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INTERNATIONAL

SETTING UP DATES WITH DEATH? THE LAW AND ECONOMICS OF EXTREME SPORTS SPONSORING IN A COMPARATIVE PERSPECTIVE

HORST EIDENMÜLLER*

I. INTRODUCTION

On September 24, 2014, extreme mountaineers Sebastian Haag and Andrea Zambaldi died in an avalanche on Nepal's Shishapangma.¹ Both athletes were sponsored by Dynafit, promoting its mountaineering equipment.² The German media outlet Spiegel Online reported live.³ Haag and mountaineer Benedikt Böhm—also sponsored by Dynafit—had embarked to set a record: climbing two peaks higher than 8,000 meters (Shishapangma and Cho Oyo) in less than 24 hours each for ascent and descent (“Double 8”), covering the approximately 100 miles between the mountains biking and running. Wading in chest high snow on a steep, wind-blown slope, the climbers had aborted a first summit attempt near the top

* Freshfields Professor of Commercial Law, University of Oxford, and Professorial Fellow, St. Hugh's College, Oxford. I would like to thank all 40 athletes who participated in the series of interviews for this project for their willingness to be interviewed and for their insightful statements and remarks. Special thanks go to Summer Ibrahim for outstanding research assistance. In particular, Ms. Ibrahim conducted the majority of interviews on which the empirical sections of this article are based. Mr. Václav Janeček produced a Vlog for the Oxford Business Law Blog on the project and commented on a draft of the paper for which I am grateful. For detailed comments and suggestions I should like to thank Omri Ben-Shahar and Jeffrey Gordon. Finally, I would like to thank the participants in the “Rabel Lecture” on October 15, 2018, at the Max Planck Institute for Comparative and International Private Law in Hamburg, participants in a Research Seminar of the Law Faculty of the University of Oxford on November 22, 2018, participants in a Work-in-Progress Workshop at the University of Chicago Law Faculty on October 24, 2019, and participants in a Blue Sky Lunch at Columbia University's Law Faculty on November 25, 2019, for helpful comments. The usual disclaimer applies. Full disclosure: I am an academic, but I was also a competitive long-distance runner as a student (sponsored), and I am an amateur mountaineer and climber (not sponsored).

1. Tyler Cohen, *Avalanche on Shishapangma, Nepal Kills Two*, BACKCOUNTRY, Sept. 25, 2014, <https://backcountrymagazine.com/stories/avalanche-shishapangma-kills-two/>.

2. *Id.*

3. *Expedition Zum Shisa Pangma*, SPIEGEL ONLINE, <https://www.spiegel.de/sport/sonst/weltrekord-versuch-himalaja-benedikt-boehm-und-sebastian-haag-starten-extremtour-a-991241.html>.

because of the extremely high avalanche risk. A couple of days later the group tried again despite the fact that the conditions had not changed much. Only a Sherpa pulled out of the climb. Personal ambition, cognitive biases, sponsor expectations and media interest had created a powerful death trap. It snapped.⁴

This is not an isolated case: Michel Leusch, Caleb Moore, Eigo Satō, Shane McConkey, Toriano Wilson, Eli Thompson, Ueli Gegenschatz—these are seven athletes who died in the last ten years on three different continents when practicing extreme sports such as performing air shows, snowmobile racing, freestyle motocross, freestyle skiing and BASE jumping. All athletes had one thing in common: they were sponsored by Red Bull, a manufacturer of energy drinks.⁵ The company runs its own TV Channel (“Red Bull TV”⁶), delivering high-quality footage of sponsored extreme sports feats and events to viewers who, it hopes, will be enticed to purchase its product to enhance their performance. After all, Red Bull supposedly “gives you wings” according to the firm’s key marketing slogan.⁷ The athletes mentioned paid a high price to deliver the message.

To be sure, extreme sports, extreme sports sponsoring, media coverage of extreme sports events, athletes reporting on their accomplishments, as well as death or serious injuries associated with extreme sports are not a new phenomenon. But the scale and scope of these features of extreme sports activities have changed dramatically in the last decade. Until the 1960s, mountaineering, for example, was a pretty esoteric pursuit. Ambitious expeditions were financed by alpine clubs or states. When Reinhold Messner climbed all 14 peaks over 8000 meters in the period from 1970 to 1986, he belonged to the first generation of mountaineers who had private sponsors to finance their activities.⁸ But only very few of his outstanding accomplishments made headline news. He reported about his ventures in books and talks months or even years after the events. When reaching the summit of Everest with Peter Habeler on May 8, 1978, without supplemental oxygen he felt that “the outer world was infinitely far away.”⁹

The difference in today’s extreme mountaineering and climbing world could not be starker. The outdoor industry booms. World-wide revenues in

4. Horst Eidenmüller, *Bergsteiger in der Medienfalle*, SÜDDEUTSCHE ZEITUNG 15, Oct. 1, 2014.

5. Uwe Buse, *Spiel ohne Grenzen*, DER SPIEGEL ISSUE 1/2017, at 70.

6. RED BULL, <https://www.redbull.com/int-en/tv/tv>. (last visited Dec. 6, 2019).

7. Red Bull India, *How Red Bull Gives You Wings (2016 Edition)*, RED BULL (Dec. 30, 2015), [https://www.redbull.com/in-en/how-red-bull-gives-you-wings-\(2016-edition\)](https://www.redbull.com/in-en/how-red-bull-gives-you-wings-(2016-edition)).

8. Messner interview on March 19, 2017, with NEUE VORARLBERGER TAGESZEITUNG. “Meine Generation ist die erste, die Geld von Sponsoren bekam und der von Verlegern und Veranstaltern die Abfallprodukte unserer Expeditionen abgekauft wurden: unsere Erzählungen als Bücher und Vorträge.” *Id.*

9. “Die Außenwelt war unendlich weit weg,” Messner in an interview on May 8, 2018 with ISPO. Interview by Johanna Stockl with Reinhold Messner, in Munich, Ger. (May 8, 2018). Tellingly, Habeler’s book account of the climb bears the title “The Lonely Victory”: PETER HABELER, *DER EINSAME SIEG* (1979).

the ecommerce market segment Sports & Outdoor are close to \$60 billion 2018 and are expected to grow further at an annual rate of 10%.¹⁰ Americans alone are said to spend \$887 billion annually on outdoor recreation, according to a report by the Outdoor Industry Association.¹¹ Competition between brands is fierce—for customers and sponsored athletes. With the rise of social media, the costs of self-promotion and marketing have declined dramatically. Many more, in particular younger, athletes compete for sponsorships, and they have to take ever higher risks to catch the attention of (potential) sponsors and the general public. The bar is set by icons such as Alex Honnold who free soloed—i.e. climbed without a rope—*Freerider*, a 2,900-foot grade 5.13a route on the southwest face of Yosemite’s El Capitan, on June 3, 2017.¹² When Tommy Caldwell and Kevin Jorgeson free climbed—i.e., with a rope but without technical aid—the 2,500 feet grade 5.14d *Dawn Wall* on the same mountain in 2014/2015, “Kevin had his phone the whole time, so he sat there on his portaledge following the media and getting incredibly stressed.”¹³ As consumers of extreme sports activities, we are wired by the media to the performing athletes, creating a pernicious feedback loop of ever more risk seeking and taking in a stressful environment. The solitary pastime of mountaineering has given way to a collective frenzy of public record seeking.¹⁴

This article investigates the law and economics of extreme sports sponsoring in a comparative perspective. The motivation for the project is the question whether the development that we have been witnessing now for a couple of years in the field is a cause for concern. Extreme sports are no longer the domain of a societal fringe group. They have become a mass phenomenon, and they attract especially young and inexperienced athletes. Hence, the law and economics of extreme sports sponsoring is a topic of significant social relevance.

At the same time, little is known right now about extreme sports sponsorships. Compared to most team sports or non-extreme individual sports such as athletics or tennis, most extreme sports take place in an almost completely unregulated environment. The extreme sports sponsoring market

10. *Sports & Outdoor*, STATISTA, <https://www.statista.com/outlook/259/100/sports-outdoor/worldwide> (last visited Dec. 10, 2019).

11. Sean McCoy, *OIA: Outdoor Industry Worth \$887 Billion*, GEAR JUNKIE (April 25, 2017), <https://gearjunkie.com/oia-outdoor-industry-economy-value-887-billion>.

12. James Lucas, *Behind the Scenes of Alex Honnold’s Freerider Free Solo*, CLIMBING, August 10, 2017, <https://www.climbing.com/people/behind-the-scenes-of-alex-honnolds-freerider-free-solo/>.

13. Tommy Caldwell, in: Chris Noble, *Why We Climb: The World’s Most Inspiring Climbers* 124 (2017).

14. Ed Douglas has a point when he speaks of “adventure pornography” in this regard. ED DOUGLAS, *THE MAGICIAN’S GLASS: CHARACTER AND FATE: EIGHT ESSAYS ON CLIMBING AND THE MOUNTAINS* 166 (2017) (“The turnover of information in the climbing world, as everywhere, keeps getting faster: from expedition websites to blogs to Twitter feeds. Everything becomes condensed, exaggerated, hyper-mediated . . . A compulsion for the extreme ends up being oddly superficial, an adventure pornography that barely holds your attention.”).

is secretive. Nobody has studied extreme sports sponsoring contracts and their influence on athletes' incentives and decision-making before.

The article focuses on sponsoring contracts concluded between individual athletes and, to a lesser extent, teams of athletes on the one side and sponsor firms on the other side. The goals of the project are twofold. First, I would like to identify the mechanisms that have led to, or are leading to, serious injuries or deaths of sponsored athletes engaging in extreme sports. This is a social-scientific (non-normative) goal. It involves a detailed analysis of athlete's motivations and incentives based on current sponsorship practices, in particular sponsorship contracts design, and media involvement. Second, I seek to assess the current sponsorship practice in terms of its welfare effects. How might an efficient sponsoring contract regarding extreme sports look like? Does the current contracting practice deviate from such an efficient design and, if so, why and how? Should the (common) law step in with mandatory rules on, for example, warning, counselling, safety precautions, compensation/bonus payments or (health, life) insurance? These are clearly normative questions, and the aim of the article is to identify ways to improve the practice of extreme sports sponsoring for the benefit of athletes, sponsors and society at large.

Two crucial factors characterize the project from a methodological perspective: it is empirical, and it is comparative. The project is *empirical* in the sense that it uses publicly available data and information on the sponsorship market, sponsorship practice, sponsor firms' policies and athletes' motivations to provide a foundation for the analysis and support the normative recommendations. More importantly, the project is empirical in that it is based on 40 structured interviews with athletes on their sponsorship contracts and, more generally, relationships with sponsors. These interviews were conducted between June and September 2018 and provide an up-to-date and, to the best of my knowledge, unique account of contract practice regarding extreme sports sponsoring worldwide. The project is *comparative* in the sense that it draws on the laws and regulations in a variety of common law and civil law jurisdictions—the United States (US), Canada, Australia, the United Kingdom (UK) and Germany—to illustrate how these jurisdictions tackle important regulatory questions relating to freedom of contract with respect to extreme sports sponsoring. I do not undertake a systematic comparative law analysis. Rather, my aim is to detect and explain differences and similarities between key “sponsor jurisdictions” and to find inspiration and guidance for confronting difficult and important policy problems.

The main findings of the article can be summarized as follows: *First*, extreme sports sponsoring contracts are currently unbalanced. Risks and rewards are unbundled—while the athletes bear almost all the risks, the sponsor firms reap almost all of the rewards. This does not necessarily imply that the current contracting practice is inefficient. Unequal bargaining power and strong non-monetary incentives of athletes may account for an uneven

distribution of the monetary cooperative surplus. But the available evidence suggests that the current practice incentivizes athletes to take inefficient risks, and, based on athletes' preferences, there are ways to significantly increase the cooperative surplus compared to the status quo. In particular, firms could and should arrange for comprehensive health, disability and life insurance for the benefit of athletes and their families—at little costs to firms and with a significant positive effect on athletes' welfare. *Second*, sponsor firms face a higher standard of care vis-à-vis young and/or inexperienced athletes. Depending on the factual circumstances of the individual case, such standard of care may require firms to engage in enhanced counselling, coaching and safety training. It may also require firms to refrain from subjecting young or inexperienced athletes to extremely high-powered financial incentives (bonus schemes) that encourage inappropriate risk-taking. *Third*, sponsors also face higher standards of care if they are involved in or influence the organization of extreme sports events or control the premises/facilities on which such events take place. *Fourth*, currently, sponsored athletes are treated by sponsors as independent contractors. Depending on the facts of each individual case and the applicable legal standard to delineate independent contractors from employees, this may or may not be correct. This article suggests that courts should give more weight to economic (in)dependency as a relevant factor in addition to control exercised by sponsor firms when assessing whether a sponsored athlete is an employee. Further, even if an athlete cannot be characterized as an employee of a particular sponsor, the level of control exercised by that sponsor and the athlete's economic dependency on him or her are factors that should weigh in on the sponsor's duties of care under contract and/or tort law, creating a more finely tuned regulatory system than the dichotomy of independent contractor and employee suggests.

The remainder of this article is organized as follows. In Section II, I will set out the mechanisms of "inefficient risk-taking" in today's extreme sports. I'll define what I mean by extreme sports, discuss the changes in extreme sports and extreme sports sponsoring in the last fifty years or so, and I develop hypotheses as to what might appropriately be characterized as "inefficient risk-taking" in extreme sports and what might cause it. Section III then studies the current contracting practice with respect to extreme sports sponsoring and, more broadly, the relationships between athletes and sponsors. As has already been mentioned, this section is based mainly on forty structured interviews with athletes. I provide a detailed account of the competition for sponsorships, the process of contract negotiations and renewal, and of the salient features of sponsorship contracts and relationships including, in particular, the compensation structure, associated incentive mechanisms and the pressure on athletes to perform. Section IV contrasts the existing contracting practice with the design features of efficient extreme sports sponsorship contracts. The analysis is based on an assessment of athletes' and sponsors' interests and priorities. A central

element of the analysis is the accident problem and how it is addressed in the sponsoring contracts. I also study the question of why the contracting practice is not moving away from its current inefficiencies towards more efficient provisions. Section V discusses the case for regulatory intervention looking, in particular, at contract, tort and labor law. I argue that sponsor firms face a heightened standard of care compared to what is generally assumed, especially vis-à-vis young and/or inexperienced athletes. They also face higher standards of care if they are (co-)organizing an extreme sports event or control the premises/facilities on which such an event takes place. Depending on the facts of an individual case, a sponsor might also have to be characterized as an employer to sponsored athletes, with significant consequences in labor law. Section VI concludes and calls for more transparency with respect to extreme sports sponsoring practice, a rigorous assessment of its effects on athletes and sponsors and for necessary reforms—for the benefit of athletes, sponsors, and society at large. I also raise the question whether the results of this article can be generalized to other (less extreme) sports.

II. INEFFICIENT RISK-TAKING IN EXTREME SPORTS

Extreme sports are not a new phenomenon. It has been remarked that “[t]he extreme sports of today find their roots in the Polynesian leisure activity, which is now called surfing.”¹⁵ In the 1910s, Paul Preuß made a couple of free solo ascents of Alpine peaks and routes, effectively founding “free soloing” and philosophizing about it.¹⁶ Ernest Hemingway reputedly said that “[t]here are only three sports: bullfighting, motor racing, and mountaineering; all the rest are merely games.”¹⁷ In this section, I set out a working definition of “extreme sports” for the purposes of this article. I discuss some important changes in the practice of extreme sports (sponsoring) in the last decades, notably those associated with the rise of the web and social media, and I argue that the current practice leads to “inefficient risk-taking” by athletes.

15. Manali Oak, *Let's Explore the Amazing History of Extreme Sports*, THRILLSPIRE (Mar. 2, 2018), <https://thrillspire.com/history-of-extreme-sports>.

16. ULRICH REMANOFSKY, *WEN DIE GÖTTER LIEBEN: SCHICKSALE VON ELF EXTREMBERGSTEIGERN* 9–26 (2011); DAVID SMART, *PAUL PREUSS – LORD OF THE ABYSS* (2019). Interestingly, Preuss had developed quite a business around his climbing pursuits by lecturing to various audiences. He reputedly made as much as 10,000 marks (approximately 80,000 in today's US-\$) out of approximately 100 lectures from 1911 to 1913. *Id.* at 135-136.

17. The attribution of this quote to Hemingway is probably false. See *Ernest Hemingway FAQ: Quotations*, TIMELESS HEMINGWAY, <https://web.archive.org/web/20120203013838/http://www.timelesshemingway.com/content/quotationsfaq>.

A. Extreme Sports

Risk is often defined simply as “possibility of loss or injury”.¹⁸ Sports and physical activity may reduce or increase risk in this sense. If you regularly hike in easy mountain terrain, you probably increase your life expectancy. “Just 25 minutes of brisk walking a day can add up to seven years to your life, health experts have said.”¹⁹ At the same time, many sports are associated with increased risk for your health in the form of (serious) injuries or even death. Just think of horseback riding, backcountry skiing or playing football. With some sports, the risk level very much depends on the precise form of the activity. Top roping on plastic holds in a gym is probably good for your health and comes with very low risks which are further reduced when auto belays are used.²⁰ At the other end of the risk spectrum regarding climbing/mountaineering lies free solo climbing of steep rock or mixed terrain, where a fall will almost certainly lead to death. Free soloing was/is practiced by climbers such as Paul Preuß or Alex Honnold.²¹ The risk is further amplified if speed is added to the equation as it is in speed free soloing. On November 16, 2015, for example, Ueli Steck cruised up Eiger’s North Face on the classic Heckmair route in two hours and twenty-two minutes—setting a new record for a speed ascent (a party of two normally needs two days to climb the route).²²

For the purposes of this article, I will define extreme sports to include all sports for which, when practiced, *immediate* death of athletes occurs with a nontrivial probability.²³ “Nontrivial” is of course an arbitrary measure. The yardstick for me is provided by the following test: do athletes normally and

18. *Definition of Risk*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/risk> (last visited Oct. 26, 2019).

19. Press Association, *Brisk Daily Walks can Increase Lifespan, Research says*, THE GUARDIAN, August 30, 2015, <https://www.theguardian.com/society/2015/aug/30/brisk-daily-walks-reduce-ageing-increase-life-span-research>.

20. Most accidents are caused by climbers not being tied in or not being belayed properly. See Francis Sanzaro, *The Perils of Plastic: Gym Climbing’s Most Common Accidents*, ROCK AND ICE, August 3, 2018, <https://rockandice.com/climbing-accidents/the-perils-of-plastic-gym-climbings-most-common-accidents/>.

21. See REMANOFSKY, *supra* note 16.

22. In his climb video, Steck remarks that he considers a time under 2 hours feasible, but “the athlete has to be willing to take quite a lot of risk.” Samcam Film, *Ueli Steck New Speed Record Eiger 2015*, YOUTUBE (Nov 19, 2015), <https://www.youtube.com/watch?v=NfpYNr7es0Y>. The previous record had been set by Dani Arnold at 2 hours 28 minutes on April 20, 2011. See Mammut, *Eiger Nordwand Speed Record-Dani Arnold*, YOUTUBE (Aug. 25, 2011), <https://www.youtube.com/watch?v=wi8nQKZkfMQ>. Steck died on April 30, 2017, on Nuptse. Climbing Staff, *Ueli Steck Found Dead on Nuptse*, CLIMBING, May 1, 2017, <https://www.climbing.com/news/ueli-steck-found-dead-on-nuptse/>.

23. Hence, I am using a narrower definition of extreme sports than JOHN CROSSINGHAM & BOBBIE KALMAN, *EXTREME SPORTS* 4 (Molly Aloian et al. eds., 2004) (“This doesn’t mean that all extreme sports are dangerous, however. Some sports are simply unusual.”). For a definition which is similar to the one used in this article see ERIC BRYMER & ROBERT SCHWEITZER, *PHENOMENOLOGY AND THE EXTREME SPORT EXPERIENCE* 3 (2017) (“In the context of this book extreme sports are those activities that lie on the outermost edges of independent adventurous leisure activities, where a mismanaged mistake or accident would most likely result in death.”).

consciously contemplate the possibility of death when engaging in a particular sport? If the answer to this question is yes, then I consider a particular sport to be an extreme sport for the purposes of this article. Based on this test, extreme sports are, for example, free solo climbing (free soloing), simul climbing²⁴, BASE jumping, wingsuit flying, extreme freeriding (skiing), freestyle motocross, bicycle motocross (BMX), or extreme freeride mountain biking.²⁵ Athletes practicing these sports are usually acutely aware of the fact that they can easily die “if something goes wrong”—and they take precautions to prevent this from happening.

Focusing exclusively on sports which involve a non-trivial risk of *immediate* death has the advantage that the risk-taking behavior of athletes can be closely and rigorously studied. As the possibility of death comes sharply into focus, the cognitive and emotional factors influencing the decisions of athletes to take a certain extreme risk (or not) are in full display. It is this heuristic usefulness which motivates and justifies the specific (narrow) definition of extreme sports used in this article.

B. The Evolution of Extreme Sports

When Paul Preuß climbed in the Alps in the 1910s, he neither had a sponsor nor did he ever contemplate doing what he did for money.²⁶ During that time, the first mountaineering boots were produced by Italian and English specialist bootmakers for a very small clientele.²⁷ There was no such thing as a distinct and commercially significant market for (extreme) sports equipment, let alone a market for sponsorships relating to such activities.

Today, the outdoor industry worldwide is estimated to turn over close to a trillion US dollars annually.²⁸ The sport sponsorship market is also a multi-billion dollar industry. In North America alone, sport sponsorships

24. Simul climbing is a technique where all climbers move at the same time while tied into the same rope. Protection is placed by the first climber and removed by the last. The climbers “protect” each other with their weight—if one of them falls, it is quite likely that the others fall as well. Simul climbing is very dangerous. When Alex Honnold and Tommy Caldwell climbed The Nose on El Capitan under two hours (1:58:07) on June 6, 2018 (the current speed record), Jeff Chapman wrote in *Climbing* on June 7, 2018: “A photograph from Honnold’s and Caldwell’s sub-two-hour climb shows Alex free climbing on the sharp end of a giant loop of rope that dangles down to a piece to which it’s tied off far below. Tommy hangs at the other end of the line beneath two more widely-spaced pieces, ascending the rope. The safety compromises—or at least the deviations from standard climbing practices—for the sake of speed couldn’t be more evident.” Jeff Chapman, *In Depth: The Evolution of the Nose Speed Record*, CLIMBING, June 8, 2018, <https://www.climbing.com/news/in-depth-the-evolution-of-the-nose-speed-record/>.

25. Arguably the best-known event in this genre is the annual “Red Bull Rampage,” which is held near Zion National Park in Virgin, Utah, United States, and is by invitation only. *Red Bull Rampage*, RED BULL, <https://www.redbull.com/se-en/events/rampage> (last visited Dec. 6, 2019).

26. However, Paul Preuß had developed a non-trivial “lecture business”, reporting about his climbs, see *supra* note 16.

27. See *Mountaineering Boots of the Early 20th Century*, AM. ALPINE CLUB, January 16, 2018, <https://americanalpineclub.org/library-blog/2017/12/18/the-evolution-of-mountaineering-boots>.

28. Sean McCoy, *OIA: Outdoor Industry Worth \$887 Billion*, GEAR JUNKIE (April 25, 2017), <https://gearjunkie.com/oia-outdoor-industry-economy-value-887-billion>.

amount to approximately \$15 billion in 2018.²⁹ On the firm level, millions of dollars flow into sport sponsorships. VF Corporation, which runs many outdoor brands (The North Face, for example), incurred \$715.9 million in advertising and promotion expenses in 2017, representing 6% of total revenues.³⁰ “We sponsor sporting, musical, and special events, as well as athletes and personalities who promote our products.”³¹ GoPro, a firm that manufactures and sells action cameras, incurred advertising costs in 2016 close to or over \$100 million and had sponsorship commitments in 2017 close to \$10 million.³² Monster Beverage Corporation, an American company that manufactures energy drinks, has close to \$100 million in contractual obligations in 2018 related primarily to sponsorships.³³ Clearly, there is now a lot of money to be made with outdoor activities, including extreme sports, and sponsored athletes are one of the key elements of firms’ marketing strategies.

A micro perspective on the current extreme sports (sponsoring) practice highlights the dramatic changes that have taken place in the last two decades, especially with the arrival of the world-wide web in the late 1990s and the rise of social media in the last decade or so. In 1995, ESPN hosted the first “X Games” (Extreme Sports Games).³⁴ Meanwhile, extreme sports have become so popular that they are beginning to replace team sports. While teen participation in team sports in the US has declined by 25% in the last decade, it has increased by more than five times in skateboarding, snowboarding, and in-line skating.³⁵ Today, sponsoring athletes is the norm—not the exception—for firms active in the outdoor business. The North Face’s team roster of sponsored climbers, skiers, snowboarders and runners currently comprises seventy-five athletes.³⁶ Red Bull sponsors more than 700 athletes, pursuing extreme sports such as Air Race (5), Wing Suit Flying (4), Speed riding (3), Sky Diving (7), Parkour (7), Cliff Diving (2) or BASE Jumping (3).³⁷ As already mentioned, Red Bull runs its own TV Channel. Extreme sports fans may also watch the Amsterdam based

29. IEG, *What Sponsors Want and Where Dollars Will Go in 2018*, SPONSORSHIP.COM 4, <http://www.sponsorship.com/IEG/files/f3/f3cfac41-2983-49be-8df6-3546345e27de.pdf> (last visited Dec. 6, 2019).

30. VF Corp., Annual Report (Form 10-K), at 6, (Jan. 27, 2018).

31. *Id.*

32. GoPro, Fiscal Year 2017 Proxy Statement and Annual Report 71, 88 (2018).

33. Monster Beverage Corp., 2017 Annual Report 95 (2018).

34. *History of X Games*, X GAMES, <https://www.xgamesmediakit.com/read-me> (last visited Oct. 26, 2019).

35. David Horton, *Extreme Sports and Assumption of Risks: A Blueprint*, 38 U.S.F.L. REV. 599, 602–03 (2004).

36. *See Our Athletes*, THE NORTH FACE, <https://www.thenorthface.com/about-us/athletes.html> (last visited Oct. 26, 2019).

37. *See All Athletes*, RED BULL, <https://www.redbull.com/at-de/athletes> (last visited Oct. 26, 2019).

“Extreme Sports Channel”, founded in 1999.³⁸ Specialist media companies, such as Teton Gravity Research, aim to foster the growth of high-risk action sports.³⁹ Athletes are constantly posting on social media, reporting on their activities. Performance is still important, but good looks and an attractive social media profile are even more important.⁴⁰ After all, it is sales that firms are interested in, and doing well in competitions may not increase sales as much as being a media darling.⁴¹ Few top performing (highly “liked”) athletes can make millions of dollars from multiple sponsorships. Competition for such sponsorships is fierce—the overwhelming majority of less well-known athletes struggle to make a living and depend on the little money they earn.⁴²

C. Inefficient Risk-Taking

The most significant change in the extreme sports (sponsoring) practice is that the level of risk has surged over the last years, and for a variety of reasons. New, extremely risky sports such as Wing Suit BASE Jumping, FreeBASE⁴³ or Parkour have been or are invented to catch the eyes of the sponsors and the general public. If athletes are not top performers in existing sports or have a sought-after social media profile, they must engage in ever more extreme activities to get noticed and sponsored. Today’s extreme sports athletes are usually very young, sometimes minors, and less experienced.⁴⁴ Speed has entered the equation, pulverizing risk. Higher

38. See Extreme PR, *Extreme Sports Channel Has Won the TV Rights for the Legendary Extreme Sports Event, the Gravity Games*, EXTREME SPORTS CO. (February 18, 2002), <https://www.extremesportscompany.com/single-post/2002/02/18/Extreme-Sports-Channel-has-won-the-TV-rights-for-the-legendary-extreme-sports-event-the-Gravity-Games>.

39. See TETON GRAVITY RES., <https://www.tetongravity.com/#go> (last visited Oct. 26, 2019).

40. See *infra* Section III. This is especially true for female athletes. For instance, in one interview, an athlete commented: “Since biking is a male driven sport, when one female joins, she gets a lot of sponsors even though she may not even race.” Interview with Anonymous Urban Cyclist and Mountain Cyclist (June–Sept 2018).

41. Digital consultants offer help. See, e.g., MEDIA DARLING DIGITAL CONSULTING, <http://www.digitalmediadarling.com/about/> (last visited Oct. 26, 2019).

42. See *infra* Section III.

43. FreeBASE is a combination of free soloing and (potentially) BASE Jumping with a base jumping parachute rig attached on the climber’s back. It was invented by Dean Potter who practiced it on the north face of the Eiger. Potter later died on May 16, 2015, in a wingsuit flying accident in Yosemite National Park, Climbing Staff, *Dean Potter, Graham Hunt Killed in BASE Jump*, CLIMBING, May 17, 2015, <https://www.climbing.com/news/dean-potter-killed-in-base-jump/>.

44. Sponsored young athletes are a salient feature of extreme sports. In team sports, athletes must usually wait until they reach professional status prior to gaining endorsements. In extreme sports, this is not the case. Young athletes are preferred likely due to their greater willingness to take risk, and they are cheaper to sponsor. In fact, there is a “Monster Army” that is composed of athletes exclusively between the ages of 13 to 21 years old. *Athlete Development*, MONSTER ARMY, <https://www.monsterarmy.com/?modalviewed=true> (last visited Dec. 6, 2019). Higher risk-taking amongst younger athletes was clearly demonstrated through the interviews. Most older athletes (approaching mid-to-late 20’s and entering 30’s) have mentioned that they no longer take on the same

speed implies less safety, as athletes economize on gear and precautions, become fatigued, lose concentration, etc. Loss of focus and concentration is also caused by athletes managing their social media accounts during extreme sports activities.⁴⁵ Finally, the increased availability of rescue facilities and options—for example high-altitude helicopter rescue operations—has led athletes to “afford” to take higher risks.

A dramatic increase in the level of risk-seeking and -taking in extreme sports may in itself be a reason for concern. After all, higher risks imply a higher probability of serious injuries and deaths. “Over 4 million injuries associated with 7 different extreme sports were registered in the United States between 2000 and 2011, of which 11.3% were [head and neck injuries].”⁴⁶ In Australia alone, using a narrow definition of extreme sports, there were 693 deaths between 2010 and 2016.⁴⁷ In 2016, 38 people died in wingsuit flying worldwide, 15 in August alone.⁴⁸ Clearly the death toll in extreme sports is significant, and it is on the rise.

However, risk-seeking and -taking have always been at the core of extreme sports. It appears that little can be said against them if athletes are well-informed, rational agents who always reflect carefully on what they are doing and why they are doing it on the basis of a considerate assessment of all relevant information. Criticisms of the current extreme sports (sponsoring) practice must question these assumptions and argue that there is a lot of inefficient risk-seeking and -taking involved in the current practice.

Risk-seeking and -taking may be defined as inefficient from the standpoint of an individual athlete if it imposes a negative expected utility on the athlete: the expected benefits of the activity are lower than the expected costs. A particular activity may, at the same time, increase net societal welfare if, for example, millions of spectators like viewing extremely hazardous actions and even deaths. However, I will adopt a microperspective and focus on the effects on individual athletes based on the—hopefully uncontroversial—assumption that any “beneficial” societal effects are of secondary importance or should even be ignored when

risks as when they were younger. They simply state that they are better at calculating risk and knowing when it is not worth it to fulfill a task or a trick, no matter the reward. But younger athletes described themselves as “hungry” and eager for sponsorships and are willing to push the boundaries of the sport.

45. See Section I *supra* (referencing the statement by Tommy Caldwell on Kevin Jorgeson). See also Interview with Anonymous Cross Country Mountain Biker (June–Sept 2018). “Risk-taking is influenced by social media. Guys mid-training would take photos and videos and would post it—may do it to get sponsored.”

46. Vinay K. Sharma, Juan Rango, Alexander J. Connaughton, Daniel J. Lombardo & Vani J. Sabesan, *The Current State of Head and Neck Injuries in Extreme Sports*, 3 ORTHOPAEDIC J. SPORTS MED. 1, 1 (2015).

47. Andrew McIntosh, Lauren Fortington, Declan Patton & Caroline Finch, *Extreme Sports, Extreme Risks. Fatalities in Extreme Sports in Australia*, 51 BR. J. SPORTS MED. 4 (2017).

48. Simone Osborne, *Wingsuit Flying: Life and Death in the Most Extreme Sport of All*, FIN. TIMES, July 11, 2017, <https://www.ft.com/content/ea511d26-6244-11e7-8814-0ac7eb84e5f1>.

normatively assessing risk-seeking and -taking in extreme sports. Even if this assumption is not shared, the focus on individual athlete's welfare is at least a legitimate perspective to adopt.

The utility function of extreme sports athletes is of course unobservable. But given the nature of the sports these athletes engage in and the risk of sudden death involved, it is safe to assume that this function is pretty extreme too—displaying an unusual degree of appetite for risk. Describing certain actions as inefficient because they impose a negative expected utility on the athlete serves as a proxy: it means to suggest that the athlete, if fully informed and fully rational and not subject to outside constraints, would not have taken a specific risk that in fact he took.

The practice of an extreme sport might impose a negative expected utility on an athlete for a variety of reasons. An athlete might not have all or the most important information to correctly assess the likely consequences of a particular action in a particular situation. The athlete might fail to correctly appreciate the level of risk in a particular situation. He or she might fail to rationally/reflectively act on a certain risk perception, taking an extreme risk that, under the circumstances (skill level of athlete, weather conditions, etc.), a more experienced and/or rational athlete would not take.

The more specific individual and societal micro-causes for inefficient risk-seeking and -taking are as varied as the personalities of the athletes who are practicing extreme sports. Humans suffer from well-known cognitive biases such as over-confidence, hyperbolic discounting and loss aversion. We are too confident (overly optimistic) that we know the correct answer to particular problems or are able to perform certain tasks,⁴⁹ we hyperbolically discount future effects,⁵⁰ and we seek risks to avert perceived detrimental outcomes.⁵¹ Extreme sports athletes may be particularly susceptible to such fallacies, especially if they are set to pull off an extraordinary achievement to counter a perceived (potential) decline in their public recognition or reputation.

Young athletes suffer from additional biases. As research in brain and behavioral science has shown, while logical reasoning relating to risk-taking is already well-developed by the age of 15, “psychological capacities that improve decision making and moderate risk taking—such as impulse control, emotion regulation, delay of gratification, and resistance to peer influence—continue to mature well into young adulthood.”⁵² Further, the

49. See generally Baruch Fischhoff, Paul Slovic & Sarah Lichtenstein, *Knowing with Certainty: The Appropriateness of Extreme Confidence*, 3 J. OF EXPERIMENTAL PSYCHOL.: HUMAN PERCEPTION AND PERFORMANCE 552 (1977).

50. See generally David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997).

51. See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

52. Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 55, 56 (2007).

socio-emotional brain network is more assertive than the cognitive-control brain network during adolescence, making it hard for the young athlete to modulate inclinations towards risk-taking under conditions of heightened arousal.⁵³ The presence of peers increases risk-taking substantially among teenagers, only moderately among college-age individuals, and not at all among adults.⁵⁴

The media is a key factor constituting this presence of peers and, more generally, the interested public. The media satisfies the desire of athletes to be recognized for their achievements and push them towards new records. However, they also facilitate inefficient commitments. When an experienced mountaineer is faced with extremely adverse weather conditions, he or she would normally cancel a summit attempt or try to get off the mountain if a storm moves in too quickly. Such prudent decisions become much more difficult if a hazardous project is broadcasted live by the media and a lot of money is sunk into its realization.⁵⁵ The announcement of the “Double 8” project by Benedikt Böhm and his partners for a specific time-frame and its live coverage by Spiegel Online⁵⁶ worked like a deadly promise: We are going to do this, no matter what the conditions relating to our personal health and fitness, the weather conditions, etc. are.⁵⁷

Group dynamics might make matters worse.⁵⁸ The lonely athlete may have less information and opportunities to counsel with a partner. However, he or she has nobody else to whom critical decisions must be justified and who might have higher expectations and ambitions. By contrast, consider again the “Double 8” project or similar multi-person ventures. Whoever pushes hard towards retreat in such a setting is the one spoiling the game.

53. *Id.*

54. *Id.* at 57.

55. Project participants might also suffer from the sunk cost fallacy. Costs incurred (sunk) in the past should not influence the evaluation of future courses of action. However, we often ignore this maxim for rational decision-making and ‘throw good money after bad.’ See, e.g., Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50(5) STAN. L. REV. 1471, 1482, 1489-93 (1998).

56. See Section I *supra*.

57. See also Fabienne Riklin, *Drama in der Todeszone*, SCHWEIZ AM WOCHENENDE (July 9, 2016), <https://www.schweizamwochenende.ch/nachrichten/drama-in-der-todeszone-131066830> (quoting Michael Ruhland, Chief Editor of the magazine BERGSTEIGER: “‘Beim zweiten Versuch sind die fünf Männer ein zu grosses Risiko eingegangen’, sagt Ruhland. ‘Andere Alpinisten hätten es bei so hoher Lawinengefahr nach dem ersten Versuch bleiben lassen.’ Doch insbesondere Böhm sei von grossem Ehrgeiz getrieben gewesen. Als Teamleiter habe er den Rekord holen wollen. ‘Die permanente mediale Begleitung der Expedition hat ihn wohl zusätzlich angestachelt.’”).

58. On detrimental group dynamics in mountaineering, see generally D. Christopher Kayes, *The 1996 Mount Everest Climbing Disaster: The Breakdown of Learning in Teams*, 57 HUM. REL. 1263 (2004); see also Interview with Anonymous Snowboarder (June-Sept. 2018) (“The decisions are left to the riders/athletes. The pressure is not explicit, but you may not want to back down. It’s also cutthroat—other athletes on the trip are doing super well, and you may just want to do it. The group dynamics of going despite conditions are strong, everyone at the end of the day would say that it is super dangerous but no one wanted to speak up on that particular issue. But overall athletes would be doing better by speaking up.”).

There is nothing to win vis-à-vis the general public with a prudent decision. Retreat does not have an upside, such as the glamour of a new record. To the contrary: the non-specialist viewers probably will be quick to perceive defeat—if they learn about the event at all.

Finally, inefficient risk-seeking and -taking may be caused by the contractual incentives of sponsored athletes. To illustrate: An athlete who has a contract for life and gets a certain amount of money per year regardless of what he or she does or accomplishes is in a pretty relaxed position. By contrast, an athlete who has a contract for a year that may or may not get renewed and that provides for a modest retainer combined with a much higher bonus scheme based on competition performances, social media success, or magazine coverage of activities, etc., surely will be prone to engage in much riskier activities. If an athlete is seeking and taking inefficient risks because he or she is incentivized to do so by the provisions in a sponsoring contract, then this may be a good reason for not enforcing these provisions.⁵⁹ Hence, extreme sports sponsoring contracts should be studied in more detail, and it is this task to which I turn in the next section of this article.

It should be noted that it is useful to think of the many different potential causes for inefficient risk-taking and death of extreme sports athletes in terms of compound probabilities. If, in a specific setting, three “problems” with potentially fatal consequences occur, and there is an 80% chance that the athlete solves each of these problems, it could appear that the athlete has a very good chance to survive. However, the probability that something goes deadly wrong actually is close to 50% ($1 - [0.8 * 0.8 * 0.8] = 48.8\%$).

III. EXTREME SPORTS SPONSORING PRACTICE

It is hard to find reliable data on extreme sports sponsoring contracts and, more broadly, the relationships between athletes and sponsors. Most sponsor corporations are either private—such as Red Bull—or public but not listed on stock exchanges, and even those sponsors that are listed do not usually publish data on individual sponsorships. Annual reports provide only general information on advertising and sponsorship expenses.⁶⁰ Hence, a detailed assessment of the current extreme sports sponsoring practice must employ a multi-source empirical research strategy that goes beyond publicly available information.

59. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 321 (2004); see also Interview with Anonymous Snowboarder (June–Sept. 2018): According to this athlete, perhaps the most risk-inducing contracts are Monster Energy’s. A month before the X games, Monster would offer a one-month sponsorship agreement “to a bunch of kids” with a very low base salary (under \$1,000). But the sponsorship contract would have a clause indicating that winnings are matched. X games winnings are up to \$20,000 and, if matched, another \$20,000 is given. Making \$40,000 in one competition is highly incentivizing, especially for kids “hungry” for success.

60. See Section II B *supra*.

In this section, I set out the research methodology of this project, especially the design of the 40 structured interviews with athletes on their sponsorship contracts. On this basis, I present my findings on the competition for sponsorships, the process of contract negotiations and renewal, and on the salient features of sponsorship contracts and relationships. These features comprise, in particular, the compensation structure, associated incentive mechanisms and the pressure on athletes to perform. The picture that emerges is that of a market tilted heavily towards satisfying the interests of the sponsors. The great majority of athletes struggle to make a living while performing under extremely hazardous conditions.

A. Research Methodology

A natural starting point for an empirical analysis of extreme sports sponsoring contracts is publicly available information. I was able to identify and study a handful of sponsorship agreements filed with the SEC in the US as part of listed companies' filing duties.⁶¹ These contracts provide some useful information on key obligations of sponsored parties such as representing the brand/sponsor and taking out insurance, and on termination rights and exclusivity. However, this information does not yield a comprehensive picture of the contracting practice, it relates to sponsored teams and not individuals, and it does not cover many of the extreme sports that I am interested in such as free solo climbing, BASE jumping, wingsuit flying, extreme freeriding, or extreme freeride mountain biking.⁶²

I also studied publicly available material on the design and drafting of sport sponsorship agreements.⁶³ By its nature and purpose, these books or book chapters offer a much more comprehensive list of items to be covered in a sport sponsoring contract. They also benefit from the expertise of the authors who draft such contracts or advise on their drafting as part of their professional activities. At the same time, good legal advice is one thing—implementing it in legal practice is another matter. Whether the recommended clauses and provisions make it into actual agreements is an open question. Further, to the best of my knowledge, there is no book specifically on the drafting of extreme sports sponsoring contracts which are investigated in this article.

Hence, I decided to conduct a series of 40 structured interviews with market participants to obtain up-to-date and comprehensive information on

61. These include, for example, an agreement of January 1, 2008, between Bob Stallings Racing and Gainsco, Inc., on auto racing, and an agreement of July 1, 2007, between Jones Soda Co. and Football Northwest and First and Goal, Inc., on national football.

62. See Section II A *supra*.

63. See, e.g., PAMELA R. LESTER, THE LAW OF PROFESSIONAL AND AMATEUR SPORT 132 (Gary A. Uberstine ed., 1998); MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE § 7 (2d ed. 1998); ADAM LEWIS & JONATHAN TAYLOR, SPORT: LAW AND PRACTICE 1241–1277 (2d ed. 2008).

the contracting practice with respect to extreme sports sponsoring. These interviews were conducted between June and September 2018. To the best of my knowledge, the information gathered provides a unique account of current contracting practice regarding extreme sports sponsoring worldwide. I supplement the information gathered via the interviews with public statements made by market participants in books or media interviews to add perspectives and assessments.

I had planned to interview athletes, sponsors, and counsel/agents for either athletes or sponsors. It turned out that neither sponsors nor sponsor representatives were willing to be interviewed. If sponsors reacted to an interview request at all, they either just cited company policy for their position, or they stated that they do not want to reveal business secrets.⁶⁴ Red Bull's reaction is typical: "Thanks for your interest. We're extremely flattered! Unfortunately, the marketing strategy that has worked best for us is not to publish our strategies. You see, Red Bull is a privately-owned company."⁶⁵ It is difficult to imagine which (type of) business secrets or marketing strategies might be reflected in the provisions of a sponsoring contract that give Red Bull an advantage vis-à-vis its competitors.⁶⁶ Rather, sponsors appear to have a more general interest to shroud their contract practices in secrecy to prevent public debate and critique.

The 40 interviewed athletes are from a pool of around 300 sponsored athletes who were contacted with an interview request. Selection bias should not be an issue as the interviewed athletes comprise both highly successful and less successful ones, and they represent most of the extreme sports as defined in Section II A.⁶⁷ A certain emphasis is on extreme sports related to mountaineering, skiing, and mountain biking. The sample includes a couple of sponsored athletes who do not practice extreme sports—for example bouldering—in order to compare contract provisions across a wider range of sports. Interviewed athletes are based all over the world. Larger groups are located in North America and Europe—the areas where most sponsors can be found.

One might think that it could be helpful to identify and interview a control group of extreme sports athletes who are not sponsored and do not aspire to obtain a sponsorship. One might then be able to compare the number of deaths or serious injuries across the two groups and draw inferences on the influence sponsorships have on these incidents. However,

64. "Monster Energy does not do interviews . . ." (Email from Anonymous Monster Energy Representative to Ms. Summer Ibrahim (Sept. 19, 2018) (on file with author)).

65. Email from Anonymous Red Bull Representative to Ms. Summer Ibrahim (July 23, 2018) (on file with author).

66. I interviewed several Red Bull sponsored athletes and their answers confirmed my suspicion.

67. One might think that the sample of interviewed athletes could be biased towards less successful athletes as these might have more time. Surprisingly, this is not the case. We had only one interview with an athlete who currently did not have any serious sponsors, and that athlete was very apologetic for wasting our time and seemed embarrassed of his lack of success.

such an approach would be fraught with methodological problems: identifying athletes within the control group can be difficult, and deaths and/or serious injuries of athletes can have many possible causes.⁶⁸ Isolating the effects of sponsorship contracts on risk-taking would require a rigorous quantitative empirical analysis for which the relevant data simply is not available. Given that the main interest in this project is to learn more about these effects as perceived by the athletes themselves, this, I submit, is not a serious deficit.

Interview questions focused on the process of contract (re-)negotiation, key contract provisions, duration of sponsorships, rights and obligations of parties, and athletes' compensation. However, interview questions did go much beyond the black-letter words of contracts, exploring the broader relationship between sponsors and athletes, developments in the extreme sports sponsoring market, the commercial and non-commercial interests of athletes and sponsors, as well as potential improvements of the current contracting practice.

Results are reported in the following section on the basis of the frequency with which certain statements were made. Words like "usually", "normally" or "overwhelming majority" are used when more than 75% of the athletes report a specific fact or hold a particular view. By contrast, words like "unusually," "rarely," "few," or "some athletes" are used when this figure is 25% or less, and "a majority" of athletes or interviewees means more than 50%. Sometimes, I quote verbatim from interview statements with an anonymous reference to the interviewee's practiced extreme sport(s). Interview transcripts are on file with me.

B. Research Results

1. Contract formation, duration and (re-)negotiation

Negotiations for an extreme sports sponsoring contract are usually initiated either by athletes approaching sponsors or *vice versa*. Many sponsors allow athletes to apply for sponsorships online.⁶⁹ Only few—experienced and prominent—athletes have agents who represent them. The interviewed extreme sports athletes are not unionized or represented by some other form of collective organization. Rather, they currently act on their own when seeking and negotiating sponsorships.

If a sponsor decides to sponsor an athlete, the terms of the contract are usually not individually negotiated. In other words, sponsored athletes are confronted with a standard form contract (standard form terms) which they

68. See Section II C *supra*.

69. See, e.g., MONSTER ARMY, <https://www.monsterarmy.com/> (last visited Dec. 6, 2019).

can accept or reject.⁷⁰ An athlete's compensation (price) is the exception to this practice. But even with respect to compensation, the contract structure (the "price schedule") is boilerplate and normally not individually negotiated. This fact is indicative of the little bargaining power the overwhelming majority of athletes have when being considered for a sponsorship. It is also very important with respect to the applicable standard of review for contract clauses under many jurisdictions, as will be discussed in Section V *infra*.

Sponsoring contracts are usually executed in writing. However, some athletes report that some of their contracts were or are only handshake deals, especially if little money is involved and a sponsor's main obligation is to provide gear or equipment.

No sponsorship contract discussed in the interviews was or is for an indefinite term. Contracts usually run for a fixed term of one to three years. The trend in recent years has been towards shorter terms than about a decade ago. Back then, five or even ten-year contracts used to be offered for select athletes. The more "attractive" an athlete is from a sponsor's perspective, the longer the term that is on offer. For athletes, a longer term is viewed as a means to reduce risk—it provides more stability and (economic) safety. For sponsors, the reverse is true. Binding an athlete to the firm for a longer period involves a bet on the athlete's future performance.

If a contract is about to expire it usually will be renegotiated. As with the formation of a sponsoring contract, such renegotiations are one-sided affairs. The sponsor usually decides whether to offer a new contract to the sponsored athlete and, if so, on what terms. The athlete then can take the offer or leave it.

2. Core obligations of sponsors

Under an extreme sports sponsoring contract, sponsors usually assume a set of characteristic obligations.

(1) *Gear*. First, sponsors provide gear. Depending on the sponsor's line of business, this can take many forms such as clothing, hardware (for example: climbing hardware, mountain bikes, skis, cameras, etc.), or nutrition (for example: energy drinks/bars, vitamins, etc.). Contracts usually contain a generic clause specifying that the sponsor will regularly provide equipment without detailing times, volumes, etc.

(2) *Compensation*. Second, sponsors pay athletes a certain compensation. This usually consists of two components: a base payment (retainer, flat honorarium) and bonus payments. The base payment is normally expressed as a certain amount per year and paid out monthly, four

70. Interview with Anonymous Snowboarder (June–Sept. 2018): "Most contracts are 'copy and pasted contracts.' A lot of the sponsorship contracts are outdated—for example, athletes get a monetary incentive if they are on a full page magazine spread, even though no one really uses magazines anymore."

times a year, twice a year, or yearly, depending on the individual contract. The amount of the base payment hinges primarily on two factors: the type of extreme sport sponsored and the prominence or visibility of the athlete. For example, extreme snowboarding or freeriding and mountain biking attract more interest and participants than mountaineering or rock climbing.⁷¹ The top annual honorarium paid by a sponsor to an individual athlete amongst those interviewed is \$500,000.⁷² Some multi-year contracts foresee an annual increase of the base payment from year to year—according to a fixed schedule or based on the bonus earned by an athlete in a previous year. Top earners make millions of dollars from multiple sponsors.⁷³ However, the overwhelming majority of athletes must be content with annual base payments in the range of \$3,000 to \$25,000—usually not enough to make a living. As a consequence, the majority of athletes need income from other jobs. Many “professional” climbers, for example, also work as mountain guides. Some interviewees report significant pay differences between male and female athletes. In downhill mountain biking, for example, male athletes are said to earn up to ten times more than female athletes—despite similar performance. Contracts usually stipulate that the (base) compensation of an athlete can be reduced if the athlete is injured and unable to perform.⁷⁴

Bonus payments come in a wide variety of forms and differ in terms of their trigger, amount, and robustness. A very soft and uncertain bonus entitlement, for example, foresees a year-end review meeting during which the athlete’s activities and achievements are discussed. On this basis, the sponsor then decides whether to award the athlete a bonus and, if so, in which size (the maximum bonus being written into the contract). More robust bonus entitlements make the amount dependent on clearly defined triggers such as competition results,⁷⁵ participation in specific events, likes on social media, appearances on TV, cover pictures/stories in magazines (up to \$10,000 for a magazine cover) or a combination of such factors. The trend in recent years clearly has been towards rewarding (social) media popularity⁷⁶ as our lives become more and more digitized (“visibility

71. *Extreme Sports: Ranking High in Popularity*, MOMSTEAM, <https://www.momsteam.com/sports/snowboarding/extreme-sports-ranking-high-in-popularity> (last visited Dec. 6, 2019).

72. By comparison, snowboarder Shaun White is reported to make a couple of million US dollars per year from a contract with Burton (Interview with Anonymous Skateboarder (June–Sept. 2018)).

73. On exclusivity see *infra*.

74. For details see Section III B 4 *infra*.

75. For example, some contracts foresee specific bonuses for making the podium in particular events. Some stipulate that the sponsor will match the prize money won by an athlete, etc. Contracts with a very short duration and high-powered bonus incentives are often offered to newcomers: “So Monster might get someone right before X games and give him or her a one-month contract—if you podium, we’ll just match your winnings” (Interview with Anonymous Skateboarder (June–Sept. 2018)).

76. *E.g.*, Black Diamond, Inc., 2016 ANNUAL REPORT, 10 (2016) (“Our social media strategy is to leverage the strength of our growing fan bases as extremely well-targeted segments for brand-rich

schedule”).⁷⁷ Given that “likeability” is a function not only of athletic performance but also of social media presence, this trend is viewed critically by athletes who, for various reasons, do not want to or cannot manage or attract a large social media following.

Base payments are usually higher than expected bonus payments—bonus payments are discounted by the probability of achieving them—and, as a consequence, are also usually higher than the bonuses that are actually handed out. Often the contract also caps the maximum bonus which an athlete can achieve. Few contracts foresee only a fixed compensation per year or are only based on bonuses. The latter occurs mostly with respect to novice athletes. Thus, sponsors minimize their risk. At the same time, they maximize the risk and pressure on the shoulders of the young athlete. Few contracts compensate athletes only for the time spent for or on behalf of a sponsor, for example, the days dedicated to photo/video shootings, attending trade fairs, etc.

Sponsored athletes may up their compensation with money for expeditions, trips, shooting videos, etc. Usually, such money is available on an ad hoc basis if a particular project has been discussed and agreed between the parties. Only rarely do contracts foresee an annual travel or video budget which athletes can use at their discretion.

(3) (*Lack of Training and Counselling*). Sponsors usually do not undertake to train or counsel athletes systematically. None of the interviewed athletes reported that any such scheme was in place. A few freeride skiers mentioned that avalanche skills training is offered on a regular basis. Similar statements were not made by athletes practicing other extreme sports. Sponsors do not normally run a program or routine of coaching, review or counselling sessions according to which they would liaise with athletes on a regular—weekly, monthly—basis to discuss projects, give advice, etc. Only very few sponsor representatives who have a deep understanding of the extreme sport in question are characterized by athletes as being potentially able to fulfil such coaching or counselling roles.⁷⁸ Athletes check in with sponsors irregularly or during scheduled review sessions (“year-end review”) to discuss progress, projects, and problems. None of the sponsors are reported to provide medical support or

communications. These outposts engage our most enthusiastic brand advocates with product updates, information regarding our sponsored athletes, their accomplishments and in turn, better help us create a sense of brand community while reinforcing brand identity. This past year has seen Black Diamond grow its Facebook ‘Likes’ by 20% to 300,000, and Instagram followers by 118% to 386,000. The progress in our online marketing programs enabled the online business to achieve growth of 24% year-over-year.”)

77. Interview with Anonymous Urban and Mountain Cyclist (June–Sept. 2018): “If social media were to shut down, that would be more catastrophic in terms of endorsing the product than an inability to race/compete.”

78. A good example is Conrad Anker, THE NORTH FACE, <https://www.thenorthface.com/about-us/athletes/conrad-anker.html> (last visited Dec. 6, 2019). Anker is a highly distinguished mountaineer and Captain of “The North Face Global Athlete Team.”

health coaching on a systematic basis. Some sponsors help with ad hoc access to expert medical treatment.

3. Core obligations of athletes

Athletes receive gear, equipment, and money from sponsors,⁷⁹ and they have to wear and use the product(s) of a sponsor and represent the brand. This obligation of athletes is central to a sponsorship contract: “You provide value for a sponsor’s brand. You appear in photos, ads, stories, and news clips reporting your (presumably significant) accomplishments. You try to be a positive face for the brand—that’s why crusty climbers rarely have sponsors, no matter how hard they climb.”⁸⁰

Many extreme sport sponsoring contracts specify a number of workdays per year—usually five to ten—during which the athlete must make him or herself available for sponsor-related activities or events such as trade fairs, photo or video shootings, films, product testing, design meetings, interviews, festivals, etc. Athletes are usually required to test sponsor products and material and provide feedback.⁸¹ Athletes are also usually required to regularly post material (photos, videos, stories, etc.) on social media.⁸² A majority of athletes stated that they have to do this weekly or four times a month. Athletes who generally participate in competitions usually undertake to participate in specific competitions specified in the contract. Apart from actively and positively promoting the brand of a sponsor, athletes must refrain from any activity that harms the sponsor. A great majority of sponsored athletes are bound by a “moral clause.”⁸³ Athletes must not behave in a way detrimental to their sponsor’s interests, such as talking poorly about the product, modifying the product or covering the product.

Further, athletes are usually subject to a confidentiality and to an exclusivity obligation. They must keep all matters relating to their sponsorship confidential, and they must not enter into other sponsorship agreements with firms operating in the same line of business as their

79. See Section III B 2 *supra*.

80. TOMMY CALDWELL, *THE PUSH* 220 (2017).

81. See, e.g., Black Diamond, Inc., *supra* note 76, at 5, 9 (“For the past 27 years, we’ve established and maintained ongoing relationships with professional athletes who excel at the sports of climbing, mountaineering, and skiing. These top athletes evaluate our products in the field with demanding use and under punishing conditions, providing valuable feedback and suggestions to our designers.”).

82. See also MARK SYNNOTT, *THE IMPOSSIBLE CLIMB: ALEX HONNOLD, EL CAPITAN, AND THE CLIMBING LIFE 198-199* (2018) (“By 2015, it wasn’t just possible for professional climbers to keep their fans apprised of their exploits in real time; it was expected. Endorsement contracts often included stipulations about social media: how often to post, which hashtags to use, and even creative guidelines.”).

83. On such clauses see, e.g., Daniel Auerbach, *Moral Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1 (2005). For a practical example see Clause 9 in the agreement of January 1, 2008, between Bob Stallings Racing and Gainsco, Inc., on auto racing, *supra* note 61.

sponsor. Multiple sponsorships with firms operating in different markets or market segments and sell different types of products are unproblematic. In fact, a portfolio of such complementing sponsorships is in the interest of all sponsor firms involved; they benefit from the increased popularity, media attention and general visibility of the athlete to which all portfolio sponsors contribute.⁸⁴ A good example for such a sponsorship mix are the contracts by Austrian climber and mountaineer David Lama who died in an avalanche on April 17, 2019, after climbing M-16 on Howse Peak.⁸⁵ Lama was or had been sponsored by The North Face (clothing), La Sportiva (climbing shoes), Petzl (climbing hardware), Kästle (skis), Leki (ski poles), Glorify (sunglasses) and Red Bull (energy drink).⁸⁶ However, only very few athletes are able to establish and maintain such a lucrative portfolio of sponsors. The majority of athletes in the interviewed panel have only three sponsors or less.

The sponsor usually has a contractual right to terminate the sponsoring agreement if the athlete violates any one of his or her core obligations. However, no incidents of contract termination were reported by the interviewed athletes. Given the relatively short duration of most contracts, not renewing an existing agreement usually is a sufficient sanction. It is also questionable whether, as a matter of the applicable law, any technical (minor) breach of contract would suffice to justify terminating the sponsorship.

4. Athlete's injury, liability, and insurance

A topic that deserves to be treated separately due to its importance for athletes and sponsors alike is athletes' injuries and their effects on athletes' and sponsors' rights and obligations. All sponsorship contracts in the interview sample contain a limitation of liability clause stating that the sponsor is not liable for any damage or harm that the athlete might suffer if he or she gets injured while practicing the sponsored activity. The clause is very broad and, on its face, also covers injury (and death) caused by a

84. In this sense, an optimal sponsorship portfolio has certain characteristics of a public good—from the sponsors' perspective. It would be interesting to develop a game theoretic model that reflects the incentives of sponsors. The sponsor moving first bears higher costs—identifying promising athletes, building their reputation, etc.—and gets a lower reward than sponsors who come in later, freeriding on the efforts of the first mover to build the athlete's reputation. However, the first mover may be able to hook the sponsored athlete up for a comparatively low price compared to what the latecomers must pay.

85. Derek Franz, Auer, Lama and Roskelley killed in avalanche on Canada's Howse Peak, ALPINIST, April 18, 2019, <http://www.alpinist.com/doc/web19s/newswire-auer-lama-roskelley-presumed-dead> (last visited Dec. 13, 2019). Lama was climbing in a party with Hansjörg Auer and Jess Roskelley—two other highly accomplished (and sponsored) climbers and mountaineers who were also killed in the accident.

86. See DAVID LAMA, <http://site.david-lama.com/de/david/> (last visited Dec. 6, 2019).

sponsor's negligence. Whether such a broad release or exclusion from liability clause withstands legal scrutiny is questionable.⁸⁷

Injury is bad for athletes for many reasons.⁸⁸ First, they cannot do what they love to do the most, i.e. practice their favorite sport. Second, they stand to lose their income or at least a sizable portion of it: the overwhelming majority of sponsorship contracts in the interview sample contain a clause that allows the sponsor to cut the athlete's base compensation if the athlete is injured for a longer (specified) time. A typical clause would stipulate, for example, that injury for less than three months does not affect the base pay. But if the athlete is injured for longer than three months, the base pay can be reduced proportionately to the time of the injury. Alternatively, the clause might say that an injury lasting for three to six months allows the sponsor to cut the base pay in half, and an injury lasting over six months allows the sponsor to stop paying the base compensation altogether. Worse still, many sponsorship contracts give the sponsor a right to terminate the contract if the athlete is injured for longer than a specified period. No wonder then that athletes usually conceal smaller injuries from sponsors, if possible. On the other hand, it must be noted that, based on these contractual clauses, the sponsor has *discretion* to reduce an athlete's compensation or even terminate the sponsoring relationship. Whether a sponsor *exercises* its discretion to this effect is a question of each individual case. Some athletes report that sponsors maintain their base payments through an athlete's injury time, as a sign of good will and a collaborative attitude.⁸⁹ However, this will put (even) more pressure on athletes to perform—i.e., to successfully complete very risky projects—once they have recovered from injury.⁹⁰ As has already been emphasized, contracts are for a limited duration of a couple of years only, and even if a sponsor does not prematurely terminate a contract upon an athlete's injury, the likelihood of a renewal will be significantly reduced.

Only very few extreme sports sponsoring contracts require athletes to purchase health or life insurance to get some coverage for themselves or their families in case of injury or death. If the athlete is required to purchase insurance in order to be sponsored or to compete, this always comes at the athlete's expense. No sponsor offers support in this respect or purchases insurance on an athlete's behalf and for his or her (family's) benefit. To the contrary: as has been discussed, injury carries the risk of pay reduction or contract termination.

87. See Section V *supra*.

88. Interview with Anonymous Urban Cyclist and Mountain Cyclist (June–Sept. 2018) (Injury-related jokes during contract negotiations underline the importance of the topic: “Usually the joke when signing the sponsorship contract is that the sponsor will ask: ‘How long do you think you’ll be injured this year?’”).

89. Some sponsors also “max out” the bonuses for the athlete when injured, so the athlete could have some additional funds for paying medical bills.

90. See Section C *infra*.

5. Choice of law and dispute resolution

Choice of law and dispute resolution appear to receive relatively little attention from sponsors and athletes. Most contracts presumably contain a choice-of-law clause and specify the applicable process for resolving disputes (litigation, arbitration or mediation; choice of forum for litigation). However, most athletes do not recall whether their contract contains such provisions. Those who do recall unanimously state that the contract is governed by the law of the sponsor's location (headquarters, incorporation) and that the courts in this country have (exclusive) jurisdiction to hear disputes that might arise. One athlete mentioned that a breach of contract might lead to "disciplinary measures" taken by a sponsor's management without specifying the nature of these measures. None of the athletes stated that the contract contained an arbitration clause or provided for mediation. This is a somewhat surprising: from the perspective of businesses, arbitration has become very popular in the last decade to shield firms against consumer or employee class action claims before state courts which might lead to sizable (punitive) damage awards and negative publicity. As all legal practitioners know, dispute resolution processes are crucial when it comes to enforcing rights and obligations. It appears that, in this respect, both athletes and sponsor firms are less sophisticated players than one might think.

None of the interviewed athletes reported any specific litigation between athletes and sponsors. This is not surprising given that only a handful of cases reached courts in the past. The scope of previously litigated cases touched on issues such as alleged exploitation of an athlete's youth and inexperience⁹¹ and sponsor liability based on negligence.⁹² However, to the best of my knowledge, none of the cases which have reached the courts in the past concerned disputes arising out of individual sponsorship contracts between athletes and sponsors.

As already mentioned,⁹³ interviewed athletes are based all over the world with larger groups located in North America and Europe—the areas where most of the sponsors are to be found. It turns out that no (significant) differences exist in the contracting practice of sponsors located in different jurisdictions. This is probably due to globalization: sponsors operate globally, and they compete against each other globally for customers and sponsored athletes.

91. Rogatkin v. Raleigh Am. Inc., 69 F. Supp. 3d 294, 296 (D. Mass. 2014).

92. See Walton v. OZ Bicycle Club, No. 90-1597-K, 1991 U.S. Dist. LEXIS 17655 (D. Kan. 1991); Lloyd v. Bourassa, No. 01-CV-039, 2002 Me. Super. LEXIS 132 (2002); Staadecker v. Emerald Health Network, Inc., No. 64191, 1993 Ohio App. LEXIS 6010 (1993); Branco v. Kearny Moto Park, Inc., 43 Cal. Rptr. 2d 392 (Cal. Ct. App. 1995).

93. See Section III A *supra*.

C. Pressure to Perform

On the basis of the research results reported in Section III B, it is clear that the overwhelming majority of athletes struggle financially to make a living from practicing their sport.⁹⁴ Competition for sponsorships is fierce. Athletes who are good (or lucky) enough to get sponsored usually earn meager salaries—much below the income of a janitor (to use Tommy Caldwell’s words).⁹⁵ A significant component of their compensation comes in the form of bonuses. Whether an athlete gets a bonus and, if so, what amount is dependent on a lot of uncertainties such as competition performance, social media resonance, avoiding injuries, etc. An athlete’s base pay may be cut in case of an injury. The contract might even be terminated. Whether it will be renewed after one, two or three years, is also uncertain. Certain athletes are contractually obligated to participate in certain competitions.

Does this contractual set-up create undue pressure on athletes to perform? More specifically, are they incentivized to take inefficient risks?⁹⁶ The literature is replete with conflicting testimonials by athletes on the issue. Some forcefully and clearly state that sponsorships and sponsors pressure athletes to take undue risks.⁹⁷ Some deny this—equally forcefully and clearly.⁹⁸ A similar mixed picture emerges from the interviews I conducted.

94. This finding is confirmed by other studies. See Holly Thorpe & Guillaume Dumont, *The Professionalization of Action Sports: Mapping Trends and Future Directions*, SPORTS IN SOC’Y (Feb. 21, 2018) <https://www.tandfonline.com/doi/pdf/10.1080/17430437.2018.1440715?needAccess=true>.

95. Caldwell, *supra* note 80 (stating “[f]or all the people who like to call themselves ‘professional climbers,’ in the United States you could probably count on both hands the number who make a real living, an income equivalent to, say, that of a janitor, based solely on getting paid to climb . . .”). Heidi Howkins Lockwood, *Jokers on the Mountain*, in CLIMBING: PHILOSOPHY FOR EVERYONE, 49, 57 (Stephen E. Schmid ed., 2010) holds a slightly different view: “. . . it is entirely possible for professional climbers living in many countries to make a living within or even well beyond the range of an astronaut’s salary.”

96. Inefficient risks as defined in Section II *supra*.

97. See, e.g., Mark Synnott, *supra* note 86, at 334 (“Even more insidious is the way social media has made it possible for people to feel pressure to perform, even when they’re alone.”); Eva Maria Bachinger, *Heute sind alle Helden – US-Alpinist Steve House im Interview*, ÖSTERREICHISCHER ALPENVEREIN BERGAUF, June 5, 2015, at 62 (“Die meisten Bergsteiger müssen vieles tun, was der Sponsor will, öffentlich zugeben tut das freilich keiner. Natürlich bittet mich Patagonia darum, Fototerminen oder Ähnliches zu absolvieren, aber mein Eindruck ist, dass viele Sponsoren Alpinisten wie Angestellte behandeln und ihnen sagen, was sie zu tun haben.” *Id.* at 65.); JOE SIMPSON, DARK SHADOWS FALLING 64-65 (1997) (Edmund Hillary on Alison Hargreaves: “Alison was a brilliant climber but she had tremendous pressures on her and she became obsessed.”; Joe Simpson: “Undoubtedly there was pressure from sponsors”); Thomas Bubendorfer, *Solo für Bubendorfer*, <https://www.youtube.com/watch?v=v1EBt0ryONU> (“Es war keine Freude mehr, sondern es waren vermarktete Ziele.”).

98. See, e.g., Andy KIRKPATRICK, COLD WARS: CLIMBING THE FINE LINE BETWEEN RISK AND REALITY 66 (2011) (“I wondered if being sponsored would mean pressure to perform but guessed that nothing could trump my own motivation. But would it cloud my judgments, making climbing ever more goal oriented? I just had to keep a rational handle on things.”); ALEX HONNOLD, ALLEIN IN DER WAND 277-78 (2016) (“Immer wieder hat es auch Leute gegeben, darunter mehrere Journalisten, die sich laut

However, a majority of the athletes confirm that there is pressure to perform,⁹⁹ especially by younger/smaller brands who wish to establish themselves in the market¹⁰⁰ and/or vis-à-vis younger athletes who also have to build up a reputation quickly in order to get more—and more lucrative—sponsorship deals.¹⁰¹ The compensation structure, especially bonus payments, are also said to push athletes towards taking high risks.¹⁰² Further, a lot of pressure is reported to be present if sponsored athletes participate in sponsored events which are viewed by a large public audience.¹⁰³ The same is true if a film/video shoot has been set up at considerable costs for a particular day.¹⁰⁴ Few athletes state that they do not feel much sponsor

gefragt haben, ob meine Sponsoren und die Medien mich dazu antreiben, mein Leben aufs Spiel zu setzen. Ich glaube, dass sie sich irren. ... Niemand möchte, dass ich solo klettere, ausgenommen ich selbst.”); Caldwell, *supra* note at 80, at 221 (“Over time, sponsors came to me, never asking me to sell my soul in return for their support.”); UELI STECK, *in*: Ed DOUGLAS, *THE MAGICIAN’S GLASS* 132 (2017) (“I want to keep it focused and I want to keep it about climbing. That’s how you push limits, not because my sponsor pays me.”).

99. Interview with Anonymous Urban Cyclist and Mountain Cyclist (June–Sept. 2018) (“Some sponsors are pushing their athletes, and are very dog eat dog, if you injure yourself the sponsors won’t care.”); *see also* Interview with Anonymous Alpinist (June–Sept. 2018) (“There are some brands that are driving athletes in dangerous situations because they know they will get a lot of visibility”); Interview with Anonymous Cross Country Mountain Biker (June–Sept. 2018) (“People tend to take risks because of the potential of exposure on social media, and the drive behind that is to get noticed by sponsors. Red Bull is a good example of this: a lot of the guys try to do bigger and bigger things and bigger jumps as they want to get noticed by Red Bull”); Interview with Anonymous Professional Skiers (June–Sept. 2018) (“Every professional athlete has had pressures to continue making a living from sponsors” and “Clearly there is pressure from social media & sponsors to take on higher risks for content.”).

100. Interview with Anonymous Freestyle Motocross Racer (June–Sept. 2018) (“The smaller/younger brands put more pressure on athletes. More established brands are thinking more long-term so they usually do not put that much pressure on the athletes.”).

101. Interview with Anonymous Snowboarder (June–Sept. 2018) (“The kids are hungry, and it is difficult to get your foot in the door. They film a crazy trick, and if it goes viral it will blow up . . . and the level is rapidly changing . . . progression is insane.”); Interview with Anonymous Snowboarder (June–Sept. 2018) (“Especially the younger kids feel the pressure to perform. They must deal with the unfortunate situation of many kids being super good, and companies just not give out many good deals. They will do more crazy jumps/stunts that they are not necessarily comfortable doing but may want to do it in order to get sponsored—‘this is my opportunity’ to stand out, they have to be doing some pretty crazy stuff, and the younger kids who are newly sponsored, they are hungrier and they want more. ‘If I keep this up, I could get on the Pro Team or move up the ranks, the reality is set such that this is possible and not just shooting for the stars.’ The older you get, the more you learn to pick your battles.”).

102. Interview with Anonymous Cross Country Mountain Biker (June–Sept. 2018) (“I think that cash is good motivation for riders. For example, we were part of a bonus structure with one of our title sponsors where they would pay [\$10,000] for a World Cup win. If I were in the situation to achieve that win and it meant taking a massive risk in a sprint or on a feature, I wouldn’t hesitate to do it—first because it’s a World Cup win, that’s career making, but the 10k would also be a motivator.”).

103. Interview with Anonymous Extreme Skier (June–Sept. 2018) (“You may have a competition that is fully organized with broadcasting, and conditions are not ideal on the day of the competition. Under normal circumstances you just wouldn’t ski that day, but you would still [have to ski] in those conditions [during a sponsored event].”).

104. Interview with Anonymous Extreme Skier (June–Sept. 2018) (“So, you are supposed to ski down this great line but the avalanche risk is extremely high. Two helicopters are there, film crews, medics and other support staff. The whole day costs the sponsor [\$150,000]. You would never ski that mountain on that day yourself, but you’ll think twice before pulling out.”).

pressure at all.¹⁰⁵ In essence, the hypothesis formulated in Section II C on the incentives created for extreme sports athletes by the current contractual arrangements with sponsors to engage in inefficient risk-tasking was confirmed in the interviews.

At the same time, when evaluating athletes' statements, a couple of things must be born in mind. First, athletes differ in terms of their age, experience, risk attitudes, cognitive capabilities, status, general living conditions, etc. Sponsors differ too—they pursue different strategies, promote different philosophies or principles, differ in size/profitability, etc. As a consequence, pressure exerted and/or pressure felt will always be a function of the specific circumstances present in an individual case. Second, active athletes usually have zero interest to admit in public that they are pressured or feel pressure. After all, who wants to lose a sponsor in a world in which competition for sponsorships is fierce and most of the athletes desperately need the money? Retired athletes or athletes that already have been dropped might have different incentives, as might athletes who speak anonymously. But even for these athletes or in these conditions it is not an easy step to take to admit that you were and/or felt unduly pressured. After all, the self-image of most extreme sports athletes is that of heroes who do not crack under pressure.

IV. DESIGNING EFFICIENT EXTREME SPORTS SPONSORING CONTRACTS

This section asks the question of whether the current design of extreme sports sponsoring contracts can be improved and, if so, how. The analysis is based on an assessment of athletes' and sponsors' interests and priorities. A central element of the analysis is the accident/injury problem and how it is addressed in sponsoring contracts. I am also investigating the question why the contracting practice might not be moving towards more efficient provisions. If value can be created (the pie enlarged) by changing the current practice, why don't we observe these changes right now?

A. Creating Value in Extreme Sports Sponsoring Contracts

Real-life negotiations are normally characterized by two key dynamics: creating and claiming value.¹⁰⁶ The parties are able to create value (enlarge the cooperative surplus, "the pie"). At the same time, they try to claim as much from the cooperative surplus as possible for themselves. Negotiating

105. Interview with Anonymous Downhill Mountain Biker (June–Sept. 2018) ("The biggest pressure is from yourself. If you have a bad race, the sponsor would never say you should have done better"); Interview with Anonymous Extreme Adventure Athlete (June–Sept. 2018) ("My sponsors just care about safety").

106. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29-182 (1986); DEEPAK MALHOTRA & MAX H. BAZERMAN, *NEGOTIATION GENIUS* 15-82 (2007); CHRISTIAN BÜHRING-UHLE, HORST EIDENMÜLLER & ANDREAS NELLE, *VERHANDLUNGSMANAGEMENT* 57-95 (2d ed. 2017).

parties have a joint interest to maximize the size of the pie: the larger the cooperative surplus, the larger the amount that each of them can potentially claim.

Creating value in negotiations can occur in different ways. Parties may have shared interests—for example certainty, stability, reputation—on which value-creating arrangements can be built. At the same time, differences between the parties—for example with respect to interests, forecasts or time-preferences—may also be used to create value. Finally, parties may be able to exploit economies of scale to this end; doing something cheaper (on average) and, as a consequence, more profitable by scaling up the activity.

The current extreme sports contracting practice already reflects many of the possibilities to create value. For example, contingent arrangements such as bonus payments are *normally* a good instrument to incentivize one of the contracting partners and, at the same time, to create value by exploiting differences in forecasts (in this case about the future performance of the athlete). Increasing the visibility of an athlete on social media satisfies his or her interest in public recognition and also helps to further a sponsor's interest in brand popularity and sales. One could identify many other value-creating features of the current practice. The crucial question is whether the parties might even be able to do much better than the existing status quo.

1. Analysis of the parties' interests and priorities

Answering this question requires a deeper look at the parties' interests and priorities. The interviews conducted with athletes unearthed a couple of interests, concerns and priorities that sponsors might not be (fully) aware of and that could be used to further increase the surplus generated from sponsoring agreements. Sponsors might also want to consider their priorities more thoroughly.

(1) *Sponsors*. Ultimately, sponsors aim to grow their business and increase their (market) value. This means maximizing profits. Profits are a function of sales and costs. Arguably, with respect to sponsoring agreements, additional revenues generated via the activities of sponsored athletes are (much) more important for sponsors than the (relatively little) costs from sponsoring contracts. Increasing sales requires sponsors to build and maintain a good reputation and brand recognition/popularity. Spectacular achievements by extreme sports athletes, records and top competition results all are good for this—provided they are widely reported by the media. At the same time, “social media darlings” and “lifestyle heroes”¹⁰⁷ might have an even bigger effect on sales than the crusty climber referred to by Tommy Caldwell. Sponsors do not want negative publicity.

107. *Study Hero*, UDEMY, <https://www.udemy.com/user/lifestyle-hero/> (last visited Dec. 6, 2019) (You can train to become a “lifestyle hero”).

Hence, they do not want their brand to be associated with a lot of deaths. In 2014, for example, Clif Bar (a sports-bar company) dropped five of its twenty sponsored climbers: Alex Honnold, Dean Potter, Steph Davis, Cedar Wright and Timmy O’Neill—all known for free soloing.¹⁰⁸ One can debate *how* bad deaths are for a brand, but they are certainly not good.¹⁰⁹

(2) *Athletes*. Extreme sports athletes do what they are doing primarily for the love of the sport. They love the thrill, the fun, and the excitement,¹¹⁰ but also the peace of mind and deep sense of satisfaction and gratification if an ambitious and/or adventurous project could be realized.¹¹¹ Athletes also wish to be recognized and respected for what they are doing and, to varying degrees, they seek publicity and fame. However, in the interviews conducted, many athletes expressed a dissatisfaction with the social media hype that has come to dominate sports in recent years, stating an interest in reducing the circus of posting, tweeting, liking, etc.¹¹²

The overwhelming majority of athletes have a strong interest in health and safety. Even those athletes practicing the extreme sports with the highest risks—for example free solo climbing—are usually careful about their safety. Alex Honnold once remarked that “[n]obody wants to die doing what they love. I love climbing, but I don’t want to fall to my death. I’d much rather die of old age.”¹¹³

The risk of severe injuries or death can be reduced by proper precautions, safety training, and counselling. If athletes injure themselves, they are not only prevented (temporarily) from doing what they love the most, but there are also potentially grave financial consequences. Costs associated with medical treatment and loss of income (from sponsors or other sources, for example as a climber from guiding) are financially draining. The overwhelming majority of interviewed athletes expressed a very strong interest in improving their insurance coverage with respect to injuries or death (health insurance, disability insurance, life insurance). Extreme sports athletes engage in pursuits that many view as selfish or reckless, often including family members or partners, and they need to justify their activities and projects continuously vis-à-vis third parties who

108. See Rock and Ice, *Honnold, Potter, and Others Fired by Clif Bar for Soloing*, ROCK & ICE (Nov. 7, 2014), <https://rockandice.com/climbing-news/honnold-potter-and-others-fired-by-clif-bar-for-soloing/>.

109. On this see also Section V *infra*. Dean Potter died in a wingsuit flying accident in 2015.

110. See STEPHEN C. POULSON, *WHY WOULD ANYONE DO THAT?* 31-52 (2016) (emphasizing “looking for adventure” and “looking for authenticity”).

111. For an excellent phenomenological account of the extreme sports experience, see ERIC BRYMER & ROBERT SCHWEITZER, *PHENOMENOLOGY & THE EXTREME SPORT EXPERIENCE* 164-72 (2017).

112. Interviewed athletes especially expressed dissatisfaction with new (younger) athletes being recognized for their “social media game” as opposed to their athleticism. Athletes over 30-years-old miss when their athleticism was the sole/main driving factor of securing sponsorships. Now, the athletes claim, it is more about who is most edgy and who can attract the most viewership.

113. Gordy Megroz, *Alex Honnold: Solo Climb El Capitan*, THE RED BULLETIN (Aug. 12, 2017), <https://www.redbull.com/us-en/theredbulletin/alex-honnold-the-first-man-to-free-solo-el-capitan>.

might be massively affected by their injury or death—hence the desire to arrange at least for proper insurance coverage.

Finally, many athletes currently feel inadequately compensated for their work and for the extreme risks they take. However, money has a different meaning and relevance for most extreme sports athletes than for professionals in other markets. Most extreme sports athletes lead a very simple, inexpensive life. Alex Honnold, for example, lives in a van as his “mobile base camp.”¹¹⁴ For a long time, it was a 2002 Ford Econoline E150.¹¹⁵ “That van served him well—he put 190,000 miles on it over nine years—but Honnold recently upgraded to a 2016 Dodge Ram ProMaster, which is roomier and more comfortable.”¹¹⁶

For most athletes, more money primarily leads to increased safety and ability to finance their modest lifestyle (and that of their partners/families). This includes building up a financial cushion in case they get injured. More money also serves as a token of being recognized as a serious and successful athlete. Finally, for female athletes, increasing the current compensation level to match that of their male colleagues would mean remedying a perceived injustice or even discrimination.

However, it should be noted that for most athletes, getting money from a sponsor is much less important as a token of recognition than being sponsored at all. Most sponsored athletes around the world—not just those practicing extreme sports—will vividly remember the day on which they received their first piece of free gear from a sponsor company and were allowed to wear its logo. One free quickdraw was sufficient in 1983 for Jerry Moffatt to think: “This is it . . . This is my first ever piece of free gear. I’m a sponsored climber.”¹¹⁷ Being a sponsored athlete means belonging to an exclusive club. As an athlete, you want to belong to the best—being sponsored is a visible sign of distinction.

2. Value creating provisions and arrangements

If one compares the interests and priorities of sponsors and athletes, it becomes clear that there might be various, yet unrealized, opportunities for increasing the cooperative surplus of extreme sports sponsoring contracts. First, sponsors and athletes have a shared strong interest to keep the sport exciting *and* safe by minimizing the risk of serious injuries, death, and all further adverse consequences triggered by an accident (such as negative media coverage). Second, sponsors are not primarily interested in keeping costs down. At the same time, athletes are not primarily interested in

114. *Inside Alex Honnold's Tricked-Out New Adventure Van*, OUTSIDE, <https://www.outsideonline.com/2133391/inside-alex-honnolds-tricked-out-new-adventure-van> (last visited Dec. 6, 2019).

115. *Id.*

116. *Id.*

117. JERRY MOFFATT, REVELATIONS 185 (2009).

maximizing their monetary income. Rather, they would like to maximize things such as excitement, recognition, health and safety, etc. This opens up the door for smart “trades” by which sponsors could do a lot of good for athletes with little money.

(1) *Systematic counselling, coaching and training.* Athletes would benefit greatly from systematic counselling, coaching, and training.¹¹⁸ This could (and should) include individual mentoring sessions on a regular basis where athletes meet with other experienced athletes and/or professional coaches (for example sports psychologists) to discuss plans, projects, problems, and their long-term career development and prospects. Sponsors could also run extreme sports specific training programs such as avalanche training for extreme skiers. Systematic counselling, coaching, and training comes at a cost. However, it would provide significant benefits for athletes and firms. Athletes would be better trained, safer, and more stable. Younger athletes would especially benefit from the guidance provided by experienced and knowledgeable coaches. Sponsors would also benefit. Athletes would be healthier, select better projects, and be less prone to injury. The likelihood of serious accidents or deaths could be significantly reduced.¹¹⁹ Also, if a negligence proceeding were to be commenced by an athlete, then it is more likely that the courts would find the sponsor to have met an adequate standard of care by offering a systematic coaching, counselling, and training program.

A positive corollary to establishing such a program would be that athletes and sponsors would talk more regularly to each other about their concerns, wishes, interests, priorities, etc. A key outcome of the interviews conducted was that currently, athletes have interests and concerns that are not necessarily known to, or shared with, sponsors. But it is only when sponsors and athletes talk to each other that they can increase the cooperative surplus by agreeing on value-creating arrangements.

(2) *Health, disability and life insurance.* As discussed, athletes have a strong interest in improving their and their family’s/partners’ health, disability, and life insurance coverage. Insurance from third parties costs

118. See also Caroline E. Faure & John M. Fitzpatrick, *Professional Action Sport Athletes’ Experiences with and Attitudes Toward Concussion: A Phenomenological Study*, 21 THE QUALITATIVE REPORT 1836, 1836 (2016) (the authors interviewed eleven professional athletes practicing freestyle BMX and motocross who were suffering from concussion; while athletes accepted concussion as a risk of their sports, they were nonetheless unaware of what concussion was and its long-term effects; athletes also mentioned that they were never provided with concussion protocols and lacked regular access to medical facilities).

119. This is especially important in today’s climate, where a new trick may come out one day, and be replicated by hundreds of other athletes in a matter of 2-3 days. One athlete mentioned that when he was first skateboarding, he would rent out DVDs of more experienced athletes to see their new tricks (which meant that a trick could take at least a year to become replicated). Today, *many* tricks could be replicated within hours to days, increasing the risk of injury. Athletes, especially younger athletes, would benefit a lot from increased safety (Interview with Anonymous Cross Country Mountain Biker (June–Sept 2018)).

money (sometimes a lot) and may be difficult to obtain at all—some athletes report that the extreme risks that they take are basically uninsurable. At the same time, sponsors are in an excellent position to assess the likelihood of severe injuries or deaths associated with the practice of a particular extreme sport. They know the individual athletes on their roster well, and they have data on the frequency of (severe) injuries and deaths associated with a particular extreme sport. Hence, from an economic perspective, sponsors are the cheapest insurers with respect to a particular extreme sport practiced by a particular athlete.¹²⁰ For risks that cannot be avoided (or that the parties do not want to avoid), and for which third-party insurance is difficult to obtain or even unavailable, the best (most efficient) contractual arrangement is for the cheapest insurer to take the risk.

As a consequence, sponsors could and should arrange for health, disability¹²¹ and life insurance for sponsored athletes. This means that athletes would be reimbursed by sponsors for the costs of medical treatment caused by accidents or injuries when practicing their extreme sport. Their families/partners would receive payments under a life insurance scheme upon their death.¹²² The sponsor would continue paying their base compensation—and maybe even (parts of) their usual annual bonus—during injury times. The sponsor would also make up for loss of income from third parties, for example from customers guided by a professional mountaineer or climber.

Contractually allocating the monetary risks associated with injuries or death to the sponsor does not imply that the sponsor should pay for the (virtual) insurance premiums associated with such a scheme. It is equally conceivable that athletes fully or at least partially contribute to this.¹²³ In fact, sponsors would likely figure in their “insurance liability” when designing base compensation schemes and suggesting them to athletes. However, it should be remembered that most athletes currently feel that they are not adequately compensated for the (extreme) risks that they take. Objectively, it is probably true that the current contracting practice reflects an extreme asymmetry of risks and rewards. The sponsors get almost all the upside from successful extreme projects or achievements in the form of the

120. On the “cheapest insurer,” see, e.g., Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90-92 (1977).

121. Disability insurance must be distinguished from critical illness insurance. Disability insurance would give athletes a monthly benefit in the event that they are disabled while critical illness insurance would give them a lump sum payment when suffering from a covered serious illness or injury. From an athlete’s perspective, disability insurance has the advantage that it offers more complete protection.

122. In theory, this could create a moral hazard problem: Athletes might take more (inefficient) risks because they know that they and their family are insured against the financial consequences of injury or death. However, any such incentive should be minimal and certainly of a lesser magnitude than the positive welfare effects of insurance. In addition, deductibles or caps could further reduce the dimension of any moral hazard problem.

123. Interview with Anonymous Snowboarder (June–Sept 2018): “All of the riders would take pay cuts for [health] benefits.”

associated media hype and increased sales. Athletes participate only by way of limited and capped bonus payments. However, athletes bear close to all downside risks if something goes wrong, i.e., if they get injured or die. Accidents will not be broadcast widely, if they are broadcast at all. It is inconceivable, for example, that Honnold's free solo climb of El Capitan¹²⁴ could or would have been turned into a blockbuster movie had he fallen to his death instead of summiting.¹²⁵ Hence, it would appear fair—to put it mildly—if sponsors shouldered the costs of better health, disability, and life insurance for athletes.

As already discussed,¹²⁶ many athletes are sponsored by more than one sponsor. It would be clearly inefficient if athletes were insured multiple times. At the same time, given that sponsors are based in different jurisdictions and operate in different markets, one cannot expect any form of supranational collective insurance scheme to emerge anytime soon. It would appear sensible to hold each sponsor liable for the full “insurance package” if they cannot agree on how to split the associated costs (“insurance premiums”). A sensible split could be based on the respective sponsorship volume (payments to athlete) and bargaining among sponsors should lead to some form of burden-sharing based on this factor.

(3) *More efficient compensation schemes.* Finally, the current compensation schemes should be reworked, especially with respect to younger athletes.¹²⁷ The mechanisms of inefficient risk-taking have been set out in detail in Section II of this article. Athletes might take risks that impose a negative expected utility on them for various reasons: they might lack the necessary information to make informed judgments, suffer from cognitive biases or adverse group dynamics, be distracted by media presence and expectations, or take inappropriate risks to get a (high) bonus. Young and inexperienced athletes in particular are prone to inefficient risk-taking. They must compete hard and do “crazy stuff” to get sponsors' attention. The psychological faculties that improve their decision-making and moderate risk-taking behavior are not yet fully developed. They are usually less experienced and more subject to peer pressure than older athletes. If they get sponsored, they will often receive only gear and/or bonuses in the first years of their sponsorship engagements, incentivizing them to take more (inefficient) risks.

Against this background, it appears that while contingent arrangements such as bonus payments are *usually* a good instrument to create value in contracts, they may be less apt with respect to extreme sports sponsoring

124. See Section I *supra*.

125. See FREE SOLO (Nat'l Geographic 2018).

126. See Section III B 3 *supra*.

127. Another important issue is pay differences between male and female athletes, see Section III B 2 (2) *supra*. Some sponsors are at least trying to unify pay across their athletes, especially with the objective of closing the pay gap between women and men.

contracts and even decrease the cooperative surplus. Athletes complain about their social media obligations, are distracted by the media when exercising their extreme sports, and may be led to inefficiently commit to particular actions because of media presence and associated bonus rewards. For younger athletes, the incentive and pressure to engage in inefficient risk-taking to achieve bonus payments is even higher. It probably would satisfy both the interests of the sponsors and of the athletes to a higher degree and create more transactional value if sponsors stopped compensating athletes with high-powered bonus schemes and just paid a (higher) base compensation. Even vis-à-vis older and more experienced athletes, sponsors should rethink their current practice and readjust contract structures—away from bonus schemes that facilitate inefficient risk-taking. By their very nature, extreme sports athletes are risk-seekers. They do not need, and should not need, to be pushed further down this road—quite to the contrary.¹²⁸

B. The Persistence of Inefficient Contracting Practices

If value can be created by changing a contracting practice, one would assume that the parties and the practice would voluntarily move to increase the cooperative surplus.¹²⁹ If there are gains from (different types of) trade, why should the parties fail to realize them? More specifically, why would sponsors and athletes not establish better counselling, coaching and training schemes, improved insurance coverage for athletes, and/or more efficient compensation schemes *if* such rules and regulations really do create value?

Many reasons can potentially account for the persistence of inefficient contracting practices, and some of them are clearly present in the extreme sports sponsoring context. Transaction costs probably do not play a significant role. Contracts are usually between only two parties, and the costs of getting together and discussing the sponsorship agreement are low. More evident reasons are the parties' lack of information and bargaining/creativity skills. Some/most sponsors appear to have no clear understanding of athletes' key interests and priorities, such as better insurance coverage: athletes do not raise the issue, sponsors do not ask, and parties generally do not talk to each other often. Also, athletes and sponsors appear to lack the necessary creativity and bargaining skills to turn potential value creation sources into improved contractual arrangements. Finally, sponsors who know better might be reluctant to bring up these issues for strategic reasons, anticipating (wrongly) that implementing

128. Because contracts usually are only for a fixed duration of a couple of years, athletes would still have a contractual incentive to engage in inefficient risk-taking to get their contract renewed. But the bonus schemes put up a much stronger incentive to this effect, for various reasons: bonuses are handed out more frequently and in the near future, and they are usually tied to obligations such as posting on social media that distract the athletes when they perform their activities.

129. See R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

changes would make them worse off or that they could at least not benefit from them as much as they would like to. Hence, one cannot count on market forces alone to move the contracting practice with respect to extreme sports sponsoring contracts in a more efficient direction.

V. REGULATORY INTERVENTION

The final section of this article therefore considers regulatory intervention. In this section, I am not so much interested in new rules and regulations that could be initiated and passed by parliaments or administrative agencies. Rather, I am focusing on what the courts can and possibly should do to initiate desirable changes of the current contracting practice with respect to extreme sports sponsoring contracts. The main emphasis in this section will be on contract law, tort law, and labor law. It is clear that these laws differ from jurisdiction to jurisdiction and, therefore, with respect to athletes and sponsors based in different jurisdictions. By drawing on laws and regulations from a variety of common law and civil law jurisdictions, I hope to provide some comparative insights that could help courts worldwide tackle important regulatory questions relating to freedom of contract with respect to extreme sports sponsoring. I will start by assessing the case for regulatory intervention, i.e., the case for interfering with the current contracting practice.

A. *The Case for Regulatory Intervention*

It has already been argued that there are many reasons to conclude that the current contracting practice is suboptimal in the sense that the cooperative surplus in athlete-sponsor relationships could be increased. I have also argued that one should not expect this practice to change spontaneously because an inefficient practice can be sticky—also for various reasons. This may already be considered to be a sufficient rationale for regulatory intervention, at least in the form of nudges that move parties in the desired directions—for example by holding that proper counselling, coaching, and training are obligations of sponsors unless parties contract otherwise.¹³⁰ By this token, the value-enhancing changes of the contracting practice¹³¹ would, as a form of best professional practice, be reflected in the applicable default contract law.

The question is whether one can or should go further. A more interventionist approach of the courts could mean, for example, to hold that certain mandatory duties apply to the athlete-sponsor relationship or to hold the sponsor liable based on negligence for the injury/death of an athlete under certain conditions. This more interventionist approach might be easier

130. On “sticky” default rules, see Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33(3) FLA. ST. U. L. REV. 651 (2006).

131. Discussed in Section IV A *supra*.

to justify if the current practice is not only inefficient, but also not backed by athletes' informed consent and if market forces, such as negative reputational consequences, do not adequately sanction potential breaches by sponsors of their obligations under the applicable contract and/or tort law.

1. The problem of athlete's consent

Athletes are of course not forced to enter into a sponsorship contract. They do so voluntarily and, as discussed, probably everybody is happy to become a sponsored athlete. However, there are a couple of problems with athletes' consent that need to be examined in closer detail.

(1) *Minors*. First, as discussed, many sponsored athletes are very young. Some are minors, lacking the capacity to enter into an extreme sports sponsorship contract on their own. Sports sponsoring contracts may do more harm than good to a minor in the long run,¹³² and this is especially so with respect to extreme sports sponsoring contracts. As a consequence, some sponsors such as La Sportiva do not sponsor minors.¹³³ In the case of minors, contracts are concluded on their behalf by their parents or guardians. Whether such contracts as a whole can be validly formed and, if so, whether certain provisions such as liability waivers can be enforced against the young athlete, are important questions that jurisdictions around the world need to address.

Under German law, for example, parents may enter into an extreme sports sponsoring contract on behalf of their child.¹³⁴ In principle, they may also agree to a liability waiver as part of such a sponsoring contract. Other jurisdictions take a more restrictive stance on liability waivers in particular. Under Australian law, for example, exclusion clauses and waivers are considered not to be operational against children, as they are to be accorded a high level of protection.¹³⁵ Similarly, under Canadian law, a waiver will not likely be held enforceable in a situation where the waiver was signed by a parent or guardian on the behalf of an infant plaintiff.¹³⁶ U.S. law is no

132. Paulo David, *Children's Rights and Sports*, 7 INT'L J. CHILD. RTS. 53 (1999).

133. La Sportiva, SUSTAINABILITY REPORT 50 (2016).

134. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 1629, 1643. According to § 1822 No. 5, guardians need the consent of the competent family court if they wish to conclude a service contract on behalf of minors which runs for longer than one year. This provision does not apply to parents.

135. Natasha Schot, *Negligent Liability in Sport*, SPORTS L. EJOURNAL 11–12 (2005); DAVID THORPE ET AL., SPORTS LAW 851–52 (3d ed. 2017).

136. See the decision of the B.C. Supreme Court in *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.* [2009] B.C.J. No. 1922; see also DOLDEN WALLACE FOLICK LLP, SPORT LIABILITY LAW: A GUIDE FOR AMATEUR SPORTS ORGANIZATIONS AND THEIR INSURERS 13 (Sept. 2012).

different. “Normally, when a minor is involved with a release, the law will not bind the participant to the exculpatory agreement.”¹³⁷

If contractual liability waivers are not enforceable vis-à-vis a minor, injury or death of the child may give rise to a claim based on negligence or, less likely, breach of contract against the sponsor under certain circumstances. Courts may hold sponsors to a more rigid standard of care vis-à-vis minors compared to adults.¹³⁸

(2) *Standard form contracts/standard terms.* Even more important for the great majority of extreme sports sponsoring contracts with respect to athletes’ consent is the issue of standard form contracts/standard terms. As already discussed, sponsorship contracts are usually not individually negotiated. There are two independent reasons for this. First, as is well-known, consumers usually do not read the fine print.¹³⁹ Engaging with standard form contracts/standard terms on an item by item basis would be a futile exercise from a cost/benefit perspective. Second, and more important in the context of this article, extreme sports sponsoring contracts are usually not individually negotiated because the sponsors have much more bargaining power than the great majority of athletes. There is massive competition amongst athletes for sponsorships. Hence, sponsors normally have excellent alternatives when negotiating with athletes.¹⁴⁰ By comparison, athletes must normally be content with what they are offered on a take-it-or-leave-it basis (few super-prominent athletes are the exception to the rule). Athletes do not benefit from a collective organization which could enhance their bargaining power by providing information and facilitating collective actions.

This has important legal consequences. Under many jurisdictions world-wide, standard form contracts/standard terms are subject to heightened judicial scrutiny compared to contracts that are individually negotiated. In the European Union (EU), for example, EU Member States are bound by a directive “on unfair terms in consumer contracts.”¹⁴¹ The directive contains provisions that force Member States to “... lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on

137. Mark Seiberling, “*Icing*” on the Cake: Allowing Amateur Athletic Promoters to Escape Liability in *Mohney v. USA Hockey, Inc.*, 9 VILL. SPORTS & ENT. L. J. 417, 432 (2002) (providing further references to the case law in various states).

138. See Section V B *infra*.

139. See Yannis Bakos, Florencia Marotta-Wurgler & David Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); see also OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE passim* (2014).

140. Good “non-agreement alternatives” are the key source for bargaining leverage in negotiations. See, e.g., Christian Bühring-Uhle, Horst Eidenmüller & Andreas Nelle, *Verhandlungsmanagement* 72–76 (2d ed. 2017).

141. Council Directive 93/13/1993.

the consumer”¹⁴² The Annex to Article 3 provides that “[t]erms which have the object or effect of . . . excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier” may be regarded as unfair. Many Member States, such as Germany¹⁴³ or, more recently, France,¹⁴⁴ have gone beyond the mandates of the directive and foresee a court review of standard form contracts and standard terms also with respect to B2B agreements.¹⁴⁵ This may have important consequences especially for liability waivers in extreme sports sponsoring contracts.

By comparison, common law jurisdictions are, in general, less intrusive when it comes to enforcing standard form contracts/standard terms. In the United States, standard form contracts are generally enforceable. However, such contracts will be subject to special scrutiny if they are found to be contracts of adhesion. For example, they may be unenforceable—in total or with respect to particular provisions—if they are deemed to be unconscionable.¹⁴⁶ Canadian law takes a similar position.¹⁴⁷ To conclude, extreme sports sponsoring contracts may be subject to heightened judicial scrutiny because they are usually not individually negotiated but rather standard form contracts.

2. “The market will fix it”

Another potential argument in the legal discourse about the degree of appropriate intervention in the current extreme sports sponsoring practice might be the reaction of markets to perceived irresponsible or unethical behavior of sponsors. One might argue that sponsors have a strong interest to prevent athletes from taking inappropriate risks as they do not want to

142. *Id.*

143. Sections 305 et seq. of the German Civil Code [Bürgerliches Gesetzbuch, “BGB”].

144. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1171 (Fr.). On the new French contract law, see Genevieve Helleringer, *The Anatomy of the New French Law of Contract*, 13(4) EUR. REV. OF CONT. L. 1 (2017).

145. See HEIN KÖTZ, *EUROPEAN CONTRACT LAW* 131–148 (2d ed. 2017). In the UK, most non-negotiated contract terms are not subject to review by the courts based on fairness considerations in B2B contracts. The exception are clauses which exclude or restrict liability for breach of contract—they are subject to a requirement of “reasonableness” under the Unfair Contract Terms Act 1977. See JACK BEATSON, ANDREW BURROWS & JOHN CARTWRIGHT, *ANSON’S LAW OF CONTRACT* 208–222 (29th ed. 2016).

146. For an overview with respect to US law, see Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey*, Oct. 28, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346498; see also Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. CONTEMP. PROBS. 81, 87–90 (2012) (highlighting specifically liability waivers in extreme risk sports sponsoring contracts).

147. See LORNE FOLICK ET AL., *SPORTS AND RECREATION LIABILITY LAW IN CANADA* 137 (2017) (discussing Canadian law); see also *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. On UK law, see JACK BEATSON ET AL., *supra* note 145, at 208–222.

have the negative publicity associated with serious accidents or deaths.¹⁴⁸ I have already mentioned that in 2014, for example, Clif Bar dropped five of its twenty sponsored climbers who are or were known for free soloing. It appears that preventing athletes from inefficient risk-taking is a key interest of sponsor firms, and if an extreme sport is too risky, then sponsor firms will no longer wish to endorse such a sport.¹⁴⁹ There is no need for legal intervention, so the argument goes, because market dynamics will fix any problems that might occur.

However, this argument is not persuasive, for many reasons. First, it is questionable how hard sponsors are hit by an accident or even death of a sponsored athlete. Videos on YouTube showing the “best” rock climbing falls or the most tragic mountain falls get more views than those of successful attempts of hard routes. Of course, this does not tell us much—if anything—about the positive or negative effects on a sponsor’s brand. But it has been suggested in the literature that, if the sponsor has a good contingency marketing plan, it can spin a disaster event into a profitable opportunity, and this suggestion is supported by case studies.¹⁵⁰ Second, not all sponsors act as Clif Bar did. Red Bull temporarily stopped sponsoring ice climbers after Hari Berger, three-time ice climbing world champion, died while ice bouldering in 2006.¹⁵¹ However, the company soon reversed its decision, and ice climbing today again features prominently among the company’s sponsored sports and athletes.¹⁵² It appears that the gains for the brand from media attention much outweigh any potential negative effects associated with severe accidents and/or deaths. Third, if sponsors of extreme sports really wanted to make the sport safer and reduce the likelihood of deadly accidents, they would not pressure athletes to attempt inefficiently risky projects. But, some sponsors exert such pressure and put up high-powered incentives (bonus schemes) that push athletes into this direction. I conclude that market forces alone cannot minimize unreasonable risks within the extreme sports industry.

148. See, e.g., Fox Factory Holding Corp., Annual Report (Form 10-K), at 10-11 (Mar. 15, 2019) (providing that, for the fiscal year ended December 29, 2017, “[o]ur brands could be adversely impacted by, among other things: . . . negative publicity regarding our sponsored athletes . . . high profile injury or death to one of our sponsored athletes . . .”).

149. See LA SPORTIVA, SUSTAINABILITY REPORT 50 (2016).

150. See generally Norm O’Reilly & George Foster, *Risk Management in Sports Sponsorship: Application to Human Mortality Risk*, 10 INT’L J. OF SPORTS MKTG. & SPONSORSHIP 45 (2008) (one of the case studies is on Mountain Hardware’s sports sponsoring program).

151. See *Hari Berger Lost*, WILL GADD (Dec. 21, 2006), <http://willgadd.com/hari-berger-lost/> (discussing Berger’s death).

152. See *Ice Climbing*, RED BULL, <https://www.redbull.com/ca-en/tags/ice-climbing> (last visited Dec. 6, 2019).

B. Duties of care vis-à-vis athletes

One regulatory tool, jurisdictions worldwide might activate to provide enhanced protection for athletes are duties of care. In this section, I will discuss some important issues that courts need to bear in mind when considering potential liability of sponsors who have breached such duties.

1. Contract and tort law

In civil law jurisdictions, duties of care are important both under contract and tort law. A plaintiff may have a damage claim for breach of contract because the defendant violated a duty of care which arises from the contract concluded between the parties.¹⁵³ Duties of care also play a prominent role in tort law.¹⁵⁴ By contrast, the emphasis in common law jurisdictions is clearly on tort law. A sponsor who violates a duty of care vis-à-vis a sponsored athlete may be found liable for damages based on the tort of negligence.¹⁵⁵

2. Liability waivers, inherent risks and assumption of risk

As already discussed at some length, practically all extreme sports sponsoring contracts contain a clause stating that the sponsor is not liable for any damage or harm that the athlete might suffer if he or she gets injured while practicing the sponsored activity.¹⁵⁶ I have also discussed that such a liability waiver might not be enforceable against minors in many jurisdictions and, because it is a standard term in a standard form contract, might also not be enforceable against athletes in general in many jurisdictions.¹⁵⁷

Another question regarding liability waivers is how these are to be construed, assuming that a court considers a waiver to be enforceable in principle in a particular setting. It has been suggested, for example, that “liability waivers should be tailored in a way in which the athletes assume only the risks that are inherent in the respective sport and that do not indemnify sponsors from liability due to the sponsor’s negligence.”¹⁵⁸ However, such an approach could only be implemented by a change of the current sports sponsoring contracting practice. It cannot be implemented by a “creative construction” of a broad-brush liability waiver which, by its wording, clearly excludes the sponsor from any and all liability.

153. See, for example, sections 241 para. 2 and 280 of the German BGB.

154. See, for example, section 823 para. 1 and para. 2 of the German BGB.

155. See generally MARK JAMES, *SPORTS LAW* 78 (3d ed. 2017) (focusing on UK law).

156. See Section III B 4 *supra*.

157. See Section V A 1 *supra*.

158. Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. CONTEMP. PROBS. 81, 106 (2012).

If the contracting practice were to move in the direction of an inherent risk doctrine, it would bring the contractual risk allocation into line with the law in many common law jurisdictions. Under the inherent risk doctrine, a defendant is not liable in negligence if a risk materializes which would have been obvious to a reasonable person under the circumstances.¹⁵⁹ A sponsor might also rely on the assumption of risk doctrine (“*volenti non fit iniuria*”) to defend him or herself, against a negligence action. Under this doctrine, the defendant is not liable if the plaintiff *actually* knew of the risk of injury arising from participating in an activity and voluntarily assumed it by agreeing to participate.¹⁶⁰

However, applying these doctrines in the extreme sports sponsoring context can be tricky. Under the inherent risk doctrine, risks inherent in a particular extreme sport must be delineated from a sponsor’s negligence. Dying in an avalanche is a risk inherent in extreme freeride skiing. But what if the sponsor has not properly counselled, coached and trained the skier to take an informed decision relating to a particular trip/stunt? What if the sponsor has a compensation scheme in place that incentivizes athletes to take undue risks? An inherent risk approach probably would not exclude the sponsor from liability under these circumstances if it can be demonstrated that the sponsor’s actions/omissions *caused* the accident. The real issue then becomes the burden of proof with respect to causation. It might be justified to put this burden on the sponsor under these circumstances.

Applying the assumption of risk defense causes similar problems. An athlete plaintiff can be said to have consented to taking an extreme risk only if he or she was properly informed¹⁶¹ and voluntarily accepted the risk. However, the notion of “voluntary acceptance” puts us back to square one. As discussed, athletes often are, or at least feel, pressured to take excessive risks. Athletes suffer from cognitive dispositions that prevent them from taking fully rational decisions with respect to extremely risky sports and activities. They also often lack the bargaining power and skills to meaningfully consent to suggested projects—or reject them. Hence, any consent to taking borderline risks will often be more fictitious than real.

Further, even if an athlete can be said to have assumed an extreme risk, this normally will not exclude a sponsor’s liability if the accident or injury was caused by a sponsor’s negligence. In this sense, the inherent risk doctrine and the assumption of risk doctrine share a common core. To hold otherwise would mean to read an implicit liability waiver even for a sponsor’s negligence into a sponsoring contract. However, this would

159. See, e.g., SCHOT, *supra* note 135, at 5–6 (discussing, in particular, the position under Australian law); DAVID THORPE ET AL., *supra* note 135, at 260–61 (on Australian law); FOLICK ET AL., *supra* note 147, at 311 (on Canadian law); Potozny v. Burnaby (City), [2001] B.C.J. No. 1224.

160. See, e.g., SCHOT, *supra* note 135, at 4–5; DAVID THORPE ET AL., *supra* note 135, at 261–263 (on Australian law); MARK JAMES, *supra* note 155, at 92–93.

161. See David Horton, *Extreme Sports and Assumption of Risks: A Blueprint*, 38 U.S.F.L. REV. 599, 606–07 (2004).

certainly not be in line with athletes' interests, and it would also be wrong as a matter of contract construction and interpretation.¹⁶² Such a broad waiver can be implemented only by an explicit liability contract provision which, however, might be considered unlawful by the courts, and for good reason.

3. Relevant factors for determining the appropriate standard of care

In the following section, I will discuss a series of factors that courts should consider when determining the appropriate standard of care in a negligence or breach of contract action against a sponsor company. Thereby, I will draw on the insights from previous sections of this article on the pressure on athletes to perform¹⁶³ and on the design of efficient extreme sports sponsoring contracts.¹⁶⁴

(1) *Expected harm and standard of care.* From an economic perspective, the greater the harm/damage in case of an accident, and the higher the likelihood of an accident, the more one can and should expect from a defendant in terms of precautions. Technically put, marginal (additional) safety precautions are justified if their costs are lower than the reduction of the expected harm—which is a function of the size of the harm and the likelihood that it occurs.

If one applies this general formula to the extreme sports sponsoring context, it is clear that, in general, significant safety precautions must be expected from sponsors. The potential harm caused by an accident is huge: severe injury or death of an athlete. The likelihood of such an event materializing is also high, as the sheer number of athletes who were severely injured or died while practicing their extreme sports demonstrate. By comparison, the costs of many suitable safety precautions will be small.

(2) *Athletes' age and experience.* When applying this abstract economic formula to the facts of an individual case, courts will have to take a close look on those factors that, given the circumstances of the case, impact on the expected harm (likelihood and size) and the costs of precautions. One such factor is the age and experience of athletes. Young, inexperienced athletes are particularly vulnerable to take inefficient risks, for various reasons.¹⁶⁵ Their cognitive action control capabilities are not yet fully developed, they are particularly sensitive to peer pressure, and they need to do extraordinarily risky things/projects to distinguish themselves from their competitors in a fierce race for sponsorships. This all translates into a much higher expected harm than is associated with extreme sports practiced by

162. See DOLDEN WALLACE FOLICK LLP, SPORT LIABILITY LAW: A GUIDE FOR AMATEUR SPORTS ORGANIZATIONS AND THEIR INSURERS 13 (Sept. 2012) (recommending that a liability waiver "must clearly exclude negligence" to have the desired effect).

163. See Section III C *supra*.

164. See Section IV *supra*.

165. See Section II B *supra*.

more senior/experienced athletes, and it justifies a higher level of precautions by sponsors.

(3) *Degree of sponsor involvement.* Another important factor is the degree of sponsor involvement in a particular extreme sports project or activity. Sometimes athletes have only a very loose connection to their sponsor, selecting projects completely on their own and reporting about them only after their completion. Sometimes, however, sponsors organize a particular event, provide the facilities, etc. Red Bull's "Rampage" is a good example for this.¹⁶⁶ Many jurisdictions worldwide have specific statutes and rules on what is called "occupier's liability."¹⁶⁷ According to these statutes and rules, a person in control of land or premises has a duty to protect from harm all those who enter into the land or premises. The level of care required on the part of an occupier varies with the nature of the premises, the activities of the premises, and to controlling the conduct of third parties on the premises.

However, even if the form and level of sponsor involvement does not bring it within the scope of statutes and regulations on occupier's liability, it might nevertheless have an influence on the duties of care under general tort or contract law. A mere *financial* interest or involvement of the sponsor will be insufficient for this.¹⁶⁸ But the higher the degree of sponsor involvement in the *organization* of a particular extreme sports activity or event, the more extensive the precautionary measures one can expect the sponsor to take. Influence on the organization of an event usually corresponds with knowledge and skills to prevent accidents. If someone designs and builds a mountain bike racetrack, for example, this person will usually be in the best, i.e.—in economic terms—least costly, position to undertake the necessary precautionary measures to prevent serious accidents from occurring. Sponsors do not always live up to these duties. Athletes report that racecourses are sometimes poorly designed and way too dangerous.¹⁶⁹ If extreme sports athletes are asked to participate in a

166. See *Red Bull Rampage 2019: Live Event Stream*, RED BULL, <https://www.redbull.com/se-en/events/rampage> (last visited Dec. 6, 2019).

167. See, e.g., DOLDEN WALLACE FOLICK LLP, *SPORT LIABILITY LAW: A GUIDE FOR AMATEUR SPORTS ORGANIZATIONS AND THEIR INSURERS* 18–19 (Sept. 2012) (discussing the Canadian Occupiers' Liability Act); FOLICK ET AL., *supra* note 147, at 24 (distinguishing protection by statute versus the common law); GA. CODE ANN. § 51-3-1 (2010) (duty of owner or occupier of land to invitee in Georgia in the U.S.); MARK JAMES, *supra* note 155, at 173 (focusing on the UK Occupiers' Liability Act 1957).

168. This is established, for example, in Canadian case law. See *Boudreau v. Bank of Montreal et al.*, 111 O.R. (3d) 544; *Gaudet v. Sullivan*, [1992] N.B.J. No. 503; *Chen (Guardian ad litem of) v. Jose Narvaex (The)*, [2003] B.C.J. No. 1517. UK case law appears to go further than Canadian law, see *Watson v British Boxing Board of Control Ltd*, [2001] QB 1134.

169. Interview with Anonymous Mountain Biker (June–Sept 2018): "There was this silver event to which 20 athletes, including myself, got invited. The schedule was practice Thursday/Friday and contest Saturday. When we showed up to the venue, the course had not even been built. Friday evening it was done, but the roll-in tower was way too big (way too dangerous). The guy who built it said no it's okay—when he tried proving to the athletes that the design of the contest was safe, he broke his eye socket.

particular photo or video shoot, often expert personnel such as doctors or mountain guides and further support resources such as rescue helicopters will be deployed to the set to reduce risks. But some athletes also report the opposite: “There is never a doctor or a nurse on board.”¹⁷⁰

(4) *Consequences for sponsors’ duties of care.* I have argued in Section IV A of this article that efficient extreme sports sponsoring contracts would involve systematic counselling, coaching and training of athletes by firms and that sponsors should stop compensating athletes with high-powered bonus schemes and just pay a (higher) base compensation. Based on the analysis above in subsection (1) alone, it appears that a good case can be made for these recommendations to be considered by courts as reflecting the appropriate (professional) standard of care required from sponsors.¹⁷¹ At least vis-à-vis young and/or inexperienced athletes, the case appears to be compelling in the light of the factors discussed in subsection (2). If a court believes that interfering with a sponsor’s compensation practice would go a step too far, it should at least require sponsors to set up a professional counselling, coaching and training regime. Sponsors cannot have it both ways: creating high-powered incentives for (young, inexperienced) athletes to perform extreme feats *and* refrain from helping athletes not to take foolish (inefficient) risks. Finally, sponsors also face specific duties of care if they are involved in or influence the organization of extreme sports events or projects (subsection (3)).

C. Labor Law

So far, the analysis in this article has proceeded on the assumption that extreme sports athletes are independent contractors, not employees of sponsors. This assumption is reflected in the current extreme sports contracting practice. However, as was discussed, many athletes are economically dependent on sponsorship money, and sponsors also exert a certain amount of control on athletes’ professional lives. Further, many athletes “feel” more like an employee than as an independent contractor. This raises the important question of whether a sponsored extreme sports athlete must properly be considered to be an employee of a sponsor, at least under certain conditions.

The impact on the rights and duties of the parties could be dramatic. Just consider the duties a window-cleaning company for high-rise buildings or a scaffolding company has vis-à-vis its employees. Athletes would be better protected by sponsors, receive social security benefits, and their

Another athlete also got wiped out when testing out the track. Needless to say, no one used the track thereafter.”

170. Interview with Anonymous Snowboarder (June–Sept 2018).

171. I find support for this conclusion in statements made by athletes in my interview sample: “The ethic of Red Bull is not kept high enough at keeping people safe” (Interview with Anonymous Slackliner (June–Sept 2018)).

contracts might run for an indefinite term and not just for a couple of months or years. At the same time, obtaining employee status is far from being an “unqualified good” for athletes: they would lose commercial freedom by being formally subject to sponsors’ directions and potentially unable to agree to multiple sponsorships, and there might also be tax disadvantages as athletes would not be able to run *all* their expenses against their income. The status as an employee versus that of an independent contractor comes with rights and obligations as a package, and not all elements will be liked or disliked by the parties to the same degree. However, jurisdictions must draw a line to determine the conditions under which one or the other package is most appropriate.

It is for this reason that I will take a closer look on the status of sponsored athletes as independent contractors or employees in the final section of this article. I will assume that the athlete is not working for a sponsored team as, for example, in professional cycling. Rather, he or she enters into a sponsoring contract with a sponsor in an individual capacity. I will discuss the variety of factors which are relevant for categorizing athletes as independent contractors or employees, and I will review the legal standards jurisdictions in North America and Europe apply to make this categorization.

1. Relevant factors

The 40 interviews that form an important empirical basis of this article have made it clear that sponsorship arrangements in extreme sports sponsoring and their impact on athletes differ significantly from athlete to athlete and sponsor to sponsor. While the contracting practice, in general, is relatively uniform, sponsoring contracts and sponsor-athlete relationships differ in terms of the control exercised by the sponsor on an athlete. Further, the economic position of athletes under sponsorship agreements varies widely.

(1) *Degree of control.* Most sponsored extreme sports athletes determine by themselves when, where and how they exercise their sport. Many are professionals who “work” full-time. But their schedule is not dictated by sponsors. Rather, they decide themselves which projects to pursue, how and when to train, or in which competitions to participate, for example. However, there are exceptions to this. In their sponsorship contracts, athletes usually promise to make themselves available to the sponsor for a couple of workdays per year—usually five to ten—for sponsor-related activities or events such as trade fairs, photo or video shootings, films, product testing, design meetings, interviews, festivals, etc.¹⁷² Some athletes are contractually required to participate in certain competitions. Further, athletes may be

172. See Interview with Anonymous Professional Skier (June–Sept 2018): “To a certain extent, the sponsor has the right to direct the project, especially during the days sanctioned for a particular trip”. See also Section III B 3 *supra*.

subject to more informal pressures relating to their day-to-day activities and “disciplinary measures” in case of alleged contract breaches.¹⁷³ I have already mentioned that many athletes “feel” that they are treated by sponsors like employees.

(2) *Degree of economic (in)dependence.* Some sponsored athletes make a lot of money from multiple sponsors, possibly on top of income from other sources. For example, a mountaineer may have a handful of different sponsors, receive royalties for books, fees for speaking,¹⁷⁴ and money as a professional mountain guide. Such an athlete certainly is not economically dependent on any one of his or her sponsors. However, this is the exception, not the rule. Many athletes have only one to three sponsors and few, if any, other sources of income. Some athletes certainly depend economically on the sponsorship money from one particular (main) sponsor. It is important to note that there is a link between economic dependence and control: if an athlete desperately needs the money from a particular sponsor, he or she will of course be much more receptive to the interests and wishes of that sponsor or even “take orders.”

2. The relevant legal standard

Jurisdictions world-wide have to identify a legal standard for determining whether somebody should properly be characterized as an independent contractor or as an employee. Central to most common law jurisdictions is the concept of control. Control is determined on the basis of tests and factors that vary (slightly) from jurisdiction to jurisdiction.

In the United States, three main tests are used when courts analyze whether an individual is an employee or an independent contractor of a specific entity: “(i) the usual common law rules or common law control test; (ii) the economic realities test (with several variations); and (iii) the ABC test (or variations of this test).”¹⁷⁵ American courts have relied on twenty common law factors when determining whether an individual is an employee or an independent contractor. The first of these is that instructions as to how to perform a job are not provided to an independent contractor. Other factors also reflect control/lack of control by the engaging entity.¹⁷⁶

173. See Section III B 5 *supra*.

174. On climbers’ income from sponsors, royalties, and speaking fees see Heidi Howkins Lockwood, *Jokers on the Mountain: In Defense of Gratuitous Risk*, in CLIMBING – PHILOSOPHY FOR EVERYONE: BECAUSE IT’S THERE 49, 57 (Stephen E. Schmid ed., Wiley-Blackwell 2010).

175. Littler’s *The National Employer* § 24.2.2(a).

176. The list continues as follows (factors relevant to “control” are underlined): (1) No training: An independent contractor does not receive training from the engaging entity. (2) No integration: The engaging entity’s operations or ability to be successful does not depend on the service of independent contractors. By contrast, the factor weighs in favor of employee status if the workers constitute a critical and essential part of the taxpayer’s business. (3) Services do not have to be rendered personally: Because independent contractors are in business for themselves and are contracted with to provide a certain result,

None of these factors will alone decide whether an individual is an employee or an independent contractor. Rather, the importance of each factor will depend on an athlete's specific obligations.

The U.S. Department of Labor Interpretation (DOL), the agency that enforces the Fair Labor Standards Act (FLSA), interprets the economic reality test to mean that the primary consideration is whether the engaging entity controls or has the right to control the work to be done by the worker to the extent of prescribing how the work shall be performed.¹⁷⁷ To determine whether the right to control exists, the DOL accords emphasis to similar factors as reflected in the common law rules or common law control test.¹⁷⁸

they have the right to hire others to assist them. (4) Control their own assistants: Independent contractors retain the right to control the work activities of their assistants. (5) Not a continuing relationship: Unlike employees, independent contractors generally do not have a continuing working relationship with the engaging company, although the relationship may be frequent, by means of multiple engagements. (6) Work hours are set by the independent contractor: An independent contractor has control over the hours worked for accomplishing the result. (7) Time to pursue other work: An independent contractor is free to work when and for whom the individual chooses. A requirement to work full-time indicates control by the engaging entity. (8) Job location: Unless the services cannot be performed elsewhere, an independent contractor has the right to choose where the work will be done. (9) No requirements on the order or sequence of work: Independent contractors have control over how a result is accomplished and, therefore, to determine the order and sequence in which their work will be performed. (10) No required reports: Independent contractors are accountable for accomplishing the objective only; interim or progress reports are not required. (11) Payment for the result: Independent contractors are paid by the job and are not compensated based on the time spent performing the work. (12) Business expenses: Independent contractors are responsible for their incidental expenses. (13) Own tools: As business owners, independent contractors provide their own equipment and tools to do the job. (14) Significant investment: An independent contractor's investment in his or her trade is bona fide, essential and adequate. (15) Possible profit or loss: Independent contractors bear the risk of realizing a profit or incurring a loss. (16) Working for multiple firms: Independent contractors are free to work for more than one firm at a time. (17) Services available to the general public: Independent contractors make their services available to the general public. (18) Limited right to discharge: An independent contractor is not terminable at will but may be terminated only for failure to comply with the terms of the contract. (19) Liability for non-completion: Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract.

177. *Anfinson v. FedEx Ground Package Sys., Inc.*, 244 P.3d 32, 41 (Wash. Ct. App. 2010).

178. See *Fact Sheet 13: Employment Relationship Under the Fair Labor Standard Act*, U.S. DEPT. OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs13.htm> (last modified July 2008). Factors considered relevant are, in particular: 1. the extent to which the services in question are an integral part of the employer's business; 2. the amount of the contractor's investment in facilities and equipment; 3. the contractor's opportunities for profit and loss; and 4. the amount of initiative, judgment or foresight in open-market competition with others required for the success of the claimed independent enterprise. Additional factors considered by the DOL include whether: the contract gives any right to the engaging party to detail how the work is to be performed; the engaging party has control over the business of the contractor; the contract is for an indefinite or relatively long period; the engaging party may discharge the contractor's employees; the engaging party has the right to cancel the contract at will; and the purported independent contractor is performing work that is the same or similar to that performed by the engaging party's employees. The DOL regards certain factors as immaterial to the determination of employee status, including: whether the worker has a license from a state or local government; the measurement, method or designation of compensation; the fact that no compensation is paid and the worker must rely entirely on tips; the place where the work is performed; and the absence of a formal employment agreement.

The third major test used to assess a worker's status is the "ABC test". The ABC test is used by approximately half the states to determine a worker's status for purposes of state unemployment insurance laws. Several states use variations of the ABC test, such as only using the A and B or A and C factors. Under the ABC test, a worker is an independent contractor if: (i) there is an ab^sence of control; (ii) the bu^siness is unusual or away from offices; and (iii) the work is cu^stomarily done by an independent contractor.¹⁷⁹ While providing a fewer number of factors, this test is also far from straightforward, making it very difficult for employers to know whether they are following the law in classifying their workers. Again, control (or the absence thereof) takes a prominent position in the analysis.

Australian,¹⁸⁰ UK,¹⁸¹ and Canadian laws reflect similar principles.¹⁸² In a landmark case,¹⁸³ the Supreme Court of Canada claimed that while the level of control exerted by an employee onto a worker will always be a factor when determining employment status, other factors must also be considered such as [ii] whether the worker provides his or her own equipment, [iii] whether the worker hires his or her own helpers, [iv] the degree of financial risk taken by the worker, [v] the degree of responsibility for investment and management held by the worker, and [vi] the worker's opportunity for profit in the performance of his or her tasks.¹⁸⁴ As in the United States, "control" is the first factor to enter into the analysis. Further clarifications may be expected from a class action case currently pending before the Ontario Superior Court of Justice, concerning whether amateur players of teams competing in the Ontario Hockey League should be considered employees.¹⁸⁵

Both in the United States and in Canada, merely labelling someone as a contract worker or employee is not the deciding factor as to whether or not they are an employee. In Canada, for instance, a relatively low level of control will pass the threshold for "employee" status if the worker is economically vulnerable vis-à-vis his or her employer and must perform duties for his or her employer.¹⁸⁶

179. See, e.g., *In re FedEx Ground Package Sys., Inc. Emp't Practices Litig.*, 273 F.R.D. 516, 521 (N.D. Ind. 2010).

180. See DAVID THORPE ET AL., *supra* note 135, at 508–11 (discussing Australian law).

181. On UK law see Employment Rights Act 1996, c. 18, § 230 (UK), and case law on "control" as decisive factor: *Ready Mixed Concrete (S. E.) Ltd. v Minister of Pensions and Nat'l Ins.* [1968] 2 QB 497, endorsed by the Court of Appeal in *Johnson Underwood Ltd. v Montgomery* [2001] EWCA Civ 318; *White v. Troutbeck SA* [2013] EWCA Civ 1171.

182. On Canadian law, see Andrew C. Harnes, *Forecheck, Backcheck ... Paycheck? Employment Status of the Quasi-Professional Athlete: A Case Study of the CHL and the Major Junior Hockey Player*, 7 HARV. J. SPORTS & ENT. L. 238, 246–53 (2016).

183. 671122 Ontario Ltd. v. Sagaz Indust. Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC 59.

184. *Id.* at para. 47.

185. See *Berg v. Canadian Hockey League*, 2017 ONSC 2608. On this case, see Harnes, *supra* note 182, at 246–54.

186. See Canada Labour Code, R.S.C. 1985, c L-2, § 3(1)(c) [re-en. 1999, c. 31, s. 149].

Most civil law jurisdictions do not differ significantly from common law jurisdictions with respect to the applicable legal standard. European Union (EU) law does not contain a general definition of who is to be properly characterized as an “employee” or “worker” for the purposes of EU law.¹⁸⁷ Rather, the concepts are used with (little) variations in the various European legal instruments. The same is true for the laws of the EU Member States. However, “control” appears to be a key factor in all these laws.¹⁸⁸ In Germany, for example, labor law, to a significant extent, is judge-made law. The courts treat somebody as an employee rather than as an independent contractor if that person must render services to another person based on a contract for services, and if the person rendering these services is contractually bound to take orders as to the performance of the work, making him or herself, personally dependent on the other.¹⁸⁹

Based on the standards set out above, most extreme sports athletes who enter into a sponsorship agreement probably must indeed be characterized as independent contractors and not as employees. While quite a few will be economically dependent on one particular sponsor, the level of control necessary to ascertain employee status normally will not be high enough for courts to hold otherwise.

However, Canadian law appears to be on the right track when stipulating that the level of control and economic dependency are two factors which can substitute each other—high economic dependency can make up for a low control level and *vice versa*.¹⁹⁰ The main reason for according economic dependency a greater weight in the analysis than is currently done in most jurisdictions is, I submit, the “hidden” or “implicit” control sponsors have when athletes desperately need their money. As discussed, this need makes an athlete highly receptive to the interests and wishes of that sponsor or even to “take orders”.

Further, some jurisdictions have established a third “status category” next to employees and independent contractors. In the UK, for example, somebody is a “worker” based on section 230(3) of the Employment Rights Act 1996 if he or she has entered into or works under “... [a] contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual . . .”.¹⁹¹ Status as a worker provides less protection than employment, but more than a finding that a person is an

187. KARL RIESENHUBER, EUROPEAN EMPLOYMENT LAW 5–8 (2012).

188. See *id.*

189. See Bundesarbeitsgericht [BAG] [Federal Labor Court] Aug. 24, 2016, 7 AZR 625/15, para. 14 (Ger.).

190. See Canada Labor Code, R.S.C. 1985, c L-2, § 3(1)(c) [re-en. 1999, c. 31, § 149].

191. Employment Rights Act 1996, c. 18, § 230(3) (UK).

independent contractor.¹⁹² As the wording of this provision demonstrates, “control” is not a decisive factor for determining worker status. Rather, judicial dicta suggest that it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal’s operations, will in most cases demonstrate on which side of the line a given person falls.¹⁹³ Depending on the specific structure of a sponsorship contract in an individual case, an English court might well conclude that sponsors are not an athlete’s clients and athletes are not primarily running a profession or business undertaking, i.e. that an athlete is a worker as defined in section 230(3).

Finally, the analysis of the proper characterization of sponsored athletes as independent contractors or employees may and should have a feedback effect on an important issue that was discussed in Section V B 3 above: determining the standard of care in a negligence/breach of contract setting. Even if an athlete cannot be characterized as an employee of a particular sponsor, the level of control exercised by that sponsor and the athlete’s economic dependency on him or her are factors that will weigh in on the sponsor’s duties of care and a potential negligence suit by the athlete. Such a spill-over effect may in fact create a more finely tuned regulatory system than the dichotomy of independent contractor and employee suggests: athletes and sponsors would retain a maximum of (contractual) freedom while athletes would be protected to the extent necessary and proportionate in an individual case by specifically calibrated standards of care.

VI. CONCLUSION

Extreme sports and extreme sports sponsoring have become key features of the modern entertainment and sports industry. Decades ago, individuals practicing extremely hazardous (fringe) sports were usually considered to be somewhat awkward or even weird borderline characters by the few who knew them. Today, many extreme sports athletes are media heroes and enjoy a celebrity status similar to that of pop music stars. Extreme sports are exciting and enriching for the athletes, demonstrate to all of us what humans can do, and they help make “normal” sports safer. However, this is only one side of the story. The majority of sponsored athletes struggle to make a living from the meagre pay they get from sponsors. Many young athletes take extreme risks to catch sponsors’

192. See *Employment Status*, GOV.UK, <https://www.gov.uk/employment-status/worker> (last visited Dec. 6, 2019).

193. *Cotswold Dev. Constr. Ltd. v. Williams* [2006] IRLR 181 [53]. This was cited with approval by both the Court of Appeal in *Hosp. Med. Grp. Ltd. v. Westwood* [2012] EWCA (Civ) 1005 [16],[18] and the Supreme Court in *Pimlico Plumbers Ltd. v. Smith* [2018] UKSC 29 [44].

attention and, hopefully, a sponsoring contract. Many die or severely injure themselves while practicing their favorite sport.

So, are extreme sports sponsors “setting up dates with death”? In order to answer this (provocative) question, this article has attempted to investigate fundamental issues of the law and economics of extreme sports sponsoring from a comparative perspective. The extreme sports sponsoring market is secretive. To better understand what is going on, a set of 40 interviews were conducted with sponsored athletes between June and September 2018. These interviews provide an up-to-date and, to the best of my knowledge, unique account of contract practice regarding extreme sports sponsoring worldwide.

The main findings of the article can be summarized as follows: *First*, extreme sports sponsoring contracts are currently clearly unbalanced. Risks and rewards are unbundled—while the athletes bear almost all the risks, the sponsor firms reap almost all of the rewards. This does not necessarily imply that the current contracting practice is inefficient. Unequal bargaining power and strong non-monetary incentives of athletes may account for an uneven distribution of the monetary cooperative surplus. But the available evidence suggests that the current practice incentivizes athletes to take inefficient risks, and, based on athletes’ preferences, there are ways to significantly increase the cooperative surplus compared to the status quo. In particular, firms could arrange for comprehensive health, disability and life insurance for the benefit of athletes and their families—at little costs to firms and with a significant positive effect on athletes’ welfare. Firms could establish systematic counselling, coaching and training programs for athletes, and they could move away from bonus-based compensation schemes. *Second*, sponsor firms face higher duties of care vis-à-vis young and/or inexperienced athletes. These athletes, in particular, are prone to “inefficient risk-taking”. Depending on the factual circumstances of the individual case, these duties may include enhanced counselling, coaching and safety training, as already mentioned. They may also require firms to refrain from subjecting young or inexperienced athletes to extremely high-powered financial incentives (bonus schemes) that encourage inappropriate risk-taking. *Third*, sponsors also face higher duties of care if they are involved in or influence the organization of extreme sports events or control the premises/facilities on which such events take place. *Fourth*, currently, sponsored athletes are treated by sponsors as independent contractors. Depending on the facts of each individual case and the applicable legal standard to delineate independent contractors from employees, this may or may not be correct. This article suggests that courts should give more weight to economic (in)dependency as a relevant standard in addition to control exercised by sponsor firms when assessing whether a sponsored athlete is an employee. Further, even if an athlete cannot be characterized as an employee of a particular sponsor, the level of control exercised by that sponsor and the athlete’s economic dependency on him or her are factors

that should weigh in on the sponsor's duties of care under contract and/or tort law, creating a more finely tuned regulatory system than the dichotomy of independent contractor and employee suggests.

Extreme sports as defined in this article involve high risks: death of athletes occurs with a nontrivial probability so that athletes normally and consciously contemplate the possibility of death when practicing their (extreme) sport. Based on this definition, sports like football, soccer, "regular" mountaineering or running would not count as extreme sports. However, the endorsement contracts with individual athletes have a similar structure to the one discussed in this article for extreme sports, and athletes' and sponsors' interests are also similar. Hence, even though the stakes (risks) are lower, one might be able to identify comparable ways to improve the current contracting practice as those discussed in this article.

Finally, the discussion on the dark side of extreme sports sponsoring contracts have only just begun. It would facilitate an informed debate on the merits of the current contracting practice and potential improvements if sponsors were less secretive about this practice. Certain reforms are desirable and, indeed, necessary—for the benefit of athletes, sponsors, and society at large. Sponsors should take a proactive attitude towards such reforms and lead the debate as opposed to concealing important facts and figures. Developing a culture of professional risk assessment and risk management requires transparency as a first important step.