

**RISK MANAGEMENT AND DEFENSE OF LAWSUITS
IN THE PARACHUTING INDUSTRY**

Parachute Industry Association Meeting

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The opinions expressed in this paper represent those of the author. They should not be construed as giving legal advice for any particular situation, in any particular state or legal jurisdiction. In any situation in which a legal question exists, you should seek competent legal advice from an attorney licensed to practice law in the relevant jurisdiction, who is familiar with aviation and skydiving law.

SKYDIVING IN THE UNITED STATES

In 1999, there were an estimated 311,511 skydivers in the United States, who made one or more jumps during that year.¹ Altogether, they made a total of approximately 3,400,000 skydives.² Unfortunately, also in 1999, there were 27 skydiving deaths in the United States.³ This number does not include an additional 21 skydivers and 5 pilots who died in skydiving aircraft crashes.⁴ And in 2004, there were 21 fatalities in the United States,⁵ In 2005, there were 27.⁶ As skydiving increases in popularity, and as the sport evolves technologically, it is inevitable that there will be accidents, with resulting injuries and fatalities. More skydiving aircraft loads, even if the risk factor remains constant, results in more accidents. The introduction of higher performance canopies, the acceptance of higher canopy wing loading and the evolution of new skydiving disciplines have created new categories of risk. And because of the public perception of skydiving as a “daredevil” activity, when accidents occur, press coverage may be extensive.

LAWSUITS ARE INCREASING AT AN ALARMING RATE

Since the last PIA symposium, in 2005, the number of lawsuits against skydiving entities has multiplied at an alarming rate. While some of this may be attributed to an increase in the total number of parachute jumps being made in the United States, and to an increase in the number of tandem jumps, other reasons seem to be important factors. Some of them are:

A. Increased advertising by attorneys. As more personal injury attorneys advertise in various media, including print, radio and television and the internet, many persons who are injured, and the families of those who die making parachute jumps, form an impression that money compensation is somehow due them for, even though the persons who decided to make the parachute jumps knew, prior to making the jumps, that in doing so, there was a real clear and present danger of severe injury or death. As a result of attorneys who are willing to take cases on a contingency fee basis, where they “roll the dice” that they may win big, or that a defendant will settle with them for a large sum, of which the attorney may get 40% or more of the gross amount of the award. (Costs of the lawsuit usually are then deducted from the plaintiff’s share, sometimes resulting in the plaintiff receiving less money than the attorney.)

B. A willingness of some persons in the parachute industry to act as expert witnesses for plaintiffs, or to cooperate with plaintiffs to locate persons who are willing to do so. Recently, there has been an alarming trend in which some skydivers have elected to act as self-proclaimed expert witnesses, espousing incorrect, if not absurd, theories as to the causes of injuries or deaths in the sport. This not only encourages plaintiffs to file lawsuits and provides fodder to the lawsuit to keep it going (with a resultant exponential increase fees and costs to the defendants), it provides an opportunity the media to pick up on the fact that there is a lawsuit in progress. Stories about skydiving injuries and deaths sell newspapers and attract radio listeners and television viewers. The more newspapers sold, or the more listeners or viewers, the higher the advertising rates that can be charged. That's the incentive that the media has to report that a lawsuit is in progress. Any such press hurts the parachuting industry. Only a solid front against aiding and abetting lawsuits against skydiving entities will protect the industry. Once this solid front is significantly breached, and particularly if one skydiving entity elects to blame another skydiving entity of the injury or death, the entire industry may topple like a house of cards. This is truly an unacceptable risk.

C. A departure from long established waiver forms and their use. As skydiving becomes more popular, many drop zones are reinventing the waiver document, cutting and pasting waiver provisions from existing waiver documents that have been proven over time to work to limit liability or to discourage lawsuits. The showing of a waiver tape, required by some manufacturers, has been eliminated by some drop zones, or a tape of their own creation, again not proven over time, is used instead. This encourages plaintiffs and their attorneys to test the legal sufficiency of the waiver document and to create new theories of liability based upon their perceived weaknesses that prolong lawsuits. Waivers used by long-established drop zones have been invalidated by judges, sometimes because of a change as small as an added semicolon. Where a valid waiver might have permitted a lawsuit to be dismissed at an early stage, or eliminated the possibility of a plaintiff having a trial by jury, the fact that the court invalidates a waiver has the opposite effect.

D. A departure from established parachuting equipment combinations. With the elimination of the experimental nature of tandem parachute jumping, users of tandem equipment tacitly became authorized to put together their own combinations of canopies, deployment device components, and tandem harnesses. Any time any part of the tandem equipment is changed from the combination that has been extensively tested by the manufacturers, the user, in effect, becomes a test parachute jumper. This, of course, increases the risk to the users, both the student and the tandem instructor. In the area of solo parachute jumping, the existing option to not follow manufacturer's recommendations with respect to equipment combinations, type of suspension line used, and canopy and pilot chute size can introduce uncertainty into the performance characteristics of the equipment and also render the user a test parachute jumper.

E. A tendency at some drop zones to focus too much on the commercial aspects of the

sport, rather than on safety issues. At some drop zones, a tandem and AFF jumper assembly line atmosphere eclipses the fundamental requirement of safety, both as to training and preparation of the tandem students and as to the timely replacement of parachuting equipment that has reached the end of its useful life. It is imperative that tandem students be properly trained so that they realize that they are not just going for a ride but must take an active part in the parachuting experience in order for it to be successful and safe. Proper body position is essential. And the instructor must be aware of the potential consequences of improper student body position and be prepared to immediately act to correct for such body position.

Not everyone is suited to make a parachute jump. Recent instances of tandem students falling out of harnesses mandates a careful analysis of each potential tandem student's suitability for making a tandem jump. If there is any doubt, it is better to err on the side of caution and refuse to make the jump.

With respect to equipment, a desire to get a few more jumps from a piece of gear that shows signs of excess wear may increase the likelihood of gear failure.

REGULATION OF SKYDIVING

There are relatively few state and federal regulations regulating skydiving. In addition to the Federal Aviation Regulations governing aircraft operation and maintenance and pilot qualifications and medical certificates, the two parts of the FARs (14 C.F.R.) related to skydiving are Part 65⁷ (parachute riggers) and Part 105⁸ (parachute jumping). Part 105, which was revised, effective 9 July, 2001, defines a parachute jump as "a parachute operation that involves the descent of one or more persons to the surface from an aircraft in flight when a aircraft is used or intended to be used during all or part of that descent."⁹ Many of the regulations in Part 105 are concerned with reducing the potential for conflict between parachute jumping operations and parachute jumpers and air traffic, or with preventing injury or damage to persons or property on the ground. They regulate such aspects of parachute jumping activities as radio equipment and use requirements¹⁰, jumps over or into congested areas¹¹, jumps onto airports¹², and flight visibility and clearance from clouds requirements.¹³ Other regulations in Part 105 concern the safety of the skydiver. These regulations include a requirement of a single harness, dual parachute pack, containing a main and a reserve parachute, both packed within the last 120 days and a requirement that the main parachute be packed by a certified parachute rigger, or the person making the jump, and that the reserve be packed by a certified parachute rigger.¹⁴ They also include regulations governing the use of static lines, a parachute deployment mechanism which uses a line attached from the man parachute container to the aircraft.¹⁵

Additional regulations, added in the revision, govern the use of tandem parachute systems for tandem parachute operations. Tandem parachute operations are defined in Part 105 as "a parachute operation in which more than one person simultaneously uses the same tandem parachute system while descending to the surface from an aircraft in flight."¹⁶ Tandem parachute systems were

developed in the early 1980's. They have become the predominant method used for student instruction and also, because of the reduced amount of training required, allow a greater number of persons to experience freefall and parachute flight. Tandem parachute systems are defined as "the combination of a main parachute, approved reserve parachute, and approved harness and dual parachute container, and a separate approved forward harness for a passenger parachutist."¹⁷ Until the revision of Part 105, tandem parachute operations were conducted under an exemption to the Part 105 requirement that a single harness, dual parachute system be used for each parachutist. The regulations require that one of the two parachutists must be designated as the "parachutist in command" and that the parachutist in command must meet certain experience and certification requirements, such as a minimum of 3 years experience in parachuting, completion of a minimum of 500 freefall parachute jumps using a ram-air parachute, completion of a tandem instructor course and certification as a tandem instructor.¹⁸ They also require that prior to boarding the aircraft for a tandem parachute operation, the passenger parachutist be given a briefing in certain emergency procedures, in the operation of the parachute and in approach and landing procedures.¹⁹

The events of September 11, 2001 have resulted in additional regulation of aircraft operations and of passenger and baggage screening. The TSA has even developed policies permitting and regulating the carriage of skydiving rigs as carry-on and checked baggage.²⁰ However, skydiving accessories, such as hook knives, may still be prohibited in carry-on baggage, under the current TSA policy that prohibits carriage in carry-on baggage of "knives of any type, except round-bladed, butter and plastic cutlery."²¹

Few state regulations govern parachuting. Those that do exist may include recreational land use statutes, protecting land owners from lawsuits for injuries that occur on their land, and waiver and release law, but they do not regulate the manner in which a parachutist conducts their jump.

Skydiving in the United States remains largely self-regulated by the United States Parachute Association (USPA). The Basic Safety Regulations (BSRs) it publishes in its Skydivers Information Manual²² form the basic framework of parachuting regulations. The BSRs regulate such areas of the sport as minimum opening altitudes, student training, maximum winds, drop zone landing area obstacle clearance requirements, and required parachute equipment. In some instances some of the BSRs are waived for specific jumps and/or types of parachuting instruction.²³

Although USPA has no legal enforcement power, most drop zones voluntarily affiliate with USPA, and most skydivers eventually become members of, and/or become licensed by, USPA. Even non-affiliated drop zones usually require that jumpers be members of U.S.P.A. in order to jump there. In 1999, USPA had 34,175 members,²⁴ and the threat of a USPA imposed sanction of revocation or suspension of a jumper's membership for violations of its regulations may serve to deter violations of the BSRs. To reduce the possibility of plaintiffs' success in lawsuits alleging negligence, all applicable BSRs should be strictly observed, since violations of the BSRs may be considered as industry standards, and such violations might be used to support an argument of negligence per se.

Likewise, drop zones may, and should, enforce regulations by grounding jumpers who violate the BSRs or who otherwise engage in hazardous skydiving practices (such as low openings

and low altitude radical hook turns). Drop zones may, and should, also inspect reserve parachute packing cards and riggers' seals to ensure that reserves are packed in accordance with the requirements of the FARs Part 65.²⁵

Skydiving is a sport with inherent risks. Although the risks can be minimized by careful planning, observance of all safety possible precautions, and use of modern equipment, skydiving is not an amusement park ride. Even if all reasonable precautions are taken, it is important to realize that accidents will occur. In addition, since most skydives are conducted from aircraft, and skydivers, parachute riggers and jump pilots are regulated by certain FARs, the potential for FAR violations exists on every skydive and in many skydiving-related activities. Of course, as in any accident in which a manufactured product is involved, plaintiffs' attorneys look for products liability causes of action against manufacturers to give them access to a deep pocket for recovery for their clients. It is in this framework that risk management becomes important.

WHAT IS RISK MANAGEMENT?

Risk management is the study and the reduction of the occurrence of accidents, injuries, fatalities, and liability exposure, which may occur in sport of parachuting activities and in other areas of the parachute industry. Risk management also includes minimizing the risk of FAA enforcement action against pilots, aircraft mechanics, parachute riggers and even jumpers.

WHY RISK MANAGEMENT IS IMPORTANT

Risk management will not eliminate lawsuits. Anyone can sue anyone, whether or not they are justified in doing so, and a vigorous defense to such lawsuits must still be presented. The purpose of risk management is to minimize the occurrence of situations which may lead to lawsuits and to discourage the filing and maintenance of any such suits by creating obstacles and defenses to their success. Likewise, FAA enforcement actions do occur with or without a legal or factual basis, but awareness of, and compliance with, the federal aviation regulations will help to reduce the risk of occurrence.

Every entity and participant in the parachuting industry has a great deal of time and money invested in their part of the industry. While the cost of risk management may, in some cases, be significant, it pales in contrast to the costs of defending a lawsuit. Such costs may include attorneys' fees of \$200 to \$400 per hour or more, in addition to deposition costs of a dollar or more per transcribed page, copying costs, travel costs, expert witness fees of hundreds or thousands of dollars and many other costs. In addition to defense costs, there is, of course, the possibility of a Plaintiff verdict, which may have devastating financial consequences for the defendant parachuting entity or entities.

Potential loss victims, who must utilize risk management, include: manufacturers (system

and component), drop zone operators, jumpmasters/tandem/AFF instructors, photographers, jump pilots, owners/lessees of land from/onto which parachute jumping operations take place; riggers, parachute packers, other drop zone employees, volunteers, subcontractors of the drop zone or any other entities involved, aircraft owners/lessees, pilots, aircraft mechanics (A&P/AI), USPA, the municipality in which the drop zone is located, and even the Federal Aviation Administration;

Types of risk include, but are not limited to, death or injury caused by another jumper, by aircraft, by aircraft accidents, by parachuting accidents, by pilot error, by rigging mistakes, by maintenance mistakes, by manufacturing mistakes or design errors, by or to spectators, by slips and falls on the premises, by intentional torts, and by combinations of any of these. Lawsuits, in recent years, reveal an increasing risk of claims against employers and employees (including tandem instructors,) alleging sexual harassment. In addition, FAA certificate actions may deprive an airman or rigger temporarily or permanently of the means to earn a living. FAA civil penalty actions may cost a violator thousands of dollars in civil penalties.

TYPES OF CIVIL LAWSUITS

Negligence

Most parachuting accident lawsuits involve allegations of negligence against one or more defendants. Claims of negligence can include negligent supervision, training, operation of the parachute system, aircraft, jump procedures, ground operations, etc. The list is limited only by the creativity of the plaintiff's lawyer. Obviously, lawsuits can be filed whether or not they are based in fact, and all must be vigorously defended, or a default judgment, for failure to defend, may be entered against the defendant failing to do so.

Defenses to negligence actions in parachuting cases include:

a. waiver or release - the plaintiff, with full knowledge of the dangers involved, waived or released their right to sue by signing a written document so stating;

b. express and implied assumption of risk - in choosing to make a parachute jump, the plaintiff, either expressly or impliedly assumed the risk which caused the injuries received (e.g., parachute malfunction, canopy collision, aircraft accident). Assumption of risk has three required elements:

- i. One must have full knowledge of a hazardous condition or risk;
- ii. The risk must be patently dangerous to him;
- iii. He must voluntarily expose himself to the hazard created.

c. contributory negligence (or in some states, comparative negligence) - the plaintiff caused their own injury, in whole or in part, and the damages claimed by the plaintiff must be reduced to the extent the plaintiff was negligent;

Waivers or Releases

Waivers or releases are a powerful deterrent to skydiving lawsuits. They have been upheld in most jurisdictions. In *Hulsey v. Elsinore Parachute Center*²⁶, waivers and assumption of the risk agreements are discussed extensively. In upholding the waiver and assumption of risk agreement, the court stated that:

Parachute jumping . . . is not an activity of great importance to the public and is a matter of necessity to no one. . . .²⁷

Because the agreement, in both its language and format, was not one which could even remotely operate to defeat the reasonable expectations of plaintiff and hence be unconscionable if enforced, we hold that it did not so operate and hence that its enforcement against him was not unconscionable.²⁸

The court further stated that parachute jumping was not an ultra hazardous activity so as to render the defendant liable under a theory of strict liability:

Although parachute jumping is clearly dangerous, as clearly pointed out to the plaintiff during the classroom instruction he received from defendant, it can be performed safely just as can skiing and white-water rafting.²⁹

In *Paralift, Inc. v. Superior Court of San Diego County, et al*³⁰, the court, in upholding a release document signed by the decedent, found that

. . . the broad language of this release expressed the intent of the parties that the decedent could participate in any activities concerning skydiving carried out by Paralift (the company operating the aircraft), for an indefinite period after the release was signed and at any appropriate and mutually agreed-upon location. The language of the release is a clear and unequivocal waiver of liability and contains no ambiguities in expressing the intent of the parties . . . The decedent's express release of any negligence liability on the part of Paralift binds his heirs . . . and provides Paralift with a complete defense . . . Based on the language of the release, it was evidently the intention of the parties that it have a broad and ongoing scope, unlimited to a certain time period, a certain geographical vicinity, or certain weather conditions.³¹

Likewise, in *Theis v. J & J Racing, et al.*,³² a Florida appellate court, in affirming summary judgment for the defendant, stated that:

The essential issue for our determination is whether the release and waiver signed by the decedent was clear, unambiguous, unequivocal, broad enough and specific enough to protect appellees from liability for their own negligence, even if their actions constituted gross negligence. We hold that the release was so clear, unambiguous, unequivocal, broad and specific.³³

....

Since the term "negligence" as used in the release is not limited, it must be construed as intended to encompass all forms of negligence, simple or gross.³⁴

It is important that there be full disclosure, prior to execution of the waiver and release document, of the risks inherent in parachuting activities, including injury and death, and including those resulting from defective products and from gross negligence. The more graphic and complete the disclosure, the more likely the waiver will be upheld. If a skydiving entity expresses concern that they may scare prospective students away by emphasizing the risks in skydiving, it is helpful to explain to them that cost of defending one personal injury or wrongful death lawsuit, if the risks are not fully disclosed, is far greater than the profits to be made from a hundred student skydives.

Some states, such as Virginia, hold that waiver agreements are against public policy. Therefore, in those states, they are held to be void as a matter of law. See, for example, *Hiatt v. Lake Barcroft Community Association*,³⁵ in which the Virginia Supreme Court held that

... the pre-injury release ... (from liability for negligence) ... is prohibited by public policy and thus, it is void.³⁶

However, even in Virginia, the doctrines of assumption of risk, contributory or comparative negligence, and enforcement of a covenant not to sue may still apply. See, for example, *Rhea v. Horn-Keen Corp.*,³⁷ in which the court held that

... the plaintiff and the decedent freely and knowingly entered into the waiver and release agreement, and such agreement was supported by adequate consideration. ...³⁸

... the court is of the opinion that the agreement between the parties . . . does not involve either a public utility or a quasi-public situation, and the agreement of release, voluntarily executed by the parties, should be upheld.³⁹

In Rhea, the court *sua sponte* also raised the issue of assumption of risk and stated that

The essence of the assumption of the risk is venturousness. . . . The release . . . should have warned . . . (the decedent of the conditions as they existed on the date of the accident). . . . The decedent assumed the attendant risk when he voluntarily joined . . . (the hazardous activity). Thus the court holds that the record establishes the assumption of risk as a matter of law.⁴⁰

Covenants not to sue

Covenants not to sue should be included in all waiver and release documents executed by skydiving participants. They provide defendants with a good offensive tool to use in defending lawsuits. A counterclaim of breach of the covenant not to sue creates a powerful deterrent to the continuation of a plaintiff's lawsuit, since even if they were to prevail and obtain a judgment against the defendant, if the defendant's counterclaim is upheld, the defendant's damages would be the amount of the judgment, plus defense costs and attorney's fees. Most Plaintiff's attorneys in parachuting related lawsuits work on a contingency fee basis. This means that they are paid a percentage of any damage awards they may obtain. From a practical standpoint, they, therefore, look for cases in which there is insurance involved, which may lead to an early settlement, or for cases in which they have a high probability of success. A counterclaim based upon a covenant not to sue stops many in their tracks, and encourages many others to dismiss their suits, when they weigh the amount of work they will have to do against a small potential return.

Products Liability

Products liability claims may include claims for defective design, breach of express or implied warranty of fitness, defective manufacturing, defective warning labeling, or strict liability in tort. It is ironic that because products liability insurance is unavailable or is prohibitively expensive for parachute industry manufacturers, most manufacturers are self-insured, and the money to defend lawsuits usually must be drawn from the research and development funds.

Disclaimers of express and implied warranties are useful in reducing the risk of liability, as are warning labels depicting, verbally and in symbols, the dangers inherent in the use of the product. Waivers and releases executed by the consumer may be of help to show express assumption of risk, though they most likely will not be effective in a manufacturing defect case. See *Westive v. Look Sports, Inc.*,⁴¹ in which the court held that "a product supplier's attempt to contract away strict liability in tort is void as against the public interest."⁴² Compare, however, *Lipson v. Superior Court*,⁴³ in which the California Supreme Court held that "a plaintiff's assumption of risk may

operate as a complete or partial bar to recovery in a strict liability action."⁴⁴

Potential products liability exposure may also exist against a seller or manufacturer if a parachute is used by a jumper who is not experienced enough to use a parachute of that particular performance level. Therefore drop zones, as well as manufacturers and dealers, should know the user's experience level prior to selling, or providing, any equipment and should always disclose the risks inherent in using a high performance parachute without proper prior experience and training.

Strict liability has four elements:

a. The product must be defective and unreasonably dangerous to the consumer or the consumer's property. The test for this is whether or not a product is dangerous beyond the expectations of an ordinary consumer, using the product in its intended manner, or in a reasonably foreseeable manner. Thus, a manufacturer must protect a consumer against even misuse, if it is foreseeable (e.g. automobile crash worthiness, childproof cigarette lighters and tamper-proof packaging.)

b. The product defect must have existed when the product left the manufacturer's control and can not have undergone any subsequent significant changes.

c. The product must cause a physical injury (as opposed to mere economic injury.)

d. Strict liability extends to anyone who is foreseeably endangered by the product.

There are three types of defects:

a. a defect in manufacturing (deviation from the design specifications or the normal product produced by the manufacturer);

b. a defect in the design of the product; The question of whether or not a product design is defective must include a test whether the benefits of the product's design outweigh the risks of the design.

c. a failure to warn about the risks of use of the product, even if not actually known.

In defending products liability lawsuits, defense counsel should consider the following in formulating a defense:

1. Was the product designed in accordance with the state-of-the-art technology, available at the time the product was manufactured and sold to the Plaintiff? Research and development departments of manufacturers are constantly trying to improve upon their previous designs to make safer products, but at any given time, there is a state-of-the-art design level. Continued manufacture of products with a safety level that is less than state of the art may increase liability exposure to manufacturers of those products.

2. Was the product modified, altered or misused, or were changes and alterations made to the product which proximately caused or contributed to Plaintiff's injuries? Often parachutists or riggers, will combine components produced by one manufacturer with components produced by others (e.g., a parachute container made by one manufacturer being combined with parachutes that are larger or smaller than those recommended by the container manufacturer.) This may result in a parachutist becoming a test jumper on each jump made with the equipment, since no manufacturer can test every possible component combination and may void any express or implied warranties.

Such modifications may include a change of container-canopy configuration, a change in suspension line material, or even a change from rubber bands to tube stows. When tandem parachute operations were conducted under exemptions to the FARs, it was possible for the manufacturers to prohibit component substitution, but since the revisions to Part 105, the probability that component substitution will occur has increased, since they are not prohibited by the FARs. It is suggested that tandem parachute system manufacturers enter into end user agreements with the users of their systems. These agreements may discourage component substitution and may provide an extra level of protection for the manufacturer, if such component substitution occurs. Use of a particular canopy by someone with fewer jumps than the manufacturer's recommended number, or use of a smaller than recommended canopy for the weight of the jumper may constitute misuse of a product.

3. Was maintenance properly performed with compliance with all manufacturer's service bulletins and/or Airworthiness Directives? Manufacturers are constantly receiving reports from users of their products. If a pattern of malfunctions develops and the manufacturer is able to find a way to eliminate or reduce the problem causing them, they will usually send notification to all registered owners, as well as publish a notice in the two major skydiving publications, Parachutist and Skydiving and on their Internet websites. Parachute riggers, who pack the reserve parachutes, required under the FARs to be packed every 120 days,⁴⁵ may also uncover problems, but it is ultimately up to the owner of the equipment to inspect their equipment prior to using it for a parachute jump and to make the necessary modifications or corrections. The log books and maintenance records of the product and of the product's use should be examined (e.g., the reserve parachute packing record card and the record of periodic maintenance to the automatic activation device (AAD), if installed).

4. Did the warnings affixed to the product contained the necessary amount of information sufficient, according to industry and governmental standards and guidelines, to communicate to the user the dangerous potential of the product and the possible consequences of its misuse? Warnings must take into consideration who will be the end user, so that the warnings adequately communicate the dangers to that user. Therefore, a warning in English may not be sufficient warning to non-English-speaking consumers. Note, however, that defenses to failure to warn may exist if the danger is obvious, if the injury would have occurred even with a proper warning, if the product user is a sophisticated user, or if there is voluntary express or implied assumption of a known risk.

5. Were there intervening acts beyond the control of the Defendant for which the Defendant had no legal responsibility (e.g., improper parachute packing or equipment assembly, jumper collisions during aircraft exit or in freefall, collision with a part of the aircraft doorframe or other structure, dead or weak AAD battery, improper exit altitude or location, improper body position at opening, low hook turn before landing)?

6. Was military equipment involved on a military jump? In such cases a government contractor defense may be applicable to defend against a lawsuit against a manufacturer. The requirements for a government contractor defense are:

- a. The U.S. Government supplied the product specifications;
- b. The equipment conformed to the supplied specifications;

c. The manufacturer warned the U.S. Government of the known dangers of use of the equipment;

7. Assumption of Risk may be a defense to products liability lawsuits, if the injured party was aware of the risks prior to use of the product. Such risks may not be limited to a specific cause of the injury but may extend to the general risk of physical injury or death. Misuse of a product is also a defense.

8. Compliance with laws, regulations (such as TSO's) and industry standards support an argument that a product is not defective, but such compliance is not conclusive.

Other Civil Lawsuits

Other lawsuits for such actions as theft, assault and battery, trespass, libel and slander, etc. may be filed as a result of the actions of one or more individual employees or agents of a business entity.

With regard to minimizing the risk of sexual harassment complaints, under Federal or state law, parachuting entities should ensure that they have a clear policy, preferably conspicuously posted in the workplace and restated in employee handbooks, against any form of sexual harassment.

Tandem instructors must pay particular attention to cautioning students, both of the same sex and the opposite sex, that they must touch them in order to properly fasten their harnesses and to control them in freefall. Tandem operators should consider disclosing this in their waiver and release documents and should consider obtaining consent for such touching prior to its occurrence. Obviously, any consent to touching contemplates only reasonable touching, and unnecessary or patently offensive touching must be avoided at all times.

In many lawsuits, liability may be imputed to the principal (the business entity), if the action was done within the course and scope of the employee's employment and was reasonably foreseeable, or if the employer became aware of the problem and failed to take measures to correct it and to discipline the offender.

Many parachute jumping operations are conducted using independent contractors, but the relationship between the parties should be closely scrutinized to ensure that the relationships are not actually employer-employee relationships, which may increase the employer's exposure under worker's compensation statutes or under Title VII⁴⁶ or state civil rights acts⁴⁷.

Airport Land Use

The FAA has recently ruled that general aviation airports can not discriminate against skydiving activities, if they receive Federal funds under a grant assurance agreement with the FAA. The case is *Skydive Paris, Inc. v. Henry County, Tennessee, Federal Aviation Administration*, Docket Number 16-05-06.(January 20, 2006).⁴⁸

In this case, Skydive Paris had been operating at the Henry County Airport for almost ten years when the airport manager ordered them to cease operation, alleging that, due to the lack of available space and the number of aircraft operations and skydiving activities, a potentially hazardous environment . . . (had) developed at the airport."⁴⁹

Skydive Paris won its appeal, and the FAA determined that:

- a. FAA Order 5190.6A provides that parachute jumping is an aeronautical use.⁵⁰
- b. Parachute jumping activities must normally be accommodated at a federally-obligated airport.⁵¹
- c. There exists a long-standing precedent for affording skydivers the same operational latitude given to an aircraft in flight or while taxiing . . .⁵²

FAA ENFORCEMENT ACTIONS AND CIVIL PENALTIES

Participants in skydiving activities must observe all relevant provisions of the FARs. These may include FAR Parts 43⁵³ (Maintenance, Preventive Maintenance, Rebuilding, and Alteration), 61⁵⁴ (Certification: Pilots and Flight Instructors), 65⁵⁵ (Certification: Airman Other Than Flight Crew Members), 67⁵⁶ (Medical Standards and Certification), 91⁵⁷ (Air Traffic and General Operating Rules), and 105⁵⁸ (Parachute Jumping). Other FARs may also be applicable in certain instances. Failure by a pilot or skydiver to observe the applicable FARs may lead to suspension or revocation of a participant's airman's certificates, or a civil penalty (a monetary penalty.) Many of the regulations contained in Part 105 prohibit a pilot in command from allowing a parachute operation to be conducted in violation of the particular regulation.⁵⁹ This means that a pilot may be found to be in violation an FAR in situations in which the primary violator is the skydiver and not the pilot, and in situations in which the pilot may have no ability whatsoever to prevent the occurrence of the violation..

Of course, skydiving participants other than pilots, mechanics, and parachute riggers do not usually hold FAA certificates, which are involved in alleged violations. Therefore, while the suspension or revocation track is limited in its application to airmen and riggers, a civil penalty action may be brought against a skydiving activity participant who holds no FAA certificate.

In some states, if a violation of a statute or FAR is found, it may be admissible in a civil case to show negligence.

Requirement of a Commercial Pilot's Certificate

The FAA requires that jump pilots (even non-commercial club jump pilots) have a commercial pilot certificate. In *Administrator v. Rawlins*,⁶⁰ the NTSB stated that it is a violation of

the FARs (14 C.F.R. § 61.118) to act as a pilot in command (PIC) of an aircraft carrying passengers for compensation without a commercial pilot certificate.

Whether the club is a profitable venture is not of importance. . . . (The club) . . . held itself out to the public as a place where aspiring skydivers could, for a fee, receive instruction and participate in a dive. As such, the paying passengers on board the skydiving flight at issue were entitled to have a properly-certificated pilot operate the aircraft.⁶¹

The NTSB also stated that the pilot's interests as an unpaid volunteer, who likes to fly and enjoys the company of skydivers, are different from the interests of the jumpers, who pay money to the skydiving club to receive instruction and to participate in skydives. Therefore, the pilot does not have a common purpose with the skydivers to even permit the sharing of the flight expenses with the jumpers.

Jumping Through Clouds

In recent years, the FAA has suspended a jump pilot's airman's certificates for permitting jumpers to jump through clouds, and the National Transportation Safety Board has upheld these suspensions. Although it is evident to skydivers that a jumper in freefall and/or under a high performance canopy can travel miles from the time they exit the aircraft, the NTSB has stated that, under FAR 105.29 (a)⁶²,

... a pilot must actively participate in the decision-making process as to whether or not a jump should go forward . . . because section 105.29 imposes upon pilots a duty, separate and independent from that of the parachutists onboard, to determine whether the intended jump can and will be made in compliance with cloud clearance requirements . . . *Administrator v. Foss*.⁶³

The NTSB, in *Foss*, goes on to state that

... upon reaching the intended drop zone, . . . (the pilot) did nothing to evaluate whether the parachutists could reach their intended landing point without passing through clouds . . . (he) could have maneuvered the aircraft so as to be able to view their landing zone for himself . . . (instead of relying solely on others in the aircraft to make that determination.)⁶⁴

It is also important to remember that there is a minimum visibility requirement and that the cloud clearance requirement is not merely a requirement to remain clear of clouds but is a requirement not to make a parachute jump, or to permit a parachute jump to be made, if the jumper cannot remain certain distances above, below, and horizontally from clouds, depending upon the altitudes involved in the jump.⁶⁵

Therefore, it is most prudent that a jump pilot make an independent determination of whether a jump can be successfully completed without violating cloud clearance requirements and that they remind each jumper, prior to conducting the jump, that they should not violate cloud clearance requirements. At least this would suggest a possible defense to future actions against pilots, based upon 14 C.F.R. § 105.29(a), though even this may not be enough to avoid pilot liability, since in *Administrator, v. Smith*,⁶⁶ the NTSB held that

... although ... (the pilot) positioned the aircraft in the general vicinity (of the exit point) he deferred to the judgment of the parachutists as to when they should actually exit the aircraft ... (and) that being the case, ... (the pilot) cannot be said to have taken such steps as might be appropriate or necessary to ensure cloud clearance.⁶⁷

Failure to Announce Parachute Jumping Activities on the Appropriate Radio Frequency

Pilots who fail to announce parachuting activity over the unicom frequency may be violated for creating a hazard to air traffic, under 14 C.F.R. § 105.13, when a parachutist passed in front of a landing Cessna 182 and no unicom announcements were made. In *Administrator, v. Woermann*,⁶⁸ the NTSB held that the standard to which pilots are held is that they exercise “the care and judgment expected of a reasonable and prudent pilot,”⁶⁹ and that “standard practice, and prudence, dictates that a pilot ... make announcements of parachuting activity over the unicom frequency.”⁷⁰

A Success Story

One success story in the string of NTSB rulings against jump pilots is *Administrator v. Chandler*,⁷¹ in which a pilot successfully defended his abrupt turns and steep spiral descent at a rate estimated to be 5800 feet per minute, which the FAA alleged were aerobatic maneuvers within four nautical miles of the center line of a Federal airway and contrary to the operating limitations of the aircraft, a Beech King Air.

In this case, the NTSB held that the FAA failed to present a foundation of evidence, due to the lack of expertise of their primary witness, to demonstrate that the pilot’s actions constituted aerobatic flight, that evidence showed that “the questionable although apparently widely practiced abrupt maneuvering was represented as ‘normal’ for parachute jumping operations,”⁷² and that there was a “lack of specificity in the King Air flight manual regarding prohibited aerobatic flight.”⁷³ Although the pilot prevailed in this instance, it is always possible, and even probable, that the FAA will violate another pilot for the same actions and that next time, their witnesses will be better

prepared to argue the FAA's case. It is, therefore, wise to counsel pilots to be thoroughly familiar with the aircraft flight manual and to remain conservative in flight maneuvers to minimize the chances that such a violation will be directed at them.

Drug and Alcohol Convictions

After-jump activities often include alcohol consumption, either at the drop zone or at a neighboring bar or restaurant. A long day of jumping may end with a long evening of drinking and partying with fellow jumpers. After such evenings, the participants typically get in their cars and drive home, risking DUI and other alcohol-related convictions.

A conviction after November 29, 1990, or the cancellation, suspension, or revocation of a motor vehicle operator's license, for a violation of any Federal or state statute relating to operating a motor vehicle while intoxicated or impaired or under the influence of alcohol or drugs ("Motor Vehicle Action"), that occurs within three years of a previous such conviction is grounds for suspension or revocation of any FAA certificate, or the denial of an application for such a certificate for a period up to 1 year from the date of the subsequent Motor Vehicle Action.⁷⁴

A frequently violated part of 14 C.F.R. § 61.15 is § 61.15(e), which mandates that an FAA certificate holder provide a written report of each Motor Vehicle Action to the FAA, Civil Aviation Security Division (AAC-700), P.O. Box 25810, Oklahoma City, OK 73125, not later than sixty days after the Motor Vehicle Action.⁷⁵

The report must include:

- (1) The person's name, address, date of birth, and airman certificate number;
- (2) The type of violation that resulted in the conviction or the administrative action;
- (3) The date of the conviction or administrative action;
- (4) The state that holds the record of conviction or administrative action; and
- (5) A statement of whether the motor vehicle action resulted from the same incident or arose out of the same factual circumstances related to a previously reported motor vehicle action.⁷⁶

Failure to comply with this requirement is grounds for denial of an FAA certificate for a period of one year after the date of the motor vehicle action, or suspension or revocation of any certificate or rating held.⁷⁷ The usual penalty requested by the FAA, however, is a 60-day certificate suspension. It is important to note that this special notification to the FAA, to this specific address, is required in addition to the required disclosure in any application form for an FAA medical. The FAA compares their information with the information contained in the National Driver Registry to discover these violations.

Refusal to submit to a drug or alcohol test when requested by a law enforcement officer or the FAA Administrator is also grounds for denial, suspension or revocation of FAA certificates.⁷⁸

TFR'S AND OTHER POST 9/11 CONSIDERATIONS

The events of September 11, 2001 have created a new area of concern for drop zone operators, pilots and even individual skydivers. In addition to the usual Temporary Flight Restrictions (TFR) that accompany travel by the President of the United States and other governmental officials, TFR's have been established around areas where large groups of people are congregated, such as stadiums, amphitheaters and amusement parks (e.g. Disneyworld and Disneyland,) and also in the airspace above and in proximity to places where there are concerns for public safety or national security, such as power plants (nuclear, hydroelectric or coal,) dams, bridges, refineries, industrial complexes and military facilities. While a traditional parachuting operation may be familiar with the usual regulations regulating parachuting jumps made at their facility, TFR's present a trap for the unwary if airspace closes for traveling dignitaries or if a demo jump is made in unfamiliar airspace.

Increased airport security may affect a jumpers ability to travel with their parachute equipment. Although the carriage of parachute equipment is specifically permitted, both as carry-on and checked baggage, there have been instances where uninformed screeners create problems for the traveler wishing to do so. The Transportation Security Administration has specific guidelines and regulations for both passengers and screeners, and those wishing to travel with parachuting equipment should be familiar with these guidelines and regulations.⁷⁹

Obviously, security is no joking matter. But a joke or comment regarding security issues, if made in the wrong place, may subject the maker not only to detention and criminal penalties, but also may result in loss of an FAA issued certificate, rating or authorization. If the TSA deems that person to be a security threat, it can so notify the FAA, and upon the issuance of a Final Notification of Threat Assessment, the FAA will revoke any certificate, rating or authorization issued under Part 61 of the Federal Aviation Regulations.⁸⁰

SUGGESTIONS TO MINIMIZE THE RISKS OF ACCIDENTS, INCIDENTS, LAWSUITS, ENFORCEMENT AND CIVIL PENALTY ACTIONS:

The following considerations are useful in risk management counseling to clients in the parachuting industry:

1. Identify the risks. Look at each person and area of the skydiving operation, and ask the question, "What could this person or company do wrong, (or what could they allegedly do wrong), which could create the potential of a liability suit?"
2. Obtain liability insurance, or at least defense cost insurance, where possible. Even if aircraft or premises insurance does not cover the potential liability damages, it may cover defense costs under a duty to defend, with a reservation by the insurance carrier of its right to deny coverage of the damages at a later date. For pilots who are members of AOPA, enrolling in the AOPA insurance plan will provide coverage for defense costs in FAA enforcement action and civil penalty cases.
3. Obtain worker's compensation insurance for all employees, whether full-time, part-time, paid or volunteer. Although such insurance may not be available from traditional insurers,

it may be available from state insurance pools, such as the Joint Underwriting Association (for Florida businesses.)

4. Utilize a properly drafted waiver, release, and assumption of risk agreement. The waiver and release agreement should be drafted by, or in consultation with, a knowledgeable attorney and should include paragraphs disclosing the risks of injury and death and disclaimers and waivers of express and implied warranties of merchantability and fitness for a particular use of the equipment used. The document should further include waivers and releases of claims for negligence, gross negligence and products liability causes of action, including those based upon hidden, latent and obvious design defects. It should also contain paragraphs concerning a specific assumption of the risks of negligence, gross negligence, products defects, including design and manufacturing defects and paragraphs agreeing to third party indemnification and a covenant not to sue. It is essential that the agreement be drafted in a manner clearly conveys its meaning and its scope, without ambiguous statements and without typographical errors and conflicting statements.

5. Ensure that each and every employee and jumper signs one or more waivers, releases and assumption of risk agreements, after full disclosure of the risks involved, including serious injury and death (e.g., by viewing the Relative Workshop Tandem Vector Waiver videotape, reading of fatality reports, etc.) If a tandem equipment manufacturer requires that their waiver agreement be used, it must be used; however, the drop zone may also use their waiver and release document in addition to that of the tandem equipment manufacturer.

Many drop zones operators require that jumpers who jump at their drop zones sign a waiver document annually. In litigation situations that may arise, this practice may serve to further support a defense argument that there was continued intent by the signer of the document to consent to its terms.

Although USPA policy now permits minors to skydive, it is important to keep in mind that a waiver and release signed by a minor's parent or guardian may be ineffective, since a parent may not contract away the rights of a minor. In fact, some tandem parachute equipment manufacturers prohibit the use of their equipment with tandem passengers under the age of eighteen. The best policy regarding jumps by minors is: **DO NOT PERMIT ANYONE UNDER THE AGE OF MAJORITY (18 in most instances) TO MAKE A PARACHUTE JUMP OR RIDE IN THE JUMP AIRCRAFT AS AN OBSERVER.** Although we have not yet seen a case of invalidation of a skydiving waiver, case law is replete with decisions holding that a parent (or other legal guardian) has no authority to waive the rights of a minor.⁸¹ In Florida, for example, a Court has held that:

. . . a minor child injured because of a defendant's negligence is not bound by her contractual waiver of her right to file a lawsuit.⁸²

6. Control movement of jumpers and spectators around the drop zone. Take measures to minimize the risk of jumper/spectator collisions, of jumpers or spectators walking into a

propeller or a rotor blade, and of contact by jumpers or spectators with other hazardous conditions that may exist around the drop zone. Locate parachute landing areas away from spectators, parked cars, concession stands, etc. Forbid low hook turns. Set up rules as to who is permitted where on the drop zone and at what times, and enforce them vigorously. If persons from the press wish to be on the drop zone in areas other than the usual spectator viewing area, it would be advisable to have them sign waivers acknowledging that they understand the risks of being present in such other areas (including the jump aircraft) and that they accept the risks and agree not to sue should they be injured or killed from any cause whatsoever.

7. Ensure that the workplace is free from hazards.

8. Maintain good records on employees and independent contractors. The records should include entries regarding training received (both initial and recurrent), aviation medical expiration dates, a resume of qualifications, previous employment and training and signed waiver and release agreements. In the case of pilots, track licenses and ratings held, flight currency requirements and medical expiration dates, so that the pilot's compliance with the Federal Aviation Regulations regarding flight status can be determined each day prior to the commencement of jumping activities.

9. Manufacturers, distributors, retail equipment sellers, and drop zone operators should ensure that all parachute equipment has visible warning labels affixed to it relating the hazards and injury and death potential in utilizing the equipment. Multilingual and symbolic warnings are also advisable. The warnings should include warnings about the experience level required for high performance canopies. Drop zones should post warning placards in their public areas.

10. Manufacturers should do everything possible to maintain the highest level of quality control throughout the manufacturing process. Products liability lawsuits are very difficult to defend when manufacturing defects are present in the product and cause the injury. Plaintiffs' lawyers have and will continue to argue that manufacturing defects are unanticipated by the user and therefore do not constitute a known risk, and that they may, therefore, be outside the scope of otherwise available assumption of risk and waiver and release protection.

11. In speaking with potential students, or with the general public, and in advertising, informed consent to inherent risks is crucial. Therefore, NEVER trivialize the risks inherent in skydiving. NEVER tell any prospective student that skydiving is safe. Do not make self-serving statements such as "Don't worry, I have dropped hundreds of students and none of them has ever gotten hurt. Nothing will happen to you." Such statements may be later quoted by a plaintiff and their attorney to attempt to invalidate signed waiver documents. It is better to lose a hundred potential students because they are too scared to sign up, than to pay the costs of one liability lawsuit brought by, or on behalf of, an injured/killed student, which may claim that the student didn't understand the risks prior to signing the waiver and release document. (\$200 x 100 is only \$20,000. Defense of a lawsuit can cost five or ten times that amount.)

12. In student training and in briefing experienced jumpers new to the drop zone, disclose to the students hazardous areas which are located around the drop zone, such as power lines, bodies of water, cattle, railroad tracks, rocky fields, trees, runways, areas for potential turbulence, etc. Have each jumper acknowledge that they understand the location of all such hazardous areas, preferably by locating them on an aerial photograph and acknowledging, in writing, that they know where they are.

13. Set up a corporate structure in which assets (e.g., parachutes and aircraft) are owned by corporations separate from that of the jump operations. Actively maintain each corporation, with minute books, annual meeting minutes, and resolutions for major corporate actions. Any money put into any corporation should be documented as a loan or as a capital contribution. Any money taken out to pay the shareholders or officers and directors should be properly documented and justified. (Speak with an accountant.) A corporation which is not operated and maintained as a corporation may permit a plaintiff's attorney to "pierce the corporate veil" and attack the assets of the individual shareholders. To avoid errors, it is best to have a competent attorney set up the corporations, act as their registered agent, maintain the corporate books, and conduct the annual meetings.

14. Evaluate the benefits and detriments of using independent contractors against those of using employees. Be aware of the Internal Revenue Service and other agency regulations and rulings on the definition of independent contractors and of the pitfalls of not having worker's compensation insurance, if it is ultimately determined by a court that it was required. Even for skydiving activities, worker's compensation insurance may be available through state joint underwriting association sources. If it were to be determined that an injured or deceased independent contractor were actually an employee, without worker's compensation insurance coverage, the consequences for the employer could be disastrous.

15. Know the employees and independent contractors. Use good hiring practices, such as thorough written applications, interviews and background and qualifications checks. Ensure that all employees and independent contractors are properly trained, including training in customer relations and sexual harassment issues, and that they are competent for the jobs they are to perform. For both independent contractors and employees, written contracts are advisable to reduce the possibility of misunderstandings in areas such as duties, performance requirements, and rules and regulations to be observed. Create and enforce written policy manuals for employees and independent contractors. Document any violations in writing and retain the records in the employee's or independent contractor's employment file. Ensure that all government notices (e.g. minimum wage notice, Equal Employment Opportunity, Family and Medical Leave Act, Federal Minimum Wage, OSHA, Employee Polygraph Protection Act) are posted, as may be required by law.

16. Ensure that a restraint system is used by each parachutist when required during flight and that crewmember and passenger seatbelts are of an approved type.

17. Ensure that seatbelts are attached and stowed to prevent them being snagged by exiting jumpers;

18. Maintain the aircraft in proper condition, following all required maintenance timetables and procedures. Ensure that all airworthiness directives are timely complied with;

19. Ensure that pilots are properly rated and properly trained. Mere possession of a commercial pilot's license does not guarantee that the holder is knowledgeable and capable enough to drop jumpers without additional training;

20. Know the fuel supplier, and take all measures necessary to eliminate fuel contamination or misfueling. Ensure that all fuel is properly filtered and that the proper type and grade of fuel is used in the aircraft;

21. Minimize the risk of fuel starvation; The FARs provide that no person may begin a flight under day VFR conditions unless the aircraft has enough fuel (considering wind and weather conditions) to fly to the first point of intended landing and to fly for 30 minutes after that.⁸³ Fuel exhaustion has been a factor in jump aircraft crashes, and fuel exhaustion in the pattern, after dropping jumpers, inexcusably does occur;

22. Verify the aircraft weight and balance prior to each flight;

23. Observe all aircraft operating limitations;

24. Ensure that prospective students and other jumpers have as much time as they feel they need to read and sign the waiver and release forms, even if it means slowing up jump operations to do so. Do not minimize, in any way, the importance of the waiver and release forms. Saying that “it’s just a formality” will be used against you in a lawsuit. If there is a waiver video, such as Relative Workshop’s Tandem Vector Waiver video, make sure that every prospective student sees it before they sign the waiver. In the case of Relative Workshop and other tandem equipment, tandem masters and instructors who will use the equipment must also view the video (if one is available, or required to be used by the manufacturer) and sign a waiver prior to its use.

25. Don’t give prospective jumpers any answers to questions that may be construed as legal advice. If a prospective jumper has a question about what language in the waiver and release document means, tell them that you can’t give an interpretation of the document and that if they have any questions, they must consult with a lawyer prior to signing the form, even if it means that they won’t jump that day.

26. Maintain a zero tolerance policy toward the possession and use of illegal drugs anywhere on the drop zone premises, in the aircraft, and prior to, during and after jump operations.

27. Maintain a zero tolerance policy toward the use of alcohol prior to and during jump operations. Observe the “eight hour from bottle to throttle”⁸⁴ rule for pilots and the low level of blood alcohol permitted for any pilot operating an aircraft (.04 percent).⁸⁵

28. Follow all Federal (FAA and others), State, Local, USPA, and equipment manufacturer requirements, recommendations and regulations, and any Letters of Agreement with any controlling Air Traffic Control facilities. Failure to do so might be deemed negligence per se and might result in the party failing to do so being held liable. Observe recommended weight limitations and sizing recommendations for canopies and harnesses.

29. Inspect all student and rental equipment on a regular schedule. If a piece of equipment is in marginal condition, repair or replace it before the next use. Require AADs on all student and rental equipment, and, of course, on all tandem equipment, and encourage AAD use by all jumpers at the drop zone. AADs save lives. Also, encourage all jumpers to carry an accessible hook knife.

30. Make sure that the aircraft is legal. This includes annual and 100 hour inspections and compliance with all STC’s (e.g., for jump door removal/installation, additional passengers in the aircraft, etc.) Ensure that there are sufficient seatbelts in the aircraft for each occupant and that there is a placard in the aircraft advising the occupants to use their seatbelts for takeoff and landing.

31. Ensure that the pilot is legal. This includes proper ratings for the flight involved (single or multi-engine, commercial, type rating, etc.) as well as currency requirements.
32. Make sure the jump is legal. File NOTAMS and secure airport authorization when required. Observe airspace restrictions, don't drop jumpers through clouds or exit over congested areas.
33. Pilots prior to making the first parachute jump each day should check for any TFR's that might affect the contemplated parachuting activities and/or aircraft flights.
34. Be familiar with, and observe, all relevant regulations of Parts 43, 61, 67, 91, 105, and 135 of the Federal Aviation Regulations, and the U.S.P.A. BSR's.
35. Be familiar with, and follow, appropriate recommendations in FAA Advisory Circulars AC 105-2, the Airman's Information Manual, and the U.S.P.A. Skydiver's Information Manual.
36. Constantly monitor and re-evaluate the risk management procedures in use, and modify them as often as necessary to improve upon them.
37. Prior to any accident or lawsuit arising, establish a relationship with a competent attorney, who is familiar with parachuting operations and the aviation, tort and contract law applicable to your particular business.
38. Determine if ratings are appropriate for the parachutes packed. Ensure that alterations are only performed by Master Parachute riggers on parachutes for which they are rated.⁸⁶
39. Ensure that the rigger meets the performance standards and currency requirements of 14 C.F.R. § 65.129.
40. Ensure that the record keeping requirements of 14 C.F.R. § 65.131 are met.
41. Ensure that the rigger has the necessary tools and facilities to accomplish the work to be performed.
42. Ensure that a seal is placed on each parachute packed, as required.
43. Ensure that all Federal Aviation Regulations and manufacturer's bulletins and rigging procedures are complied with. Don't cut corners in inspecting and packing procedures.

IF AN ACCIDENT OCCURS

Contingency plans should be made for each potential accident type (e.g., aircraft accident with and without injuries/fatalities, fatal/non-fatal parachuting accident and employee or spectator accident, products liability lawsuit.) Legal counsel should read accident/fatality reports in Parachutist, Skydiving and elsewhere, and should work with the drop zone client or manufacturer to try to create an environment at the drop zone or manufacturing site which minimizes the chances of that type of accident/incident occurring. Working with the client before an accident occurs ensures that no time is lost and nothing is overlooked when one does occur.

Some areas to be considered in developing action plans, and recommendations to be made to clients in the parachuting industry, are:

1. In a non-fatal accident, give first aid. Do not move a victim, until medical assistance arrives, unless absolutely necessary (e.g., a post crash fire). In a clearly fatal accident, do not touch the body. Wait for law enforcement/medical officials to arrive.

2. After any accident, protect the scene, including the equipment, aircraft rigger's, and jumper's logbooks, parachute packing cards, and any videotapes or photographs taken before, during and after the jump. This will help to prevent spoliation of evidence claims in lawsuits and may help in the investigation to determine what occurred. Ensure that all equipment items are thoroughly photographed, without disturbing, as much as possible, their condition and location at the scene. Try to discourage the police from pulling any handles/pilot chutes, and forbid anyone else from doing so. It is better that this be done in a controlled environment rather than by someone unfamiliar with parachuting equipment. Having an established procedure to ensure that the parachuting equipment is not tampered with until a proper investigation can be conducted may help to convince the law enforcement investigators to merely take possession of the equipment until a later time when such an investigation can occur. The procedures should be written and should specify that the equipment must not be used, dismantled, cleaned or altered in any way, except to remove the injured personnel from the equipment or out of danger. This protection should not only include the canopies, harness and container, but should extend to the AAD, altimeter, helmet, goggles and gloves, as well.

Spoliation of evidence has different levels of significance in different states. the consequences of spoliation can range from an adverse inference against the party destroying or losing the things or documents in anticipation of, or during, a lawsuit, to outright dismissal of a lawsuit, to a separate cause of action for such destruction or loss. Additional factors, such as whether or not the loss or destruction was deliberate, the degree of prejudice to the other party, and the availability of other equally probative sources of evidence may also affect the significance of a claim of spoliation, in a particular case, in a particular state. Spoliation of evidence, by a plaintiff, can work in favor of a defendant, if a court determines that the defendant's ability to defend the case is seriously compromised by the spoliation. And photographic evidence may not be sufficient to relieve the party possessing the evidence of the requirement to permit inspection by the other party or parties.

From a defense standpoint, the ability to inspect evidence in its unaltered state may be crucial to proof of defenses, such as product alteration, improper maintenance or product misuse.⁸⁷ And the duty to preserve potential evidence extends not only to the equipment involved, but to all relevant records and even to emails and other forms of electronic evidence.⁸⁸

Of course, an equipment manufacturer must balance its competing interests of preserving potential evidence in its original state versus examining the evidence to determine if there was an equipment failure or malfunction. This dilemma is not easily resolved, particularly in view of the pressures often put on manufacturers by law enforcement and Federal Aviation Administration officials to quickly determine the cause of an accident or incident.

3. It is a good idea to assign a person to log all events that occur and actions taken. Try to obtain statements from as many potential witnesses as possible, such as the other parachutists on the jump, witnesses on the ground, the aircraft pilot, etc. Ask any and all witnesses to give written, signed, statements as to what they saw and/or heard. Get their names, addresses and

telephone numbers. Protect the statements in the same manner as the original waiver and release agreement, so that they can later be provided to legal counsel/investigators.

4. Maintain an accident/incident kit at the drop zone. It should include, at least, a digital still camera, video camera, extra disks, tape and batteries, a micro-cassette tape recorder with extra batteries and tapes, ac adapters for the video camera and battery chargers for the still camera and video camera batteries, latex gloves, large garbage bags and plastic tie closures, a tape measure, a yardstick (to include a size reference in photographs), pens, pencils, note pads, paper, yellow warning tape, rope, and flashlights with extra batteries.

5. Stop jumping operations if necessary or if advisable.

6. Make copies of any and release documents signed. Protect all originals as if the lives of the business principals depend upon them. The life of the business may!

7. Protect all aircraft logbooks and maintenance records and parachute rigging data and packing cards in the same manner as the original waiver and release agreement. Likewise, make and preserve copies of relevant currency pages of the pilot's logbook, as well as the pilot's airman's certificates and medical certificate.

8. Ensure that next of kin are notified, preferably by law enforcement officials.

9. Make no statements as to fault. Any statements made could be later construed against the Defendant.

10. Make only general statements to the press, such as, "The matter is under investigation." Statements such as, "Accidents happen." could enrage potential plaintiffs, who otherwise might not sue. Keep in mind that the press is out to get a story. They are not the friends of the parachuting entity.

11. Immediately contact and consult with competent legal counsel. Don't wait to be served with a lawsuit before doing so. Competent legal counsel means someone who is familiar with the applicable law and with parachuting operations and the defense of parachuting related lawsuits.

12. Unless unavoidable (i.e., required by law), make no statements to the FAA, law enforcement officials, NTSB, or anyone else, until competent legal counsel has been consulted. Again, in any statement made, never admit fault.

13. Cooperate with law enforcement authorities to the extent required, BUT, if at all possible, without permitting them to tamper with, or otherwise affect the condition of, the parachute equipment. Ensure that competent legal counsel is involved in all such matters.

14. Videotape all post-accident equipment inspections, using continuous taping, rather than starting and stopping the videotape recording.

15. Timely file all required written reports (e.g., the NTSB accident report), with the advice of competent legal counsel.

16. Visit the injured at home or in the hospital, if appropriate, but make no statements as to fault.

17. Analyze the accident/incident from a risk management perspective; Determine what could have been done to prevent the accident/incident and ensure that measures are put in place to minimize the chances of a recurrence of a similar type of accident/incident.

CONCLUSION

As skydiving and the parachute industry evolve, the risks to all entities and individuals involve in the industry continue to expand in both frequency and variety. Risk management will never completely eliminate the risks in the parachute industry, nor will it ever eliminate lawsuits and FAA certificate and civil penalty actions. It will, however, if properly performed, minimize the risk exposure for those who practice it and will minimize the chances of suffering the devastating effects of defending and/or losing a lawsuit filed against a business or an individual, personally, or the cost of civil penalties and loss of airman's certificates. The more universally risk management techniques are applied, the more opportunity the parachute industry will have to progress, without the impediment of such time-consuming lawsuits and defense costs.

END NOTES

1. http://www.uspa.org/1999_stats.htm.
2. Id.
3. Sitter, USPA 1999 Fatality Summary, Parachutist, April, 2000, at 31.
4. Scott, Crash Course, Parachutist, April, 2000, at 38.
5. http://www.uspa.org/about/page2/relative_safety.htm
6. Id.
7. 14 C.F.R. § 65.1 et seq.
8. 14 C.F.R. § 105.1 et seq.
9. 14 C.F.R. § 105.3.
10. 14 C.F.R. § 105.13.
11. 14 C.F.R. § 105.21.
12. 14 C.F.R. § 105.23.
13. 14 C.F.R. § 105.17.
14. 14 C.F.R. § 105.43.
15. 14 C.F.R. §105.47
16. 14 C.F.R. §105.3
17. Id.
18. 14 C.F.R. §105.45
19. Id.
20. <http://www.tsa.gov/public/display?content=090005198005b0f5>
21. http://www.tsa.gov/interweb/assetlibrary/Permitted_Prohibited_12_18_2003.pdf

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- 22 United States Parachute Association Publications, THE 2001 SKYDIVER'S INFORMATION MANUAL (2001) [hereinafter cited as SKYDIVER'S INFORMATION MANUAL] Section 2-1.
 23. SKYDIVER'S INFORMATION MANUAL, supra Section 2-2.
 24. http://www.uspa.org/1999_stats.htm
 25. 14 C.F.R. § 65, Subpart F.
 26. Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333 (1985).
 27. Id. at 343.
 28. Id. at 345.
 29. Id. at 346.
 30. Paralift, Inc. v. Superior Court of San Diego County, et al., 23 Cal. App. 4th 748 (1993).
 31. Id. at 757, 758.
 32. Theis v. J & J Racing, et al., 571 So.2d 92 (2nd DCA 1990).
 33. Id. at 93.
 34. Id. at 94.
 35. Hiatt v. Lake Barcroft Community Association, 244 Va. 191 (1992).
 36. Id. at 5.
 37. Rhea v. Horn-Keen Corp., 582 F.Supp. 687 (W.D.Vir. 1984)
 38. Id. at 691.
 39. Id. at 692.
 40. Id.
 41. Westive v. Look Sports, Inc., 17 Cal. App. 4th 1715 (1993).
 42. Id. at 1742.

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43. Lipson v. Superior Court, 31 Cal.3d 362 (1982).
 44. *Id.* at 372.
 45. 14 C.F.R. § 105.43(b)(1).
 46. 42 U.S.C. § 2000e-5 et seq.
 47. See, for instance, the Florida Civil Rights Act, Fla. Stat. ch. 760.01 et seq. (2000).
 48. *Skydive Paris, Inc. v. Henry County, Tennessee, Federal Aviation Administration*, Docket Number 16-05-06
 49. *Id.* at 13.
 50. *Id.* at 15.
 51. *Id.*
 52. *Id.* at 18.
 53. 14 C.F.R. Part 43.
 54. 14 C.F.R. Part 61.
 55. 14 C.F.R. Part 65.
 56. 14 C.F.R. Part 67.
 57. 14 C.F.R. Part 91.
 58. 14 C.F.R. Part 105.
 59. See, for example, 14 C.F.R. § 105.5, § 105.7, § 105.13(a)(1), § 105.17, § 105.19(a), §105.21(a), § 105.23, § 105.25(a), § 105.43, § 105.45(a), and § 105.49(a).
 60. Administrator v. Rawlins, NTSB Order No. EA-4583 (1997).
 61. *Id.* at 4
 62. 14 C.F.R. § 105.29(a), now 14 C.F.R. §105.17(a)
 63. Administrator v. Foss, NTSB Order No. EA-4631 (1998) at 5.

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64. Id. at 6.
65. 14 C.F.R. § 105.29, now 14 C.F.R. §105.17.
66. Administrator, v. Smith, Order EA-4622 (1998) at 5.
67. Id. at 6
68. Administrator, v. Woermann, EA-4659 (1998).
69. Id. at 4.
70. Id. at 5.
71. Administrator v. Chandler, EA-4659 (1999).
72. Id. at 13.
73. Id.
74. 14 C.F.R. § 61.15.
75. 14 C.F.R. § 61.15(e).
76. Id.
77. Id.
78. 14 C.F.R. § 61.16.
79. See “Travel Tips”: http://www.tsa.gov/public/interapp/editorial/editorial_1254.xml. See also: “Transporting Special Items - Parachutes”: <http://www.tsa.gov/public/display?content=090005198005b0f5d>; Also see: Section 17.2 of Version 4.0 of the “Screening Checkpoint Standard Operating Procedure.”
80. 14 C.F.R. § 61.18 (c)(2). See also 14 C.F.R. § 65.14 (c)(2).
81. See, for instance, Childress v. Madison County, 777 S.W.2d 1 (Tenn. 1989), Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (Conn. S.Ct. 1958).
82. Dilallo v. Riding Safely, Inc., d/b/a Bar-B Ranch, 687 So. 2d 353, 357 (Fla. 4th DCA 1997).
83. 14 C.F.R. § 91.151.

84. 14 C.F.R. § 91.17(a)(1).

85. 14 C.F.R. § 91.17(a)(4).

86. 14 C.F.R. § 65.125(b).

87. See Anderson v. Schwartz, 687 N.Y.S.2d 232 (1999).

88. See Computer Associates International, Inc. v. American Fundware, Inc., 133 FRD 166 (1996 US Dist Lexis 14053).