KENNETH B. PRINDLE*
MICHAEL L. AMARO
ANDY J. GOETZ
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JACK R. REINHOLTZ
JACK C. NICK
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CATHY MULLER DIEHL

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ARPI GALFAYAN
BRUCE L. DAVIS
DANA M. HEYDE
CYNTHIA A. PALIN
ROBERT R. WILLIS
DANIELLE P. OCHI
MICHELLE C. GOLDEN

LAW OFFICES OF

PRINDLE, AMARO, GOETZ, HILLYARD, BARNES & REINHOLTZ LLP

310 GOLDEN SHORE, FOURTH FLOOR
LONG BEACH, CALIFORNIA 90802
TELEPHONE: 562.436.3946
FAX: 562.495.0564
PRINDLELAW.COM

OF COUNSEL
STEPHEN C. KLAUSEN
ROBERT H. BARONIAN
MATTHEW J. ESCHENBURG
ALFRED G. LUCKY, JR.
MARK B. PEPYS
DAVID M. HILLINGS
MICHAEL D. VALENTINE
GARY H. ANDERSON
CELESTE M. SCOTT
JENNIFER D. HOLT
JANE S. BLUMBERG
E. JANE WELLS
KIMBERLY A. ALLEN
CORY M. MARTIN

† ALSO ADMITTED IN HAWAII
‡ ALSO ADMITTED IN HAWAII AND WASHINGTON
* ALSO ADMITTED IN COLORADO
** ALSO ADMITTED IN MASSACHUSETTS

GARY E. YARDUMIAN
(1961-2007)

J. LAWRENCE JUDY
(1945-2006)

PRE-EVENT WAIVERS AND RELEASES A COMPARATIVE REVIEW OF CURRENT STATE LAWS

A Comparative Review of Current State Laws

BY: MICHAEL L. AMARO

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LAW OFFICES OF
PRINDLE, AMARO, GOETZ,
HILLYARD, BARNES & REINHOLTZ LLP

Legal Aspects of Waivers in Sport, Recreation and Fitness Activities

ALABAMA

1. Are releases enforceable? Yes.

2. Are there any statutes that reflect enforcement of a release? No.

3. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

4. Relevant Cases: *Carnival Cruise Lines, Inc. v. Goodin, 535 So. 2d 98 (1988)*

Facts - Plaintiff had cerebral palsy and was confined to a wheelchair. When making cruise plans, the travel agent assured Plaintiff that the bathroom and shower facilities would be accessible to him by wheelchair. Plaintiff signed a form acknowledging that certain restrooms could not accommodate a wheelchair and another releasing the cruise line from liability. After the ship left port, Plaintiff discovered that no bathrooms on the ship were accessible by wheelchair.

Rationale - An unambiguous release, supported by valuable consideration, will be given effect according to the intention of the parties as adjudged by the Court from what appears on the fact of the document; parol evidence is inadmissible to impeach it. However, it is well-established that parol of other extrinsic evidence is admissible to explain or clarify a latent ambiguity. Once an ambiguity in a release arises, the determination of its true meaning rests with the finder of fact.

Holding - The release was ambiguous in its provision that certain bathrooms would not accommodate a wheelchair. There is no error in submitting the issue to the jury, nor in refusing to construe "certain bathrooms" as meaning all bathrooms.

Rommell v. Automobile Racing Club, Inc., 964 F.2d 1090 (1992)

Facts - Plaintiff was injured while working in a pit crew during an auto race. He signed several releases prior to the accident, but asserted that he did not understand the effect of the releases. He brought claims for negligence and wanton conduct.

Rationale - An affidavit denying that one understood the releases which he signed is insufficient to avoid the binding effect of those written documents. Pre-race releases are valid and not void against public policy. Since participation in automobile races is a voluntary undertaking of a hazardous activity, releases from liability, when voluntarily entered into, should be enforced.

Holding - The releases barred Plaintiff's negligence claims, and he failed to meet his burden in proving the wanton conduct.

Dudley v. Bass Anglers Sportsman Soc'y, 777 So. 2d 135 (2000)

Facts - Plaintiff fisherman sued Defendant fishing organization and its director, alleging that Defendants were negligent in handling the investigation of accusations that Plaintiff cheated in a fishing tournament. Plaintiff signed an entry form that contained a release.

Rationale - A contract that is voluntarily entered into in order to compete in a fishing tournament is not an adhesion contract because it is not a consumer contract and the major obligation under that contract is not to pay money (although one may be required to pay an entry fee for the tournament), but instead consists of participating in the tournament and obeying tournament rules while doing so.

Holding - Based on the release, summary judgment was granted to the Defendants.

ALASKA

5. Are releases enforceable? Yes.

6. Are there any statutes that reflect enforcement of a release? *Alaska Statute Title 5, Chapter 45 Section 120* Ski Liability, Safety, and Responsibility: Use of Liability Releases Alaska Statute §09.65.292 Parental Waiver of Claim Against Provider of Sports or Recreational Activity

7. Can a parent execute a release for a minor? Yes.

   Alaska Stat. §09.65.292 provides that a parent may release or waive the child's prospective claim for negligence against a provider of a sports or recreational activity.

8. Relevant Cases: *Kissick v. Schmierer, 816 P.2d 188 (1991)*

Facts - After three passengers signed a covenant not to sue prior to flying, the passengers and the pilot were killed in an airplane crash. The agreement provided that flight passengers could not sue for "any loss, damage, or injury to their person . . . property which may occur from any cause whatsoever." The passengers' widows filed wrongful death claims against the pilot's estate.

Rationale - Exculpatory agreements are strictly construed against the party seeking immunity from suit. To be effective, an agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor of the effect of signing the agreement.

Holding - Because there was an ambiguity as to whether "injury" included death, the decedents' agreement not to sue did not bar their widow's wrongful death claim.

Moore v. Hartley Motors, Inc., 36 P.3d 628 (2001)

Facts - The injured party was injured when she drove her ATV over a rock and the vehicle rolled over. Before participating in the class, the injured party signed a release of liability, which purported to absolve the Defendants from "any and all liability, loss, damage claim or cause of action, known or unknown, including but not limited to all bodily injuries and property damage arising out of the participation in the ATV Riding Course."

Rationale - The release purported to waive liability only for the inherent risks of ATV riding. The release did not suggest an intent to release the Defendants from liability for acts of negligence unrelated to those inherent risks. Underlying the ATV course release signed by the participant was an implied and reasonable presumption that the course is not unreasonably dangerous.

Holding - The injured rider's allegation that the course was improperly laid out was actionable to the extent that she claimed the course was unreasonably dangerous because it posed risks beyond the ordinary risks of off-road ATV riding assumed by the release.

Legends, Inc. v. Kerr, 91 P.3d 960 (2004)

Facts - Plaintiff was injured at the Alaska Rock Gym when she dropped from a climbing wall onto a padded surface formed by several mats whose seams were overlaid by tape. The tape where she landed was weak or split and her foot penetrated into the seam, causing her to suffer a displaced, comminuted fracture of her right knee. Plaintiff sued the owner of the Gym, contending they had actual knowledge of the condition of the tape and had negligently failed to maintain the premises in a reasonably safe condition.

Rationale - The use of the words "negligence" along in the Gym's release does not definitively establish the scope of this release. Read as a whole, the release does not conspicuously and unequivocally alert climbers that they are giving up claims against the Gym beyond those associated with the inherent risk of bouldering or that they are giving up any claims that the Gym failed to meet the standards of maintenance and safety that the Gym specifically indicates in the release that it will strive to achieve and upon which the release may have been predicated. Any ambiguity in this regard must be construed against the Gym as the drafter of the pre-recreational exculpatory contract seeking to avoid liability for negligence.

Holding - Because such a claim is not conspicuously and unequivocally precluded by the document read as a whole, Plaintiff is not barred by the release from bringing her claim and the Gym is not entitled to summary judgment on the issue of liability.

ARIZONA

9. Are releases enforceable? Jury question per statute and case law

10. Are there any statutes that reflect enforcement of a release?

    Ariz. Const. art. XVIII, §§ 5
    "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

    A.R.S. Section 5-706
    Skiing; Release of liability

    A.R.S. Section 12-556
    Limited liability; closed-course motor sport facility owners; lessors and operators; definitions

    A.R.S. Section 12-553
    Limited liability of equine owners and owners of equine facilities; exceptions; definitions

11. Can a parent execute a release for a minor? Possibly.

    Ariz. Rev. Statute §12-553 A.2 (2006) allows for a parent to execute a release in the context on equine activities. An equine owner is not liable for an injury if the parent or legal guardian of the minor has signed a release before taking control of the equine.

12. Relevant Cases: *Maurer v. Cerkvenik-Anderson Travel, Inc., 165 Ariz.Adv.Rep.51 (1994)*

Facts - The client purchased a student tour from the travel agency and agents. During a train ride, the client fell to her death while attempting to change train cars. The Defendants were aware of other deaths on the trains prior to booking the client's tour, but the client received no warning. The parents of the client argued that the travel agency and the agents were negligent. Her itinerary contained a paragraph expressly entitled "Waiver of Liability." Molly also received an invoice form that contained a "Waiver of Liability" provision, along with a certification that the customer had read the waiver of liability and acknowledged by her payment for the trip that she had read the information, agreed to it and understood all its terms and conditions.

Rationale - Attempts to release oneself from liability by contract for harm caused by one's own negligence are not looked upon with favor. This would tend to encourage carelessness. While an agent may be discharged from liability by an affective release, such agent has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.

Holding - The travel agency and the agents were aware of other deaths on the trains prior to booking the clients tour, but the client received no warning.

Benjamin v. Gear Roller Hockey Equip. Inc., 198 Ariz. 462 (2000)

Facts - Plaintiff lawyer was an experienced roller blader who was aware of the normal risks of roller hockey and who testified he understood the meaning of negligence. Plaintiff was injured during a roller hockey game.

Rationale - Absent any public policy to the contrary, Arizona allows parties to agree in advance that one party shall not be liable to the other for negligence. Defendant absolved itself from its own negligence through the liability waiver and release by clearly and explicitly stating in the agreement its intent to absolve itself from its own negligence. When there was no explicit release of liability for a Defendant's own negligence, the release had to be construed strictly as inapplicable to claims based on that negligence. A specific listing of every one of the possible causes of an accident was not required for a release to be effective. It was enough if the signing party understood the types of risks covered by the release.

Holding - The release was a valid release of claims based on Gear's alleged negligence.

Phelps v. Firebird Raceway, Inc., 210 Ariz. 403 (2005)

Facts - The driver lost control of his vehicle and crashed into a wall. He filed an action against the raceway, claiming that its employees were negligent in failing to rescue him more quickly from the burning vehicle and in failing to provide adequate emergency medical care. In a motion for summary judgment, Firebird asserted that because the Release and Waiver signed by the driver were express contractual assumptions of risk, *Ariz. Const. art. XVIII, §§ 5* did not apply.

Rationale - The Waiver was labeled "Assumption of Risk," and explicitly stated, "I voluntarily elect to accept the risks connected with my entry into the restricted area and with racing." Arizona case law and legal scholars have long viewed such contracts as a form of assumption of risk. However, *Ariz. Const. art. XVIII, §§ 5* unambiguously requires that the defense of assumption of risk be a question of fact for the jury "in all cases whatsoever" and "at all times." The Defendant's argument that summary judgment as to the enforcement of contractual waivers of liability is proper because that Court has previously affirmed such judgments are rejected by the Court. Other appellate cases including *Maurer, Sirek*, and *Benjamin*, did not address the applicability of *Article 18, Section 5*. Other opinions (*Bothell* and *Morganteen*) have considered contractual waivers but have expressly declined to consider whether it applied.

Holding - A jury must decide if the affirmative defense of assumption of risk, whether express or implied, precludes a Plaintiff from recovering damages resulting from any negligence on the part of a Defendant. The Plaintiff's constitutional argument cannot fail simply because prior litigants did not assert their constitutional rights or because our Courts did not address them.

Valley National Bank v. National Ass'n for Stockcar Auto Racing, Inc., 736 P.2d 1186 (1987)
Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291 (1990)
Morganteen v. Cowboy Adventures, Inc., 190 Ariz. 463 (1997)
Lindsey v. Cave Creek Outfitters, L.L.C., 207 Ariz. 487 (2003)

ARKANSAS

13. Are releases enforceable? Yes.

14. Are there any statutes that reflect enforcement of a release? No.

15. Can a parent execute a release for a minor? No. *Williams v. United States, 660 F.Supp.699 (1987)*

16. Relevant Cases: *Williams v. United States, 600 F.Supp.699 (1987)*

Facts - The father of a decedent brought a negligence and wrongful death action against the government following the drowning death of his son at an Air Force summer camp. The father had signed a release form consenting to treatment in case of injury and releasing the United States Air Force of any and all responsibility and/or liability for injury or death that might occur.

Rationale - Contracts exempting a party from liability for negligence are strictly construed and must be sufficiently clear and definite to express an intent to release one of the parties from liability for negligence. Exculpatory contracts are not void *per se* and may be valid in appropriate circumstances. However, the agreements will not be enforced if they violate any rule of public policy. As such, agreements purporting to release a party from liability for his own negligence before it occurs have not been upheld based upon the strong public policy of encouraging the exercise of care and protecting the persons from the effects of agreements which are rarely considered by the signor.

Holding - The language was insufficient to apprize an unsuspecting parent of the conduct for which the government is seeking to eliminate liability. Even if the language of the release was sufficiently clear to absolve the government of liability for its negligent conduct, it should clearly be against the sound public policy of Arkansas to permit the Government to assume the care and custody of school children without an underlying policy encouraging the exercise of reasonable care.

Plant v. Wilbur, 345 Ark. 487 (2001)

Facts - A pit crew member sued owners and operators of an automobile speedway, alleging that injuries he received during a race resulted from their negligence. Plaintiff claimed that the release was void as against public policy.

Rationale - This Court has never before been presented with a situation where a release was executed in the context of a dangerous recreational activity. The release was required of anyone who wanted to enter the pit area and was of a type commonly used by racetracks

because of the dangerous activities that took place in these areas. The pit crew worker was a regular participant in auto races, had signed the same release form on at least 12 prior occasions, made no allegations that he was forced to sign the release, was familiar with the pit area and its proximity to the racetrack, was familiar with the dangers inherent in the sport of auto racing, and with this knowledge, continued to voluntarily participate in this activity.

Holding - The release was not overly vague and, in consideration of the evidence is valid.

Rick's Pro dive 'N Ski Shop, Inc. v. Jennings-Lemmon, 803 S.W.2d 934 (1991)
Finagin v. Ark. Dev. Fin. Auth., 355 Ark. 440(2003)
Bryan v. City of Cotter, 2009 LEXIS 616 (2009)

CALIFORNIA

17. Are releases enforceable? Yes.

18. Are there any statutes that reflect enforcement of a release?

    Cal. Civ. Code § 1668
    All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law.

19. Can a parent execute a release for a minor? Yes.

    Plazter v. Mammoth Mountain Ski Area, 104 Cal.App.4th 1253 (2002)
    Aaris v. Las Virgenes Unified School Dist., 64 Cal.App.4th 1112 (1998)
    Hohe v. San Diego School Dist., 224 Cal.App.3d 1559 (1990)
    Doyle v. Giulicci, 43 Cal.Rptr. 697 (1965)

20. Relevant Cases: *Benedek v. PLC Santa Monica, 104 Cal.App.4th 1351 (2002)*

Facts - Health club member sued health club for personal injuries while on the club's premises, but was not using the club's exercise equipment. The member signed a waiver of liability as part of a membership agreement at the club. The waiver released the club from liability for all personal injuries sustained by a member on the premises whether using exercise equipment or not.

Rationale - A written release may exculpate a tortfeasor from future negligence or misconduct. To be effective, the release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. The release need not achieve perfection. Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. In determining the purpose for which the release was signed, an appellate Court looks at the language of the release and the agreement in which it is included, and not the inherent risks of the underlying recreational or sports activity. The relevant injury in a health club membership release context is not whether the injury was reasonably related

to the purpose of using fitness equipment, but whether it was reasonably related to the release signed.

Holding - Given its unambiguous broad language, the release reached all personal injuries suffered by Plaintiff on Defendant's premises. The purpose of the release included access to and entry on the facilities; the injury suffered was, therefore, reasonably related to the purpose of the release.

Sanchez v. Bally's Total Fitness Corp., 68 Cal.App.4th 62 (1998)

Facts - Plaintiff contends that because the release and assumption of the risk clause does not specifically state that she is releasing Bally's from its "negligent" conduct, the provision is invalid as a matter of law.

Rationale - The inclusion of the term "negligence" is simply not required to validate an exculpatory clause. Whether the exculpatory clause bars recovery against a negligent party is controlled by the intent of the parties as expressed in the written agreement. Plaintiff's injury was reasonably within the contemplation of the parties. She admitted to reading and understanding the contract, and understood that she was signing a contract. Furthermore, a waiver of liability in a health or fitness club membership agreement necessarily releases the health club from liability for its negligence, since there is no other liability to release.

Holding - The release and assumption of the risk provision was explicit and comprehensible when read as a part of the whole agreement and barred Plaintiff's claim.

Tunkl v. Regents of University of California, 383 P.2d 441 (1963)
Bennett v, United States Cycling Federation, 239 Cal.Rptr.55 (1987)
Paralift, Inc., v. The Superior Court of San Diego County, 23 Cal.App.4th 748 (1993)
Allaback v. Santa Clara County Fair Association, Inc., 46 Cal.App.4th 1007 (1996)
Allan v. Snow Summit, Inc., 1996 Cal.App. 4th 1358 (1996)
Ramage v. Forbes Int'l, 1997 U.S. Dist. LEXIS 18940 (1997)
YMCA of Metropolitan Los Angeles v. Superior Court, 55 Cal.App.4th 22 (1997)
Royal Ins. Co. of Am. v. Southwest Marine, 194 F.3d 1009 (1999)
Jorst v. Bros., 2001 U.S. Dist. LEXIS 12824 (2001)
Sweat v. Big Time Auto Racing, 117 Cal.App.4th 1301 (2004)
City of Santa Barbara Superior Court, 41 Cal.4th 747 (2007)

COLORADO

21. Are releases enforceable? Yes.

22. Are there any statutes that reflect enforcement of a release?

Colo. Rev. Stat. § 33-44-101 to 114
"Ski Safety Act"

Colo. Rev. Stat. § 13-21-119
Equine and Llama activities

Col. Rev. Statute §13-22-107
Waiver of Parent for Prospective Negligence Claims

23. Can a parent execute a release for a minor? Yes.

Col. Rev. Statute §13-22-107 - A parent of a child may, on behalf of the child, release or waive the child's prospective claim for ordinary negligence.

Pollock v. Highlands Ranch Community Association, 140 P.3d 351 (2006)

24. Relevant Cases: B*rooks v. Timberline Tours, 941 F.Supp.959 (2001)*

Facts - Plaintiff mother was injured, and minor son was killed, in a snowmobile accident while on a guided snowmobile tour. A release was signed by the parents on behalf of their son.

Rationale - Exculpatory agreements have long been disfavored. In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: 1) the existence of a duty of the public; 2) the nature of the service performed; 3) whether the contract was fairly entered into; and 4) whether the intention of the parties is expressed in clear and unambiguous language. A duty to the public contemplates a party engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. By definition and common sense, snowmobiling is neither a matter of great public importance nor a matter of practical necessity. Furthermore, the relevant inquiry is whether the "intent of the parties was to extinguish liability and whether this intent was clearly and unambiguously expressed." The release provisions of the Agreements were written in simple, clear terms, and are not inordinately long or complicated

Holding - The release is valid.

Mincin v. Vail Holdings, 308 F. 3d 1105 (2002)

Facts - Plaintiff purchased a gondola lift ticket and a bike rental coupon and was presented with a bicycle rental agreement which contained exculpatory language, which he signed. Plaintiff diverted from the trail and ran into an unmarked ditch, which was concealed by high grass. He suffered serious injuries, including paraplegia.

Rationale - Under Colorado law, a contact modification generally requires additional consideration. However, an exculpatory agreement signed after a fee to participate in a recreational activity has been paid is part of the same transaction and is therefore enforceable without additional consideration other than permission to participate in the activity. Furthermore, the public interest in mountain biking is minimal, and the provision of trails and bicycles does not involve a duty to the public. The service provided is not a public necessity,

and nothing indicates that the agreement was entered into unfairly. The agreement is clear and unambiguous.

Holding - The exculpatory agreement is enforceable as a matter of law.

Chadwick v. Colt Ross Outfitters, Inc., 100 P.3d 465 (2004)

Facts - Plaintiff contracted for and participated in an elk hunt organized by the Outfitter. While hunting without immediate supervision, the saddle began to slide and the mule bucked, throwing him down a hill and causing several fractures to his neck.

Rationale - The release agreement in this case is so unambiguously broad that, on its face, it includes a release from even wilful and wanton negligence. Enforcing a release from wilful negligence would clearly not be consistent with public policy; however, rather than rendering the entire agreement void, similarly broad language has, in the past, been construed to extend only as far as would be consistent with public policy. Additionally, the contract does not fail for other policy reasons. There was no indication that the contract was unfairly entered into. Plaintiff admitted in his deposition that he read the contract and understood that he was executing a release of liability when he signed it. Moreover, the Outfitter had no duty to the public that would be violated by the release agreement. Defendant provides a recreational service, neither publicly regulated nor a great public importance, and therefore the contract does not fall within the category or agreements effecting the public interest.

Holding - Because it was unambiguous and not violative of public policy, the release was not enforced.

Lahey v. Covington, 964 F.Supp.1440 (1996)
B&B Livery, Inc. v. Riehl, 960 P.2d 134 (1998)
Rowan v. Vail Holdings, Inc., 31 F.Supp.2d 889 (1998)
Sapone v. Grand Targhee, 308 F.3d 1096 (2002)

CONNECTICUT

25. Are releases enforceable? No.

Waivers are void against public policy
Hanks v. Powder Ridge Restaurant Corp., 276 Conn.314 (2005)

26. Are there any statutes that reflect enforcement of a release?

Conn. Gen. Stat. §§ 52-557p
Assumption of risk by person engaged in recreational equestrian activities

C.G.S.A. §§ 52-572h(n)
Negligence actions

27. Can a parent execute a release for a minor? Yes, but only barred on unreported cases.

Fisher v. Rivest, 2002 Conn. Super. LEXIS 2778 (2002) (unreported case)
Saccente v. Laflamme, 2002 Conn. Super. LEXIS 3630 (2002) (unreported case)

28. Relevant Cases: *Hanks v. Powder Ridge Restaurant Corp., 276 Conn.314*

Facts –Plaintiff brought his three children and another child to Powder Ridge to snow tube. Neither Plaintiff nor the four children had ever snow-tubed at the facility prior to that time, but the snow-tubing was open to the public regardless of prior snow-tubing experience. The only restriction on the public use was that only persons six years of age or older or forty-four inches tall were required to participate. To snow-tube at Powder Ridge, patrons were required to sign a "Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability." Plaintiff read and signed the agreement on behalf of himself and the four children. While snow-tubing, Plaintiff's foot became caught between his snow tube and the man-made bank of the snow-tubing run, resulting in serious injuries that required multiple surgeries to repair.

Rationale – Powder Ridge's agreement expressly and unambiguously purported to release the facility operators from prospective liability for negligence. However, the agreement violated public policy because the operators invited the public generally to snow-tube at their facility regardless of ability, snowtubers were under the care and control of the operators as a result of the economic transaction, the agreement was a standardized adhesion contract offered to snow-tubers on a "take it or leave it" basis, and without the opportunity to purchase protection against negligence at an additional, reasonable fee, and the operators had superior bargaining authority.

Holding – Snow-tubing patrons cannot be made to sign a waiver that absolves the facility of all liability because such waivers violate public policy.

Hyson v. White Water Mt. Resorts of Conn., 256 Conn. 636 (2003)

Facts - The Plaintiff was injured during an accident that occurred while snow tubing at a resort, and claimed that negligence was the cause. Prior to using the facilities, the Plaintiff signed a release of liability, which did not specifically refer to possible negligence by the Defendant.

Rationale - In keeping with the well established principle that the law does not favor contract provisions which relieve a person from his own negligence, in Connecticut the better rule is that a party cannot be released from liability for injuries resulting from its future negligence in the absence of language that expressly so provides. A requirement of express language releasing the Defendant from liability for its negligence prevents individuals from inadvertently relinquishing valuable legal rights. Furthermore, the requirement that parties seeking to be released from liability for their negligence expressly so indicate does not impose on them any significant cost.

Holding - The release signed by Plaintiff in the present case did not expressly provide that, by signing it, she released the Defendant from liability for damages resulting from its negligence.

Delk v. GO VERTICAL, 303 F.Supp.2d 94 (2004)

Facts - Plaintiff received injuries when she fell while climbing at a climbing gym. Plaintiff signed a waiver, but did not read it.

Rationale - The general rule is that where a person of mature years and who can read and write signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so. Connecticut Courts have repeatedly held that Plaintiffs cannot escape the consequences of a waiver into which they voluntarily entered merely by establishing that they did not read it. Accordingly, State trial Courts have been strikingly consistent in upholding as valid and enforceable agreements exempting owners and operators of sports facilities form liability for negligence entered into with patrons of the facility except in limited circumstances warranting a public policy exception to the rule of enforceability. Only waivers that do not satisfy the strict language requirements set forth by the Connecticut Supreme Court in *Hyson* have been deemed unenforceable with respect to negligence suits brought against sports facilities by their patrons.

Holding - The waiver was valid and enforceable because the exculpatory clause clearly and expressly purported to absolve the corporation of liability resulting from its own negligence.

Golden v. Curves International, Inc., 2003 Conn. Super. LEXIS 1441 (2003) (unreported case)
Foley v. Southington-Cheshire Community YMCAS, Inc., 2002 Conn. Super. LEXIS 990 (2002) (unreported case)
Connors v. Reel Ice, 2000 Conn. Super. LEXIS 1926 (2000) (unreported case)
Laliberte v. White Water Mt. Resorts, 2004 Conn. Super. LEXIS 2194 (2004) (unreported case)

DELAWARE

29. Are releases enforceable? Yes.

30. Are there any statutes that reflect enforcement of a release?

    10 Del. C. §§ 8132
    Comparative Negligence

    6 Del. C. §§ 2-302(1)
    Unconscionable contract or clause

31. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

32. Relevant Cases: *Hallman v. Dover Downs, Inc., 1986 U.S. Dist. LEXIS 15708 (1986)*

Facts - While covering a stock car race, the reporter leaned against a railing that buckled and caused the reporter to fall and suffer injuries. The reporter brought an action against the race track and contended that the release form he signed before entering the race track is invalid.

Rationale - In deciding whether releasing language is clear and unambiguous, the understanding of the parties is paramount. Furthermore, Delaware law permits a Court, as a matter of law, to refuse to enforce any contract found to have been unconscionable at the time it was made. *6 Del C. §§ 2-302(1)*. Waiving liability before something unanticipated happens to injure a person may well be unconscionable. A release given before liability arises may be void as contrary to public policy. As such, parties may agree to waive contract, statutory, or other rights, but only if public policy is not involved.

Holding - The release signed by Plaintiff may be void because it is ambiguous, unconscionable or against public policy.

Evans v. Feelin' Good, Inc., 1991 Del. Super. LEXIS 38 (1991)

Facts - Plaintiff was injured on some exercise equipment at a health club. Plaintiff had signed a release which did not purport to release the health club from all possible liability from its own negligence, but only from damages that occurred resulting from or arising out of the patron's use of the facilities and equipment.

Rationale - The release was a simple pre-injury release commonly found in health club membership contracts that is neither unconscionable nor contrary to public policy, and it was straightforward and simple enough in its language not to require an examination of its applicability. The release does not need to specifically name the party to be released for its own negligence. The release was to be admissible at trial because it plainly and specifically referred to the use of the "passive exercise equipment" on the health club premises.

Holding - The Court denied the motion to exclude the release as evidence at trial.

McDonough v. National Off-Road Bicycle Ass'n., 1997 U.S. Dist. LEXIS 8036 (1997)

Facts - The parents' son died of heat stroke during an off-road bicycle race sanctioned and promoted by the bicycle association. The bicycle association denied liability, contending that the deceased expressly assumed the risks inherent in an off-road bicycle race when he signed the agreement and release of liability.

Rationale - Since Delaware adopted a comparative negligence statute, it has become necessary to distinguish between primary and secondary assumption of the risk because secondary assumption of risk became totally subsumed within comparative negligence. Primary assumption or risk, however, still exists as a complete bar to recovery. In an express agreement to assume a risk, a Plaintiff may undertake to assume all risks of a particular

relation or situation, whether they are known or unknown to him. However, for the release to be effective, it must appear that the Plaintiff understood the terms of the agreement, or that a reasonable person in his position would have understood the terms. The evidence must establish that the parties intended the release to apply to the particular conduct of the Defendant which has caused the harm.

Holding - Defendants' motion for summary judgment was denied because Plaintiffs assert that a genuine issue of material facts exists as to whether their son understood that the release included a waiver against hazards created by Defendants' alleged negligent and reckless conduct in promoting the race.

Lafate v. New Castle County, Del. Super. LEXIS 496 (1999)

FLORIDA

33. Are releases enforceable? Yes.

34. Are there any statutes that reflect enforcement of a release?

    Fla. Stat. § 773.03
    Limitation on liability for equine activity; exceptions

    Fla. Stat. § 773.05
    Limitation on liability of persons making land available to public for recreational purposes

35. Can a parent execute a release for a minor? No. *Kirton v. Fields* (2008) 997 So. 2d 349, overruling:

    Global Travel Marketing, Inc. v. Shea, 908 So.2d 392 (2005)
    Gonzalez v. City of Coral Gables, 871 So.2d 1067 (2004)
    O'Connell v. Walt Disney World Co., 413 So.2d 444 (1982)

36. Relevant Cases: B*anfield v. Louis, 589 So.2d 441 (1991)*

Facts - Plaintiff completed and signed an official entry form to compete in a professional triathlon. While riding her bicycle on the course, she was struck and seriously injured by a car.

Rationale - Waivers, although not looked upon with favor, are valid and enforceable in Florida if the intent to relieve a party of its own negligence is clear and unequivocal. It is of great public concern that freedom to contract be not lightly interfered with. When a waiver is not prohibited under constitutional or statutory provisions, or prior judicial decision, it should not be struck down on public policy grounds unless it is clearly injurious to the public good or contravenes some established interest in society. Courts, therefore, should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it has been made clear that there has been some great prejudice to the dominant public

interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties.

Holding - The waiver was valid and did not violate public policy. There was no showing of great prejudice to the dominant public interest.

Goeden v. CM III, Inc., 802 So.2d 420 (2001)

Facts - Plaintiff signed up for a motorcycle school. In order to enroll, Plaintiff was required to sign a release of liability for, among other things, the schools own negligence.

Rationale - The public interest factor will invalidate an exculpatory clause when: 1) it concerns a business of a type generally suitable for public regulations; 2) the party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity for some members of the public; 3) the party holds himself out at willing to perform this service for any member of the public who seeks it; 4) as a result of essential nature of the service and the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength; 5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and 6) as a result of the transaction, the person or property of the purchaser is placed under control of the party to be exculpated.

Holding - For members of the public who are twenty-one (21) or older, attendance at the motorcycle school is not a requirement insofar as the driver's license law is concerned. That being so, the Court was not persuaded that attendance at the school is a matter of practical necessity or an essential service.

Hopkins v. Boat Club, Inc., 866 So.2d 108 (2004)

Facts - The injured parties were using a water craft under the supervision of one of the boat club's employees. The husband crossed a large boat wake, resulting in his wife being thrown from the boat and causing her to suffer serious injuries.

Rationale - Federal law is consistent with Florida law in its disfavored treatment of exculpatory clauses seeking to release a party from its own negligence. As is the case law under Florida law, the intent to relieve a party from responsibility from its own negligence must be clearly expressed in a release for it to be effective under Federal law. But Federal Courts consistently refuse to hold that words such as "negligence" or "negligent acts" are indispensable. State laws requiring specific reference to the releasee's "negligence" therefore conflict with Federal law and may not be applied in cases involving Federal maritime law. Consequently, state bright-line rules requiring explicit reference to a releasee's "negligence" are preempted by Federal law. However, there was no indication that the boat club was operating a commercial carrier or that transportation was occurring port to port. Thus, *46 U.S.C.S. § 83c* was not applicable. Looking at the waiver itself, there was no indication that the parties were in unequal bargaining positions, the contract referred to specific risks, and it covered all employees.

Holding - The release was sufficient to inform a reasonable person that the boat club was released from liability.

Dilallo By & Through Dilallo v. Riding Safety, Inc., 687 So.2d 353 (1997)
Borden v. Philips, 752 So.2d 69 (2000)
Raveson v. Walt Disney World Co., 793 So.2d 1171 (2001)
Cousins Club Corp v. Silva, 869 So.2d 719 (2004)

GEORGIA

37. Are releases enforceable? Yes.

38. Are there any statutes that reflect enforcement of a release?

    O.C.G.A. § 1-3-7
    Waiver of law

39. Can a parent execute a release for a minor? There does not appear to being any case law on this topic.

40. Relevant Cases: *Flood v. Young Woman's Christian Ass'n of Brunswick, Ga., Inc. 398 F.3d 1261 (2004)*

Facts - The decedent, who was training to become a rescue swimmer when she drowned, used the pool at the facility after signing an informed consent document.

Rationale - A party may exempt itself from its own simple negligence through exculpatory clauses as long as the clause is not void as against public policy. A party may not exempt itself from gross negligence. Failure to apply certain safety standards does not necessarily rise to the level of gross negligence. Exculpatory clauses in fitness club contracts are generally not void as against public policy; however, they must be clear and unambiguous. Any ambiguities in the clause will be interpreted against the drafter. However, Georgia Court of Appeals has clarified that an exculpatory clause does not need to expressly use the word "negligence" in order to bar a negligence claim. In fact, the Court of Appeals has stated that a party's release from any and all liabilities, claims, or lawsuits will effectively bar the opponent's negligence claims.

Holding - The exculpatory clause was valid and there was insufficient evidence of gross negligence to withstand a summary judgment motion.

McFann v. Sky Warriors, Inc., 268 Ga.App.750 (2005)

Facts - Defendant company took passengers for rides and engaged in simulated aerial combat. The widows' husbands were a pilot and a safety pilot, and were killed when the aircraft they were flying in crashed due to a wing separation from the plane.

Rationale - Although Georgia law prohibits dispensing or abrogating by agreement the benefit of laws made to preserve public order or good morales, "a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." *O.C.G.A. § 1-3-7*. A contract cannot be said to be contrary to public policy unless the Georgia Assembly has declared it to be so, or unless the consideration of the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something is in violation of law. Although exculpatory clauses are valid and binding and not void as against public policy, they will not relieve a party from liability for acts of gross negligence or wilful or wanton conduct.

Holding - Given the evidence, the Court found that jury questions existed on whether Defendant company's gross negligence or wilful or wanton conduct caused the crash, which would render the agreements unenforceable.

Hembree v. Johnson, 224 Ga.App.620 (1997)
Barbazza v. Int'l Motor Sports Ass'n, Inc., 245 Ga.App.790 (2000)
Shultz v. Florida Keys Dive Ctr., Inc., 224 F.3d 1269 (2002)
Flanigan v. Executive Office Ctrs., Inc., 249 Ga.App.14 (2001)

HAWAII

41. Are releases enforceable? Jury question per statute.

42. Are there any statutes that reflect enforcement of a release?

    H.R.S. § 663-10.95
    Motorsports facilities; waiver of liability

    Haw. Rev. Stat. ch. 663B
    Equine liability

    Haw. Rev. Stat. §§ 663-1.54
    Recreational activity liability

43. Can a parent execute a release for a minor? No.

    Haw. Rev. Stat. Ann. §663-10.95 (2006)
    Motorsport facility waiver attempting to protect the facility from liability for negligence against a minor is unenforceable against the minor.

    Douglass v. Pflueger Hawaii Inc., 110 Haw.520 (2006)
    Leong v. Kaiser Foundation Hospitals, 71 Haw.240 (1990)

44. Relevant Cases: Petty v. Odyssea Vessels, Inc., 115 F.Supp.2d 768 (2000)

Facts - Plaintiff seaman was injured while at sea and sued Defendants, marine companies, for personal injuries. After Defendants obtained a signed release from Plaintiff, they moved for summary judgment.

Rationale - Releases signed by seamen, the "wards of admiralty," are given the most careful scrutiny. Therefore, a Defendant must carry the burden of demonstrating that a Plaintiff seaman fully understands both his rights and the consequences of his action in signing a release. Several factors are relevant to a Court's appraisal of a Plaintiff's understanding of his rights, including: 1) the nature of the legal advice available to the seaman when signing the release; 2) the adequacy of consideration; 3) the existence of arm's length negotiation; and 4) the appearance of fraud or coercion. Additionally, the ability of the seaman to understand his rights and the consequences of his actions may be called into question if the seaman lacked the requisite mental capacity when signing the release. However, generally speaking, the Courts are receptive to a Defendant's motion for summary judgment based upon a release signed in exchange for consideration. Normally, even if a release may have been improvidently signed, the Court would hold a Plaintiff to the terms of the agreement. But, if a genuine issue of material fact exists regarding the validity of a release, then a seaman is entitled to a factual determination of this issue.

Holding - The Court found that there were genuine issues of material fact regarding whether Defendants have overreached themselves and have coerced Plaintiff into signing the release.

King v. CJM County Stables, 315 F.Supp.2d 1061 (2004)

Facts - Plaintiffs signed releases before participating in a trial ride; they purported to release the stable from all liability arising from the activity, including any claims arising from the stable's negligent acts or omissions. Plaintiffs filed the suit after the wife was bitten by another rider's horse. Plaintiffs argued that the release forms did not constitute a valid waiver of the stable's liability and that they did not relieve the stable from liability for its own negligent conduct.

Rationale - The Court held that *Haw Rev. Stat. §§ 663-1.54* was applicable to the case; although inherent risk waivers were validated under the statute, such waivers did not extend immunity to recreational activity providers for damages resulting from negligence. The Standing Committee that drafted the section described its purpose and function as necessary to more clearly define the liability of providers of commercial recreational activities by statutorily validating inherent risk waivers signed by the participants. Furthermore, the committee found that these inherent risk waivers do not extend immunity to providers for damages resulting from negligence. In substituting the provisions of Senate Bill 647 with those of House Bill number 581, which was codified into *§ 633-1.54*, the Standing Committee eliminated "the substantive provisions of *S.B. No. 647, S.D.1*, the Senate companion measure," including a section "exempting the provisions of Chapter 663B, existing law regarding equine liability." Thus, equine activities, such as the one in this case, are covered in *§ 633-1.54*. The two sections read together provide that a trier of fact must determine if injuries were caused by the "inherent risks" of a recreational activity. And if the trier of fact finds that the injuries were "caused solely by the inherent risk and unpredictable nature" of a horse, then there is a rebuttal presumption that the Defendant's negligence did not cause the injuries. The injured Plaintiff may then rebut the presumption of no negligence by a preponderance of the evidence.

Holding - Summary judgment was denied because the release form explicitly precluded waiving liability for negligence. Also, *Section 633-1.54(c)*'s provision automatically creates a genuine issue of material fact as to whether the horse-biting incident was an inherent of the horseback riding activity in which Plaintiffs participated. This statutory-imposed genuine issue of fact precludes summary judgment as a matter of law.

Foronda v. Hawaii International Boxing Club, 96 Haw. 51 (2001)
Fujimoto v. Au, 95 Haw. 116 (2001)

IDAHO

45. Are releases enforceable? Yes.

46. Are there any statutes that reflect enforcement of a release?

    I.C. § 6-1206
    Liability of outfitters and guides

    I.C. § 6-1107
    Liability of ski area operators

47. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

48. Relevant Cases: *Lee v. Sun Valley Co., 107 Idaho 976 (1984)*

Facts - Before going on a trial ride, the horseback rider signed a disclaimer, which provided in part that the horseback rider assumed full responsibility for his safety. The disclaimer further stated that the horseback rider understood that he was riding at his own risk. However, he filed a negligence action against Defendant ranch for injuries he sustained when he was thrown from his horse. Plaintiff argues that the language of the contract is ambiguous.

Rationale - The agreement clearly and simply states that Sun Valley should be held "harmless for every and all claim which may arise from injury, which might occur from use of said horse and/or equipment," which is both unambiguous and applicable to the facts alleged by Plaintiff.

Holding - The release signed by Plaintiff is sufficient to absolve the Defendant of liability.

Groves v. Firebird Raceway, 1995 U.S. App. LEXIS 28191 (1995)

Facts - Plaintiff paid the entry fee and signed a release in order to participate in a race at Firebird Raceway. He had signed similar agreements before participating in other racing events in the past. During a race, the vehicle crashed and burst into flames. Plaintiff contends that the release does not bar claims for negligent firefighting. Specifically, he asserts that the

terms “EVENT(S)” and “NEGLIGENT RESCUE” are undefined, thereby rendering the release ambiguous and unenforceable.

Rationale - A party may contract to absolve itself from certain duties and liabilities. Such contracts must speak clearly and directly to the conduct of the Defendant which caused the harm at issue. Where the clear purpose of the release is to preclude all liability, however, the parties need not have contemplated the precise occurrence which resulted in harm. However, contracts that violate public policy are void. Express agreements which exempt one party from liability for negligence may violate public policy if: 1) one party is at an obvious disadvantage in bargaining power; or 2) a public duty is involved. Mr. Groves has failed to demonstrate that there is a genuine issue of material fact concerning whether he was at an obvious disadvantage in bargaining power. Further, the Idaho legislature has not imposed a public duty on persons involved in conducting automobile races and those activities are not similar to the public duties performed by a public utility or a common carrier.

Holding - The release here is drafted in clear and unambiguous terms. Although the agreement does not specifically preclude negligent firefighting claims, read in its entirety, its effect is to bar such claims. Also, the release does not violate Idaho public policy.

Hanks v. Sawtelle Rentals, Inc., 133 Idaho 199 (1999)

Facts - Plaintiff husband and wife rented a snowmobile from Defendant outfitters and subsequently collided with Defendant’s agent, who was on his way to recover a malfunctioning snowmobile.

Rationale - *I.C. § 6-1206* limits the liability of licensed “guides” and “outfitters” to “participants.” All Defendant company did here was lease equipment. Fitting the Plaintiffs for the rented clothing and helmets was merely incidental to leasing the equipment. Further, Defendant’s decision to retrieve the disabled vehicle cannot be said to be a service to the Hanks.

Holding - The provision did not operate to limit Defendant’s liability to Plaintiff.

ILLINOIS

49. Are releases enforceable? Yes.

50. Are there any statutes that reflect enforcement of a release?

    Ill. Rev. Stat., ch. 110 (1987)

51. Can a parent execute a release for a minor? No.

    Wreglesworth v. ARCTO, Inc., 316 Ill.App.3d 1023 (2000)
    Meyer v. Naperville Manner Inc., 262 Ill.App.3d 141 (1994)

52. Relevant Cases: *Garrison v. Combined Fitness Centre, Ltd., 201 III. App.3d 581 (1990)*

Facts - Plaintiff was injured while lifting weights at Defendant's fitness center. He contended that an exculpatory clause contained within his membership agreement did not encompass injuries proximately caused by defective equipment provided for a member's use.

Rationale - A party may contract to avoid liability for his own negligence and, absent fraud or wilful and wanton negligence, the contract will be valid and enforceable unless: 1) there is a clause substantial disparity in the bargaining position of the two parties; 2) to uphold the exculpatory clause would be violative of public policy; or 3) there is something in the social relationship between the two parties that would militate against upholding the clause. The rationale for this rule is that Courts should not interfere with the rights of two parties to contract with one another if they freely and knowingly enter into the agreement. Here, Plaintiff's signature on the membership agreement was not obtained by fraud, nor did a special relationship or unequal bargaining position exists. The exculpatory clause was clear and explicit. Plaintiff's injury was of a type that would normally be contemplated by the parties at the time the contract was made. Additionally, *III. Rev. Stat. ch. 100, para. 2-621* provides a method whereby a party who is not the manufacturer of an allegedly defective product, may defer liability to the manufacturer.

Holding - Finally, the Court rejected the claim that upholding the clause in the context of a product liability action would have violated public policy.

Platt v. Gateway In's Motorsports Corp, 351 III. App.3d 326 (2004)

Facts - The employee was working in the race track infield. He was injured as he attempted to drive across the track while tow trucks were circling it to dry it, a standard track procedure. The employee argued that the exculpatory agreement he signed failed to bar his negligence action because a race was not in progress at the time of his injury and his injury resulted from an occurrence unrelated to an "event." The term "event" was undefined and the employee asserted it was ambiguous, and therefore should have been construed in his favor.

Rationale - Exculpatory agreements have been upheld in the auto racing context where an injured driver or participant has brought suit against an owner or operator of a raceway. Although exculpatory agreements are not favored and will be strictly construed against the benefitting party, parties may allocate the risk of negligence as they see fit, and exculpatory clauses do not violate public policy as a matter of law. To be valid and enforceable, it must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the Plaintiff agrees to relieve the Defendant from a duty of care. Also, the foreseeability of danger is an important element of the risk a party assumes and will often define the scope of an exculpatory agreement. However, the precise occurrence that results in injury need not have been contemplated by the parties at the time they entered into the contract. It should only appear that the injury falls within the scope of possible dangers ordinarily accompanying the activity and, thus, reasonably contemplated by the Plaintiff. The contract as a whole was broad and inclusive and barred liability for

negligence claims "arising out of or related to the event(s)." The tow trucks were preparing for the event by driving around the racetrack, and therefore, the Plaintiff's resulting negligence claim arose out of or was related to an event. Furthermore, the Plaintiff's injury fell within the scope of possible dangers ordinarily accompanying auto racing activities and, thus, was reasonably contemplated by the Plaintiff.

Holding - Although the parties may not have contemplated the precise occurrence that resulted in the Plaintiff's accident, we do not render the exculpatory agreement inoperable.

INDIANA

53. Are releases enforceable? Yes.

54. Are there any statutes that reflect enforcement of a release? Yes.

    Ind.Code Ann. §34-28-3-2 (2006)
    Release for Racing

55. Can a parent execute a release for a minor? Yes.

    Ind.Code Ann. §34-28-3-2 (2006)
    Minors who have been emancipated to participate in automobile or motorcycle racing may not avoid a contract, liability release, or an indemnity agreement by reason of the minor's age.

    Huffman v. Monroe County Community School, 564 N.E.2d 961 (1991)

56. Relevant Cases: *United States Auto Club v. Smith, 717 N.E.2d 919 (1999)*

Facts - Plaintiff's husband, a participant of a racing team, brought a pit pass which authorized his entry into the infield area which was located in the center of Defendant's racetrack. Plaintiff's husband signed a liability release. After Plaintiff's husband was killed in an accident at the track, Plaintiff filed a wrongful death action against Defendant for negligence.

Rationale - Parties are generally permitted to agree in advance that one is under no obligation of care for the benefit of the other, and shall not be liable for the consequences of conduct which would otherwise be negligent. Additionally, it is well-settled in Indiana that such exculpatory agreements are not against public policy. The precise language of the release that Plaintiff signed provided that he would "indemnify and hold harmless the releases and each of them from the loss, liability damage or cost they may incur due to the presence of the undersigned in or upon the restricted area, whether caused by the negligence of the releases or otherwise." It is apparent that the primary purpose of the release here was to relieve Defendant and all other releasees of liability that arose from permitting individuals to remain in the restricted area of the pits. Even more compelling, the exculpatory language set forth in the release makes specific reference to the "negligence of the releases."

Holding - In light of the language set forth in the release and indemnity agreement here, we find that the release executed barred claims for negligence against USAC.

Marsh v. Dixon, 707 N.E.2d 998 (1999)

Facts - Plaintiff was injured while riding amusement ride constructed by Defendant president for Defendant company. Though Plaintiff executed a release discharging Defendants from liability, he and his wife filed suit for gross negligence and products liability.

Rationale - An exculpatory clause will not act to absolve the drafting party from liability unless it specifically and explicitly refers to the negligence of the party seeking release from liability. An exculpatory clause not referring to the negligence of the releasee may act to bar liability for those damages incurred which are inherent in the nature of the activity, or the exculpatory clause is void only to the extent it purports to release a Defendant from liability caused by its own negligence. The requirement of specificity is only necessary when the risk of harm is a latent danger, i.e. the Defendant's negligence.

Holding - Because the release did not specifically relieve Defendants from liability caused by their own negligence, it did not exculpate appellees.

King v. Univ. of Indianapolis, 2002 U.S. Dist. LEXIS 19070 (2002)

Facts - The decedent died after suffering heat stroke during his participation in football practice, and the mother contended that his death was caused by negligent treatment on the part of Defendants.

Rationale - Indiana case law recognizes the affirmative defense of assumed risk such that parties are permitted to agree in advance that one is under no obligation of care for the benefit of the other, and shall not be liable for the consequences of conduct which would otherwise be negligent. Indiana Courts acknowledge that such agreements do not violate public policy. In order for a contractual clause to shift the risk of negligence, however, such exculpatory clause must both specifically and explicitly refer to the negligence of the party seeking release from liability. Also, in order to incur a risk, a person must have actual knowledge of the specific risk he has accepted. It is not enough that a Plaintiff have merely a general awareness of a potential for mishap, but, rather, the defense demands a subjective analysis focusing on the Plaintiff's actual knowledge and appreciation of the specific risk involved and the voluntary acceptance of that risk. The defense does not operate as a complete bar to recovery in all cases, but instead, where a Plaintiff alleges injury caused by forces other than those inherent in a particular game or activity engaged in by the injured party, incurred risk factors into the factual injury regarding the proper apportionment of fault under Indiana's comparative fault scheme.

Holding - Summary judgment for the Defendant was denied because while the form executed by the decedent expressly addressed the risks inherent in football, by assuming such risks the decedent did not assume the risk of Defendants' negligence. Also, further factual inquiry was

required to determine whether the decedent was aware of, appreciated, and voluntarily accepted the specific risk involved.

Shumate v. Lycan, 675 N.E.2d 749 (1997)
Powell v. American Health Fitness Center, 694 N.E.2d 757 (1998)

IOWA

57. Are releases enforceable? Yes.

58. Are there any statutes that reflect enforcement of a release?

    Iowa Code ch. 88A (2001)
    Safety Inspection of Amusement Rides

59. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

60. Relevant Cases: *Lathrop v. Century, Inc., 2002 Iowa App. LEXIS 1136 (2002)*

Facts - Plaintiffs an injured mother individually and on behalf of her two children, sued Defendant snow tubing park, alleging negligence after the injured mother suffered a back injury while snow tubing at the ski resort. Before they were allowed to enter, they signed a release form containing specific provisions, whereby persons tubing at the park released the park from liability for any injuries incurred.

Rationale - The Court will not curtail the liberty to contract by enabling parties to escape their valid contractual obligation on the ground of public policy unless the preservation of the general public welfare imperatively so demands. Snow tubing, a purely recreational activity, is not of such great importance to the public as to justify an exception to the general rule. Furthermore, the appellate Courts of this State have consistently upheld the validity of broadly worded releases.

Holding - The release is enforceable.

Grabill v. Adams County Fair & Racing Ass'n, 666 N.W.2d 592 (2003)

Facts - The participants took part in an auto race at a county fair and they all signed a general release that released the racing promoters and others from any claim for injuries arising out of or related to the activity. The spouse did not sign the release. An accident occurred during a fireworks demonstration that injured the participants.

Rationale - Contracts releasing persons from liability for their own negligence acts are enforceable and are not contrary to public policy. Releases assented to by participants in hazardous activities are also upheld. However, it has been recognized that a fireworks display is not an ultra hazardous activity even though it is an activity that threatens a great risk of harm

or death, since the risk of serious harm from the discharge of fireworks is one that could be eliminated through the non-negligent manufacture of the fireworks, and since fireworks displays are a matter of common usage on appropriate occasions such as the Fourth of July. The release clearly identifies the individuals who are to be considered released parties. A releasing party does not need to have contemplated the precise occurrence that caused injury as long as the occurrence was within the broad range of events that might transpire with respect to the matter being undertaken.

Holding - The release was a complete defense to their action for personal injuries in that: 1) the language of the release was broad enough to cover a fireworks display; 2) the participants knew that fireworks displays were common during racing events; and 3) fireworks displays were not an ultra hazardous activity.

KANSAS

61. Are releases enforceable? Yes.

62. Are there any statutes that reflect enforcement of a release? No.

63. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

64. Relevant Cases: *Fee v. Steve Snyder Enterprises, 1986 U.S. Dist. LEXIS 28158 (1986)*

Facts - The claimant's husband was killed while skydiving when the automatic parachute opener made by the manufacturer and sold to the husband by the facility failed to operate. The claimant brought an action against the manufacturer and the facility for, among other things, wrongful death and survivorship based on claims of negligence.

Rationale - Kansas Courts recognize the validity of exculpatory agreements, however, they are not favored by the law and are strictly construed against the party relying on them. The terms of the agreement are not to be extended to situations not plainly within the language employed. It is not necessary, however, that the agreement contain specific or express language covering in so many words the party's negligence, if the intention to exculpate the party from liability clearly appears from the contract, the surrounding circumstances and the purposes and objects of the parties. Here, although it specifically releases the Parachute Center from liability for injuries or death arising out of the "ownership, operator, use, maintenance or control" of many device," the agreement fails to mention any release of liability revolving around the sale of any product to the parachuter. Strictly construing the agreement, we do not believe that this should be interpreted to exempt the Parachute Center from a failure to use due care in furnishing safe equipment, or should allow it to sell a product in a defective condition unreasonably dangerous to the parachuter. To do so would impermissibly extend the terms of the agreement to situations not plainly within its language.

Holding - The Court denied summary judgment to the facility.

Ki Ron Ko v. Bally Total Fitness Corp.,2003 U.S. Dist. LEXIS 19378 (2003)

Facts - Mr. Hansen signed a retail installment contract to become a patron of Defendant Bally Total Fitness. The retail installment contract, which contained a waiver and release of liability, served as his membership with Defendant. Mr. Hansen later assigned the membership to Plaintiff. Plaintiff neither saw the retail installment contract signed by Mr. Hansen nor obtained or signed his own retail installment contract. His membership card, however, made reference to the waiver of liability provision. Plaintiff was burned by hot water coming out of the hose in a sauna at the facility.

Rationale - A party may contract away responsibility for its own negligence, but only when it has been done in "clear and unequivocal" terms. Such contracts are not favored by the law and are strictly construed against the party relying on them. General language or all-inclusive language exempting a party from liability is insufficient. The Court should consider whether any limitation on liability is fairly and honestly negotiated and understandingly entered into, and may consider the totality of the circumstances surrounding the formation of the contract. One consideration may be whether the non-drafting party had knowledge of the exculpatory clauses by having them pointed out to him or the clauses themselves being conspicuous in the contract. However, failure to read an agreement is not an excuse for failing to comply with the agreement. Kansas law has long held it to be the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it." The waiver and release clause was conspicuous in the contract and on the back of Plaintiff's membership cards. Plaintiff cannot now claim that the contract was not "fairly and honestly negotiated and understandingly entered into" because he chose not to obtain a copy of the contract or read the back of his membership card.

Holding - The language was clear. Plaintiff's injury fell squarely within the injuries contemplated by the exculpatory language. Furthermore, when Plaintiff assumed Mr. Hansen's rights and obligations under the retail installment contract, he also assumed the limitation on liability.

KENTUCKY

65. Are releases enforceable? Yes.

66. Are there any statutes that reflect enforcement of a release?

Ky. Rev. Stat. Ann. §§ 411.190
Recreational Use Statute

Ky. Rev. Stat. Ann. §§ 433.883
Cave Protection Statute

67. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

68. Relevant Cases: *Donegan v. Beach Bend Raceway Park, Inc., 894 F.2d 205 (1990)*

Facts - Appellant stock car driver was injured during a race when his car slipped on a patch of water and struck a concrete post off the track. Asserting theories of gross, wanton, and wilful negligence, appellant brought an action against appellee track owner and contended that the general release he signed did not bar his claims.

Rationale - Kentucky law discourages agreements to release another from liability for personal injury caused by negligence. Such releases must be interpreted narrowly, and against the protected party. However, an exception to this general rule has been carved for racetracks. There is a distinction, though, between wilful and wanton negligence, for which one cannot release another, and ordinary or gross negligence, for which one can. The waiver forms Plaintiff signed bar his claim for gross negligence.

Holding - A reasonable trier of fact could not find that Defendant acted with a conscious disregard of the rights of safety of others under the circumstances where Plaintiff was familiar with the race track and where a maintenance crew had dried at least part of the track before the races began on the night appellant was injured.

Coughlin v. T.M.H. Int'l Attractions, 895 F.Supp.159 (1995)

Facts - The son died from injuries he sustained during a cave exploration tour given by Defendant tour guide on property owned by the corporation. His parents alleged that Defendants' negligence was the cause of their son's death. Before participating in the tour, the son signed a release form, which purported to waive liability for injury.

Rationale - Kentucky law supports a public policy that disfavors and bars exculpatory agreements from enforcement. In analyzing exculpatory agreements as to one party's negligence, Courts must look to whether the public interest requires performance of the duties in the agreement and whether the parties stand on an equal footing with one another. A release is against public policy if the parties possess unequal bargaining power. Releases must be interpreted narrowly, and against the protected party. Although one may be released of liability for ordinary or gross negligence, one may not be released of liability for wilful and wanton negligence. Here there are no public interests in encouraging commercial caving by validating releases under these circumstances. In an activity such as competitive racing, the public's interests are a factor, and invalidating a release may lead to a decrease in such events because track owners fear liability. Even if some cave owners will now discontinue commercial tours for fear of liability without valid releases, this does not overcome the evident public interest in the physical safety and legal protection of our citizens. Moreover, a tour of a cave does not qualify as a recreational activity.

Holding - Plaintiff did not release Defendants of liability by signing the release form because he was not on equal footing with Defendants because the release read more as an enticement than a warning, there was no public interest in encouraging commercial caving, and touring caves did not qualify as a recreational activity on the same par with auto or bicycling racing.

Dunn v. Paducah International Raceway, 599 F.Supp.612 (1984)
Estate of Peters v. United States Cycling Federation, 779 F.Supp.853 (1991)

LOUISIANA

69. Are releases enforceable? No. Releases are unenforceable.

70. Are there any statutes that reflect enforcement of a release?

La Civ. Code Ann. art. (2004)
Clause that excludes or limited liability

71. Can a parent execute a release for a minor? No.

Costanza v. Allstate Insurance Co. U.S Dist LEXIS 21991 (2002)

72. Relevant Cases: *Ramirez v. Fair Grounds Corp.*, 575 So.2d 811 (1991)

Facts - Plaintiff was seriously injured when he fell from a 12-foot high loft in the landowner's stable. Approximately four months before the accident, he had signed an application for stall space and use of the landowner's fairground facilities, which contained clauses excluding the landowner's liability for any injury to the applicant and requiring the applicant to indemnify the landowner and hold it harmless from any liability.

Rationale - Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party, as provided by *La. Civ. Code Ann. art. (2004)*. But Defendant argues that the words of the statute are qualified by the comments thereunder, and specifically relies on comment (a) which states that Article 2004 "does not change the law" and comment (e) which states that the article "does not govern 'indemnity' clauses, 'hold harmless' agreements, or other agreements where parties allocate between themselves the risk of potential liability towards third persons." However, *Section 9 of Louisiana Act (Act) 331 of (1984)* specifically provides that the headings and comments in the Act are not part of the law and are not enacted into law by virtue of their inclusion in the Act. *La. Acts 331, §§ 9 (1984).* Consequently, even if the comments were to be interpreted so as to express a meaning different from the statute, they have no legislative effect on the statute because they are not part of the law. Furthermore, because the statute is clear and unambiguous with respect to the issue in this case, and its application does not lead to absurd consequences, it shall be applied as written and no further interpretation may be made of it in search of the intent of the legislature.

Holding - The clauses in the application are null because they, in advance, exclude the liability of Fair Grounds for causing physical injury to Ramirez.

MAINE

73. Are releases enforceable? Yes. Rigorously enforced.

74. Are there any statutes that reflect enforcement of a release? No.

75. Can a parent execute a release for a minor? No.

Doyle v. College, 403 A.2d 1206 (1979)
Rice v. American Skiing Co., Me. Super. LEXIS 90 (2000)

76. Relevant Cases: *Rice v. American Skiing Co.,* 2002 Me. Super. LEXIS 90 (2000)

Facts - Plaintiff parents went to Sunday River to ski with son who was almost nine years old at the time. Prior to son's enrollment in the ski class, Plaintiff mother signed a form entitled "Acknowledgment & Acceptance of Risks & Liability Release" on behalf of herself and her son.

Rationale - Releases in general are not against public policy. However, for its terms to be valid, a release absolving a Defendant of liability for its own negligence must spell out with greatest particularity the intention of the parties contractually to extinguish negligence liability. The Courts have traditionally disfavored contractual exclusions of negligence liability and have exercised a heightened degree of judicial scrutiny when interpreting contractual language which allegedly exempts a party from liability for his own negligence. The interpretation of an unambiguous contract is a question of law. As for the issue of whether an unambiguous release of negligence claims given by a parent on behalf of her child is valid, the Court finds that the safety risks of offering training and instructions to children risk against which a for-profit business may insure itself.

Holding - The language is unambiguous and, if valid, would clearly release the Defendants from liability for damages and losses sustained as a result of negligence in the operation of the ski area, which would include the claim of negligent supervision in this case. However, the Court concluded that the claim for negligence supervision brought on behalf of the son is not barred by the release provision of the Ski Enrollment Form signed by his mother.

Lloyd v. Sugarloaf Mt. Corp., 2003 ME 117 (2003)

Facts - Plaintiff was injured in a crash during a practice run for a race hosted by the company and sponsored by the organization. He had signed releases when he joined the organization and when he registered for the race, and argued that because the two releases were inconsistent, the releases did not apply.

Rationale - While these two releases overlap, they are not inconsistent. The fact that one release specifies negligence and the other is more general does not create an inconsistency

nor does the fact that the entry release contains an indemnification clause. In order for the releases signed by Lloyd to absolve Defendants to their own negligence, they must expressly spell out with the greatest particularity the intention of the parties contractually to extinguish negligence liability. Given that the parties agree that the practice session was mandatory to participation in the race itself, it would be disingenuous to conclude that the practice run was not, in the words of the membership release, "arising directly or indirectly from or attributable . . . to any negligence . . . in connection with . . . any bicycle racing or sporting event," and, therefore, we reject this contention. Furthermore, in Maine, releases saving a party from damages due to that party's own negligence are not against public policy. Generally speaking, Courts holding that similar releases for recreational activities are void as against public policy do so because they find that the activity is a public service or open to the public; the facility invites persons of every skill level to participate; the facility has the expertise and opportunity to control hazards and guard against negligence; the facility is in a better position to ensure against risks; and broad releases of liability would remove incentives for the facility to manage risks, thereby requiring the public generally to bear the costs.

Holding - We conclude that the membership release, with its express reference to negligence, sufficiently spells out the parties' intent to extinguish the negligence liability of the Defendants. Furthermore, because the practice run was mandatory, any negligence occurring during the practice run was attributable to the bicycle racing event. Finally, the releases did not violate public policy, as the race was not public service, and the entrants were not under any compulsion to sign the releases.

Hardy v. St. Clair, 1999 ME 142 (1999)
Lloyd v. Bourassa, Me. Super. 2002 LEXIS 132 (2002)
Bresnahan v. Bowen, 263 F.Supp.2d 131 (2003)

MARYLAND

77. Are releases enforceable? Yes.

78. Are there any statutes that reflect enforcement of a release?

House Bill 745
Education - Pole Vaulting – Helmets

House Bill 412
Education - Sports Programs - Mouth Guards

House Bill 750
Courts - Settlements and Releases - Limited Prohibitions

Md. Stat. §§ 5-401.1.
Courts and Judicial Proceedings

79. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

80. Relevant Cases: *Barber v. Eastern Karting Co.*, 108 Md.App.659 (1996)

Facts - The racer suffered an extremely serious injury when her hair became entangled in the rear axle of a high-performance go-cart that she was driving during a go-cart racing event organized and sponsored by the racetrack. The racer had signed a release prior to her race.

Rationale - When a statute imposes a standard of care, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for failure to conform to that statutory standard is unenforceable. A general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a Defendant from all liability for any future loss of damage will not be construed to include the loss or damage resulting from the Defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the Plaintiff's intention. This rule parallels the rule that a release is construed from the standpoint of the parties at the time of its execution. Extrinsic evidence is admissible to show both the relation of the parties and the circumstances which surrounded the transaction. A Plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the Defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy. In order for an express agreement assuming the risk to be effective, it must appear that the terms of the Release were in fact brought home to, and understood by, the Plaintiff, before it may be found that the Plaintiff has agreed to them. Alternatively stated, to relieve contractually a party from liability for its negligence, language to that effect must be clear and definite.

Holding - To the extent that the anticipatory release in the present case purports to exempt the Defendant from tort liability to the Plaintiff for the failure of the Defendant's guide to conform to the standard of care expected of members of his occupation, it is unenforceable.

Seignear v. National Fitness Inst., Inc., 132 Md.App.271 (2000)

Facts - Plaintiff joined Defendant health club and signed exculpatory clause. At the time she joined, Plaintiff had a history of serious lower back problems, including a herniated disc. These facts were disclosed to NFI prior to the accident. Plaintiff was injured as a result of NFI's negligence while she was undergoing an initial evaluation at the fitness club.

Rationale - In Maryland, for an exculpatory clause to be valid, it need not contain or use the word "negligence" or any other "magic words." Unambiguous exculpatory clauses are generally held to be valid in the absence of legislation to the contrary. There is in the ordinary case no public policy which prevents the parties from contracting as they see fit. Three exceptions have been identified where the public interest will render an exculpatory clause unenforceable. They are: 1) when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton or gross negligence; 2) when the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other's negligence; and 3) when the transaction involves the public interest. The fact that the

contract presented to Plaintiff was a contract of adhesion does not demonstrate that NFI had grossly disparate bargaining power. There were numerous other competitors providing the same non-essential services as NFI. The exculpatory clause was prominently displayed and Plaintiff makes no claim that she was unaware of this provision prior to her injury. Furthermore, to possess a decisive bargaining advantage over a customer, the service offered must usually be deemed essential in nature. Courts have found generally that the furnishing of gymnasium or health spa services is not an activity of great public importance nor of practical necessity. A Maryland Court "will not invalidate a private contract on grounds of public policy unless the clause at issue is patently offensive."

Holding - The provision expressed is clear intention by the parties to release NFI from liability for all fact of negligence. Plaintiff voluntarily applied for membership in a private organization, and agreed to the terms upon which the membership was bestowed. She may not repudiate them now. Furthermore, the services offered by a health club are not of great importance or of practical necessity to the public as a whole.

MASSACHUSETTS

81. Are releases enforceable? Yes.

82. Are there any statutes that reflect enforcement of a release? No.

83. Can a parent execute a release for a minor? Yes.

    Webb v. Jiminy Peak, 2002 Mass.App. Div.16 LEXIS 8 (2002)
    Sharon v. City of Newton, 437 Mass. 99 (2002)
    Eastman v. Yutzy, 2001 Mass.Super. LEXIS 157 (2001)
    Quick v. Walker's Gymnastics & Dance, 16 mass. L. Rep. 503 (2003)

84. Relevant Cases: *Zavras v. Capeway Rovers Motorcycle Club, 44 Mass. App. Ct. 17 (1997)*

Facts - Plaintiff was injured while a participant in a motor dirt bike race at the Defendant's premises. He filed a three-count complaint which, as amended, alleged the following: 1) negligence in failing to provide suitable flag holders to protect the participants from accidents; 2) gross negligence in providing incompetent minor children to act as "flagmen"; and 3) gross negligence by the "flagman" in acting in an extremely careless manner and in reckless disregard of the consequences.

Rationale - A Defendant ordinarily may validly exempt itself from liability which it might subsequently incur as a result of its own negligence. However, it may not do so with respect to its gross negligence. Even where simple negligence is alleged, Massachusetts cases, for policy reasons, are cautious in enforcing releases against liability and in certain circumstances decline to do so. Summary judgment is rarely granted in negligence actions. Even where the inattention was only momentary, a jury has been allowed to find gross negligence where the inattention occurred in a place of great and immediate danger.

Holding - The racer could not maintain a claim against the racetrack that alleged negligent hiring of flaggers because testimony that the flagger appeared young, without more, could not form the sole basis for the gross negligence claim. Also, there was no evidence that the racetrack acted in gross disregard of others or violated any regulation in hiring the flagger. However, the racer could maintain a class of gross negligence by the flagger because there was evidence that the flagger showed a want of even scant care.

Hunter v. Skate III, Mass. App. Div 274 (1999)

Facts - Plaintiff was injured by a defect in the ice while he was participating in a league hockey game at the property owner's ice rink. The defect was caused by a leak in the roof of the building. Plaintiff was an experienced player and had executed a waiver in favor of both the league and the property owner. The victim filed a negligence action against the property owner.

Rationale - There is no rule of general application that a person cannot contract for an exemption from liability for his own ordinary negligence and that of his agents and servants. A right that has not yet arisen may be released. In the absence of fraud or duress, a Plaintiff is bound by any waiver he executed which releases a Defendant from liability. In Massachusetts the allocation of risk by agreement is not contrary to public policy.

Holding - The waiver was clear and comprehensive and the victim acknowledged reading and understanding the waiver. The allocation of risk by the agreement was not contrary to public policy, and the victim was free to choose not to participate in the game. There was no showing that the negligence of the property owner amounted to gross negligence.

Borges v. Sterling Suffolk Racecourse, 11 Mass. L. Rep. 668 (2000)

Facts - Plaintiff a horse trainer, was injured when he fell on the ice at Defendant's premises, a horse track. He stabled his horse at Defendant's track, and had executed a stall application which contained a comprehensive release of liability in favor of Defendants. He argued that the release was not in effect at the time of his fall.

Rationale - Releases which would preclude a party from pursuing future claims arising out of negligence are enforceable. A right which has not yet arisen may be made the subject of a covenant not to sue or to be released, and a party may validly exempt itself from liability which it might subsequently incur as a result of its own negligence. Absent fraud or duress, a party who signs a release is bound by its terms whether or not he reads and understands the release. In the absence of a specific requirement, the time for performance of a contract does not extend forever but only for a reasonable time. In determining what is a reasonable time for a contract of indefinite duration to remain in effect, a Court should consider the nature of the contract, the probable intention of the parties, and the attendant circumstances. Where the evidence is in dispute and open to different inferences, the question whether an act has been done within a reasonable time after the happening of a certain event is ordinarily a question of fact, but where the facts are not in dispute the question becomes one of law.

Holding - The conduct of the parties made it apparent that it was their intention, at the time of execution of the stall application, that the provisions of that application, including the comprehensive release of liability, would continue throughout the racing season when it was executed, and, therefore, it was in effect at the time of Plaintiff's fall.

Bastable v. Liberty Tree Mall P'ship, 6 Mass. L. Rep. 217 (1996)
Vallone v. Donna, 49 Mass. App. Ct. 330 (2000)
Lautieri v. Bae, 17 Mass. L. Rep. 4 (2003)

MICHIGAN

85. Are releases enforceable? Yes.

86. Are there any statutes that reflect enforcement of a release?

MCLS §§ 691.1664
Equine Activity Liability Act

87. Can a parent execute a release for a minor? No.

Smith v. YMCA of Benton Harbor/ St. Joseph, 550 N.W.2d 262 (1996)

88. Relevant Cases: *Faranso v. Cass Lake Beach Club, Inc., 1998 Mich.App. LEXIS 1697 (1998)*

Facts - Plaintiff fell asleep in one of the tanning salon owners' tanning beds. She suffered burns in connection with her 65 minute exposure under the sun lamps. She filed a tort action against the tanning salon owners.

Rationale - It is not contrary to Michigan's public policy for a party to contract against liability for damages caused by ordinary negligence. As with other contracts, the validity of a contract of release turns on the intent of the parties. To be valid, a release must be fairly and knowingly made. A release is not fairly made and is invalid if: 1) the releasor was dazed, in shock or under the influence of drugs; 2) the nature of the instrument was misrepresented; or 3) there was other fraudulent or overreaching conduct. To warrant recession or invalidation of a release, a misrepresentation must be made with the intent to mislead or deceive. Failure to read a contract document provides a ground for recession only where the failure was not induced by carelessness alone, but instead was induced by some stratagem, trick or artifice by the parties seeking to enforce the contract. A request to sign a release, without more, is insufficient to demonstrate fraudulent or overreaching conduct in connection with its execution. Furthermore, the scope of a release is governed by the intent of the parties as it is expressed in the release. If the text of the release is clear, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. In its ordinary and

natural meaning, the work "any" is broad enough to allow a Defendant to disclaim liability for any negligence claims.

Holding - The release barred Plaintiff's claims because her failure to read the release was not induced by fraud on the part of the tanning salon owners, a request to sign a release, without more, was insufficient to demonstrate fraudulent conduct in connection with its execution; and Plaintiff's promise to release the Defendants from liability constituted adequate consideration for the tanning salon owners to have permitted the injured person to use their facility.

Cole v. Ladbroke Racing Mich., Inc., 241 Mich.App.1 (2000)

Facts - Plaintiff, a licensed exercise rider of horses, was injured when a kite spooked the horse he was riding and the horse threw him to the ground. Plaintiff alleged negligence against Defendant arising from the fact that there were no outriders available to help him. Plaintiff signed a release while he was pursuing opportunities as a jockey agent. He did not sign another release when he assumed the duties of an exercise rider.

Rationale - The release covered "all risks of any injury that the undersigned may sustain while on the premises." As this Court has held, there is no broader classification than the word "all." The release clearly expressed Defendant's intention to disclaim liability for all injuries, including those attributable to its own negligence. The release specifically addressed the dangerous conditions and inherent dangers in the restricted area of the racetrack the phrase "which Ladbroke cannot eliminate after exercising reasonable care" is not a limit on the scope of the release, but, rather, is an unambiguous emphasis of the fact that being in the restricted area entails dangers that cannot be eliminated by exercising reasonable care. As far as the Equine Activity Liability Act (EALA) applies, a race meeting generally covers several days and may even take place on different tracks and thus entails much more than the actual race on the racetrack on the race day. The activity of exercising a race horse at a track in preparation for a race is included in the EALA's definition of "horse race meeting." Nevertheless, the language of the EALA is clear and unambiguous. It does not apply to horse race meetings.

Holding - The immunity granted by the EALA does not apply to horse race meetings. However, the release signed by Plaintiff barred the action. The injury Plaintiff suffered was contemplated by the broad language of the release.

Lamp v. Reynolds, 249 Mich.App.591 (2002)

Facts - Plaintiff's injuries arose because he hit an unknown, unexpected and concealed tree stump just off the edge of the racetrack. The racetrack owners knew about the tree stump, knew that it was common for racers to leave the track during the race, failed to remove the stump or to make the stump's presence known to the racers, and admitted that a hidden tree stump near a racetrack was a dangerous condition that could cause serious injury.

Rationale - It is well established in Michigan that, although a party may contract against liability for harm caused by this ordinary negligence, a party may not insulate himself against liability for gross negligence or wilful and wanton misconduct.

Holding - General releases did not bar the Plaintiff's wilful and wanton misconduct claims; the evidence supported the trial Court's findings that the racetrack owner's conduct was wilful and wanton; the racetrack owner failed to prove that Plaintiff's conduct was a legal or proximate cause of his injuries because the racetrack owner admitted that the injuries arose solely because he hit an unknown, unexpected and concealed tree stump; and failure to establish proximate cause defeated the racetrack owners' comparative fault defense.

Sosa v. Beverly Hills Racquet Club LTD., 1998 Mich.App. LEXIS 2528 (1998)
Barrett v. Mt. Brighton, 474 Mich. 1087 (2006)

MINNESOTA

89. Are releases enforceable? Yes.

90. Are there any statutes that reflect enforcement of a release?

§ 604A.11
Volunteer athletic coaches and officials; physicians and trainers; immunity from liability

§ 604A.12
Livestock activities; immunity from liability

§ 604A.25
Owner's liability; not limited

91. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

92. Relevant Cases: *Beehner v. Cragun Corp., 636 N.W.2d 821 (2001)*

Facts - Plaintiff fell off her horse when the trial ride company's dog scared her horse. Before the ride, Plaintiff was required to sign a liability release form.

Rationale - Minnesota recognizes the validity of exculpatory clauses, but they are disfavored and strictly construed against the benefitted party. An exculpatory clause that is not ambiguous, not the result of a disparity in bargaining power, and not for a public or essential service, is enforceable as consistent with the public policy. Relevant to this case is the fact that there is no Minnesota case holding that a liability release in a contract for recreational activity is unenforceable due to a disparity of bargaining power. Proof that a party had no opportunity to negotiate the terms of an exculpatory agreement is not enough to show a disparity of bargaining power. Furthermore, a necessary or public service, for the purpose of interpreting exculpatory clauses, is a service subject to public regulation or of practical necessity for some members of the public. A contract for recreational services is not necessary to a party. Additionally, an exculpatory agreement signed after a fee to participate in a recreational activity has been paid is part of the same transaction and is therefore

enforceable without additional consideration other than permission to participate in the activity. And finally, in a dispute over the applicability of an exculpatory clause, summary judgment is appropriate only when it is uncontested that the party benefitted by the exculpatory clause has committed no greater-than-ordinary negligence.

Holding - Because the exculpatory clause was not ambiguous, not the result of a disparity in bargaining power, and not for public or essential service, the clause was enforceable as consistent with public policy.

Ball v. Waldoch Sports, Inc., 2003 Minn.App. LEXIS 1105 (2003) (unpublished)

Facts - The snowmobiler rider was participating in a snowmobiling-grass-drag-racing event. He was traveling at approximately 123.7 miles per hour, lost control, and was seriously injured. However, the snowmobiler rider, who participated in many such races, signed a release, which state in-part, that he released, waived and discharged, and covenanted not to sue, for any and all loss or damage, and any claim or demands therefore on account of injury to the person, whether caused by the negligence of the releases or otherwise, while the undersigned was in or upon the restricted area and/or participating in the event. Per the release, he also assumed full responsibility for the risk of bodily injury or death.

Rationale - The use and acceptance of exculpatory agreements is firmly established in the context of recreational sports and racing. These agreements are generally viewed as being in the intent of both parties. In the context of sporting events, and interpreting exculpatory clauses, in determining whether language releasing event sponsors from claims "whether caused by the negligence of the releasees or otherwise" creates an ambiguity in scope, the appellate Court looks to the meaning of the contract as a whole. Phrases found in a contract should not be interpreted out of context, but rather given a meaning in accordance with the obvious purposes of the contract as a whole. Negligence caused "in another way" suggests negligence by someone other than the releasees. Of 45 reported cases that analyze exculpatory contracts using the term "negligence or otherwise," none of the cases conclude that the term creates an ambiguity in scope. In that context of exculpatory clauses related to sporting events, even if "negligence or otherwise," typical language in such clauses, creates an ambiguity in scope, it should not mean that the entire release is void, only that the disputed provision will not be enforceable. In the latter context, a better interpretation of the law is that any "term" in a contract which attempts to exempt a party from liability for gross negligence or wanton conduct is unenforceable, not the entire contract.

Holding - Because the exculpatory clause manifested an unvarying intent to release the sponsors from negligence claims that formed the basis for the action, did not violate public policy, and did not state an intent to release the sponsors for intentional or wilful acts, the release was enforceable.

Kaltenback v. Splatball, Inc., Minn.App. 1999 LEXIS 1032 (1999) (unpublished)
Dailey v. Sports World South, Inc., 2003 Minn.App. LEXIS 1223 (2003) (unpublished)
Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783 (2005)

MISSISSIPPI

93. Are releases enforceable? Yes.

94. Are there any statutes that reflect enforcement of a release? No.

95. Can a parent execute a release for a minor? A minor's right may not be relinquished except pursuant to a specific authorization from a Court of competent jurisdiction.

Johnson v. Ford Motor Co., 707 F.2d 189 (1983)

96. Relevant Cases: *Turnbough v. Ladner*, 754 So.2d 467 (1999)

Facts - Plaintiff suffered decompression sickness after taking a scuba class from Defendant. He had signed an anticipatory release of liability, but still sued appellee under negligence principles.

Rationale - The law does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence although, with some exceptions, they are enforceable. However, such agreements are subject to close judicial scrutiny and are not upheld unless the clauses must be fairly and honestly negotiated and understandingly entered into. Although waivers are commonly used and necessary for some activities and the attendant risks and hazards associated with them, those who wish to relieve themselves from responsibility associated with a lack of due care or negligence should do so in specific and unmistakable terms. The agreement in this case fails to do that.

Holding - The language of the release did not demonstrate that appellant intended to accept any heightened exposure to injury caused by the malfeasance of appellee in failing to follow basic safety guidelines. Moreover, the release was a pre-printed form that appellant and appellee did not negotiate. Consequently, the release did not act to dismiss appellant's claims.

Rigby v. Sugar's Fitness & Activity Ctr., 803 So.2d 497 (2002)

Facts - Plaintiff fell when she stepped on a white piece of plastic on the steps of the indoor pool of Sugar's Fitness and Activity Center. She sued Sugar's claiming negligent maintenance of the club's pool. A release was signed at the time she joined Sugar's and was still in effect at the time of her injury. Plaintiff testified in her deposition that she did not remember signing this waiver.

Rationale - Contracts attempting to limit the liabilities of one of the parties will not be enforced unless the limitation is fairly and honestly negotiated and understood by both parties. There is nothing in the record to support the notion that this contract was ever fairly and honestly negotiated and understood by both of the parties. Specifically, Plaintiff does not recall any discussion of this waiver because she did not remember signing it. Furthermore, all questions

of negligence and contributory negligence shall be for the jury to determine. There is a dispute as to the negligence regarding the cleaning of the pool.

Holding - Plaintiff should have been allowed to produce her evidence in a trial to settle this dispute by jury.

MISSOURI

97. Are releases enforceable? Yes.

98. Are there any statutes that reflect enforcement of a release? No.

99. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

100. Relevant Cases: *Hornbeck v. All Am. Indoor Sports, 898 S.W.2d 717 (1995)*

Facts - The injured person claimed that a tear on the artificial turf on the soccer field caused his injury. The tenant argued that the release signed by the injured person absolved him from liability while the landlords argued that they did not maintain sufficient control over the leased premises to acquire a duty to make repairs.

Rationale - An agreement between a patron and the operator of an amusement device exempting the latter from liability for ordinary negligence resulting in personal injury is valid and enforceable against the patron if the patron is properly notified thereof. In order for a release or indemnification to exonerate a party from future acts of their own negligence, it must clearly and unambiguously do so. General language will not suffice.

Holding - Because the language of the Release is ambiguous as to whether or not it absolves All American from its own negligence, All American cannot make a *prima facie* showing that it is entitled to judgment as a matter of law based on the affirmative defense of release.

Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (1999)

Facts - Plaintiff rented skis at Snow Creek Ski Area and signed a "Snow Creek Ski Area Rental Form." The form contained a release of liability. This document was signed by Plaintiff during the process of renting equipment. The form had to be completed before obtaining skis and equipment. Plaintiff claims she felt pressured to move along and did not have an adequate opportunity to read and fully comprehend the rental form.

Rationale - Missouri appellate Courts require that a release from one's own future negligence be explicitly stated. Clear, unambiguous, unmistakable and conspicuous language is required in order to release a party from his or her own future negligence. The language of the exculpatory clause must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence. General language will not suffice. The words "negligence" or "fault" or their equivalents must be used conspicuously so that a

clear and unmistakable waiver and shifting of risk occurs. A contract that purports to relieve a party from any and all claim but does not actually do so is duplicitous, indistinct and uncertain. The exculpatory language and its format did not effectively notify Plaintiff that he was releasing Defendant from claims arising from its negligence. The form did not indicate it was a release. The title was in large type. By contrast, the exculpatory clause is in approximately 5 point type at the bottom of the form. A provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon.

Holding - The language and format leaves doubt that a reasonable persona agreeing to the clause actually would understand what future claims he or she is waiving.

Sander v. Alexander Richardson Invs., 334 F.3d 712 (2003)

Facts - Boats owned by Plaintiff were destroyed while moored at the Defendant's Yacht Club when another boat caught fire. The boat owners sought recovery from the Yacht Club, which defended based on an exculpatory clause in the Boat Space Rental Agreement that the Yacht Club had with each of the boat owners.

Rationale - Exculpatory clauses, whether fully exonerating a party from its own negligence or not, must be clearly and unequivocally expressed. When language in a contract's exculpatory clause is explicit, it is beyond the province of the reviewing Court to imply limitations or conditions on the exercise of a power to allocate risks so unmistakably expressed. Slip rental cases recognize exculpatory clauses that absolve a marina from all liability as valid contractual negotiations. The rule that an exculpatory clause that absolves a marina from liability for its own negligence is enforceable as long as the parties' intent to do so is clear and the clause is not the result of overreaching is limited to clauses contained in slip rental agreements. For purposes of determining whether there was overreaching in a contract, it is not enough to assert that one party was less sophisticated than the other. There must be some evidence that the party holding the example, engaging in fraud or coercion or by insisting on an unconscionable clause. Similarly, the mere fact that contracts are form contracts does not *per se* lead to the conclusion that a Defendant engaged in overreaching.

Holding - The agreement as a whole clearly shifted the risk of loss to the boat owners and exculpated the marina from liability for damage resulting from the fire.

Alack v. Vic Tanny International of Missouri, Inc., 1995 Mo.App. LEXIS 1473 (1995)
Benett v. Hidden Valley Golf & Ski, Inc., 318 F.3d 868 (2003)

MONTANA

101. Are releases enforceable? No.

102. Releases are unenforceable. Are there any statutes that reflect enforcement of a release?

MCA §§ 1-3-204
Waiver of Benefit of a Law

MCA §§ 28-2-701
What is unlawful

MCA §§ 28-2-702
Contracts which violate policy of the law – exemption from responsibility

103. Can a parent execute a release for a minor? No.

Mont.Code Ann. §28-2-702 (2006) All exculpatory agreements purporting to relieve a party from all liability for future negligence is unenforceable by statute.

104. Relevant Cases: *Haynes v. County of Missoula*, 163 Mont.270 (1973)

Facts - Plaintiffs were owners of horses destroyed in a fire. They had insured the horses. The insurance company paid Plaintiffs for the loss of one of the horses and became subrogated to the Plaintiffs' claims against Defendants to the extent of that payment. Plaintiffs completed the entry blank and signed the general release form and returned the form to the Fair Board.

Rationale - Even though a particular exculpatory agreement is not invalidated by statute, its enforcement may be contrary to public policy or to the "public interest" and such agreement is often invalidated thereby. The general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid. However, it is not true that any agreement of this kind is void as against public policy. Whether a person can relieve himself by agreement from the duties attaching as a matter of law to a legal relationship created by contract between himself and another person, is a matter of some difficulty. The conclusion has been reached that even under the view that a person may, under some circumstances, contract against the performance of such duties, he cannot do so where either: 1) the interest of the public requires the performance of such duties, or 2) because the parties do not stand upon a footing of equality, the weaker party compelled to submit to the stipulation." *Section 58-607, R.C.M. (1947)* provides everyone is responsible not only for ". . . his wilful acts, but also for injury occasioned by their want for care." The purpose of the statute is to fix liability on the tortfeasor and to make the victim whole. *Section 49-105, R.C.M. (1947)* provides that one may waive the advantage of a law intended solely for the benefit, but not a law established for a public reason. The two statutes are broad enough to render illegal any exculpatory clause or release relieving a potential tortfeasor from all liability for future negligent conduct where such clause or release is contrary to public policy or against the public interest.

Holding - The release is illegal and unenforceable because it is contrary to the public policy of this state and against the public interest.

McDermott v. Carie, LLC, 2005 MT 293 (2005)

Facts – McDermott and his family were paying guests at HPR, a dude ranch in Beaverhead County. Prior to participating in any activity at the dude ranch, McDermott was required to sign a Waiver and Release Agreement purporting to prospectively excuse HPR from liability for any injuries he may suffer while participating in activities at HPR. While attempting to untie a horse from a lead rope tied to a hitching post, the horse pulled back. The rope, still wrapped around McDermott's finger, tightened, severing the distal portion of McDermott's right finger.

Rationale — The court stated that pre-tor release that McDermott signed was illegal as against the law and public policy of the state. However, the court held that a redacted version of the agreement was admissible as evidence that demonstrate that a plaintiff had notice of the inherent risk posed by the unpredictable nature of horses. Moreover, the agreement was admissible as evidence to support HPR's affirmative defense that the statutory equine liability limitations, Mont. Code Ann. §§ 27-2-727(1); 27-1-725, shielded it from liability, because the statutes require a plaintiff to be aware of the risks posed by horses.

Hold – While a release agreement is not enforceable under Montana law to absolve a defendant from liability arising out of its negligence, a defendant may admit evidence of a release agreement to show that an injured plaintiff had notice and was aware of the inherent risks posed by the unpredictable nature of horses.

NEBRASKA

105. Are releases enforceable? Yes.

106. Are there any statutes that reflect enforcement of a release? No.

107. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

108. Relevant Cases: *Mayer v. Howard, 220 Neb.328 (1985)*

Facts - Plaintiff signed various documents and proceeded to race his motorcycle at speeds in excess of 100 m.p.h. He crashed and alleged that the cause was the latent defective design of the racetrack.

Rationale - The documents signed by Plaintiff were intended to make sure that he knew and comprehended the dangers to which he was voluntarily exposing himself before he would be permitted to operate a motorcycle on the track. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him. The language of the documents was not narrow or limited. Thus, to be void as against public policy, the contract

would have to be quite clearly repugnant to the public conscience. Furthermore, even without a release, one who engages in racing activities assumes the risk of such activities and is precluded from recovering for any injury resulting therefrom. This rule should apply whether the vehicle being raced is a stock car or a motorcycle.

Holding - Because the documents simply brought to Plaintiff's attention these matters which Defendant believed to be necessary to make an informed decision to race, and which if known and understood by Plaintiff constituted an assumption of risk on his party, the documents could not be contrary to public policy, and in fact reflected the public policy.

McCurry v. School Dist. of Valley 496 N.W.2d 433 (1993)

NEVADA

109. Are releases enforceable? Yes.

110. Are there any statutes that reflect enforcement of a release?

NRS § 41.141
When comparable negligence not bar to recovery; jury instructions

111. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

112. Relevant Cases: *Renaud v. 200 Convention Ctr., 102 Nev.500 (1986)*

Facts - Plaintiff filed a negligence claim against Flyaway for injuries she sustained while utilizing its free-fall simulator. Flyaway had required that Plaintiff sign a liability release form which purported to exculpate Flyaway of any liability for negligence that might occur while Plaintiff was on its premises.

Rationale - Assumption of the risk is based on a theory of consent. In order for a litigant to have assumed the risk, two requirements must be met. First, there must have been voluntary exposure to danger. Second, there must have been actual knowledge of the risk assumed. A risk can be said to have been voluntarily assumed by a person only if it was known to him and if he fully appreciated the danger. The essential element of the defense is the actual knowledge of the danger assumed.

Holding - Because there was a dispute as to whether Plaintiff knowingly and voluntarily assumed the risks associated with the simulator, the matter was not appropriate for a determination as a matter of law.

Tuner v. Mandalay Sports Entertainment, LLC 680 P.3d 1171 (2008)

NEW HAMPSHIRE

113. Are releases enforceable? Yes.

114. Are there any statutes that reflect enforcement of a release? No.

115. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

116. Relevant Cases: *Barnes v. New Hampshire Karting Ass'n, 128 N.H.102 (1986)*

Facts - Plaintiff signed a pit pass containing a release and waiver from liability before entering the cart racetrack. He did not read the release portion before signing it. He rounded a blind turn in his cart, which collided with a disabled cart. No flagman was present to warn drivers of hazards.

Rationale - A Defendant seeking to avoid liability must show that the exculpatory agreement does not contravene public policy. Once an exculpatory agreement is found unobjectionable as a matter of public policy, it will be upheld only if it appears that the Plaintiff understood the import of the agreement or that a reasonable person in his position would have known of the exculpatory provision. Furthermore, the Plaintiff's claims must be within the contemplation of the parties at the time of the execution of the agreement. The parties need not, however, have contemplated the precise occurrence that resulted in the injuries involving negligence on the part of the Defendants. Since the terms of the contract are strictly construed against the Defendant, the contract must clearly state that the Defendant is not responsible for the consequences of his negligence.

Holding - The language of the agreement was not ambiguous and the release applied to practice laps. Also, failure to read the entire release does not preclude enforcement of the agreement.

Dean v. MacDonald, 147 N.H.263 (2001)

Facts - Plaintiff was injured by a race car doing practice laps as he crossed a racetrack. He had signed a release of liability.

Rationale - Although New Hampshire law generally prohibits exculpatory contracts, the Supreme Court will enforce them if: 1) they do not violate public policy; 2) the Plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and 3) the Plaintiff's claims were within the contemplation of the parties when they executed the contract. In interpreting a release, reviewing Courts give the language used by the parties its common meaning and give the contract itself the meaning that would be attached to it by a reasonable person. As long as the language clearly and specifically indicates the intent to release the Defendant from liability for personal injury caused by the Defendant's negligence, the agreement will be upheld. Parties to an exculpatory contract may adopt language to cover a broad range of accidents by

specifying injuries involving negligence on the part of the Defendants. Additionally, having failed to avail himself of the opportunity to read a release of liability, yet gaining the admission to which his signature was a condition precedent, a Plaintiff cannot complain that he had no notice of the import of the paper he signed. Finally, the release was not invalid because it failed to identify the Defendants by name. The functional rather than the specific identification of those released made it clear that the release was to apply to all parties associated with the race.

Holding - The language clearly and specifically indicated the intent to release the Defendants from liability for the consequences of their own negligence and is sufficient to cover a broad range of accidents occurring at automobile races.

NEW JERSEY

117. Are releases enforceable? Yes.

118. Are there any statutes that reflect enforcement of a release?

N.J.S.A. § 5:13-3
Responsibility of operator (Skiing)

N.J.S.C. § 5:14-1
Roller Skating Rink Safety and Liability

N.J.S.A. § 5:15-1
Equine Animal Activities

119. Can a parent execute a release for a minor? No.

Hojnowski v. Vans Skate park, 375 N.J.Super.568 (2005)
However, this case was appealed to the New Jersey Supreme Court, which held that an arbitration agreement signed by the parent (involving a Van's Skate Park) on behalf of the minor, could operate to force the matter to be arbitrated, as an alternative to a jury trial.

Fitzgerald. Newark Norning Ledger Co., 111 N.J.Super.104 (1970)

120. Relevant Cases: *Brough v. Hidden Valley, 312 N.J.Super.139 (1998); Stelluti v. Casapenn Enters, LLC* (2009) 408 N.J. super. 435 (trial court properly granted summary judgment to a fitness club in a member's lawsuit, based upon the waiver and release provision in the membership agreement. The court did note, that public policy would not insulate the health club from unreasonable acts or reckless/wilful conduct).

Facts - When Plaintiff purchased a condominium at Hidden Valley, she was required to become a member of the resort and, amongst the various closing documents, sign a "Member Winter Dues Application," which included a release. Plaintiff sustained serious injuries while skiing on one of Defendants' ski slopes. Plaintiff contends that given the obligations imposed

on ski operators by the Ski Statute any release discharging liability that arises under the Statute is "patently invalid" and against public policy.

Rationale - An affirmative statutory duty of care imposed upon ski resort operators by *N.J.S.A. 5:13-3(a)* cannot be the subject of what, in effect, are contracts of adhesion. The release was included in a "membership agreement" which was one of several closing documents Plaintiffs were required to sign. There was nothing in those documents that would have alerted Plaintiffs to the fact that they were releasing Defendants from their statutory duties. Further, the release here does not expressly focus upon the liability that might arise from a failure of Defendants to comply with their statutory duty of care.

Holding - The release should have no role whatsoever in the trial.

Hojnowski v. Vans Skate Park, 375 N.J.Super.568 (2005)

Facts - The minor wanted to use the skate park. To that end, his mother executed on the minor's behalf a document that waived the right to hold the skate park liable for injuries. Several days later, the minor, who was 12 years old, fractured his femur while skateboarding at the skate park.

Rationale - To allow a parent or guardian to execute exculpatory provisions on his or her minor's behalf would render meaningless for all practical purposes the special protections historically accorded minors. In the tort context especially, a minor should be afforded protection not only from his own improvident decision to release his possible prospective claims for injury based on another's negligence, but also from unwise decisions made on his behalf by parents who are routinely asked to release their child's claims for liability.

Holding - The release at issue was voided because it limited the tort remedies available to the minor child to less than the law, if unfettered, would otherwise provide.

NEW MEXICO

121. Are releases enforceable? Yes.

122. Are there any statutes that reflect enforcement of a release?

N.M.S.A. § 42-13-1
Equine Liability Act

123. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

124. Relevant Cases: *Berlangieri v. Running Elk Corp., 134 N.M.341 (2003)*

Facts - Defendant operates a recreational resort facility in northern New Mexico. Plaintiff stayed as a guest and arranged to take part in a guided horseback trail ride on that day.

Plaintiff was asked to read and sign the Lodge's "Agreement for Release and Assumption of Risk." The Lodge manager asked the guests whether they understood the terms of the agreement. Plaintiff apparently stated that he did, but has no memory of this discussion, or signing the release.

Rationale - Releases are considered on a case-by-case basis. The general rule that liability releases for personal injury can be enforced in limited circumstances is retained. However, public policy dictated that they not be enforced. A liability release requires such clarity that a person without legal training could understand the agreement. Also, the appellate Court considered whether a release is affected with a public interest such that it is unenforceable as contrary to public policy. Public policy favoring the invalidation of a release can be furnished either through statutory or common law. The release presented in this case expressed the intent of the parties that the guest would not hold the resort liable for its negligent acts. The Equine Liability Act, *N.M.S.A. §21-13-1 et seq. (1993)*, expresses in general terms public policy that equine operators had to be accountable for injuries due to their own fault. However, it is not appropriate to invalidate all recreational releases, but they must be strictly construed, and the policy implications of their enforcement must be considered.

Holding - The policy generally expressed in the Equine Liability Act and other factors trigger the public policy exception to the general rule that liability releases for negligence are enforceable. As a result, the liability release executed by Plaintiff may not be enforced.

NEW YORK

125. Are releases enforceable? Yes.

126. Are there any statutes that reflect enforcement of a release?

    NY CLS Gen. Oblig. §§ 5-326
    Agreements excepting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable

127. Can a parent execute a release for a minor? No.

    Valdimer v. Mt. Vernon Hebrew Camps, Inc., 9 N.Y.2d 21 (1961)

128. Relevant Cases: *Stuhlweissenburg v. Town of Orangetown, 223 A.D.2d 633 (1996)*

Facts - Plaintiff, a member of a softball team, was injured when she slid into third base while playing softball at Veteran's Field in Orangetown. The sponsor of her team allegedly paid a $400 fee to the town. Plaintiff alleged that pursuant to *NY CLS Gen. Oblig. §§ 5-326* any waiver of liability was void as against public policy.

Rationale - To void a release of liability executed by a user of a recreational facility pursuant to *NY CLS Gen. Oblig. §§ 5-326*, the individual must have paid a fee for use of the facility. A

membership fee paid by Plaintiff four months prior to the race was not a fee or other compensation for the use of the facility within the meaning of *§§ 5-326*. The provision is not applicable by its terms insofar as the release executed by injured party was neither in, or in connection with, or collateral to Plaintiff's admission ticket.

Holding - The Plaintiff has failed to produce any evidence that she paid a fee for admission to, or use of, the Town's softball field. Accordingly, *NY CLS Gen. Oblig. §§ 5-326* did not void the release executed by Plaintiff prior to participating in her softball game.

Scrivener v. Sky's the Limit, 68 F.Supp.2d 277 (1999)

Facts - Plaintiff wife bought Plaintiff husband skydiving lessons at Defendant skydiving company. Prior to taking lessons, Plaintiff husband signed a release and indemnification agreement, releasing Defendant from liability for any claims arising out of participation in skydiving activities. Plaintiff husband also took a test which reiterated the dangerous nature of the sport. Plaintiff husband was seriously injured while executing his first solo jump. Plaintiffs sued Defendant for negligent instruction.

Rationale - In the absence of contravening public policy, exculpatory provisions is a contract purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the Courts, generally are enforced, subject however, to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a Defendant of liability for the Defendant's negligence, the agreement will be enforced. Such an agreement will not be enforced, however, where it purports to exempt liability for wilful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest renders the exculpatory clause unenforceable. New York Courts have found *NY CLS Gen. Oblig. §§ 5-326* inapplicable where the Plaintiff is injured while participating in instructional, rather than recreational, sporting activities, and the fee paid was tuition for a course of instruction, as opposed to the use fee for recreational facilities contemplated by the statute.

Holding - Defendant was entitled to summary judgment because the release clearly stated the intention of the parties to relieve Defendant and its instructors of liability and *§§ 5-326* is not applicable.

Bufano v. National Inline Roller Hockey Ass'n, 272 A.D.2d 359 (2000)

Facts - The injured Plaintiff was a member of an inline roller hockey league. To become a member of the league he paid $25 annual dues and signed a registration form, which contained a release of liability. Plaintiff was injured in a fight with another player during a game.

Rationale - The release signed by Plaintiff is not invalidated by *NY CLS Gen. Oblig. §§ 5-326* since the $25 he paid was not paid to the owner or operator of a recreational facility. In addition, the liability release he signed expressed in clear and unequivocal language the intent to relieve the Defendants of all liability for personal injuries to Plaintiff caused by the

Defendants' negligence. Moreover, by voluntarily participating in the game, Plaintiff assumed the risk of the injuries he sustained.

Holding - The release is enforceable.

Williams v. City of Albany, 271 A.D.2d 855 (2000)

Facts - Defendant was a for-profit corporation engaged in operating a regional sports recreation league that was comprised of approximately 55 flag football teams, each of which paid a $550 fee to compete in the league. Plaintiff was injured while participating in a league game. Defendant argued that because Plaintiff did not personally pay a fee, Plaintiff and his wife could not avail themselves of the protection of *NY CLS Gen. Oblig. §§ 5-326*.

Rationale - The Court does not deem the statute as limited in application to the person or entity who actually pays the fee. Rather, the statute, by its express terms, is applicable to an owner or operator of a recreational facility to received a fee. Additionally, the fact that Defendant did not own, maintain or control the playing field where the recreational activity took place is not controlling. The relevant injury is whether Defendant, as the operator of the recreational activity in question, received compensation therefor.

Holding - Inasmuch as Defendant received a fee for the use of the facilities where Williams was injured, the release executed by him is void as against public policy and is wholly unenforceable.

Murley v. Deep Explorers, Inc., 281 F.Supp.2d 580 (2003)

Facts - The decedent died during an advanced scuba diving excursion. He had signed a series of liability releases prior to scuba training. Plaintiffs brought a wrongful death suit, but Defendants asserted several affirmative defenses based on the liability releases.

Rationale - There is nothing inherently unfair about the use of releases in sporting events such as scuba diving. A liability release signed by a student in a scuba diving course is enforceable where the release's clear and unequivocal language expresses the intent to relieve the school of all liability for personal injury. In determining whether a waiver or release associated with scuba diving is valid under Federal law, Courts generally consider the following: 1) whether the person signing the waiver had informed consent; 2) whether the clause was inconsistent with public policy; and 3) whether the clause constitutes a valid adhesion contract. A pre-accident waiver or release typically will absolve a Defendant from liability if these three factors are shown. In this case, the decedent clearly understood the dangers associated with scuba diving, and represented on the three releases that he was advised of the hazards and that he assumed all risk of harm, injury or damage. The releases clearly expressed Defendants' intent to free themselves and their employees from liability arising from negligence, and the language contained in the release unequivocally put a layperson on notice of their legal significance and effect. Furthermore, the decedent had enough experience to understand the dangers of scuba during, and clearly accepted the risks.

Holding - Summary judgment for Defendants was proper because the decedent knowingly and voluntarily signed three liability releases barring Plaintiffs from brining a negligence suit.

Filson v. Cold River Trail Rides, 242 A.D.2d 775 (1997)
Barone v. St. Joseph's Villa, 255 F.Supp.2d 973 (1998)
Lux v. Cox, 32 F.Supp.2d 92 (1998)
Salazar v. Riverdale Riding Corp., 183 Misc. 2d 145 (1999)
Bacchiocchi v. Ranch Parachute Club, Ltd. 273 A.D.2d 173 (2000)
Olivelli v. Sappo Corp., 225 F.Supp.2d 109 (2002)
Millan v. Brown, 295 A.D.2d 409 (2002)
Fusco v. Now & Zen, Inc., 294 A.D.2d 466 (2002)
Lemoine v. Cornell Univ., 2 A.D.3d 1017 (2003)
O'Connor v. United States Fencing Ass'n, 260 F.Supp.2d 545 (2003)
Evans v. Pikeway, Inc., NY Slip Op 24556 (2004) (uncorrected opinion)

NORTH CAROLINA

129. Are releases enforceable? Yes.

130. Are there any statutes that reflect enforcement of a release?

N.C. Gen. Stat. §§ 99C-2(c)
Actions Relating to Skier Safety and Skiing Accidents

46 U.S.C.S. § 183
The limitation of Liability Act

N.C. Gen. Stat. § 115D-72
Motorcycle Safety Instructions Programs

131. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

132. Relevant Cases: W*aggoner v. Nags Head Water Sports, 1998 U.S. App. LEXIS 6792 (1998)*

Facts - Plaintiff rented a jet ski from Defendant. As part of the rental agreement, she signed a pre-printed form titled "Rental Agreement/Waiver." Plaintiff was injured while riding on the jet ski and sued, alleging that Defendant negligently maintained and operated the watercraft. She did not understand that form and allowed Defendant to escape liability for its own wrongdoing.

Rationale - North California Courts will enforce an exculpatory clause unless it is violative of a statute, gained through inequality of bargaining power, or contrary to substantial public interest. The release here does not violate The Limitation of Liability Act (*46 U.S.C.S. ?1 183*) because the statute is limited by its terms to common carriers. Defendant was not acting as a common carrier. Plaintiff was not the victim of unequal bargaining power because only where

"it is necessary to enter into the contract to obtain something of importance which for all practical purposes is not obtainable elsewhere" will "unequal bargaining power" void an exculpatory clause. Additionally, recreational boat renting is insufficiently important to justify an imposition on the freedom of contract. Furthermore, the exculpatory clause here was conspicuous and unambiguous. It was titled, in all capital letters, "WAIVER AND ASSUMPTION OF RISKS." Plaintiff's attention was drawn on it, as illustrated by the facts that she wrote her name in the first sentence and signed the document immediately below the clause. Furthermore, a broad exculpatory clause that does not specifically mention the word "negligence" is sufficient to bar a claim for negligence.

Holding - Therefore, the renter had assumed the risk of the accident connected with the operation of the craft.

Strawbridge v. Sugar Mt. Resort, Inc., 320 F.Supp.2d 425 (2004)

Facts - Plaintiff fell while skiing at Sugar Mountain due to a bare spot on the mountain. Defendants' rely on the ski equipment rental agreement and the statement on the back of the lift ticket to show that Plaintiff waived his right to bring this action.

Rationale - North Carolina Courts strictly construe the terms of exculpatory agreements against the parties seeking to enforce them. Giving broad meaning to the phrases "related to the use of this equipment" and "resulting from . . . use of this equipment," one could reasonably interpret the statements as barring only suits that arise out of injuries caused by the equipment. Since the Court is to construe the agreement against the party seeking to enforce it, the Court accepts this meaning. Yet this does not apply because Plaintiff does not claim that his injuries were caused by a defect in the equipment. On the other hand, the statement on the back of the lift ticket clearly encompasses injuries of the type Plaintiff suffered because it states that the user agrees to "assume all risk of personal injury as a result of all the inherent risks of skiing." This language would bar Plaintiff's claims. However, the Courts will not enforce an exculpatory clause if it is violative of a statute, gained through inequality of bargaining power, or contrary to a substantial public interest. To enforce the exculpatory terms of the lift ticket would violate *N.C. Gen. Stat. §§ 99C(c)(7)*, which imposes on ski area operators the duty "not to engage wilfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties." Plaintiff's case is built on the claim that Sugar Mountain acted negligently. If this is so, then allowing Defendant to contract its way out of liability would undercut the statute. Even if the exculpatory language did not violate a statute, it would still be void because enforcing the language would run contrary to a substantial public interest. The public interest exception to the general rule that exculpatory clauses are enforceable finds its basis in the North Carolina Supreme Court's statement that "a party cannot protect himself by contracting against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty."

Holding - The agreement that Plaintiff signed while renting equipment does not bar this action. And although the statement on Plaintiff's lift ticket, by its own terms, does bar him from suing Sugar Mountain for the injury he suffered, the exculpatory clause is violative of public policy

and is therefore unenforceable. Furthermore, the Court finds that the ski industry is sufficiently regulated and tied to the public interest to make exculpatory clauses improper.

Fortson v. McClellan, 131 N.C.App.635 (1998)

NORTH DAKOTA

133. Are releases enforceable? Yes.

134. Are there any statutes that reflect enforcement of a release?

N.D. Cent. Code, §§ 9-08-02
Contracts against the policy of the law

135. Can a parent execute a release for a minor? Yes.

Kondrad v. Bismark Park Dist., 2003 N.D. LEXIS 3 (2003)

136. Relevant Cases: *Reed v. University of North Dakota,1999 ND 25 (1999)*

Facts - Plaintiff student had a national letter of intent and played hockey at Defendant university for two years before being injured in a preseason hockey conditioning program. When the hockey players, including Plaintiff, signed the registration form, they agreed not to hold the participating sponsors responsible for any claims arising from their participation in the event and Defendant agreed to let them run on the course during Defendant's road race.

Rationale - Generally, the law does not favor contracts exonerating parties from liability for their conduct. Contractual exculpatory clauses are strictly construed against the benefitted party, and they will not be enforced if they are ambiguous or release the benefitted party from liability for intentional, wilful, or wanton acts. (*N.D. Cent. Code §§ 9-08-02,*) Courts construe contracts in light of existing statutes, which become part of and are read into the contract as if those provisions were included in it. The interpretation of this release is thus governed by *N.D. Cent. Code §§ 9-08-02*, and exoneration for "any claims" and "all responsibility" is limited to negligent acts as a matter of law. However, contracts are also construed to give effect to the parties' intent, which, if possible, must be ascertained by giving meaning to each provision of the contract. The parties are bound by clear and unambiguous language evidencing an intent to extinguish liability. Although the language of this release is broad, it unambiguously evidences an intent to exonerate Defendant from liability for Plaintiff's injuries and would be rendered meaningless if it were construed otherwise. Furthermore, Plaintiff was not subject to unequal bargaining power because any perceived mandatory requirement for him to participate in this race involved his relationship with the UND hockey program and not the Defendant.

Holding - Under the broad language of this release, Reed assumed all responsibility for injuries incurred as a direct or indirect result of his participation in the race, and he agreed to

exonerate NDAD from responsibility for any claims. Additionally, the release was not against public policy. It exonerated Defendant from liability for Reed's negligence claims.

Kondrad v. Bismarck Park Dist., 2003 N.D. LEXIS 3 (2003)

Facts - The Plaintiff child was participating in an after-school care program operated by the Park District. He fell on the school grounds while riding a bicycle owned by a child who was not part of the program. His mother had signed a waiver prior to the victim's participation. Plaintiff argues this language must be interpreted as exonerating the Park District from liability for damages only as to injuries sustained during "activities associated with" the BLAST program. The Park District has conceded that riding a bicycle was not an activity associated with the program, however, the waiver and release exonerated it from liability for negligence resulting in injury or damages to Plaintiff while participating in the program irrespective of whether, at the time of the injury, Plaintiff was involved in a planned activity associated with the program.

Rationale - Generally, the law does not favor contracts exonerating parties from liability for their conduct. However, the parties are bound by clear and unambiguous language evidencing an intent to extinguish liability, even though exculpatory clauses are construed against the benefitted party. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. The issue whether a contract is ambiguous is a question of law. An unambiguous contract is particularly amenable to summary judgment. All provisions of a contract are construed together to give meaning to every sentence, phrase, and word. Here, the assumption of risk and waiver clauses were separate and distinct. Each contained a clearly expressed meaning and consequence. Under the assumption of risk clause, the mother agreed to assume the full risk of injury and damages resulting from Plaintiff participating in any activities associated with the BLAST program. In addition, under the waiver and release clause, the mother waived and relinquished all claims against the Park District for injuries or damages incurred on account of Plaintiff's participation in the BLAST program. The language of waiver and release is not limited to only those injuries incurred while participating in activities associated with the program, but to all injuries incurred by the child on account of his participation in the program.

Holding - Under the unambiguous language of the agreement, the mother exonerated the Park District from liability for injury and damages incurred by Plaintiff son while participating in the program and caused by the alleged negligence of the Park District.

OHIO

137. Are releases enforceable? Yes.

138. Are there any statutes that reflect enforcement of a release? No.

139. Can a parent execute a release for a minor? Yes.

Mohney v. USA Hockey, Inc., 5 Fed.Appx.450 (2001)

Cross v. Carnes, 724 N.E.2d 828 (1998)
Zivich v. Mentor Soccer Club, 1997 Ohio App. LEXIS 1577 (1997)

140. Relevant Cases: *Lamb v. University Hosp. Health Care Enters., 1998 Ohio App. LEXIS 3740 (1998)*

Facts - The fitness center client allegedly sustained injury to his shoulder as the result of using modified equipment in the fitness center. The fitness center and its manager asserted a defense of assumption of the risk, citing the waiver signed by the client stating that it was a release of liability for negligence on the part of the fitness center and its officers as agents.

Rationale - A participant in a recreational activity is free to contract with the proprietor of such activity as to relieve the proprietor of responsibility for damages or injuries to the participant caused by the negligence of the proprietor except when caused by wanton or wilful misconduct. Such contracts constitute express assumption of the risk. For express assumption of the risk to operate as a bar to recovery, the party waiving his right to recover must make a conscious choice to accept the consequences of the other party's negligence. Consequently, the waiver must be expressed to terms that are clear and unequivocal. If it is not so expressed, the intention of the parties is a factual inquiry, and is properly ascertained by a jury. Moreover, such agreements do not bar recovery for wanton or wilful misconduct. In determining whether a waiver of liability is enforceable, therefore, the key issue is whether the agreement unequivocally releases the proprietors from their own negligence. Lastly, in order for a Plaintiff to be barred from recovery by assumption of the risk, the risk of injury must result in participation in the event or activity for which a release was signed.

Holding - The waiver states that it is a release of liability for negligence on the part of the Center, its officers or agents. It is clear and unambiguous.

Clutter v. Karshner, 2001 U.S. App. LEXIS 19094 (2001)

Facts - Plaintiff paid a fee and signed, without reading, a document entitled "Release and Waiver of Liability and Indemnity Agreement." While driving in a heat race, Plaintiff lost control of his vehicle at turn three. The accident rendered Plaintiff paraplegic. Plaintiff claims the release is invalid because there was no meeting of the minds when it was signed. He never read the language of the document; he felt rushed to sign it; and the K-C Raceway representative manning the sign-in booth was poorly informed as to the document's effect.

Rationale - Ohio law permits stock-car participants and proprietors to contract "in such manner so as to relieve the proprietor of responsibility to the participant for the proprietor's negligence, but not for the proprietor's wilful or wanton conduct." The release was set out in clear terms and presented to Plaintiff. He chose not to read the terms. While Plaintiff felt rushed to sign, and perhaps did not understand the gravity of the release, he was not rushed by anyone representing Defendant. Plaintiff chose not to inform himself of the release's parameters, despite having the opportunity to do so.

Holding - The release was enforceable

Bishop v. Nelson Ledges Quarry Park, Ltd., 2005 Ohio 2656 (2005)

Facts - Plaintiff, who was eighteen years of age, drowned in Defendant's pool. A fee of $5 was collected from Plaintiff and he signed the required sign-in sheet, containing a waiver of liability clause, before entering the park. Plaintiff argues the intent to release the party was not expressed in clear and unequivocal terms.

Rationale - It is well settled in Ohio that participants in recreational activities and the proprietor of a venue for such an activity are free to enter into contracts designed to relieve the proprietor from responsibility to the participant for the proprietor's acts of negligence, but not for his wilful or wanton misconduct. Clauses limiting liability shall ordinarily be construed strictly against the drafting party. Ohio has no provisions, however, that regulate the size of the type to be used in contract provisions. The appellate Court agrees to broad principle that contract provisions, particularly those which purport to waive liability, should be printed in type large enough for a person or normal vision to read easily. The sheet signed by the decedent is clearly labeled at the top as a "Liability Waiver Form" in bold type. Any person signing the waiver sheet was on notice that the company was attempting to disclaim all liability for drowning, which is certainly a foreseeable risk of the activity. The term, "all liability" in this case is sufficient to encompass a loss from drowning due to any alleged negligence on the part of Defendant. Although the better practice is to expressly state the word "negligence" somewhere in an exculpatory provision, the absence of that term does not automatically render the provision fatally flawed.

Holding - Reviewing the terms of the waiver language is the light most favorable to Plaintiff, there is no genuine issue of material fact relating to the validity of the waiver that decedent signed. The waiver passed the test of clarity as it was printed in type large enough for a person of normal vision to read easily and put the decedent on notice that he was waiving liability.

Hall v. Woodland Lake Leisure Resort Club, 1998 Ohio App. LEXIS 4898 (1998)
Lamb v. University Hosp. Health Care Enters.,1998 Ohio App. LEXIS 3740 (1998)
Mohney v. USA Hockey, Inc., 5 Fed.Appx.450 (2001)
Curtis v. Hoosier Racing Tire Corp., 299 F.Supp.2d 777 (2004)

OKLAHOMA

141. Are releases enforceable? Yes.

142. Are there any statutes that reflect enforcement of a release?

Okla. Const. art. 23, §§ 6

143. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

144. Relevant Cases: *Martin v. A.C.G., Inc., 1998 OK CIV APP 148 (1998)*

Facts - Plaintiff injured her hand while using an exercise machine at a health club. A health club employee had previously been injured on the machine and the operator did not take steps to prevent future injuries. Plaintiff had signed a contract approximately eight days prior to the accident which contained an exculpatory clause releasing Defendant from any and all liability resulting from her use of the facility and assuming all risks in connection therewith, including known and unknown risks.

Rationale - By entering into an exculpatory agreement the promisor assumes the risks that are waived. While these exculpatory promise-based obligations are generally enforceable, they are distasteful to the law. For a validity test the exculpatory clause must pass a gauntlet of judicially crafted hurdles: 1) their language must evidence a clear and ambiguous intent to exonerate the would-be Defendant from liability for the sought-to-be-recovered damages; 2) at the time the contract containing the clause was executed there must have been no vast difference in bargaining power between the parties; and 3) enforcement of these clauses must never (a) be injurious to public health, public morals or confidence in administration of the law or (b) so undermine the security of individual rights vis-a-vis personal safety or private property as to violate public policy. The clause will never avail to relieve a party from liability for intentional, wilful or fraudulent acts or gross, wanton negligence.

Holding - The contract released the operator from any and all liability resulting from the customer's use of the facility and assumed all risks; the customer was on an equal footing with the operator when the contract was executed, and the exculpatory clause did not violate public policy; the action was properly decided on the unambiguous contractual agreement between the parties; and there was no evidence showing negligence and no reversible error was alleged.

Manning v. Brannon, 1998 OK CIV APP 17 (1998)

Facts - The injured person went to the skydiving company to learn how to skydive. During his training, he signed an exculpatory contract, which released the skydiving company from liability in the event of injury. On his second jump, the injured person was hurt.

Rationale - Exculpatory contracts, a contract to avoid liability for damages also known as a "waiver" or "release," may be valid and enforceable so long as: 1) the intent to excuse one party from the consequences of his or her own negligence is expressed in clear, definite and unambiguous language; 2) the agreement is made at arm's length with no vast disparity of bargaining power between the parties; and 3) the exculpation is not contrary to statute or public policy, such a waiver or release from liability is valid and enforceable. The language is clear and unambiguous. It clearly demonstrated the intent to relieve the skydiving company of liability and described the nature and extent of damages that the skydiving company sought to avoid in language that a lay person did not argue that he had no choice but to agree to be trained by the skydiving company. An exculpatory contract in the context of a high-risk sport like skydiving was not against the public policy of the State.

Holding - Plaintiff clearly and unambiguously released Defendant from any liability when he knowingly executed the exculpatory agreement.

OREGON

145. Are releases enforceable? Yes.

146. Are there any statutes that reflect enforcement of a release? No.

147. Can a parent execute a release for a minor? No.

Ohio Casualty Ins. Co. Mallison, 223 Ore. 406 (1960)

148. Relevant Cases: S*teele v. Mt. Hood Meadows Ore., Ltd., 159 Ore.App.272 (1999)*

Facts - Jameson went skiing at Mt. Hood Meadows. He bought a day pass at the lift ticket booth. There is a burgundy border at the bottom of the pass. Printed within the border is a direction to the purchaser to read the "contract of release and indemnification agreement, terms and conditions, and assumption of risk notices" on the other side of the pass. Two signs at the ski resort called attention to the terms printed on the back of the pass. While Jameson was skiing at Mt. Hood Meadows, he suffered injuries that allegedly led to his death.

Rationale - When one party seeks to contract away liability for its own negligence in advance of any harm, the intent to do so must be clearly and unequivocally expressed. In determining whether a contract provision meets that standard, the Court will consider both the language of the contract and the possibility of a harsh or inequitable result that would fall on one party if the other were immunized from the consequences of its own negligence. The latter inquiry turns on the nature of the parties' obligations under the contract. A release need not always specifically refer to negligence to bar a negligence claim. The Court is to consider the nature of the parties' obligations and the expectations under the contract as well as the language of the contract in determining whether the parties' intent is clear and unequivocal. The back of the ticket includes *Or. Rev. Stat. §§§§ 30.970-30.990*, which bars recovery for an injury caused solely by an inherent risk of skiing, but does not preclude recovery, if the injury is caused by a combination of an inherent risk of skiing and operator negligence. A ticket holder reasonably could have understood that he or she was only releasing any claims for personal injury that resulted from those inherent risks. In addition posted signs asking guests to report claims, for injuries implied that the guests retained some claims for personal injuries whatever their cause including claims for the Defendants negligence.

Holding - The Defendant was not entitled to summary judgment because the release on the lift ticket did not clearly and unequivocally reflect an intent to absolve the Defendant of the consequences of its own negligence.

Landren v. Hood River Sports Club, Inc., 2001 U.S. Dist. LEXIS 21515 (2001)

Facts - Plaintiff joined Defendant and signed a membership contract that incorporated Defendant's Policies and Procedures handout that included a section entitled "Liability of the Club and the Members." Later, Plaintiff was injured in Defendant's sauna when the bench he was standing on collapsed "like a trap door" and threw him to the floor.

Rationale - Generally, absent some consideration of public policy, parties to a contract can restrict or modify what would otherwise be a tort liability between them. The treatment courts accord such an agreement depends upon its subject and terms and the relationship of the parties. A presumption exists against an intention to contract for immunity from the consequences of one's own negligence, and contracts will not be construed to provide immunity or indemnity unless the intention to do so is clearly and unequivocally expressed. An ambiguous agreement is to be construed against the drafter. Additionally, agreements to limit the liability of one party to a contract for its own tortious conduct are enforceable only under three circumstances: 1) the limitation of liability was bargained for; 2) the provision was called to the other party's attention; or 3) the provision is conspicuous, "reads in part that a term or clause is conspicuous when it is so written that a reasonable person ought to have noticed it. A printed heading in capitals is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. Whether a term or clause is "conspicuous" or not is for decision by the Court.

Holding - The release was unenforceable because the language was in the same typeface and size as the rest of the agreement. There was no evidence that the parties discussed the liability waiver before the member signed the agreement. While it was reasonable for the club to limit its liability for the members use of its equipment, it was not reasonable for the club to limit its liability for injuries to its members that occurred in the auxiliary areas like the locker room, saunas, or restaurants. The Court also found that the language was ambiguous because it did not clearly cover a member who was injured by the club's failure to maintain its auxiliary areas.

PENNSYLVANIA

149. Are releases enforceable? Yes.

150. Are there any statutes that reflect enforcement of a release? No.

151. Can a parent execute a release for a minor? No.

Troshak v. Terminix International Co, 1998 U.S. Dist. LEXIS 9890 (1998)
Shaner v. State Sys. of Higher Educ., 40 Pa. D. & C. 4th 308 (1998)
Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F.Supp.240 (1997)

152. Relevant Cases: *Nicholson v. Mount Airy Lodge, 1997 U.S. Dist. LEXIS 21035 (1997)*

Facts - Plaintiff went roller skating at the Mount Airy Lodge, using roller skates rented from Mount Airy Lodge. After Plaintiff had skated for a short time, the right rear wheel on his right

roller skate suddenly came loose causing him to fall and suffer injuries. Before Plaintiff began skating, he signed a document which included a release of liability.

Rationale - An exculpatory agreement is valid and enforceable when the contract does not contravene any policy of the law; the contract is an agreement between individuals relating to their private affairs; and, each party was a free bargaining agent, not simply one drawn into an adhesion contract. The agreement must be construed strictly and against the party asserting it, and it must spell out the intent of the parties with the utmost particularity. While exclusionary clauses are construed strictly against the party who seeks to avoid liability, the court must use common sense in interpreting the agreement. Because Plaintiff decided to roller skate as a recreational activity while on vacation and there is no evidence that he was under any compulsion to do so, he cannot complain that he was in an unfair bargaining position when he signed the exculpatory agreement. Any negligence by Defendant for failing to maintain or inspect the roller skates did not pre-date the release because it occurred simultaneously with Plaintiff's signing of the rental agreement and acceptance of the skates. However, the express language of the agreement reserves Plaintiff's right to assert a claim against Defendant for any conduct that amounts to gross negligence. The exculpatory agreement clearly limits Plaintiff's claim to one of gross negligence.

Holding - Because Plaintiff may be able to show that Defendant failed to exercise even slight care and that such gross negligence proximately caused his injury, Defendant's motion for summary judgment was denied.

Fay v. Thiel College, 55 Pa. D. & C. 4th 353 (2001)

Facts - In order to participate in a study abroad a trip to Peru, students of Defendant Thiel College had to sign an exculpatory clause found in a waiver of liability form, as well as a consent form to allow faculty supervisors to authorize necessary treatment in a medical emergency. If a student refused to sign either form, the student could not participate in the trip. Plaintiff signed both forms. When Plaintiff fell ill during the trip, she was taken to a medical clinic in Cuzco. The faculty and the rest of the group continued on their journey. At the clinic, Plaintiff underwent an unnecessary appendectomy and was sexually assaulted by the surgeon and the anesthesiologist.

Rationale - Generally speaking, an exculpatory clause is valid if: 1) it does not contravene any policy of law, that is, if it is not a matter of interest to the public or State; 2) the contract is between persons relating entirely to their own private affairs; and 3) each party is a free bargaining agent and the clause is not in effect a contract of adhesion. However, despite the validity of a provision, certain standards must be met before it will be interpreted and construed to relieve a person of liability for his own negligence. Such standards are: 1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law; 2) such contracts must spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it; 3) such contracts must be construed with every intendment against the party who seeks the immunity from

liability; and 4) the burden to establish immunity from liability is upon the party who asserts such immunity.

Holding - Because rejecting the transaction entirely was Plaintiff's only option other than accepting the contract with the exculpatory clause, this Court finds that the subject waiver of liability form is a contract of adhesion. It is, therefore, not valid in that it fails to satisfy one of the three requirements for the validity of such a clause. Additionally, the consent form is not another waiver of liability form because nowhere in the consent form do the words "waiver," "release," or "waiver of liability," or any other words of similar import and effect appear.

RHODE ISLAND

153. Are releases enforceable? Yes.

154. Are there any statutes that reflect enforcement of a release? No.

155. Can a parent execute a release for a minor? A parent may not compromise his child's cause of action absent express authority to do so, either under a statute or by approval of the Court.

Julian v. Zayre Corp., 120 R.I. 494, 499 (1978)

156. Relevant Cases: *Brown v. Wakerfield Fitness Ctr., Inc., 1994 R.I.Super LEXIS 79 (1994)*

Facts - Plaintiff sought compensatory damages that allegedly resulted from an aneurysm he suffered while performing a complimentary introductory workout at the facility, on grounds that Defendants were negligent in failing to accurately screen him. The Defendants argue that the waiver signed by Plaintiff constitutes a complete bar to any prospective recovery by him.

Rationale - Exculpatory clauses illustrate the contractually expressed intent of the parties and are to be strictly construed against the party seeking to be exonerated.

Holding - The Court finds that said release does not operate to waive Plaintiff's rights against the Defendants for their alleged negligence. Rather, the release simply speaks to consequences of Plaintiff's potential disregard for the Defendant's rules.

SOUTH CAROLINA

157. Are releases enforceable? Yes.

158. Are there any statutes that reflect enforcement of a release? No.

159. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

160. Relevant Cases: *Fisher v. Stevens, 355 S.C. 290 (2003)*

Facts - Plaintiff worked on a wrecker crew at the Speedway of South Carolina. In order to work at the Speedway, Plaintiff was required to sign a release and waiver of liability. During a race, the wrecker on which Plaintiff was working responded to a crash. While the wrecker was moving towards one of the vehicles, Plaintiff fell off the back of the wrecker and suffered severe injuries.

Rationale - The South Carolina Supreme Court, in recognition of the freedom of private parties to contract as they choose, previously has upheld exculpatory contract. However, they are not favored by the law and will be strictly construed against the party relying thereon. An exculpatory contract is unenforceable as a matter of law if it is ambiguous and uncertain. Additionally, such contract will be void as against public policy where it does not clearly inform the Plaintiff he is waiving all claims due to a Defendant's negligence. The phrase "any person in any restricted area" was overly broad and its enforcement would offend notion of public policy as it would release from liability any person in the restricted area of the track, whether authorized to be there or not. Other terms were sufficiently vague so as to not identify any owner or driver of any vehicle. The release could have plainly stated that the injured party agreed to relieve the wrecker Defendant's for all liability.

Holding - The release did not clearly inform the injured party that he was waiving all claims due to the wrecker appellant's negligence. Thus, it did not bar the Plaintiff's claims.

McCune v. Myrtle Beach Indoor Shooting Range, Inc., 612 S.E.2d 462 (2005)

Facts - Before being allowed to participate in a paint ball game at the range, the Plaintiff signed a general waiver of liability. Despite her own and the range's employees' failed attempts to tighten or replace her ill fitting mask, Plaintiff played the game. Plaintiff was struck in the eye during the game.

Rationale - Exculpatory contracts are upheld by the Court of South Carolina. However, since such provisions tend to induce a want of care, they are not favored by the laws and will be strictly construed against the party relying thereon. In order for an exculpatory clause to be construed to exempt a party from liability for his own negligence, there must be explicit language clearly indicating that such was the intent of the parties. Except where he expressly so agrees, a Plaintiff does not assume the risk of harm arising from Defendant's negligence unless he then knows of the existence of the risk and fully appreciates its unreasonable character. Here the agreement was voluntarily signed and specifically stated: 1) she assumed the risks, whether known or unknown; and 2) she released the Defendant from liability, even from injuries sustained because of the risk she faced. The waiver in the case at bar is distinguishable from the one in *Fisher v. Stevens* because it is neither ambiguous or overbroad, In fact, McCune in her deposition characterized the release as a "standard waiver."

Holding - Since she expressly assumed those risks in order to participate in the game, the waiver prevented recovery on her claims.

SOUTH DAKOTA

161. Are releases enforceable? Yes.

162. Are there any statutes that reflect enforcement of a release?

S.D. Stat. § 42-11-3
Conduct not exempt from liability (Equine Activities)

163. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

164. Relevant Cases: *Holzer v. Dakota Speedway, Inc., 2000 SD 65 (2000)*

Facts - Plaintiff served as a member of a race car driver's pit crew. He became seriously injured due to an accident in the pit area.

Rationale - Anticipatory, pre-releases are much more likely to be deemed valid and enforceable when they are written on a separate document and not as part of separate written material, and the more inherently dangerous or risky the recreation activity, the more liability an anticipatory release will be held valid. However, releases that cover wilful negligence or intentional torts are not valid and are against public policy. Besides South Dakota, releases by participants in auto races have been upheld and found not to violate any public policy in a number of jurisdictions. Additionally, there is no public policy in South Dakota against race promoters being afforded some contractual protection for sponsoring auto racing. In the absence of fraud or a relation of trust and confidence between the parties, a releasor can ordinarily not avoid the effect of a release upon the grounds that at the time he signed the paper he did not read it or know its contents, but relied on what another said about it. If a releasor is functionally illiterate, it is his duty to procure someone to read or explain the release to him before signing it.

Holding - The release signed by Plaintiff was on a separate document. The record did not show facts supporting Defendant's reckless or conscious disregard or any risk of harm to the Plaintiff. The accident was clearly within the scope of the release. Additionally, the release did not involve a matter of public interest, but rather, was a private agreement between two individuals. Finally, there was no evidence that Plaintiff was denied the opportunity to read the release. Yet the release was not misleading, and should have had someone explain it to him if he did not understand it.

TENNESSEE

165. Are releases enforceable? Yes.

166. Are there any statutes that reflect enforcement of a release?

Tenn. Code Ann. §§ 68-114-103
Tennessee Ski Area Safety and Liability Act

Tenn. Code Ann. §§ 47-18-303
Unenforceable health club agreements

167. Can a parent execute a release for a minor? No.

Childress v. Madison County, 777 S.W.2d 1 (1989)

168. Relevant Cases: *Floyd v. Club Sys., Inc.,1999 Tenn.App. LEXIS 473 (1999)*

Facts - Plaintiff sustained personal injuries while using the weight equipment at the Defendant health club. He had signed an exculpatory clause by which he expressly assumed the risk of negligence, which he alleged violated public policy.

Rationale - Subject to certain exceptions, parties to a contract may agree that one shall not be liable for his or her negligence to the other. One of the exceptions to that general rule favoring the freedom to contract involves the situation where a professional person operating in an area of public interest and pursuing a profession subject to licensure by the State attempts to contract against his own negligence. Courts use a six factor test to determine when it is in the public's interest that parties not be permitted to enter exculpatory contracts. Yet the law is clear and unambiguous that the exculpatory clause in this health club contract is valid and enforceable. *Tenn. Code Ann §§§§ 47-18-305(4), (5)(A)* provides that "health club contracts must include certain statements, for example, a notification that the buyer has a right to cancel and a warning that payment in full may mean paying for future services and may entail a loss of money should the health club cease to do business." This provision has nothing to do with the safety of the premises or equipment at The Club. However, the substance of the statutory requirement is embodied in the contract and any minor distinction does not materially alter the meaning of the phrases to a reasonable reader.

Holding - The exculpatory clause in the contract is a valid and complete bar to Plaintiff's negligent cause of action. Moreover, he cannot escape the effect of this clause due to the contract's failure to incorporate certain statutorily-required language in an exact and verbatim manner.

Tompkins v. Helton, 2003 Tenn.App. LEXIS 433 (2003)

Facts - Plaintiff was a guest at the Defendant's Speedway. She had to sign a release agreement before she was allowed to enter the restricted loading area of the racetrack. She was subsequently hit by a car.

Rationale - Subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another. In the absence of fraud or overreaching, such provisions are

generally held to be enforceable. However, an exculpatory clause is not enforceable where the provision affects the public interest. Owners of speedways do not perform a service of great importance to the public. Speedway races are not an essential public service, as are medical services, housing, or construction loans. A patron can observe the races from areas other than the restricted areas and need not sign any release. Furthermore, the voluntary nature of attendance and the atmosphere of a recreational event at a speedway race negate a finding that the patron is placed under the control of the owner, so as to be subject to the risk of carelessness by the owner or his agents. The release was not an adhesion contract because a patron can attend the racetrack without signing the release agreement; there is no showing that a patron is faced with a "take it or leave it" situation. The Court will not attempt to ascertain the actual mental processing of the parties entering into the particular contract; rather the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.

Holding - The release agreement was unambiguous, valid and a bar to the Plaintiff's recovery.

Hendersonv. Quest Expeditions, Inc., 2005 Tenn.App. LEXIS 334 (2005)

Facts - Plaintiff was injured while on a white water rafting expedition operated by Defendant. He was given a pre-printed waiver of liability to sign prior to the excursion. The release was not reviewed with him by an employee.

Rationale - Parties may contract that one shall not be liable for his negligence to another but that such other shall assume the risk incident to such negligence. It is not necessary that the word negligence appear in the exculpatory clause. Public policy favors freedom to contract against liability for negligence. An exception to this rule was recognized wherein certain relationships required greater responsibility which would render such a release obnoxious. White-water rafting is not a service of great importance to the public, which is often a matter of practical necessity for some members of the public. Regulation of this activity does not mean that it affects the public's interests. The Tennessee legislature has evidenced that the public policy is that commercial white water rafting companies be protected from claims for injuries to patrons (*Tenn. Pub. Acts 169 (2005).)* Moreover, Tennessee had held that if the exculpation contract sufficiently demonstrates the parties' intent to eliminate liability for negligence, the absence of the word "negligence" is not fatal. The fact that the injury occurred during an activity that was not foreseeable or not associated with a risk "inherent in the sport" did not matter.

Holding - The contract was plain, and enforceable as written.

Burks v. Belz-Wilson Props, 958 S.W.2d 773 (1997)
Livingston v. High County Adventures, 1998 U.S. App. LEXIS 17781 (1998)
Terry v. Ober Gatlingburg, Inc., 1998 Tenn.App. LEXIS 76 (1998)
Dunlap v. Fortress Corp., 2000 Tenn.App. LEXIS 720 (2000)

TEXAS

169. Are releases enforceable? Yes.

170. Are there any statutes that reflect enforcement of a release?

Tex. Bus & Com. Code § 1.201(10)
General Definitions and Principles of Interpretation

171. Can a parent execute a release for a minor? No.

Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002)
Munoz v. II Jaz, Inc., 863 S.W.2d 207 (1993)

172. Relevant Cases: *Littlefield v. Schaefer, 955 S.W.2d 272 (1997)*

Facts - Victim was killed when he crashed while riding on one of Defendant's promoter's motorcycles. He had signed several release forms before riding the motorcycle. The release form was inconspicuously placed, was written in tiny type, and consisted of 30 lines of text compressed into a 3"x4" square.

Rationale - Risk-shifting clauses such as a release clause must satisfy two fair notice requirements. First, a party's intent to be released from all liability caused by its own future negligence must be expressed in unambiguous terms within the four corners of the contract. Second, the clause must be conspicuous. *Tex. Bus & com. Code § 1.201(10)*, says that whether a release is conspicuous is a question of law to be decided by the following definition: "a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." A printed heading in all capital letters is conspicuous. Language in a body of a form is conspicuous if it is in larger or other contrasting type or color. The fact that a release heading has a larger font size than the release language does not, alone, make a release conspicuous. Simply because someone signs a document containing the word release did not mean that they intend to exculpate the released party from their own negligence. The releasing party must be able to read what is being released. Where a party is not to know what the contract terms are because they are unreadable, as a matter of law the exculpatory clause will not be enforced.

Holding - The release failed to satisfy the conspicuous requirement as a matter of law, subjecting victim to unfair surprise and was unfairly and unknowingly disgorged of his rights.

Grewal v. Hickenbottom, 2003 Tex.App. LEXIS 8620 (2003)

Facts - The school admitted Plaintiff and the parties executed an Enrollment Agreement, which released the school from any liability for negligence. He was subsequently injured during a training session at the wrestling school and sustained injuries leaving him in a coma. Plaintiffs ask that the Enrollment Agreement be voided because disparate bargaining power

existed between the parties, evidence by the student's enthusiasm for becoming a student at the school and the school's alleged control over a student's future in wrestling.

Rationale - Parties may agree to limit the liability of one party for future negligence if the agreement does not violate the constitution, statutes, or public policy. Such an agreement does not violate public policy if there is no disparity of bargaining power between the parties. Assuming that an unequal relationship may exist between a student and a school that trains in a particular skill, it is the unfair use of, not the mere existence of, an unequal bargaining power that undermines a contract.

Holding - The student freely chose to enroll at the school and there is no evidence that the school forced or pressured him into signing the Enrollment Agreement. In addition, the instructors at the school do not occupy a position of dominance simply by virtue of their status as wrestling instructors.

UTAH

173. Are releases enforceable? Yes.

174. Are there any statutes that reflect enforcement of a release?

Utah Code Ann. §§§§ 57-14-1 to 7
Limitation of Landowner Liability - Public Recreation

175. Can a parent execute a release for a minor? No.

Hawkins v. Peart, 2001 UT 94 (2001)

176. Relevant Cases: *Hawkins v. Part, 2001 UT 94 (2001)*

Facts - Defendant required Plaintiff's mother to sign a release form prior to allowing Plaintiff to ride one of its horses. The release form contained a waiver of liability and an indemnity.

Rationale - The law generally treats pre-injury releases or indemnity provisions with greater suspicion than post-injury releases. Most Courts allow these releases except where there is a strong public interest in the services provided. A clear majority of Courts treating the issue have held that a parent may not release a minor's prospective claim for negligence. Courts often hold that in a post-injury setting a parent's signature on a release is ineffective to bar a minor's claims against a negligent party. Based on this premise, since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has authority to release a child's cause of action prior to an injury. In general, the common law disfavors agreements that indemnify parties against their own negligence because one might be careless of another's life and limb, if there is no penalty for carelessness. Because of this public safety concern, a reviewing Court strictly construes indemnity agreements against negligence. Several jurisdictions have invalidated agreements that require parents to indemnify a party against negligent acts that injure the parent's child.

The Utah Supreme Court also concludes that public policy renders void such an indemnity agreement.

Holding - Having now adopted a rule intended to preserve a minor's right to recover damages caused by another's negligence, we cannot uphold an agreement that shifts the source of compensation from the negligent party to the minor's parent.

VERMONT

177. Are releases enforceable? Yes.

178. Are there any statutes that reflect enforcement of a release? No.

179. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

180. Relevant Cases: *Dalury v. S-K-I, Ltd., 164 Vt. 329 (1995)*

Facts - While skiing at the resort's facilities, the skier sustained serious injuries when he collided with a metal pole that formed part of the control maze for a ski lift line. The skier signed a form releasing the resort area from liability, which the resort required of all of its customers. The skier and his wife filed a complaint against the resort, alleging negligent design, construction, and replacement of the maze pole.

Rationale - An exculpatory agreement should be upheld if it is: 1) freely and fairly made; 2) between parties who are in an equal bargaining position; and 3) there is no social interest with which it interferes. The determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations. For an exculpatory clause relating to an area that is open to the public, the major public policy implications are those underling the law of premises liability. In Vermont, a business owner has a duty of active care to make sure that its premises are in safe and suitable condition for its customers.

Holding - The exculpatory clause was contrary to public policy because regardless of whether a ski resort provided an essential public service, it was a facility open to the public, and a business owner owed a duty of active care to its customers to ensure that its premises were in a safe and suitable condition.

Umali v. Mount Snow, Ltc., 247 F.Supp.2d 567 (2003)

Facts - The contestant was injured while participating in a dual slalom mountain bicycle race in Vermont, which was organized and sponsored by Defendants. Before the race, the contestant signed a series of application and entry forms, each of which contained releases and waivers pertaining to events organized and sponsored by Defendants.

Rationale - The Vermont Supreme Court has refused to absolve ski areas and sports events organizers and sponsors from any and all liability in the context of recreational skiing, as well as in organizing, designing and operating events like the race in question. In the Second Circuit, whether or not a race is professional or amateur is not dispositive regarding a liability waiver's enforceability. A totality of circumstances test considers each given case against a backdrop of current societal expectations. Rather than just assessing the characterization of a race as pro or amateur, the relevant circumstances include access to the general public and the participation of varying skill levels.

Holding - Because this race was open to all skill levels and the releases in this case are so broad as to remove all incentive for Defendants to manage risk, the exculpatory releases are void as contrary to public policy.

Nishi v. Mount Snow, Ltd., 1997 U.S. App. LEXIS 6738 (1997)

VIRGINIA

181. Are releases enforceable? Pre-injury releases are generally declared void because of public policy. However, the Court will uphold such releases when involved with automobile races.

182. Are there any statutes that reflect enforcement of a release? No.

183. Can a parent execute a release for a minor? No.

Hiett v. Lake Barcroft Community Association, 418 S.E.2d 894 (1992)

184. Relevant Cases: *Elswick v. Lonesome Pine Int'l Raceway, Inc., 54 Va.Cir. 368 (2001)*

Facts - The race car driver was injured in a mini-cup race and sought damages. The race track operator had secured a signed release and waiver of liability and indemnity agreement from the driver prior to the race.

Rationale - Participation in automobile races was a voluntary undertaking. Race car drivers were not permitted to participate unless they signed a release to hold the owner/organizer harmless in the event of injury. Otherwise organizers would not sponsor sporting events. In view of *Va. Code Ann. § 46-2-865*, declaring car racing as reckless driving unless authorized by the owner of the property, releases should be valid and not a violation of public policy. Furthermore, the driver agreed by signing the release that the activities were very dangerous involving the risk of serious injury and acknowledged that he inspected restricted areas of the track. This case is distinguishable from *Heitt v. Lake Barcroft Community*, in which the Court declared that pre-injury releases violated public policy. In *Heitt*, the Court did not address the validity of a release involving the inherently dangerous activity of race car driving.

Holding - The release was valid and barred Plaintiff's constructive fraud and negligence claims.

WASHINGTON

185. Are releases enforceable? Yes. Are there any statutes that reflect enforcement of a release?

Rev. Code Wash. (ARCW) §§ 79A.45.030
Skiing and Commercial Ski Activity: Standard of conduct – Prohibited acts – Responsibility

186. Can a parent execute a release for a minor? No.

Wagenblast v. Odessa, 110 Wn.2d 845 (1998)
Scott v. Pacific West Mountain Resort, 119 Wn.2d 484 (1992)

187. Relevant Cases: *Craig v. Lake Shore Ath. Club, 1997 Wash.App. LEXIS 907 (1997)*

Facts - Plaintiff injured himself while using a piece of exercise equipment called a "dip station." The dip station tipped over and the member fell, sustaining injuries. Plaintiff had signed a membership agreement form when he joined the club. Midway down the second page of the membership agreement, there was a double black line, below which appeared the word "Waiver," written in large letters. He contends that it does not cover claims related to defective equipment.

Rationale - Exculpatory clauses in pre-injury releases are strictly construed and must be clear if the exemption from liability is to be enforced. But a valid waiver need not specifically mention that it releases the service provider from liability for negligence, provided that the language used shows that parties' intent to shift the risk of loss. The third paragraph of the release signed by Plaintiff clearly states his intent to "waive and release" the Club from "all . . . claims for damages . . . for any and all injuries suffered . . . while . . . participating in Lake Shore Athletic Club's exercise classes and fitness programs." This language compares favorably to other waiver clauses that Washington Courts have found to be valid releases of negligence claims. However, the phrase, "while participating," suggests a causal connection. A patron would not be on notice that he was waiving claims for calamities unrelated to the Club's exercise program. It is reasonable to expect that exercise equipment subject to unsupervised use by numerous individuals will occasionally have defects that could cause injury. Although this specific risk may not have been contemplated, the broad language of the waiver encompasses risks such as this that are an integral part of the exercise program. Moreover, the waiver appeared in a separate section of the "Health and Fitness Questionnaire" under the word "Waiver" set in large type. The parenthetical sentence directed below this title directed the prospective signer to "Please Read Carefully and Sign," thereby emphasizing the importance of the exculpatory language. Finally, the member's allegations of gross negligence by the club were insufficient to raise a material issue of fact.

Holding - The release was sufficient conspicuous and comprehensive to cover Plaintiff's claim, and he failed to raise an issue of material fact as to gross negligence.

Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn.App.334 (2001)

Facts - Plaintiff was injured skiing at a recreational ski area owned by the Defendant corporation. He argued that the release he signed prior to skiing was unenforceable because: 1) the language of the release was ambiguous; 2) it was inconspicuous; and 3) it violated Washington public policy.

Rationale - Exculpatory agreements are generally enforceable, subject to three exceptions. First, inconspicuous releases are enforceable. Second, releases cannot limit liability for acts falling greatly below the standard established by law for protection of others. Third, releases must not violate public policy. A person who signs an agreement without reading it is bound by its terms as long as there was ample opportunity to examine the contract in as great detail as he cared, and failed to do so for his own personal reasons. With respect to the enforceability of a liability release, despite its recreational appeal, skiing is not a service of great importance to the public, much less a service of "practical necessity." Thus, the release did not violate public policy. Rather skiing is a private and nonessential activity. Furthermore, the plain language of the clause signed by the skier left no doubt of its intent to release the Defendant from liability for all personal injuries resulting for its negligent operation of the ski area. The release was clearly titled and the words "release" and "hold harmless and indemnify" were set off in capital letters throughout the agreement. The corporation did not have a near monopoly power, as the skier had the option of skiing at a number of comparable ski resorts. The exculpatory clause was not a "take it or leave it" adhesion contract.

Holding - In upholding the release in this case, the Courts hold that a pre-injury waiver can be used to abrogate the duty imposed on ski area operators by *Rev. Code Wash. (ARCW) §§ 79A.45.030* because it did not violate public policy.

Stokes v. Bally's Pacwest, Inc., 113 Wn.App.442 (2002)

Facts - Plaintiff joined the health club and signed a retail installment contract that evidenced the terms and conditions of membership. The agreement contained a waiver and release provision. Several months after signing the agreement, the member slipped on a round metallic plate placed in a wooden floor on the basketball court. He injured his knee and shoulder.

Rationale - The Washington Supreme Court has recognized the right of parties, subject to certain exceptions, to expressly agree in advance that one party is under no obligation of care to the other, and shall not be held liable for ordinary negligence. The general rule is that exculpatory clauses are enforceable unless: 1) they violate public policy; 2) the negligence act falls greatly below the standard established by law for protection of others; or 3) they are generally bound by its terms as long as there was ample opportunity to examine the contract and the person failed to do so for personal reasons.

Holding - The language at issue is conspicuous and enforceable. Bally's owes no duty to Stokes for his injuries. Summary judgment in favor of Bally's is required.

WEST VIRGINIA

188. Are releases enforceable? Yes.

189. Are there any statutes that reflect enforcement of a release?

W. Va. Code §§ 20-3B-3
Duties of Commercial whitewater outfitters and commercial whitewater guides

190. Can a parent execute a release for a minor? No.

Johnson v. New River Scenic Whitewater Tours, Inc., 313 F.Supp.2d 621 (2004)

191. Relevant Cases: *Johnson v. New River Scenic Whitewater Tours, Inc., 313 F.Supp.2d 621 (2004)*

Facts - Fourteen-year old Lindsay died while participating in a rafting trip led by Defendant New River Scenic. Lindsay's mother, Plaintiff, Karen Johnson, filed suit against Defendant, who subsequently filed a third-party complaint against Fort Johnson Baptist Church and its employees, John Peters, asserting that they were contractually obligated to indemnify Defendant based on two documents signed by Peters the morning of the trip. The documents contained the language of both release of liability and indemnification. Defendant contends that both are legally binding contracts that obligate either Peter or Fort Johnson to indemnify Defendant against the wrongful death suit filed by Ms. Johnson. Alternatively, Defendant claims that Peters had been vested with the start of the trip, Fort Johnson required the youths to obtain "permission slips" from their parents. Although she executed one, Lindsay lost the form before turning it in to Peters. Nonetheless, Ms. Johnson recalls giving Fort Johnson verbal authorization for her daughter to travel with the group.

Rationale - An anticipatory release of liability that purports to exempt the Defendant for tort liability to the Plaintiff for the failure of the Defendant's guide to conform to the standard of care expected of members of his occupation is unenforceable. Ms. Johnson's allegations go beyond common law negligence; her complaint claims that the raft operator's conduct was "reckless," "intentional," and "in contravention of the standard of care imposed by the West Virginia Whitewater Responsibility Act." No language existed in the "release of liability" document that would support a conclusion that through it, Defendant's conduct was to be indemnified by a third-party. A contract by one party to indemnify another party from harm that should befall a third-party should contain language to that effect. Consistent use of the first person in the release contract eliminates any possibility that the document would be read as a third-party indemnification agreement. Standard boilerplate releases that are executed between a participant in an activity and that activity's commercial sponsor regularly contain the word "indemnify" or one of its variants, and do not alter the true nature of the document; a

release from liability. The enforceability of this type of agreement was precluded by this Court in *Murphy v. North Am. River Runners, 412 S.E.2d 504, 508 (1991)*. Furthermore, a clause in an agreement exempting a party from tort liability is unenforceable on grounds of public policy if the agreement would exempt a party from liability arising from that party's failure to comply with a safety statute, as the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waiver. Even if State law permitted the enforcement of the indemnity agreements, the tour operator failed to proffer enough evidence to permit a jury to conclude that the church's employees were vested with sufficient authority to bind the decedent's personal representative to the agreement.

Holding - The third-party Defendant's motion for summary judgment was granted, and the Plaintiff's motion in limine was also granted.

WISCONSIN

192. Are releases enforceable? Yes.

193. Are there any statutes that reflect enforcement of a release?

Wis. Stat. § 895-481
Civil Liability Exemption; Equine Activities

194. Can a parent execute a release for a minor? Yes.

Osborne v. Cascade Mt., Inc., 259 Wis.2d 481 (2002)

195. Relevant Cases: *Atkins v. Swimwest Family Fitness Ctr., 277 Wis.2d 303 (2005)*

Facts - The decedent visited the facility, of which she was not a member, and filled out a guest registration on a card that also contained a standardized waiver release statement. The release appeared below the registration, and the entire card was printed in capital letters with the same size, font and color. Soon after she began swimming, an employee spotted her lying motionless underwater near the bottom of the pool. She died the next day.

Rationale - Generally, exculpatory clauses have been analyzed on principles of contract law. However, lately the contractual analysis has not been emphasized, as many of the factors previously reviewed on a contractual basis have been reached in the more recent cases on public policy grounds. For a contractual injury, the Court need only look to the contract itself to consider its validity. Specifically, the Court examines the facts and circumstances of the agreement to determine if it was broad enough to cover the activity at issue. If not, the analysis ends and the contract should be determined to be unenforceable in regard to such activity. If the language of the contract does cover the activity, the Court then proceeds to an analysis on public policy, which remains the germane analysis for exculpatory clauses. In *Yauger v. Skiing Enters*, the enforceability of an exculpatory clause was determined on two grounds: 1) the waiver must clearly, unambiguously and unmistakably inform the signer of

what is being waived; and 2) the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed. In *Richards v. Richards*, the Court used a combination of factors to determine if the exculpatory language was contrary to public policy. The first factor was that the contract served two purposes, neither of which was clearly identified or distinguished. Second, the Court held that the release was broad and all-inclusive. Finally, there was little or no opportunity to negotiate or bargain over the contract. Applying the factors from *Yauger* and *Richards*, Defendant's exculpatory clause is in violation of public policy. First, this exculpatory waiver, which uses the word "fault," is overly broad and all-inclusive. Second, the form, serving two functions and not requiring a separate signature for the exculpatory clause, thus not sufficiently highlighting that clause, does not provide the signer adequate notification of the waiver's nature and significance. Third, there was little or no opportunity to bargain or negotiate in regard to the exculpatory language in question.

Holding - Under this framework, the waiver in question is unenforceable as against public policy.

Mettler v. Nellis, 280 Wis.2d 753 (2005)

Facts - Jessica Mettler, fifteen years old, fell off a horse while taking a riding lesson from Nellis. When her mother took Jessica to her first lesson, they were given six pages of documents to be signed before Jessica's lesson could begin. The documents included three releases. Jessica and her mother signed the documents. The Mettlers argued that the releases were void as against Public Policy and an exception to the equine immunity statute applied. In support of their argument on equine immunity, they submitted an affidavit of an experienced equestrian teacher, who concluded that Nellis' teaching techniques were unreasonable under the circumstances.

Rationale - Exculpatory clauses are not favored in Wisconsin. That is because they often allow conduct below an acceptable standard of care. While not invalid *per se*, exculpatory clauses are closely scrutinized by Courts and are strictly construed against the party that seeks to rely on them. Exculpatory clauses are void if they violate public policy. Courts look at a variety of factors, which were recently summarized in Atkins, to determine whether an exculpatory clause violates public policy. The waiver must clearly, unambiguously, and unmistakably inform the signer of what is being waived and the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed. A release is unenforceable where it: 1) serves two purposes and neither purpose is clearly identified or distinguished; 2) is broad and all-inclusive; and 3) is a standard, pre-printed form signed with little or no opportunity to negotiate or bargain. All three releases provide that the signer assumes the unavoidable risks inherent in horse-related activities. However, the documents purport to release "any liability or responsibility for any accident damage, injury or illness," not merely injuries from horse-related activities. The release is broad enough to include intentional behavior. An exculpatory contract contravenes public policy when it would absolve the tortfeasor form any injury to the victim for any reason. The releases are broad not only in the scope of behavior covered but in the number and category of individuals and entities released. Nellis claims that other language in the releases, stating that "the inherent risks of equine activities" are defined in *Wis. Stat. §895.481*, adequately explains what risks are being

assumed. However, the Court strictly construed any ambiguity against Nellis, and could not conclude that such a meaning would be unmistakable to a layperson.

Holding - The releases are too broad and all-inclusive to be enforceable.

Park-Childs v. Mrotek's, Inc., 218 Wis.2d 167 (1998)
Werdehoff v. General Star Indem. Co., 229 Wis.2d 489 (1999)
Niese v. Skip Barber Racing Sch., 252 Wis.2d 766 (2002)
Cass v. Am. Home Assure. Co., 284 Wis.2d 572 (2005)

WYOMING

196. Are releases enforceable? Yes.

197. Are there any statutes that reflect enforcement of a release? No.

198. Can a parent execute a release for a minor? There does not appear to be any case law on this topic.

199. Relevant Cases: *Street v. Darwin Ranch, Inc., 75 F.Supp.2d 1296 (1999)*

Facts – Plaintiff, an invitee of Defendant's ranch, participated in a horseback trail ride. During the ride, Plaintiff fell from his horse and was injured. Prior to the outing, Plaintiff signed a release.

Rationale - Exculpatory agreements such as the release at issue here are enforced unless it is contrary to public policy. In deciding whether a clause contravenes public policy, the Courts consider: 1) whether a duty to the public exists; 2) the nature of the service performed; 3) whether the contract was fairly entered into; and 4) whether the parties expressed their intentions in clear and unambiguous language. If the exculpatory agreement passes muster under these factors, the party signing the agreement cannot bring a negligence action against the released party. Claims for wilful and wanton misconduct cannot be waived by any exculpatory agreement. In Wyoming, private recreational businesses generally do not qualify as services demanding a special duty to the public. Rather, service providers owe a public duty under Wyoming law only if the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. Because recreational trail rides are neither of great importance to the public, nor a practical necessity to any member of the public, Defendant owed no public duty. While many other states have enacted statutes that attempt to define the duties of hazardous recreation activity providers, Wyoming has not done so. In fact, Wyoming legislature explicitly considered establishing statutory equine provider duties before enacting the 1993 amendments to the Wyoming's Recreation Safety Act, but ultimately decided not to do so. The true public policy expressed by the Act is to benefit the recreation activity risks. The release is, at the very least, consistent with the public policy expressed by the Act, if not in furtherance of it. The release blatantly and unambiguously specifies that Plaintiff waived negligence claims against Defendant for all injuries resulting from participation in the recreation

activity and common sense dictates that the intent of the parties was to release Defendant from negligence liability for exactly the type of injury sustained by Plaintiff.

Holding - The release is valid and enforceable because it does not concern an essential service of practical necessity, and it expresses unambiguously the intent of the parties to exculpate Defendant from negligence liability.

Massengill v. S.M.A.R.T. Sports Med. Clinic, P.C., 996 P.2d 1132 (2000)

Facts - Plaintiff was injured while using a lat-pull-down machine at Defendant's sport medicine clinic. Plaintiff husband and wife sued. When Plaintiffs joined Defendant's clinic prior to the accident, they had executed an agreement and release.

Rationale - Exculpatory clauses or releases are contractual in nature, and we interpret them using traditional contract principles and consider the meaning of the document as whole. The language of the Agreement and Release is clear in manifesting an intention to release S.M.A.R.T. and those involved with the facility from liability; it specifically states that S.M.A.R.T. will not be held liable for "those damages resulting from acts of negligence on the part of S.M.A.R.T. SPORTS, its officers or agents. And, in plain reading of the language in the context of the entirety membership application evidences no other rational purpose for which it could have been intended. The factors the Court considers for evaluating a negligence exculpatory clause are: 1) whether a duty to the public exists; 2) the nature of the service performed; 3) whether the contract was fairly entered into; and 4) whether the intention of the parties is expressed in clear and unambiguous language. A private recreational business does not qualify as one that owes a special duty to the public nor are its services of a special, highly necessary nature. Furthermore, an exculpatory clause in health club contracts do not violate public policy. The Recreational Safety Act does not foreclose the invocation of a contractual release or waiver for negligence conduct that is not released by the assignment of the inherent risk to the person participating in the sport or recreational opportunity under the statute. Plaintiff's participation was purely recreational and S.M.A.R.T. did not owe him a public duty. S.M.A.R.T. is not engaged in a type of business generally thought suitable for public regulation and Massengill was engaged in a recreational activity not an activity pursuant to a physician's order.

Holding - The case is correctly resolved as a matter of law under principles relating to contract, and the contractual language being clear and unambiguous, there are no genuine issues of material fact.

Dunbar v. Jackson Hole Mt. Resort Corp., 392 F.3d 1145 (2004)

STATES THAT HAVE UPHELD ELECTRONIC AGREEMENTS

ARIZONA

Ariz. Retail Sys., Inc., v. Software Link, Inc., 831 F.Supp.759, 766 (D. Ariz. 1993), refusing to enforce the terms of a shrink-wrap license agreement because it constituted additional terms to the contract.

CALIFORNIA

Stomp, Inc. v. NeatO, LLC, 61 F. Supp.2d 1074, 1081 (C.D. Cal. 1999), holding that a "click-wrap agreement" (allowing a consumer to consent to the terms of a contract by "clicking" an acceptance button) is an enforceable contract. However, *Comb. v. PayPal, Inc., 218 F.Supp.2d 1165 (N.D. Cal. 2002)* struck down a click-wrap agreement because it was unconscionable.

CONNECTICUT

Vacco v. Microsoft Corp., 793 A.2d 1048 (2002), noting that the Defendant software manufacturer's products are accompanied by a license agreement specifying that the software transaction is a sale, not a license.

DISTRICT OF COLUMBIA

Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (2002), upholding a click-wrap agreement in which the consumer had adequate notice of the terms and enforcement of the terms was otherwise reasonable.

DELAWARE

Rinaldi v. Iomega Corp., 41 U.C.C. Rep. Serv. 2d. 1143 (1999), noting that a purchaser had the option to reject the contract terms after payment by returning the goods, found that the disclaimer was "conspicuous" and thus effective despite its physical placement inside the packaging of the drive.

FLORIDA

America Online, Inc., v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001), holding a forum selection clause in an electronic agreement was enforceable.

GEORGIA

McCrimmon v. Tandy Corp., 414 S.E.2d 15 (Ga. App. 1991), holding that a purchaser was bound by the terms of a shrink-wrap license, where the sales receipt provided to the customer at the time of purchase gave notice of three terms in a license agreement in a software manual inside the box containing the computer and software.

ILLINOIS

DeJohn v. The T.R. Corp., Intern., 245 F.Supp.2d 913, 921 (2003), upholding an electronic forum-selection clause. *In re Real Networks, Inc., No. OOC 1366, WL 631341*, at **6-7 (N.D. Ill. May 8, 2000)*, finding that an arbitration agreement in a click-wrap agreement is binding because the licensee had a chance to review the terms of the deal and showed assent by clicking.

KANSAS

Mortgage Plus, Inc., v. DocMagis, Inc., WL 2331918, at **4 (D.Kan. Aug. 23, 2004)*, finding that the consumer had a choice to download the software and accept the terms and therefore, holding the click-wrap agreement a valid contract.

KENTUCKY

Meade v. Richardson Fuel, Inc., 166 S.W.3d 55, 57, footnote 3 (Ky. App. 2005), noting that Kentucky allows written and electronic agreements.

LOUISIANA

O'Quinn v. Verizon Wireless, 256 F.Supp.2d 512, 517 (M.D. La. 2003), holding that the purchaser of a telephone headset was bound by the arbitration terms in a pamphlet located inside the box.

MASSACHUSETTS

Hughes v. McMenamon, 204 F.Supp.2d 178, 181 (D. Mass. 2002), holding that forum selection clauses in a click-wrap agreement were enforceable because the consumer had freely agreed to the terms, making it reasonable. However, *Williams v. American Online, Inc., WL 13825 *4 (Mass. Super. 2001)*, expressing unwillingness to enforce a click-wrap agreement because the terms were present after the consumer clicked, "I agree" which did not have reasonable notice. *1-A Equipment Co. V. Icode, Inc., 2003 Mass. App. Div. 30 (2003)*, enforcing a forum selection clause in a click-wrap agreement.

MINNESOTA

*I-Systems, Inc., and Jeremy Kahn v. Softwares, Inc., et al., 2004 U.S. Dist. Lexis 6001 (D. Minn. 2004), Hopkins v. Trans Union, L.L.C., WL 1854`9`, *2 (D. Minn. Aug. 19, 2004)*, holding a forum selection clause in a click-wrap agreement valid.

MISSOURI

Davidson & Associates, Inc., v. Internet Gateway, 334 F.Supp.2d 1164 (E.D. Mo. 2004), holding that the purchaser had a choice to accept the terms and therefore, the electronic terms of the usage agreements were enforceable contracts.

NEW JERSEY

Caspi v. Microsoft Network, 732 A.2d 528, 532 (N.J. App. Div. 1999), holding an electronic contract was in the same format as other contracts and therefore, valid. The Court also stated that enforceability depends on adequate notice.

NEW YORK

Moore v. Microsoft Corporation, 293 A.D.2d 587 (N.Y. App. Div. 2002), enforcing liability limitations and warranty disclaimers in a click-wrap agreement. *Register.com, Inc., v. Verio, Inc., 126 F.Supp.2d 238 (S.D. N.Y. 2000)*, finding that even though the purchaser was not required to click "I agree" the terms were clearly posted on the web site, and by using the service the purchases had assented to the terms.

OHIO

Mathias v. America Online, Inc., 2002 Ohio 814 (Ohio Ct. App. 2002), enforcing a click-wrap agreement, including liability limitations amongst other clauses.

OREGON

*Thomas v. Mayhew Steel Products, WL 2486260, *1 (D.Or. Nov. 04, 2004)*, agreeing that a forum selection clause over the internet will be upheld as valid when it is expressly stated.

RHODE ISLAND

Groff v. America Online, Inc., WL 307001 (R.I. Super 1998), holding that such "click-wrap agreements" are enforceable contracts.

TEXAS

Barnett v. network Solutions, Inc., 38 S.W.3d 200, 203-204 (Tex. App. 2001), upholding a forum selection clause in an online contract because the Court found that purchaser had adequate notice of the terms of the agreement before accepting.

UTAH

Novell, Inc., v. Network Trade Center, Inc., 25 F.Supp.2d 1218 (D. Utah 1997), considering a claim by a software manufacture against a distributor for copyright infringement, the Court held

the shrink-wrap license was invalid as against such purchasers to the extent that they purport to maintain title to the software in the copyright owner.

VIRGINIA

Kilgallen v. Network Solutions, Inc., 99 F.Supp.2d 125 (D. Mass. 2000), holding a click-wrap renewal agreement binding on the domain name owner.

WASHINGTON

Dix v. ICT Group, Inc., 106 P.3d 841 (Wash. App. div. 3, 2005), refusing to enforce an on-line forum selection clause in a class action suit. *M.S. Mortenson Co. v. Timerline Software Corp., 970 P.2d 803, 809 (Wash. App. 1999)*, holding the buyer manifested assent to the software license terms by installing and using the software.