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SURVIVING REALITY TV: THE ULTIMATE CHALLENGE FOR REALITY SHOW CONTESTANTS

By Jennifer L. Blair *

With the popularity of reality television remaining unabated, precious little attention is given to the effects participation as a contestant on a reality television show may have. Although there is a growing body of work concerning the mental toll reality television takes on its contestants, the legal ramifications of such effects have remained largely unexamined. Even as some producers of such shows acknowledge the effects their programming has on their contestants, many hide behind the contracts contestants signed prior to filming, effectively blocking litigation. Further, a favorite defense of producers is that the contestants are not their employees and thus are not owed common employer-employee duties. Reality show contestants are left with a feeling of being deceived and manipulated by producers hungry for ratings.

I. INTRODUCTION

Sinisa Savija committed suicide by throwing himself in front of a commuter train on July 11, 1997.[1] A month earlier, he was the first contestant kicked off *Expedition: Robinson*, a Swedish reality television show on which the American television show Survivor is based.[2] His widow, Nermina Savija, told the Swedish newspaper *Aftonbladet*, "He was a glad and stable person before he went away, and when he came back he told me, 'They are going to cut away the good things I did and make me look like a fool . . . .'"[3] She also told the *Associated Press*, "It's not a game when you choose ordinary people and put them under great pressure, constantly in front of the camera."[4] Reality show producers, such as *Survivor's* Mark

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1. Luke Benedictus, Big Bother, The Age, Apr. 27, 2003, http://www.theage.com.au/articles/2003/04/26/1051316052306.html.

2. *Id.*

3. *Id.*

4. Gloria Hillard, *'Survivor!': Questioning Candidates-And the Game*, CNN.COM, Oct.

Burnett, contend that Savija's suicide was not connected to the show. Burnett suggests that Savija was mentally ill prior to the show, and that personal issues, such as his separation from his wife and being a refugee, caused his suicide.[5]

Whether Savija's suicide was directly connected to his elimination from *Expedition: Robinson* can never be determined. However, his suicide after his distressed comments to his wife highlights an emerging trend within the reality show realm: the damage reality show producers may be causing to contestants' mental health and physical safety.

Although reality television has been standard programming on many television stations for slightly over a decade, the effects the shows' productions have on contestants' mental health and physical safety have stayed largely in the background.[6] Further, given the voluminous contracts contestants must sign before appearing on the shows, litigation has been surprisingly nonexistent. Additionally, because reality show contestants are not covered by acting unions, they enjoy none of the protections professional actors receive.[7]

As reality shows[8] continue to push the limits of television programming in attempts to attract viewers, the health and safety of reality show contestants become important considerations. Part II of this Article argues that reality show contestants should be considered employees of reality show production companies. Part III discusses the effects of reality television on contestants' mental health, while analyzing the psychological tactics used by producers. Part IV focuses on the safety issues affecting contestants, arising from both production and from other contestants. Part V analyzes potential causes of action against reality television producers. Part VI focuses on reality show contracts, discussing the level of informed consent needed to make the contracts enforceable, as well as issues contestants may have in litigation. Finally, this Article concludes by suggesting steps that reality show production companies should take to ensure that they are properly protecting the health and safety of their contestants.

21, 1999, http://www.cnn.com/SHOWBIZ/TV/9910/21/survivor/index.html.

5. *Id.*

6. *See infra* Part III.

7. Edward Wyatt, *On Reality TV: Tired, Tipsy, and Pushed to Brink*, N.Y. TIMES, Aug. 2, 2009, at A1.

8. The analysis in this paper is limited to competition-based reality shows and excludes reality shows that follow people through their daily lives, as well as talent-based reality shows, such as *American Idol*.

II. REALITY SHOW CONTESTANTS AS EMPLOYEES

To bring a reality show contestant under the umbrella of employment law, one must show that a reality show contestant qualifies as an "employee" of the production company. According to the *Restatement (Third) of Employment Law*, three elements must be satisfied to classify an individual as an employee.[9] First, an individual may be classified as an employee if the individual "acts, at least in part, to serve the interests of the employer."[10] Second, the employer must consent to the employee's services.[11] The third element is satisfied when "the individual does not render the services as an independent business person because the employer controls the manner and means by which the services are performed."[12]

The first element—the individual acts to serve the interests of the employer —can be met easily. Reality show producers select contestants they believe will produce high ratings for their shows.[13] While contestants have their own reasons for wanting to participate in a reality show, their participation is based on how well they serve this interest.[14] Therefore, a reality show contestant's participation in a reality show serves the interests of the show's producers.

The second element, which requires that the employer consent to the employee's service,[15] is also satisfied. Would-be contestants go through several rounds of interviews and selection processes before they are chosen to participate on a reality show.[16] Once selected to appear on shows, contestants are typically rushed through the contract process, wherein they sign lengthy contracts prepared by the production companies.[17] Thus, because prospective contestants are handpicked after going through several selection processes conducted by the shows' producers, one can infer the producers' consent to the final contestants' services.[18]

The third element, that the employee is not an independent contrac-

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9. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (2008).

10. *Id.* § 1.01(a).

11. *Id.* § 1.01(b).

12. *Id.* § 1.01(c).

13. Amy Kaufman, *Reality TV—Who's Vetting the Contestants?*, THE WRAP, Sept. 21, 2009, http://www.thewrap.com/television/article/reality-tv-whos-vetting-contestants-7524.

14. *Id.*

15. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (2008).

16. *See generally* Kaufman, *supra* note 13.

17. SAM BRENTON & REUBEN COHEN, SHOOTING PEOPLE: ADVENTURES IN REALITY TV 138 (2003).

18. *See generally* Kaufman, *supra* note 13.

tor,[19] is also satisfied. Once the contestants are chosen for a reality show, the producers usually move them into a central location—often some kind of housing—wherein the contestants dwell for the duration of the show's filming.[20] Typically, the contestants' "services" are performed almost around the clock; that is, the contestants are almost constantly being filmed.[21] The contestants often have little respite from the filming and must participate in activities mandated by the producers.[22] Therefore, the employers—the reality show's producers—have near complete control over the manner and means by which the contestants' services are performed.

There is a caveat to the general rule about the employer-employee relationship. Volunteers are not considered employees.[23] However, an individual is only a volunteer and not an employee if "the individual renders uncoerced services without being offered a material inducement."[24] "Material inducement" is broadly defined as "the promise of any type of material gain, whether in the form of monetary compensation, some special benefit . . . , or an in-kind payment."[25] All that is required is that an "employer makes some kind of economic commitment to the employee."[26] Notably, in-kind benefits include food and shelter.[27] The inclusion of in-kind benefits is important to reality show contestants as most contestants receive "little to no pay for their work,"[28] but do receive food and shelter from production companies.[29] Thus, reality show contestants can be classified as employees because they receive material inducement from the respective show's producers in the form of in-kind benefits.

Furthermore, reality show contestants should not be considered independent contractors. While there are several factors courts will consider on a case-by-case basis,[30] the determining element is typically the right of employer control.[31] The employer's right to control the way in which the employee completes his or her work is dispositive. "Where an employer has

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19. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (2008).

20. *See e.g.*, BRENTON & COHEN, *supra* note 17, at 3.

21. *See generally id.*

22. *See generally id.* at 118.

23. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 (2008).

24. *Id.*

25. *Id.* cmt. b.

26. *Id.*

27. *Id.*

28. Wyatt, *supra* note 7.

29. *Id.*

30. 19 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 54:2 (4th ed. 2001).

31. *Id.* § 54:3.

the right to control only the results or the end sought to be accomplished, and the contracting party independently determines the details and means of accomplishing that result, an independent contractor relationship exists."[32] For an employment relationship to exist, "assumption of exercise of control must be so persistent and the other party's acquiescence in that exercise of control so pronounced as to raise an inference that the parties, by implied consent, had agreed that the principal might have the right to control the details of the work."[33]

Reality show contestants are constantly under the control of their producers once they arrive at the filming location.[34] Indeed, producers keep the contestants in total isolation from the outside world; cell phones, books, CDs, and newspapers are confiscated from contestants upon arrival.[35] Producers defend contestant isolation on the grounds that it "ensure[s] fairness and prevent[s] cheating."[36] Once filming starts, producers subject contestants to constant filming.[37] Producers also dictate what time contestants will wake up in the morning, where they will spend their day, what they will be doing, the length of time they will perform, when they can eat, when they can return to their temporary home, what they will do once there, and what time they will go to sleep.[38] Hence, reality show contestants are under the producer-employer's constant control. As such, the contestants should be deemed to be in an employer-employee relationship with the producers and not deemed to be independent contractors.

Hence, reality show contestants can be classified as employees of reality show production companies. First, they meet the three elements required to show that a person is an employee of an employer. Second, they are not volunteers because they receive in-kind payments of food and shelter from producers. Third, they are not independent contractors because they are under the almost constant control of their producers. Consequently, reality show contestants should be regarded as employees, which in turn means that reality show production companies owe them certain duties as their contestant-employees.

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32. *Id.*
33. *Id.*
34. *See generally* Wyatt, *supra* note 7.
35. *Id.*
36. Wyatt, *supra* note 7.
37. *See generally id.*
38. *Id.*

III. MENTAL HEALTH AND PSYCHOLOGICAL TACTICS

Reality shows continually push the limits of contestants' mental health to achieve the ratings they desire. Producers employ several psychological tactics to keep their shows interesting for viewers, often at the expense of their contestants' mental health.[39] One section of the CIA's KUBARK interrogation manual, employed during the Cold War, is eerily similar to the methods many reality shows use on their contestants:

> [M]an's sense of identity depends on a continuity in his surroundings, habits, appearance, actions, relations to others etc. Detention permits the interrogator to cut through these links and throw the subject back upon his unaided internal resources . . . . Control of the source's environment permits the interrogator to determine his diet, sleep pattern, and other fundamentals.[40]

Reality shows use similar tactics to provoke dramatic or extreme behavior from their contestants.[41] Tactics reality shows employ include plying contestants with alcohol,[42] "sleep deprivation, the illusion of imminent harm, the disjuncture of normal time, concentration on apparent irrelevancies, the building up and dashing of hope, and the fostering of distrust and paranoia."[43]

Examples of such psychological tactics abound among reality shows. Jen Yamola, a contestant on *Hell's Kitchen*, said she was "'locked . . . in a hotel room for three or four days' before production started."[44] Further, producers confiscated her books, CDs, cell phone, and newspapers.[45] She was only allowed to leave her room with an escort.[46] During a filming of ABC's *The Bachelor*, contestants were forced to wait in vans "while the show's crew set up for a twelve-hour 'arrival party.'"[47] Once contestants were allowed out of the vans, they found "there was little food, but bottomless glasses of wine."[48] On *Project Runway*, contestants often had to work eighteen-hour days, which usually began around 6:00 a.m. and ended near midnight.[49] Even then, their days were not over: after concluding work,

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39. *See generally* BRENTON & COHEN, *supra* note 17.
40. *Id.*
41. *Id.*
42. Wyatt, *supra* note 7.
43. BRENTON & COHEN, *supra* note 17, at 117.
44. Wyatt, *supra* note 7.
45. *Id.*
46. *Id.*
47. Wyatt, *supra* note 7.
48. *Id.*
49. *Id.*

the contestants then had to film "confessionals," which often lasted into the early morning hours.[50]

Examples of long days, little food, and endless alcohol seem commonplace among reality shows, and producers may sometimes cross the line from psychological tactics into genuine mental cruelty. In one egregious example, producers on the UK's second season of *Survivor* told contestants that a close relative of theirs had been flown out to the location.[51] The producers placed the relatives of the remaining five contestants in various points within the tropical location.[52] Contestants were to find the relatives and write down four pieces of information about each one, except that when contestants encountered their own loved ones, they were not allowed to speak to them or touch them.[53] The contestant who won the challenge was permitted thirty minutes to spend with his or her loved one, while the other contestants were not allowed to see or speak to their relatives.[54] Thus, contestants who had spent over a month in an unfamiliar, rugged location with little food, much stress, and undoubtedly overwhelming homesickness were only offered a brief glimpse of their loved ones.[55] After the show, one contestant remarked, "That was a seriously cruel game . . . wasn't it?"[56]

Another example of psychological tactics used by producers is the giving and withholding of food.[57] Regulating when and what people may eat is a long-used tactic of interrogators: "[t]he withholding and giving of food at irregular times is a method practi[c]ed in prisoner interrogations, designed to disrupt the routine of the subject and undermine [his] sense of normalcy, increasing [his] dependence on interrogators."[58] For example, on *Survivor*, food is "used to foster group division and sharpen the drama of the contest."[59] In one *Survivor* challenge, the prize was a fully cooked breakfast, including sausage, toast, and cold orange juice.[60] The winner openly wept as he ate the meal, while the other contestants were forced to

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50. *Id.*
51. BRENTON & COHEN, *supra* note 17, at 114–15.
52. *Id.*
53. *Id.* at 115.
54. *Id.*
55. *Id.*
56. *Id.* at 116.
57. BRENTON & COHEN, *supra* note 17, at 121.
58. *Id.*
59. *Id.*
60. *Id.* at 122.

watch him eat.[61] Producers provide contestants with rice rations based on the Geneva Convention's minimum calorie intake for prisoners of war,[62] but expect the contestants to find any additional food by fishing or foraging.[63] Limiting food intake and then forcing the contestants to watch another contestant eat a full meal seems particularly cruel and designed to encourage animosity.

Like generations of interrogators, reality show producers employ psychological tactics to push contestants to their outermost mental limits. These tactics are deliberate and calculated, not accidental or random. By continuing to keep contestants off-balance and unsure, producers guarantee they will be able to capture dramatic and extreme behavior to entertain viewers. However, entertaining viewers often comes at the expense of intentionally or negligently causing contestants serious mental and emotional harm from which they may have difficulty recovering.

IV. SAFETY

Because reality show contestants should qualify as employees of reality show producers and networks,[64] the producers owe certain duties to the contestants. At the most basic level, an employer is required to furnish the employee a safe place in which to work and to provide appropriate and safe instrumentalities with which to work.[65] The employer is responsible for making the workplace safe.[66] Specifically, the employer "has a duty to provide its employees with a safe place of work, and a failure to comply with this duty renders the employer liable to an employee who may have sustained injuries as the proximate result of the employer's neglect."[67] Thus, reality show producers must provide their contestants with a safe workplace, which includes ensuring their safety during challenges and protecting them against possible harm from other contestants.

A. Challenges

As reality television shows compete with each other each year, producers are compelled to test the limits of contestants' mental and physical acumen to win ratings. Producers put contestants through increasingly out-

61. *Id.*
62. Benedictus, *supra* note 1.
63. BRENTON & COHEN, *supra* note 17, at 121.
64. *See supra* Part II.
65. 27 AM. JUR. 2D *Employment Relationship* § 193 (2010).
66. *Id.* § 248.
67. *Id.*

rageous and possibly dangerous challenges in an attempt to curry favor with audiences. Some of these challenges may fall into the abnormally dangerous activities classification. To determine whether a reality show challenge is an abnormally dangerous activity, one should consider several factors:

> (a) existence of a high degree of risk of some harm to the person . . . ; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.[68]

Thus, challenges such as swimming in a tank with alligators and poisonous frogs, stepping through quicksand, and navigating a junkyard while being attacked by dogs[69] all qualify as abnormally dangerous activities. Each activity carries a high degree of risk of some harm to the contestants and a strong likelihood that the harm to the contestant will be great. Further, use of reasonable care, such as the presence of medical personnel and the use of stunt supervisors, will not eliminate the risk of harm to the contestants. Because reality shows continue to produce ever-more outrageous challenges to gain ratings, it is evident that the activities in most challenges are not commonly performed in real life. Lastly, while some viewers may find the abnormally dangerous challenges entertaining to watch, it is unlikely a court will consider that the pursuit of ratings outweighs the dangerous attributes of the challenges.

Putting up safeguards will not protect producers from litigation, as courts usually find that public policy "does not allow individuals to waive their right to sue for harms caused by dangerous activity."[70] Even with the

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68. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

69. *See* NBC, http://www.nbc.com/Fear_Factor/files/index.shtml (last visited Apr. 23, 2010). Many of the stunts outlined on *Fear Factor's* website also include "Fear Facts," which highlight not only the dangers of the challenges, but also the producers' knowledge of the dangers. For example, in one challenge titled "Swamp Course," contestants had to collect three skulls from an obstacle course. The first skull was at "the bottom of a fifteen-foot well"; the second skull was "in a pit of quicksand"; and the third skull was behind the rear legs of an alligator. The "Fear Facts" of the "Swamp Course" included: "Most injuries associated with quicksand . . . result from . . . the victims having their limbs pulled from their sockets during a rescue attempt" and "A seven-foot alligator . . . can rip a human arm off in less than three seconds." *Id.*

70. Joel Michael Ugolini, *So You Want to Create The Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 77 (2004).

voluminous contracts contestants are required to sign, producers cannot require contestants to sign away their rights to sue should they become seriously injured from an abnormally dangerous activity. Producers are faced with a dilemma: produce only safe challenges to protect themselves against lawsuits from injured contestants and potentially lose viewership, or safeguard their abnormally dangerous challenges as much as possible and pay out damages to injured contestants.

Because the primary goal of producers is to gain ratings, it seems unlikely they will water down their challenges to ensure that no court would classify the challenges as abnormally dangerous activities. Rather, it is more likely that producers will risk the safety of their contestants and risk the potential for lawsuits should injuries arise.

B. Other Contestants

Since the reality shows discussed here require contestants to live together for the show's duration, contestant screening becomes an important part of ensuring the safety of all contestants.[71] However, because reality shows have much smaller budgets than scripted television, the money available to conduct meticulous inquiries on contestants is usually lacking.[72] Thus, some reality shows find themselves needing to rely on the potential contestants to be truthful.[73]

Reality shows require their potential contestants to pass physical and mental health examinations before being selected.[74] Again, however, the efficacy of the examinations depends entirely on each show's budget.[75] Every contestant is given a "written personality test in mental health," but in-person psychological tests performed by a doctor, which can cost from $450 to $1000 per contestant, only occur when the budget allows.[76] Further, because reality shows typically want to cast people who will increase viewership, the primary focus of the vetting process is to weed out people who have broken the law, not people who appear to be wild, extreme, or

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71. *See* Kaufman, *supra* note 13.

72. *Id.*

73. *Murder Suspect Raises Reality TV Questions*, MSNBC.COM, Aug. 21, 2009, http://today.msnbc.msn.com/id/32505557.

74. *See*, *e.g.*, Eligibility Requirements for CBS' Pirates Project, CBS.COM, http://www.cbs.com/primetime/pirates/documents/CBSs_PIRATES_Casting_App.pdf (last visited Sept. 20, 2010).

75. *See* Kaufman, *supra* note 13 (discussing the "problem" of taking money out of casting budgets to run more thorough background checks).

76. *Id.*

"crazy."[77]

While the types of checks vary among shows, contestants typically must fill out questionnaires about every place they have lived and worked, as well as any other names by which they have been known.[78] The background checks, the costs of which can range from $400 to $1,000 per contestant, are outsourced to firms that investigate the information on the contestants' questionnaires.[79]

Depending on the type of show and the funding available to pay for background checks, there are generally three "levels" of investigation.[80] The first level is a simple search of online public records.[81] Because the online information available varies widely between counties and states, most shows pay for a more thorough check.[82] The more thorough check comes in the form of the second level, where investigators are sent to the courthouses "in locations where the potential cast members have resided."[83] The third level, used by most shows where the contestants are in one location and/or are expected to have physical or sexual contact, involves personally interviewing people who know the contestants.[84]

Despite some shows' attempts to filter out potential contestants who may be dangerous to other contestants, there are numerous examples of both producers' failures to investigate contestants' backgrounds sufficiently and contestants who are not what they appear to be. A recent, high profile example is Ryan Jenkins, a contestant on VH1's *Megan Wants to Marry a Millionaire*.[85] After appearing on the show, Jenkins brutally mutilated and murdered his ex-wife.[86] A few days after the murder, Jenkins committed suicide in a hotel room in Canada.[87] A subsequent search of Jenkins' background turned up a 2007 assault charge in Calgary, which resulted in fifteen months of probation.[88] Producers for the show say they conducted

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Kaufman, *supra* note 13.

82. *Id.*

83. *Id.*

84. *Id.*; *see also* Stephen Battaglio, *TV Contestants Have Colorful Ties to Past*, N.Y. DAILY NEWS, Jan. 31, 2003, at 119 (reporting that a "high percentage" of potential contestants for *The Bachelor* are rejected for having genital herpes).

85. Kaufman, *supra* note 13.

86. *Murder Suspect Raises Reality TV Questions*, *supra* note 73.

87. Kaufman, *supra* note 13.

88. *Murder Suspect Raises Reality TV Questions*, *supra* note 73.

checks on each contestant via an outside firm but offered no explanation why the checks did not turn up the assault charge.[89] Producers also said "they wouldn't have cast [Jenkins] if they'd 'been given a full picture of his background.'"[90]

Another example of a failed background check occurred on Fox's *Who Wants to Marry a Millionaire?*.[91] A financial investigation revealed that millionaire Rick Rockwell's[92] former fiancée had filed a restraining order against him.[93] In her 1991 petition for a protective order, Rockwell's ex-fiancée, Debbie Goyne, alleged that Rockwell hit her, slapped her in the face, and threatened to kill her.[94] Rockwell did not disclose the information to producers, nor did they attempt to investigate. However, a simple public records search would likely have revealed the information.[95] The Rockwell incident highlights that producers should be vigilant in screening their contestants. In hindsight, it seems obvious that a reality show premised on marriage (especially one between two strangers) should have asked potential "millionaires" about all aspects of their relationships, including whether the potential contestant has ever had a domestic violence protective order against him or her.

Justin Sebik, a contestant on CBS's *Big Brother 2*, is another example of someone who should have been screened out as a potential danger to other contestants.[96] Before appearing on *Big Brother 2*, Sebik was arrested in 1996 and later charged with assault and theft.[97] Once on the show, Sebik was routinely intoxicated and was filmed urinating on windows, throwing wine bottles, and physically threatening another contestant.[98] One night while intoxicated, Sebik kissed another contestant, Krista Stegall.[99] Sebik then pulled a knife out of a kitchen drawer, held it to Stegall's throat and asked, "Would you mind if I killed you?"[100] Producers immediately kicked

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89. *Id.*

90. Kaufman, *supra* note 13.

91. Brian Lowry, *"Reality" Television Gets Another Blow; Probe Begun*, L.A. TIMES, Apr. 29, 2000, at A13 [hereinafter Lowry, *Reality Television*].

92. It was also discovered that "Rick Rockwell" was not his real name. *See* IMDB.COM, www.imdb.com/name/nm0734351/ (last visited May 1, 2010).

93. Lowry, *Reality Television*, *supra* note 91.

94. Nadya Labi, *An Online Paper Trail*, TIME, Mar. 6, 2000, at 69.

95. *See id.*

96. Gary Susman, *Cutting-Edge TV*, EW.COM, July 8, 2002, http://www.ew.com/ew/article/0,,312835,00.html.

97. *Id.*

98. *Id.*; BRENTON & COHEN, *supra* note 17, at 129.

99. *Id.*

100. *Id.*

Sebik off the show,[101] however the evidence is conflicting as to whether producers knew of Sebik's criminal record.[102]

Sebik's behavior draws attention to a difficult area for producers: how to handle potential contestants when their background checks "fail to identify what *might* be a propensity for violence."[103] Typically, an employer must exercise a duty of reasonable care in hiring employees.[104] This duty "includes the employer's obligation to conduct a reasonable investigation into the employee's work experience, background, character, and qualifications."[105] Whether an employer is liable for harm done by an employee depends on the totality of the circumstances.[106] The totality of the circumstances test includes whether the type of harm caused to the plaintiff "was reasonably foreseeable as a result of the employment, as, for example, where an employer knew or should have known . . . that its employee has violent tendencies or has destructive or dishonest tendencies."[107] However, "where the record is devoid of evidence that the employee ha[s] any propensity toward violence or that the [employer] knew of that propensity, the employer is not liable."[108]

Noting the examples above, great tension exists between the depth of the background checks reality shows can afford and the responsibility placed on the shows' producers to protect contestants from another potentially dangerous contestant. Because reality shows are less expensive to produce than scripted shows, reality shows are popular among networks and production companies.[109] Requiring reality shows to conduct comprehensive background checks for each of their potential contestants will likely raise shows' production costs.[110] However, producers' use of psychological tactics to promote extreme behavior by even well-adjusted, "normal" contestants[111] suggests pressure should be placed on networks and producers to exhaust all possible resources when investigating potential

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101. *Id.*

102. *Compare* Battaglio, *supra* note 84 (stating that "CBS didn't know about the police record of [Justin Sebik]"), *with* Susman, *supra* note 96 (stating that CBS "acknowledged that it had known of an arrest for robbery").

103. BRENTON & COHEN, *supra* note 17, at 129.

104. AM. JUR. 2D, *supra* note 65, § 393.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Ugolini, *supra* note 70, at 70.

110. *See* Kaufman, *supra* note 13.

111. *See supra* Part III.

contestants. Failure to investigate contestants adequately can—at the least—result in lawsuits alleging negligent hiring.[112]

As of March 2010, while no reality show contestant had experienced death at the hands of another contestant,[113] the possibility still exists given reality shows' inconsistent investigation methods and budgets.[114] Although investigation practices within the industry may improve with the recent Ryan Jenkins case,[115] they may not improve at all until a contestant experiences serious physical harm or death inflicted by another contestant. Still, akin to the abnormally dangerous challenges discussed above, producers may find it more cost-effective to defend against any arising lawsuits, rather than improve their overall investigation processes.[116]

V. POTENTIAL CAUSES OF ACTION

Reality show contestants who believe they have been harmed by their producers may have several potential causes of action. Likewise, producers should be aware of the types of instances in which these claims arise so they can better protect themselves from liability. Potential causes of action include negligence, false imprisonment, intentional and negligent infliction of emotional distress, and the economic torts of fraud and misrepresentation.

A. Negligence

A contestant who suffers an injury resulting from his or her participation in a reality show may assert a claim of negligence. For example, Krista Stegall, discussed in Section IV above,[117] claimed "CBS was negligent in failing to unearth assault charges against fellow housemate Justin Sebik, who was kicked off the program after holding a knife to her throat."[118] As with any negligence claim, a reality show contestant must prove "the defendant owed [the contestant] a duty to use reasonable care to prevent such injury, that the defendant breached that duty, that the breach

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112. *See* AM. JUR. 2D, *supra* note 65, at § 393 (2010) (stating the underlying requirements for a negligent hiring cause of action).

113. Lisa de Moraes, *Reality Show Contestants Willing to Kill in French Experiment*, WASHINGTONPOST.COM, Mar. 18, 2010, http://washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703594.html.

114. *See supra* Part IV.B.

115. *See supra* Part IV.B.

116. *See supra* Part IV.A.

117. *See supra* Part IV B.

118. Brian Lowry, *Be Sure to Read the Fine Print*, L.A. TIMES, Aug. 20, 2002, at F8 [hereinafter Lowry, *Fine Print*].

factually and legally caused a foreseeable injury to [the contestant], and that damages occurred as a result."[119]

B. False Imprisonment

A reality show contestant may also assert a false imprisonment claim. False imprisonment occurs when the defendant "intentionally confines the [contestant] within fixed boundaries if the [contestant] was conscious of the confinement at the time."[120] False imprisonment likely arises in many reality shows, as confining contestants to a home, apartment, or other type of dwelling is commonplace.[121] In such instances, contestants are not normally allowed to leave the production to return home at the end of each day.[122] Indeed, much of reality television programming focuses not on the technical aspects of the show, but rather on the relationships and conflicts that develop between the contestants.[123]

False imprisonment could arise when contestants express their desire to leave the show entirely or simply leave an aspect of the show's production. Because contestants are subject to the continuous control of their shows' producers, they are prohibited from moving about freely, and they must go where the producers direct.[124] Thus, it is possible that each time a contestant expresses his or her desire to leave the location or the show, he or she has a claim for false imprisonment.

C. Intentional and Negligent Infliction of Emotional Distress

A reality show contestant may also have potential claims of intentional or negligent infliction of emotional distress.[125] To prevail on a claim for intentional infliction of emotional distress, a plaintiff must show four elements.[126] First, a contestant must show "extreme and outrageous con-

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119. 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 14:2 (3d ed. 2009).

120. *Id.* § 14:15.

121. *See generally* BRENTON & COHEN, *supra* note 17, at 118.

122. *See generally id.* at 118–19.

123. *See generally id.* at 118 ("[S]hows can't exist without this measure of control over contestants, liberty and privacy [is] curtailed so that all angles of focus and interaction are pointed inwards, as lines criss-crossing a group dynamic.").

124. *See supra* Part II.

125. *See generally* Ugolini, *supra* note 70, at 82–83 (stating that in extreme situations, reality show contestants may have grounds to assert lawsuits claiming they suffered emotional distress as result of being duped or ambushed).

126. SELZ ET AL., *supra* note 119, §14:17.

duct by the [producers]."[127] Second, a contestant must show that the producers either intentionally or recklessly caused the contestant to endure severe emotional distress.[128] Third, the contestant must show that he or she "actually suffered severe emotional distress."[129] Finally, the contestant must show the producer's actions caused the contestant's severe emotional distress.[130] Because it can be difficult to ascertain whether intentional infliction of emotional distress claims are genuine, courts are wary of such claims and they are among the harder claims to prove successfully.[131]

It is unlikely reality show contestants will be able to establish intentional infliction of emotional distress on the parts of the producers. Most contestants will likely fail to establish the first element, which requires contestants to show extreme and outrageous conduct.[132] According to the *Restatement (Second) of Torts*, liability is generally found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[133]

With the exception of reality shows in which producers initially mislead contestants as to the purpose of their show,[134] most contestants know the purpose of the show in which they will be appearing and understand what will be expected of them prior to filming. When producers explain to contestants their shows' premises and the potentially life changing consequences that may result from appearing on the shows, producers' conduct is likely removed from the "extreme and outrageous" realm.[135]

To prevail on a negligent infliction of emotional distress claim, a con-

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. SELZ ET AL., *supra* note 119, § 14:17.

133. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

134. *See infra* Part VI.B.; *see also* Ugolini, *supra* note 70, at 82 (citing CNN.com, *'Joe Schmo' Duped in New Reality Show*, August 29, 2003, *available at* http://www.cnn.com/2003/SHOWBIZ/TV/08/29/television.joe.schmo.reut/) (detailing a Spike TV produced reality show called "Joe Schmo Show" where producers told the contestant he was participating in a show called "Lap of Luxury," but in actuality, the show "'was an elaborate hoax, perpetrated on an unsuspecting 'Joe Schmo' by a cast of actors and a team of producers, who created scripted lines and rigged competitions to test the unwitting star.").

135. *See* BRENTON & COHEN, *supra* note 17, at 139 (discussing the "talk of doom" and in general, producer honesty regarding reality show expectations); *cf.* Ugolini, *supra* note 70, at 82 (discussing how reality TV shows that are premised on contestant surprise may constitute "extreme and outrageous" conduct). S*ee generally* STIRLING MEDIA RESEARCH INST., BROAD STANDARDS COMM'N, CONSENTING ADULTS? 57 (2000) (discussing informed consent at the outset of reality TV show contracts).

testant must show that "the [producer's] conduct in the underlying accident fell below the applicable standard of care; that the [contestant] suffered severe emotional distress; and that the [producer's] conduct was a cause-in-fact of the [contestant's] injury."[136] Like intentional infliction of emotional distress, the producer's conduct must be "sufficiently outrageous and extreme to be considered atrocious and unreasonable in society."[137] Further, the conduct must cause the contestant "to be in unreasonable danger of physical injury or cause fear for his or her safety."[138]

Thus, similar to an intentional infliction of emotional distress claim, it will likely be difficult for contestants to show that producers' conduct was not only extreme and outrageous, but also that it put the contestants in unreasonable danger of physical injury.[139] While it may be easier for contestants in some jurisdictions to establish that they feared for their safety,[140] it is still generally unlikely a court will find producers' conduct extreme and outrageous.[141]

D. Economic Torts: Fraud and Misrepresentation

Finally, a reality show contestant may assert claims based on fraud and misrepresentation. A contestant may have a claim for fraud when a producer "makes a false factual representation, knowing it to be false . . . with an intent to induce the [contestant] to act . . . in reliance on the misrepresentation, upon which the [contestant] justifiably relies, causing damage to the [contestant] resulting from such reliance."[142] While most contestants will not succeed on a fraud claim because producers have informed them at least to some degree of what to expect, contestants appearing in shows where producers have misled them as to the show's purpose may be able to establish fraud on the producers' part.[143] However, even if a contestant can show producer fraud, he or she will likely be unable to litigate the claim

136. 86 C.J.S. *Torts* § 84 (2010).

137. SELZ ET AL., *supra* note 119, § 14:18.

138. *Id.*

139. *See generally id.* (highlighting the difficulty of succeeding on a negligent infliction of emotional distress claim).

140. *See id.* (stating that while traditionally the element of physical harm within a negligent infliction of emotional distress claim was difficult to prove, some states like California and Hawaii, have recently allowed juries to determine whether this element has been satisfied).

141. *See id.* (stating that the threshold for the extreme and outrageous prong of a negligent infliction of emotional distress claim is rather high).

142. *Id.* at § 14:19.

143. *See* Ugolini, *supra* note 70, at 82–84 (discussing the growing trend of lawsuits based on reality TV shows that are premised on contestant surprise).

because of his or her contract with the show.[144]

Thus, reality show contestants may find that they have potential causes of action against reality show producers and networks, including negligence, false imprisonment, intentional and negligent infliction of emotional distress, and the economic torts of fraud and misrepresentation. While contestants might feel producers are liable to them for their emotional, physical, and economic harms, many will find their potential claims thwarted by the contracts they entered into with producers and networks.[145]

VI. CONTESTANT CONTRACTS

As the popularity of reality television programming remains unabated, contestants' contracts have become longer and more complicated.[146] As Nigel Lythgoe, one of *American Idol*'s executive producers stated, "Whenever you do a contract, you have to try to anticipate every angle, because you can't tell what's going to happen."[147] Other industry representatives have said that the willingness of contestants to "risk humiliation or even death" makes their contracts longer and more complicated to "err on the side of caution legally."[148] While reality show producers want to protect themselves from potential litigation, it is questionable whether producers make sure contestants fully understand the implications of not only the contracts they sign, but also the consequences of appearing as reality show contestants.[149]

A. Informed Consent

The basic requirement of reality show contracts is informed consent.[150] Informed consent is established when a consenting party gives his or her "permission, based on knowledge of facts and information."[151] In terms of agreeing to appear on reality shows, "'informed consent' . . . permits one to ask what it is that participants assent to when they agree to appear on a particular program[], and whether program[]-makers provide po-

144. *See infra* Part VI.B.

145. *See infra* Part VI.B.

146. Lowry, *Fine Print*, *supra* note 118.

147. *Id.*

148. *Id.*

149. *See* BRENTON & COHEN, *supra* note 17, at 139–40 (discussing the discrepancy between what a producer's "talk of doom" entails and what the contestant understood, especially in regards to the "context in which their words and actions will be situated").

150. *See id.* at 137–38; *see also* STIRLING MEDIA RESEARCH INST., *supra* note 135, at 11.

151. STIRLING MEDIA RESEARCH INST., *supra* note 135, at 11.

tential and actual participants with the information required for them to give meaningful consent."[152] Thus, reality show producers must gain each potential contestant's informed consent, which they generally attain through standard contractual agreements.[153]

These contracts, however, hamper producers' ability to get contestants' informed consent. For example, in 2002, some reality television show contracts were at least fifty pages long.[154] Further, the contracts are largely boilerplate and typically rife with legal jargon instead of plain language.[155] Even so, the language in some these contracts are exaggerated: one of the clauses for CBS's *Survivor* gives CBS the right to the contestants' life stories "in perpetuity and throughout the universe."[156] The "life story" clause is in a sentence that has over 150 words.[157] Assuming contestants have fully read and understood these lengthy contracts, it is nevertheless difficult for producers to obtain contestants' informed consent, since doing so may require disclosure of show details. Because so many reality shows center around contestants' reactions to various planned twists and challenges,[158] informing contestants of everything they will encounter would likely ruin the much-needed reactions. Indeed, some reality shows rely upon the premise that "the participant does not know what is going to happen to [him or her]."[159] Consent issues are further complicated when award money is involved; it is possible most contestants may focus more on the money and less on what they will have to endure to even get a chance at winning the prize.[160] For the foregoing reasons, even under the very best circumstances, one must question whether a reality show contestant's consent is truly informed.

As a common defense to accusations of producer misconduct and contestant disillusionment, producers remind contestants that the contestants freely choose to participate on reality shows.[161] An attorney whose firm represented CBS in a lawsuit by a former *Survivor* contestant explained, "When people do participate, they're told very clearly what rights

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152. *Id.*

153. BRENTON & COHEN, *supra* note 17, at 138.

154. Lowry, *Fine Print*, *supra* note 118.

155. BRENTON & COHEN, *supra* note 17, at 138.

156. SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION 45 (Matthew J. Smith & Andrew F. Wood eds., 2003).

157. *Id.*

158. *See* BENTON & COHEN, *supra* note 17 at 54.

159. *Id.*, at 141.

160. *Id.*

161. Lowry, *Fine Print*, *supra* note 118.

they're giving up in exchange for the opportunity to be seen."[162] However, there is evidence to contradict that statement. One contestant on *Big Brother UK* explained how "the pace of the selection process and the garnering of consent can bewilder the participant, making them feel powerless, distant from awareness that they control one side of the decision."[163] In this contestant's experience, after the first round, the selection process "bec[ame] swift, sudden [and] dizzying": consent must be given quickly and contestants only have a week "to prepare, . . . leave [their] job[s], and say [their] farewells."[164] Shortly before that season of *Big Brother UK*, the producers gave the contestants a speech pejoratively dubbed the "[t]alk of [d]oom."[165] The stated purpose of the speech gave contestants last minute information about what to expect during and after the show, and reiterated to the contestants that they were about to embark on a life-changing experience.[166] The overall effect was to excite the contestants about their participation while technically fulfilling the producers' responsibility to inform.[167]

B. Litigation

Reality show contracts also hamper contestants in their litigation efforts. Entertainment attorney Jonathan Anschell puts it succinctly: "No contract can prevent someone from suing. It can prevent them from winning."[168] Thus, even if contestants have a legitimate claim, they are often stymied by the contracts they signed under the rush of becoming a contestant.[169]

For example, in January 2010, Malena Brush unsuccessfully attempted to challenge a mandatory arbitration provision in her contract with E! Entertainment Television (E!).[170] E! contacted Brush, asking if she would like to audition for a reality show about the making of a girl pop group.[171] E! informed Brush that, if "hired," she would receive a salary of $1,500 weekly while the show filmed.[172] Brush attended three auditions

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162. *Id.*

163. BRENTON & COHEN, *supra* note 17, at 138.

164. *Id.*

165. *Id.* at 139.

166. *Id.*

167. *Id.*

168. Lowry, *Fine Print*, *supra* note 118.

169. *See* BRENTON & COHEN, *supra* note 17, at 139–40.

170. *'Reality Hell' Star Fights To Keep Case In Court*, 22 ANDREWS ENT. INDUS. LITIG. REP. 4 (2010) [hereinafter *Reality Hell*].

171. *Id.*

172. *Id.*

and was instructed by E! to perform "humiliating activities" at her home as part of the program.[173] The day after the filming at her home, E! sent Brush a limousine to take her to the studio.[174]

When Brush arrived at the studio, network employees confiscated her cell phone.[175] Then they introduced Brush to other people, introducing them as other "'girl band' participants" or "recording studio personalities."[176] In actuality, the other people present were actors who E! paid to "harass, embarrass, heckle, insult, and offend" Brush for the next eight hours.[177] Because the studio had not only picked her up but had also taken her cell phone, Brush could not leave the studio or call anyone for help.[178] In her complaint, Brush alleged the employees demanded she videotape an interview, wherein she was forced to say certain statements before they allowed her to leave.[179] After the incidents, Brush discovered that everything had been taped for an episode of an E! show, *Reality Hell*.[180]

Brush filed a lawsuit stating numerous causes of action against E!, including fraud, conspiracy, and false imprisonment.[181] E! pointed out that Brush's contract contained a mandatory arbitration provision and claimed she was "trying to 'avoid the legal implications' of her contract" by filing a lawsuit against E!.[182] The judge agreed with E! and ruled that Brush honor her contractual obligations.[183]

Although Brush was not technically precluded from having her claims heard, query whether she should have to abide by a contract that was, at its core, based on the fraudulent misrepresentations of E!. Recall that the definition of informed consent requires the contestant know exactly to whom and for what purpose she is consenting.[184] Brush thought she was consenting to appear on a reality show about a girl pop group.[185] She did

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173. *Id.*
174. *Id.*
175. *Id.*
176. *Reality Hell*, *supra* note 170.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id*
181. *Id.*
182. *Reality Hell*, *supra* note 170.
183. *Id.*
184. *See supra* Part VI.A.
185. *Reality Hell*, *supra* note 170 (discussing E!'s contact with Brush regarding only a casting opportunity for a "new girl group show" which would be similar to MTV's *Making the Band*).

not think she was consenting to be mocked, humiliated, and held hostage.[186] Therefore, given the apparent lack of Brush's informed consent, the court should have found that the contract Brush signed was unenforceable due to E!'s fraudulent misrepresentations, and allowed her to adjudicate her claims.

Other reality show contestants have also brought lawsuits involving their portrayal on their respective shows. Taheed Watson and Ytossie Patterson, two contestants on Fox's *Temptation Island*, filed a defamation suit against Fox in 2001.[187] Fox removed both contestants from the show, claiming the couple did not disclose that they had a child together.[188] Watson and Patterson contended they told producers about their child early in the interview process.[189] Producers for the show told them the disclosure of their child was "the wrong answer," and then coached them not to discuss the child.[190] To support the claim, Patterson said the producers provided her with a phone twice daily to call their child.[191] After being removed from the show, both contestants claimed they received "threats, profanity, epithets, and expressions of moral indignation" from *Temptation Island* fans.[192] Watson and Patterson admitted they participated on the show to help further their acting and modeling careers, but they received little to no work after Fox removed them from the show.[193] Watson and Patterson eventually settled with Fox out of court.[194]

Assuming Watson's and Patterson's claims are true, they highlight another area where producer misrepresentation calls into question the enforceability of reality show contracts. As mentioned above, producers may find themselves needing to rely on contestants alone to be honest about their backgrounds.[195] However, what happens when contestants are honest about their backgrounds, but their honesty is not what producers want to hear? Watson alleged that Fox "needed a 'good-looking black couple' at

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186. *Id.*

187. Brian Lowry, *'Temptation' Parents Defend Suit Against Fox*, L.A. TIMES, Apr. 5, 2001, at D6 [hereinafter Lowry, *Temptation*].

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Lowry, *Temptation*, *supra* note 187.

194. E-mail from Taheed Watson to Jennifer Blair-Smith (May 6, 2010, 14:28 EST) (on file with author) (referring to the contract signed with Fox as an "iron clad" contract that required mediation in the event of a legal issue).

195. *Murder Suspect Raises Reality TV Questions*, *supra* note 73.

the last minute."[196] If Fox indeed needed a couple such as Watson and Patterson, producers may have been inclined to overlook their child, coach them to not mention the child, and assure them they would be able to communicate with the child if they agreed to appear on the show.[197] If producers promise a material part of a reality show contract is waivable in return for contestants' signatures on the contract,[198] producers should not be able to later claim that the contestants' alleged "violation" of the contract is grounds to terminate their employment.

In some cases, reality show contestants may know very little about the contents of the contracts they sign given their length, the use of boilerplate and legal jargon, and the relatively short time contestants have to review the contracts.[199] Producers may coerce contestants into signing the contracts by draping the legal implications in exaltations of fame and money.[200]

Though not every contestant on a reality show leaves with a sense of wrongdoing on the part of producers, contestants who feel as though producers have committed misconduct toward them run into countless obstacles stemming from their signed contracts.[201] While much of the litigation until now has concerned contestants' dissatisfaction with their portrayals, one must question for how long and for what types of behavior courts will allow producers' reliance on contestants' contracts to obstruct lawsuits.

VII. CONCLUSION

Reality show contestants must be granted greater protection than they currently have. If courts find that reality show contestants are employees of production companies, then the producers of those companies owe their contestants several duties.

First, producers must recognize that some of their tactics to garner ratings may come at the expense of their contestants' mental health and well-being. While producers should not necessarily be required to abstain com-

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196. Lowry, *Temptation*, *supra* note 187.

197. *Id.*

198. Lowry, *Temptation*, *supra* note 187 (stating that parties shall not bring an innocent third party "into the mix").

199. *See generally* BRENTON & COHEN, *supra* note 17 (stating the importance of using plain English rather than difficult to understand legal jargon within consent forms); *see supra* Part IV.

200. *See generally* BRENTON & COHEN, *supra* note 17 (indicating the focus on prize money).

201. *See supra* Part VI.B.

pletely from many of their mental tactics, they should realize the severity of the harm they may cause and offer contestants after-show counseling to help the contestants cope with their reality show experiences. Indeed, a minority of shows already offer their contestants such after-show counseling.[202]

Second, producers should consider the safety of contestants while on the show, namely by ensuring they conduct thorough background checks of all individuals appearing on their shows. Although conducting thorough background checks will likely raise reality show production costs, producers may find the costs worthwhile considering some of the unstable, untruthful, and sometimes extremely dangerous contestants who have appeared on reality shows.

Finally, if contestants bring lawsuits challenging the practices of production companies, courts should not be so quick to hold that contestants must abide by the contracts' language. Instead, courts should closely examine the circumstances underlying contracts' signing to determine whether contestants gave informed consent, which includes examining whether contestants were actually told the complete truth about a show's premise and their roles on the show. Moreover, courts should not allow producers to engage in fraud or misrepresentation when dealing with contestants while hiding behind their contracts when contestants try to bring lawsuits based on producers' actions.

While Savija's suicide may be an outlier in the sphere of reality television, the evidence laid out in this article indicates that the reality show production process can pose real threats to the mental health and physical safety of its contestants. Producers need to recognize these potential threats and take affirmative steps to ensure not only that contestants understand the effects the shows may have on their health and safety, but also to ensure they are protected in as many ways as possible. Without improving or implementing additional safeguards, many contestants will find that the ultimate challenge is surviving their reality television experience.

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202. Benedictus, *supra* note 1.