"HOLD HARMLESS" INCENTIVE IN RECREATIONAL USE STATUTE

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Many states, localities and private organizations are interested in developing and enhancing linear trail systems to increase public recreation opportunities. Most linear trail systems of any significant distance, however, usually require public recreation access across private lands, in particular a railroad right of way or a utility corridor. Accordingly, public entities and trail advocates seek to develop partnerships with railroad and utility companies to develop a trail allowing public recreation access along a railroad right of way or utility corridor. Railroad companies and utility companies are oftentimes very reluctant to allow public recreation access along the railroad right of way or utility corridors based upon a fear that any accident may prompt costly legal actions and subsequent liability.

In most states, recreational use statutes (RUS) have been enacted to encourage private landowners to open their land for public recreational use free of charge. With minor variations, the RUS adopted in most jurisdictions was based on a model statute, entitled "Public Recreation on Private Lands: Limitations on Liability," that appeared in the 1965 edition of Suggested State Legislation from the Council State Governments. Generally, an applicable RUS provides that a landowner who opens land for public recreational use free of charge owes no legal duty to guard, warn or make the premises reasonably safe for the recreational user. As a result, the landowner will be immune from liability for ordinary negligence, but not willful/wanton misconduct on the part of the landowner. Under the willful/wanton misconduct exception to RUS immunity, the landowner would still be liable for misconduct demonstrating an utter disregard for the physical well being of others, tantamount to an intent to injure.

By statute, an applicable RUS effectively affords the recreational user the same legal status and duty of care owed a trespasser. For both trespassers at common law and recreational users under an applicable RUS, there is no affirmative legal duty to exercise reasonable care in preparing or maintaining the premises. For trespassers and RUS recreational users alike, the landowner would, however, owe a very limited legal duty to avoid negative behavior, i.e, engaging in outrageous misconduct that demonstrates an utter disregard for those on the premises that is tantamount to an intent to injure, "mantraps."

While an applicable RUS provides a very strong legal defense against negligence liability, landowners can still be sued by an injured recreational user. As a result, a landowner must still raise the RUS as a defense and, thus, incur the cost of legal representation to respond and defend a liability claim. Despite a strong legal defense that will preclude liability in most cases, an applicable RUS does not overcome the fear of being sued in the first place. As a result, an RUS may not accomplish the stated legislative objective of these laws, i.e., to encourage landowners to open their land to public recreation use free of charge. As described below, Virginia is one of the few jurisdictions to amend its RUS to address the real landowner fear of being sued and the attendant cost of legal representation. Moreover, the Virginia RUS as amended would allow for

private landowners to receive some types of fees in exchange for allowing public recreation access to their land.

INDEMNIFY LIABILTY COST

In the mid 80's, a prominent Virginia legislator was interested in public policy to promote a depressed farming economy through diversification into public recreation, e.g. fishing ponds, camping, etc. As remains the case today in developing linear public trail systems over a railroad right of way or utility corridor, one significant disincentive for private landowners to allow public recreation access was the fear of liability for recreation related injuries. At the time, much of this private land in Virginia involved forests owned by a large paper company.

Like similar statutes in most jurisdictions, the original Virginia RUS based on the 1965 model statute did not address the real concern of private landowners about being sued and incurring legal costs to raise an applicable RUS and successfully defend a liability claim brought by an injured recreational user. To address the true liability concern involving the cost of a lawsuit for the landowner, the Virginia RUS was amended to add a very significant provision which will allow a landowner to enter into an agreement in which a public entity is required by statute to "hold harmless" and indemnify the landowner for the cost associated with a claim brought by an injured recreational user. SEE: https://vacode.org/2016/29.1/5/1/29.1-509/

Specifically, under the Virginia RUS, a valid "Section E" agreement would require the public entity to provide indemnification for the cost of any legal representation and damages associated with a claim by an injured recreational user. In pertinent part, Section E provides as follows:

> [T]he government, agency locality, not-for-profit organization, or authority with which the agreement is made shall indemnify and hold the landowner harmless from all liability and be responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to the benefit of this section as the result of a claim or suit attempting to impose liability.

Under Section E, "any person" may enter into an agreement with a public entity to grant an "easement or license" for "the use of, or access over, his land by the public" for any of the recreational purpose enumerated in the RUS.

Section E is an effective statutory response to the real liability concern of private landowners: “Can l still be sued? Yes, you can always be sued, but you will "just be along for the ride" if you enter into a Section E agreement. In the event of any claim or lawsuit, the public entity with which the private landowner has a Section E agreement is obligated to indemnify the private landowner for any liability and provide or pay for the cost of "all reasonable legal services required... as the result of a claim or suit attempting to impose liability."

A Section E agreement with a public entity can involve "the Commonwealth or any agency thereof, any locality, any not-for-profit organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code, or any local or regional authority created by law for public park, historic site or recreational purposes."

In pertinent part, enumerated recreational purposes in the Virginia RUS include: "hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or... any other recreational use..."

A "landowner" covered by the RUS includes "the legal title holder, any easement holder, lessee, occupant or any other person in control of land or premises, including railroad rights-of-way." For example, within the context of an applicable RUS, a volunteer group would be considered an "occupant" in control of the premises at the time of any alleged negligence in providing assistance with trail development and/or maintenance.

The statutory definition of "land" or "premises" in the Virginia RUS includes "real property or right-of-way, whether rural or urban, waters, boats, private ways, natural growth, trees, railroad property, railroad right-of-way, utility corridor, and any building or structure which might be located on such real property, waters, boats, private ways and natural growth." The original Virginia RUS was amended to broaden and strengthen the scope and applicability of the statutory definition of "land" to expressly include urban as well as rural land. In Virginia, this is particularly important in the development of a comprehensive linear trail system, many of which traverse through suburban and urban areas, most notably in Northern Virginia.

FEE EXCEPTION ALLOWS PAYMENTS

The legislative intent of the model RUS was to encourage private landowners to open their land for public recreational use "free of charge." Accordingly, in addition to the willful/wanton misconduct exception, the RUS in most jurisdictions also provides a fee exception. In pertinent part, the Virginia RUS provides that this statute "shall not limit the liability of a landowner which may otherwise arise or exist when the landowner receives a fee for use of the premises or to engage in any activity" defined in the RUS as a recreational purpose or use.

Generally, the fee exception will apply if the recreational user paid a fee to access that particular portion of the premises where the injury occurred. In other words, did the recreational user have to pay a fee to be standing at the location where the injury occurred? Accordingly, an entrance fee may void RUS immunity for the entire site while a campground fee may only void immunity for the campsite itself, not adjacent trails open to the public for recreational use free of charge.

In addition to allowing indemnification under Section E, the statutory definition of "fee" in the Virginia RUS provides an additional incentive to landowners to enter into agreements with public entities to allow public recreational use of the premises. Specifically, the statutory definition of "fee" in Section A of the Virginia RUS does not include the following fees or payments received by the landowner from government, not-for-profit, or private sources:

> license fees, insurance fees, handling fees, transaction fees, administrative fees, rentals or similar fees received by a landowner from governmental, not-for-profit, or private sources, or payments received by a landowner for rights of ingress and egress... or any action taken by another to improve the land or access to the land

> for the [recreational] purposes [enumerated in the RUS]... or remedying damage caused by such uses.

As a result, in addition to the hold harmless and indemnity requirements in a Section E agreement, the Virginia RUS would also allow a landowner to receive rent and/or any transactional fees associated with an agreement allowing public recreational access to the premises without triggering the fee exception to statutory immunity from negligence liability.

GOVERNMENTAL IMMUNITY PRESERVED

In addition, Section E expressly preserves existing public recreational immunity available to localities under Virginia Liability Localities in Operation of Parks, Recreational Facilities and Playgrounds. § 15.2-1809 https://vacode.org/15.2-1809/ Pursuant to this statute, localities are immune from liability for ordinary negligence, but not gross negligence, in the operation and maintenance of a park, recreational facility or playground.

Similarly, Section E provides that "[a]ny action against the Commonwealth, or any agency thereof, for negligence arising out of a use of land or railroad rights-of-way covered by this section shall be subject to the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). The Virginia Tort Claims Act limits the amount recoverable by any claimant to $100,000 or "the maximum limits of any liability policy maintained to insure against such negligence," whichever is greater. https://vacode.org/8.01-195.3/

Further, under the Virginia Tort Claims Act, the Commonwealth is liable like a "private person" for personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment." Accordingly, immunity under the Virginia RUS immunity would also apply to the Commonwealth, like any "private person," who opens the premises under its ownership or control free of charge for public recreational use.

As a result, all parties to a Section E agreement (private landowners, localities, non-profits, the Commonwealth) would be immune from ordinary negligence under the Virginia recreational use statute. When the RUS applies, liability, if any, for injuries sustained by a recreational user would require proof of egregious or outrageous behavior (willful/wanton misconduct, gross negligence) as opposed to mere carelessness (ordinary negligence). When the applicable law requires proof of willful/wanton misconduct or gross negligence, as opposed to ordinary negligence, liability is very unlikely and many of these claims are not pursued in the first place or dismissed prior to trial.

LIABILITY AS EXCUSE

To date, there has been no reported case law in Virginia testing the validity and enforceability of a Section E indemnity agreement under the Virginia RUS. Moreover, it's unclear to what extent Section E agreements have been developed and actually implemented to provide public recreation trail access over private lands.

Given the availability of indemnification for any liability and attorney fees associated with a

claim brought by an injured recreational user, the perceived fear of liability may not have any legal basis under the Virginia RUS. In many instances, however, liability concerns are offered as a mere pretext, a convenient excuse, to deny public recreation access across private land. Denying public recreation access based on liability effectively short circuits and effectively ends the discussion. It's always easier to deny access and not have to spend the time and effort necessary to partner with public entities to allow public recreation trail access along a utility corridor or a railroad right of way.

Aside from indemnification from any liability and the cost of legal representation under the Virginia RUS, what benefit accrues to the private landowners, in particular railroad and utility companies? Similar to sponsors in an "adopt a highway" program, trail advocates and public entities might ensure that railroad and utility companies receive public relations benefits and recognition for providing public recreational trail access across their property.

Recently, there have been a series news reports involving derailments of crude oil tanker trains. One derailment triggered a catastrophic fire near downtown Lynchburg, Virginia. In light of this bad press, railroad companies in Virginia and elsewhere might be concerned about a potential future incident involving injuries to users of a public recreation trail adjacent to a railroad right-of-way. Despite the existence of a valid and enforceable Section E to cover any liability and legal costs associated with injuries to recreational users, the railroad company may still fear adverse impacts to its business operations and reputation in the court of public opinion in the event of an accident.

MEDIA REPORT ANXIETY

In Virginia, the State Trails Committee provides advice to the Commonwealth of Virginia on a number of trail related issues, including liability concerns related to the use of private rail and utility corridors for public trail systems. In particular, a news report has raised ongoing consternation among public agencies about a perceived "precedent" set by a wrongful death claim against the Virginia Department of Game and Inland Fisheries.

See: http://www.courthousenews.com/2014/12/31/va-utility-faces-200m-wrongful-death-suit.htm.

As described in the media report, the family of a 6-year-old girl who drowned while fishing with her grandfather sued Virginia's largest utility for $200 million, claiming its negligence led to the tragedy. The family alleged Dominion Virginia Power failed to warn visitors to the Lake Anna recreation area of dangers associated with its use of the lake's water to cool a nearby nuclear power plant. The 6-year-old girl was fishing with her grandparents when she fell through a gap in the fence surrounding the lake and drowned. The forceful current swept the girl under, preventing any rescue attempt.

On the day of the drowning, Dominion Power was using water from the lake to cool steam at its nuclear facility. The process involves condensing the steam into the water, and then pumping it back into the lake. The family claimed this procedure caused water temperatures in the lake to vary greatly, leading to dangerous undercurrents.

The family alleged these dangerous undercurrents constituted an ultra-hazardous activity in a public lake available for invitees to participate in water recreation sports. Moreover, the family alleged "the four foot square gap between the fences at Lake Anna posed a safety threat to visitors, especially to children." Dominion claimed the Commonwealth through the Department of Game and Inland Fisheries (DGIF) was responsible for this "Fisherman's Catwalk."

Apparently, DGIF settled this case, rather than litigate the claim. Since a settlement is not an admission of liability, despite popular opinion to the contrary, there is no legal precedent whatsoever set by this case.

USE OR LOSE RUS DEFENSE

Under the Virginia state tort claims act, the liability DGIF as an agency of the Commonwealth is limited to $100K per incident. (SEE: https://vacode.org/8.01-52/) As owner of the lake in control of the process, which created the allegedly dangerous currents, the potential liability exposure of Dominion would not be limited. That being said, had this case been litigated, both DGIF and Dominion could have raised the Virginia recreational use statute as a strong defense to any liability.

While certainly tragic, similar case law would suggest that strong lake currents in a nuclear facility are neither "ultra hazardous" as alleged or sufficiently egregious to constitute gross negligence. As defined by the Virginia Supreme Court, gross negligence "shows an utter disregard of prudence amounting to complete neglect of the safety of another." Accordingly, assuming DGIF and Dominion opened the premises for public recreational use free of charge, no legal duty was owed to guard, warn or make the premises reasonably safe for fishing under the Virginia recreational use statute. Moreover, the risk of drowning in a manmade or natural body of water not designated for swimming is generally considered an open and obvious risk to anyone old enough to be at large, including the drowning risk posed by strong currents.

When litigated rather than settled, these claims can be successfully defended when the applicable legal standard to impose liability is "gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" an applicable RUS. For example, in the case of *Clem v. United States*, 601 F. Supp. 835 - Dist. Court, ND Indiana 1985, the federal court found landowner immunity under the Indiana RUS to a tragic drowning of a father in Lake Michigan. In so doing, the court stated: "This is a case where the human heart strings pull in one direction and the law compels a contrary conclusion." Mr. Clem was swimming in Lake Michigan with his wife and daughter when he was caught in an undertow current and drowned while trying to save his wife.

In the Virginia incident, it was not clear whether or not a Section E agreement was in place between the utility company and DGIF at the time of this particular tragedy. Regardless, DGIF could have raised the Virginia RUS as a defense and vigorously litigated this claim through trial and, if necessary, an appeal to the state supreme court. Instead, DGIF chose to settle, rather than litigate. The decision whether to settle or litigate involves a number of economic and political considerations which are not necessarily based on the available law, including landowner

immunity under an applicable state recreational use statute.

The popular media is quick to report an astronomical dollar figure when a claim is filed, like $200 million. Less media attention, however, is given when a claim is ultimately dismissed or settled. Moreover, when settled, the actual amount paid is usually far less, a mere fraction of alleged damages cited by the media in reporting the initial claim.

EFFECTIVE RUS DEFENSE

As illustrated by reported court decisions in a number of jurisdictions, landowner liability should be the rare exception, rather than the rule, particularly when an available RUS defense is available.
SEE: http://www.parksandrecreation.org/2016/July/Recreational-Use-Statutes-in-State-Supreme-Courts/

The body of case law interpreting the scope and applicability of landowner immunity under an RUS is extensive and well developed. That being said, to date, the Virginia courts have yet to consider a Section E indemnity agreement under the Virginia RUS. Regardless, as illustrated by reported case law, an applicable RUS provides immunity to the owners and occupiers of land in the vast majority of cases involving injured recreational users on the premises free of charge. The existence of a Section E indemnity agreement is more about shifting financial responsibility for the cost of defending any liability claim away from the private landowner.

In addition to Virginia, California would also allow public entities to indemnify private landowners for allowing public recreational use of their premises. Specifically, as described in a 1995 opinion from the state attorney general, California recreational use law would similarly allow a county to agree to indemnify private landowners for injuries sustained by persons using the trails adjoining or traversing the landowners' properties in order to acquire land for a county-wide recreational trail system. https://oag.ca.gov/system/files/opinions/pdfs/95-305.pdf)

In addition to Virginia and California, other jurisdictions might consider similar "Section E" amendments to an existing RUS. Specifically, in a more effective RUS, governmental or private entities would hold landowners "harmless" from any liability and indemnify the cost of any liability and legal representation associated with a claim by an injured recreational user. In so doing, the RUS will become a much stronger legal tool to promote increased development of public recreational opportunities on private lands, in particular along trails traversing a utility corridor and railroad right-of-way.

Rather than routinely settling claims, public entities must understand and be willing to utilize an existing RUS to aggressively defend recreational injury claims and be willing to litigate through the appeals process, if necessary. Given governmental immunity under an applicable RUS or other available immunity statutes, in the long run, the cost defending infrequent individual claims, including indemnification and assuming legal costs for private landowners, will be far outweighed by increased public recreation benefits and opportunities.

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