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WHITE PAPER ALERT

California -

Primary Assumption Of Risk

CONFIDENTIAL COMMUNICATION

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Nalwa v. Cedar Fair (Cal. Supreme Ct. - Dec. 31, 2012)

Happy New Year from the California Supreme Court. Or perhaps I should say...Yes, Virginia, some people work on New Year's Eve, in this instance the California Supreme Court, cranking out an opinion so the winners have something extra to celebrate and giving the losers an even bigger excuse to drown their sorrows.

On New Year's Eve the California Supreme Court issued the long awaited opinion in Nalwa v. Cedar Fair – eviscerating the decision of the California Court of Appeals and unambiguously upholding the right of recreation facilities to assert the primary assumption of the risk defense.

Nalwa is a case about bumper cars and primary assumption of the risk. The California Supreme Court has led expansion of this doctrine in the sports context, applying the doctrine to immunize defendants in a wide variety of settings. It does so again, making clear that the doctrine does not only apply to sporting activities, but applies in any recreational activity.

The court uses common sense to show that the whole point of bumper cars is to bump, and that allowing liability for bumping accidents might indeed chill the underlying activity. Could a defendant prevent or limit head-on bumping by only allowing one-way travel by the bumper cars or, as here, more rigorous enforcement of its policy against this practice? Sure - and, yes, such efforts may have prevented the fracture here. Nonetheless, common sense, and the California Supreme Court, tell us that when you get into a bumper car that allows multi-directional travel, some head-on bumping might occur, that is a classic example of assumption of the risk. Common sense also tells us there is a downside to chilling this practice. Some people want to slam (and be slammed) head on. To permit post event explanations of subjective intent would risk elimination of this recreational practice.

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We all have some experience with the underlying recreational concepts. We can draw lines between what is inherent in an activity and what is not, while preserving the character of the underlying act. Judges likely do so better than juries who are confronted by episodic cases involving sympathetic, injured, participants. So, if you're headed out to an amusement park, watch out for those bumper cars...they might just get a tiny bit more violent after today.

Please contact us with any questions....and Happy New Year.

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