Michigan's Equine Activity Liability Act: Are We Galloping in the Right Direction?

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Horses, by their nature, present risks because they are large, powerful, unpredictable animals that act on instinct. Indeed, a horse with no dangerous or aggressive history nevertheless has the potential to hurt anyone who is riding, driving, handling, or near it. Injuries bring the possibility of litigation.

Michigan's Equine Activity Liability Act, M.C.L. § 691.1661, et seq. (the "EALA") is one of 46 state laws nationwide (all but California, New York, Maryland and Nevada) that in various ways limit or control liabilities in their equine industries. Michigan's EALA states that qualifying defendants (horse owners, stables, industry professionals, trainers, breeders and others) should not be liable if an "equine activity participant" sustained injury, death or damage from an "inherent risk" of equine-related activities, subject to numbered exceptions. Michigan's EALA includes four exceptions, including providing "faulty tack or equipment," providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity," and "dangerous latent conditions of land" where an equine activity takes place "for which no conspicuous warning sign is posted." Michigan's fourth EALA exception departs substantially from the national trend and applies when a qualifying defendant "commits a negligent act or omission that constitutes a proximate cause of the injury, death or damage."

In the years that followed the Michigan EALA's passage, many have debated the existence and purpose of the "negligence" exception. Some, like this author, believe the EALA's "negligence" exception has been interpreted to improperly swallow up its immunities. This author believes that Michigan should eliminate the negligence exception.

LEGISLATIVE HISTORY

The EALA had no "negligence" exception when introduced in the Michigan legislature in 1993 as HB 5006. In its place, by comparison, was an exception for "an act of omission that constitutes willful or

wanton disregard for the safety of the participant, and that act of omission was a proximate cause of the injury or death." HB 5006 also included a fifth exception, removed from the bill before its enactment that allowed liability for intentionally caused injuries. When HB 5006 proceeded to the Senate, a substitute bill deleted its 'willful or wanton" exception and replaced it with an exception for a "negligent act or omission that constitutes a proximate cause of the injury, death, or damage." That version became the law.

THE PROMISE OF IMMUNITIES

Section three of the EALA promises liability limitations when an "equine activity participant" sustains injury from an "inherent risk of equine activity." More specifically, Section three provides:

> Except as otherwise provided in Section five [the law's list of exceptions, discussed below], an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. Except as otherwise provided in section five, a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity.

Section two of the EALA provides important definitions that include "equine" (a "horse, pony, mule, donkey, or hinny"), "engage in an equine activity," "equine activity sponsor," "equine professional," and "inherent risk of an equine activity." Section four excludes regulated horse race meetings and provides that "two persons may agree in writing to a waiver of liability beyond the provisions of this act and such waiver shall be valid and binding by its terms." Section six requires "equine professionals" to post warning signs with specified language and to repeat this "warning" language in their contracts.

In 2010, the Michigan Supreme Court in B*eattie v. Mickalich,* 486 Mich. 1060; 784 N.W.2d 38 (2010), addressed the interplay between the EALA's immunity provisions and the scope of its "negligence" exception. In *Beattie*, the plaintiff was injured while helping the defendant saddle a horse named "Whiskey" that was described as "green broke," but the horse allegedly reared up and injured her. The lawsuit alleged claims under the EALA's "negligence" exception. The trial court dismissed the case, and the Michigan Court of Appeals affirmed. In doing so, it suggested that the EALA's "negligence" exception was not intended to swallow up the immunities. As to whether "negligence" claims could be viable, the Court held that this could occur only if that act or omission involves something other than inherently risky equine activity. A divided Michigan Supreme Court reversed. The majority held that the EALA did not abolish negligence claims, and a plaintiff has no obligation to plead a claim in avoidance of the law's "negligence" exception.

The divided Supreme Court in *Beattie v. Mickalich* reflects the differing opinions involving the scope of the EALA's immunities and its "negligence" exception. In this author's opinion, the Michigan EALA's "negligence" exception should be eliminated and replaced with a "willful and wanton" or "willful or wanton" exception for five reasons.

First, this amendment would put Michigan in line with approximately 27 states whose EALAs have "willful/wanton" exceptions instead of "negligence" exceptions.

Second, this would restore the EALA's intent when introduced into the legislature 20 years ago.

Third, lawsuits could still proceed under a "willful/wanton misconduct" exception.

Fourth, the amendment would not disturb the EALA's three other exceptions of "faulty tack or equipment," providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity," and "dangerous latent conditions of land."

Fifth, this amendment would offer meaningful protection to Michigan's equine industry.

ABOUT THE AUTHOR

Julie I. Fershtman, a shareholder with Foster Swift, is widely considered to be one of the nation's most experienced Equine Law practitioners. Her practice also focuses on commercial litigation and insurance coverage and defense. She is listed in *The Best Lawyers in America*® 2013 and 2014.