light because they deserve particular attention. As a result of what New Jersey did in 1992, about 98 percent of that bill is now the law in Nevada. It was passed in 1993. It was also passed, with very minor changes, in Pennsylvania, last summer.

That bill, you will recall, has a -- and as it was adopted in Nevada and Pennsylvania -- has an inherent risk or assumption of the risk provision to it. It also has provisions regarding standards of conduct on the participants themselves.

In contrast, there is the Ohio system. Ohio passed a statute at the same time, 1992. Basically what Ohio does is to impose an obligation on participants, on riders to obey the posted signs. It does not include, for example, oral instructions, and that is, I believe, part of the problem with that particular statute.

A third system that I'll mention to you is the New York system. In New York, a bill was passed in 1990 that requires riders to review posted signs, having reviewed them, to then make an informed choice whether or not they want to get on them.

The other areas are river rafting, snowmobiling, horse riding, downhill skiing; there are a few states that have legislation regarding baseballs, primarily the foul ball problem. You'll see waterskiing statutes. You'll see roller skating statutes. You will see boating statutes. By and large, you could effectively categorize them within some of the models that I have discussed in these other areas.

Now, the next area that I would like to cover with you is common goals or purposes behind this legislation. By far and away, the driving impetuous for each of these activities is public safety. It's my opinion, having reviewed a great quantity of these, that public safety is advanced in two meaningful ways. One is that these statutes and regulations educate the participant how to act safely. For example, if they have an obligation to read a sign that is going to give them the education that they need to be able to act safely. It may have certain restrictions. It's very common in the amusement ride industry just to have signs regarding pregnancy, bone, back, neck problems, things of that sort.

The second thing that these type of provisions do is they motivate the participant. They give them a reason to act safely. It may be a criminal penalty with a fine or with incarceration, and they are all with no exceptions, very minor, probably the worst that you would find is somewhere in the magnitude of $2000 and maybe three months, tops, and that's in all contexts. But more importantly, they may have implications in a liability context as well.

The best statistical data that you will find for the validity of these types of safety provisions, I believe, is the seat belt provisions. A number of states have studied this. States that have mandated the use of seat belts have statistically verified that driver compliance with seat belts goes up drastically. I know in my state, when we went to mandatory seat belts, the statistics I saw were something like 30 percent to 40 percent before the statutes; 80 percent to 85 percent usage within two years, three years, or four years, something of that nature.

Another important goal beyond these sorts of provisions is to protect the economy at stake. There is a phenomenon in these industries that I refer to as the spillover effect, where not only does the operator have a very serious

problem with publicity for particular incidents, for an incident that wasn't even their fault, but there's a spillover effect for other industries. So that, for example, in serious injury cases, the attendance not only at that operator but at other operators in the area, drops drastically, even though they were not responsible for what may have happened.

There is also a problem and a fear that failure to have protection of this sort is tantamount to inviting these businesses to fold. I know that is a big problem in the equestrian industry. Actual businesses going out of business because they can't afford to take the liability on their own. They can't meet the state-imposed requirement for maintaining minimum levels of insurance because they can't afford it. There is a cyclical nature to the insurance that I'm not going to get into because that's not my area, but I anticipate that you will hear more about that from other witnesses.

Another purpose behind these statutes is to define liability and to diminish legal uncertainty. It's the fact that you can't predict what's going to happen in a liability case that very often causes insurance premiums to escalate beyond what a mere loss ratio would otherwise reasonably cause you to incur. These provisions also have the ability to stabilize insurance premiums.

I have talked to a number of operators from Ohio, who have told me that they believe that in three years of operating with a rider responsibility provision there, they have noticed an improvement in guest relations. They believe that it is no longer as antagonistic as it once was. That they are better able to deal with and communicate with their patrons because they no longer have this expectation of guaranteed safety. They now believe that they have perceived a shift in public attitude, such that there is a general awareness that you can do the best job that you possibly can and you still can't guarantee 100 percent no one will get hurt.

There is also-- One of the other goals behind these provisions is to stabilize amusement or sales tax collection.

The last area that I would like to cover is common elements that you see in these types of provisions. These will be elements that you may well want to consider as you go about your job. It's very common to see some sort of obligation imposed on the participant to report their injury. This is a necessary component or common in part of imposing on the operator an obligation to report the incident to the state inspector.

A corollary to that is imposing an obligation on the injured party to report it to the operator so the operator can report it to the state. It happens, I don't know statistically how often that it does happen, but I know that it happens quite often -- individuals will claim to be injured, walk away and come back at some point in the future when it is very difficult, if not impossible, to verify were they ever there, were they injured there. Those cases are extremely contentious. Many operators and many insurance companies will fight those as a matter of principle, no matter what.

Part of the rationale behind imposing the duty to report those injuries is to promote public safety. Get the information out, if there is a problem, not only at that site but across the industry. If an injured person has a problem that's going to affect the way rides are going to be inspected across the state or across the country, that word needs to be gotten out as quickly as possible.

The second common element that you will see in these types of provisions deals with the qualifications that the participant must satisfy in order to engage in the activity. Commonly you will see an obligation to have certain knowledge how to engage in the activity, what training they must have to engage in the activity, an obligation to review and understand the signs before they engage in the activity, to satisfy any

posted restrictions on who may participate; to know the range of their ability, to know that they have sufficient physical dexterity, to know that the activity will not exceed the level of their ability, to have no impairment by drugs or alcohol, that they have the authority to engage in whatever it is that they are going to be doing. Those are common elements that you see regarding the qualifications to participate in all sorts of sports or recreational activities.

Another area is what I refer to as the code of conduct or standards of care for that person. If they are qualified to participate, once they crossed that threshold, how are they supposed to behave? Very commonly, there are two elements to that. One common element is a duty to obey posted or oral instructions. Another one falls under the general category of a duty to use reasonable care. Sometimes you will see it phrased that way. Sometimes you will see it, then is broken out and specific behavior is identified under that category. In some instances, it is simply stated, "a duty to use reasonable care," and then it is basically left up to the operator to define that in their posted signage.

In those states that try to provide a laundry list, if you will, of specific activities, you will see things such as: a duty not to exceed the individual's physical size, sometimes there may be a weight limit, for example, or their physical ability; a duty not to interfere with safe operations, for example, if you are riding a ski lift not to try to start swinging it or reaching out and touching the supporting posts or things of that nature; a duty to use the safety devices or not to disconnect or disable the safety devices; a duty not to alter the intended operation of the equipment or the activity; a duty to control the activity if it is intended that they will control it, for example, in a go-cart situation, they operate the gas, they operate the brake, they operate the steering wheel, but not to alter that, not to modify the governor so the thing now

doubles in speed; not to reach beyond the carrier; not to throw, drop, or expel objects from or towards the activity; loading or unloading, when instructed, at the appropriate place, unless there is an emergency or told to do so, or controlling speed or direction.

Those are common, specific, obligations that are imposed on participants in numerous recreational activities. Another common element that you will see in these types of provisions is an obligation to notify their participant of various things. It's very uncommon to rely on the fiction that because it's a law everyone knows it. What you usually see is an obligation to post the law or provisions of some sort, an obligation to post the instructions to engage in the activity, an obligation to post restrictions, and an obligation to post the safe conduct standards that the rider should adhere to.

Usually, you will see some sort of civil or criminal penalty that we'll attach to violations. Sometimes you will see provisions governing the operator's power or authority to eject an unruly participant or to refuse admission to them. That was the rule at common law. If you wanted to eject or refuse admission to someone for any reason or no reason at all, you could do so, and you can continue to do so in the vast, overwhelming majority of states, unless to do so would violate another law. You can't, for example, eject someone based on race or religion or disability or things of that sort. As long as it's not prohibited by another law, the operator retains that discretion, in the vast majority of states, to do so.

That's an important component of this. Some of you might recall several years ago a Ferris wheel incident at Myrtle Beach, South Carolina that got a lot of publicity. In essence, what happened was a large, heavyset teenager decided that he would rock his Ferris wheel seat, which at the time was necessary, because as the wheel goes around, the carrier has to be able to rotate. The operator told him to knock it off,

you'll tip it over, etc. He continued to do it. He succeeded in flipping it. He came out. He hit the carrier immediately underneath. He was heavy enough that he flipped that. He fell and was killed. Another one of the girls that was also tipped out was seriously injured. The thing that you may recall seeing on television is that one of the girls wound up -- her ankle was caught in the spiderwebbing and they had to go up there -- and this was videotaped -- going up there and physically getting her out. She was suspended approximately 40 feet above the ground. All because this teenager disobeyed an instruction to stop swinging.

Another common element that you will see in provisions of this sort deals with what I refer to as miscellaneous liability provisions; for example, changing the statute of limitations, imposing a 90-day or some other period notice requirement, such as what you all have now in your amusement ride statute, and attaching certain consequences to that. New Hampshire has a choice of venue provision that indicates that ski resorts can only be sued in the county in which they are based. Vermont has a provision that limits the ability for an expert to be able to come in and testify on ski cases. There is basically a heightened requirement to show sufficient qualifications to testify as an expert in a ski case in Vermont.

Those sorts of provisions have been probably better developed in the medical malpractice arena than they have in the sport or recreational activities.

The last area that I'll touch on is the whole question of the assumption of risk, which is a common feature in these types of provisions. Unfortunately, assumption of risk has taken on many meanings over the years. It means many different things to different people. I think it's important to set the stage in this way. There are four generally accepted meanings to the phrase assumption of the risk.

The first and probably the simplest to understand is when a participant expressly agrees that they will not hold the operator responsible, and they agree to assume whatever risk is associated with it. So that, for example, if you want to parachute, you will sign a release saying -- whether or not you call it a covenant not to sue, whether or not you call it an exculpatory agreement, whether or not you call it a release, they're all the same thing. The thrust of it is that you are expressly agreeing to undertake the risk associated with an activity.

I will pose as a query to the panel -- I do not have an answer to this. There is an issue whether in those contexts in which there is a state-mandated insurance requirement, as is the case for the amusement ride and the ski lift industry in many states, whether or not -- and I'm not aware of any authority on this -- but whether or not that demonstrates enough solicitude on the part of the legislature that releases of that type would not be valid, whether or not that is an expression of public policy sufficient to preclude operators of that type from being able to use prereleases or exculpatory clauses?

The second type of assumption of risk essentially comes down to this: It is deemed an implied agreement on the part of the participant that he will relieve the operator of a duty of care when he voluntarily encounters a known or obvious risk inherent in the relationship that he's entering into. This is, for example, in California -- I know that this Commission has particular interest in California -- California has, by case law, very recently had a series of decisions dealing with what they refer to as the reasonable, implied assumption of the risk. That is this second facet of assumption of the risk. To give you some examples so that you can appreciate what I'm talking about, this version of assumption of the risk is the same thing as saying that a ski operator does not have a duty to level out moguls on his hill. That is an inherent part of skiing.

If you go skiing, very often that's part of the challenge of skiing. You are looking for moguls; you want to get that up and down effect. When you play football, inherent in football is physical contact, and sometimes people get hurt playing football or various other sporting activities. It's an inherent risk associated with the activity.

Another example, if you were to agree to take a job or to elect to ride on a horse that was known to have dangerous propensities, rearing or whatever, you nevertheless elect to proceed to do so, that would be deemed an implied agreement, on your part, to participate to assume that risk. You know about it; you've elected voluntarily to participate in it.

There is a third form of assumption of risk, and that is where the participant is aware of the risk that has been created by an operator's negligent conduct, and yet, voluntarily proceeds to encounter it. In this case we are now talking about where the operator has done something carelessly; for example, has allowed spilled material to remain on the floor. It has been there long enough that the operator should have gotten it up using reasonable care. If the participant sees it or is aware of the risk associated with it and still elects to proceed through it, that would be a form of assumption of risk. That would be a form that I'm referring to the third commonest form of assumption of risk.

The fourth category of assumption of risk is where a participant chooses to undertake a known risk and, in doing so, has chosen to do so unreasonably. For all intents and purposes, that is the same thing as saying contributory negligence. In my spilled milk example, they see the milk on the floor, they know it's there. If the finding is made that was unreasonable to nevertheless proceed across it, that would become this fourth category. It's essentially the same thing as contributory negligence in different clothing. It's a different label for the same activity.

That's my outline, my presentation. I'll be glad to amplify any of that.

MR. ZUCKER: Does anybody have any questions of the witness?

MR. GILLIAN: I just have to agree on some of the numbers as far as the percentages of the accidents that are caused by the participant. I mean this is-- I've been on our safety board for the State here since Governor Byrne appointed me in the '70s. So those numbers are right, in my opinion.

SENATOR SINGER: I just want to make one comment twofold. Number one is, we are seeing more rides and more types of amusements coming out more and more participation oriented, whether it's through electronics or anything else like that. The problem is going to expand, not get smaller. People want to be more of the ride; they just don't want to be there and do nothing. So, whether it's controlling a control -- there could be a headset around it or anything else like that -- this problem is going to become more acute.

Do you notice at the new IMAX theater type of thing, they're getting into that in a movie theater way? It's going to have some type of eventual greater participation within other nonsensual amusement type things. For example, going to a movie theater, placing a headset on, placing one of those other things on, they're going to create-- "Did you put it on right?" "It gave me a headache." There's going to be a whole new area opening up with that that we have to be aware of.

Secondly, the inherent risk-- I just came back from Vail from a week's skiing. It is understood -- people in skiing -- that accidents happen. I was standing in a lift line, thank goodness the last day, when some person out of control came crashing in. I ended up falling backwards onto his poles and cracked a rib. Totally-- I was innocent. I was standing there and this person-- (indiscernible) That's part of the game. If you don't want to ski, don't take that risk and don't go there.

You don't turn around and sue anybody saying, "You cracked my rib; therefore, I'm suing everybody." That's part of the understanding that there are people who can lose control. It's ice and snow, it's every other thing you can think about, and you can't be on this aspect of saying, "I'm suing the lift operator, they should have protected me," or "I'm going to sue the person who ran into me, they should have known better." It's an inherent risk from the industry. If you don't like it don't ski, but you can't go around -- because, otherwise, they would just cease to exist, and you know Vail is the mecca of skiing in the country.

I think that in the outline you've said, and my concern being on both the amusement end of it and also the participating end of it because of the horse industry, there is inherent risk. There is a responsibility of the participant, a proven responsibility. Though I may differ with you saying that they didn't clean up the milk because they knew it was there and the person went through it anyway, that becomes a grey area in my mind. "I didn't know it was milk. I just thought it was something part of -- I don't know, I wasn't paying attention to it." That gets into a sticky area. But I think that there is a certain responsibility of the participant, whether it's into a movie theater, or whether it's into amusement ride, or whether it's into horseback riding. It's there, and if you don't want to take the risk, don't do it.

The sign is posted that way before they enter the park. That should be sufficient enough. I think that if you just go ahead and show that there is need for some type of statute in New Jersey to protect both the industry, but more important, the safety of the individuals involved.

MR. PIERCE: Right. I agree with you. I will add this, the Colorado Ski Safety Statute, as with most of those in that situation you described, would insulate the operator from skier/skier collisions. Your recourse would be solely against

the crazy boy. It doesn't affect your ability to go after the reckless skier.

SENATOR SINGER: True, true, but he wasn't reckless; it just happened.

MR. PIERCE: Right.

SENATOR SINGER: In other words it's part of the inherent risk in the sport, too. When there are icy conditions out there someone can lose control. It doesn't mean the person was reckless. To the fine tune you can claim anyone as reckless if he loses control in skiing. It happens. But you're right. It is something that the operator is not at fault.

MR. PIERCE: Right.

SENATOR SINGER: I couldn't sue the operator because that could happen on his lift line. By the way, if you're a skier there has to be a reason. Twenty-five percent of accidents are not injuries but people falling off, getting off the ski lift. I mean, it happens all the time. Good skiers or not, they get tangled up. I mean it happens. If you're going to fault the operator because someone's ski gets crossed or somebody gets looped into something, the industry ceases to exist.

MR. PIERCE: Right.

MR. DiSIMONE: Is there any data or do you have a feel for whether or not simply the statement that "under penalty of law" -- if you're to be penalized for breaking the rule or the regulation in a particular activity or a dollar amount penalty, such as a $50 fine, $25 fine, or a $1000 fine -- is any more or less a deterrent? How that would operate? Whether or not simply saying, if you break the rule it's a $25 fine, or if you break the rule it's a $1000 fine? Is there an instance correlated in any way to say that saying the fine is greater the penalty reduces the instance?

MR. PIERCE: I'm not aware of any statistics that have correlated compliance with a safety standard to the severity of

the penalty. Probably the only meaningful statistics that I have ever seen deals with the seat belt context. I think that there is an intuitive belief in the industry that it doesn't need to be severe, that it needs to be minimal, and it's just the threat of it more than anything else that produces the compliance.

Anecdotally from talking with operators in Ohio operating under the Amusement Ride Statute for the past three seasons, and there has been some press to this effect in some of the trade journals, also, what has happened as a practical matter is that they believe that compliance has improved, safety has improved, yet they have had several prosecutions.

They will use the threat of prosecution to get compliance. So that the acting up or the unruly teenager gets it pointed out to him that if it happens again they're out of there and they're taken before the local prosecutor. They've had several convictions as misdemeanors for violating the Ohio provision.

I think the dynamic here isn't really so much the severity of it. It's the fact that it exists and that it can be used by the operator on the spot as an additional tool to obtain compliance. I think that is what dynamically goes on to help provide for the safety component.

MR. DiSIMONE: Carrying that one step further, if someone is convicted of whatever that infraction might be and is injured during the course of it, does it preclude them from making a claim from being injured?

MR. PIERCE: It's going to depend on the state and what their law is regarding comparative negligence.

DR. SAMUELS: If I may, I think that is the bigger psychological issue with a lot of these laws, okay. Because if we have a law that says you have to do this behavior when you're in an amusement ride or whatever else we want to talk about, it

right away says to the participant, I can't sue if I do that and get injured.

So, I think, from a behavioral standpoint, that's one of the big mechanisms in these laws. As far as the rest of it goes, the penalty, it's like any other law we have. I mean, if we said you get the death penalty for not -- for swinging a ski lift chair, okay, people would ride like this on a ski lift. (gesturing) So obviously that's going to have an effect. I think with this it's really people thinking I'm not going to be able to sue if I screw around anymore.

MR. ZUCKER: Wayne, in the Vermont statute, you mentioned it's a one sentence statute that basically all participants in sports activities assume the obvious and necessary risks inherent in those activities. Who decides or how is it decided? What are those obvious and necessary risks? Have there been -- to your knowledge -- an avalanche of cases determining what is or what is not an obvious or a necessary risk?

MR. PIERCE: I'll read the language to you because I have it here in my book. It says, "Not withstanding the provisions of Section 1036 of this title, which is the Comparative Negligence Statute, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary."

There are approximately four reported decisions that have construed that statute. In preparation last night, I happened to review one of them, which was a reported Federal circuit case out of the First Circuit. You asked me who decides, and ultimately, it's going to be a judge, if he can do it as a matter of law, or it's going to be a jury after an extended trial.

But the thing that was important, and I think that is as meaningful guidance here, is that the First Circuit, in commenting on this, drew this comparison: In most ski inherent

risk statutes there is a laundry list. It is a run-on sentence that says that you assume the risk of bare spots, that you assume the risk of various other things. There are about 10 things that you will very commonly see.

Vermont does not include that. The ruling was that was a tendency to increase the likelihood that a particular case is going to wind up going all the way. There is actually a trial judge, a separate opinion for that same case, before it went to the First Circuit. The trial judge denied a motion for summary judgment and set the case in to go to trial. Part of the reasoning was because Vermont didn't include this long laundry list; therefore, he read that as indicative of legislative intent to send this stuff to the jury, not to cut it off in the early stages.

From my perspective, there is value in trying to itemize these items, because it increases the likelihood that a nonmeritorious case -- the case is just as likely to go to a jury and the jury is going to reach the same result. It's just that all sides have expended much more effort getting to that point than they might otherwise have done if the legislature had taken the time to spell out some of those specific activities.

MR. ZUCKER: So are you advocating spelling out the specific activities that have particular risks inherent in that activity, or do you think that the Vermont approach, which is similar to the California approach, is the most efficient way to go?

MR. PIERCE: I think that there are advantages to both of them. It makes intuitive sense, to me, to the extent that a legislature or a disinterested body can determine in a clear neutral way, this is the conduct that participants should adhere to. This is what they are responsible for, to the extent that they can articulate that, I think, that a service has been done for everybody -- to the injured participant, to the industry, to everybody -- because now, once and for all, it has been laid

out. Now there is no need to squabble. Now there is no need to expend a lot of energy chasing down red herrings.

However, you will never be able to have a comprehensive list for anything. There is also going to be that room there where, under our system of jurisprudence, there is always going to be a fact-finding process. There is always going to be a certain residual element that will go to a jury, to a fact finder no matter how specific you are.

MR. ZUCKER: What would you think of a system or a legislative scheme that allowed the regulators, one of the departments within the government, to explore designated activities and determine a list of the behaviors of patrons, or participant behavior within the activity, that increased the risk of an injury and regulating it in that manner, so that we can come up with a list for each activity, notify the participant of what they should not do and, therefore, increase public safety?

MR. PIERCE: That's exactly what we have been trying to do in Maryland -- is to try and do this by regulation in the belief that a regulator with expertise in a particular industry, for example our amusement ride provisions, that they are best qualified, that they are more qualified than the 188 legislators in Annapolis to make that decision. We spent a year and a half with them going through it, and we still haven't come to a consensus on how to proceed with it in that regard.

But, in essence, I think that is more desirable for a regulator who is familiar with the industry to be able to do that. There are a few precedents for going it that way. New Hampshire has, by regulation-- Basically it imposes an obligation on amusement riders to use reasonable care not to injure themselves, the equipment, or other riders. That's basically what it says. Indiana has a provision, by regulation -- it doesn't happen very often, thank God, that they get to use it-- But basically what it says is that if a rider knows that

their equipment is defective and then they proceed to use it anyway, then they've got problems. Fortunately that doesn't happen at all or ever or very often.

But as a rule, it is a fact that almost all these provisions are legislation, and that may be reflective of the fact that regulatory agencies for amusement rides, for example, only exist in approximately 15 states, I would estimate. Out of the 40 states that regulate it, only 15 have a meaningful regulatory agency. Most of those states impose inspection requirements on the insurance company or on the owner himself.

MR. GILLIAN: We are under -- New Jersey operates that way.

MR. PIERCE: Oh, I know.

MR. GILLIAN: Next Monday, the State inspectors will show up at my place and go through for load testing. Every ride that has any momentum to it has to be load tested each year. Then, in addition to that, each ride has to be inspected for the proper restraints, the chains across, the signs up, anything you can think of. So, I mean, we basically have that system going on in New Jersey.

SENATOR SINGER: I think what we are talking about is-- There isn't a code of conduct yet--

MR. GILLIAN: Not yet.

SENATOR SINGER: --in New Jersey. If you establish that first and then put in legislation that triggers the additional concerns for specific rides or the industry, regulations can be promulgated; that's one thing. But I think you have to establish a code of conduct and what responsibility does anyone have for any ride or any participating sport, first.

But let me just ask you one other question to tie in to it. One of the big problems with the legislation arising in New Jersey originally was age. We were trying to determine, and maybe you answered to some extent, there is no age of responsibility, it's everyone that's responsible. So our

concern was, in a lot of our areas, 14 year olds and 15 year olds come by themselves to the park. The big question from the legal profession at the time was, well, they're not old enough to be responsible for that. Has that been a problem in other states where they just blanket say, "Look, if you're old enough to go on the ride, you're old enough to be responsible"?

MR. GILLIAN: Pennsylvania law is 14.

MR. PIERCE: But the thing that's curious about this treatment of minorities is that if you look at it, none of the ski industry provisions have an age requirement.

SENATOR SINGER: You're right.

MR. PIERCE: You won't find it in any of them. It has cropped up sporadically in the amusement ride context. Nevada has a 13-year reference, Pennsylvania has the 14-year reference. You won't find it in any other amusement ride provisions. I can't talk to you about some of the other activities, equestrian or whatever; those two I do know.

If you read those provisions, in Nevada it is not across the board. It is limited solely to the assumption of the inherent risk aspect. That 12 year old has the same obligation not to throw stones at the ride as the 21 year old, and that minority reference is limited solely to the assumption of the risk provision.

The same thing is true in Pennsylvania. The 14-year-old reference is limited to the assumption of the risk question. It doesn't have any bearing on standard of care and, Roy, if you have the language there in front of you, correct me, but I'm pretty sure that when they defined rider they don't put an age limit in rider, am I right?

MR. GILLIAN: It just says, "A rider 14 years of age or older, embarking on a ride after failing to pay appropriate considerations for its use when required by amusement park rules and regulations, shall be considered to be a trespasser."

MR. ZUCKER: No that's the-- Is there something in the definition section in the first part of the statute?

MR. GILLIAN: Oh here it is, "A rider, a person 14 years of age or older, utilizing amusement ride. The term includes any person who is an invitee whether or not the person pays consideration."

MR. PIERCE: In that case, they are the only state that applies it. That bill goes on to list certain standards of conduct. That is the only instance that is on the books that applies across the board.

We have had this argument at some length in my state and it -- to summarize it in this way for you because I think this may be helpful. From a safety perspective, if regulating the conduct of a five-year-old or something to that effect -- and I'm intentionally trying to pick one that's very small -- if they have the ability to comprehend pictograms, which is a very common aspect of these signs, they don't necessarily have to be able to read. But if they see a silhouette of a pregnant women, that may mean something to them. As long as they have the capacity to understand that, there is an opportunity there to be able to improve that ride. It would be unfortunate to lose that.

Now whether or not that has implications, whether or not you're going to carve out a special exemption saying they retain their right to sue or something like that, which has been part of the argument that we have been going through in my state, that's a separate question. But from strictly a safety perspective, those uses can, I believe, be effectively regulated and numerous other industries do so.

The other part of the comment, though, was this, it is not an absolute necessity to first have the legislature ask a code of conduct and then have the regulators step in. As long as the enabling statute from the legislature says, "The regulator has the authority to regulate the use of the ride,"

that language is broad enough to encompass the types of regulations that Lary and I have been discussing.

It's not necessary for the legislature to first get into the act. That has been part of the debate in my state, because our enabling regulation is limited to regulations for operation maintenance. So there is some question whether or not that is broad enough to include a rider's use of the equipment. At this point, there is a school of thought that we could not go this route; we have to go to the legislature first.

I haven't looked at New Jersey's law specifically, recently, to see whether or not its necessary to go to the Legislature, initially.

SENATOR SINGER: That doesn't help the horse industry at all.

MR. PIERCE: Oh, not at all. That only applies in those contexts where the state has gone to the effort to put a regulatory agency and incur all the expense to do that. That's very rare. If you don't get all the activities, I know there has been some correspondence as far as what the scope of this Commission should be, there's probably hundreds, easily, of activities that you potentially are going to get into and only a few, a handful of them have regulatory agencies.

SENATOR SINGER: We're mandated by our Governor, less government, not more.

MR. GILLIAN: That's right, and in all fairness this came about because of our -- this was basically our law that we tried to get through last time, and the reason why that age came up is because the attorneys that were on the Commission felt that there was a certain thing that you guys have where--

SENATOR SINGER: We solved the problem, changed the Governor. (laughter)

MR. PIERCE: Your comment is true though, sir. It is a fact that amusement operators or leisure operators increasingly find themselves positioned as babysitters. There

has been some publicity in the trade journals regarding this phenomenon where, as society becomes more and more dual wage earners and the need for childcare escalates, they can't find it. It's not affordable.

It's oh, so easy to buy a $150 season pass to some amusement park that now becomes the dumping ground, and you don't have to pay for summer camp, you don't have to pay for day care. You just drop them off in the morning and pick them up at the end of the day.

DR. SAMUELS: We pointed out, I think, at a previous meeting, Wayne, too, that some of the family entertainment centers are already offering themselves literally as a child care babysitting service because of the nature of those facilities.

First of all, thank you very much for your very comprehensive presentation. I wanted to ask you, in light of the fact that, you know, we're supposed to be fashioning a law here that's so comprehensive in nature -- and my sense in having listened to your review again this morning, that there really is nothing exactly out there that is as comprehensive possibly as we've been charged to do -- what are your feelings about that specifically? How do you think we should go about that?

In taking into consideration the fact that regulatory people, you know, seem to be mostly involved with this in the government, what would be your hunch of some kind of combination of regulatory and industry committees almost, sort of like a ASTM type of an approach to things? In other words, if an industry wanted to be included under the terms of this law, would that be a viable approach to require them to maintain some kind of industry committee that perhaps would submit to a regulatory body and whether you think such a design would work?

MR. PIERCE: The last part of that intrigues me considerably. There are-- To the extent that you can find meaningful precedents to an across-the-board approach, you would

definitely start with Wisconsin, and the Wyoming statute would bear that out and duplicate it, regarding the inherent risk aspect of Wyoming's Recreational Safety Statute.

The others, the Idaho and the Vermont statutes, I referred to are, sort of, subsumed in the others. They don't really add anything analytically to the process.

Your comment, Jack, about the use of the industry itself to develop the standards and then to incorporate them, which happens through the ski provisions, through ANSI, and, in a few states, the ride provisions through ASTM being incorporated, that has, in fact, happened.

That is intriguing to me because that would give the opportunity to the people who know the most about the safety aspects of their business to be able to have a direct input. The problem becomes how to monitor it in a way that it doesn't become overreaching, as I see it. It seems to me that somebody would need to second guess so that the list is reasonable and it doesn't become a wish list to insulate them from everything. To the extent that it was reasonable and safety driven, I think that the industry can and should play a very vital role in development of something like that.

The other thing, the other option that I, sort of, alluded to earlier was having an obligation to obey posted signs. What you're doing is putting the onus on the operator; the person who knows that equipment better than anybody. That particularly, in those fields where you have a regulator looking over their shoulder, that is probably the strongest argument for doing something like that.

You're always fearful that you're going to see a sign that-- There is a standing joke, "Go to the fair and read the signs." The joke behind that is there are so many signs that you couldn't possibly do anything but read them. There is the fear that too many signs defeats its purpose and no one pays attention to them after some point in time.

That, I think, is probably the most realistic of all options, to give the operators a certain amount of discretion to be able to develop standards and then-- Particularly, for example in Ohio, what Ohio says is that, yes, the operator can develop his standards, but he has to draw them from a recognized source. He has to draw them from ASTM or from statute or something like that which helps diminish the fear of overreaching or self-servingness and still give them a certain amount of flexibility to custom tailor their sign to their particular piece of equipment.

DR. SAMUELS: I think the more specific flow here that I would see happening is having these -- if an industry wanted to be covered under this, or let's say State Park and Recreational Department wanted to be covered, you know, into the governmental domain, or the Boy Scouts wanted to be covered in the State of New Jersey, they could draw up a list with strong encouragement that it be well-referenced based on the literature that's out there. Then submit that to a regulatory panel in the State that would actually approve the list. That's the specific flow that I'm suggesting. What do you think about that?

MR. PIERCE: It hasn't been done across the board, comprehensively. That is basically what happens in the Ohio Amusement Ride Bill. It's more than workable. The question has more to do with financing and how to assemble expertise in that body because of the hundreds of potential industries that you might be involved with. I think that gives you a certain amount of flexibility from a regulator's perspective without having to -- and still minimizing your investment, your overhead in trying to develop that sort of thing.

MR. BLEIFER: I had two questions about the Vermont type of statute. The first is, are you aware of any difference in perhaps the number of injury-type lawsuits filed since the passage of the assumption of risk, meaning sporting injuries, etc? Has anyone taken a look to see if there has been a

decrease or a disincentive to file those suits at all, or is there just kind of a knowledge of some of the cases that have gone up on appeal and we know that, you know, maybe they will or maybe they will not get to a jury depending on an interpretation?

MR. PIERCE: I am not familiar with any statistics that would meaningfully address the exact question as you've phrased it. The only references that I have seen are to the effect that it's almost unheard of for an injured person to win a downhill skiing case. It's incredibly difficult to do that, that's in states that don't have a risk assumption provision. Then for passenger tramway accidents, for example, I've seen -- I recall reading articles earlier that refer to a figure of 75/25. That 25 percent of uphill injuries ultimately leading to settlements or favorable jury verdicts--

MR. BLEIFER: I'm asking the question that way because I think you've made it clear that even with that type of a statute, whether it's just a general assumption of risk statement or one of these laundry lists of what you are assuming, that they're going to be those cases that do go all the way as you say.

I'm just wondering whether there might be any kind of general disincentive to lawyers who might just not want to bother to pursue those if they have that uphill battle, or whether they are just going ahead anyway and saying that, "Well, my case is going to get around it somehow."

MR. PIERCE: I can't meaningfully comment on the disincentive for a plaintiff's counsel to take a case in a given circumstance. I can offer as an indirect measure of that attitude -- and I think you have an insurance representative coming here shortly who I believe will back this up -- from my conversations with insurance representatives, it appears to me that to have a meaningful effect on the insurance premium it needs to be in place for a good while and it needs to be

comprehensive. They are very disinclined to do state by state rate fixing without some very significant experience under their belt.

MR. BLEIFER: My other question is have you seen any other states taking this context of amusement, sporting, recreation activity and tinkering with burdens of proof or standards of negligence, in other words, to raise the standard to gross negligence or recklessness, or to change the comparative negligence standard to maybe a 30 percent bar as opposed to a 51 percent bar? Have you seen anything like that anywhere else? Because it's been raised as a possibility here. I don't know if anyone's in favor of it or not, but I'm just curious as to whether it's been attempted anywhere?

MR. PIERCE: I'm not aware of any precedent at all on tinkering with the burden of proof in that context.

MR. BLEIFER: Thank you.

MR. ZUCKER: Wayne, you brought a copy of the Uniform Rider Safety Act published by IALDA. I'm wondering what is that status of this? Has it been introduced anywhere? Is it ready to be introduced anywhere? What approach did you take in drafting this draft legislation?

MR. PIERCE: This has been sent as a draft to representatives in probably six states, and I have passing contact with those individuals. It's my understanding that in those -- for those individuals who I actually took the time to send it to now, as a draft, it was because they needed it then and there. I'm thinking of a go-cart operator in South Dakota who had his legislators' attention and was prepared and had to introduce it in the beginning of January. But I don't know; I haven't had any feedback. I don't know what the status of it is, but it's my understanding that it has been used to some degree in probably five or six jurisdictions. There is another half dozen that are waiting for the final version. Georgia, Florida, South Carolina, California, Washington, Oregon,

Kentucky are some of the ones that I know are in the wings such that the timing is right that they will be able to do something this year or next year.

MR. GILLIAN: You know, this is a fallacy that I have a problem with. When you get into go-carts-- I used to have an electric go-cart, and I had more accidents on that during the years I had it than anything else that I had. I eventually got rid of it. Right now I have one thing out of the 33 pieces of equipment that I have -- a glass house, walk through -- that I have more accidents in because of teeth -- kids walking into the-- We have a loudspeaker, we notify them. We have signs, but still that is my biggest problem. You know the deal is, do I get rid of that to eliminate my problem? I think go-carts are really-- You know, that drags the whole industry down. If you're going to lump all this together--

MR. PIERCE: I take that comment back to yours earlier about the increasing tendency to participant interaction with the activity. That's my perception, as well, is that's a trend, that's a reality, and that is a fact. Your personal experience bears it out--

MR. GILLIAN: Right.

MR. PIERCE: --that the more active the participant is in the activity the more likely it is that they are going to be injured. I think the basis for that is that they are causing their own problems to begin with. Not that the activity is necessarily more risky, but that they are causing their own problems.

DR. SAMUELS: Remember the old adage, "People shouldn't live in glass houses." (laughter)

MR. GILLIAN: Well, it still comes back to our whole problem here, you know, are we going to go broad or are we going to go to the amusement industry?

DR. SAMUELS: Well, we seem to be going around with that.

MR. GILLIAN: I mean the charge is broad.

DR. SAMUELS: I mean, you know, the other way to do this, if there is an alternative, is to pass a model type of law for a couple of industries and then say to the other industries in the state, "Well, if you'd like to pursue this law, you know, you could do that."

MR. GILLIAN: The Senator said this at our very first meeting.

DR. SAMUELS: So far we've agreed that we're going with the broad idea because that's what the charge to the Commission was. That's the way the Chair interpreted the charge.

MR. PIERCE: But these other options of using -- giving the operator discretion through signs, to tailor it, giving the industry discretion -- I don't know if there's precedent for that other than maybe what Ohio does -- but that is very appealing to me.

MR. ZUCKER: Wayne, would you be willing to admit the Uniform Rider Safety Act, the draft, into the record? Is it sufficiently advanced to--

MR. PIERCE: I don't mind. This is my only copy, though.

MR. ZUCKER: Okay, you can send it to us.

MR. PIERCE: Yes.

MR. ZUCKER: Why don't you send it to Craig. He's the secretary and all. We'll make it part of the record.

MR. PIERCE: Okay.

MR. ANDRES: Mr. Pierce, with your permission, if I could ask you a few questions.

MR. PIERCE: Sure.

MR. ANDRES: We've made reference to an acronym here today, IALDA-- I-A-L-D-A -- and I believe that you are secretary and treasurer of that organization?

MR. PIERCE: Yes.

MR. ANDRES: Just so the record is clear, in the event that folks want to review a transcript at a later point in time, IALDA stands for what, sir?

MR. PIERCE: International Amusement and Leisure Defense Association.

MR. ANDRES: Is it fair to characterize that as an industry organization?

MR. PIERCE: It is. I'm not sure-- I mean, let me say it in my words. It's a group of people who have come together who have a common interest in the legal affairs of the amusement and leisure activities industry.

MR. ANDRES: From the defense side?

MR. PIERCE: From the operators side.

MR. ANDRES: Sure, as distinguished from being consumers or a users side.

MR. PIERCE: Not that they are excluded, but, yes, you're right.

MR. ANDRES: They're not excluded, you just don't have any.

MR. PIERCE: Probably so.

MR. ANDRES: One of the things that you started with when you initially made your presentation to our Commission was that you indicated that safety is, of course, the paramount concern. I would think that your organization would agree with that as well.

MR. PIERCE: What I have been talking about, I believe that is the underlying concern, yes. There is a dichotomy, and you will see it in the names for these various statutes. Very often, I think it happened here, the New Jersey Fair Safety and Liability Act, or something of that sort, those two very often are the touchstones for these pieces of legislation. I don't want to say that one is paramount and one is not. That's more of a decision maker's role. They are, I think, both comparative factors or goals.

SENATOR SINGER: I love two attorneys talking together. (laughter)

MR. ANDRES: As a Commission, my understanding is one of our paramount concerns is, of course, protecting the citizens of the State of New Jersey. I think that must necessarily include safety as a paramount concern when someone uses these rides.

In that regard, do you agree that philosophically and perhaps financially it would be inappropriate for an industry to set its own standards for public safety purposes?

MR. PIERCE: Philosophically inappropriate? Not philosophically inappropriate.

MR. ANDRES: How about financially and from a public safety point of view, would you agree that it would be inappropriate to have an industry itself set the standards for its liability?

MR. PIERCE: I want to amplify why I say that. When I say philosophically, as a rule the industry knows better than any other body how best to operate a particular procedure safely. I think that they are absolutely critical to the process. They do not necessarily need to be the only decision maker. They need to be a key critical component of it. I think that's pretty much, if you look at it across the country and in these various systems, they do retain the authority to play a vital role.

Now, I'm not sure exactly what you mean by financially.

MR. ANDRES: Well, obviously folks have financial interest in this. The amusement industry is in the business of making a profit, and I'm not saying that is bad, that is the American way. They are in business to make a profit, and that can clearly, in certain instances, run contrary to what might be in the best interest of the consumer from a safety perspective.

The courts are full of cases to that effect. You know, this is a gross analogy, but you look at the Ford Pintos and things of that nature. Those kinds of profit motives often conflict with safety. That being the case, don't we need to be very concerned with an industry setting standards for itself?

I mean, in your testimony earlier, you talked about potential and risk for overreaching and things of that nature. Don't you see that as a viable concern for this Commission? To make sure that the industry doesn't set the standards for itself?

MR. GILLIAN: They should at least be involved, though.

MR. ANDRES: I agree with you. I couldn't agree with you more. The industry needs to be involved just as the consumer needs to be involved and things of that nature. But I think it runs contrary to the public interest to have an industry who has a financial incentive and motive to set its own standards. Do you agree with that?

MR. ZUCKER: Can we--

DR. SAMUELS: Who else would do it?

MR. ZUCKER: I just want to address one point. I'm not sure it takes us anywhere to categorize any degree of concern about having the industry self-regulate itself. I think we all agree that there has to be a role for the industry because, quite frankly, the industry in addition to being--

The industries that we are seeking to regulate clearly have a body of experience and a body of expertise in what and how incidents occur and what is a safe operation. I don't think there's anybody around the table right now who knows more about that than Roy Gillian, as a result of his years of experience. Tapping into that experience, I would think, is not a cause of concern. I would be concerned about a bill or about a regulation that didn't include industry participation.

But what I want to focus on is the question of the consumer. A consumer goes to a ride. The consumer enjoys Gillian's Water Wonderland or Six Flags for a day, and goes home at night, and maybe repeats the experience during the summer. What role do you see for consumers or consumer advocates in this self-regulation, in this regulation process? What input do they have? By they, who would you include in they? I guess that's really what I want to find out.

MR. ANDRES: The consumer's role, I think, is very simple and appropriate advocates on behalf of the consumer. Consumers want safety, period; nothing more, nothing less. They don't want their safety jeopardized in any way, shape, or form by an industry or an individual. We want, as consumers, to have the best possible product there, however we need to do it.

When we have an industry setting standards which could legally bind a consumer, I have to believe, and I think everybody, although they wouldn't fess up to it, can see that there is a risk there. I mean, you look at historically what happens when industry set its own standards, and that's a problem.

MR. ZUCKER: But if we agree, if we're going to be looking for areas of agreement here, can we also agree that the statistics that show that rider, that is, consumer actions are a major cause of both their own injuries and also injuries to others?

MR. ANDRES: Whose statistics?

MR. ZUCKER: Excuse me?

MR. ANDRES: Whose statistics?

MR. ZUCKER: The government's statistics. The Consumer Product Safety Commission's statistics, okay.

MR. ANDRES: So we take as a given that--

MR. ZUCKER: Do you have any problem with that idea that there is a certain percentage, whether it is a high percentage or a low percentage will depend on our view of those

statistics, but that a certain percentage of consumer accidents, consumer injuries is a result of consumer behavior on a ride or in an activity?

MR. ANDRES: Absolutely, no question about that.

MR. ZUCKER: If that's true, then shouldn't we have a concern about having consumer input into this process?

MR. ANDRES: I agree.

MR. ZUCKER: Because they're not going to want to make their-- They're not going to want to pass any regulation that is going to in any way restrict their behavior. I mean, I think there is concern on all sides, and I think that the end result should be a process that includes both consumers and the industry.

MR. ANDRES: I don't disagree with you.

MR. ZUCKER: But I'm just wondering, where is that repository of consumer expertise that we can find? That's not -- I'm not being cynical and I'm not being argumentative with you, Ken. Where is that consumer input? Can you define it for me?

MR. ANDRES: I drafted correspondence, and I would suggest my correspondence under date of March 28, 1995. I have to believe that at a minimum, those seven organizations, that there must be bona fide evidence that deals with this problem. I don't want a consumer organization coming in and saying that an industry should be responsible for everything under the sun. It's not fair. I don't want an industry coming in and saying we should be responsible for nothing or setting up our own standards. It's not fair. Both sides of that coin are inappropriate.

I think that we need to hear and see evidence, other than anecdotal evidence, from both sides. I agree with you in that regard. When you look and you see that an individual who appears on behalf of an industry, as Mr. Pierce has -- that's his profession. He's knowledgeable in this area and I

understand his views. But he tells us, for instance, that 20 percent of the statistical evidence available to you would seem to indicate that the injuries are caused by the industry side, whether it be 15 percent negligence or carelessness on behalf of the operator, the young man or young woman who may be operating the ride, 5 percent mechanical. That strikes me as a problem which we need to also address very seriously.

Because when you say things to me, some of which with I agree, where you're saying that a heightened sense of awareness, such as through signage to the consumer, makes a safer product because of the perhaps fear of God, or perhaps the fear of not bringing a lawsuit if you don't comply with signage. I can't believe that a heightened responsibility for the industry, even if it's only for that other 20 percent, using your statistics, also brings in the fear of God or the fear of law and makes for a better, safer product for everybody. I think that's what we need.

I can't imagine any thinking person not agreeing that safety is the paramount concern, and then we start going from there. We want the consumers and the citizens of this State, when they go to Great Adventure or any other place, to do it safely.

MR. BLEIFER: Ken, are you suggesting perhaps that the existing scheme of standards and inspections is itself insufficient?

MR. ANDRES: It likely is.

MR. BLEIFER: Because I don't know if we've ever addressed that issue.

MR. ANDRES: If we have 20 percent of x amount of people being hurt because of operator error or mechanical problems, sure I think that suggests that the regulatory scheme is insufficient. I think that suggests there is room for improvement on the industry side. I'm not sitting here with my head in the sand. I am dead certain that in certain instances

the consumer is the wrongdoer in terms of causing a problem, but we need to see it from both sides, because I agree with you. The fear of God or the fear of law has an equal effect. I think that, as to the industry, they need to know that if they act in a way that is inappropriate that there will be sanctions of one way or another. I think the consumer needs to know that, too.

DR. SAMUELS: I think you need to understand that the committees, like in ASTM, are open to any person that wants to become a member. So, in suggesting before that we could have so-called industry committees making up regulations, it could actually be a double protection there, because those industry committees could be open to consumer groups. The industry though has to have the expertise. It is just too difficult for the average person off the street to understand the psychosocial dynamics of interaction with all these different types of equipment, all the mechanical things that go into various different situations and so on and so forth, without having some expertise.

So I think what your real issue is, is protecting the consumer and looking at the other side of the fence. Clearly it is a valid one, but I don't really see a problem in that and I have found that-- I have participated in IALDA a little bit. If I can say something about IALDA, I have found the people to be very open-minded, really, truly dedicated to just making the industry safer. Of course, we're talking only about the amusement industry here once again.

There is a large diversity. You can't speak for every single industry. There are different people that crop up in different venues, you know, at all times that cause problems. You used the example of the auto industry. I mean, each industry perhaps at times has a problem, person or problem people that cause problems, but I don't think we should focus so much on IALDA, because I think that this is a very well-meaning,

positive, you know, balanced effort that is going on with this group.

I mean the work Wayne has done with collecting these laws, as far as I know, hasn't been done by anyone else. I, as several people know, I follow a large number of recreational industries, and that unto itself is a very positive action. So I think IALDA should be commended for the work they have been doing so far on behalf of both consumers and the industry.

MR. ANDRES: I am not attempting in any way to denigrate IALDA or what Mr. Pierce has done. In fact, everything that IALDA, or Mr. Pierce, or any legitimate member of his organization does to produce consumer safety will get my thanks and my applause because it's well-deserved in that regard. However, we need to understand that, as you agree, there are problem people in every industry, and we need, quite frankly, to protect the public from the industries, whether it be the bad apple or what you see happening as a trend in an industry. When you let people regulate themselves and set standards, you are asking for a problem, pure and simple. Do those people who have particular knowledge in an industry need to be at the table? Of course they do.

MR. ZUCKER: I think we're going over a battle that has already been fought in this State, in this Legislature. It was back in 1975, they began regulating the amusement ride industry in the State of New Jersey. Those regulations have been on the books, and in fact, the amusement industry, of which Mr. Gillian is a part, is -- I don't want to characterize it -- but it's a heavily, it's fair to say, it's a heavily regulated industry in the State of New Jersey.

It's inspected, it's regulated, not just by State statutes, but also by the industry standards and the independent standards setting agencies such as ASTM and ANSI. So we're not here to rewrite the regulations and the standards that are already on the books. I think what drove, what is driving this

Commission -- one of the things that is driving this Commission is the idea that there are certain inherent risks in some of these activities that we're involved in that cannot be regulated out, that cannot be inspected out, that cannot be engineered out.

The question is, and I think this is one of the overriding questions, out of fairness to the industry, and in order to give the industry some ability to protect itself in terms of obtaining insurance and paying for insurance: Is there a law or an approach that we can all agree on that would help us identify the inherent risks that cannot be regulated out, that may serve as the basis of a lawsuit and to level out the playing field in terms of those risks? That's my perspective on it. If we can do it and also enhance public safety at the same time, I think, then, we're on the right track.

MR. ANDRES: We've had a dialogue amongst ourselves. May I ask a few additional questions of the witness?

MR. ZUCKER: Sure.

MR. ANDRES: Mr. Pierce, you made reference to a concern of the industry that certain people involved in the industry would literally be driven out of business. Are there any statistics available, to your knowledge, of folks who have literally closed up their shop because of these concerns?

MR. PIERCE: I'm not aware of statistical compilations that would support that. It's something that appears in the literature. It's something that you hear about, but I'm not aware of anybody that has ever actually compiled data to that effect.

MR. ANDRES: Have you, personally, ever seen evidence of folks who have literally been driven out of the industry because of these concerns?

MR. PIERCE: Yes. Well, I don't know what you mean by these concerns. Have they been driven out because they can't afford insurance? Yes. Have they been driven out because of

fear that if it happens to somebody else, then they'd rather go dry clean, rather than worrying about something hanging over their head? I'm aware of cases of that, sure.

MR. ZUCKER: That's not a good analogy. (laughter)

MR. ANDRES: In those instances, has anything ever been done in terms of follow-up to look to see with those particular folks who have been driven out of the industry what their safety records were and things like that?

MR. PIERCE: I really don't know.

MR. ANDRES: You've talked about a code of conduct for users or riders. Is IALDA or anyone else within the industry proposing any sort of reciprocal code of conduct for your members and the operators?

MR. PIERCE: Well, the one word answer is sure.

MR. ANDRES: Does that exist anywhere in any sort of written form?

MR. PIERCE: I want to make sure that we're talking about the same thing.

MR. ANDRES: Sure.

MR. PIERCE: ASTM F24 has 40 pages or 50 pages of standards governing the amusement ride industry. ANSI has 250 pages governing the aerial passenger tramway. Regulations exist in most states. Are we talking about the same thing?

MR. ANDRES: Yes.

MR. PIERCE: There is regulation of the-- That's one of my themes today is that 20 years ago it was in its infancy, and I think that you can make a strong argument and demonstrate that they've had a desirable effect. The old problem, the mechanical problem, it's not that it has disappeared, but its frequency has gone way down. But the issue of safety has not been eliminated, and now it has come to life and it has been reborn under a different set of circumstances, now it's the human side.

MR. ANDRES: Does IALDA participate in ANSI, in A-S-T-M, as a member?

MR. PIERCE: Not as a member, no.

MR. ANDRES: As a contributing organization?

MR. PIERCE: Individuals in the defense group are members of various other safety organizations.

MR. ANDRES: What is the position of the industry, if we can single out, let's say, the statistical evidence that you have provided us with today, the 20 percent of consumer or patron injury would be due to operator error or mechanical error?

MR. GILLIAN: I think that's two separate things. I think the operator error is different from mechanical error. Mechanical error fits into that 5 percent you used.

MR. ANDRES: And 15 to operator?

MR. GILLIAN: I would think.

MR. ANDRES: Okay, that's why I'm using the term 20. I'm not trying to insinuate--

MR. GILLIAN: That 20 shakes me up because I don't think that's true.

MR. ANDRES: I'll break it down. The 15 percent, the statistical evidence that you brought to bear would indicate that there is operator error. What's the industry's position, perhaps, on when we're addressing these issues of liability, strict liability in those circumstances, since that is a situation that is solely within the control of the operator?

MR. PIERCE: Strict liability is a term abhorrent to me.

MR. ANDRES: I know it is, that's why I'm asking you.

MR. PIERCE: What is the industry's position whether or not they should be strictly liable?

MR. ANDRES: Yes, when they cause injury through operator error.

MR. PIERCE: Well, I can make sure we're using the same terms here. Normally an operator has a legal responsibility when they fail to use reasonable care.

MR. ANDRES: That's negligence, right?

MR. PIERCE: Yes.

MR. ANDRES: You understand what strict liability is, correct?

MR. PIERCE: I certainly think so. I'm not aware of anybody who is advocating strict liability for any amusement or leisure operation. Is that your question?

MR. ANDRES: That's my question.

MR. PIERCE: I'm not aware of anybody doing that.

MR. ANDRES: The same question with regard to strict liability for mechanical error, what's the position of your industry as to whether or not they should be strictly liable under those circumstances when, through mechanical error, they cause injury to a patron?

MR. PIERCE: Well, I don't want to nitpick with you, but if they have unreasonably caused the injury, then they would be liable, but they are not going to be strictly liable. If, through something beyond their control, something that innocently happens, they do not cause it by their fault, then there would not be liability under any state, that I'm aware of, in this country.

MR. KIRSCHNER: Could I interject something just to be clear? My impression is Mr. Pierce is not here as an industry witness.

MR. PIERCE: Not at all.

MR. KIRSCHNER: He may represent certain industries, but he is here to give us a dispassionate, and I think he did, presentation of the laws as they exist in other states. It is up to us as a Commission to evaluate that data and proceed as we wish. Mr. Pierce can answer what he wants, but I don't know that this gets us anywhere. He's not here as an industry

representative, and we may have industry representatives here in the future. I think those questions might be more appropriate to those witnesses. This line of questioning, I think, is rather pointless.

MR. ZUCKER: Ken, I may be able to answer your question. The New Jersey Amusement Park/Fair Liability was introduced back in 1992 and made it through the Legislature, contained both a rider code of conduct which was tied to an assumption of the risk in the event of a person violating the rider code of conduct.

In addition, it also contained the clause that also required all amusement parks covered by the act to strictly comply with all existing regulations including all the ASTM and the ANSI regulations that were incorporated. The regulations also included, and they still do include today, many regulations that require a specific code of conduct for operators of amusement rides.

The rides that Mr. Gillian has on his pier are operated by individuals; those individuals are already governed by a code of conduct in the regulation. There was nothing in that legislation that passed the Legislature that in any way modified or reduced the existing industry obligation. It did not make it strictly liable for a violation of those, but it incorporated those, and I think it put them on the same footing as the rider code of conduct.

Since I drafted the bill, I sort of understand what we were trying to do in that bill -- I thought the Governor understood, but in the end he conditionally vetoed it, the former governor -- was to put the patrons and industry on the same footing and make some kind of mutual and reciprocal obligations in that bill. Maybe it didn't come clear; for whatever reason, it was conditionally vetoed and not much of it survived.

But it was just enacted, in its entirety, in Pennsylvania. There is now a rider code of conduct in Pennsylvania, a 14-point rider code of conduct, that was drawn almost word for word from the New Jersey bill. In addition, a clause in the bill incorporating by reference all of the Pennsylvania regulations which track the New Jersey regulations. I look at that as a pretty fair result. One that will enhance the safety of the consumer/patron.

MR. GILLIAN: The way I understand it and the way I operate, if a bolt breaks and a ride goes down, somebody gets hurt, we pay. If one of my operators screws up and does something and somebody gets hurt, that is our problem. It's the guy that stands up on the roller coaster and gets hit -- you know that we have no control over it. It is the area that we are trying to work -- that person did something himself that's wrong and he got hurt, and we shouldn't have to pay.

MR. ANDRES: Here's my problem with that; I don't think that the industry goes far enough to--

MR. GILLIAN: To make it so the guy couldn't stand up?

MR. ANDRES: To do something to regulate their conduct. Now I, believe me sir, I know where you are from. I've been a patron of yours. I know that you cannot "ensure against everything." But I can't help but believe that there could be some more institutional or regulatory controls to eliminate some of the things that, you know, that kids are going to do. The example that Wayne gave, the one teenager did apparently some ludicrous things down in Maryland or wherever it was. I don't expect you to be climbing up on the Ferris wheel and manacling that kid and say stop doing this.

MR. GILLIAN: He should have thrown him off.

MR. ANDRES: And not hit anyone else, which would have been nice.

MR. GILLIAN: No, I mean, he should have brought him down and got rid of him.

MR. ANDRES: That's the problem. You know, for instance, that kids are going to be kids. It doesn't make it right. Kids are going to do some dumb things. As adults in the industry, I have to believe that we have to be in a better position to police that aspect of it for safety purposes. You know, you are not going to stop every kid from doing something crazy. The good Lord can't do that, but there are probably some standards that can be written, and perhaps some regulatory requirements, to eliminate some of the patron-caused problems. I really think that we would be doing the public a service in that regard.

MR. ZUCKER: I'd like to-- It's now 12:15, Tony do you have something else you would like to say?

MR. DiSIMONE: Just one comment.

MR. ZUCKER: Go ahead.

MR. DiSIMONE: On the self-regulation. Every industry self-regulates to a degree, whether it's the bar association, the public adjustor's association, in codes of ethics in whatever it may be, that's number one.

Secondly, having come through a number of years being an insurance adjustor for companies and then on the other side of the fence in another situation, you can see the pendulum being very much consumer oriented at this point and really less and less concerned to the operator and the owner, to the degree that the operating owners have forces out there, security forces and all the rest of this stuff, to prevent something from happening; because it is so easy for someone to make a claim, so easy to create such financial duress in this industry as to reduce it and, in instances, close it down to the detriment of everybody: financial detriment to the State, detriment to the population that enjoy it and so forth. I think we've gone beyond that.

I don't know the charge of this Commission being anything more, at this point, than to study the aspect of where

this is all going. One of the things that we're missing, I think, not missing, but one of the things I think we're looking at is the direction. I don't think it's the obligation of this Commission to say we should be looking at what the State's obligation is to regulate ride safety.

I think they have their charge. If they have to expand regulation, then it's the State's impetus to do that. Certainly the operators can say, "We think you need this or that or whatever," and, in a sense, standardize what they think is proper. But I don't think that's their function, nor are we asking the State to give over the authority to the private enterprise to regulate that industry. That's never become a question here, I don't think.

I miss the analogy here that perhaps we're not protecting the consumers. We don't have the authority to do that. If you're talking about the industry having the authority, we don't have the authority to do that. That is certainly the obligation and the authority of the State, and nobody is going to take that away from them. I think what we are looking at is what is going on beyond that.

Am I missing that point, or is that what we are looking for?

MR. ZUCKER: I think that's what we are looking for but, you know, I think that is as good a general statement as I have heard.

With that, does anybody else have a question of Wayne because it's now 12:15 going on 12:30? I think it's time for us to adjourn this unless somebody has something else that they would like to state for the record or another question to address to the witness.

MR. ANDRES: I just have another indication for the record--

MR. ZUCKER: Go ahead.

MR. ANDRES: --and it's apropos of what we have been discussing as distinguished from a question for the witness.

MR. ZUCKER: Go ahead.

MR. ANDRES: There are various pieces of legislation now floating around in the Assembly and the Senate -- this again goes to our charge and I've addressed it in my letter -- I think we should be collectively, as a Commission, make some type of decision as to whether we should request of the leadership of the Legislature that we have an opportunity to review these things because we are seeing piecemeal problems.

As I indicated to you, last week, in front of the Assembly Agriculture and Veterans Affairs Committee, they addressed legislation dealing with equestrian activities. I'm concerned that we are liable to see serious fragmentation addressing all kinds of issues.

MR. ZUCKER: It's a good point, and I have a suggestion in that regard. I have your letter dated March 28, 1995 and you do indeed address that issue. I would like to ask every member of this Commission to communicate with Alex Drago, the Commission Chairman, and provide Mr. Drago with their position--

MR. ANDRES: I think it's a great idea.

MR. ZUCKER: --on whether or not we should go forward with that request. Let's put it on the table for discussion at our next scheduled meeting, all right, Craig?

MR. BLEIFER: Yes. One more thing, Alex asked me to have everyone consider between now and the time of our next meeting, or if you have some sort of an answer beforehand, of further witnesses we might have testify, because the next witness is our last scheduled one so far. I see that already in this letter of March 28 from Ken, we have seven groups listed here.

I don't know, Ken, if you are planning on contacting any of them yourself or particular individuals?

MR. ANDRES: I was going to request of the--

MR. ZUCKER: As Acting Chairman, I'm going to assert this prerogative. I would like to ask Ken to see if he could identify, not necessarily one witness from each of the seven organizations, but one or two witnesses from one or two of these organizations.

MR. ANDRES: I will coordinate with folks and report to yourself and Mr. Drago as to what I think is reasonable.

MR. ZUCKER: That would be great. That would be very helpful. That would expedite the process.

MR. ANDRES: No problem.

MR. ZUCKER: Because I think that we already have a witness scheduled for the next hearing.

MR. ANDRES: Yes.

MR. ZUCKER: I think the witness following that should be a witness from one of the seven organizations that you listed in your letter.

MR. ANDRES: I concur completely.

MR. GILLIAN: The first two are the same basically.

We've appeared before the United States Department of Labor with some problems, and they had a very dim view.

MR. ZUCKER: I would also ask, if anybody else has any suggestions for witnesses, communicate with Alex so that at our next hearing we can not only discuss the issue of communication with the leadership of the Assembly and the Senate, also the identity of additional witnesses who will be called by this Commission.

DR. SAMUELS: I think we did take a vote, though, that we were going to look at the broader issue at the last meeting, so -- and that might have happened before you came in, Lary.

MR. ZUCKER: That could have been, I was late.

DR. SAMUELS: So, you know, I think it's pretty superfluous to do that again, unless we want to discuss it again. I don't know.

MR. ZUCKER: Well, I think that Ken Andres has brought the issue to the table, and I think we ought to address it. I just want to reopen the process if anyone has any additional witnesses communicate with Alex.

DR. SAMUELS: I think it is important though that we settle that, because I just think it's two different things entirely and we're, kind of, wasting our time. If we're going to be more industry specific, fine. I said this when this came up the last time, that's fine, I don't have any problems with that, but if we're going to go the other way, it's a whole different focus.

MR. ZUCKER: Well, I wanted Wayne Pierce to testify today as a lead off witness because I really think that he has a unique perspective and having compiled, annotated, and summarized the laws of every jurisdiction. It's a process that puts me in awe of the effort that it took to do that. I'm not quite sure why he did that, but I'm glad that he did it.

I want to thank Wayne of behalf of the Commission for joining us here today and coming up from Baltimore and taking time from your busy practice. I hope you'll be available if we need your expertise in the future.

MR. PIERCE: Okay.

MR. ZUCKER: Thank you very much, we appreciate it. (applause)

MR. PIERCE: Thank you.

MR. ZUCKER: With that, we're adjourned.

**(MEETING CONCLUDED)**

# APPENDIX

**AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY**
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TO: GILAMCO, INC. 2-2-95
D/B/A WONDERLAND PIER
SIXTH ST. ON THE BOARDWALK
OCEAN CITY, NJ 08226

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY
POLICY NO. 4GL22772

NOTICE IN COMPLIANCE WITH STATE INSURANCE STATUTES AND REGULATIONS

Dear Policyholder:

In order to comply with state insurance law and regulations, we must notify you that one of the following may occur when your policy expires on 5-2-95.

1. We will be unable to renew your policy, and coverage will terminate on the above date.

2. If we are able to provide renewal, the premium will increase by over 20% and/or the coverage provided will decrease.

3. We will be able to provide renewal coverage at the terms, conditions and rate as currently written, and if a premium increase occurs, it will be by less than 20%.

If at all possible, it is our desire to provide you with a renewal quotation. If you do not receive a renewal quotation prior to the above expiration date, please contact your insurance agent.

Very truly yours,

Robert A. Nelson, CPCU
Senior Vice President
Special Risks Casualty Brokerage

cc agency
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IX