Summer 2010

DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
# LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

## IN BRIEF

### COLORADO



### UTAH



### WYOMING



### NEW MEXICO



## COLORADO

### DEFENSE VERDICT OBTAINED BY DEWHIRST & DOLVEN ON PLAINTIFFS' $1.5 MILLION CONSTRUCTION DEFECT CLAIMS; DEFENDANT AWARDED $33,000 ON COUNTERCLAIM

*Larimer County:* Dewhirst & Dolven's client, LT Builders, built a custom home for the Plaintiffs, Stephen and Linda Castle. LT Builders' principal, Larry Thompson, was also named as a defendant in the action.

One of the features of the home was an indoor swimming pool. Upon completion, the pool was one half foot more shallow than specified in the contract between LT Builders and the pool contractor. Unsuccessful attempts to resolve the problem resulted in an escalation of complaints by the homeowners and ultimately the lawsuit. In addition to claims regarding the pool, Plaintiffs alleged that the water well for the property was negligently drilled and defective, the water treatment system was improperly designed and never functioned, breaches in the building envelope allowed intrusion of mice, rats and birds into the house and the attic and wall cavities, the roof was defectively installed, windows were defectively installed, and other defects existed. Plaintiffs also claimed that they had been double billed for work and supplies and that LT Builders and Larry Thompson misappropriated bathtubs and windows.

Plaintiffs claimed they were entitled to $1,527,988, plus attorneys fees and costs from Defendants, and asserted numerous causes of action including breach of contract, negligent and defective construction, negligent supervision/management, breach of fiduciary duty, breach of obligation of good faith and fair dealing, conversion, violation of Colorado's Consumer Protection Act, fraud, excessive lien, as well as joint and several liability and claims of entitlement to punitive damages. LT Builders counterclaimed for the amount of its lien in unpaid construction draws. Defendants' attorneys, lead counsel Trevor Cofer, Sue Pray and Robin Lambourn of Dewhirst & Dolven, LLC, were successful in obtaining dismissal before trial of the claims against Larry Thompson individually, and also obtaining dismissal of the fraud claims.

After more than nine days of trial plus over a day of deliberation, the jury returned with a verdict for the defense and awarded Plaintiffs no damages. The jury found that

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Plaintiffs weren't damaged as a result of the water well, swimming pool and water treatment system. Although the jury found that Plaintiffs did suffer damages as a result of other construction defects, the jury determined that Plaintiffs' negligence contributed 50% to the damages and thus Plaintiffs' recovery under the negligence actions was barred under Colorado's comparative negligence law. The jury also found that LT Builders did not breach a duty of good faith and fair dealing and did not assert an excessive lien. Finally, the jury awarded LT Builders $33,029.07 on its counterclaim.

*Castle v. LT Builders, Case No.: 2004CV2483.*

## New Legislation Requires Insureds under Auto Policies to Designate the Insurer as Agent for Service of Process; Tortfeasors Deemed Uninsured in Certain Circumstances

House Bill 10-1164, was approved by the Governor on May 5, 2010, and addresses service of process in actions concerning incidents that may be covered by a motor vehicle insurance policy. The act is to take effect January 1, 2011, and is applicable to insurance policies issued on or after said date.

In the legislative declaration of C.R.S. § 42-7-102, the general assembly declared "that it is necessary to simplify the process for an innocent victim to access the negligent driver's liability insurance policy or his or her own uninsured motorist coverage in order to prevent the burden from being borne by the taxpayer or the health care system." Thus, the general assembly declared "that the policy of Colorado is that all motor vehicle liability policies shall require Policyholders of an automobile liability policy to appoint their Insurance carrier as an agent for the purpose of service of process in certain limited instances in accordance with section 42-7-414 (3), and to deem a defendant to be uninsured for purposes of uninsured or underinsured motorist coverage if the court deems service on the defendant's insurance company to be ineffective or insufficient."

C.R.S. § 42-7-414(3)(a) requires that specific language be included in motor vehicle liability policies stating that if the insured's whereabouts for service of process cannot be determined through reasonable effort, the insured agrees to designate and irrevocably appoint the insurance carrier as the agent of the insured for service of process, pleadings, or other filings in a civil action brought against the insured, if the cause of action concerns an incident for which the insured can possibly claim coverage. Dewhirst & Dolven, LLC may act as a registered agent to receive this service.

In addition, Colorado's UM/UIM statute, C.R.S. § 10-4-609, will include an additional provision stating "an alleged tortfeasor shall be deemed to be uninsured solely for the purpose of allowing the insured party to receive payment under uninsured motorist coverage, regardless of whether the alleged tortfeasor was actually insured, if: (a) the alleged tortfeasor cannot be located for service of process after a reasonable attempt to serve the alleged tortfeasor; and (b) (I) service of process on the insurance carrier as authorized by Section 42-7-414 (3), C.R.S., is determined by a court to be insufficient or ineffective after reasonable effort has failed; or (II) (A) the report of a law enforcement agency investigating the motor vehicle accident fails to disclose the insurance company covering the alleged tortfeasor's motor vehicle; and (B) the alleged tortfeasor's insurance coverage when the incident occurred is not actually known by the person attempting to serve process." C.R.S. § 10-4-609(6).

## Legislature Modifies Commercial General Liability Insurance Policies Issued to Construction Professionals

HB 10-1394 is an act affecting commercial general liability (CGL) insurance policies issued to construction professionals. The act is effective May 21, 2010, and applies to insurance policies currently in existence or issued on or after the effective date of the act.

C.R.S. § 13-20-808 is added to the Colorado Revised Statutes and includes legislative statements "that insurance policies issued to construction professionals have become increasingly complex, often containing multiple, lengthy endorsements and exclusions conflicting with the reasonable expectations of the insured." C.R.S. § 13-20-808(1)(a)(II). The Colorado legislature further declared "the policy of Colorado favors the interpretation of insurance coverage broadly for the insured. The long-standing and continuing policy of Colorado favors a broad interpretation of an insurer's duty to defend the insured under liability insurance policies and that this duty is a first-party benefit to and claim on behalf of the insured." C.R.S. § 13-20-808(1)(b)(I)-(II).

The legislature also impugned the decision of the Colorado Court of Appeals in *General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company,* by stating that decision "does not properly consider a construction professional's reasonable expectation that an insurer would defend the construction professional against an action or notice of claim contemplated by this Part 8." C.R.S. § 13-20-808(1)(b)(III). The Court of Appeals in *General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.* held that, as a matter of first impression, complaints in a construction defect action that only alleged poor workmanship, did not allege an occurrence that triggered a duty to defend in the CGL policies issued to the subcontractors. *General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.,* 205 P.3d 529 (Colo. App. 2009).

The new legislation provides "in interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the

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property damage is intended and expected by the insured." C.R.S. § 13-20-808(3). However, "nothing in this subsection (3): (a) requires coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or (b) creates insurance coverage that is not included in the insurance policy." C.R.S. § 13-20-808(3)(a)-(b).

"Upon a finding of ambiguity in an insurance policy, a court may consider a construction professional's objective, reasonable expectations in the interpretation of an insurance policy issued to a construction professional." C.R.S. § 13-20-808(4)(a). "If an insurance policy provision that appears to grant or restore coverage conflicts with an insurance policy provision that appears to exclude or limit coverage, the court shall construe the insurance policy to favor coverage if reasonably and objectively possible." C.R.S. § 13-20-808(5).

"An insurer's duty to defend a construction professional or other insured under a liability insurance policy issued to a construction professional shall be triggered by a potentially covered liability described in: (I) a notice of claim made pursuant to section 13-20-803.5; or (II) a complaint, cross-claim, counterclaim, or third-party claim filed in an action against the construction professional concerning a construction defect." C.R.S. § 13-20-808(7)(a).

Additionally, C.R.S. § 10-4-110.4 is added to the Colorado Revised Statutes and is applicable to "an insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work." C.R.S. § 10-4-110.4(3). The statute states in part, that "a provision in a liability insurance policy issued to a construction professional excluding or limiting coverage for one or more claims arising from bodily injury, property damage, advertising injury, or personal injury that occurs before the policy's inception date and that continues, worsens, or progresses when the policy is in effect is void and unenforceable if the exclusion or limitation applies to an injury or damage that was unknown to the insured at the policy's inception date." C.R.S. § 10-4-110.4(1). "Any provision in an insurance policy issued in violation of this Section is void and unenforceable as against public policy. A court shall construe an insurance policy containing a provision that is unenforceable under this section as if the provision was not a part of the policy when the policy was issued." C.R.S. § 10-4-110.4(2).

### New Legislation Codifies "Made Whole" Doctrine and Restricts Subrogation Where Injured Party Has Not Been Fully Compensated

House Bill 10-1168 was signed by Governor Ritter on April 28, 2010, and barring a referendum petition, is set to take effect on August 11, 2010. The act concerns "a limitation on the ability of an insurer to obtain repayment of benefits from an injured party who recovers damages from the party responsible for the injury in situations when the injured party would not be fully compensated if the benefits are repaid to the insurer."

A new section is added to the Colorado Revised Statutes wherein the legislature declares that "when a payer of benefits seeks repayment of the benefits provided to an injured party, the repayment reduces the amount available to the injured party to compensate him or her for injuries and damages other than the cost of medical care and medical services; reimbursement or repayment of benefits should not be permitted when the injured party would not be fully compensated for his or her injuries and damages." C.R.S. § 10-1-135(1)(a)-(b). "This law regulating insurance and health benefit plans is intended to ensure that an injured party who recovers damages for bodily injuries caused by a third party and receives benefits pursuant to an insurance policy, contract, or benefit plan is fully compensated for his or her injuries and damages before the payer of benefits may seek repayment of benefits provided to the injured party." C.R.S. § 10-1-135(1)(d).

Thus, this new legislation states "reimbursement or subrogation pursuant to a provision in an insurance policy, contract, or benefit plan is permitted only if the injured party has first been fully compensated for all damages arising out of the claim. Any provision in a policy, contract, or benefit plan allowing or requiring reimbursement or subrogation in circumstances in which the injured party has not been fully compensated is void as against public policy." C.R.S. § 10-1-135 (3)(a)(I). This paragraph does not limit subrogation rights relative to recovery of amounts paid for property damage or the right of an insurer providing uninsured or underinsured motorist coverage pursuant to section 10-4-609 to an injured party to pursue claims against an at-fault third party. C.R.S. § 10-1-135 (3)(a)(II).

The legislation also establishes presumptions regarding whether the injured party has been fully compensated based upon whether the injured party recovers the limits of available liability, UM or UIM coverage, and requirements of notice and arbitration if disputes arise between the payor of benefits and the injured party. C.R.S. § 10-1-135 (3),(4). In addition, the payor of benefits may initiate a direct action against the at-fault third party, where the injured party has not done so "by the date that is sixty days prior to the date on which the statute of limitations applicable to the claim expires." C.R.S. § 10-1-135(6)(a)(II).

This new legislation does not affect reduction of damages based on amounts paid by a collateral source, or subrogation or lien rights of hospitals, the Department of Health Care Policy and Financing, workers' compensation carriers or self-insured employers as provided by Colorado statute. C.R.S. § 10-1-135(10).

## Utah

### Utah Legislature Amends Health Care Malpractice Act Including Increase and Hard Cap on Non-economic Damages

Senate Bill 145 was signed on March 23, 2010 by Governor Gary Herbert and includes three amendments to Utah's

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Health Care Malpractice Act. First, it amends the cap on non-economic damages that may be awarded in a malpractice action; second, it requires an affidavit of merit from a health care professional to proceed with an action if the pre-litigation panel makes a finding of non-meritorious; and third, it limits the liability of a health care provider, in certain circumstances, for the acts or omissions of an ostensible agent.

U.C.A. § 78B-3-410 is amended to include a $450,000 hard cap on non-economic damages for causes of action that arise May 15, 2010 and thereafter. Previously, for a cause of action arising on or after July 1, 2002, the prior $400,000 limitation was adjusted for inflation. U.C.A. § 78B-3-410(c). The previous, inflation-adjusted cap will stay in effect for causes of action arising between July 1, 2002 and May 14, 2010.

In addition U.C.A. § 78B-3-423 is added which creates an Affidavit of Merit requirement to proceed with litigation if the claimant has received an opinion from Utah's pre-litigation panel that the claim is "non-meritorious." The affidavit of merit shall "be executed by the claimant's attorney or the claimant if the claimant is proceeding pro se, stating that the affiant has consulted with and reviewed the facts of the case with a health care provider who has determined after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of a medical liability action." U.C.A. § 78B-3-423(2)(a). Additionally, a signed affidavit from a health care provider is also required, stating that in the health care provider's opinion there are reasonable grounds to believe that the applicable standard of care was breached and the breach was a proximate cause of the injury claimed, and providing the bases for the health care provider's opinion. U.C.A. § 78B-3-423(2)(b).

S.B. 145 also includes the addition of U.C.A. § 78B-3-424 which provides a limitation of liability for ostensible agent. "Ostensible agent" is defined as a person who is not an agent of the health care provider, and "who the plaintiff reasonably believes is an agent of the health care provider because the health care provider intentionally, or as a result of a lack of ordinary care, caused the plaintiff to believe that the person was an agent of the health care provider." U.C.A. § 78B-3-424(1)(b). The new law provides that a health care provider shall not be liable for the malpractice of an ostensible agent if the ostensible agent has privileges with the health care provider, meets certain insurance requirements, and other criteria. This section applies to a cause of action that arises on or after July 1, 2010.

### Awards and Verdicts in Rear End Accidents Across Utah's Wasatch Front

*Salt Lake County:* Plaintiff, a 68 year old retired male, was rear-ended by Defendant who had not realized Plaintiff was stopped ahead of Defendant until another car ahead of Defendantsuddenly changed lanes. Plaintiff sustained a medial meniscus tear and ACL sprain, and sprain injuries to his neck and back. Plaintiff alleged need for a total knee replacement. Arbitrator Paul Matthews awarded $1,283.85 for past medical specials (beyond PIP), $6,300 for future medicals, and $13,000 in non-economic damages for a total "new money" (in addition to PIP) award of $20,583.85.

*Erasmus v. Ferrin,*
*Case No.: 080922564.*

*Salt Lake County*: Plaintiff, a 50 year old male, was stopped at a traffic signal when he was rear-ended by Defendant. Defendant admitted fault and estimated his speed at impact to be 30 miles per hour. Plaintiff claimed cervical and lumbar injuries, past medical expenses of $17,652, and future medical expenses of $34,500 (including a future surgery which was disputed by Defendants). The jury awarded economic damages of $51,202, and non-economic damages of $60,000 for a total award of $111,202.

*Migliaccio v. Bambrough,*
*Case No.: 070913175.*

*Utah County:* Plaintiff, a 34 year old male employed as a retail store clerk, was stopped in traffic when rear-ended by Defendant traveling approximately 45 miles per hour. Plaintiff claimed head, neck, back, and shoulder pain, medical expenses of $23,866 and lost wages of $20,457. The jury awarded $15,916 in past medical expenses, $20,456 in lost wages, and $25,000 in non-economic damages, for a total award of $61,372.80.

*Juarez v. Cherry,*
*Case No.: 070402256.*

*Utah County:* Plaintiff, a female certified nursing assistant in her 30's, was rear-ended and her head was thrown into the windshield breaking it. Plaintiff claimed neck and back injuries, in addition to a closed head injury. She sustained $4,695 in medical expenses which were paid by PIP. Plaintiff claimed $13,000 in lost wages. Arbitrator Lew Quigley awarded $8,000 for general (non-economic) damages, and $3,000 for lost wages. $1,074 was added in interest for a total award of $12,074.

*Collings v. Miller,*
*Case No.: 060403331.*

*Weber County*: Plaintiff, a male aircraft mechanic, was rear-ended by Defendant. Plaintiff claimed disc herniation at C5-6 and aggravation of pre-existing back condition. Defendant disputed causation, noting Plaintiff's prior treatment for neck and back conditions. Plaintiff claimed medical expenses of $13,467 and lost income of $23,000. The arbitrator awarded $58,965.

*Conroy v. Cain,*
*Case No.: 050902911.*

## Wyoming

### Jury Awards $50,000 in Claim of Disability Discrimination; Judge Adds $568,647 in Back Pay, Costs and Attorneys Fees.

*U.S. District Court: District of Wyoming:* Plaintiff was employed as an electrician in Defendant's Worland aluminum can manufacturing plant. He suffered a stroke in March 1999, and was released to return to work about three months later, with work restrictions including use of a safety harness when working at heights.

Plaintiff worked for two years with this restriction until the plant's workers went on strike in June 2001. When Plaintiff sought to return to work when the strike ended in February 2002, he was required to have a doctor's release.

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Plaintiff provided the release and resumed work with the same work restriction in April 2002.

Plaintiff claims he was told to stop working in October 2002 because he was a safety hazard, and was later demoted to a janitorial position in February 2003, which he worked at for more than three-and-a-half years, until September 2006 when he stopped working due to a shoulder surgery. His first surgery failed and was followed up by a second surgery in March 2007. Plaintiff never returned to work, but claimed he was able to work and Defendant failed to reasonably accommodate his disability. Defendant asserted Plaintiff was a danger to himself and other workers, regardless of any accommodation.

In January 2009, the jury returned a verdict of $50,000 in favor of Plaintiff, finding that Defendant had discriminated on the basis of Plaintiff's disability. In a subsequent March 2009 hearing, the court also awarded Plaintiff $137,549.30 in back pay, and $5,859.91 in lost pension benefits. Later still, in January 2010, the court awarded attorneys fees and costs of $425,237.39, for a total of $568,646.60 awarded by the court post-trial.

*Justice v. Crown Cork and Seal, Co., Case No.: 06CV66.*

### Horse Riding Fatality Yields $1.2 Million Verdict

*U.S. District Court: District of Wyoming:* Defendant operated a natural horsemanship program (Harmony Horsemanship) which advocated riding with only a minimum of equipment including an English saddle and no bridle. Plaintiffs' Decedent, Kristina Barkhurst, worked as Defendant's apprentice.

In January 2006, Kristina accompanied Defendant and her boyfriend on a horseback ride. Plaintiffs claimed Defendant insisted that Kristina use only the minimal riding equipment. The horse had a history of bolting in open spaces with this type of equipment. On the day of the incident, the horse bolted again, throwing Kristina to the ground where she first landed on her heels, then somersaulted onto her head, sustaining fatal injuries.

Defendant asserted protection under Wyoming's Recreational Safety Act. Plaintiffs claimed the Act was not applicable due to Defendant's negligence in selecting the horse and equipment, and providing inadequate training. Plaintiffs also claimed Defendant sought to conceal, alter or manufacture evidence, including a release and assumption of risk purported to have been signed by Kristina. After an eight-day trial, the jury found that Defendant was negligent and awarded $1.2 million in damages.

*Barkhurst v. Skinner, Case No. 05CV25.*

## New Mexico

### Federal Court Finds Corporate Parties had Disparate Bargaining Power and Refuses to Apply Economic Loss Rule to Dismiss Torts; Warranty Claims Barred by Statute of Limitation

*U.S. District Court: District of New Mexico:*An aviation insurer and a corporate owner of a small airplane (Piper Mirage) brought claims against the manufacturer of the airplane's turbocharger and the manufacturer of the airplane's engine. The plane had several prior owners before the corporate Plaintiff (a seller of grass seeds and legumes) obtained the plane in February 2003. The accident occurred in April 2006 when the small plane was flying over southern New Mexico and was forced to make an emergency landing after its engine suddenly stopped. While the pilot escaped injury, the plane itself was severely damaged.

Plaintiffs filed suit in April 2009 alleging negligence, strict liability, and breach of implied warranty claims. Defendants moved for summary judgment asserting Plaintiffs' negligence and strict liability claims were barred by New Mexico's economic loss rule, and that the implied warranty claims were time-barred.

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## About Our Firm

Dewhirst & Dolven LLC has been published in A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. The founding partners, Miles Dewhirst and Tom Dolven, practiced as equity partners with a large Colorado law firm before establishing Dewhirst & Dolven, LLC.

Our attorneys have combined experience of over 100 years and are committed to providing clients throughout Utah, Wyoming, New Mexico and Colorado with superior legal representation while remaining sensitive to the economic interests of each case.

We strive to understand our clients' business interests to assist them in obtaining business solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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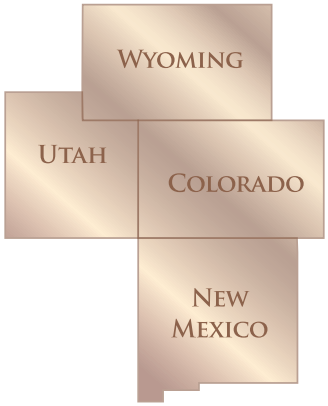




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New Mexico's economic loss rule was first recognized in *Utah International Inc.v. Caterpillar Tractor Co.*, 775 P.2d 741 (N.M.App. 1989) which held "in commercial transactions, where there is no great disparity in bargaining power of the parties, economic losses from injury of a product to itself are not recoverable in tort actions; damages for such economic losses in commercial settings in New Mexico may only be recovered in contract actions." The New Mexico rule requires that there be relatively equal bargaining power among the parties and real opportunity for bargaining, such that the parties would be reasonably expected to exact meaningful concessions from one another.

The New Mexico Federal District Court found that no parity in bargaining power existed between the aircraft purchaser and Defendants as the purchaser lacked any meaningful opportunity to bargain with Defendants regarding the allocation of liability. Plaintiff had no pre-sale contact with the Defendant manufacturers as there were several prior owners before Plaintiff. Because there was no plausible way for the corporate Plaintiff to have exacted meaningful concessions from Defendants, the court held that the economic loss rule did not apply, and allowed Plaintiffs to pursue their negligence and strict liability claims.

Regarding Plaintiffs' implied warranty claims, Plaintiffs sought damages arising from an alleged breach of New Mexico's statutory implied warranties of merchantability and fitness for a particular purpose. N.M.S.A. §§ 55-2-314 and 55-2-315. Actions based on these sections are limited by New Mexico statute § 55-2-725 which requires that actions for breach of warranty be brought within four years of delivery, unless the warranty explicitly guarantees future performance. The court noted that implied warranties, like those at issue, do not explicitly guarantee future performance.

Thus, the court held the breach of warranty action was time-barred because it was not filed within four years of delivery. Though there may have been dispute as to which delivery was operative (the delivery by the manufacturer to Piper or any of the subsequent deliveries of the aircraft), when using the latest possible delivery date, the February 2003 date of delivery to Plaintiff, the implied warranty claim was still time-barred because the suit was not commenced until April 2009-over six years later. Defendants' Motion for Summary Judgment was granted with regard to the warranty claim, but denied with regard to the torts.

*AIG Aviation Ins. et al. v. AVCO Corp., et al., decided April 1, 2010.*

## Limited Civil Immunity Provided to Space Flight Entities

On February 20, 2010, Governor Bill Richardson signed the Spaceflight Informed Consent Act into law. N. M. S. A. § 41-14-1 *et seq*. The act requires that space flight entities warn their customers about the risks inherent in space flight and, if such warning is given, provides space flight entities civil immunity from tort liability. The civil immunity does not apply where a space flight entity acts with gross negligence or willful or wanton disregard for the safety of the customer. The legislation was enacted to protect New Mexico's significant investment in the Spaceport (on a 27 square mile tract of state-owned land, 45 miles north of Las Cruces) and to remain competitive with other states that have already passed similar measures.