

# THE THREE “L”S LAWSUITS LEGAL ISSUES LESSONS LEARNED

A Presentation by  
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And  
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# **LEGAL DISCLAIMER**

The following is intended to be general information only – not specific legal advice. Consult with competent counsel familiar with your organization and the laws pertinent to its operations.

# YOUR GOAL; OUR PURPOSE TODAY

## Overall Goal:

### The Endeavor to Run a Quality Program

Choosing to Responsibly Manage Risks Rather than Just Avoid Lawsuits.

Responsibly Managing Risks considering Risk of Loss to Participant and to Operation.

And Being Prepared in the event of an incident and resulting lawsuit

Learning from the cases

# OUTLINE FOR CASE STUDIES

- 1) Who gets sued and why?
- 2) Causes of action, including negligence and the duty/standard of care
- 3) Available defenses
- 4) Use of releases
- 5) Third party contractors
- 6) Insurance
- 7) Staffing
- 8) Safety measures
- 9) Incident/Crisis Response? Post incident action or inaction
- 11) Laws/case law, standards and practices in the industry
- 12) Org's/its staff members' external representations; Org's internal policies
- 13) Social media issues
- 14) Documents to defend the Organization

Wilderness Company

Owner

Field Staff/Employees

Third Party Contractor

Sponsors

Board members

**WHO GETS SUED AND WHY?**

# LAWSUIT

## Causes of action alleged

Negligence

- Duty, Breach, Causation and Damages

Gross negligence, willful, reckless misconduct

Failure to warn

Violation of law – e.g. CPA

Premises Liability

Product Liability

Negligent hiring, training or supervision of staff

Negligent supervision or instruction of participants

Breach of Contract

Intentional Infliction of Emotional Distress

## Available Defenses

Release/Waiver

Assumption of Risk

Inherent Risk

Defeat element/s of Claim

Comparative Fault (Potential Reduction of Damages)

Governmental Immunity

Immunity – volunteer

Statute of Limitations

# PLAYA TORTUGA



## SI LO ATRAPA LA RESACA

- ◆ No luche contra la corriente
- ◆ Nade fuera de la corriente y luego hacia la orilla
- ◆ Si no logra escapar, manténgase a flote pedaleando
- ◆ Si necesita auxilio, grite o agite los brazos

## PARA SU SEGURIDAD

- ◆ Sepa nadar
- ◆ Nunca nade solo
- ◆ Si no está seguro, no se meta al agua

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## CASE STUDY – OGLETHORPE UNIVERSITY COSTA RICA STUDY ABROAD PROGRAM

Downes & five other adult students

Program claimed to follow “best practices” to “ensure safety of students.”

Paid tuition to Oglethorpe University for credits

Three Professors planned and led trip

No effort to investigate dangers/risks in CR

Downes signed Participant Agreement

Tour Operator – Horizontes (guide & bus driver)



# HIRED “HORIZONTES” – A THIRD PARTY CONTRACTOR

University contracted Costa Rican operator - “Horizontes” to provide tour guide/transport

Suggested day trip to Playa Tortuga, west coast beach

No information about ocean danger

No instructions given about rip currents

No warning signs

No lifeguards on duty and no safety equipment

No mention of swimming/ no ban on swimming

# DOWNES WENT DOWN IN A RIP CURRENT

Pre-trip, a professor asked if they were “good swimmers.” They said yes.

Professor said on a prior trip a weak swimmer wore a life jacket in water.

Downes (an adult) chose to swim in ocean

Downes was caught in a rip current

Another student tried to rescue him

Downes drowned; body found 3 days later

US Consular Advisory:  
Dangerous beaches in  
Costa Rica.



# WRONGFUL DEATH LAWSUIT

Downes' parents filed a lawsuit against Defendant Oglethorpe University for the wrongful death of their son.

Claims of Negligence and Gross Negligence

Georgia State Law

➤ Other potential defendants?

# PICK A SIDE - DEFEND YOUR POSITION

- **Make your case.... Who wins?**
  - **What is your argument?**
  - **What supports your position – documents, witnesses?**
  - **Relevant industry practices/standards?**
  - **Relevant Organization conduct or policies?**
  - **Other issues?**

# WHAT REALLY HAPPENED???

## **CASE SUMMARY – URBAN PIONEER EXPERIENTIAL ACADEMY**

Robby and Mikhail (17 years old)

UPEA - Charter School in San Francisco

Academic and experiential program for students with drug and alcohol issues

Challenge Class with Wilderness Expedition - required

Class consisted of wilderness training & community service

2 months training in class

Each family signed an Acknowledgment of Risk form

Discussion - alcohol or drugs in wilderness forbidden

Signed Wilderness Expedition Contract “I will not use alcohol or drugs”.

# THE UPEA WILDERNESS TRIP

Ventana Wilderness, California

Late winter

3 Patrol Solo groups – 9 students each

Base Camp 3 miles away – all teachers

No cell phones/no SAT phones

Moonless night



## WHAT HAPPENED FOR UPEA

Patrol Solo at Horse Bridge campsite

Other patrols visited (against the rules)

2 Intruders (Age 23) entered Horse Bridge

Intruders offered alcohol

UPEA students drank alcohol

Altercation between students and Intruders.

Robby and Mikhail left to hike to Base Camp

No flashlights

They both fell off narrow trail to bottom of ravine

Lawsuits filed by both families alleging negligence and gross negligence and reckless misconduct.

Suits against UPEA, its Director, the teacher and the San Francisco School District.

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A photograph showing a steep, eroded hillside. The foreground and middle ground are dominated by a dirt path or road that has become a gully, filled with loose soil and scattered rocks. The soil is a light brown or tan color. Sparse, dry-looking vegetation, including small shrubs and grasses, is scattered across the slope. In the background, a larger, more densely vegetated hillside rises, covered in dark green trees and bushes. The sky is a pale, overcast blue. The overall scene suggests a natural process of erosion or a man-made path that has become unstable.

**CASCADE OF EVENTS**

# PICK A SIDE - DEFEND YOUR POSITION

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**Wilderness Expedition: Acknowledgement of Risk (all participants)**

Los Padres 2/24/03 through 3/5/03  
Location of Expedition Dates of Expedition  
Instructor: Les Schrisper Phone # 388-4066

In consideration for allowing my child/ward to participate in the Urban Pioneer Experiential Academy (UPEA), Challenge Semester – Wilderness Expedition, I agree as follows:

I am familiar with the UPEA'S Challenge Semester Wilderness Expedition. I understand that this program has an exemplary safety record and relies on extensive safety training for its participants. I also understand that this program has risks, including certain risks, which cannot be eliminated without fundamentally altering the unique character of this program. The same elements that contribute to the unique character of this program can be the cause of loss or damage to my belongings, accidental injury, and illness or, in extreme cases, permanent trauma, disability or death. I understand that UPEA believes it is important for me to know in advance what to expect and to be informed of the programs' inherent risks. The following describes some, but not all, of those risks.

Wilderness Expedition involves travel out of doors where participants are subject to numerous risks, environmental and otherwise. Activities include hiking, backpacking, camping, cross-country travel and rope work (climbing/rappelling).

Challenge Semester Wilderness Expeditions occur in remote places where communication and transportation are difficult. Consequently, even though staff may implement certain medical practices according to training, emergency evacuations and medical care may be delayed.

Travel is by vehicle to the wilderness and then by foot over rugged, unpredictable off-trail terrain, which may include boulder fields, downed timber, river crossings, high mountain passes, slippery rocks and snow-covered trails. Participant risks include rockslides, falling, slipping in knee-high rivers, getting lost as well as environmental risks.

Environmental risks and hazards include rapidly moving cold water; insects, snakes and predators, including (rarely) large animals; falling and rolling rock; lightning and unpredictable forces of nature, including weather, which may change to extreme conditions without notice. Possible injuries and illnesses include hypothermia, frostbite, high altitude illnesses, sunburn, heatstroke, dehydration, and other mild or serious conditions.

Instructors may be required to make decisions under difficult circumstances, based on a variety of perceptions and evaluations, which by their nature are imprecise and subject to error.

I understand this description of the risks involved is not complete and that other unknown or unanticipated risks may result in property loss, injury or death. I agree to assume responsibility for all the risks inherent in the activities, which comprise these Wilderness Expeditions. My participation in this program is purely voluntary, no one is forcing me to participate, and I elect to participate with full knowledge of the inherent risks.

I and my parent(s) or guardian, if I am a minor, represent that I am fully capable of participating in this program. Therefore, I, and my parent(s) or guardian, if I am a minor, assume and accept full responsibility for me and for the injury, death, loss of personal property, and expenses suffered by me and/or them as a result of my voluntary participation in this program, as well as for any loss, injury or death resulting from my own negligence.

Robby Bogomolny  
Participant's Name (print)  
Inna Bogomolny  
Parent/Guardian Name (print)

V. Bogomolny  
Participant's Signature  
I. Bogomolny  
Parent/Guardian Signature (must sign for minor under 18 yrs.)  
Date  
Date

# PARTICIPANT AGREEMENT LANGUAGE MISSING....

Release of all claims

Waiver of right to a jury trial.

Arbitration clause for disputes.

Damages limited.

Participant agreed to indemnify the company for the cost of defending a lawsuit; and

Release for gross negligence.

Acknowledge risks

Release negligence

NOT gross negligence

NOT willful misconduct

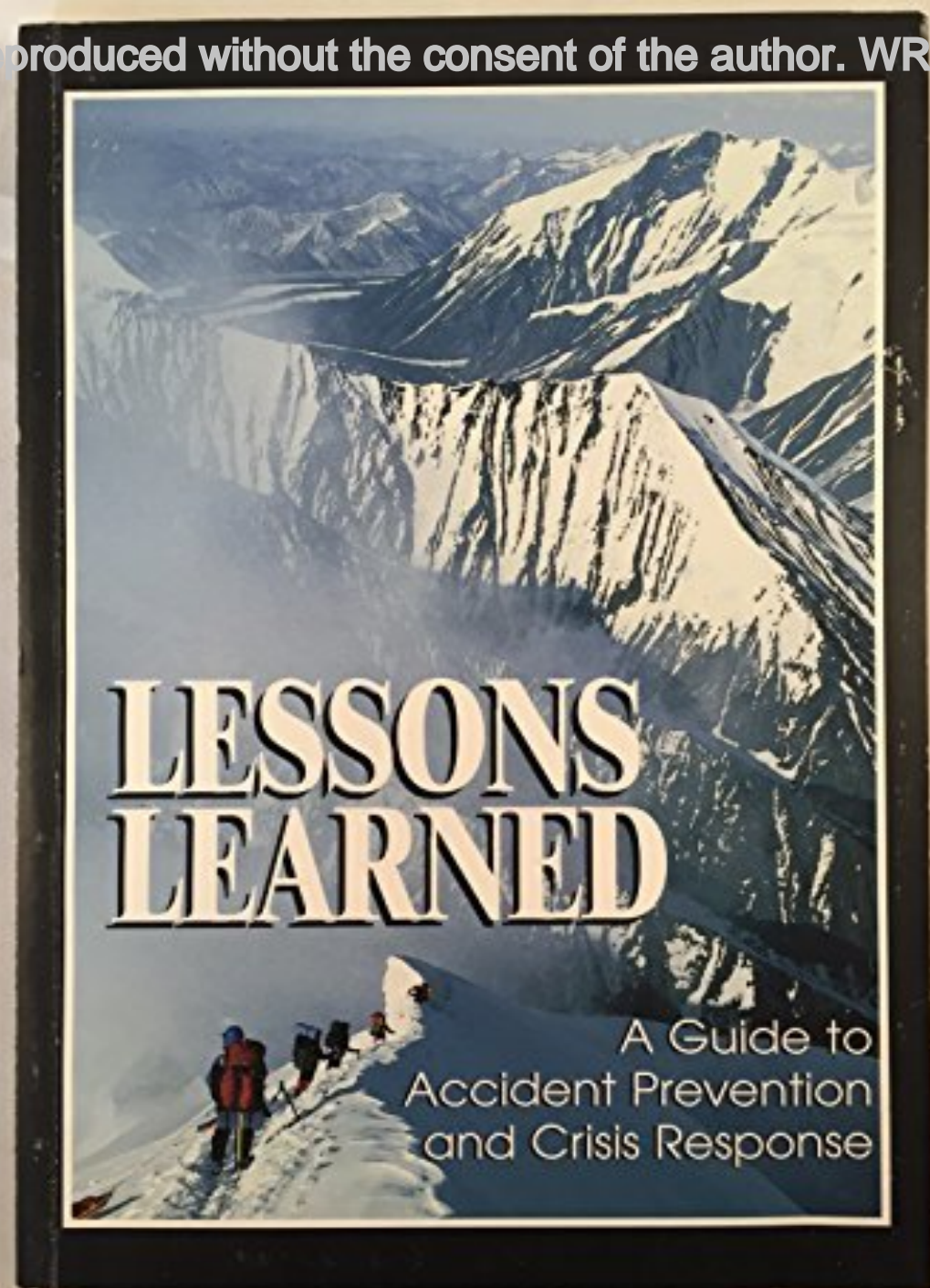
Waiver of right to sue

Choice of state law

Signature of adult

# WHAT REALLY HAPPENED???

**Case Study –  
Ptarmigan Peak  
Lessons Learned**



## CASE STUDY — PTARMIGAN PEAK

University of Alaska offered Intro Mountaineering Class for 25 years

14 climbers - 12 beginner mountaineers and 2 instructors

Ptarmigan Peak – 4,880 foot summit in Chugach Mountains

Signed Releases for activity

Summer day Class hiked to base of route and camped overnight

Early the next morning, climbed the couloir, and some hiked to summit rested.

Descending a snow-filled couloir/gully in late afternoon.

Did not use the longer walk-off route.

Four teams roped together in groups of 3 or 4.

Climbers had ice axes to use as anchors.

2 people died and 12 people injured – 8 Eight people filed lawsuit



# THANK YOU

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## TAKE AWAYS:

1. Prepare & educate staff.
2. Plan & consult with attorney.
3. Ask – What will this sound like when you are on the witness stand in front of a jury?