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From the editors

Dear Readers,

This early 1993 issue of *Tort Trends* clearly demonstrates the commitment of the members of our Tort Section Council to deliver a top quality newsletter. All the following articles are written by our members. They cover various current topics.

1. We start with an article by Loren S. Golden, of Elgin, entitled "A Release By Any Other Name," which discusses the impact of a general release on future litigation with future parties. Loren also provides a sample release.

2. James P. Ginzkey, of Bloomington, discusses the application of the statute of limitations applied to the construction cases in his article: "Judicial Abuse of Section 13-214."

3. We have an article by Mark L. Karno, of Chicago, entitled "Written Exculpatory Clauses as a Defense to Tort Claims: A Survey of Illinois Case Law and Pointers to the Practitioner."

4. Next, our co-editor, the Honorable Lester D. Foreman, presents "Supreme Court Does Not Detour In Giving Direction To Straighten Out Curve Issue," an in-depth analysis of *Hutchings v. Bauer*, 149 Ill. 2d 568 (1992).

5. Finally, we close with two pieces by this editor (one with the assistance of my colleague, David Macksey), which we hope will assist our readers in avoiding being parties to lawsuits.

Again, we invite our readership to submit written comments or rebuttal articles on anything that you feel is appropriate. If the materials meet with our editorial policy, they will be published for all to share. Please send written comments to Joseph Marconi, Suite 2200, 222 North LaSalle Street, Chicago, Illinois 60603.

Sincerely,
Joseph R. Marconi, co-editor

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A release by any other name

By Loren S. Golden, Brady, McQueen, Martin, Collins & Jensen

I. *The problem.* You are in the process of representing a plaintiff who was injured in an automobile accident. During the course of litigation, you arrive at a good faith settlement with one of the parties. At the time of this settlement:

A. You have a concern that one or more of the doctors or hospital personnel who subsequently treated plaintiff were negligent;

B. You are not aware of any medical negligence at the time of execution of the release but you learn of such negligence at a later date.

The release that is executed by your client has the following salient language: I hereby release defendant and all other persons, firms or corporations who might be liable...

You file a malpractice suit against the medical providers. The defendant medical providers file a motion to dismiss based upon the general release executed by your client. Before you check to see if your malpractice premium is paid or before you explore a career change as a cowboy on the outback of Australia, consider this. All may not be lost.

II. *Pre-January 20, 1984.* Prior to January 20, 1984, the release of the original tortfeasor acted as a release of the subsequently negligent physician.¹ However, prospectively from January 20, 1984, under section 302(c) of the Illinois Joint Tortfeasors Act (Ill. Rev. Stat. 1991, ch. 70, par. 302(c), ILCS 1992, 740 ILCS 100/2), the release is effective only as to those persons specifically identified in the release.² Therefore, the first thing to consider is the date that the release was executed. If the release was executed on or after January 20, 1984, then the release probably

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Written exculpatory clauses as a defense to tort claims: a survey of Illinois case law and pointers to the practitioner

By Mark L. Karno, Robert Schey & Associates

An exculpatory agreement constitutes an express assumption of risk in that one party is consenting to relieve another party of an obligation of conduct toward him. *Falkner v. Hinckley Parachute Center*, 178 Ill. App.3d 597, 533 N.E.2d 941, 945, 127 Ill. Dec. 859, 863 (2d Dist., 1989). This article will survey Illinois case law dealing with exculpatory clauses and will also give some practical pointers to the practitioner who is faced with an exculpatory clause when litigating the issue. This article does not address the related issues of an implied assumption of risk or voluntarily encountering a known risk which amounts to contributory negligence.

The following is an example of an exculpatory agreement contained in the application for membership to a popular health club in Chicago:

WAIVER OF LIABILITY

I understand that although the Club's facilities, equipment, services and programs are designed to provide a safe level of beneficial exercise and enjoyment, there is an inherent risk that use of such facilities, equipment, services and programs may result in injury to me. Therefore, I hereby agree to specifically assume all risk of injury to me while using any of the Club's facilities, equipment, services or programs and I hereby waive any and all claims or actions I may have against the Club or its owners and employees as a result of such injury. The risks include, but are not limited to:

1. Injuries arising from my use of any exercise equipment, machines, and tanning booths.
2. Injuries arising from my participation in supervised or unsupervised activities and programs in the swimming pool or on the running track, the courts, the exercise rooms, the sun deck, or any other areas of the Club.
3. Injuries or medical disorders resulting from exercising at the Club, including, but not limited to, heart attacks, strokes, heat stress, sprains, broken bones and torn muscles or ligaments.
4. Accidental injuries within the facilities, including but not limited to, the locker rooms, steam rooms, whirlpool, sauna, showers and dressing rooms.

I also acknowledge the existence and the need for Rules and Regulations including those governing the use of Club's equipment and facilities and participation in programs and services. I hereby agree to comply with the Rules and Regulations and to amendments or additions to them as the Club deems necessary.

/S/ _____ Member

Generally, in Illinois, contracts exculpating a party from liability from common law negligence claims will be enforced unless it would be against a settled public policy of the state to do so or there is something in the social relationship of the parties militating against upholding the

agreement. *Harris v. Walker*, 119 Ill.2d 542, 548, 519 N.E.2d 917, 919, 116 Ill. Dec. 702, 704 (1988).

Illustrative of exculpatory agreements held to be void on grounds of public policy are those by which a common carrier of goods or passengers attempts to avoid liability for loss or damage arising from its negligence or that of its servants. *Jackson v. First National Bank of Lake Forest*, 415 Ill. 453, 114 N.E. 721, 725 (1953). (But cf., *In Re: Bell Switching Station Litigation*, 234 Ill. App.3d 457 (1st Dist., 1992) where exculpatory language found in the company's tariff was found to properly limit the company's liability for disruption of service to a rebate of the costs of missed service.) Among the contracts held to be void because of the social relationships of the parties are those between employer and employee which would exonerate the employer from liability for future negligence either of himself or other employees. *Jackson v. First National Bank of Lake Forest, Id.*

As between private parties, the validity of an exculpatory contract depends on whether there exists a substantial disparity of the parties' bargaining positions. *Schlessman v. Henson*, 83 Ill.2d 82, 413 N.E.2d 1252, 1254, 46 Ill. Dec. 139, 141 (1980).

The issue of an exculpatory contract has come up in a number of contexts in Illinois courts:

Landlord/tenant relationships

In *O'Callaghan v. Waller and Beckwith Realty Company*, 15 Ill. 2d 436, 155 N.E.2d 545 (1959), the court rejected the plaintiff's contention that due to a shortage of housing that a disparity of bargaining power existed between lessors of residential property and their lessees giving the lessors an unconscionable advantage over tenants. In upholding the validity of the exculpatory agreement, the court reasoned that the relationship of landlord and tenant does not have monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid due to the existence of thousands of landlords. (See also, *Jackson v. First National Bank of Lake Forest*, 415 Ill. 453, 114 N.E. 721 (1953).)

Horseback riding

The court also rejected the plaintiff's contention that an exculpatory contract was invalid in *Harris v. Walker*, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill. Dec. 702 (1988). There, the plaintiff, an experienced rider, injured himself when he fell from a horse rented from the defendant. The court found no public policy being offended by enforcing the signed exculpatory contract since there was no unequal bargaining power. The court reasoned that the plaintiff voluntarily chose to enter into a relationship with the defendant, whereby plaintiff agreed to accept the rules associated with horseback riding. The court also held that an exculpatory contract was a permissible defense to an action brought under the Animal Control Act. (See also *Vanderlei v. Heideman*, 83 Ill. App.3d 158, 403 N.E.2d 756, 38 Ill. Dec. 525 (2d Dist., 1980) (horseshoer kicked by horse he was shoeing); *Gray v. Pflanz*, 341 Ill. App. 527, 94 N.E.2d 693 (4th Dist., 1950) (jockey hired to ride horse in a single race fell off horse in that race); *Clark v. Rogers*, 137 Ill. App.3d 591, 484 N.E.2d 867, 92 Ill. Dec. 136 (4th Dist., 1985), (experienced trainer of stallions fell

off when mounting a stallion who became excited by mares in the vicinity).

Auto racing

A fertile area of litigation involving exculpatory contracts has evolved around the sport of automobile racing. In *Schlessman v. Henson*, 83 Ill.2d 82, 413 N.E.2d 1252, 46 Ill. Dec. 139 (1980), the plaintiff, an experienced amateur race car driver signed a very broad release and waiver agreement releasing all claims in favor of the operator of the motor speedway. He was injured when a banked portion of the racetrack caved in during a race. In affirming the summary judgment entered in favor of the operator of the speedway, the court rejected the driver's claim that the agreement was a contract of adhesion. The court reasoned that he was under no economic or other compulsion to sign the release in order to engage in amateur auto racing. The court also rejected the driver's claim that the release was signed by plaintiff when the parties were operating under a mutual mistake of fact (concerning the condition of the track). The court reasoned that the release was intended to cover all claims. Finally, the court rejected his claim that the collapse of the embankment was outside the scope of the release reasoning that the release was very broad in its language and there could be a myriad of factors, known or unknown, singly or in combination which could result in unexpected and freakish accidents. (See also: *Rudolph v. Santa Fe Park Enterprises, Inc.*, 122 Ill. App.3d 372, 461 N.E.2d 622, 78 Ill. Dec. 38 (1st Dist., 4th Div., 1984), exculpatory contract upheld where plaintiff was required to sign it prior to entering pit area and denied reading it before he was injured while watching the race in the infield; *Koch v. Spalding*, 174 Ill.App.3d 692, 529 N.E.2d 19, 124 Ill. Dec. 302 (5th Dist., 1988), exculpatory contract barred the lawsuit of a racetrack flagman; *Morrow v. Auto Championship Racing Association, Inc.*, 8 Ill.App.3d 682, 291 N.E.2d 30 (1st Dist., 3d Div., 1972), lawsuit of automobile racer barred where he was injured in the pit area when a wheel from another vehicle struck him; *Provence v. Doolin*, 91 Ill. App.3d 271, 414 N.E.2d 786, 46 Ill. Dec. 733 (5th Dist., 1980), court reversed a judgment on a jury verdict in favor of pit crew member struck by an automobile. There the court determined that the plaintiff assumed the risk of injury and was contributorily negligent as a matter of law without considering the terms of the signed exculpatory contract; and *Lohman v. Morris*, 146 Ill. App.3d 457, 497 N.E.2d 143, 100 Ill. Dec. 263 (3d Dist., 1986), exculpatory contract signed by driver of race car who was sued by a pit crew member for injuries suffered when driver struck pit crew member served to bar driver's third-party complaint for indemnity filed against racetrack owners.) (Cf. *Simpson v. Byron Dragway, Inc.* 210 Ill.App.3d 639, 569 N.E.2d 579, 155 Ill. Dec. 398 (2d Dist., 1991), a fact question exists as to whether a race car driver whose fatal collision with a deer on the racetrack was a reasonably foreseeable risk which ordinarily accompanied auto racing.)

Health clubs

The necessity that an exculpatory contract be clear, explicit and unequivocally show an intent to protect the party seeking to be relieved of a certain obligation of conduct towards the other party is demonstrated by the case of

Calarco v. YMCA of Greater Metropolitan Chicago, 149 Ill. App.3d 1037, 501 N.E.2d 268, 103 Ill. Dec. 247 (2d Dist., 1986). There, the plaintiff was injured when a weight in the weight room hit her in the hand while she was helping another patron. She had signed an exculpatory clause releasing the YMCA for injury claims "arising out of or connected with (her) participation in any activities of the YMCA of Metropolitan Chicago." The court, in construing the terms of the contract strictly, held that the language of the clause was not sufficiently clear, explicit and unequivocal to show an intention to protect the YMCA from liability arising from the use of its equipment. In reaching this result the court cited case law from other jurisdictions which stand for the proposition that a limit on liability for negligence will not be inferred unless such intention is clearly expressed and the language of an agreement clearly notifies the prospective releasor of the effect of signing the agreement.

In *Larsen v. Vic Tanny International*, 130 Ill. App.3d 574, 474 N.E.2d 729, 85 Ill. Dec. 769 (5th Dist., 1984), the court affirmed the trial court's denial of the health club's motion for summary judgment, holding that a fact question existed as to whether the exculpatory contract clause of a health club membership agreement encompassed a situation where a member sustained injury when he inhaled dangerous gas generated by a combination of cleaning compounds. There, the court focused in on the foreseeability issue as raised by Illinois Pattern Jury Instruction—Civil, No. 13.01 which deals with assumption of risk pursuant to a contractual relationship which requires proof that "the plaintiff knew these dangers [which caused the injury] existed and realized the possibility of injury from them or the exercise of ordinary care would have known the dangers existed and realized the possibilities of injury from them and entered into the contract voluntarily." I.P.I. Civil, No. 13.01. (Cf., *Owen v. Vic Tanny's Enterprises*, 48 Ill. App.2d 344, 199 N.E.2d 280 (1st Dist., 1st. Div. 1964), plaintiff signing an exculpatory agreement could reasonably contemplate the possibility of injury resulting from slippery surfaces in or around swimming pool; *Kubisen v. Chicago Health Clubs*, 69 Ill. App.3d 463, 388 N.E.2d 44, 26 Ill. Dec. 420 (1st Dist., 5th Div., 1979) where the plaintiff fell on a slippery surface in the steam room; and *Bers v. Chicago Health Clubs, Inc.*, 11 Ill. App.3d 590, 297 N.E.2d 360 (1st Dist., 2d Div., 1973), exculpatory clause releasing health club from all liability for injuries suffered by customer on its premises was not void as against public policy.)

Amusement rides

In *Russo v. The Range, Inc.*, 76 Ill. App.3d 236, 395 N.E.2d 10, 32 Ill. Dec. 63 (1st Dist., 4th Div., 1979), the plaintiff who was injured while going down a giant slide admitted reading the reverse side of his ticket which read: "The person using this ticket so assumes all risks of personal injury..." At the top of the slide a sign warned "slide at own risk—not responsible for personal injury." The sign also instructed patrons in the proper way to ride the slide and not to use their hands or feet to slow their descent. The plaintiff, who used his hands and feet to slow himself down while going down after his body left the slide after going over a dip admitted that he read and understood the sign. There, the court reversed the trial court order granting sum-

mary judgment in favor of the defendant. They found that a fact question existed as to what the plaintiff was reasonably aware of after reading and understanding the "slide at own risk" sign and whether the danger Russo encountered was one which ordinarily accompanied the riding of the slide. They reasoned that based on the facts presented that it was possible to infer that Russo's ride down the slide was an abnormal occurrence caused by some danger unknown to him and a risk he did not assume. (Cf., *Murphy v. White City Amusement Co.*, 242 Ill. App. 56 (1st Dist., 1926).)

Spectator sports

In *Yates v. Chicago National League Ball Club, Inc.*, 230 Ill. App.3d 472, 595 N.E.2d 570, 172 Ill. Dec. 209 (1st Dist., 1st Div., 1992) where the plaintiff, a spectator at a major league baseball game was struck in the face by a foul ball, the defendant raised the defense of an express assumption of risk based on a disclaimer of liability printed on the back of plaintiff's ticket. The appellate court affirmed the trial court's ruling that because the disclaimer on the back of the plaintiff's ticket was so small that it could not be legibly reproduced by photocopying that it was not effective. The court relied upon the Restatement (Second) of Torts, §496B Comment "c" which provides that:

c. In order for an express agreement assuming the risk to be effective, it must appear that the plaintiff has given his assent to the terms of the agreement. Particularly where the agreement is drawn by the defendant, and the plaintiff's conduct with respect to it is merely that of a recipient, it must appear that the terms were in fact brought home to him and understood by him, before it can be found that he has accepted them. Restatement (Second) of Torts, §496B Comment "c."

and Restatement (Second) of Torts, §496B, Comment "c." Illustration 1 which provides:

1. A, attending a theater, checks his hat in B's check room. He is handed a ticket, on the back of which, in fine print, it is stated that B will not be liable for any loss or damage to the hat. Reasonably believing the ticket to be a mere receipt, A accepts it without reading it. B negligently loses the hat. A is not bound by the provision on the back of the ticket.

Thus, in *Coronel v. Chicago White Sox, Ltd.*, 230 Ill. App.3d 734, 595 N.E.2d 45, 171 Ill. Dec. 917 (1st Dist., 2d Div., 1992), the court held that language on the back of the admission ticket that the holder assumed all risks and danger incidental to the game of baseball, including batted balls and further agreed that the participating clubs, their agents and players would not be liable for injury claims arising out of the holder being a spectator merely presented a jury question as to whether the plaintiff, a spectator, injured by a foul ball, received adequate warning that he could be struck by one.

Other recreational activities

In *Moran v. Lala*, 179 Ill. App.3d 771, 534 N.E.2d 1319, 128 Ill. Dec. 714 (2d Dist., 1989), a participant in a survival sport involving the use of a paint pellet CO² gun was shot in the eye prior to the start of the game while standing in the "free zone." Prior to the incident, the plaintiff, an experienced hunter, signed a very broad and encompassing exculpatory contract. In affirming the judgment

entered on the jury verdict in favor of the defendant, the court concluded that there was sufficient evidence for the jury to conclude that the possession of CO² guns on the free zone was contemplated by the rental agreement and was a risk assumed by the plaintiff, especially considering that he was an experienced hunter and the risk was obvious to a person experienced with weapons.

In *Falkner v. Hinckley Parachute Center*, 178 Ill. App.3d 597, 533 N.E.2d 941, 127 Ill. Dec. 859 (2d Dist., 1989), the court affirmed the trial court's granting of a summary judgment on the negligence counts in favor of the parachute training center and its president. There, the court held that the exculpatory clause was valid and encompassed the risks of unsafe equipment and negligent instruction. The court concluded as a matter of law that some risks of fatal injury is ordinarily attendant to the sport of parachute jumping and that the decedent, a former officer and pilot in the Army Air Corps, would have been aware of these risks. However, the court reversed the summary judgment in favor of the defendants on the counts of the complaint alleging wilful and wanton misconduct on their part. The court held that agreements exculpating one from the results of wilful and wanton misconduct are illegal and against the public policy of Illinois.

Practical pointers

When a client enters your office with a case involving an exculpatory clause, you must first look at the relative bargaining power of the parties to the agreement. If it is apparent the exculpatory agreement is a contract of adhesion or that the releasee has monopolistic characteristics then the agreement will probably be set aside by a court. Conversely, if the plaintiff was a willing participant in an activity and had equal bargaining power with the releasee, the agreement will be upheld. This is especially true where the person signed the agreement.

Second, examine the agreement to determine if it clearly and unequivocally encompasses the cause of the injury. Remember that it is a contract and that all of the traditional rules of contract construction will apply. (E.g., a contract will be strictly construed against the drafter.)

Third, was the manner in which the injury occurred a reasonably foreseeable event in light of the language contained in the exculpatory agreement? This not only involves an inquiry into who the plaintiff is and his/her life experiences, but also whether the event producing the injury is one which ordinarily accompanies the activity. I.P.I. Civil No. 13.01 requires a defendant to prove:

First, that defendant and the plaintiff had an agreement under which the plaintiff was to participate in activities which exposed him to the danger that resulted in the injury of which he complains;

Second, that the danger was one that ordinarily accompanies the activities contemplated in the agreement;

Third, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;

Fourth, that the plaintiff voluntarily subjected himself to this danger; and

Fifth, that this danger was the cause of the plaintiff's injuries. *Illinois Pattern Jury Instruction, Civil No. 13.01.*

Fourth, has the releasee engaged in either intentional or wilful and wanton conduct towards the injured party. If so, the exculpatory clause will be found invalid as violating public policy.

Finally, if you are seeking to attack the validity of an exculpatory agreement, be creative. Each case has its own peculiar circumstances. Shut the office door, turn off the telephone intercom switch and carefully scrutinize the facts of your case. You may come up with a well reasoned and novel approach to dealing with your client's problem.

Supreme court does not detour in giving direction to straighten out curve issue

By Hon. Lester D. Foreman, Circuit Judge, Circuit Court of Cook County, Chicago

Hutchings v. Bauer, 149 Ill. 2d 568, ___ N.E.2d ___ (1992) merits the attention of the bar, firstly, because it presents an interesting factual scenario which could touch the practice of many lawyers representing landowners and, secondly, because it appears from the number of expressions by the supreme court justices that this case presented a lively problem, with a curve.

The defendant property owners operated a horse farm in Lake County which was adjacent to the roadway and a curve therein which presented a difficulty to many motorists in attempting to negotiate the same, the result being that many cars left the road at the curve and persistently crashed through the defendants' fence. The township refused a request to erect a protective guardrail, which prompted defendants to construct their own barrier. The barrier was constructed of vertical posts connected by horizontal posts or logs.

Defendants notified the county highway department with respect to the "barricade" they had put up on their property. The county posted "advisory" speed limit signs denoting a 25 miles per hour speed limit in this area which had an overall 35 miles per hour speed limit. In addition, the county erected chevron signs to warn motorists of the upcoming curve in the road.

The plaintiff's injuries resulted from traveling on the roadway in question and failing to successfully round the curve while on his motorcycle, thereby necessitating a maneuver whereby he attempted to pass between two of defendants' vertical posts. Unfortunately, plaintiff was unable to see one of the horizontal logs joining the vertical posts, since the log had become obscured by grass that had grown up around it. The inevitable occurred; the motorcycle crashed into the horizontal log, causing the plaintiff to sustain serious injuries.

Justice Heiple, in writing for the majority, was confronted with the issue of the property owners' duty to persons who deviate from the public way and are injured by devices, fences or abutments erected by the landowner to protect his property against the very deviation which precipitates the injury.

At the onset of the majority opinion, Justice Heiple observed that while foreseeability is an important factor in ascertaining whether a duty exists, legal duty does not have

its foundation bottomed solely upon foreseeability. *Lamkin v. Towner*, 138 Ill. 2d 510, 522-23, ___ N.E.2d ___ (1990).

Conversely, following the teaching of that often cited negligence case of *Cunis v. Brennan*, 56 Ill. 2d 372, 375, ___ N.E.2d ___ (1974), it is required that the foreseeability of the harm must be balanced against the "burdens and consequences" which result from a recognition of or regard for the duty.

In observance of the doctrine of foreseeability, the opinion suggests that in retrospect everything is foreseeable. Citing numerous cases wherein both the supreme court and appellate court have, with respect to artificial conditions placed on private property near roadways, assumed the foreseeability of injury arising therefrom but courts nonetheless did not impose a duty upon the landowners, the majority concluded that if foreseeability, exclusively, were the test of duty, in each of the cases cited the landowner would have been exposed to recovery, since just the fact that a person was injured would suggest it was a foreseeable accident with attendant liability.

The supreme court, in recognizing the basic right of the property owner to protect and use his property, concluded that the defendants had the right to use and protect their property in the fashion in which they did. The erection of a barrier to prevent the "incursions" of wayward motorists from crossing over the defendants' property was a right and a lawful activity. More importantly, it was observed that a contrary holding would constitute a taking of defendants' property without compensation, resulting in denial of substantive due process under both the federal and state constitutions. Unquestionably, the defendants were under no obligation to dedicate and donate a part of their land to the public for use as part of the roadway.

It is most important at this point to take note of the determination by the court that the barrier erected by the defendants was a reasonable one. This was based on the observation that the barrier was not designed as a trap or to cause harm or injury and basically was visible, at least in part.

Bringing the majority position to a termination, it was stated that the plaintiff drove his motorcycle at a speed in excess of the advisory speed limit. Plaintiff went off the road and then chose to drive between the vertical posts, coming into contact with a barrier that was intended as a barrier, solely to prevent vehicles from coming onto the defendants' property. Comparing the rights of the parties, the court observed that the defendant had a right to erect the barrier while the plaintiff was without a right to drive onto the defendants' land.

The case did not stop at this point. Justice Freeman advanced a special concurrence joined by Justice Cunningham. Justice Clark dissented, joined by Justices Bilandic and Miller. Justice Miller then presented a separate dissent.

In Justice Freeman's concurring opinion, he suggested that foreseeability is a troublesome concept, citing the classic case of *Lance v. Senior*, 36 Ill. 2d 516, ___ N.E.2d ___ (1967), involving a hemophiliac child swallowing a needle picked up on the floor at a home his mother was visiting for tea.

In exploring the foreseeability concept, Justice Freeman took note of Section 368 of the Restatement (2d) of Torts. This section deals precisely with the issue presented by the factual situation in the case at bar. The restatement sug-