

TRANSITIONING A RIVER OUTFITTER TO THE NEXT GENERATION

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I. Introduction and Overview

This is an actual case, although the names and location have been modified. The dialog used in the case is fictionalized and designed only to assist the reader in comprehending the situation presented. The case is designed to highlight business and legal issues that should be considered when operations expand and ownership changes. Of particular significance in this case is the focus on modernizing operations without losing the original organization's commitment to the environment and its cultural mission. The case examines the legal, managerial and marketing concerns surrounding a decision to expand and diversify operations with the change in ownership.

The case is ideal for use in a *Legal Environment of Business* course, as it can be re-examined and used when each legal issue is covered in the course. In other words, the case provides a *contextual* setting to which the law can be applied which can be referenced throughout the semester when chapters on relevant material are discussed. By using this one business setting, or *context*, to reinforce principles throughout a course, the focus subtly shifts from the legal environment of business to *business in its legal environment*, a very important distinction for learning because the relevancy of the material will become more obvious, and less attenuated. In contrast, selecting the best, albeit unrelated, cases to illustrate various legal points can confuse inductive thinkers with respect to seeing the big picture. Maintaining a constant context, however, allows students to follow the impact of the law on a business, even if the example used is not the best possible one to illustrate the legal principle at issue.

In addition to content knowledge, business law students must develop *portable skills*, such as thinking critically, making connections between ideas and engaging in lifelong learning,¹ which will allow them to form reasoned judgments and to think across otherwise compartmentalized topics throughout their careers. The new *Conceptual Age* requires employees to be creative and innovative in interdisciplinary settings.² As a result, legal educators in colleges of business should favor of an approach that integrates and highlights holistically the law's relationship to business and the success of business enterprises.

The case is followed by discussion questions designed to prompt its analysis and to frame the problems presented by the facts of the case. Some of the questions are designed to analyze legal issues that should be risk-managed when operations expand. In particular, issues are posed concerning protecting intellectual property, minimizing exposure to tort liability, expanding operations to international markets, and managing employee relations in the wake of increased competition. Select questions may be discussed in class, assigned as the basis of a written report, or given as a take-home exam. The teaching note provides suggested responses to the questions and provides resource material for instructors. The case builds to a decision point concerning expansion. Student groups could be assigned one of those possibilities to make a presentation on the risks and benefits of pursuing the endeavors, as well.

Some questions may require the students to conduct at least some cursory research on the topic, such as, Employee Ownership Plans, before analyzing the underlying issue. There are several questions for which the students could consult a governmental website, such as those of the U.S. Patent & Trademark Office, the Center for Disease Control and Prevention and the U.S. State Department, for valuable information. Other websites can also provide supplemental, pertinent information; encouraging students to use legitimate and rich web-based recourses helps to teach informational literacy,³ and the importance of evaluating the legitimacy of sources.

II. The Case: The Development and Expansion of the Kimetoga Whitewater Center

A. Background

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The light twinkled and danced on the river as spring welcomed the dogwood blossoms. This beautiful river outpost, tucked away in a mountain gorge, had been Whitt and Paula Lincoln's home, livelihood and passion for the past forty years. Approaching eighty years old, Whitt knew it was time for the next visionaries to take the reins of the enterprise—enterprise, yes, not business. The Kimetoga Whitewater Center ("KWC") was about family, nature and sport for visitors to the area, for its employee-owners and for its founders, and not necessarily profit. KWC rose rapidly from a scrappy operation spawned by idealistic river rats in the 1970s to one of the largest and most renowned outfitters in the country, struggling periodically to reconcile its founding philosophy with changing economic realities.

The knock on the door signaled to Whitt that the reporter, who was writing a feature article for the local paper about the pending transition in ownership, had arrived. Paula accompanied her to Whitt's office, which overlooked the river. The reporter was already familiar with the Kimetoga Whitewater Center. After all, twenty-two Olympic paddlers have been on KWC's staff in its 40-year history. An international paddling destination, KWC is a large commercial outdoor guide center surrounded by a national forest, and located on the Kimetoga River in the Appalachian Mountains.

The 59 miles of the Kimetoga River comprise one of the largest free-flowing (not dam-controlled) stretches of river in the region, where rafters are faced with five back-to-back Class IV-V rapids. The river's level and character correlate with natural rainfall, with high water and the highest thrill levels usually occurring in the spring and early summer. Summer and fall trips are more scenic and less chaotic. When the KWC burst onto the whitewater scene 40 years ago, it became ground zero for a new world of paddling, which was characterized by new boundaries, new paradigms, and new expectations.

"Greetings, Whitt," Becky Jay, a reporter for the Kimetoga Village Weekly, said as she shook Whitt's hand. "Thank you so much for meeting with me. You have a great story and I'm anxious to tell it. Can you start by giving me some background? I've only been coming here to raft for the last 10 years, so I'm eager to learn what events preceded that period," Becky stated with sincere interest. With that prompt, Whitt and Paula began narrating the history of KWC.

In the fall of 1971, Ace Parsons bought a small roadside inn on the banks of the Kimetoga River, which included a gas station, a restaurant, and some acreage on the river. The land was situated along a heavily wooded stretch of the river located in a relatively undeveloped area. No other commercial whitewater companies were operating in the area at that time. Ace planned to use the business as an outpost for a summer camp, a paddling clinic for canoe clubs, or a whitewater teaching center. Plan B was to offer guided raft trips to offset the annual mortgage. Ace soon realized he needed a partner and his childhood friend, Whitt Lincoln and his wife Paula, avid canoeists, joined him in the endeavor.

In fact, Paula first crashed over Big Toga Falls in 1955, which, at that time, was considered to be a veritably insurmountable river obstacle. She would later go on to take her fiancé, Whitt Lincoln, down the same river, just five years before they opened KWC with Ace. It was the spring of 1972 that Whitt and Paula decided to join Ace and make a lifestyle change. The couple, joined by a love of paddling and the outdoor lifestyle, had their first date at the age of fourteen. Whitt became a programmer for a college and Paula became a schoolteacher. Cashing in their retirement, they packed their belongings and their children and moved to Kimetoga Village.

"Yep, we started with just four rafts and used the family van to transport river runners that first year--- lived on savings and hope while scrapping out a vision of a paddling outpost," Whitt recalled. Paula added with a laugh, "The only accounting was the checkbook." Whitt and Paula logged 80 to 100-hour work weeks guiding raft trips and running the small motel, gas station, restaurants and a paddling school. "We had great teachers in the school—they'd spend hours dissecting the mechanics and physics of paddling in order to hone their teaching techniques — translating the fluid, almost intuitive body movements into anatomical step-by-step instructions for beginners. They'd share strategies for getting students to keep their head down through the roll, or how to pick up with their knee," Whitt said. When KWC was launched in 1972, paddling was a relatively new sport. For paddlers who wanted to eat, sleep and breathe whitewater, KWC stood out. "There were only two other river outfitters in the entire region," Whitt noted.

KWC created a niche market for whitewater rafting and attracted serious leisure paddlers who wanted to immerse themselves in the world of paddling and experience being in the *flow zone*, that sense of effortless action people feel when completely immersed in an activity. By 1975, a network of paddlers gathered at KWC--- more than half the paddlers from the 1972 Olympic team were working there. News of the KWC immersion experience spread by word-of-mouth to other serious paddlers, and slowly the KWC culture began to form.

"We were fortunate to have assembled a great management team who also just happened to be world class kayakers," recalled Whitt. One of those paddlers was Jack Clayton, who also decided in the 1970s to make a lifestyle change. Clayton quit his job as an investment advisor making \$16,000 a year for a job at KWC that paid \$7,000 a year. He was on the 1972 Olympic team and was a member of the U.S. paddling team for four years.

More than half his fellow paddlers from that 1972 team – including all three women from the team –already had found their way to KWC. "It was sort of a network of paddlers. Those who decided they wanted to train, to get good at it—they knew KWC was a place where you could get paid to work in the world of paddling, be surrounded by your friends and get paid to be on the river guiding rafts or teaching canoeing," Paula observed. By year three, six of the paddlers from the 1972 U.S. Olympic team were staffers at KWC.

Whitt acknowledged that "Jack came along in the nick of time. The skill set KWC needed most, it turned out, wasn't another paddling pro, but his financial smarts." Clayton quickly became Whitt's right-hand man as vice-president. "We were a great team. I was the philosopher and visionary, and he had the business skill set to support that," said Whitt.

He continued to reminisce. “We created a community even though the pay was small, hours were long, and the work was seasonal. When we came up here, it was not a business decision, but a lifestyle decision. We assumed we would make less money than if we stayed in the city, but we would be working with friends who enjoyed the same activities we did.” After all, the goal of both founders was not to build one of the world’s premier river outfitters, but instead to carve out a place where like-minded rafters together could scratch out a modest living doing what they loved.

“From the beginning, that was the guiding principle, not that some people would be working for the owners, but it would be a community of friends working together,” Whitt said. Employees were fed through company meal plans and lived in KWC housing quarters. Everyone worked, ate, slept and played alongside each other. There was even a daycare for KWC employees with children. Early on, the company developed an employee-stock plan that would give employees shares in the company. It was a financial benefit, but more so it was a way of creating a sense of buy-in and communal ownership.

Although there were many perquisites associated with working KWC, there were also sacrifices; the work was seasonal, the pay was low, and long hours were required. The hospitality and tourism industry depends on tourists, which requires employees to work weekends, evenings, and holidays. The seasonal nature of the job made it tough for those employees with children or who wanted to start a family. From year to year, weather was also a determining factor in the volume of business, employee work hours, and resulting pay checks.

Becky was curious about what transformed the nascent venture into a multi-million dollar operation. “Of all the ingredients that set the stage for KWC’s unprecedented success, none was as unexpected and out of ordinary than the release of the movie ‘Deliverance’ in 1972. The blockbuster movie catapulted paddling into the consciousness of mainstream America and captured the public imagination.” Lincoln was a double in the movie, and helped the actors stay safe. “Our job was to be downstream with safety ropes so we could pull the paddlers to shore before they went over the waterfall,” he said. “There really was a 65-foot drop!” he laughed. The same year, whitewater paddling made its debut as an Olympic sport in Augsburg, Germany.

KWC showed its first profit in 1975 and began to expand. In 1976 KWC unveiled its first clinic – the Whitewater Clinic Program to teach the nuances of whitewater paddling. Two years later, KWC expanded its Outdoor Education Programs to high school and college student groups for the first time. Classes included instruction on environmental stewardship as well as techniques in providing outdoor recreation services. The first paddling clinic for children aged 10-14 was launched later and ultimately morphed into KWC’s Kids’ Week, a camp. The instruction was second to none—in fact, one instructor developed *Rapid Progressions*, a teaching method designed for the introductory course that virtually guarantees success in mastering kayak basics. *Learn to Paddle by Rapid Progressions* is currently KWC’s most popular paddling clinic.

The year 1976 was also the same year that KWC went international with new *Adventure Travel* programs to the rivers of Central America. Eventually, the program expanded to include a variety of adventure trips in over twenty foreign countries including a partnership with a sister company in Nepal, which has been one of the leading and pioneer rafting, trekking, tour and peak climbing companies in Nepal for more than thirty years. KWC instructors led kayaking, as well as whitewater rafting, trips in numerous locations all over the world. However, the company’s Adventure Travel programs began to decline when several of the guides quit KWC and began to operate their own international excursions. The fact that former employees used the contacts gained over the course of employment to compete with KWC did not really bother the KWC leadership--they were just pleased that people were out there, exploring and enjoying the outdoors, especially since there was plenty of business to go around.

Indeed, the 1980s saw significant growth and expansion. KWC began offering mountain bikes for rent, 15-speed, all-terrain, bicycles. It augmented its restaurant offerings, first by opening *Slow Joe’s Riverside Café*, and then by building *Paula’s Garden Restaurant*, which overlooks the KWC campus. Since the beginning, Paula was considered KWC’s expert in native edible plants and how to make them delicious. Today, the garden is as fabulous as ever, featuring a whopping five different varieties of basil.

Basecamp Lodging, designed for overnight guests, also made its debut. Basecamp Lodging provided basic, affordable housing, comparable to a through-hiker hostel for folks on the Appalachian Trail, with shared bunk lodging that could accommodate up to 86 people in 7 buildings. A shared community building with a full kitchen, dining hall, and charcoal grill also were available to Basecamp guests. Finally, it improved and expanded its retail establishment by adding a gear annex. A new *Outfitter’s Store*, twice the size of its predecessor opened in the 1990s.

But keeping up with its own growth was one of the biggest challenges faced by KWC during the first two decades. “Some years we intentionally cut back on the marketing efforts because we thought they were growing too big,” Paula said. Part of that success bred competition. As more and more rafting outfitters entered the market, the Kimetoga showed signs of stress. Fearing the river would become overrun by commercial trips, the National Forest Service, which controls most of the land along the river, capped the number of outfitters in 1984 and introduced a permit system for paddlers.

By the mid-1990s, the steady growth enjoyed during the first 25 years began to taper off, and the KWC entered an era of slow decline. Artificial whitewater training centers, coupled with a national decline in paddling, precipitated the decline, along with internal decisions, like hanging on to employee perquisites the company could no longer afford. At the end of the 1990s, KWC posted three years of losses. In response, KWC opened its *Ropes Challenge Course and Alpine Tower* to

accommodate the growing number of corporate and youth groups seeking to improve problem-solving skills and group cohesion through experiential learning.

KWC also acquired one of its most important assets in the 90s---its three-letter domain name. “Who would have thought! We’ve been offered a million dollars for it!” exclaimed Whitt. The three letter domain name was huge since the actual name, *Kimetoga*, can be easily misspelled. When it was first acquired, the importance was under-estimated. Now, it’s almost as crucial as the actual dirt below the operations!

But by the end of the 1990s the company was removed from its former era of Olympiads. “We needed to proactively re-position ourselves at the center of the elite paddling world, and the 1996 summer Olympics staged on the nearby Ocoee River would be our time to shine. To lure pro paddlers interested in serious leisure, we put up the money to hire and pay a director for the Racing Club---anyone racing under the banner of the club would have access to a formal instructor, training regimen and organizer,” Whitt recollected. Ultimately, six out of the seven paddlers on the 1996 Olympic Team trained at KWC. “It was a renewal our commitment to the highest levels of the sport, and helped to reinforce an athletic culture—but we couldn’t have done it without Bob.”

Bob, to whom Whitt referred, was Bob Johnson, hired as the first director of the Kimetoga Racing Team. Johnson worked at KWC, as a dishwasher in 1989 while training as an Olympic hopeful for the ’92 games. “He was 19 and he didn’t have to worry about the hassles of normal life, like grocery shopping or commuting to work. His life was self-contained and revolved around the river,” Paula remembered.

“But that was then and this is now—time for another re-invention, and time for the next generation to carry on,” Whitt asserted without remorse. He was referring to the recent sale by the founders of the majority stake in the enterprise.

“Are you ready to exit?” asked Becky. “Well, I’m not exiting entirely. I’m still on the board and hold some shares---but I wouldn’t be nearly as comfortable with the change except for the fact that we’re turning it all over to someone who is a child of the gorge and a believer in what KWC represents in our community.” That person is Chandler Perkins.

B. The Changing of the Guard

Chandler Perkins, the new president and CEO of KWC, paddled the Kimetoga as a child. Remembering the heyday of KWC, Chandler remains adamant about replicating and continuing that electricity. Perkins, along with a group of six young professionals from the same city abandoned by the Lincolns decades ago, intend to merge their love of outdoor recreation with their business and investment acumen. Most importantly, they are all paddlers, have young children, and want KWC to be part of their own families’ lives for another 40 years.

Today, KWC owns a fleet of 1,000 rafts, 120 busses and employs 850 staffers during peak season. It owns 450 acres on the river, although the footprint of its operations is only about sixty acres, leaving plenty of room for expansion. KWC guides 150,000 rafters down the Kimetoga and six other rivers in the Appalachians each year. The new owners recognize that in the past twenty years, outdoor recreation has grown exponentially in the region and has become a major economic driver. KWC has the potential to be a destination resort, not just a single activity on a vacation. To be successful as a destination resort, they must inspire tourists to select their destination ahead of others. To that end, they must conceive of KWC as a brand to market and manage strategically. With that goal in mind, Chandler knew they needed to register the logo that had been used for years as a trademark pronto.

When Chandler first approached the Lincolns and Ace about transitioning the company, he knew in his heart that there was absolutely no divestment prospect. In other words, his goal for KWC was not to make it attractive to buyers and sell it in a few years, but to hold the company long-term. With this goal in mind he approached old friends and business acquaintances, all of whom were like-minded and possessed diverse skills. The team he amassed consisted of investment bankers, real estate experts, lawyers and marketers. Enthusiastic in their support, the investors spent a week in KWC’s guide training school to familiarize themselves with the operation.

Arguably, the biggest obstacle to luring this new group of investors was the employee stock ownership plan (“ESOP”), a huge liability. At its peak, the employees owned sixty percent of the company. In fact, the phrase *Employee-owned* was prominently displayed on the company’s letterhead. While ownership certainly bred loyalty, a sense of pride, and meaningful participation in the company’s operations, it was expensive. Changes in the legal and reporting requirements that were prompted by the Enron and Worldcom debacles made it onerous and costly to administer the ESOP. As a result, KWC began phasing it out a few years earlier. Nevertheless, the assembled investors needed to bring not only their commitment to the cause and their specific business expertise, but also sufficient capital to buy-out about one-third of the company’s total stock.

As Chandler Perkins, President and CEO of KWC read the guest comments on the company’s blog-site, he reflected on its legacy and the future direction. The enterprise had already diversified beyond its international trips and paddling schools to other areas such as retail stores and ropes courses.

“What should our destination resort offer? Fly fishing, outdoor photography, wilderness skills courses, ziplining, ---a spa?” asked Chandler as he met with his co-investors. Of course, they had discussed the future of KWC when Chandler first

pooled the investors together to pitch the idea. But it was time for the water to hit the paddle, so to speak, and a definitive course to be chartered.

I'm not sure fly-fishing is that great on the Kimetoga—but outdoor photography would provide an activity for guests interested in casual leisure activities who might not want to get out on the river.” “Right, and for those interested in serious leisure, we could offer ziplining.” “Ziplining? Isn't that dangerous?” “Well more dangerous maybe than photography, but to make an omelet you gotta break some eggs...” “What about horseback riding?” “Ouch! I hear it's hard to get insurance for that activity because it has something to do with strict liability in some states, but I don't know.”

Ideas continued to jump from the discussion's participants. “How about offering experiential tourism adventures – you know the trend today is not ‘where you go’ but ‘what you do when you get there.’ “Should we re-launch international excursions?” If they were pitched to the right market, it could insure a new adventure would always await our repeat customers.” “Maybe, maybe not—the prestige it cloaked us with back in the day is less valuable now because of the certifications that are now available.”

“That's it!! What about expanding our programs beyond paddling to offer some of those certifications like Wilderness First Aid or a Wilderness Survivor course!” “What about Water Rescue courses? There are several levels we could offer.” “Right—in fact, we could have an outdoor adventure educational center!”

“Yes, an education center, and what about an event planning department, too? We could expand our events--get folks in the doors and sustain our dedication to supporting outdoor activities!” “Definitely! We could bid to host industry events and build from our successful Guest Appreciation Festival.”

“If we do expand events, then we need to think seriously about getting an alcohol sales license for the restaurants.” “Alcohol? That's controversial among the locals.” “And we don't need inebriated paddlers and liability issues either.” “True, but being able to have a beer after a river run is what most tourists would expect.”

“Speaking of building from what we have, we should expand our outdoor retail establishment to other locations—that would help build brand identity and visibility.”

“But if we really want to be a destination resort we need upscale resort accommodations.” Although KWC lodging had expanded from the rather Spartan *Basecamp Lodging* to facilities able to accommodate about two hundred guests in bunk-style cabins and mid-scale hotel rooms, it was far from a destination resort facility. “We have plenty of land. But the thought of a big hotel is quite a deviation from our core of operations.” “Maybe we should try to lure an established brand.” “I don't know—I like the idea of cabins on the property instead of a chain hotel. Maybe we could sell lots, and manage the cabins built on them as vacation rentals.” “Well, whatever we build, if we build, needs to demonstrate our pledge to the environment and sustainability.”

“True, and if we are going to expand all of our operations to this degree, we need to consider our liability exposure. We carry thousands of passengers in those vans on that narrow gorge road. It only takes one eighteen-wheeler going over the line and crashing into the bus, and all our assets are at risk.” “Good point—when we diversify and expand, maybe we should break off into smaller entities.”

So many options to consider, and even more risks to contemplate, both financial and legal. How to proceed? Building and branding a quality destination resort that centered on outdoor adventures and environmental sustainability was going to be challenging---and undoubtedly rewarding!

III. Teaching Note

The following sections provide sample questions and answers to legal and marketing issues that could be explored using the case. Given the diverse operations and the plan for expansion, there are many more issues than those enumerated which also could be examined, depending upon what instructors cover in their Legal Environment course and what chapters are emphasized. For example, some KWC workers are seasonal. Are they entitled to unemployment compensation in the off-season? Which, if any, employees would be exempt from the overtime provisions of the FLSA?

Just as a business entity faces a number of potential areas to consider when minimizing risk exposure while maximizing profit potential, this case is designed to serve as a background for the discussion of a multitude issues that can be expanded by instructors based upon the content of their courses. By keeping the context (KWC) the same, however, the relevancy of the law to all aspects of business operations is reinforced—*business in its legal environment* remains the focus. The following questions are sound examples, but are not intended to be an exhaustive list, nor are the answers intended to be the only options for response and exploration of the issue. Moreover, each time a potential lawsuit is discussed, the question of which court would have jurisdiction over the parties and the subject matter of the dispute could be reviewed.

A. Case Review Questions

The first questions are designed to review the facts and important parts of the case as a pre-cursor to examining the legal and managerial issues.

1. Describe the culture of KWC.

KWC is a unique, values-driven organization that has been the industry leader in outdoor recreation adventures for over forty years. The image of KWC as 'birthplace of whitewater sports' is a key component in the construction of a culture based on a shared love of the outdoors and whitewater sports, a strong work ethic, team spirit, quality, and a sense of ownership. At KWC, values and norms are an important part of the culture.

2. What two events precipitated the growth of KWC in the 1970s?

The 1970s represent the decade that marked the beginning of the modern environmental movement. Two unrelated events occurred which highlighted the sport of whitewater rafting /paddling, and boosted NOC's business and visibility. First, whitewater kayaking became an Olympic sport. The US team was loaded with paddlers who would go on to staff KWC. Second, the release of an American adventure movie on whitewater rafting in the southeast became a big box-office hit. Both events drew public attention to the new sport of kayaking.

B. Minimizing Exposure to Tort Liability

Business operations must guard their exposure to tort liability to the extent feasible. While insurance plans should be evaluated periodically to insure adequate coverage, it is essential for managers to minimize exposure to litigation so that claims are few and any settlements remain within the policy limits. The following questions focus on potential tort issues.

1. KWC's primary activity for forty years was river rafting. What contractual provision is designed to protect it from injuries that may occur to guests? Is that clause likely enforceable or could it be unconscionable? What about with respect to the ropes course? Would such a clause be viable? Why or why not?

An *exculpatory clause* or *hold-harmless agreement* is a contractual provision designed to insulate or *release* the entity seeking exculpation from liability, which usually involves negligence. The term derived from the Latin root *culpa*, meaning blame or fault, and the prefix, *ex*, suggesting not; thus, do not blame me or consider me to be at fault. There are two competing public interests at stake in evaluating the validity of such clauses. The first consideration is the notion that the law desires to hold parties accountable for their negligent actions that lead to another person's injury or result in damage to his or her property.⁴ After all, the law seeks to hold one's conduct to the standard of a reasonably prudent person. If one's conduct is substandard and is the proximate cause of another person's loss, then damages are owed under tort law. On the other hand, freedom of contract is a revered principle in our jurisprudence; therefore, if the parties wish to bargain about and include an exculpation clause in their agreement, why shouldn't courts enforce it?

In evaluating whether or not exculpatory clauses are valid or instead unenforceable and against public policy, courts will examine several factors: is the release the result of bargaining or attached to a contract of adhesion, or did the parties bargain about its inclusion?⁵ Is the clause seeking to exculpate a party from personal injury or property damage?⁶ Did the clause use clear language and was its intent obvious?⁷ If negligence was involved, was the defendant's conduct reckless, or did it involve gross negligence?⁸

Some courts also follow the criteria enunciated in a leading case involving a physician's release of liability when the patient subsequently died allegedly as a result of the doctor's negligence, *Tunkl v. Regents of University of California*.⁹ Those criteria are: (1) the agreement concerns an endeavor of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards; (4) the party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services; (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and (6) the person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees, or its agents.¹⁰

In applying these factors, of primary importance is the fact that KWC's activities are recreational in nature. As such, rafting excursions, bike rentals and ropes courses involve activities that are neither essential nor heavily regulated, compared to public transportation and health care. In the absence of gross negligence, the release of liability should be valid providing

the risks are sufficiently disclosed so that the participant can make an informed decision. Of course, KWC must insure that the equipment is maintained adequately and that their employees neither recklessly nor intentionally subject participants to known perils that exceed the normal expectation of risk in order to secure the protections afforded by the clause.

Thinking critically, what are some key differences between rafting excursions, bike rentals and ropes courses with respect to the public policy concerns enunciated previously? One basic difference is the fact that there are potential risks posed by a river over which KWC and its employees would have no control. A sudden downpour of rain could render rafting much more treacherous than originally anticipated. But the potential for such a development is generally known. On the other hand, the ropes course is designed and maintained by KWC; therefore, from a responsibility perspective, KWC operates a ropes course more than it operates the river. Another distinction can be made regarding bike rentals. While KWC bears responsibility for maintaining the bikes, once rented the operation of a functional bike is under the control of the cyclist. So in addition to evaluating the activity generally, the facts surrounding how any harm occurred should be considered as well for the purpose of establishing fault.

Whatever the activity, it is crucial in all situations that risks be disclosed as completely as possible.¹¹ For example, the release for the ropes course should ask participants to disclose any medical conditions that could impair their ability to complete the activity successfully. The release should insure that the participant acknowledges that outdoor, adventure-based activities involves both known and unanticipated risks, which could result in physical or emotional injury, paralysis, death, personal injury, or injury to property, and that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activity. The release also should enumerate examples, such as: slipping and falling; being hit by falling objects, water hazards, exhaustion, exposure to temperature and weather extremes which could cause hypothermia (heat related illnesses), heat exhaustion, sunburn, dehydration; and exposure to potentially dangerous animals, insect bites, and hazardous plant life, and equipment failure or malfunction.

The release should inform the participant that KWC employees have difficult jobs to perform, and that while they strive for safety, they are not infallible, as well. For example, employees could be unaware of a participants' fitness or abilities, could misjudge the weather or other environmental conditions, or could give incomplete warnings or instructions. In sum, specificity of risk-warning, coupled with clear, unequivocal acceptance by the participants of those risks in writing, is essential to managing KWC's tort liability.

Finally, a basic principle of contract law provides that minors can disaffirm agreements during their minority,¹² and for reasonable time after reaching the age of majority.¹³ Since minors are a primary clientele of these activities, it is absolutely crucial for KWC to insure that the legal parents or guardian sign the release on behalf of the minor, and that any adult signing on behalf of the minor is in fact the legal guardian.

2. *Would the hold harmless agreement more likely be deemed invalid or invalid in each of these situations on the ropes course and why?*

- *A participant's I-phone™ fell out of his pocket and was ruined.*
 - No liability. Property damage that participant could have averted.
- *A participant broke her leg after grabbing a rope that KWC knew was rotten and failed to replace.*
 - Liability. Personal injury and gross negligence.
- *A participant slipped and fell after failing to follow clear directions.*
 - No liability. Personal injury, but no substandard conduct.
- *A participant suffered sunburn from being in the sun for three hours trying to complete the course.*
 - No liability. Personal injury that participant could have averted, assuming adequate warnings given.

3. *What about retail operations? KWC seeks to expand its retail operations by adding two additional outlets. Such an expansion might strengthen the brand of KWC as an outdoor destination resort. Two primary areas of tort liability emerge with respect to customers of retail establishments: premise liability and product liability. Along with adequate insurance coverage, the potential risk exposure can be managed by the exercise of care and through contractual provisions.*

a. What potential tort liability for premise maintenance accompanies operating a brick and mortar retail establishment?

Owners and occupiers of premises owe a duty of care to those persons who enter upon their property. Generally, the duty of an occupant of premises to exercise reasonable care to make the premises safe for certain classes of visitors by eliminating, or warning of, hazardous or defective conditions. In other words, owners, occupants, lessees of premises are under a duty to exercise ordinary care in the management of their premises to avoid exposing persons to unreasonable risk of harm.¹⁴

If KWC could reasonably foresee injury to customers as a result of any of the conditions in its store, then the injury could be considered the company's fault based on principles of negligence. For example, KWC should put entry mats on the floor to insure its entrance is not slippery when it rains because such a hazard is foreseeable,¹⁵ as well as slip-resistant strips on the stairs to help prevent patrons from slipping and falling. It should also manage its product displays with reasonable care; stacked goods could fall and cause patrons to slip as a result.¹⁶ If there are hazards which cannot be avoided, such as a wet floor when it is being mopped, consumers should be warned so that assumption of the risk can be a viable defense.¹⁷

Other questions on premises liability that could be explored include:

- What if the patron enters an *employee only* section?
- What if a patron is at the store after hours?
- Is someone who enters the store seeking to sell advertising to KWC owed the same standard of care as a customer (*invitee/licensee distinction*)?
- Is a delivery person owed the same duty of care as a customer?
- Is the parking lot included in the duty of care?
- What is the effect of building code violations on the duty of care which result in personal injury (*negligence per se*)?

b. Is a retail establishment liable if it sells defective products that cause injury to consumers or do not perform as represented? Discuss the applicability of the warranty provisions of the UCC and give examples.

A fault paradigm, like the one used to establish premise liability, is not the only one that applies to retail sales. Clearly, if a packaged product is negligently designed, manufactured or inadequately labeled concerning safe use, any fault would be that of the manufacturer. Nevertheless, liability could attach to all sellers, even the retailer who would have had no duty or reason to inspect the product. The Uniform Commercial Code, a state statute, Article 2 of which governs contracts for the sale of goods, extends liability for defective products to all sellers.¹⁸

For example, assume that KWC sold a defective mountain bike which caused injury to a consumer when the handle brakes did not stop the wheels from turning. Under section 2-314 all merchant sellers warrant that goods sold are fit for their ordinary purpose,¹⁹ unless otherwise excluded.²⁰ Since consumers would expect a mountain bike with brake handles to stop the bike, the product is not fit, and KWC could be liable for those personal injuries as well as for compensatory damages, the cost of the nonfunctioning bike. Thus, it is important for KWC to include an indemnification clause in its contracts with manufacturers and distributors to protect it from liability related to the vendor's products, and to shift liability back to them or to their insurance companies.²¹

Retailers also could have liability under another warranty, the warranty of fitness for a particular purpose.²² That section provides that in situations in which "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."²³ As a retailer of outdoor gear, it would be normal for customers to assume that KWC's sales clerks have a level of expertise to select appropriate gear for their activity. In situations where the buyer seeks that expert recommendation, the warranty of fitness arises. For example, if a customer relied on a KWC sales clerk to select the appropriate boot to climb Denali in sub-zero temperatures, and the boot did not sufficiently insulate the climber's feet causing frostbite to occur, KWC could be liable. The boots may be fit for the ordinary purpose of hiking and climbing—but not hiking and climbing in sub-zero temperatures, which was the buyer's particular purpose.

Likewise, any affirmative representations made by KWC's agents could create warranty liability. Express warranties can be any 1) affirmation of fact or promise, 2) description of the goods, or 3) a sample or model made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.²⁴ For example, if a KWC sales clerk represents that a backpack is waterproof, then a warranty is created, providing that such characteristic is material to the buyer's purchasing decision, i.e., a basis of the bargain.

So why do sellers make such representations given the liability exposure? Often express warranties will prompt a sale based upon consumer preferences, or one merchant may be preferred over others based on the expertise of its agents whose recommendations are sought. While there is possible risk exposure for breach of warranty when representations are made, the seller must be concerned about the bottom line, as well. The key is not to eliminate all risk, but to manage a level of reasonable, calculated risks. It is also critical for retailers to evaluate indemnification clauses with their suppliers, as well as to thoroughly vet the quality of products purchased for resale.

4. *Why might horseback riding be treated differently? What type of tort liability could cover such an activity?*

The standard of care in most activities is that of a reasonably prudent person—a negligence standard. However, some activities fall under the umbrella of strict liability, which imposes liability without regard to fault. Usually that standard is reserved for those activities which pose an unreasonable risk of potential harm to bystanders or participants, and which are abnormally dangerous.²⁵ For example, the ownership and possession of wild animals is governed by strict liability under the common law because wild animals are inherently dangerous.²⁶ In contrast, the ownership and possession of domesticated animals generally is governed by a negligence standard of care. However, if the owner or possessor has reason to know of a domestic animal's dangerous tendencies, then a strict liability standard could apply to any harm caused by the animal.²⁷

If a horse previously had thrown riders, then a riding stable arguably would know or have reason to know that the animal had dangerous propensities, and strict liability principles would apply, resulting in significant liability exposure.²⁸ Therefore, a riding stable should verify that the horses providing its guests are tame, well-broken and absent any malevolent history. As long as the animal did not previously exhibit dangerous tendencies, a negligence standard should apply. Under that standard, a stable would be wise to provide pre-ride safety and riding instruction prior to departure, set an age limit for riders, for example, "riders must be five years or older," establish a maximum weight for riders, and enforce a prohibition on double riders, at least for children.

Because of the substantial liability exposure for equine activities, almost all states have enacted equine activity liability statutes that grant qualified immunity from civil liability to certain classes of persons who are engaged in equine activities under certain conditions.²⁹ For example, the statute may protect the industry from the applicability of strict liability if sufficient warnings are provided under an assumption of risk doctrine.³⁰ These statutes also may supersede common law strict liability for inherent risks, and provide immunity at least when the defendant's conduct is not negligent, willful or wanton.³¹ The impetus for such protective legislation arguably is grounded in the substantial economic and social impact of the horse industry, and the reality that the unavailability of liability insurance or the high cost of liability insurance has forced many equine operations out of business.³²

5. *What about lodging expansion? The decision to expand has financial, marketing and legal implications.*

a. *What decisional issues are presented from a business operations standpoint? What pros and cons should be considered in evaluating the building of a destination resort?*

KWC's lodging facilities can accommodate a total of 200 guests and consist of (1) Base Camp Lodging - basic, affordable housing in bunk-style cabins and a shared community building with full kitchen, dining hall, and charcoal grill and (2) mid-scale hotel rooms. To remain consistent with KWC's core values and future direction, have students determine which of the following methods of lodging expansion would be the best fit, discussing the pros and cons of each. Students may also come up with other lodging expansion suggestions. For example:

- Lure an established hotel brand to build on the property
- Build cabins on the property
- Sell lots and manage the cabins built on them as vacation rentals
- Build a timeshare condominium on the property
- Build a destination resort hotel on the property

Characteristically, destination resorts serve as a primary motivation to visit an area, offering higher quality facilities and levels of service than other local businesses in the vicinity. A destination resort can be thought of as the ultimate stopping place that provides most of the guests' amenities. For example, guests do not have to leave the premises for lodging, food, drink, entertainment, sports, shopping or recreation activities.³³

To best compete in today's environment as a destination resort, KWC should first review its core values, future direction, and current facilities. An important part of the initial KWC culture were values based on team spirit, a sense of ownership, quality, a strong work ethic, and a shared love of whitewater sports and the outdoor environment. Although employee control has now been eliminated, the other values remain intact today. KWC is committed to providing highly skilled instructors, memorable and safe outdoor experiences for guests, community support, and environmental sustainability. The company's future direction reflects a green culture. A destination resort has the potential to increase revenue through:

- Higher occupancy.
- Higher sales per room than other categories of hotels
- An extended season if it included in-door sports
- Facilities and/or a spa to increase visitation during the shoulder months
- An expansion of target markets, which could include the addition of a conference center and related amenities to attract the meetings market or business travelers, both important target markets, and/or

- A fine dining restaurant with upscale food and alcoholic beverage selections.

On the other hand, a destination resort potentially may result in a deviation from KWC's core of operation. Moreover, according to the season, the resort hotel guest base could show a wide variation, potentially affecting the cash flow. It also would require:

- Substantial financial investment
- Higher average number of employees per room (resulting in much higher payrolls than other kinds of hotels)
- Employees with different skill sets, who may or may not be available in the area, and
- Availability of 24/7 quality service to meet guest expectations for a resort hotel.

b. What are some legal issues of which lodging establishments must be mindful? For example, must the lodging establishment admit all guests who seek admittance? Is the lodging establishment liable if guest's possessions are damaged or lost?

The law that applies to lodging is deeply rooted in the history of the common law. In Medieval England the traveling upper class stayed in the great houses of their noble contemporaries, while the monasteries opened their doors to the traveling poor; the middle class, on the other hand, stayed at inns, which provided shelter, food, and drink.³⁴ Because traveling at this time was wrought with danger precipitated by thieves and outlaws,³⁵ the innkeeper owed a common law duty to accept all persons who sought lodging, providing they were not disorderly, drunk, filthy, or there for an illicit reason.³⁶ Today, Title II of the Civil Rights Act of 1964 applies to lodging establishments that serve as a place of public accommodation for transient guests, and prohibits "discrimination or segregation on the ground of race, color, religion, or national origin."³⁷

At common law innkeepers were responsible for the property of their guests brought into the inn (*infra hospitium*) as an insurer.³⁸ To mitigate the harshness of the common law's absolute liability rule for property, state legislatures passed statutes which limit the innkeeper's liability for guests' property if certain conditions are met, such as making safes available and posting a notice of their availability.³⁹ Additionally, the law of contracts (e.g., reservations), bailment (e.g., left belongings of guests), negligence (e.g., prevention of foreseeable harm by third parties) and employment law (e.g., respondeat superior) are all relevant to the operation of a lodging facility, and provide fertile ground for exploring how KWC can manage legal risks.

6. *Discuss the potential liability and regulations associated with the sale of food and alcohol.*

a. What is the potential liability under the UCC for the sale of food?

Food constitutes a good under the UCC so food and beverages served at any of KWC's eateries must be merchantable, or fit for the ordinary purpose of consumption.⁴⁰ Some states interpret merchantability under the UCC by the foreign/natural test. If the ingredient ingested, which caused harm to the consumer, was natural to the food, then the food is still merchantable.⁴¹ For example, if a patron broke a tooth on an olive in a Martini, there would be no liability in a jurisdiction which applies the foreign natural test to define merchantability because pits are natural to olives. Other jurisdictions define merchantability by the reasonable expectations test, and inquire whether or not a consumer can reasonably expect to find the substance in the food served.⁴² Under this test, if a consumer reasonably would expect a pitted olive in a prepared cocktail, then the drink would not be merchantable, notwithstanding that pits are natural to olives. Aside from the UCC, recently passed federal legislation requires restaurants with twenty or more locations and substantially the same menu items to provide an approximate calorie value for each of the restaurant's food and drink offerings on its menu board, individual menu, or drive thru menu.⁴³ This regulation does not apply to KWC's eateries, but food safety regulations administered by the local health department do apply.

b. What is the liability exposure for the sale of alcohol?

The serving of alcohol is subject to even more governmental oversight than the serving of food. Under the common law, bars (taverns) generally would not have been liable if a patron consumed too much alcohol and injured a third party since it was the customer, and not the seller, who caused the harm.⁴⁴ Eventually, however, *Dram Shop* Acts were passed by state legislative bodies to monitor more closely responsibility in the sale and consumption of alcohol.⁴⁵ These acts usually make it illegal to provide alcohol to minors and also impose liability in tort for illegally providing alcohol to habitual drunkards or intoxicated individuals if those persons subsequently injure a third party.

As a result, the potential liability is substantial for commercial establishments that sell alcohol. Illegal sales of alcoholic beverages could result in the revocation or suspension of a liquor license, leading to potential job loss or closing of the

business.⁴⁶ Anyone serving alcohol at an establishment can be sued for damages or injuries resulting from illegal alcohol sales, including bartenders, servers, managers, and owners. Owners of bar and beverage operations may be liable to the injured or deceased party or parties for a range of damages, such as compensation for pain and suffering, medical expenses, lost wages, property damages, funeral expenses, support for spouse and dependents, and possibly punitive damages. All establishments serving alcoholic beverages should acquire insurance to cover these potentially overwhelming amounts of recoverable damages. Because each state's dram shop act has different provisions, it is important to consult the relevant statute to ascertain its parameters.⁴⁷

In addition, a person who is injured by the acts of an intoxicated individual may have the common law right to bring a lawsuit against the owners of a bar or restaurant where the individual causing the injuries was served alcoholic beverages independent of any claim under a state's Dram Shop Act.⁴⁸ In a case involving a drunken driving accident, for example, the injured party may choose to sue for negligence, defined as failing to exercise the level of care that someone of ordinary prudence would have exercised under the same circumstances. Thus, it is critical for an establishment's defense to be able to demonstrate that it has exercised reasonable care with alcohol service, such as stopping service when persons show signs of intoxication and offering them a means of transportation.

As social concerns for alcohol abuse escalate, more courts are holding establishments liable for serving intoxicated guests. With the proposed lodging expansion and addition of alcoholic beverages, KWC should be aware of legal responsibilities of alcohol service as well as the consequences of violating the laws regarding alcohol service. Special alcohol service procedures are also required in some situations. For example, meetings, receptions, banquets, and other special events present a challenge to the effective control of alcohol risks. Lodging facilities face additional difficulties because, in addition to the hotel's bar and restaurants, guests may also drink in other locations on the property. It is the responsibility of the lodging staff to make sure intoxicated guest do not leave the property. To control liability risks effectively, alcohol awareness training is essential for all employees serving alcohol. Training should concentrate on techniques to identify intoxicated guests, stop their alcohol service, and prevent them from driving. Simply cutting off alcohol service to intoxicated guests is not enough.⁴⁹

c. How is the sale of alcohol regulated by the government? How do the laws and regulations of your state control the sale of alcoholic beverages?

Under the U.S. Constitution, each state has the right to control the sale of alcoholic beverages within that state.⁵⁰ State governments subject sellers of intoxicating beverages to strict licensing requirements as well, which regulate the serving and/or sale of wine, beer, and/or mixed beverages. Often the licensing system is complex and specifies different regulations according to the type of establishment and the type of beverage sold—wine, beer or liquor. States have administrative agencies, usually called *Alcoholic Beverage Control* boards or commissions that administer the regulations and provide information to assist sellers with compliance.⁵¹ Although alcoholic beverage control boards in each county typically have explicit responsibilities and powers, more often than not the final control rests with the state liquor authority. As a part of this regulatory scheme, states usually require server training for licensees and their employees, regulate the hours of sale, mandate labels for dispensing, and provide fines and penalties for violations.

An establishment selling alcoholic beverages should have a copy of its state liquor authority's rules and regulations. It is important to note that every state's (and sometimes county) laws are different regarding on-premises and off-premises alcoholic beverage sales.⁵² For on-premises consumption three types of licenses are available: a wine license (which may or may not include the sale of beer), a beer license, and a liquor license (which includes the sale of beer and wine). License renewal is mandatory on an annual basis. Every retail licensee is generally required by state law to maintain records of daily sales and purchases of alcoholic beverages for on-premises consumption. The hours of the day during which an establishment may or may not sell alcoholic beverages are also regulated by ABC Boards. In some areas, for example, selling alcohol on Sunday may be illegal, while other areas may permit the sale of alcohol on Sunday only after noon.

Additionally, states will permit local options for municipalities and counties to determine whether or not alcohol can be served.⁵³ In some regions, the sale of *liquor by the drink* is still prohibited in restaurants. Instead, the facility can obtain a permit for patrons to bring their own alcoholic beverages, or offer guests the option of joining a private club that is not covered by the local ordinance. KWC can serve liquor by the drink legally in its area of operation; however, in deciding whether or not it should expand the menu to include alcohol, it must weigh the costs of insurance and regulatory compliance against the projected additional revenue, the expectations of the population in its targeted market, and the local culture concerning the sale of alcohol. Serving micro-brews is an especially popular trend, and could enhance business.

C. Employment Issues

1. *KWC has experienced competition from former employees in the past. How could those risks be managed by contract? Would such a clause be enforceable? What would be some permissible restrictions on competition?*

Restrictive covenants are often viewed with disdain by courts because they restrict the ability of parties to the contract to earn a living,⁵⁴ as a result, they are often examined for legality on reasonableness grounds.⁵⁵ Generally, courts examine if the time and geographic constraints in the no-compete clause are reasonable.⁵⁶ As a general proposition, a non-competition agreement of two years is within the range that courts have deemed reasonable.⁵⁷ Some states by statute provide additional criteria for examining the enforceability of covenants not to compete, as well.⁵⁸ Courts require that the employer articulate a legitimate business interest to protect from unfair competition by former employees.⁵⁹ The protection of trade secrets qualifies as a legitimate interest in most jurisdictions,⁶⁰ as does the protection of other confidential information (such as customer lists),⁶¹ as well as the goodwill fostered on behalf of the employee for the employer.⁶² A covenant can be a valid means to protect an employer against postemployment unfair competition, providing the employer's legitimate business interests outweigh the employee's concern regarding the possible loss of livelihood.⁶³

KWC faced competition by former employees who acted as guides on their international excursions. At the time they were initially launched, these international excursions gave credibility to KWC's operations by enhancing the reputation of its instructors and guides as being capable of going global. Of course, when clients booked excursions with KWC, it was the guides with whom an affinity developed. The guides provided the expertise and the quality experience that inspired clients to return year after year. It was the personal relationship between the client and the guide, as well as the client's confidence in the guide's abilities, which brought repeat business to KWC. Predictably, when the guides started their own business, the clientele of KWC went with them.

But it was KWC who gave the guides the opportunity to develop that rapport. But for being employed by KWC and supported financially by KWC in arranging and booking the tours, the guides would not have a clientele. That goodwill can be protected in most jurisdictions by a restrictive covenant. Therefore, a restrictive covenant should be enforceable, providing it is ancillary to any agreement between the guides and KWC, and reasonable in duration and geographic scope. Since most trips for the clients would be annual events, a two to three year covenant might be considered reasonable, as it might take clients a trip or two before they feel comfortable with the new KWC guide. What range of restriction is reasonable geographically would depend upon from where KWC drew its clients.

What might also add legitimacy to such a covenant on these facts would be restricting enforcement to the type of experiences and adventure activities that the former employee led for KWC. In other words, the restriction could be limited to kayaking or rafting, and not cover trekking or hiking in exotic locales. Such considerations allow the employer to earn a living by leading other types of adventure travel during the restricted period. Alternatively, the covenant could be limited to contacting only former clients of KWC, which tends to render the duration of the restraint reasonable.⁶⁴

Although the former management of KWC was not terribly concerned about competition from former employees, the new leadership should consider including a restrictive covenant in the employment agreement with the guides, if it re-launches an expansive international travel program. To enforce such a clause, KWC would need to seek an injunction to stop any former employee from competing; determining whether or not to seek such legal action is within their discretion. The clause, however, provides the company an option.

2. *What is an ESOP? What are the advantages and disadvantages of such an employee stock plan for KWC?*

An ESOP is a qualified retirement program, which can be established as a trust fund for employees to which the company contributes 1) cash to buy company stock, 2) shares directly to the plan, or 3) loans money in order for the employee to buy shares.⁶⁵ Contributions to the plan are tax-deductible; further, employees pay no tax on the contributions until they receive the stock when they leave or retire.⁶⁶ An employee owned stock plan creates a sense of buy-in to the company's success. Employees believe that their efforts will prove fruitful to themselves personally. In other words, an ESOP creates a connection between the company's success and each employee's financial success, resulting in increased loyalty and productivity.⁶⁷ In the case of KWC, the ESOP also contributed to the communal like culture of the business.

As time progressed, however, the viability of the plan became problematic. The plan created substantial financial commitments which could be realized at any time if employees decided to cash-out their stock. A significant part of KWC's net worth was tied up in the real estate it owned on the river as compared to the revenue generated from operations. Real estate is anything but liquid; that reality would make it difficult to pay out the option on short notice, or in any event, make it a losing proposition. In fact, stock owners effectively could hold the company hostage with a unified decision to force a stock buy-out if they were tempted by lucrative offers of developers.

Moreover, many of the employees in the 1990s and early 2000s did not contribute their sweat equity when the company was born. Yet they could cash out at the higher value of the stock, which had increased in value based upon efforts of the original team of employees. When KWC commenced operations, there was little in the way of financial remuneration for employees, and stock options provided a way of recognizing their dedicated efforts to help the enterprise succeed. That

means of compensating employees became less important as the company's operations and revenue stream increased. Another issue with the stock option plan surfaced in the early 2000s. Specifically, compliance with new governmental regulations in the wake of corporate scandals made it too costly to administer the plan. ESOPs are regulated under federal securities law.⁶⁸

D. International Expansion and Sustainable Tourism

1. *What are the legal risks associated with providing international adventure travel excursions?*

KWC could broker travel excursions and shift liability risks to the tour company chose, but it would not gain a rapport and reputation for excellence with the travelers. So while leading excursions poses potential perils, liability can be managed by taking calculated precautions. Full-service travel excursions are all-inclusive in the sense that the company takes care of everything except air: the logistics, lodging, meals, equipment and transportation. With that level of service there are inherent risks, particularly when guests are experiencing challenging, intermediate whitewater, paddling Class II-V rapids through some of the most rugged and pristine creeks in the world. Previously, KWC facilitated both kayak and rafting on international trips. However, participants who raft are typically less experienced than kayakers; families with young children could participate. If KWC re-launches its international excursions on a broader scale, it should consider limiting the activity to experienced kayakers.

KWC, necessarily, must contract with local lodging facilities, restaurants and transportation companies to provide their services on location. Certain contract clauses can be used to manage some risks arising out of those agreements. For example, in the event a dispute arose, a forum selection clause could mandate that U.S. courts would have jurisdiction over any dispute arising under the contract, and even specify the district in which the case should be filed.⁶⁹ A choice of law clause could guarantee that the laws of the state of KWC's incorporation would govern.⁷⁰ Alternatively, an arbitration clause could select alternative dispute resolution.⁷¹ While each of these provisions helps to reduce litigation or transactional costs in the event of a dispute, as a practical matter, executing a judgment is still impractical unless the service providers have assets in the United States. Alternatively, litigating in the country wherein the dispute arose and the assets are located can be a costly proposition. So as a practical matter, the best tool for minimizing risk exposure rests with a wise, well-researched selection of the provider. KWC must be intimately familiar with the reputation and quality of the service provider chosen; first-hand experience with the provider is essential.

Potential health and safety issues must be managed on such trips as well. KWC must be informed of any pre-existing medical conditions of the participants, and obtain documentation that participants have received appropriate vaccinations for the area to which they will travel (or an informed waiver if the participant does not wish to be vaccinated).⁷² Vaccination information is available on the website for the Center for Disease Control.⁷³ Medical problems that arise abroad can be more costly because many domestic health insurance plans, including Medicare, do not provide coverage internationally. Therefore, KWC should *require*, as a contractual condition of booking an excursion, that all clients be insured individually, and that KWC be provided details of the client's insurance, including 24-hour emergency contact number/s, along with documentation that the insurer is aware of the destination and the type of activity to be undertaken. The insurance should cover such contingencies as personal accident and injury, including death and disability, medical expenses, repatriation, and loss of personal effects. KWC should *recommend strongly* that its patrons purchase evacuation insurance as well, for medical, natural disaster, and security advisory evacuation services.⁷⁴

The failure to provide evidence of the required insurance should be a condition subsequent in the contract,⁷⁵ which if unsatisfied would excuse KWC from the agreement, and make operational the cancellation clause, if within the penalty period. A cancellation clause protects against lost revenue by leveling graduated penalties depending upon the amount of notice given by the client. Comparable to a liquidated damages clause,⁷⁶ the cancellation clause protects KWC from lost revenue if the client cancels and the company is not able to re-book the space. The client can purchase insurance to cover such a contingency as well, should they be unable to go on the trip for unavoidable reasons.⁷⁷

KWC should also insure that the traveler has a valid passport and any necessary visa. Visa requirements might vary depending upon the citizenship of the participant. The U.S. State Department's website provides information about whether or not a visa is needed for U.S. citizens to travel to any country in the world, in addition to information on the location of the U.S. embassy and any consular offices, crime and security information, as well as health and medical conditions in the country.⁷⁸ The website also lists travel alerts for potential issues such as strikes, demonstrations, health issues or any elevated risk of terrorist attacks.⁷⁹ It also provides travel warnings for certain countries to which travel is seriously discouraged because of an unstable government, civil war, or ongoing and intense crime or violence, or frequent terrorist attacks.⁸⁰ KWC must remain vigilant in checking this website for information relevant to their excursions.

2. *Give some practical suggestions for how KWC could structure the international excursions to insure greater safety for participants. Visit some adventure travel websites to ascertain how they manage liability in their policies for suggestions.*

KWC should provide participants a packing list (including a full gear list), suggested reading, and any other information that may pertain to the particular trip. It should request a kayaking resume to be submitted for approval by the trip leader to verify the skill level of the participants. Participants should be able to demonstrate Class IV kayaking skills including a solid roll, as well as an ability to paddle Class IV all day, and to hike a specified relevant distance if a hike-ins is required to access the river or creek. The group size should be kept at a manageable number for each trip leader, at a minimum of no more than eight kayakers per guide. Participants should be alerted to the expected temperatures so that they will dress and pack appropriately. Since KWC could be considered an expert, they would be in a better position than the occasional traveler to be aware of risks involved in international adventure travel; therefore, they would owe a duty to their clients to warn of such risks it can reasonably foresee. If they are traveling to a non-English speaking country, it would be preferable for the guides to be bilingual in the country's language. Even more critical is for the guide to be trained as a Wilderness EMT first responder in the event for an emergency, as well as to be certified in whitewater rescue techniques.

3. *How can sustainability be addressed in such excursions?*

KWC should practice sustainable tourism so native habitats are not compromised in the quest for adventure. KWC should work with the communities visited so that they too will benefit from the tour. One way to give back to the community is for KWC to hire local guides and train them in outdoor leadership, rescue techniques and wilderness medicine in order to provide a better, safer service for their clients and to support and sustain their families and community. Aware that one of its primary goals is sustainability, KWC should align its business with ecological principles to help raise public awareness of sustainability issues. For example, the organization *Leave No Trace* has a series of guidelines for outdoor ethics.⁸¹ KWC could work towards developing a series of whitewater *Leave No Trace* guidelines.

When embarking on international adventure excursions, KWC guests could be given the opportunity to engage in experiential tourism, a new global learning trend in which tourists create meaning through direct experience.⁸² For example, KWC should encourage clients to experience and expand upon the true nature of adventure travel by emphasizing both cultural and ecological sustainability. To further this goal, KWC can instruct travelers not only about the destination, but also about the people, the local culture and how to help sustain its character while deepening their own leisure travel experiences. To that end, the company could encourage participants to interact with the native population socially, taste new foods, practice local customs and participate in festivals.

4. *How does KWC ensure that it is environmentally responsible?*

Tourism is an integral part of today's society. Consequently, environmental responsibility is becoming an important topic as the tourism industry acknowledges that it has significantly more accountability to the environment and to the world than do individuals.⁸³ Environmental responsibility refers to the obligation a company has to conduct business in a way that protects the environment.⁸⁴ The future direction for KWC is based on sustainability and commitment to a green culture.

One of the founding principles of KWC is based on environmental responsibility. KWC makes every effort to promote environmental responsibility in an attempt to preserve the benefits and enjoyment of outdoor recreation for future generations. As a leader in outdoor recreation for over 40 years, KWC is an advocate and sponsor of numerous efforts to preserve the natural environment. For example, the company has taught more paddlers and taken more guests whitewater rafting than any other outdoor recreation company. KWC's effort to protect the environment is a reflection of its broader social responsibility. Many companies, especially green ones, have made social responsibility a crucial part of their business model.⁸⁵

E. Intellectual Property and Branding

There are several types of intellectual property: Copyrights, Patents, Trade Secrets, Trademarks and Service Marks. These questions will discuss their applicability to the intellectual property of KWC.

1. *What is a trademark? What are the benefits of establishing a trademark for KWC? What constitutes trademark infringement? Give examples.*

The Trademark Act of 1946 (Lanham Act) is a federal law that protects registered trademarks from infringement. A trademark is “any word, name, symbol, or device, or any combination thereof...used to distinguish ...goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”⁸⁶ In order to be protected against infringement, trademarks should be registered, designated as such (™ or ®), and be used in the context of business/commerce.⁸⁷ A registered trademark is exclusive after five years, but can be challenged in first five years by other alleged holders.⁸⁸

Trademarks must be distinctive and not merely descriptive.⁸⁹ There are categories of distinctiveness that are eligible for protection: a mark or phrase that is: 1) suggestive of the product’s characteristics (*LA* for a low alcohol beer marketed by Anheuser-Busch); 2) arbitrarily associated with a product (Apple Computers) or fanciful (NIKE); or descriptive, but only if the descriptor has acquired a secondary meaning distinctive of the applicant’s goods (Philadelphia brand cream cheese); however, a trademark cannot be generic.⁹⁰ The primary benefit of using a trademark is to allow consumers to associate the mark with the product *brand*, and presumably, brand association increases the firm’s profit margin. Federal law protects the economic value of such intellectual property by allowing an injunction against others who would infringe that mark.

To prove trademark infringement under the statute, the plaintiff must show (1) that it owns a valid and protectable mark; (2) that the alleged infringer used a “reproduction, counterfeit, copy, or colorable imitation” of that mark in commerce and without consent; and (3) that such use is likely to cause confusion.⁹¹ Often the primary issue will be whether or not there exists a likelihood of confusion among customers and prospective customers. In determining whether or not there is a likelihood of confusion, courts consider several factors: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services the marks identify; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the alleged infringer’s intent; and (7) actual confusion.⁹²

For example, the University of Georgia Athletic Association brought suit against a beer wholesaler for marketing *Battlin’ Bulldog Beer*.⁹³ The UGAA claimed that the cans infringed its symbol for its athletic teams. The symbol, which depicted an English Bulldog wearing a sweater with a “G” and the word BULLDOGS on it, had been registered by the UGAA.⁹⁴ Soon after the beer appeared on the market, the university received telephone calls from friends of the university who were concerned that *Battlin’ Bulldog Beer* was not the sort of product that should in any way be related to the University of Georgia. The beer cans bore the disclaimer, “[N]ot associated with the University of Georgia,” although it was relatively inconspicuous on an individual can and was not visible on a six-pack.⁹⁵ The court found that there was an infringement and upheld the permanent injunction granted by the district court.⁹⁶

On the other hand, Fox News filed suit asserting that a book by liberal satirist (now Senator from Minnesota) Al Franken violated its trademarked slogan, “fair and balanced.” Fox was seeking an injunction to halt distribution of Franken’s book, *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right*, alleging that the book would be likely to confuse consumers into believing that it was endorsed by Fox. A federal district judge denied the request by Fox News for an injunction,⁹⁷ and Fox dropped the lawsuit.⁹⁸

Federal law also provides that “the owner of a famous mark” is entitled to *injunctive relief* against another person’s commercial use of a mark (stop the use) if that use “causes dilution of the distinctive quality” of the famous mark.⁹⁹ Dilution can occur when unauthorized use of a mark either blurs or tarnishes the distinctive nature of the mark. While a likelihood of confusion is not necessarily required, the statute requires a showing of actual dilution, rather than a likelihood of dilution.¹⁰⁰ Where the marks are not identical, the mere fact that consumers mentally associate a user’s mark with a famous mark is not sufficient to establish actionable dilution.¹⁰¹

While the Lanham Act protects trademarks against dilution, it does not protect trademarks against parody because arguably there is no likelihood of confusion or blurring of the distinctiveness of the mark. Moreover, parody may be viewed as commentary protected by the First Amendment. Sometimes, however, the line between parody and infringement is debated in court. For example, Vuitton, a French luxury fashion house that sells its monogrammed handbags (for between \$995 and \$4,500) only to licensed stores or boutiques, brought suit to enjoin the sale of a small polyester chew-toy, shaped roughly like a handbag, that bears a monogram that parodies the French luxury goods retailer’s famous monogram canvas mark.¹⁰² These *Chewy Vuiton* toys were decorated with geometric doo-dads that mimic Louis Vuitton’s four-pointed-star designs, and featured an interlocking CV logo in place of the famous interlocking LV logo.¹⁰³ The court determined that the *Chewy Vuiton* dog toys conveyed enough of the original design to allow the consumer to appreciate the point of parody without appropriating the mark.¹⁰⁴

2. Develop a trademark for KWC. How can it be registered? Visit www.uspto.gov and describe the process.

Sample response:¹⁰⁵



Prior to completing a trademark application, one should research his/her intended trademark through the USPTO. Applications can then be submitted, and fees paid, online. The filing process can take up to a year, but applicants should check their application status every 3-4 months. If approved for publication in the Official Gazette, there is a 30-day opposition period, during which the public may object to the proposed trademark. If there is none, a registration certification will be issued by the USPTO.

3. *Assuming that KWC registers a trademark, must the company do anything else to guarantee it will remain protected?*

While federal law protects trademarks, the government does not police infringement or dilution cases. It is up to the holder of the mark to bring a lawsuit to protect the federally granted right of exclusion. Also, it is not the case that once something is trademarked it is always trademarked. If the mark becomes generic it loses its protection. Holders must be vigilant in policing infringement. (Bayer) *Aspirin* is an example of a lost trademark.

4. *The instructors at KWC developed certain key techniques for teaching both first-time paddlers as well as more experienced paddlers. What were they? Could those techniques be protected under federal trademark law? What about copyright law? Patent law? Can contracts or the law that applies to trade secrets afford protection? Define and discuss these legal means of protecting intellectual property and apply them to these techniques. What about the recipe of a favorite dish at Paula's Garden Café (See Appendix 2)? What protection for intellectual property would be the best fit?*

The techniques included *Rapid Progressions*, a teaching method designed for the introductory course to help students master kayak basics, as well as specific strategies taught to get students to keep their head down through a roll, or to pick up with their knee. These techniques were the result of KWC instructors dissecting the mechanics and physics of paddling and translating the fluid, intuitive body movements into anatomical step-by-step instructions for beginners. Neither the technique nor the strategy is subject to trademark protection because there is no product or service associated with the teaching mechanics.

Neither the technique nor the strategy at this developmental point is subject to copyright protection either. The U.S. Constitution provides, "*The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*"¹⁰⁶ The Copyright Act of 1976¹⁰⁷ protects all works fixed in a tangible medium of expression, and provides a nonexclusive list of types of works, lists permissible reproductions, and, as amended, extends the length of protection to life plus 70 years, or 95 years for non-author copyright holders (longer than the original Act's 14 years).

Copyright protects original works of authorship that are fixed in "a tangible form of expression."¹⁰⁸ So in addition to a work being reduced to a tangible medium of expression, it must be original to be protected by federal law. To date, neither the method nor the technique has been reduced to an intangible form. The process alone is not capable of being protected. A training manual, however, that described in detail the teaching techniques could be copyrighted. So what if a training manual was written by the employee of KWC who developed the method while serving as an instructor? Who would own its copyright? An individual creation is immediately copyrighted to the creator; however, if the creator is acting as an employee of the buyer, the copyrightable material is considered a *work for hire*, and the employer, or other person for whom the work was prepared, owns the copyright.¹⁰⁹ Thus, KWC would have to right to license its publication and obtain royalties if it was produced in the course of employment.

In fact, KWC did make and copyright two films on paddling techniques, in which their instructors demonstrated step-by-step the paddle roll. The films were designed to serve as testaments to KWC's role as an innovating market leader.

Could the technique also be patented? A patent is an exclusive privilege granted to an inventor, including legal entities, which allows the holder to manufacture, use, or sell a product, or to employ a method or process for a fixed, non-renewable period of twenty years.¹¹⁰ In order for an invention to be patented it must be novel, useful and nonobvious.¹¹¹ In other words, the item must have not been produced previously, have a useful application, and of such a nature that a person or ordinary skill could not have discovered it easily. Further, the item cannot be in the form of a scientific abstraction or idea, but instead must be part of a tangible environment.¹¹²

Some *processes*, statutorily defined as an art or method,¹¹³ can be patented under these requirements. For example, business data processing technologies, methods for performing data processing, calculation operations in the practice, administration or management of an enterprise, calculation operations in the processing of financial data or the determination what to charge for goods or services may be patentable, as may be computer-implemented processes related to e-commerce.¹¹⁴ However, while the paddling techniques involve a process, unlike business processes, they should not remain secret. As a practical matter, the value is in their revelation.

Similarly, trade secrets remain confidential and secret, as long as they are protected successfully from disclosure.¹¹⁵ Information protected by the law of trade secrets must take some effort to develop and confer on the owner a competitive advantage, such as formulas, recipes, customer lists, internal research findings, marketing plans, designs, and patterns.¹¹⁶ The techniques taught by the instructors by definition could not remain secret or they would be of no use to students. So by definition trade secret law could not protect the information.

Likewise, nondisclosure agreements often serve as a part of an overall scheme to protect a company's confidential information.¹¹⁷ However, such an agreement is of no use to information which must be revealed for it to have value, like the paddling techniques. On the other hand, nondisclosure agreements are critical in protecting vital information, the revelation of which could impair the company's competitive edge. Requiring employees to sign nondisclosure agreements reinforces the notion that the information transmitted is intended to remain secret. For example, it is advisable for KWC's employees in reservations to sign a nondisclosure agreement concerning the company's *Customer Management Relationship* software.¹¹⁸ That software, linked to the reservation system database, is a key component of KWC's relationship marketing, its client list and their preferences. It would give any competitor a head start on knowing what specific outdoor experience product to market to which customer.

A recipe could easily constitute a trade secret if KWC took sufficient measures to safeguard its secrecy. Examples of trade secrets include the formula for Coca Cola® and the recipe for KFC™ seasoning. Whether or not the cost of safeguarding the recipe's secret, and the logistics required to maintain secrecy, justify protecting it should be weighed against any competitive advantage it brings to KWC. On the other hand, a book of recipes from Paula's Garden Café could be copyrighted and sold as they are tangible and original. Compiling such a book of recipes could prove to be an effective marketing strategy for the establishment as well, and the book could be sold as a local souvenir in the KWC's retail shop. Patents are less applicable; however, if Paula produces a distinct and new variety of basil, then that botanical could be patented.¹¹⁹

How might KWC guard its competitive edge with respect to these valuable techniques? Its best option is to insure that its instructors do not use the information to compete against KWC, and to insist that they sign an enforceable restrictive covenant as part of their employment agreement.¹²⁰ Additionally, the term, *Rapid Progressions*, could be trademarked so as to insure that no other entity usurps their *handle* or imprimatur on the technique.¹²¹

5. *What is a domain name? Why was it so important to acquire? Think of a domain name for one of your hobbies, and to explain how you would register it, visit <http://www.icann.org/en/about/learning/beginners-guides/domain-names-beginners-guide-06dec10-en>.*¹²²

Domain names are world-wide web (www.) site names, and the equivalent to an address on the Internet. The Internet Corporation for Assigned Names and Numbers ("ICANN") is a non-profit organization that coordinates the Domain Name System, Internet Protocol addresses, and space allocation, among other management functions, such as standardizing the technology and codes necessary for the exchange of billions of communications daily.¹²³ Today, individuals are not as dependent on the expertise of travel agents to plan vacations as they were twenty years ago. Instead, they turn to the Internet to plan their vacations. Therefore, the visibility of KWC is crucial on the Internet. Three-letter domain names are especially desirable. Domain names can be protected by trademark law, as well. Federal law prohibits *Cybersquatting*, a practice of registering a domain name with the intention of selling it the owner of the trademark.¹²⁴

6. *What is a brand? Describe KWC's current brand identity. If KWC becomes a destination resort, how should KWC reposition its brand to reflect the change?*

A brand is a name, term, sign, design, symbol, phrase, or combination of these elements used by an organization to identify its products and differentiate them from competitors.¹²⁵ KWC's current brand identity is based on quality outdoor adventures for the whole family that emphasize safety, fun and educational programs. To accommodate various personal approaches to leisure, KWC offers a variety of outdoor activities to target serious and casual leisure participants. Current target markets include those who want river adventures, scenic enjoyment, day visitors stopping by as a roadside attraction, families taking outdoor adventure photos, or super hardcore leisure enthusiasts spending a day or a week participating in various unconventional outdoor adventure activities.

Because KWC was one of the first adventure organizations to offer high quality river experiences, it has earned the reputation as an industry leader. KWC sustained this advantage by building a strong brand which established an industry standard. However, changes in consumer consumption patterns, perceptions of leisure, and an influx of new river lovers, have led to a more diverse group of recreational participants. As a result, to compete successfully in today's environment, it has become critical for businesses to create a unique identity that differentiates them from their competitors.

If KWC decides to become a destination resort, this strategy may reveal new growth segments. Repositioning their brand would allow KWC to offer the same product but with new values and benefits for new customers. By branding the

destination experience as opposed to the property's physical attributes, some destinations have successfully developed a distinctive positioning strategy to entice guests to visit their destination rather than their competitors. Notably, "successful destination branding lies in its potential to reduce substitutability."¹²⁶ By focusing on the tourist experience, KWC could offer guests an array of inimitable casual and serious leisure experiences in a spectacular outdoor environment. On its premises, for example, KWC has whitewater rafting and other outdoor activities, restaurants, lodging, outdoor gear and apparel retail stores, leadership and outdoor skills programs for all ages, corporate retreats, and special events and festivals.

Ask the students to determine which of the following tourism positioning tactics would be the best fit for KWC as a resort destination. Possible tourism positioning tactics include *Adventure tourism*, *Slow tourism*, *Spa tourism*, *Experiential tourism*, *Eco-tourism*, *Educational tourism*. Students may be asked to examine the strengths and weaknesses of each tactic. Could one or more of the tactics be combined to create synergy? The following paragraphs provide sample responses for *adventure tourism* and *slow tourism*.

Adventure tourism involves trips to destinations in a natural setting to participate in a new experience, often involving personal challenges and excitement in a controlled environment. This type of tourism is increasing in popularity among a growing number of consumers interested in discovering unusual experiences and destinations. KWC is regarded as a pioneer in the adventure tourism field, initially attracting serious leisure participants who wanted the *flow* experience.¹²⁷ *Flow theory* is based on the assumption that people reach peaks of involvement in their lives that produce intense feelings of creativity and enjoyment. Activities that generate flow require skill, increased concentration, a sense of control, challenge, and total immersion in the activity. These moments are referred to as "flow" experiences.¹²⁸ Flow-producing activities may include white-water kayaking, hiking, fishing, zip-lining, and white-water canoeing. KWC offers many of these activities; however, over time, KWC's target market has shifted to general guests who want a quality experience. For continued success in adventure tourism and the acquisition of new market segments, KWC should refresh and broaden its products and services and build its brand. The strengths and weaknesses of maintaining the adventure tourism positioning strategy include:

Strengths:

- Recognized industry leader in the adventure tourism
- Highly skilled and knowledgeable staff
- Reputation for high quality river experiences
- Variety of outdoor adventure activities offered
- Strong brand identity

Weaknesses:

- Limited focus on current target market without introducing new market segments
- New types of competitors in the industry (e.g., whitewater training centers)
- Internal organizational changes
- Included as part of KWC's positioning strategy already

On the other hand, *slow tourism* is a relatively new concept that grew out of the Slow Food movement which began Italy in 1986 as a response to the growing industrialization of food and standardization of taste.¹²⁹ The Slow Tourism movement is "a cultural revolution against the notion that faster is always better."¹³⁰ Slow tourism accepts a slow pace as the norm for participating in leisure activities, a pace that allows for reflection and rediscovery.¹³¹ Tourism products that are naturally slow include ecotourism, rural, nature tourism, trekking, horseback riding, and river.¹³² Re-branding KWC as a slow tourism destination resort shows promise as a good fit. For example, KWC already possesses several of the slow tourism components, including a mission statement which emphasizes sustainability and authenticity, a nature-based environment that includes a variety of river activities, and *Paula's Garden Restaurant* featuring five different varieties of basil in the garden. Marketing a slow tourism experience to visitors, as opposed to individual activities, has the potential to attract new target markets, increase revenue, create synergy, and enhance the guest experience. Strengths and weaknesses of a slow tourism positioning strategy for KWC include:

Strengths:

- Generates *first mover* advantage associated with a new concept
- Aligns with changes in consumer lifestyles and leisure patterns
- Brands the KWC experience as opposed to single activities
- Increases potential to attract new market segments
- Provides a holistic approach - integrating KWC's various components

Weaknesses

- Deviates from core business
- Requires employees with different skill sets

- Potentially could alienate current target markets
- Employees could be reluctant to embrace new branding concept

F. Business Organizations

Liability exposure of business owners varies depending upon what type of organization is chosen. For example, a sole proprietorship's personal assets can be attached to satisfy the debt of the business. On the other hand, the shareholders of a corporation can only lose the value invested in the shares.

1. *What type of business organization is KWC? What law governs its operations, and what does that law provide? Who are its owners, and how does ownership change? What is the potential personal liability of its owners in conducting the business?*

KWC is a for-profit corporation owned by shareholders, who purchase stock in the company. It is governed by the laws of the state of its incorporation. Typically, state law provides for perpetual existence, with transfers of stock resulting in ownership changes. KWC was closely held, or owned by a small number of shareholders. To exist, corporations must form under applicable state law. KWC incorporated on February 28, 1974. To incorporate, KWC filed articles of incorporation which stated the name of the corporation (Kimetoga Whitewater Center), the purpose of the organization ("to engage in the business of organizing, equipping, guiding, leading and promoting white water rafting trips..."), the company's address, as well as the name and address of its registered agent. The articles gave KWC the power to issue 100,000 shares of common stock with a par value of \$1/share. The articles also set forth the number of directors on KWC's board (3), along with their addresses.

The shareholders are not liable for the debts, judgments or obligations of the corporation. While shareholders do not generally have a right to participate in the day to day management of the firm, in closely held corporations, the shareholders are more active in the company's control and even may try to restrict transfer to outsiders.¹³³ Members on the board of directors and the officers of the corporation are considered to be agents of the company, and owe fiduciary duties to the shareholders to safeguard their financial investment. While directors and officers are not absolutely liable for business decisions that result in financial losses, they must exercise reasonable business judgment and act in good faith.¹³⁴ In a closely held corporation, in which a substantial portion of one's wealth portfolio is associated with an enterprise, a large judgment against the corporation still could have serious personal financial consequences.

2. *If the company re-organizes, would an LLC be appropriate? What is an LLC and how would a re-organization improve their liability exposure?*

A Limited Liability Company ("LLC") is a form of unincorporated business organization that provides limited liability to all of its owners and permits members to participate in the management of the enterprise. Typically, state statutes require the filing of articles of organization that are similar to articles of incorporation. Like a corporation, an LLC is typically perpetual in duration and annual reports must be filed, as well. An operating agreement governs the relationship between the members of the LLC. While members have no specific interest in property owned by the LLC, members do have two personal property interests in the LLC: 1) the right to share profits and losses and to receive distributions, and 2) a management interest to participate in the operations of the enterprise. Members are not personally obligated for the debts or other liabilities of the firm, although a member who is personally liable or who personally guaranteed a debt can be held liable to the exclusion of the other members.

G. Organizational Culture and Ethics

1. *Describe the organizational culture at KWC.*

Organizational culture can be thought of as the organization's personality, a system of shared meaning that determines how employees act.¹³⁵ The culture of an organization is encoded in the values, norms, stories (legends), beliefs, images, rituals, languages, myths and other symbolic constructs that shape the experience of everyday life.¹³⁶ For example, the ways in which employees view their job, work with colleagues, perform, and envision the future are largely determined by cultural norms, values, and beliefs. It is these ingredients that compose the organizational culture. KWC employees have always been leaders in the work place. They aspire to excellence in their fields and disciplines, and demonstrate a commitment to the service of others. Above all, they want to provide visitors with unforgettable experiences in the great outdoors. The staff takes pride in always being polite, gracious, and prepared to help and assist whenever needed.

Norms and values are an important part of the culture at KWC. For example, behind KWC's steady growth are three core values: excellence in outdoor adventures, active corporate citizenship and unparalleled high quality work environments for KWC team members. The company took on these attributes. These core values united a community of pioneers and leaders in an exciting, constantly changing and fun work environment.

The founding spirit of "Whitt and Ace" still pervades the company. Myths and legends about the KWC founder "heroes" did much to sustain and communicate the cultural values underlying KWC's success. For example, co-founder, Whitt Lincoln was a charismatic leader and a peace-loving individual who set out to create a team atmosphere that would bind the company together. Consequently, KWC employees maintain strong interpersonal relationships that are familial in nature. The emphasis is on having fun, promoting and preserving the quality of the outdoor experience and enjoying long-term friendships with other outdoor enthusiasts.

2. *What role did culture play in the evolution of KWC?*

In the 1970s, the organizational culture at KWC was communal. The guiding principal was the formation of a closely-knit community of friends doing what they loved best - working together in breath-taking whitewater locations, honing their skills, and sharing a passion for active outdoor recreation. Integrated patterns of beliefs or shared meaning are supported by various operating norms and rituals.¹³⁷ For example, initially KWC emphasized cooperative values and an identity rooted in the world of environmental sustainability rather than that of competitive business.

One major contributing factor to the KWC culture was the employee-stock plan. The financial benefit created a sense of buy-in and communal ownership. Over time, however, the external environment changed socially, politically, and economically. Consequently, the employee stock plan became a liability. As the value of KWC's stock increased, it became too costly to offer to new employees who had not "put in their time" so to speak. In addition, other employee perks, such as day care for the employees' children and deep discounts on retail merchandise and international adventure trips became too expensive to continue. A critical decision had to be made. Employee stock buyout ensued. Today, the organizational culture at KWC more closely resembles a standard business model. In other words, how employees deal with customers and how different levels of staff communicate with one another is determined by the business culture.

3. *How does ethos differ from culture? Describe the ethos at KWC.*

Culture is a complex issue. Characteristics of culture include patterns of interaction between individuals, themes and images examined in conversation, rituals of daily routine, and language.¹³⁸ On the other hand, ethos is the fundamental spirit of a culture.¹³⁹ This case study demonstrates how ethos develops around the organizational culture. An organization's culture usually reflects the vision or mission of the organization's founders. For example, Ace Parsons and Whitt Lincoln established the early culture at KWC by projecting an image of what it should be. KWC is viewed as a collectivity to which employees belong rather than just a workplace comprised of separate individuals. The collaborative spirit of the KWC community often pervades the work experience, and there is considerable emphasis on shared concerns, interdependence, and mutual help.

Ethos can be thought of as the reflection of a "local group's special beliefs, norms, events, values, traditions, moral principles, and performance standards."¹⁴⁰ This ethos is reflected in one of KWC's goals: "Our goal is to share ways for people to play outside, while teaching them that taking care of the great outdoors." The strong bonds KWC employees formed with one another contributed to the development of a distinctive ethos sustained through social processes, images, symbols, ritual, and stories.¹⁴¹ Today, stories about the original group of river rats are still told to guests and have become an integral part of the KWC ethos.

4. *In what ways can KWC ensure it acts ethically towards the following stakeholders: Customers, Employees, and the Community?*

a. *Customers*

KWC is a leisure service leader committed to professionalism and to providing their customers with quality service and meaningful value. "Professionalism describes how members of the profession incorporate obligations with skill and knowledge in ethical relationships with customers."¹⁴² Above all, KWC employees show professionalism. KWC instructors, for example, demonstrate professionalism through a commitment to the service of customers and by providing their guests with positive and memorable outdoor experiences. KWC instructors educate their customers about the local culture and the importance of green practices and environmental sustainability.

Highly skilled and trained KWC instructors also serve as role models and mentors for children and young adults. Since 1980, KWC has hosted youth camps in the sport of whitewater paddling. Youth campers have the opportunity to gain a sense of personal accomplishment while experiencing a positive high-quality adventure experience. Participants in KWC's Youth Paddling Team promote team responsibility and are held to a high level of professional conduct. In addition, there is a focus on safety and a low instructor-to-student ratio to ensure hands-on instruction and individual attention.

b. Employees

Between followers and leaders, trust is the cornerstone of ethics and shared values. At all levels, effective leaders must be trustworthy and loyal. By behaving ethically and consistently from a solid values base, leaders can build trust and loyalty among their employees.¹⁴³ Whitt Lincoln was a charismatic leader who has the most valuable of leadership skills, the ability to build a feeling of camaraderie among staff members and to retain the loyalty of key employees for many decades.

KWC employees are an elite group of highly trained and skilled individuals who focus on the safety of their customers and a positive, high-quality guest experience. KWC offers employees the opportunity to work in beautiful outdoor locations, to sharpen their outdoor skills, and the potential to become leaders in the work place. KWC also empowers their employees by giving them ownership of environmental goals and the tools to act on them. In return, KWC employees assume volunteer leadership positions, undertake environmental challenges, confront sustainability issues, provide memorable leisure experiences for visitors, and promote *green* awareness.

c. The Community

KWC believes giving back to the local community is essential and realizes the choices they make affect the impact their guests have on the community. KWC also understands the need for sustainable tourism and is truly committed to working with their community partners. KWC feels that communities should benefit from their presence and that the environment should not be compromised in the search for adventure. Consequently, KWC creates outdoor environments that are fun, inviting, and reflect the communities they serve. KWC employees give back to the community by funding charitable causes and through community partnership initiatives to preserve the regional culture and the environment.

KWC devotes substantial resources to their community efforts. For example, on an international level, KWC has led adventure travel trips in more than 25 countries around the world. While abroad, KWC actively promotes the practice of hiring local guides and helping to train them in outdoor leadership. This practice not only provides a better, safer service for their customers, but also helps to support and sustain the local guides' families and their communities.

5. How has KWC's core values contributed to the organization's long-term success?

KWC's core values reflect what is truly important to them as an organization. The core values support the company culture and are the soul of their organization. Behind KWC's long term success is a strong work ethic based on the company's core values which are: excellence in outdoor adventures, active corporate citizenship, and unparalleled high-quality work environments for their employees. These core values form the foundation of a close-knit community of KWC leaders and talented, seasoned instructors within a unique, values-driven organization.

As previously noted, ethos is the reflection of a group's norms, values, beliefs, moral principles, traditions, and performance standards.¹⁴⁴ The strong bonds KWC employees formed with one another contributed to the development of a distinctive ethos.¹⁴⁵ A passion for active outdoor recreation is the ethos that unites KWC employees in a constantly changing work environment and reflects KWC's core values.

IV. Epilogue

KWC continues to grow under the new leadership. The company opened a new Zip Line Adventure Park that features a traditional zip line and aerial obstacle course. Built by designers certified by the Association for Challenge Course Technology,¹⁴⁶ the Zip Line Adventure Park features state-of-the-art equipment and obstacles. The new attraction sports a European-style aerial adventure course where participants negotiate a series of challenging aerial obstacles and sky bridges while harnessed into a unique self-guided belay system. In an effort to reduce risk of injury, the company chose the *Saferoller*,^{TM147} a self-guided belay system imported from Switzerland, which offers participants the freedom to move through the course at their own pace, and to select the specific challenges they want to tackle. It also offers maximum safety, as the passive system does not require any staff manipulation while a participant is on the course. And helmets and harnesses are inspected daily by trained KWCV staff!

Under the guidance of the new Event Planning Department, the campus became home to an annual *Adventure Travel Film Festival* that features films from around the world along with live music and entertainment. It expanded its activities

and sponsorships, as well. KWC was awarded the industry's top honor for businesses contributing to the future of outdoor recreation for several of its initiatives:

- Starting the Canoe Club Challenge, an annual series of paddling races based on participation instead of competition;
- Supporting the Nantahala Kids Club, a local area outreach program offering free paddling lessons and outings to over 40 local schoolchildren from 6 to 16 along with use of gear and equipment;
- Launching and growing the NOC Youth Paddling Team, an effort to sponsor youth paddlers who promise to focus on school, promote whitewater paddling as a recreational activity and to live a drug and alcohol-free lifestyle while improving as whitewater athletes;
- Sponsoring and hosting the Camp Cup Challenge, an event giving over 150 youth paddlers at North Carolina's large summer camp community the chance to paddle in a large, end-of-season inter-camp competition;
- Opening an experiential retail environment at the entrance to a national park that educates visitors on easy guided and do-it-yourself recreational opportunities in the park; and
- Winning a bid to host the 2013 ICF Canoe Freestyle World Championships in order to promote regional paddle-sport opportunities to a worldwide audience.

KWC recently opened two new retail establishments, one at the entrance to the nearby national park, and one in a renowned hotel in the area's largest city. The retail space provides quality outdoor gear, fine casual apparel from leading outdoor brands, as well as local souvenirs. KWC renewed its commitment to serve as an industry example for preserving the environment and sustainability by insuring that all of its new retail establishments, as well as its remodeled store on the Kimetoga River, hold the coveted LEED Gold certification in an effort to improve the environmental impact of the business and reduce the company's carbon footprint. Obtaining LEED Gold certification from the U.S. Green Building Council, the top third-party designation for green building, involves adhering to extensive measures in construction and interior design, and requires close to a perfect score when measuring the overall environmental efficacy of a building.¹⁴⁸

KWC expanded its Outdoor School to include Water Rescue Courses and River Leadership Courses for professional guides, private boaters, fish and game personnel, and others who work or play on or around flowing water. KWC also partnered with the pioneers of wilderness medicine certification programs to offer a new venue for that association to offer *Wilderness Medicine Certifications*.¹⁴⁹ The partnership provides outdoor professionals a single destination for building backcountry skills. Coursework includes Wilderness First Responder, Wilderness First Aid, and Wilderness Emergency Medical Training, with introductory to advanced levels of training. Expedition leaders, camp counselors, backcountry guides, along with career military and law enforcement professionals seek such wilderness medicine certification. Finally, it opened a Wilderness Survivor School, which teaches students how to work with nature and its resources rather than against it. All programs have enhanced the reputation of KWC as a pioneer of safety in outdoor activities, and provided their guides with cutting edge training.

KWC did reorganize. KWC filed *Articles of Merger* with the Secretary of State. The surviving entity was Kimetoga Whitewater Center, LLC, and the merged entity, the former Kimetoga Whitewater, Center, Inc. Also established was KWC Stores, Inc. for its retail business with an initial issuance of 100,000 shares of common stock. The KWC Foundation launched a non-profit corporation as well.

Appendix 1

KWC Milestones

1942-Work is completed on the Kimetoga Dam, is built to supply electricity to the home of ALCOA. At the time, large amounts of aluminum were being produced for the war effort. The dam was once of great importance to the war effort, as two German spies were detained in, on their way to blow up Kimetoga Dam. Big Toga Falls is created with force of dynamite by the Southern Railway Company. The river was diverted to create a more direct railroad route, part of a historical line that connected the many rural towns with the rest of the world. Today, the earthen dam stands tall at 250ft. Water is pumped from the bottom of the lake, dropped 1,000 feet through a turbine where electricity is generated and sent to homes in the area. It then flows through a channel and back into the natural riverbed at the put-in.

1968-Soon-to-become KWC staff member Johnny Harris paddles with a team on the first descent of the Gauley River in West Virginia. This famous trip on arguably the biggest whitewater in the East gave credence to a stretch of the river that was about to be impounded for the second time and made into a lake. It is now a world-class run.

1972-Whitt and Paula Lincoln, along with Ace Parsons open the Kimetoga Outdoor Center for its first season, guiding brave souls on the Kimetoga and Katoga Rivers. The Center consists of the former Tote & Tarry Motel, a restaurant and a gear

store. In its first season, KWC offered full-day raft trips on the Kimetoga River, eventually adding trips on Sections III & IV of the Katoga River. Canoe and kayak excursions were undertaken upon request. Whitewater Kayaking makes its debut as an Olympic sport in Augsburg, Germany. The US team is loaded with paddlers who would go on to staff KWC.

1975-KWC shows its first profit.

1976-KWC unveils Adventure Travel programs to the Usumacinta River in Guatemala, also known as the "River of Ruins." KWC would go on to lead trips in rafting, kayaking, hiking, sailing, biking, scuba diving, horse-packing and skiing in more than 20 countries around the world. KWC introduces its Whitewater Clinic Program. An organized and streamlined approach to learning the nuances of whitewater paddling, KWC's first clinics offered such luxuries as transportation in new vans with plush carpeting and a tape player! The family-style meals, talented instructors and variety of rivers gain instant popularity with guests. KWC instruction is now a renowned paddling school earning top honors from industry organizations and publications.

1977-With the flume in repair and water flowing through the channel of the Middle Ocoee, KWC leads guests down eastern Tennessee's whitewater roller-coaster for the first time. Staff members of KWC, along with other groups such as American Whitewater would fight for many years to ensure recreational releases on this stretch of the Ocoee. Eventually it would all pay off, as the Ocoee is now the second most rafted river in the country.

1978-Outdoor Education Programs are offered to high-school and college student groups for the first time at KWC. These include classes in environmental stewardship as well as techniques in providing outdoor recreation services. Continuing this tradition to today, colleges come from near and far to learn industry standards and gain hands-on experience with the Southeast's industry leader in outdoor recreation, KWC.

1980-KWC offers its first kids' paddling clinic for paddlers ages 10 to 14. These clinics have since morphed into KWC's Kids' Week, a camp that provides lots of time on the river. The KWC instructors by far rate this week as the most fun all summer.

1981-KWC expands to River Left: With a purchase of land extending from Kimetoga Falls past Big Toga Falls, KWC moves the busy rafting traffic away from the road and into the Raft Barn. Cabins are also built to accommodate the growing number of overnight guests.

1982-Rafting expands to two more rivers when KWC buys Kimetoga River Expeditions; the French Broad near Asheville, NC and the beautiful Nolichucky, which flows through North Carolina and into Tennessee.

1983-Kayak revolution: Boat innovator Vladimir Vanha constructs the first 'short boat', the 10-foot Jeti. It was created in a workshop on the shores of the Kimetoga. KWC's staff members were among the first to try it out. Prior to this breakthrough, kayakers were doomed to traveling with gigantic racing boats. The first Guest Appreciation Festival wraps up another season on the Kimetoga. It included a huge Used Gear Sale, Halloween costume contest, races both on and off the water, music and dancing.

1984-Mountain bike rentals are available for the first time at KWC. They are 15-speed 'all-terrain' bicycles, the Mt. Whitney by Ross.

1985-KWC River Left gets a veritable face-lift; a gear annex is added to the Raft Barn, Slow Joe's Riverside Café opens, and the Basecamp lodging takes in its first guests. Slow Joe is a Kimetoga River legend, serving up fast, delicious food to refuel after a hard day paddling. His recipe for mean bean dip is still used today.

1987-Paula's Garden Restaurant is built overlooking the KWC campus. The unique building was designed by KWC staff member. The impetus behind the restaurant was to provide another option for dining and to create more meeting space for the ever-growing paddling clinics. Named for KWC-founder Paula Linclon, it was built to overlook a grand garden of herbs and local plants that could be incorporated into the daily menu.

1990-KWC hosts the Kimetoga 90 Raft Rally for Peace at its campus on the Kimetoga River. It was the first international whitewater rafting event hosted in the US. More than 20 countries were represented in a week of friendly competition, outdoor appreciation and international cooperation and understanding.

1992-Seven KWC staff members travel to Barcelona to represent the US in whitewater events. C-2 paddlers Joe Jacobi and Scott Strausbaugh bring home the gold medal.

1994-Rafting begins on the Big Pigeon River, after recreational releases are guaranteed by the Federal Energy Regulatory Commission (FERC).

1995-Work on the new Outfitter's Store is completed. The new space contains double the original square footage-3,000. Subsequently, it was deemed to be the Best Whitewater Store in America by *Men's Journal* for its expert staff and proximity to the water.

1996-The new Ropes Challenge Course and Alpine Tower open at KWC, to accommodate the growing number of corporate and youth groups seeking to improve problem-solving skills and group cohesion through experiential learning. Olympic Whitewater comes to the Ocoee River. Massive construction creates a world-class whitewater slalom course on the almost-dry Upper Ocoee. It is thought to be the first-ever "enhancement" of a natural river for Olympic use. This Olympic fame practically put the Ocoee on the map. It is now the second most rafted river in the country, with 216,000+ rafters each year.

2002-KWC Instruction introduces Rapid Progressions. This teaching method is the first learn-to-paddle course that guarantees your success in mastering kayak basics. Learn to Paddle by Rapid Progressions is currently KWC's most popular paddling clinic.

2005-KWC staff members finish work on the Flint Ridge Trail. All 4.5 miles of single-track wind behind the Kimetoga campus and are open to runners and bikers. KWC founder Whitt Lincoln is inducted into the Whitewater Hall of Fame in McHenry, Maryland. He is among the inaugural class of inductees for his enormous contribution to advocacy of whitewater sports. Inducted with him is a former KWC staffer who was an innovator of river safety equipment and an author of many whitewater guides and manuals.

2006-*Good Morning America* visits KWC! A live broadcast held on the banks of the Kimetoga River aired nationwide, naming KWC the "Number 1 Vacation with a Splash."

2008-KWC partners with North American River Runners (NARR) in Beckley, West Virginia to expand rafting to the East's biggest, most well-known Class V whitewater river, the Gauley.

Appendix 2 Kimetoga Two-Bean Hummus

➤ **In a food processor, pulse:**

- ✓ 1/2 an onion
- ✓ 3 Tablespoons garlic

➤ **Add the following ingredients and pulse:**

- ✓ 4 Tablespoons lemon juice
- ✓ 1 teaspoon black pepper
- ✓ 1 teaspoon salt
- ✓ 1/2 teaspoon cayenne pepper
- ✓ 2 teaspoons cumin
- ✓ 1/4 cup parsley

➤ **Add the following and pulse again:**

- ✓ 2/3 can black beans
- ✓ 1/3 can garbanzo beans
- ✓ 1/3 cup tahini

➤ **At this point, pulse to the desired consistency.** Add in some of the black bean water if the mixture is too thick, but remember, too thin a consistency is not good!

This peppery spread is a favorite of Kimetoga River guests, both vegetarian and otherwise, and makes a hearty sandwich filling or a dip for carrots, celery and crackers. It's also loaded with fat-free protein to keep your energy up for paddling. This recipe makes enough for 6-7 raft trips. The Kimetoga Chef recommends using number 10 cans of beans, rinsed.

¹ Claudia Wallis, *How to Bring Our Schools Out of the 20th Century*, TIME, Dec. 18, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1568480,00.html>.

² DANIEL H. PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE (2006).

³ The Association for College and Research Libraries Information defines information literacy as “a set of abilities requiring individuals to ‘recognize when information is needed and have the ability to locate, evaluate, and use effectively the needed information.’” *Information Literacy Competency Standards for Higher Education*, ASSOCIATION FOR COLLEGE & RESEARCH LIBRARIES, available at <http://www.ala.org/acrl/standards/informationliteracycompetency#f1> (last visited Jan. 24, 2013) (citing Final Report of the Presidential Committee on Information Literacy). The Association also sets *Information Literacy Competency Standards for Higher Education*, which provide a framework for assessing the information literate individual. One of the characteristics of an information literate person is the ability to “evaluate information and its sources critically.” *Id.*

⁴ 17A AM. JUR. 2D *Contracts* § 281 (2012). As a result, exculpatory clauses are strictly construed against the party seeking exculpation. *Id.*

⁵ *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 797 (Vt. 1995).

⁶ An exculpatory clause is more likely to be upheld if the damage resulting from the tortfeasor’s negligence involves property and not personal injury. See *Berlangieri v. Running Elk Corp.*, 48 P.3d 70, 76 (N.M. 2002).

⁷ 57A AM. JUR. 2d *Negligence* § 53 (2012). See also *Gimpel v. Host Enterprises, Inc.*, 640 F. Supp. 972 (E.D. Pa. 1986) (evaluating legitimacy of a clause in a bicycle rental agreement).

⁸ See, e.g., *Martinez v. Skirmish, U.S.A., Inc.*, 2009 U.S. Dist. LEXIS 51628 (E.D. Pa. June 15, 2009) (discussing the effect of an exculpatory clause for alleged gross negligence in renting poorly maintained goggles with a loose rear strap that was likely to loosen and slip during ordinary paint ball activities, creating an unreasonable risk of physical harm).

⁹ 383 P.2d 441 (Cal.1963).

¹⁰ *Id.* at 445-46.

¹¹ 17A AM. JUR. 2D *Contracts* § 282 (2012).

¹² JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §§ 8.1-8.9 (4th ed. 1998).

¹³ *Sisneros v. Garcia*, 613 P.2d 422, 423 (N.M. 1980).

¹⁴ See *Gilhooley v. Star Market Co., Inc.*, 508 N.E. 2d 609 (Mass. 1987) (discussing premise liability jury instructions).

¹⁵ 62A AM. JUR. 2d *Premises Liability* §§ 490, 529 (2012).

¹⁶ See *Martin v. Wal-Mart Stores, Inc.*, 183 F.3d 770 (1990) (finding store liable for customer’s injury resulting from slipping on shotgun shells previously stacked on display).

¹⁷ 62A AM. JUR. 2d *Premises Liability* §§ 495-96 (2012). Assumption of the risk is a valid defense when the plaintiff knowingly and voluntarily assumes a risk created by the defendant.

¹⁸ In addition to analyzing liability under the UCC, the instructor may discuss strict liability as applied to torts under the Restatement.

¹⁹ A merchant is defined as “a person who deals in goods of the kind ...involved in the transaction. U.C.C. 2-104(1) (19---)

²⁰ *Id.* To exclude the implied warranty of merchantability the disclaimer must mention merchantability and be conspicuous. *Id.* § 2-316 (2). However, the limitation of consequential damages for personal injury caused by consumer goods is prima facie unconscionable. *Id.* § 2-719 (3).

²¹ The professor could ask the students to find a relevant indemnity clause on the Internet or through Westlaw/Lexis Nexis. For example, “Seller shall indemnify and save Buyer, Buyer's Affiliates and their respective successors and assigns harmless from any breach of these warranties and, for greater certainty, no limitations on Buyer's remedies in Seller's documents, if any, shall operate to reduce this indemnification. Seller shall also indemnify Buyer from and against all liability or damages (including any lost profits, recall costs or other consequential damages) imposed upon Buyer resulting from acts or omissions of Seller in respect of Goods or Services.” *Keiper, LLC v. Intier Auto. Inc.*, No. 10-1486, U.S. Ct. App. 6th Cir., 2012 U.S. App. LEXIS 5394 (6th Cir. March 13, 2012). Students also should be reminded that KWC has a legal right to reject goods that are non-conforming to any warranties made by the Seller. U.C.C. § 2-601(a).

²² *Id.* § 2-315. To exclude or modify an implied warranty of fitness the disclaimer must be in writing, be conspicuous, and clear, such as “There are no warranties which extend beyond the description on the face hereof.” *Id.* § 2-316 (3).

²³ *Id.*

²⁴ *Id.* § 2-313(1). The seller need not use words such as “warranty” or “guarantee” or have a specific intention to make a warranty, although “an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.” *Id.* § 2-313(2).

²⁵ Abnormally dangerous activities are those activities which are not of common usage and which “create a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors.” *RESTATEMENT OF THE LAW 3D OF TORTS Liability for Physical and Emotional Harm* § 20 (2010).

²⁶ *Id.* § 22.

²⁷ *Id.* § 23.

²⁸ *Walters v. Grand Teton Crest Outfitters, Inc.*, 804 F. Supp. 1442, 1446 (D. Wyo. 1992) (involving a mule). *See also* *Abelseth v. City of Gillette*, 752 P.2d 430, 433-4 (Wyo. 1988).

²⁹ For an overview of such legislation and North Carolina's statute in particular see Karen A. Blum, Comment, *Saying 'Neigh' to North Carolina's Equine Activity Liability Act*, 24 N.C. CENT. L.J. 156 (2001).

³⁰ For example, North Carolina requires the following warning to be posted: "Under North Carolina law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting exclusively from the inherent risks of equine activities." N.C. GEN. STAT. § 99E-3 (2013).

³¹ The North Carolina statute, for example, does not limit the liability of an equine activity sponsor if the entity: "(1) provides the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such faulty equipment or tack proximately caused the injury, damage, or death; (2) provides the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or to safely manage the particular equine; (3) commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission proximately caused the injury, damage, or death; or (4) commits any other act of negligence or omission that proximately caused the injury, damage, or death." N.C. GEN. STAT. § 99E-2(b) (2013).

³² Blum, *supra* note 29, at 156, 177-79.

³³ ROCCO M. ANGELO & ANDREW N. VLADIMIR, *HOSPITALITY TODAY* 154 (2001).

³⁴ JOHN E.H. SHERRY, *THE LAWS OF INNKEEPERS* 5 (3rd ed. 1993).

³⁵ *Id.* at 7.

³⁶ *Raider v. Dixie Inn*, 248 S.W. 229, 229-30 (1923).

³⁷ 42 U.S.C.S. § 2000a (2013).

³⁸ A. Darby Dickerson, Note, *Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments*, 41 VAND. L. REV. 129, 145-50 (1988). *See also* David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51 (discussing the development of the common law on innkeeper liability).

³⁹ Often such statutory limits are required to be posted on the room's door. Students could investigate the law of their state regarding limits of liability and the required notices.

⁴⁰ For a discussion of the UCC's provisions see *supra* notes 18-24, and accompanying text.

⁴¹ *See e.g.*, *Webster v. Blue Ship Tea Room*, 198 N.E.2d 309 (Mass. 1964) (fish bones in chowder); *Koperwas v. Publix Supermarkets, Inc.*, 534 So.2d 872 (Fla. 1988) (clam shell in soup).

⁴² *See e.g.*, *Zabner v. Howard Johnson's Inc.*, 201 So. 2d 824 (Fla. 1967) (walnut shells in ice cream); *Jeffries v. Clark's Restaurant Enterprises, Inc.*, 580 P.2d 1103 (1987) (crab shell in crab melt sandwich); *Jackson v. Nestle-Beach, Inc.*, 569 N.E. 2d 1119 (Ill. 1991) (nut shell in candy bar).

⁴³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 4205 (2010). The Food & Drug Administration is currently in the process of implementing the requirements. *New Menu and Vending Machines Labeling Requirements*, U.S. FOOD AND DRUG ADMINISTRATION, available at <http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm> (last visited Feb. 23, 2013). For a discussion of the legislation see Katherine Wilbur, *The Informed Consumer is a Healthy Consumer? The American Obesity Epidemic and the Federal Menu Labeling Law*, 23 LOY. CONSUMER L. REV. 505, 516-520 (2011).

⁴⁴ Meganne Diamond, Note, *A Response to Deficiencies in Illinois Dramshop Liability*, 1986 U. ILL. L. REV. 837, 839-41.

⁴⁵ A "'dram' means something that has alcohol in it--something that can intoxicate." *Lacy v. State*, 32 Tex. 227, 228 (1869).

⁴⁶ RONALD F. CICHY & LENDAL H. KOTSCHVAR, *MANAGING BEVERAGE OPERATIONS* 78 (2d ed. 2010).

⁴⁷ For a discussion of such statutes see, e.g., Elizabeth A. Ryan, *Can I Start You Off with Some Drinks?: An Analysis of Commercial Alcohol Provider Liability in Texas*, 39 TEX. TECH L. REV. 45 (2006); Ross Sharkey, Note, *Rohlfs v. Klemenhausen, LLC: Is It Time to Revise Montana's Dram Shop Act?*, 72 MONT. L. REV. 127 (2011); Brett T. Votava, Comment, *Missouri Dram Shop Liability: Last Call for Third Party Liability?* 69 U.M.K.C. L. REV. 587 (2001).

⁴⁸ Cichy & Kotschevar, *supra* note 46, at 82.

⁴⁹ *Id.* at 93.

⁵⁰ U.S. CONST. amend. XXI, § 2.

⁵¹ *See, e.g.*, *The Commonwealth of Massachusetts Alcoholic Beverages Control Commission*, available at <http://www.mass.gov/abcc/index.htm> (last visited Feb. 23, 2013). Instructors could invite students to visit the website of the regulatory agency in their state to summarize the laws and regulations, or to note important provisions.

⁵² ALBERT W.A. SCHMID, *THE HOSPITALITY MANAGER'S GUIDE TO WINES, BEERS AND SPIRITS* 22 (2004).

⁵³ 45 AM. JUR. 2d *Intoxicating Liquors* §§ 55-86 (2012).

⁵⁴ *See, e.g.*, *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728-29 (Ind. 2008) (asserting that noncompetition covenants in employment contracts are in restraint of trade and disfavored by the law); *VisionAIR, Inc. v. James*, 606 S.E.2d 359, 362 (N.C. App. 2004) (reiterating that covenants not to compete between an employer and an employee are not viewed favorably); *Bellsouth Corp. v. Forsee*, 595 S.E.2d 99 (Ga.App. 2004) (affirming that the restrictive covenant must specify with particularity the nature of the business activities to be restrained).

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- ⁵⁵ See, e.g., *Okuma Am. Corp. v. Bowers*, 638 S.E.2d 617, 620 (N.C. App. 2007) (listing six factors to consider to examine the reasonableness of a restrictive covenant); *Stultz v. Safety & Compliance Mgt., Inc.*, 648 S.E.2d 129 (Ga. App. 2007) (applying a three-element test of duration, territorial coverage, and scope of activity for examining reasonableness).
- ⁵⁶ *Borden, Inc., v. Smith*, 478 S.W.2d 744 (Ark. 1972) (refusing to enforce an overly broad restrictive covenant or to enforce the covenant to the extent that would be reasonable); *American Security Serv., Inc., v. Vodra*, 385 N.W.2d 73 (Neb. 1986) (finding a three-year restraint to protect the goodwill of the employer was not unreasonable).
- ⁵⁷ *Lockhart v. Home-Grown Indus. of Ga., Inc.*, No. 3:07-CV-297, 2007 U.S. Dist. LEXIS 67256, at *20 (W.D.N.C. Sept. 10, 2007).
- ⁵⁸ See, e.g., *A.E.P. Indus., Inc. v. McClure*, 302 S.E.2d 754, 760 (N.C. 1983) (requiring an agreement not to compete to be in writing and ancillary to an employment contract); *Hostetler v. Answerthink, Inc.*, 599 S.E. 2d 271 (Ga. App. 2004) (enforcing covenants only if the restraint is reasonable, founded upon valuable consideration, reasonably necessary to protect the employer, and not unduly prejudicial to the interests of the public).
- ⁵⁹ See, e.g., *Passalacqua v. Naviant*, 844 So.2d 792, 795 (Fl. Ct. App. 2003); *Sharvelle v. Magnante*, 836 N.E.2d 432, 436-37 (Ind. Ct. App. 2005); *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003).
- ⁶⁰ See, e.g., *Gordon Termite Control v. Terrones*, 84 Cal. App. 3d 176, 148 Cal. Rptr. 310 (Cal. App. 2 Dist. 1978); *Aspect Software, Inc. v. Barnett*, 787 F. Supp. 2d 118 (D. Mass. 2011).
- ⁶¹ *Synergetics, Inc. v. Hurst*, 477 F.3d 949 (8th Cir. 2007).
- ⁶² For a discussion of the goodwill interest and the enforceability of restrictive covenants generally see Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107 (2008).
- ⁶³ 42 AM. JUR. 2d *Injunctions* § 135 (2012).
- ⁶⁴ AM. JUR. 2d *Monopolies, Restraints of Trade, Unfair Trade Prac.* § 891 (2012).
- ⁶⁵ *ESOP (Employee Stock Ownership Plan) Facts*, The National Center for Employees Ownership, <http://www.esop.org> (last visited Jan. 7, 2013).
- ⁶⁶ *Id.* For a brief overview of ESOPs see Matthew T. Bodie, *Aligning Incentives with Equity: Employee Stock Options and Rule 10b-5*, 88 IOWA L. REV. 539, 546-50 (2003).
- ⁶⁷ *Employee Stock Ownership Plans (ESOPs)*, INC., <http://www.inc.com/encyclopedia/employee-stock-ownership-plans-esops.html> (last visited Jan. 7, 2013).
- ⁶⁸ Bodie, *supra* note 66, at 547.
- ⁶⁹ A forum selection clause is a contractual designation as to where any litigation that may occur in regard to the contract should take place. David H. Taylor, *A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 785 (1993). See also 17A AM. JUR. 2d *Contracts* § 260 (2012) (discussing the general enforceability of forum selection clauses).
- ⁷⁰ The parties to a contract may agree as to the law which will govern their transaction through a choice-of-law provision, which is generally recognized as valid and enforced by courts. 17A AM. JUR. 2d *Contracts* § 261 (2012). For a discussion of their enforceability see *id.* §§ 261-65.
- ⁷¹ The Federal Arbitration Act (FAA) provides for the enforceability of a written arbitration provision in any maritime transaction or contract involving interstate commerce, and declares that such agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012). Commercial business, consumer, and employment disputes are arbitrated by organizations such as the National Arbitration Forum (NAF) and the American Arbitration Association (AAA).
- ⁷² For general information on international travel and health precautions see *Your Survival Guide to Safe and Healthy Travel*, CENTER FOR DISEASE CONTROL & PREVENTION, available at <http://wwwnc.cdc.gov/travel/page/survival-guide.htm> (last visited Jan. 26, 2013).
- ⁷³ *Vaccinations*, CENTER FOR DISEASE CONTROL & PREVENTION, available at <http://wwwnc.cdc.gov/travel/page/vaccinations.htm>
- ⁷⁴ Such supplemental coverage can provide field rescue units that will come to the insured’s aid wherever an emergency occurs, by whatever means necessary. For a list of possible travel health and medical evacuation insurance companies see *Medical Information for Americans Abroad*, U.S. DEPT. OF STATE, http://travel.state.gov/travel/tips/brochures/brochures_1215.html (last visited Jan. 26, 2013).
- ⁷⁵ A condition subsequent is the occurrence or non-occurrence of an event which terminates a contractual obligation. Satisfaction as a condition in a sales contract is an example, as are morals clauses in contracts. For a discussion of morals clauses in celebrity endorsement contracts see Douglas Wood & Keri Bruce, *Celebrity Endorsements: The Devil is Really in the Details*, <http://www.adlawbyrequest.com/tags/morals-clause> (last visited January 14, 2013).
- ⁷⁶ Damages may be liquidated in the agreement at an amount that is “reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.” RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).
- ⁷⁷ Purchasers should be aware, however, that generally, such insurance plans only cover specific contingencies, like a death in the family or illness, and not simply a decision to change one’s plans.

⁷⁸ *International Travel Information*, U.S. DEPT. OF STATE, available at http://travel.state.gov/travel/cis_pa_tw/cis_pa_tw_1168.html (last visited Jan. 25, 2013).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ “Leave No Trace Center for Outdoor Ethics teaches people of all ages how to enjoy the outdoors responsibly, and is the most widely accepted outdoor ethics program used on public lands. Through relevant and targeted education, research and outreach, the Center ensures the long-term health of our natural world.” *About Us*, THE LEAVE NO TRACE CENTER FOR OUTDOOR ETHICS, available at <http://Int.org/about>. The guidelines include: 1) Plan Ahead and Prepare, 2) Travel and Camp on Durable Surfaces, 3) Dispose of Waste Properly, 4) Leave What You Find, 5) Minimize Campfire Impacts, 6) Respect Wildlife and 7) Be Considerate of Other Visitors. *Use of Logo, Seven Principles and more*, THE LEAVE NO TRACE CENTER FOR OUTDOOR ETHICS, available at <http://Int.org/about/use-logo-seven-principles-and-more>.

⁸² William L. Smith, *Experiential tourism around the world and at home: Definitions and standards*, 2 INT’L J. SERV. & STANDARDS, 4 (2006); B. JOSEPH PINE & JOSEPH H. GILMORE, *THE EXPERIENCE ECONOMY* 172 (2011).

⁸³ CATHY A. ENZ, *HOSPITALITY STRATEGIC MANAGEMENT* 100-03 (2d. 2010).

⁸⁴ Irmeli R. Palmberg, I. E. & Jari Kuru, *Outdoor activities as a basis for environmental responsibility*, J. ENVIRONMENTAL EDUC., Winter 2000, at 33.

⁸⁵ ANDREW S. WINSTON, *GREEN RECOVERY* 2 (2009).

⁸⁶ 15 U.S.C.S § 1127 (2012). For a useful and concise expose of trademark law see *Overview of Trademark Law*, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm> (last visited Jan. 8, 2013).

⁸⁷ Registration under the Lanham Act provides notice to the public of the registrant's claim of ownership as well as a presumption of ownership, the exclusive right to use the mark, the ability sue for infringement in federal court, to use of the U.S registration to obtain registration in foreign countries, and to file with the U.S. Customs Service to prevent importation of infringing foreign goods.

⁸⁸ 15 U.S.C. § 1052(f) (2012).

⁸⁹ 15 U.S.C. § 1052(e) (2012).

⁹⁰ *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1184 (5th Cir.1980).

⁹¹ 15 U.S.C. § 1114(1)(a) (2012).

⁹² *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984).

⁹³ *University of Ga. Athletic Assoc. v. Laite*, 756 F.2d 1535 (11th Cir. 1985).

⁹⁴ *Id.* at 1537.

⁹⁵ *Id.* at 1547.

⁹⁶ *Id.*

⁹⁷ *Fox News Network, LLC, v. Penguin Group (USA), Inc.*, No.03 Civ. 6162 (RLC), U.S. Dist S.D.N.Y. 2003 U.S. Dist. LEXIS 18693 (Aug. 20, 2003).

⁹⁸ The suit was deemed by some observers to be frivolous as there was *no* likelihood of association between Fox news and Franken. K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL’Y 609, 613 (2004).

⁹⁹ 15 U.S.C.S. § 1125(c) (2012).

¹⁰⁰ 15 U.S.C.S. §§ 1125(c) & 1127 (2012).

¹⁰¹ *See, e.g., Moseley v. Secret Catalogue, Inc.*, 537 U.S. 418 (2003). In that case, the lingerie chain store, *Victoria’s Secret*, sued an adult-toy, gag gift and lingerie shop named “Victor’s Little Secret.” The Supreme Court held that, although the army officer who saw a “Victor’s Little Secret” advertisement made a mental association with “Victoria’s Secret,” he did not form any different or tarnished impression of *Victoria’s Secret*.

¹⁰² *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 464 F. Supp. 2d 495, 2006 U.S. Dist. LEXIS 80575 (E.D. Va., 2006), *aff’d* 507 F.3d 252 (4th Cir. 2007). *Haute Diggity Dog*, which is based in Las Vegas, Nevada, also makes parody chew toys called Chewnel No. 5 (Chanel No. 5), Furcedes (Mercedes), Jimmy Chew (Jimmy Choo), Dog Perignonn (Dom Perignon), Sniffany & Co. (Tiffany & Co.), and Dogior (Dior). *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 502.

¹⁰⁵ If students use the initials “KWC” in their trademark, instructors may want to discuss whether or not there would be a likelihood of confusion with the mark “KFC” (Kentucky Fried Chicken). The response should discuss the fact that, while the initials are similar, the two marks are dissimilar, and also note that the goods/services that the marks identify are not similar (outdoor recreation destination v. a restaurant known for chicken) nor are the facilities of the two businesses similar.

¹⁰⁶ U.S. CONST. art. I, § 8, para. 8.

¹⁰⁷ Pub. L. 94-553, 90 Stat. 2541 (1976).

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- ¹⁰⁸ 17 U.S.C.S. § 102 (2012). No publication or registration is required in order to perfect copyright ownership rights. Ownership rights are secured automatically when work is fixed in tangible medium. Like trademark holders, copyright owners can sue for infringement by an unauthorized use.
- ¹⁰⁹ 17 U.S.C.S. § 201(b) (2012). In some situations the parties' relationship may be unclear. In those cases courts determine examine several factors, such as who supplied instrumentalities and tools, the location of the work site, the length of working relationship, a hiring party's control over the work, and extent of control exercised by each party. *Comm. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
- ¹¹⁰ 35 U.S.C.S. § 154 (2012).
- ¹¹¹ 35 U.S.C.S. §§ 101-103, 112 (2012).
- ¹¹² The Supreme Court identified three categories of subject matter which cannot be patented: "laws of nature, natural phenomena, and abstract ideas." *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).
- ¹¹³ 35 U.S.C.S. § 100(b) (2012).
- ¹¹⁴ *See* *Bilski v. Kappos*, 130 S. Ct. 3218 (2010) (involving proposed patent for a method of hedging the risks of commodities trading). For a discussion of issues associated with patents on business processes see also Daniel F. Spulber, *Should Business Method Inventions Be Patentable*, 3 J. LEG. ANALYSIS 265 (2011).
- ¹¹⁵ In order to be able to establish the tort of misappropriation, the plaintiff must prove that serious attempts were made to keep the information secret. In other words, the security must be sufficient such that the unauthorized acquisition of the information without resort to improper means. UNIF. TRADE SECRETS ACT § 1 (1986).
- ¹¹⁶ 27 AM. JUR. 2d *Employment Relationship* § 178 (2012).
- ¹¹⁷ Nondisclosure agreements are generally enforceable when employers have legitimate trade secrets to protect. *See, e.g., Vermont Microsystems v. Autodesk, Inc.*, 88 F.3d 142 (2d Cir. 1996).
- ¹¹⁸ For an overview of such systems see WILLIAM G. ZIKMUND, RAYMOND MCLEOD, JR., & FAYE W. GILBERT, *CUSTOMER RELATIONSHIP MANAGEMENT: INTEGRATING MARKETING STRATEGY AND INFORMATION TECHNOLOGY* (2003).
- ¹¹⁹ Plants asexually produced may be patented, providing that they otherwise meet the criteria for patents. 35 U.S.C.S. § 161 (2103).
- ¹²⁰ *See supra* notes 54-64, and accompanying text.
- ¹²¹ A trademark (or service mark) can be a combination of words or a name used to identify and distinguish the goods/services of one seller or provider from those of others. *What is a trademark or service mark?*, U.S. PATENT & TRADEMARK OFFICE, available at <http://www.uspto.gov/trademarks/index.jsp> (last visited Jan. 21, 2013). For a more complete discussion see *supra* notes 86-105, and accompanying text.
- ¹²² The downloadable *Beginner's Guide to Domain Names* in the website address explains the process, and could be used as a group exercise.
- ¹²³ For an overview, visit the organization's website at *Welcome to ICANN*, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, available at <http://www.icann.org/en/about/welcome> (last visited Jan. 19, 2013).
- ¹²⁴ Anticybersquatting Consumer Protection Act, Pub. L. 106-113, 113 Stat. 1536 (1999).
- ¹²⁵ ROGER A. KERIN, STEVEN W. HARTLEY, & WILLIAM RUDELIUS, *MARKETING* 292 (9th ed. 2009).
- ¹²⁶ Simon Hudson & J. R. Brent Ritchie, *Branding a memorable destination experience: The case of 'Brand Canada'*, INT'L J. TOURISM RES., Mar./Apr. 2009, at 217.
- ¹²⁷ *See* MIHALY CSIKSZENTMIHALYI, *BEYOND BOREDOM AND ANXIETY* (1975) (discussing flow theory).
- ¹²⁸ Mihaly Csikszentmihalyi, *Finding Flow*, PSYCHOL. TODAY, Jul.-Aug. 1997, at 46; MIHALY CSIKSZENTMIHALYI, *Toward a psychology of optimal experience*, REV. PERSONALITY & SOC. PSYCHOL., Fall 1982, at 14.
- ¹²⁹ *History of Slow Food*, SLOW FOOD USA, available at http://www.slowfoodusa.org/index.php/about_us/details/manifesto/ (last visited May 1, 2013).
- ¹³⁰ CARL HONORE, *IN PRAISE OF SLOWNESS: CHALLENGING THE CULT OF SPEED* 44 (2005).
- ¹³¹ SIMONE FULLAGAR, KEVIN MARKWELL, & ERICA WILSON, *SLOW TOURISM: EXPERIENCES AND MOBILITIES*, 1-2 (2012).
- ¹³² *History of Slow Food*, SLOW FOOD USA, available at http://www.slowfoodusa.org/index.php/about_us/details/manifesto/ (last visited May 1, 2013).
- ¹³³ *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964).
- ¹³⁴ If officers and directors violate their fiduciary duties, they can be subject to a derivative suit, which is similar to a class action lawsuit by the shareholders. *Grabow v. Perot*, 539 A.2d 180 (Del. 1988); *Smith v. Van Gorkom* 488 A.2d 858 (Del. 1985); *Shlensky v. Wrigley* 237 N.E.2d 776 (Ill. App. 1968).
- ¹³⁵ JAMES L. GIBSON, JOHN M. IVANCEVICH, & JAMES H. DONNELLY, *ORGANIZATIONS* 47 (7th ed. 1991).
- ¹³⁶ GARETH MORGAN, *CREATIVE ORGANIZATION THEORY* 64-67 (1981).
- ¹³⁷ *Id.*
- ¹³⁸ DAVID A. DECENZO & STEPHEN P. ROBBINS, *FUNDAMENTALS OF HUMAN RESOURCE MANAGEMENT* 415 (9th ed. 2007); STEPHEN P. ROBBINS, *BUSINESS TODAY: THE NEW WORLD OF BUSINESS* 317-318 (2001).
- ¹³⁹ ROBERT A. STEBBINS, *AMATEURS, PROFESSIONALS AND SERIOUS LEISURE* 7 (1992).
- ¹⁴⁰ *Id.*

¹⁴¹ MORGAN, *supra* note 136, at 132.

¹⁴² DEBRA J. JORDAN, *LEADERSHIP IN LEISURE SERVICES: MAKING A DIFFERENCE* 230 (2d ed. 2001).

¹⁴³ Steve Bourne & John D. Snead, *Environmental determinants of organizational ethical climate: A community*, 21 J. BUS. ETHICS 283-290 (1999); JOANNE B. CUILLA, *Leadership Ethics: Mapping the Territory*, in ETHICS: THE HEART OF LEADERSHIP 4 (1998); Beverly Kracher & Deborah L. Wells, *Employee selection and the ethic of care in MANAGERIAL ETHICS* 95 (M. Schminke ed. 1998); MANUEL LONDON, *PRINCIPLED LEADERSHIP AND BUSINESS DIPLOMACY* 48 (1999); Marian Mattison, *Ethical decision making: The person in the process*, 45 SOC. WORK 208 (2000).

¹⁴⁴ Robert A. Stebbins, *Social world, life-style, and serious leisure: Toward a mesostructural analysis*, 35 WORLD LEISURE & REC. 7 (1993); David R. Unruh, *Characteristics and types of participation in social worlds*, SYMBOLIC INTERACTION, Oct. 1979, at 124.

¹⁴⁵ Stebbins, *id.* at 23-26; David R. Unruh, *The nature of social worlds*, PAC. SOC. REV. Fall 1980, at 284.

¹⁴⁶ Founded in 1993, ACCT promotes the use of Challenge Courses Technology and sets minimum standards for Challenge Course and Aerial Adventure Course installation, operation and inspection. *About ACCT*, ACCT ASSOCIATION FOR CHALLENGE COURSE TECHNOLOGY, available at <http://acctinfo.org/displaycommon.cfm?an=1&subarticlenbr=66> (last visited Jan. 25, 2013).

¹⁴⁷ For information on the system see *Saferoller*, <http://www.saferoller.com> (last visited Jan. 17, 2013).

¹⁴⁸ For an explanation of the certification system see *LEED Green Building Rating Systems*, U.S. GREEN BUILDING COUNCIL, available at <http://new.usgbc.org/leed/> (last visited Jan. 14, 2013).

¹⁴⁹ Wilderness medicine encompasses the prevention, diagnosis, and treatment of injuries and medical conditions that may occur during activities in remote territories. Douglas Dupler, *Wilderness Medicine*, GALE ENCYCLOPEDIA OF MEDICINE (2002), available at <http://www.healthline.com/galecontent/wilderness-medicine>.