

1 Liability Releases
& Waiver Agreements

2 Waivers and Releases

Validity & Enforceability?

3 Waive, Release, Exculpate
Claims For Acts Of Future Negligence

In Exchange For Opportunity To Participate

4 Legal Effect:
lower standard of care
owed to participant from ordinary negligence

to willful, wanton misconduct.

5 Statutes may effect
same standard
as valid waiver (willful, wanton, gross negligence)

6 Pre-Injury Releases Void in Virginia

HIETT v. LAKE BARCROFT COMMUNITY ASN.
Supreme Court of Virginia, 1992

7 P injured
shallow dive
triathlon

sponsored by D

8 ran into lake, thigh high water,
dove, struck object or lake bottom.

9 P: Va. agreement entered prior to any injury

releasing tortfeasor from personal injury negligence liability
is void as against public policy.

10 S.Ct.: release
from liability
for personal injury which may be caused by future acts of negligence

are prohibited "universally."
(in Virginia)

11 To put
other parties
to contract
at the mercy of its own misconduct

can never be lawfully done
where an enlightened system of jurisprudence prevails.

12 Pre-injury release provision signed by P

is prohibited by public policy
and, thus, it is void.

13 Road Race Waiver Specified Risks

Williams v. Cox Enterprises, Inc.

Ga.App. 1981

14 P: race sponsors negligent failure to warn of extreme heat & humidity

failure to provide liquids & medical facilities

failure to ascertain physical capability of runners

15 Waiver: "I am in proper physical condition to participate"
one of most difficult 10k courses in America

eat & humidity, hills make this a grueling race

16 P, law student:
testified appreciated risks

posed by running in high heat & humidity

17 Application described course in very specific terms

P admitted read warning & already aware of danger

18 Notice of Type of Negligence Assumed?

GARRISON v. COMBINED FITNESS CENTRE, LTD.

Ill.App. (1990)

19 P lifting 295 lb weight from bench press apparatus

called for friend to "spot" him

bar rolled off grooved bar rest

crushed P's trachea

20 P alleged injury caused by improper design of bench

D: exculpatory clause in membership agreement

21 D: Waiver relieved D of negligence liability

injuries "arising out of facilities & equipment"

22 Exculpatory clause to be valid & enforceable

clear, explicit, and unequivocal language

23 Put P on notice of

range of dangers assumed

24 reference types of activities, circumstances, or situations

which P agrees to relieve D

of duty of reasonable care

25 Here, exculpatory clause could not be more clear or explicit

26 injury from use of weights, equipment, & selection of type of equipment to be used

"entire responsibility" of member

- 27 Injury falls within scope of dangers

ordinarily accompanying weightlifting
normally contemplated by parties at time of contract

- 28 Exculpatory clause does NOT always relieve D of liability

stemming from provision of defective equipment

- 29 D NOT insulated where dangers constituted willful or wanton
misconduct

- 30 if P could show quality or integrity of equipment was extremely inferior
supplying to public

could be deemed willful and wanton negligence

- 31 California Liability Release Ambiguous, Not Enforceable

Leon v. Family Fitness Center (Cal.App. 1998)

- 32 head injuries when a sauna bench on which he was lying collapsed
beneath him at Fitness Center

- 33 Club Membership Agreement
(Retail Installment Contract)

blanks for insertion of financial and "Federal Truth in Lending"

34 The exculpatory clause is located at the bottom of the left-hand column of the front page

35 Buyer is aware that participation in a sport or physical exercise may result in accidents or injury,

36 Buyer assumes the risk connected with the participation in a sport or exercise

37 print size is an important factor

but it is not the only one to be considered in assessing the adequacy of release document

38 An express release is not enforceable

if it is not easily readable.

39 important operative language should be placed in a position which compels notice

and must be distinguished from other sections of the document.

40 A reader should not be required to muddle through complex language

to know that valuable, legal rights are being relinquished.

41 An exculpatory clause is unenforceable if not distinguished from other

sections,

42 if printed in the same typeface as the remainder of the document,

and if not likely to attract attention because it is placed in the middle of a document.

43 releasing paragraph is not prefaced by a heading

to alert the reader it is an exculpatory release

44 document is titled "Club Membership Agreement (Retail Installment Contract)"

giving no notice to the reader it includes a release or waiver of liability.

45 no language to alert a reader

Family Fitness intended the release to exculpate it from claims based on its own negligence.

46 Where such exculpation is sought,

the release must contain specific words "clearly and explicitly expressing such intent"...

47 "the release is ineffective because, read as a whole,

it does not clearly notify a customer of the effect of signing the agreement - it was not clear, unambiguous and explicit":

48 No mention that it was intended to insulate the proprietor from liability for injuries caused by its own negligence.

49 for his own personal injuries resulting from the enterprise's own negligent acts, regardless whether related to the sports or exercise activities it marketed.

50 In order for the agreement to assume the risk to be effective,

terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm.

51 where the agreement is drawn by the defendant and the plaintiff passively accepts it,

its terms will ordinarily be construed strictly against the defendant.

52 Not every possible specific act of negligence by the defendant must be spelled out in the agreement or discussed by the parties

53 It is only necessary that the act of negligence, which results in injury to the releaser,

be reasonably related to the object or purpose for which the release is given.

54 the collapse of a sauna bench when properly utilized is not a known risk.

- 55 negligence was not reasonably related to the object or purpose for which the release was given,
- 56 injuries resulting from participating in sports or exercise rather than from merely reclining on the facility's furniture
- 57 hazards typically include the risk of a sprained ankle due to improper exercise or
- 58 overexertion, a broken toe from a dropped weight, injuries due to malfunctioning exercise or sports equipment, or from slipping in the locker-room shower.
- 59 Injuries resulting during the proper use of the bench would no more be expected to be covered by the clause than those caused by the ceiling falling on his head
- 60 release is neither sufficiently conspicuous nor unambiguous to insulate Family Fitness from liability to Leon for injuries received when its sauna bench collapsed
- 61 TRADITION AND TRENDS IN PARENT/CHILD WAIVERS
- 62 TRADITIONAL RULE
- Children generally lack the legal capacity to enter into binding contracts, including waiver agreements.

63 in the absence of expressed statutory or judicial authorization to do so,

64 parents traditionally have had no legal authority to waive, release, or settle

the child's right of action for a personal injury.

65 Hawkins

v.

Peart,

Utah 10/30/2001

66 parent signed a waiver on behalf of his minor daughter

releasing liability for future negligence concerning horseback riding.

67 clear majority of courts treating the issue have held that

a parent may not release a minor's prospective claim for negligence."

68 Scott

v.

Pacific West Mountain Resort

(Wash. 7/30/1992)

69 settled law in many jurisdictions

absent judicial or statutory authority

parents have no authority to release a cause of action belonging to their child.

- 70 other jurisdictions have considered the validity of pre-injury releases signed by a parent

concluded that such releases do not bar the child's cause of action for personal injuries.

- 71 Cooper
v.
Aspen Skiing Company
(Colo. 2002)

- 72 public policy of Colorado affords minors significant protections

preclude a parent or guardian from releasing a minor's own prospective claim for negligence.

- 73 would render meaningless for all practical purposes

special protections historically accorded minors

- 74 minor should be afforded protection
unwise decisions made on his behalf

by parents who are routinely asked to release their child's claims for

liability

- 75 holding that parents may not release a minor's prospective claim for negligence

comports with the vast majority of courts that have decided the issue.

- 76 question is a matter of legislative prerogative, and, of course,
the General Assembly could choose to address it differently.

- 77 Section 13-22-107
Colorado Revised Statutes.

- 78 Cooper v. Aspen Skiing Company has not been adopted by the general assembly

does not reflect the intent of the general assembly or the public policy of this state.

- 79 C.R.S. § 13-22-107
"Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities where certain risks may exist."

- 80 Public, private, and non-profit entities providing these essential activities to children in Colorado

need a measure of protection against lawsuits

- 81 without the measure of protection these entities may be unwilling or unable to provide the activities.
- 82 to encourage the affordability and availability of youth activities in this state,
- expressed legislative intent of the general assembly in C.R.S. § 13-22-107
- 83 permit "a parent of a child to release a prospective negligence claim of the child
persons and entities involved in providing the opportunity to participate in the activities.
- 84 C.R.S. § 13-22-107 provides that "[a] parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence."
- 85 "Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children"
- 86 making "conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk."
- 87 law has long presumed that parents act in the best interest of their children"

consequently, "proper parental choices on behalf of children that should not be ignored."

88 assuming the decision is "voluntary and informed," C.R.S. § 13-22-107

a parent's decision to waive a child's prospective negligence claim

89 should be given same dignity as decisions

regarding schooling, medical treatment, and religious education.

90 a "child" as "a person under eighteen years of age."

91 would not permit parent to waive the child's prospective claim

for a willful and wanton act or omission, a reckless act or omission, or a grossly negligent act or omission.

92 ALASKA STATUTE
Alaska Stat. § 09.65.292

93 authorizes a Parental waiver of child's negligence claim

against provider of sports or recreational activity

94 waive the child's prospective claim for negligence

against the provider of a sports or recreational activity in which the child participates

95 "sports or recreational activity"

commonly understood sporting activity, whether undertaken with or without permission

96 "baseball, softball, football, soccer, basketball, hockey, bungee jumping, parasailing, bicycling, hiking, swimming, and skateboarding."

97 MODERN TREND?

98 City of Santa Barbara

v.

Superior Court

62 Cal. Rptr. 3d 527

(7/16/2007)

99 courts in California and a few other states have enforced agreements, signed by parents

releasing liability for future ordinary negligence committed against minor children in recreational and related settings.

100 Zivich

v.

Mentor Soccer Club

(Ohio 6/29/1998)

101 parents have authority to bind their minor children to exculpatory

agreements

in favor of volunteers and sponsors of nonprofit sport activities for negligence.

102 Sharon

v.

City of Newton

(Mass. 6/10/2002)

103 validity of a release signed by the parent of a minor child

permitting her to engage in public school extra-curricular sports activities."

104 enforcement of release is consistent with the Commonwealth's policy

encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect their students

105 fundamental liberty interest of parents in the rearing of their children

includes their making judgments and decisions regarding risks to their children.

106 acknowledging a parent's fundamental right to make decisions on behalf of their children,

including the authority to release a prospective negligence claim of the child

107 FOR PROFIT?

108 uphold the validity of parent/child waivers

recognize public policy which favors measure of protection to those providing youth with sport and recreation opportunities

109

courts tend to make a significant distinction between public or non-profit agencies

and commercial providers.

110 Hojnowski

v.

Vans Skate Park

(N.J. 7/17/2006)

111 Kirton

v.

Fields

(Fla. 12/11/2008)

112 waivers unenforceable when executed by a parent on behalf of a child

participating in a commercial activity or using a commercial recreation facility.

113 Woodman

v.

Kera, L.L.C.,
Mich.App. (8/12/2008)

114 reiterated traditional rule
refused to find a waiver by a parent on behalf of their minor child valid.

115 Michigan Legislature is the proper institution in which to make such
public policy determinations,

not the courts.

116 New York, state law
(NY CLS Gen Oblig § 5-326)

117 any agreement which exempt "pools, gymnasiums, places of public
amusement or recreation and similar establishments from liability for
negligence"

118 are "void as against public policy and wholly unenforceable"

when a facility operator receives a fee or compensation for use of the
facility.

119 Failure to Read the "Sign Up Sheet"

Dombrowski

v.

City of Omer

Mich.App. 1993

120 Injured

participating in
rope climbing
event
during festival in City of Omer
annual "Sucker Festival"

121 Waiver of Liability
required to sign form
"Rifle River Sucker Festival" at top

122 In consideration of the possible injurys [sic] which could occur in this
event

I hereby release...

123 all participating groups and persons officially connected with this event
from any and all liability for any injury or damages whatsoever arising
from any participation in this event

124 Notice at bottom
parents had to sign if the participant was under the age of eighteen
language double-spaced, in capital letters
standard pica 12 point, script font

125 Several signatures
appear on the form

plaintiff's signature at bottom of list
times of various participants also noted on list

126 To be valid,
a release
must be
fairly and knowingly made

127 Liability waiver unenforceable mutual mistake
no "meeting of minds"

alleged mistake was failure to read liability waiver before signing it.

128 One who signs
a contract cannot invalidate it
on basis that he/she did NOT read it
or thought that its terms were different
absent a showing of fraud or mutual mistake

129 Failure to read
a contract document
provides a ground for rescission

only where the failure was not induced by carelessness alone

130 But instead
was induced
by some stratagem, trick or artifice

by the parties seeking to enforce the contract

131 Deposition testimony
did not believe read before signing

but told him he had to sign it because it was a release form
if he got hurt, he couldn't come back on us

132 Here, no inducement
to sign it
without first
reading it

133 moreover, the nature of the document itself does not hinder the reading
or understanding of it

134 "Waiver of Liability"
at top of form

puts layman on notice waiving liability claims
arising out of his participation in event

135 More validity
to argument if entitled
"Rope Climb Sign-up Sheet"

contained vague reference to advising participants
to read reverse side before signing

136 Public Interest Factors

Boyce v. West
Wash.App. (1993)

- 137 Wrongful Death Claim
against defendants Gonzaga U. & West

son died participating in scuba program

- 138 Boyce argued
release of Gonzaga
from liability
violates public policy, and should not be enforced

- 139 Exculpatory clauses
strictly construed
must be clear
if the release from liability is to be enforced

- 140 Contracts of release of liability for negligence
in Wash. valid
unless a public interest is involved.

- 141 Public interest
factors
endeavor of type generally thought suitable for public regulation

- 142 Party seeking exculpation
performing service of great importance to public
often matter of practical necessity for some members of public

- 143 Decisive advantage of bargaining strength
by party seeking exculpation
because of essential nature of service
in economic setting of transaction
- 144 In exercising
superior bargaining strength
confronts public with standard contract of adhesion
makes no provision, pay additional fees
to obtain protection against negligence.
- 145 Members of public seeking services
must be placed under control of those furnishing services
subject to the risk of carelessness on the part of party seeking
exculpation
- 146 Instruction in
scuba diving does NOT involve a public duty

although a popular sport, does NOT involve public interest
- 147 Boyce had option of NOT taking class
no practical necessity to do so
- 148 Boyce entered into
private and voluntary transaction
in exchange for enrollment
freely agreed to waive any negligence claims

- 149 Scuba diving involves no more a question of public interest than does motorcross racing, sky diving, or motorcycle dirtbike riding.
- 150 Whether Boyce assumed risk of negligent instruction & supervision by West
- 151 Negligent instruction and supervision are clearly risks associated with being a student in a scuba diving course and are encompassed by the broad language of the contract
- 152 Public Entity, Dominant Public Interest?
BANFIELD v. LOUIS
FLA.APP. 1991
- 153 P injured in bike race sponsored by defendant city whether it is ALWAYS against public policy

to relieve a governmental entity of its duty not to be negligent.
- 154 Sponsoring promoting triathlon not engaged in activity of great public interest, or performing necessary service.

155 City should receive benefit of waiver.

P: Against public policy

to allow sponsors to be release from responsibility for safety of participants.

156 Legitimate interest in public safety vs freedom of contract

157 Dominant public interest, clearly injurious to public good,

contravenes established interest of society
strike down contract on public policy grounds.

158 Small percentage of public participates in triathlon races

no showing of great prejudice to dominant public interest to enforce waiver.

159 Public School Interscholastic Athletics Releases

Wagenblast v. Odessa School District
Wash 1988

160 Applied 6 public policy factors
interscholastic athletics part of public education
essential public service suitable for public regulation
no alternatives to standardized adhesion contract

161 Waivers invalid, schools enjoined
from using invalid releases as prerequisite to participation

162 Club Release & Brochure "Exercise Prescription"

Winkler v. Kirkwood Atrium Office Park

Tex.App. 1991

163 staff of fitness experts, exercise prescription

clinical data to prepare prescription

164 Here, no prescription

whether negligent in not providing personalized prescription

165 Whether release misrepresented
fraudulent inducement in marketing brochure

166 Brochure: club's staff not licensed physicians

buyer agrees not relying on clubs physiological measurements
in decision to begin exercising in club

167 Contract Concerning Health & Safety
Leidy v. Deseret Enterprises

Pa.Super. 1977

168 P referred to spa by doctor as part of post-operative treatment

allege treatment given contrary to doctor's instructions to spa

169 Public interest: those claiming to be qualified to follow doctor's orders are in fact qualified, and accept responsibility

170 Public interest: Physical Therapy Act

persons licensed to treat via referral from physician

171 Physical therapist liable for negligence
if performing therapy in direct contradiction to doctor's orders
did not apply to non-therapeutic administration of normal exercise

172 Sufficient evidence here to suggest Spa operation

involved a matter of public policy

173 Individual Exercise Program for Bad Back

Schlobohm v. Spa Petite, Inc.

Minn. 1982

174 Examined exercise program card
recommended 20 to 40 lbs on leg extension machine

noted prior experience with muscle spasms

175 No evidence directed to Spa by health advisor

176 Spa business not type generally subject to public regulation

not matter of great public importance
contrasted to Leidy

177 Whitewater Waiver

GOLDSTEIN v. D.D.B. NEEDHAM
740 F.SUPP. 461 (1990)

178 5/11 drown high-siding;
waiver for injuries "arising out of participation in the trip."

179 Waiver did not indicate specific risks to be encountered on trip

no mention of whitewater rafting as activity
or risks involved in whitewater rafting Chilko river.

180 Whether risks explained before signing release;
high-siding explained.

181 Assumption of risk, voluntary encounter with a known danger as
expressed in document.

182 SAENZ

v.

WHITEWATER VOYAGES, INC.
276 CAL.RPTR. 672 (1990)

183 Drown rafting Murderer's Bar Rapid; waiver

safety talk, dangers of whitewater rafting,

184 Brochure graded rapids, given option to walk the trail around rapid
dangers of MBR explained, procedures if fall into water

185 2x asked if want to run; "Let's do it"

186 Difficulty in drafting release
plain language

expresses aware of whitewater risks includes inherent risk of drowning.

187 Cave Tour Waiver Ineffective

Coughlin v.
T.M.H. International Attractions, Inc.
W.D.Ky. 1995

188 whether release void as against public policy

unequal bargaining position, inexperienced caver

189 release more of an enticement
than a warning of specific risks

relied on tour guide, rather than caving experience

190 No public interest in encouraging caving

by validating releases under circumstances

191 