PRE-LOSS WAIVERS AND RELEASES

2011 STATE LAW SURVEY

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If you have any questions about the topics addressed in this Survey, please contact an IALDA member in the subject state as listed on our website. IALDA counsel are glad to discuss these issues with you as a professional courtesy and without charge.

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The International Amusement & Leisure Defense Association, Inc. is an international non-profit association of defense attorneys, operators, insurance representatives and others whose mission is to promote and protect the legal interests of the amusement, recreation and leisure industries. IALDA provides a forum for members to exchange information, share experiences and develop common discovery, safety and litigation strategies. IALDA also operates as a clearinghouse for speakers and authors on industry-specific topics and educational seminars.

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ALABAMA

1. Is there a state statute that applies or only case law?

Alabama Code § 12-21-109 speaks to "written receipts, releases, discharges, and judgments entered pursuant to pro tanto settlements..."

> All receipts, releases, and discharges in writing, whether of a debt of record, a contract under seal or otherwise, and all judgments entered pursuant to pro tanto settlements, must have effect according to their terms and the intentions of the parties thereto.

Ala. Code § 12-21-109 (1975). Releases will be interpreted as contracts under Alabama law and enforced as written. "Pursuant to § 12-21-109, Ala. Code 1975, we must give effect to the language of the release, 'according to [its] terms and the intentions of the parties thereto,' and those intentions are 'to be ascertained as in the case of other written instruments." McNealy v. Spry Funeral Home of Athens, Inc. 724 So.2d 534 (Ala. Civ. App 1998)(quoting Steenhuis v. Holland, 115 So.2d 2 (Ala. 1927).

Alabama follows a contract law standard of interpretation for releases as indicated in an 11th Circuit's opinion.

> The major substantive change (through Ala. Code § 12-21-109) in the common law rule was that of modifying the law regarding settlements or releases, and changing it according to the law of contracts, that is, that the release must be given effect according to the intentions of the parties. **Thus, under Alabama law, the common law rule on the subject of general releases has been modified by the intention of the [parties] standard of contract law.**

Alabama Farm Bureau Ins. Co. v. Hunt, 519 So.2d 480 (Ala. 1987)(emphasis added).

2. What does the statute or case law say with respect to what language needs to be in the waiver?

The case law does not require specific language, but releases and/or exculpatory clauses must reflect the intent of the parties. Exculpatory clauses excusing a party from its own negligence are disfavored but enforced if the intention of the parties is expressed in "clear and unequivocal language." The Alabama Supreme Court recognized this enforceability by clarifying a previous opinion:

> Industrial Tile argues that Alabama...in Alabama Great Southern RR Co... rejected the general rule and now follows the rule that, as between private parties, any contract which permits the indemnification of the indemnitee against his own wrongs is void as against public policy. We agree that there is language in the opinion which supports Industrial Tile's contentions. However, after carefully reviewing all of the authority in this state, we are compelled to conclude that, if the parties, **knowingly,**

> **evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other, including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language, then such agreements will be upheld..."**

Industrial Tile, Inc. v. Stewart, et al, 388 So.2d 171 (Ala. 1980).

Releases can be set aside or rescinded for fraud, economic duress, and failure to obtain a meeting of the minds or incapacity. *See* Alabama Farm Bureau Ins. Co. v. Hunt, 519 So.2d 480 (Ala. 1987).

3. Can an adult sign for a child, i.e. is the waiver effective as to minors?

Settlements and Releases:

With certain exceptions, contracts in Alabama are not enforceable against minors. A minor may disaffirm any contract to protect him "from being taken advantage of by others due to the (his) 'improvidence and incapacity.'" Thode v. Monster Mountain, LLC, 754 F. Supp. 2d 1323 (M.D. Ala. 2010).

Therefore, Court approval of a settlement/release with a minor is required to later enforce the agreement against a minor. However, summary approval by the Court without a judicial investigation into the merits of the claim and investigation of the facts to determine "whether the settlement is in the best interest of the infant," is not sufficient.

> Thus, it is a general rule that where a judgment is rendered for an infant in his action to recover damages for personal injuries, and there is no judicial investigation as to the merits of the claim, but the proceedings are merely formal for the purposes of carrying out a settlement...even though the court acquiesces in the rendition of the judgment, relief may be had against the judgment.

Abernathy v. Colbert County Hospital Bd., 388 So.2d 1207 (1980). The Abernathy Court held that despite a hearing and pro-ami consent judgment, the judgment approving settlement of a minor's personal injury claims should be overturned. The Court must conduct a "more extensive examination of the facts to determine whether the settlement is in the best interest of the infant." *Id.*

Such a judicial determination is required because "...(The next friend) cannot release the cause of action, nor compromise it, nor submit it to an arbitration the result of which will bind the infant." *Id.* The Court must approve any settlement on behalf of the minor. "[T]he court having the power and being charged with the duty of controlling the suit to the protection of the infant's interest, an attempted compromise cannot have force and validity injected into it by (the Court's) mere consent..." *Id.*

Pre-Injury Release:

Interpreting Alabama law, the U.S. District Court for the Middle District of Alabama held, "... that, under Alabama law, a parent may not bind a child to a pre-injury liability waiver in favor of a for-profit activity sponsor by signing the liability waiver on the child's behalf."[1] Thode v. Monster Mountain, 754 F.Supp.2d at 1327. The Court refused to enforce a liability waiver signed by the minor's chaperone on behalf of his parents required by a motorcycle motocross park. In the absence of on-point Alabama authority, the Court synthesized the following established points of Alabama law applicable to this memorandum;

(1) Alabama's default rule holds any contract with a minor is voidable;

(2) No Alabama exceptions to this default apply to a pre-injury release of liability[2]; and

(3) Alabama has restricted a parent's right to limit a child's **post-injury** claims;

See Id. at 1326

Importantly, the Court's holding is tempered by its final footnote which states:

> The Court **does not hold that an indemnity agreement, such as that contained in another clause of the Release, signed by parents in order for their child to be allowed to participate in a dangerous activity, would not be enforceable against the parents.** This issue is not presented.

Id. (emphasis added). In other words, parents may not release a minor's right of recovery, but may indemnify a party, achieving a similar result.

4. Are the courts reluctant to uphold the waiver?

See above; pre-injury releases in Alabama are not enforceable against a minor.

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[1] The Court recognized an absence of Alabama precedent to support its finding but concluded, "...many courts rejecting parents' right to bind children to pre-injury releases have relied on legal principles recognized by Alabama..." Thode v. Monster Mountain, 754 F.Supp.2d at 1327.

[2] Alabama enforces contracts with minors for necessities including medical care. To disaffirm a contract, the minor must return the consideration received in exchange. A minor can not "return" medical aid received (or other necessary consideration) and therefore can be held liable under such a contract. "...Alabama law, like the law of most other states, provides that persons providing the 'necessities' of life to minors may recover the reasonable value of such necessaries irrespective of the existence or nonexistence, of a (voidable) contract respecting those necessaries." Williams v. Baptist Health Systems, Inc., 857 So.2d 149, 151 (Ala. Civ. App. 2003).

5. How does one try to defeat the waiver?

See above; pre-injury releases in Alabama are not enforceable against a minor. A contract for necessaries can be enforced for the reasonable value of the service or good provided. "...when an infant executes a contract, the infant is liable only on his implied promise to pay for necessaries, and all other provisions of the contract are voidable at the election of the infant." Ex Parte: Odem (re: The Children's Hospital of Birmingham v. Kelley), 537 So.2d 919, 920 (Ala. 1988).

6. Other issues re waivers particular to your state.

ALASKA

Validity of Liability Waivers/Releases – Alaska

1. Controlling Law

1. Ski Liability, Safety, and Responsibility: Use of Liability Releases. Alaska Stat. § 5.45.120 (Michie 2000)
2. Parental Waiver of Claim Against Provider of Sports or Recreational Activity. Alaska Stat. § 09.65.292
3. Limitations on Claims Arising From Skiing Act ("Ski Act"). Alaska Stat. § 09.65.135. (Comparative negligence not excluded from this Act. *See Hiibschman By & Through Welch v. City of Valdez*, 821 P.2d 1354, 1364 (Alaska 1991) (analyzing legislative intent of Act and finding it preserved the common law duties of ski operators).
4. A landowner that allows a recreational activity on the landowner's land without charge generally does not owe a duty to those using the land. *See* Alaska Stat. § 09.65.202.

2. Waiver Requirements

Liability waivers must reflect a "conspicuous and unequivocally expressed" intent to release from liability. *Kissick v. Schmierer*, 816 P.2d 188, 191 (Alaska 1991) (holding liability waiver did not bar a wrongful death claim after an airplane crash because the agreement's phrase "injury to their person" did not clearly include death as an injury). Such intent must be ascertained by examining the whole liability waiver, not just isolated sections of it. *Legends, Inc. v. Kerr*, 91 P.3d 960, 963 (Alaska 2004). In *Kerr,* the plaintiff fractured her knee when she dropped from a climbing wall onto padded mats with taped seams, and her foot penetrated a taped seam because the tape where she landed was weak or split. The plaintiff sued the Gym owners, contending they had actual knowledge of the condition of the tape and had negligently failed to maintain the premises in a reasonably safe condition.

The *Kerr* court held the term "negligence" does not definitively establish the scope of a release. Read as a whole, the release failed to conspicuously and unequivocally alert climbers that they were giving up claims against the Gym beyond those associated with the inherent risk of bouldering. It did not alert climbers that they were giving up any claims that the Gym failed to meet the standards of maintenance and safety, standards that the Gym specifically indicated in the release that it would strive to achieve and upon which the release might have been predicated. Any ambiguities in these regards were construed against the Gym as the drafter of the contract. The plaintiff was thus not barred by the release from bringing her claim and the Gym was not entitled to summary judgment on the issue of liability.

In *Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 632 (Alaska 2001), a release 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." The court held this release purported to waive liability only for the inherent risks of ATV riding, not for negligence unrelated to those inherent risks. "[I]f a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger" and is therefore not an inherent risk of the sport. *Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 633 (Alaska 2001) (citations omitted). The release contained

an implied and reasonable presumption that the ATV course was not unreasonably dangerous. Therefore, the injured rider's allegation—that an ATV course was improperly laid out when she drove her ATV over a rock and the vehicle rolled over—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. *Id.*

3. Waiver of Minors' Prospective Claims

A parent may waive his child's prospective claim for negligence "against the provider of a sports or recreational activity." Alaska Stat. § 09.65.292. The release or waiver must be in writing and shall be signed by the child's parent. No Alaska cases have involved this statute.

4. Willingness of Courts to Enforce Waivers

There is insufficient information to predict whether Alaska courts will uphold liability waivers. For adults, the case law expresses a willingness to find liability waivers do not bar plaintiffs' claims. On the other hand, Alaska is one of only a handful of states to enact a statute allowing parents to waive their children's prospective claims.

5. Defenses to Liability Waivers

1. There was no consideration for the release.

2. The release is void as against public policy. In *Moore*, the court determined the release was not void against public policy because the ATV safety course, although perhaps providing a desirable opportunity for an ATV driver, was not an essential service, and therefore the class providers did not have a "decisive advantage of bargaining strength" in requiring the release for participation in the ATV safety class. The plaintiff had a choice about whether to take the class or not, and chose to sign the release in order to participate.

3. The release violates the recreational use statute. A recreational use statute may provide immunity to certain locales. However, this recreational use statute only applies to unimproved land, which does not include a university ski hill fell. *Univ. of Alaska v. Shanti*, 1992).

4. The waiver does not contain clear, explicit language waiving a person's or entity's liability.

5. The waiver language is not conspicuous within the document.

6. The parties were not sufficiently informed about the potential risks in order to permit a "knowing" waiver of those risks and attendant liabilities.

7. Citing the Ninth Circuit's decision in *Farina*, plaintiffs could argue that the invalid portion of a release clause should not be severed from the remainder of the release clause, and thus the entire release clause should be void. *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995). To date, no Alaska cases have addressed this argument.

6. Other Issues

None.

ARIZONA

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WAIVER – RELEASE: ARIZONA CASE LAW

1. Is there a state statute that applies or only case law?

a. No Arizona Statute.

b. Case law: ***Phelps v. Firebird Raceway, Inc.,*** 210 Ariz. 403, 111 P.3d 1003 (2005).

In 2005, the Arizona Supreme Court in the published opinion of ***Phelps v. Firebird Raceway, Inc.,*** 210 Ariz. 403, 111 P.3d 1003 (2005), *on the specific language of Arizona's Constitution*, Article 18, Section 5, holding the defense "of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury," applies to an assumption of risk. Therefore, the Arizona Supreme Court held that express written contractual waivers and releases were questions of fact for the jury to decide, and that Trial Courts could no longer grant summary judgment as a matter of law based upon a written waiver or release.

The Supreme Court in ***Phelps v. Firebird Raceway*** further directed lower Courts to instruct the jury both on the enforceability of contracts, including waivers and releases, and on the substance of premises liability, as long as it remains clear that the ultimate decision as to the enforceability of the release and waiver signed by Plaintiff is for the jury to decide.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

a. Waiver document must contain specific, prominent waiver language and be explicitly entitled "Release of Liability."

b. If Releasor intended to absolve itself from its own negligence, the language and form of the Waiver must clearly absolve the Releasee from liability for its own negligence and must clearly advise the Releasor that he is releasing any claims for injury caused in whole or in part by the negligence of Releasee relating to the specific activities.

c. A general release of all liability will **not** absolve a Releasee of its duty to disclose unexpected and extraordinary risks known to Releasee but not known to Releasor.

d. A specific listing is **not** required of every one of the possible causes of an accident for a waiver to be effective.

e. It is enough if the Releasor understands the types of risks covered by the waiver.

f. The alleged cause of the injury must be one of the hazards generally associated with Releasor's activities and contemplated in the Release; stated another way, the risk cannot be an extraordinary and unknown risk.

g. Waiver must sufficiently specify the potential risks that Releasor is assuming, including the possibility of an unsafe condition of Releasor's premises, activities, or equipment.

h. Releasee must sign Waiver document.

3. Can an adult sign for a child, i.e. is the waiver effective as to minors?

No Arizona case has ever ruled on whether a parent or guardian can sign a waiver or release on behalf of a minor. Based on the prior 30 year Arizona appellate history requiring Court-approval of a minor's claim settlement, an Arizona Court would most probably **not** uphold a written waiver or release signed by a parent or guardian that would preclude a minor's right to sue for injuries on commercial premises.

4. Are the courts reluctant to uphold the waiver?

Yes, all Court opinions ruling on waivers state from the outset that "waivers are disfavored in Arizona out of concern that they may encourage carelessness of the Releasee."

5. How does one try to defeat the waiver?

a. Appeal to jury that waiver is unfair to a plaintiff not trained in waivers, or the specific industry.
b. Claim the waiver language is insufficient, ambiguous, or non-specific.
c. Claim the injury incident was not one of the inherent risks contained in the waiver.

6. Other issues re: waivers particular to your state? See above.

Joseph Brownlee is a Board Member and Past President of the International Amusement and Leisure Defense Association (IALDA), and has principally been responsible for representing and defending the amusement and leisure industries throughout Arizona over the past 25 years.

ARKANSAS

MEMORANDUM

TO: File

FROM: Jason J. Campbell

- Is there a state statute that applies to waivers/exculpatory clauses?

  No, there is no Arkansas statute that applies to liability waivers/exculpatory clauses.

- What language needs to be in the exculpatory clause?

  Exculpatory clauses are strictly construed against the party relying on them. The exculpatory clause must "clearly and specifically set out the negligent liability to be avoided." *Miller v. Pro Transportation*, 77 S.W.3d 551 (Ark. App. 2002).

  The factors to be considered when evaluating enforcement of exculpatory clause include the following: 1) whether the party is knowledgeable of the potential liability they are releasing; 2) whether the party benefits from the activities surrounding the transaction; and 3) whether the contract is fairly entered into. *Finagin v. Arkansas Development Finance Authority*, 139 S.W.3d 797 (Ark. 2003).

  Arkansas courts have also on occasion applied a "total transaction approach." Under this approach the court comprehensively analyzes all the conditions and factors involved in the transaction, not just the literal language of the agreement. *Plant v. Wilbur*, 47 S.W.3d 889 (Ark. 2001).

- Can the adult sign for the child, i.e., is the waiver effective as to minors?

  There is no Arkansas precedent which directly addresses this question.

- Are courts reluctant to uphold exculpatory clauses?

  Due to public policy concerns of encouraging the exercise of reasonable care, Arkansas has a long history of refusing to enforce exculpatory clauses that exempt a party from liability as a result of negligence. In 2001, the Arkansas Supreme Court enforced, for the first time, a contract

containing an exculpatory clause that completely avoided liability for ordinary negligence. Since that decision, there have been a number of other decisions which have been more liberal in the enforcement of exculpatory clauses.

How does one defeat an exculpatory clause?

Consideration must be given to whether the activity at issue involves a narrow segment of society or a matter involving general public interest. The argument has been made that recreational activities that do not involve the general public as a whole do not warrant the same standard of public policy concern.

If there is a demonstrated lack of familiarity with the risks and dangers associated with the activity, it is more likely that the exculpatory clause will not be enforced.

Evidence of fraud, duress, undue influence, lack of capacity, mutual mistake, or inequitable conduct is sufficient to prevent enforcement of an exculpatory clause.

/vc

CALIFORNIA

CALIFORNIA

Is there a state statute that applies or only case law?

California case law controls the judicial enforcement of liability waivers and releases. Although *Civil Code* Section 1668 is a statute on the books, such statute is generally not applicable to recreational releases and waivers. Such section states:

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

Pursuant to California case law, waivers and releases, given in the context of recreational activities are enforceable. However, two recent case decisions have created two "exceptions" to the general rule. One exception is that a waiver and release will not bar a claim of "gross negligence". *See City of Santa Barbara v Superior Court (Janeway)* (2007) 41 Cal.4th 747. The second exception is that a waiver and release will not bar a cause of "negligence per se" based upon a violation of statute. *See Capri v LA Fitness* (2006) 136 Cal. App. 4th 1078.

Some other relevant cases: *Benedek v. PLC Santa Monica, 104 Cal.App.4th 1351 (2002);Sanchez v. Bally=s Total Fitness Corp., 68 Cal.App.4th 62 (1998); 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).*

What does the case law say with respect to what language needs to be in the waiver or release?

There are no specific requirements as to what language is required. The language used need merely to reflect an "objective" intent that legal rights are being given up, and the waiver provision be conspicuous, and readily understandable. The term "negligence" need not be used. Also, no specific font size is required, however, 10 point font is the generally accepted minimum.

Can a parent execute a release for a minor?

Yes. But only a parent or legal guardian has the capacity to sign. A chaperone or supervising companion does not have such legal authority or capacity.

See 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).

Are Courts reluctant to uphold the waiver?

No. California Courts are willing to uphold the waivers. However, based upon the fairly recent cases of *City of Santa Barbara* and *Capri*, artful plaintiff attorneys often throw in a gross negligence claim or cause of action, or a negligence per se claim, to circumvent a valid waiver and release.

How does one try to defeat the waiver?

As indicated, causes of action for gross negligence or negligence per se (violation of statute) are asserted in the complaint. The waiver will bar the claims for "ordinary negligence", but not gross negligence or negligence per se.

Other issues particular to your state.

None, other than above.

CALIFORNIA II

2011 IALDA WAIVER AND RELEASE SURVEY PROJECT (CALIFORNIA)

Is there a state statute that applies or only case law?

The body of law in California governing waiver and release/exculpatory agreements is largely case law driven. Parties attempting to defeat a waiver and release agreement frequently cite to *Civil Code* Section 1668, which invalidates any and all contracts as a matter of public policy that purport to exculpate a party for responsibility for his own fraud, willful injury to person or property of another, or a violation of the law, whether willful or negligent.

The rule of law in California has long been that unless the subject matter of a contract affects the public interest, parties to a contract are free to allocate the risk of injury. *Tunkl v. Regents of the University of California* (1963) 60 Cal.2d 92. Contractual releases of liability in the context of recreational activities do not involve the public interest. *Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1.

What does the statute or case law say with respect to what language needs to be in the waiver?

There are no statutes or reported cases that specifically require any particular language to be included in an exculpatory agreement in California. All that is required is that the injury in question be "reasonably related" to the purpose of the waiver and release and that the terms of the document be clear, unambiguous and explicit. *Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758. However, we generally recommend that a such an agreement make specific reference to the fact that the document is purporting to waive "all negligence" of the releasees so as to avoid any confusion and to defeat claims by a plaintiff that the document is vague or ambiguous.

Also, exculpatory agreements that attempt to waive intentional torts or conduct or "gross negligence" will not be enforced as against public policy. *City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal.4th 747; *Civil Code* Section 1668.

Can an adult sign for a child, i.e., is the waiver effective as to minors?

Yes. Minors' waivers are enforceable in California. *Hohe v. San Diego Unified* (1990) 224 Cal.App.3d 1559; *Aaris v. Las Virgenes* (1998) 64 Cal.App.4th 1112.

Are the courts reluctant to uphold the waiver?

This depends entirely on the particular judge and jurisdiction. Exculpatory agreements identical in language have been enforced on summary judgment in some counties, while courts in other counties have denied to enforce them. Generally, courts seem reluctant to enforce waiver agreements against minors, especially those with serious injuries.

How does one try to defeat the waiver?

The most popular current method employed by plaintiffs to defeat a waiver is the invocation of the doctrine of "gross negligence." Prior to 2007, aggravated "degrees" of negligence did not exist for the purposes of enforcement of exculpatory agreements. However, the case of *City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal.4th 747 changed the law, and holds that exculpatory agreements purporting to absolve a party from future "gross negligence" are unenforceable and against public policy. "Gross negligence" has been defined as "a want of even scant care or an extreme departure from the ordinary standard of conduct." Accordingly, plaintiffs are now arguing that defendants have engaged in conduct amounting to "gross negligence" with respect to the injury-causing incident with increased frequency in order to circumvent summary judgment.

Plaintiffs have also attempted to invalidate exculpatory agreements by attacking the formatting of the document. A recent federal case venued in California disregarded plaintiffs' attempts to render a waiver unenforceable by claiming that capitalized and italicized text within a waiver and release document "distracted" the reader from focusing on the operative language. *See Lewis v. Mammoth Mountain Ski Area* (2009) E.D. Cal, 2009 WL 1426802. Essentially, the party drafting the release should take care to ensure that the formatting of the document is reasonable (has large enough font, perhaps used bold-faced type and/or capitalization for key terms) so as to ward off arguments of vagueness and ambiguity.

Other issues re: waivers particular to your state?

COLORADO

VALIDITY OF LIABILITY WAIVERS/RELEASES – COLORADO

1. Controlling Law

In Colorado, liability waivers are governed primarily by the case law, but there is also a statute that allows parents prospectively to waive any negligence claims of their children. See § 3, below. There are also statutes that affect this for equine liability and skiing.

2. Waiver Requirements

The case law has been on the books for many years. *See* ***Jones v. Dressel***, 623 P.2d 370 (Colo. 1981). Liability waivers are analyzed by examining four factors: (1) existence of a duty to the public; (2) nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of parties is expressed in clear and unambiguous language. ***B & B Livery, Inc. v. Riehl***, 960 P.2d 134(Colo. 1998) (citing ***Jones***, 623 P.3d 370); ***Hamill v. Cheley Colo. Camps, Inc.***, 2011 WL 1168006 (Colo.App. Mar. 31, 2011); ***Miller v. Home Ranch Co.***, 2011 WL 1755539 (D.Colo. May 9, 2011). Where there is no public duty involved, and the nature of the service performed is recreational, the focus is typically on the fairness of the circumstances in which the waiver was signed and, most importantly, the ambiguity issue. The latter typically focuses on, first, whether the waiver reflects the parties' mutual intent to extinguish liability and, second, whether that intent is clearly and unambiguously expressed.

Liability waivers have been upheld in cases involving numerous recreational activities: *e.g.*, ***Chadwick v. Colt Ross Outfitters, Inc.***, 100 P.3d 465 (Colo. 2004) (back-country hunting trip); ***B & B Livery***, 960 P.3d 134 (horseback riding); ***Jones***, 623 P.2d 370 (skydiving); ***Hamill***, 2011 WL 1168006 (horseback riding); ***Forman v. Brown***, 944 P.2d 559 (Colo.App. 1996) (river-rafting trip), *cert.* denied (1997); ***Mincin v. Vail Holdings, Inc.***, 308 F.3d 1105 (10th Cir. 2002) (mountain biking accident; action against mountain resort renter of bike); ***Brooks v. Timberline Tours, Inc.*** 127 F.3d 1273 (10th Cir. 1997) (snowmobile tour); ***Robinette v. Aspen Skiing Co.***, 2009 WL 1108093 (D.Colo. Apr. 23, 2009) (skiing; skier ran into facility's snowmobile on slope), *aff'd*, 363 Fed.Appx. 547 (10th Cir. Jan. 25, 2010); ***Forman v.*** Brown, 944 P.2d 559 (Colo.App. 1996) (river-rafting trip), *cert. denied* (1997); **Lahey *v. Covington***, 964 F.Supp. 1440 (D.Colo. 1997) (white-water rafting); ***Potter v. National Handicapped Sports***, 849 F.Supp. 1407 (D.Colo. 1994) (handicapped ski racing).

Concerning the statutory law, see § 3 regarding waiver of minor's claims.

Colorado also has a statute that governs equine activities, **§ 13-21-119, C.R.S.**, and precludes liability for injuries that result from the inherent risk of equine activities (including llama activities), with the types of hazards set out in the statute. The statute exempts "equine professionals from liability that result from those inherent risks, **§ 13-21-119(3)**, except for the horse-racing industry, **§ 13-21-119(4)(a)**, and for those injuries that result from the defendant's providing equipment or tack that the defendant knew or should have known was faulty, where that equipment of tack caused the injury; or provided an animal and failed to make reasonable and prudent efforts to determine its ability to engage safely in the equine or llama activity and to

determine the participant's ability to safely manage the particular animal, based on the participant's representations of his ability; where there is a latent condition of the property that the defendant owns, leases, rents or has possession of, if that latent condition causes the participant injuries; and where there is an intent to injure the participant or if the defendant engages in willful or wanton disregard of the participant's safety. § **13-21-119(4)**. The statute also sets out a warning notice that *must* appear in signage in or around the stables or corrals, and that is also required to be included in any contract and/or liability waiver. § **13-21-119(6)(a)**. This statute has been upheld by the Colorado courts, ***Clyncke v. Waneka***, 157 P.3d 1072 (Colo. 2007); ***B & B Livery*** 960 P.2d 70 (Colo. 1998); ***Day v. Snowmass Stables, Inc.***, 810 F.Supp. 289 (D.Colo. 1993); *see* ***Miller***, 2011 WL 1755539, as have the exceptions to liability set out in that statute, ***Clyncke***, 157 P.3d 1072. As long as a release does not violate the public policy of the statute, a release that contains the requisite statutory language may, in fact, also contain broader language that waives non-inherent risks of horseback riding. ***B & B Livery***, 160 P.2d 134; ***Miller***, 2011 WL 1755539.

Colorado also has a Ski Safety Act §§ **33-44-101 *et. seq.*, C.R.S.**, that sets out inherent risks of skiing, *see* § **33-44-103(3.5)**, specifies various duties of passengers on ski lifts, operators (both regarding signage and notices required to be provided to skiers), and various duties of the skiers. Aside from exceptions set out in the rules, skiers may not seek to recover from ski area operators for injuries resulting from any of the inherent dangers and risks of skiing, **§ 33-44-112**, and there is a limitation on the amount of liability **§ 33-44-113**. Importantly, a plaintiff's lift ticket had a printed statement on the back stating that the skier had assumed the risk of skiing was inadmissible where the Act allocated the parties' varying duties regarding safety of those around them, and no private agreement could modify these statutory provisions. ***Phillips v. Monarch Recreation Corp.***, 668 P.2d 982 (Colo.App. 1983).

3. Waiver of Minors' Prospective Claims

Colorado has a statute, § **13-22-107** (attached), added in 2007, that allows parents to prospectively waive negligent claims their minor children may have from participating "in sporting, recreational, educational, and other activities where certain risks may exist." § **13-22-107(1)(a)(I)**. The legislature's opening comments make it clear that it is the public policy of Colorado to allow parents to make choices such as this for their children, and the statute expressly overrules a Colorado Supreme Court case, ***Cooper v. Aspen Skiing Co.***, 48 P.3d 1229 (Colo. 2002), that held to the contrary.

The key language is that parents may make this decision, "[s]o long as the decision is voluntary and informed..." § **13-22-107(1)(a)(V)**. There are only two cases that have interpreted this statute, both recently: ***Hamill***, 2011 WL 1168006, and ***Wycoff v. Grace Community Church of Assemblies of God***, 2010 WL 5054410 (Colo.App. Dec. 9, 2010). Both cases indicated that the legislature's use of the term "informed" added something that had not existed in previous cases interpreting liability waivers, so that in addition to analyzing the four factors in the *Jones* line of cases, courts must determine whether any waiver is "informed." Presumably, apprising a parent of the nature of the activities in which the child will be involved and listing the

various types of risks (for example, personal injury, disability, death), should be sufficient, as was true in *Hamill*. The statute does not apply, and a parent may not waive a child's claim against a defendant, for willful and wanton conduct or any reckless or grossly negligent act or omission. **§ 13-22-107(4)**.

4. Willingness of Courts to Enforce Waivers

As noted above, Colorado's state and federal courts are both ***not*** reluctant to uphold waivers that fulfill the case-law and statutory requirements.

5. Defenses to Liability Waivers

As noted, whether the plaintiff is an adult or a minor, liability waivers do not apply when a defendant's conduct was willful, wanton, or reckless. Related to that, and as a general rule, liability waivers will not apply where their application would be contrary to public policy. *E.g.* ***Boles v. Sun Ergoline, Inc.*** 223 P.3d 724 (Colo. 2010) (claim for strict product liability is premised on number of public-policy considerations that would be flatly thwarted by legitimizing disclaimers or exculpatory agreements; agreement releasing manufacturer from strict product liability based on release customer signed as condition of using tanning facilities was void as against public policy); ***Rowan v. Vail Holdings, Inc.*** 31 F.Supp.2d 889(D.Colo. 1998) (sufficient evidence of willful and wanton conduct by owner of ski slope was present to create jury question); *see* ***Stanley v. Creighton Co,*** 911 P.2d 705 (Colo.App. 1996) (because residential leases were matters of public interest, waiver of lessor's negligence claims through exculpatory clause was void as against public policy). Because they are to be strictly construed, waivers have also been held to be invalid where the waiver language did not expressly apply to both parties who signed it, ***Del Bosco v. United States Ski Ass'n***, 839 F.Supp. 1470 (D.Colo. 1993).

Regarding the limited statutory immunities, under the equine statute, where a plaintiff can prove that the defendant's negligence was not an "inherent risk of equine activities," liability may be imposed. ***Fielder v. Academy Riding Stables***, 49 P.3d 349 (Colo.App.), *cert. denied* 2002.

Other than these approaches, and especially in situations that are recreational activities, parents will typically try to attack the third and fourth factors under the *Jones* decision, namely, by showing that the waiver was not freely entered into or that it is ambiguous.

6. Other Issues

None are really applicable at this time.

DELAWARE

Validity of Liability Waivers/Releases – Delaware

1. Controlling Law

1. Equine Liability Act. Del. Code Ann. Tit. 10, § 8140 (1999).
2. Comparative Negligence. 10 Del. C. § 8132
3. Unconscionable Contract or Clause. 6 Del C. § 2-302(1)

2. Waiver Requirements

Delaware Courts recognize the validity of a general release of a party from liability. *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981) (upholding liability waiver for boating accident where waiver form released "all other persons"). An injured or aggrieved party can give a general release that inures to the benefit of third party strangers to that document. *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985-86 (Del. 1981) (upholding release); *cf. Benton v. State*, 711 A.2d 792, 798 (Del. 1998) (finding general release did not relieve defendant from either civil liability or the obligation to make restitution for her criminal conduct). Delaware courts consider extrinsic evidence to determine the scope of a release. *Sellon v. General Motors Corp.*, 521 F. Supp. 978, 984-986 (D.Del.1981); *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981). A release is valid if it is not ambiguous, unconscionable, or contrary to public policy. *Hallman v. Dover Downs, Inc.*, D. Del., C.A. No. 85-618-CMW, Wright, J. (Dec. 31, 1986). *See also Egan & Sons Air Conditioning Co. v. General Motors Corp.*, Del. Super., C.A. Nos. 88L-MY-18 and 88L-MY-28, Gebelein, J. (April 27, 1988) (Mem. Op.) at 6; *Tucker v. Albun, Inc.*, CIV. A. 97C-04-025, 1999 WL 1241073 (Del. Super. Ct. Sept. 27, 1999).

Contractual provisions which purport to relieve a party from liability for matters resulting from its own negligence are not favored. *Marshall v. Maryland, D. & V. Ry. Co.*, Del. Super., 1 W.W. Harr. 170, 112 A. 526 (1921); *Pan American World Airways v. United Aircraft Corp.*, Del. Supr., 3 Storey 7, 163 A.2d 582 (1960). For such a provision to be upheld, it must be "crystal clear" in its language evincing the clear intent of the parties to absolve the protected party of liability created by that party's own actions. *Id.* at 12 (citing *J.A. Jones Const. Co. v. City of Dover,* Del. Super., 372 A.2d 540, 553 (1977)). Preinjury release disclaimers are to be construed strictly, but they should not be construed contrary to the plain and ordinary meaning of the words and probable intent. *Lafate v. New Castle County*, C.A. 97C-11-112-WTQ, 1999 WL 1241074 (Del. Super. Ct. Oct. 22, 1999). In *All-State Inv. & Sec. Agcy., Inc. v. Turner Const. Co.*, 301 A.2d 273 (Del. 1972), the Delaware Supreme Court specifically pointed out the need for an express provision showing the intent to relieve a party from the result of its own negligence in order for that result to flow from a contract provision. The Delaware cases which have found contractual language sufficient to protect a party against a claim based on its own negligence have all specifically referred to negligence of the protected party. *See, e.g., Warburton v. Phoenix Steel Corp.*, 321 A.2d 345 (Del. Super. Ct. 1974), *aff'd. sub. mom., Noble J. Dick, Inc. v. Warburton*, 334 A.2d 225 (Del. 1975); In *All-State Inv. & Sec. Agcy., Inc. v. Turner Const. Co.*, 301 A.2d 273 (Del. 1972). Conversely, contractual provisions which purport to give protection generally against liability or which even protect against negligence generally have been held not to meet the test for protection from a claim based on one's own negligence. *State*

v. Interstate Amiesite Corporation, 297 A.2d 41 (Del. 1972); *Blum v. Kaufman*, 297 A.2d 48 (Del. 1972); *Powell v. Interstate Vendaway, Inc.*, 300 A.2d 241 (Del. 1972).

A clear and unambiguous release "will [only] be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries." *Edge of the Woods, Ltd. P'ship v. Wilmington Sav. Fund Soc'y, FSB*, 2000 Del. Super. LEXIS 35, 2000 WL 305448, at *4 (Del. Super. Ct. Feb.7, 2000); *see also Deuley v. DynCorp International, Inc.*, 8 A.3d 1156, 1163 (Del. 2010) (upholding release for police officers who agreed to except insurance benefits in exchange for release because risk shifting involved was akin to workers' compensation). For a liability waiver to be upheld, "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." *McDonough v. National Off-Road Bicycle Ass.*, D. Del., C.A. No. 95-504-SLR, Robinson, J. (June 2, 1997) (Mem. Op.) (denying summary judgment because there was a material issue of fact whether a cyclist competing in a race contemplated harm occurring from a source other than the normal hazards of bicycle racing before executing a release, normal hazards being collision or rough roads and trails, not necessarily death from heat stroke allegedly caused by negligent event management); *see also Devecchio v. Del. Enduro Riders, Inc.*, 2004 Del. Super. LEXIS 444 (Del. Super. Ct. Nov. 30, 2004) (holding that release did not constitute a valid understanding between the parties because it stated that the participants in a motorcycle race had had the opportunity to inspect the course and had in fact found the course to be safe, but the defendants admitted that riders were not allowed to inspect the course, as such inspection would have contravened American Motorcycle Association guidelines).

In *Lafate v. New Castle County*, C.A. 97C-11-112-WTQ, 1999 WL 1241074 (Del. Super. Ct. Oct. 22, 1999), the court denied the defendant's motion for summary judgment after finding that a plaintiff's signing a preinjury release did not constitute a primary assumption of risk as a matter of law The *Lafate* plaintiff received a general waiver and release on two different occasions, relieving the defendant of all liability from injuries occurring from play. The release language was in both the rules and regulations distributed to all team members, and was also a part of the roster signed by all players including the Plaintiff. The distributed "rules and regulations" spoke of "injuries . . . no matter under what circumstances incurred." The roster release, actually signed by the players, and therefore "more significant" in the court's mind, spoke of "any and all injuries which may be suffered by us during our participation." The court found these documents appeared to be designed to bar all claims related to the athletic participation, but that the language did not expressly give a release for injuries resulting from the defendant's own negligence. The defendant argued that the plaintiff's knowledge of the rules and his signature on the waiver, which was part of the roster, constitute a primary assumption of the risk, relieving NCC of liability and entitling NCC to summary judgment. The court found that because there must be limits to the permissible role of a disclaimer, "it would not be within the normal expectation of the health risk of playing basketball that a supervising employee would place a metal bar within normal head range between two basketball courts."

In *Hallman v. Dover Downs, Inc.*, D. Del., C.A. No. 85-618-CMW, Wright, J. (Dec. 31, 1986), a newspaper reporter was assigned by the paper to cover a stock car race at Dover Downs International Speedway. Before he was allowed onto the premises, he was required to sign a

release. Moreover, the reporter's press badge contained a liability release for personal injury or property damage. *Id.* at 3. While reporting on the races, the reporter leaned against a wooden railing that gave way and caused him to fall to the ground below. The Court denied defendant's motion for summary judgment after finding that material issues of fact existed as to whether the release was ambiguous, unconscionable, or violated public policy. *Id.* at 5. The release was potentially ambiguous because it was written in tiny print and the reporter did not have the opportunity to read it. The release was potentially unconscionable because the reporter had to sign the release in order to do his job as a reporter, and the terms of the release were potentially unreasonable. Also, the release may have been void for public policy reasons because its language was overly broad.

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether Delaware courts will uphold liability waivers.

4. Willingness of Courts to Enforce Waivers

The validity of liability waivers often raises genuine issues of material fact, but there is insufficient information to predict whether Delaware courts will uphold liability waivers.

5. Defenses to Liability Waivers

1. Enforcement would be contrary to public policy because the liability waiver contains explicit language releasing the defendant from liability for its own negligence. *See Slowe v. Pike Creek Court Club, Inc.*, CIV.A. 08C-08-029PLA, 2008 WL 5115035 (Del. Super. Ct. Dec. 4, 2008) (finding release waiver might violate public policy); *Tucker v. Albun, Inc.*, CIV. A. 97C-04-025, 1999 WL 1241073 (Del. Super. Ct. Sept. 27, 1999) (finding release waiver might violate public policy because it purported to release the defendant from liability "WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE"); *Evans v. Feelin' Good, Inc.*, 90C-FE-24, 1991 WL 18066 (Del. Super. Ct. Feb. 1, 1991) (holding liability waiver did not violate public policy because it did not purport to release a health club from all possible liability but only that arising out of the use of the facilities and equipment on the premises). "[A] term exempting a party from tort liability for harm negligently caused is unenforceable on grounds of public policy if the term exempts one charged with the duty of public service from liability to one whom that duty is owed." *Hallman* at 13. A release may violate public policy if the language exempting the benefitted party from his own negligence is not "crystal clear." *J.A. Jones Const. Co. v. City of Dover,* 372 A.2d 540, 553 (Del. Super. Ct. 1977). In the context of governmental sponsorship of recreational activity, there is no compelling broad public policy to override "waive," "release," and "discharge" language. *Lafate v. New Castle County*, C.A. 97C-11-112-WTQ, 1999 WL 1241074 (Del. Super. Ct. Oct. 22, 1999).

2. The waiver is ambiguous because the reasonable person would expect it to release the defendant from liability for one type of injury, but the plaintiff suffered a different type of injury that falls outside the scope of the release. *See Slowe v. Pike Creek Court Club, Inc.*, CIV.A. 08C-08-029PLA, 2008 WL 5115035 (Del. Super. Ct. Dec. 4, 2008) (endorsing plaintiff's argument that a reasonable person would have expected a preinjury waiver to release a health

club from liability for injury caused by "the use of properly maintained exercise equipment," whereas plaintiff's injury was caused by negligently maintained steps, which were not necessarily "exercise equipment").

3. The liability waiver is unconscionable. A liability waiver is substantively unconscionable if it purports to release the defendant from liability for risks not inherent in using the defendant's facility. *See Tucker v. Albun, Inc.*, CIV. A. 97C-04-025, 1999 WL 1241073 (Del. Super. Ct. Sept. 27, 1999) (finding release potentially unconscionable when it released defendant from all liability "ARISING OUT OF OR RELATED TO THE EVENT(S)...."). A liability waiver is procedurally unconscionable when the plaintiff lacks a meaningful choice about whether or not to sign it. *Compare Tucker v. Albun, Inc.*, CIV. A. 97C-04-025, 1999 WL 1241073 (Del. Super. Ct. Sept. 27, 1999) (holding that the plaintiff did have a meaningful choice because he could have paid for general admission and watched the stock races from the grandstand with the rest of the spectators) *with Hallman v. Dover Downs, Inc.*, D. Del., C.A. No. 85-618-CMW, Wright, J. (Dec. 31, 1986) (holding the release was potentially unconscionable because the reporter had to sign the release in order to do his job as a reporter.)

6. Other Issues

None.

FLORIDA

1. **Is there a Florida statute that applies or only case law?**

There is no statutory scheme governing general pre-injury releases in Florida. There are certain statutes that provide requirements in special circumstances. Florida Statute § 744.301(3) governs pre-injury releases executed by parents or guardians for minors. This statute is discussed in greater detail below. Florida Statute § 549.09 concerns the releases in the context of closed-course motorsport facilities and is also discussed below.

2. **What does the statute or case law say with respect to what language needs to be in the waiver**

While exculpatory provisions which attempt to relieve a party of his or her own negligence are generally looked upon with disfavor, such provisions are valid and enforceable by Florida courts where the intention is made clear and unequivocal and are entered between persons of equal bargaining power. Hardage Enterprises, Inc. v. Fidesys Corp., 570 So.2d 436, 439 (Fla. 5th DCA 1990); Sunny Isles Marina, Inc. v. Adulami, 706 So.2d 920, 922 (Fla. 3rd 1998). The wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away. Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc., 974 So.2d 565, 568 (Fla. 2nd DCA 2008) quoting Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co., 580 So.2d 628, 634 (Fla. 1st DCA 1991)).

Florida Courts are split whether specific language must be apparent in pre-injury releases to be valid. The 1st, 2nd, 3rd and 4th District Court's of Florida have established bright line rules requiring releases to contain express language releasing a defendant from the defendant's own negligence. Levine v. A. Madley Corp., 516 So.2d 1101 (Fla. 1st DCA 1987); Rosenberg v. Cape Coral Plumbing, Inc., 920 So.2d 61 (Fla. 2nd DCA 2005); Witt v. Dolphin Research Center, 582 So.2d 27 (Fla. 3rd DCA 1991); Van Tuyn v. Zurich American Ins. Co., 447 So.2d 318 (Fla. 4th DCA 1984). The 5th District has rejected the need for express language referring to release of the defendant for "negligence" or "negligent acts" in order to render a release effective to bar a negligence action. Lantz v. Iron Horse Saloon, Inc., 717 So.2d 590 (Fla. 5th DCA 1998) (disproved on other grounds by Kirton v. Fields, 997 So.2d 349 (Fla. 2008)). While no specific language is required to be included in a release in the 5th District, the wording must be so clear and understandable that an ordinary and knowledgeable party will know what rights he or she is contracting away. Raveson v. Walt Disney World Co., 793 So.2d 1171 (Fla. 5th DCA 2001). Language in waivers absolving persons from "any and all liability, claims, demands, actions, and causes of action whatsoever," is broad enough to encompass negligence actions in the 5th District. Cain v. Banka, 932 So.2d 575 (Fla. 5th DCA 2006).

3. **Can an adult sign for a child, i.e., is the waiver effective as to minors?**

Yes. Florida Statute § 744.301 was amended on April 24, 2010 to include

subsection (3) allowing parents or natural guardians to executive releases in advance for their minor children for any claim or cause of action against a commercial activity provider, its owners, affiliates, employees or agents that would accrue to the minor child for personal injury, including death, and property damages, but only for an inherent risk in the activity. This statute reversed the Florida Supreme Court's decision in Kirton v. Fields. 997 So. 2d 349 (Fla. 2008). That decision held that public policy does not permit parents and guardians to execute enforceable pre-injury releases on behalf of minors in commercial activities. The statute does not shield commercial owners and operates from injury caused by their owner negligence. The decision does not apply retroactively.

"Inherent risk" is defined in the statute as "those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner. The term includes, but is not limited to: (1) The failure by the activity provider to warn the natural guardian or minor child of an inherent risk; and (2) The risk that the minor child or another participant in the activity may act in a negligent or intentional manner and contribute to the injury or death of the minor child. A participant does not include the activity provider or its owners, affiliates, employees, or agents.

This release must, at a minimum, include the following statement in uppercase type that is at least 5 points larger than, and clearly distinguishable from, the rest of the text of the waiver or release:

NOTICE TO THE MINOR CHILD'S NATURAL GUARDIAN

READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU ARE AGREEING THAT, EVEN IF (name of released party or parties) USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM (name of released party or parties) IN A LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS FORM, AND (name of released party or parties) HAS THE RIGHT TO REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

If the waiver or release follows the statutory form and waives no more than allowed under this statute, there is a rebuttable presumption that the waiver or release is valid and that any injury or damage to the minor child arose from the inherent risk involved in the activity. To rebut the presumption that the waiver or release is valid, a claimant must demonstrate by a preponderance of the evidence that the waiver or release

does not comply with this subsection. To rebut the presumption that the injury or damage to the minor child arose from an inherent risk involved in the activity, a claimant must demonstrate by clear and convincing evidence that the conduct, condition, or other cause resulting in the injury or damage was not an inherent risk of the activity. If a presumption is rebutted, liability and compensatory damages must be established by a preponderance of the evidence.

Florida Statute § 744.301 also specifically provides that parents and natural guardians can waive and release in advance any claims or causes of action against noncommercial activity provides, their owners, affiliates, employees or agents to the extent authorized by common law. Florida courts have decided that parental waivers for minor children for noncommercial activities, such as community-supported and school-supported activities are enforceable. Shea v. Global Travel Marketing, Inc., 870 So.2d 20, 24 (Fla. 4th DCA 2003); Krathen v. School Bd. of Monroe Cty., 972 So.2d 887 (Fla. 3d DCA 2007).

Florida Statute § 549.09 provides special rules for releases involving minors participating in a motorsport events at a closed-course facility. That statute provides that persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or her or his heirs, representative, or assigns for negligence which proximately causes injury or property damage to the nonspectator within a nonspectator area during the period of time covered by the release. The release must be printed in 8 point type or larger. If the minor is participating in an activity at a closed-course motorsport facility, other than a motorsports event as defined in Florida Statute § 549.10, a waiver or release must comply with the requirements in Florida Statute § 744.301(3) discussed above.

4. Are the courts reluctant to uphold waivers?

Yes, exculpatory clauses that limit or exempt liability for negligence are enforceable but are disfavored by the courts. Hopkins v. The Boat Club, Inc., 866 So.2d 108 (Fla.1st DCA 2004); Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc., 974 So. 2d 565 (Fla. 2nd DCA 2008); Muns v. Shurgard Income Properties Fund 16-Limited Partnership, 682 So.2d 166 (Fla. 4th DCA 1996); Tatman v. Space Coast Kennel Club, Inc., 27 So.3d 108 (Fla. 5th DCA 2009). A release is not effective unless it clearly and specifically provides for a limitation or elimination of liability for specific acts. Fana v. Orkin Exterminating Co., Inc., 734 So.2d 434 (Fla. 3rd DCA 1999). Such clauses are strictly construed against the party claiming to be relieved of liability. Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151 (11th Cir. 2009).

5. How does one try to defeat the waiver?

Florida Courts refuse to enforce waiver for various reasons. A wavier provision that is not clear and unequivocal will not be enforced by Courts. For example, waivers intending to encompass present as well as future events must state so with clarity and precision. Cain v. Banka, 932 So.2d 575 (Fla. 5th DCA 2006). Also, provisions must clearly provide what liability has been waived. For example, in the 1st, 2nd, 3rd and 4th

Districts, a waiver failing to expressly provide that a person's own negligence is waived will be unenforceable as to those claims.

Florida Courts do not permit persons to waive liability for intentional torts. Zuckerman-Vernor Corp. v. Rosen, 361 So.2d 804 (Fla. 4th DCA 1978); Fuentes v. Owen, 310 So.2d 458 (Fla. 3d DCA 1975). Waivers for malicious or grossly negligent conduct will likewise not be enforced. . BellSouth Telecommunications, Inc. v. Kerrigan, 55 F. Supp. 2d 1314 (N.D. Fla. 1999). Southworth & McGill, P.A. v. Southern Bell Tel. & Tel. Co., 580 So.2d 628, 631 (Fla. 1st DCA 1991). Waiver provisions that would render another clause in a contract meaningless will also not be enforced. See Goyings v. Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2nd DCA 1981) and Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc., 974 So. 2d 565 (Fla.2nd DCA 2008) (where waiver provision sought to waive liability for injuries but also stated that reasonable precautions would be taken to assure an individual's safety).

6. Other issues regarding waivers particular to Florida?

GEORGIA

Validity of waivers/releases in Georgia

Georgia Courts have historically honored valid pre-injury waivers and releases as being within the rights of competent parties operating under no disabilities to contract as they see fit. Georgia Courts will not hesitate to apply such waivers and releases to allow operators to defeat claims for personal injury. However, since Georgia treats waivers and releases as contracts, minors may not sign a waiver/release and be bound by it. Likewise there is no statutory or case authority in Georgia as in other states (most notably, Michigan) which deals with the effectiveness of a waiver/release signed by a parent or guardian on behalf of a minor.

The general rule in Georgia is that a contractual waiver of liability for simple negligence is valid, the exception being where the waiver violates public policy. "A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of the law." *Camp v. Aetna Ins. Co.*, 170 Ga. 46, 50, 152 S.E. 41 (1929). See also *Brown v. Five Points Parking Ctr.*, 121 Ga.App. 819, 821, 175 S.E.2d 901 (1970); *Country Club Apts. v. Scott*, 154 Ga.App. 217, 267 S.E.2d 811 (1980), *affd.* 246 Ga. 443, 271 S.E.2d 841 (1980). The General Assembly has enacted no statute which either expressly or impliedly forbids contractual waivers of liability by participants in sporting or recreational events.[1]

Thus, to the extent an injured party's claim for alleges only simple negligence, the release usually will entitle the operator to a grant of summary judgment. *Barbazza v. International Motor Sports Association*, 245 Ga.App. 790, 538 S.E.2d 859 (2000); *My Fair Lady of Ga. v. Harris*, 185 Ga.App. 459, 460-461, 364 S.E.2d 580 (1987). On the other hand, an injured party may recover for acts of gross negligence despite a valid release for negligence. See *Turner v. Walker County*, 200 Ga.App. 565, 566(2), 408 S.E.2d 818 (1991); *Hawes v. Central of Ga. R. Co.*, 117 Ga.App. 771, 772, 162 S.E.2d 14 (1968).

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[1] O.C.G.A. § 13-8-2 lists the types of contracts that have been found to be contrary to public policy in Georgia.

Statutory Releases

There are three activities in Georgia that have specific statutory release/assumption of risk statutes.

Equine and llama activities – O.C.G.A. § 4-12-1, *et seq.*

Roller Skating Safety Act of 1993 – O.C.G.A. § 51-1-43

Snow skiing – O.C.G.A. §43-43A-1, *et seq.*

In all three situations, the operator is required to comply with the requirements of the operator as listed in the statute and to post notices that contain warning language specified in the statute.

These statutory waivers protect only against the inherent risks of the activity. The typical means employed by injured parties to avoid the effect of the statutory waiver are to show defects in the equipment or premises, some violation of the statute by the operator which led to the injury or, as in the case of standard releases, gross negligence.

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HAWAII

HAWAII

Is there a state statute that applies or only case law?

H.R.S. § 663-10.95

This statute pertains specifically to motorsports facilities. Waivers of liability for negligence are enforceable provided the motorsports facility has a general liability policy of no less than $1,000,000.00 for spectators and no less than $500,000.00 for participants, per claim, indemnifying participants and spectators for the negligence of the facility, its employees or agents.

H.R.S. § 663-1.54 (recreational activity liability)

A recreational participant may waive the recreational provider's liability for damages and injuries resulting from the inherent risks associated with the recreational activity. However, §663-1.54 specifically states that an inherent risk does **not** result from the "negligence, gross negligence, or wanton acts or omissions" of the owner/operator. Accordingly, consensus has been that §663-1.54 precludes waivers for negligence.

What does the case law say with respect to what language needs to be in the waiver or release?

H.R.S. § 663-1.54, subd. (b)

No waiver shall be valid unless:

(1) The owner or operator first provides full disclosure of the inherent risks associated with the recreational activity; and

(2) The owner or operator takes reasonable steps to ensure that each patron is physically able to participate in the activity and is given the necessary instruction to participate in the activity safely.

Can a parent execute a release for a minor?

Only the statute pertaining to motorsports facilities (H.R.S. § 663-10.95) addresses this issue. Under this statute, a parent or legal guardian may execute the Release on the minor's behalf.

Are Courts reluctant to uphold the waiver?

Yes. As noted above, the general recreational activity liability statute (H.R.S. § 663-1.54) provides that a waiver applies only to inherent risks. § 663-1.54, subd. (c) provides that the issue of whether a risk is inherent or not is one for the trier of fact to decide.

How does one try to defeat the waiver?

With respect to general recreational activities, as long as the Complaint alleges negligence, summary judgment based upon a liability release is not feasible. Again, waivers are only enforceable as to injuries resulting from inherent risks, which the statute provides must be determined by the trier of fact.

Other issues particular to your state.

Defendants must resort to theories such as primary assumption of risk, which still allows determination of the inherent risks of the sport or activity to be done as matter of law. See *Foronda v. Hawaii International Boxing Club, 96 Haw. 51 (2001)*

IDAHO

VALIDITY OF LIABILITY WAIVERS/RELEASES – IDAHO

1. Controlling Law

In Idaho, liability waivers are governed primarily by case law, rather than statute. There are statutes that provide some guidance such as those that deal with the enforceability of such waivers when a public duty is involved, see § 2, below, and those involving minors. See § 3, below.

2. Waiver Requirements

Courts look with disfavor on attempts to avoid liability and construe such provisions strictly against the person relying on them, especially when that person is the preparer of the documents. ***Jesse v. Lindsley***, 233 P.3d 1 (Idaho 2008). As such, exculpatory releases must speak clearly and directly to the conduct of the defendant which caused the harm at issue. ***Anderson & Nafziger v. G.T. Newcomb, Inc.***, 595 P.2d 709 (Idaho 1979). Where the clear purpose of the release is to preclude all liability, however, the parties need not have contemplated the precise occurrence that resulted in harm. ***Rawlings v. Layne & Bowler Pump Co.***, 465 P.2d 107 (Idaho 1970); *accord* ***Lee v. Sun Valley Co.***, 695 P.2d 361 (Idaho 1985) (agreement that simply stated that outfitter and guide would be held "harmless for every and all claim which may arise from injury" that occurred from use of horse and equipment was unambiguous and enforceable); ***Groves v. Firebird Raceway, Inc.***, 849 F.Supp. 1385 (D.Idaho 1994), *aff'd, and rev'd on other grounds mem.*, 67 F.3d 306 (9th Cir. 1995).

There are two exceptions to the general notion that pre-injury releases exempting one party from liability for its negligent acts are valid and enforceable. These are when (1) one party is at an obvious bargaining disadvantage, or (2) a public duty is involved, for example, a public utility company or common carrier. ***Lee***, 695 P.2d 361.

The legislature may also create a public duty. When the legislature limits the liability of one group in exchange for adherence to specific duties, then those duties become public duties that cannot be waived. In such a case, a pre-injury release may absolve a party from common-law liabilities, but it may not absolve the party from a public duty imposed by statute. Examples of such statutes include Idaho's Skiing Act, **I.C. §§ 6-1101, *et seq.***, Recreational Use Statute, **I.C. §§ 36-1601, *et seq.***, Equine Act, **I.C. §§ 6-1801, *et seq.***, and Outfitter & Guide Liability Act. **I.C. §§ 6-1201, *et seq.***

3. Waiver of Minors' Prospective Claims

There is no case law or statute directly on point. However, applying general contract law, to have a binding obligation, the contracting parties must have the capacity to contract. In Idaho, minors do not have the capacity to contract. **I.C. § 29-101**. Therefore, the contract of a minor may be disaffirmed by the minor, either before the age of majority or within a reasonable time

afterwards upon restoration of consideration. **I.C. § 32-103**. By extension, parents have no authority to release a cause of action belonging to their child. A Ninth Circuit decision, albeit applying Washington law, held that minors are afforded significant protections that preclude parents or guardians from releasing or waiving a minor's prospective claim for negligence. ***Arnold v. Amtrak***, 13 Fed.Appx. 573 (9th Cir. 2001). This is the majority rule throughout the country.

4. Willingness of Courts to Enforce Waivers

As noted above, Idaho's state courts are ***not*** reluctant to uphold waivers that comply with case-law requirements and relevant statutory restrictions.

5. Defenses to Liability Waivers

A plaintiff may argue with success that the language was either ambiguous or did not contemplate the type of conduct which caused the specific harm. A plaintiff may also argue that the defendant had an unfair bargaining advantage or a public duty was involved, created by statute or otherwise.

Any waiver will apply only to the person who signed it. *See* ***Groves v. Firebird Raceway, Inc.***, 67 F.3d 306 (9th Cir. 1995) (waiver barred claim by personal-injury plaintiff who signed liability waiver, but waiver did not preclude loss-of-consortium claim by spouse who did not execute it).

6. Other Issues

None are really applicable at this time.

ILLINOIS
&
INDIANA

ILLINOIS

1. Is there a state statute that applies, or only case law?

The enforceability of a waiver is governed by case law.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

A liability waiver and release will be enforced if: (1) it clearly spells out the intention of the parties; (2) there is nothing in the social relationship between the parties militating against enforcement; and (3) it is not against public policy. *Evans v. Lima Lima Flight Team,* 373 Ill. App. 3d 407, 412 (1st Dist. 2007).

The language of the waiver must clearly show the intent of the parties. *Evans v. Lima Lima Flight Team*, 373 Ill. App. 3d 407, 412 (2007). It must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it covers and for which the plaintiff agrees to release the defendant from a duty of care. *Id.* The parties need not have contemplated the precise occurrence which results in injury. *Id.* at 415; *Schlessman v. Henson*, 83 Ill.2d 82, 86 (1980). The injury must only fall within the scope of possible dangers ordinarily accompanying the activity. Evans at 415.

3. Can an adult sign for a child, i.e. is the waiver effective as to minors?

An adult cannot sign a waiver releasing a minor child's claim. *Meyer v. Naperville Manner*, Inc., 262 Ill. App. 3d 141, 146 (1994).

4. Are the courts reluctant to uphold the waiver?

No, Illinois courts have long held waivers valid and enforceable for adults. Waiver agreements barring negligence claims are ordinarily enforceable and do not violate public policy as a matter of law. *Platt v. Gateway Int'l Motorsports Corp*, 351 Ill. App. 3d 326, 330 (2004). Courts have not demonstrated reluctance to enforce the agreements if they are valid.

5. How does one try to defeat the waiver?

The question that must be answered is did the waiver reasonably foresee the possibility of the danger being released. The plaintiff's accident must be within the scope of possible dangers. Still, the precise occurrence need not be contemplated or foreseen. The plaintiff's attorney will argue that the accident falls outside of the waiver as the accident was not foreseeable and was not contemplated in the waiver.

A waiver is not enforceable if something in the social relationship between the parties militates against enforcement. *Vanderlei v. Heideman*, 83 Ill. App. 2d 158 (1980). For instance, common carriers and passengers have a special relationship, as do employers and employees. *Maness v. Santa Fe Park*, 298 Ill. App. 3d 1014, 1019.

A waiver is also not enforceable if it is against public policy. This requires more than mere violation of a statute; it requires violation of the policy embodied in the statute. For instance, in *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 166 (Ill. App. Ct. 1st Dist. 1986), the court found real estate regulations embodied a public policy of protecting the public from dishonesty, so the court refused to enforce an exculpatory clause in favor of a real estate broker. However, in *Evans v. Lima Lima Flight Team*, 373 Ill. App. 3d 407, 416 (2007), the court upheld the waiver even though the pilot in question may have violated an air safety statute. The court reasoned that the waiver still upheld public policy since it did not remove all incentives to promote air safety, just ones as to fellow flight team members. Id.

Plaintiffs can also defeat waivers by arguing that the waiver does not apply to the injury in question. Plaintiffs must argue that the injury was the result of a risk that does not normally accompany the activity in question. For instance, striking a deer is not a risk that normally accompanies drag racing (*Simpson v. Byron Dragway, Inc.*, 210 Ill. App. 3d 369 (1991)), but part of the track collapsing is (*Schlessmann v. Henson*, 83 Ill.2d 82 (1980)). Similarly, breathing in noxious fumes isn't the sort of risk that normally accompanies exercising at a health club. *Larsen v. Vic Tanny, Int'l*, 130 Ill. App. 3d 574 (1984).

6. Other issues re: waivers particular to your state:

Electronic waivers are valid in Illinois as a party can consent to a contract in Illinois by manifesting assent by clicking on a hyperlink on the internet. *DeJohn v. .TV Corp. Int'l*, 245 F. Supp. 2d 913, 916 (N.D. Ill. 2003).

INDIANA

1. Is there a state statute that applies, or only case law?

For the most part, the law regarding enforceability of waivers in Indiana is governed by case law. However, one statute, Ind. Code §34-28-3-2 allows a court to apply a liability release to a minor for purposes of automobile or motorcycle racing.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

In order to exempt a defendant from a negligence claim, the waiver must specifically refer to negligence. *City of Hammond v. Plys*, 893 N.E.2d 1 (Ind. Ct. App. 2008). Although courts have held that parties can refer to negligence without mentioning the word "negligence," it seems helpful for defendants to do so. *Avant v. Community Hospital*, 826 N.E.2d 7 (Ind. Ct. App. 2005). As long as the waiver makes clear that the person signing the release is holding the defendant harmless for the defendant's own acts, courts usually find the waiver sufficient. Id.

3. Can an adult sign for a child, i.e. is the waiver effective as to minors?

Yes, but only for certain purposes. Ind. Code Ann. §34-28-3-2 allows a release to be effective against a child in a motorcycle or car race if the child is partially emancipated by the court.

If the waiver is for something other than motorsports the law is less clear. Settlement agreements signed by minors are voidable. Ind. Code. 29-3-9-7; *Danes v. Automobile Underwriters, Inc.*, 307 N.E.2d 902, 906 (Ind. Ct. App. 1974). An Illinois court applying Indiana law has interpreted this to mean that releases signed by a parent on behalf of a minor before an accident are not enforceable against minors in Indiana. *Wreglesworth v. Arctco, Inc.*, 316 Ill. App. 3d 1023, 1028 (Ill. App. Ct. 1st Dist. 2000).

4. Are the courts reluctant to uphold the waiver?

Indiana courts have held that such waivers are not against public policy. *Avant v. Community Hospital*, 826 N.E.2d 7 (Ind. Ct. App. 2005). Courts have not shown reluctance to uphold such waivers.

5. How does one try to defeat the waiver?

Ordinary principles of contract law apply to waivers, so most ordinary contract law arguments are likely available. Since Indiana requires a high level of specificity in order to waive negligence claims, many plaintiffs argue that the exculpatory clause does not mention negligence specifically enough. See *Anderson v. Four Seasons Equestrian Center, Inc.*, 852 N.E.2d 576 (Ind. Ct. App. 2006).

6. Other issues re: waivers particular to your state:

Online clickwrap agreements, where a computer user assents to a contract by clicking a button online, are enforceable for purposes of forum selection in Indiana. *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007).

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IOWA

Grefe & Sidney, PLC

To: Joe Hassinger, Director IALDA

From: Guy Cook

Re: Validity of Waivers and Releases on a State-by-State Basis

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Questions Presented: The IALDA is formulating a comprehensive resource related to the validity of waivers/releases on a state-by-state basis. It will make the final document available to insurance carriers and other industry partners, which will contain answers to the following questions:

1. Is there a state statute that applies to waivers/releases or only case law?
2. What does the statue or case law say with respect to what language needs to be in the waiver?
3. Can an adult sign for a child? (i.e. Is the waiver effective as to minors?)
4. Are courts reluctant to uphold the waiver?
5. How do plaintiffs attempt to defeat the waiver?
6. Are there other issues regarding a waiver in the State.

We have agreed to supply these answers with respect to the State of Iowa.

Discussion:

1. Is there a state statute that applies to waivers/releases or only case law?

There is a state statute which applies to releases. Iowa Code §668.7 (2010). Section 668.7 applies to releases as follows:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides.

Id. Generally, a written release should include a specific identification of the tortfeasors to be released. *Aid Ins. Co. v. Davis County,* 426 N.W.2d 631, 633 (Iowa 1988). A party must be "sufficiently identified in a manner that the parties to the release would know who was to be benefitted." *Id.* A release should refer to a person "by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt." *Id.* at 635 (quoting *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 420 (Tex.1984)). A designation such as "any other person, firm or corporation" does not sufficiently identify a tortfeasor to be released. *Id.* at 634. For example, in *Peak v. Adams*, 786 N.W.2d 519 (Iowa App. 2010), an Iowa appeals court reversed a grant of summary judgment in favor of an insurer who relied on general release language which was premised on

What does the statue or case law say with respect to what language needs to be in the waiver?

Iowa case law holds waivers/releases must clearly set forth the rights to be waived. For example, a waiver/release which states it is a "covenant not to sue" and that it "releases" an entity "from all liability... for all loss or damage or any claim... on account of injury...whether caused by the negligence of the Releasee or otherwise..." will be upheld. *See e.g., Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993). By contrast, a waiver/release which merely includes "general exculpatory provisions" will be rejected as a basis to deny relief. *Baker v. Stewarts' Inc.*, 433 N.W.2d 706 (Iowa 1998). In *Baker*, the Iowa court considered the validity of a document signed by a plaintiff who claimed that hair straightening products applied to her scalp at a cosmetology school produced subsequent baldness. *Id.* at 707. The document stated in relevant part, "I will not hold the Stewart School, its management, owners, agents, or students liable for any damage or injury, should any result from this service." *Id.* The Court determined the document did not amount to an anticipatory release because the document's language which merely made reference "management, owners, agents or students liable for any damage or injury," was insufficient to release the defendant from liability for the negligent acts of its professional staff. *Id. See also, Sweeney v. City of Bettendorf*, 762 N.W.2d 873 (Iowa 2009). Hence, while Iowa courts do not require "magic words" within a release, it does note the "better practice" is to include the words "negligence and/or fault" as opposed to merely "accident." *Id.*

3. **Can an adult sign for a child? (i.e. Is the waiver effective as to minors?)**

No. *Galloway v. State*, 790 N.W.2d 252 (Iowa 2010). In July, 2005, fourteen-year-old Taneia Galloway was on a field trip with Upward Bound, a youth outreach program organized by the University of Northern Iowa. Galloway was injured when she stepped off of a bus and was struck by a car as she attempted to cross the street. Before the trip, Galloway=s mother had signed a field trip permission form and a release and medical authorization. The district court dismissed the suit based on the release. The Supreme Court reversed, holding parents= authority to make decisions affecting their children=s affairs is limited in a number of contexts. For example, parents have no right to release or compromise causes of action belonging to a minor without authorization from a court. Limits on parental authority are derived from a well-established public policy that children must be accorded a measure of protection against improvident decisions of their parents. The same public policy demands minor children be protected from forfeiture of their personal injury claims by parents= execution of pre-injury releases. Such pre-injury releases, according to the Court, violate public policy.

4. **Are courts reluctant to uphold the waiver?**

Iowa courts focus on the language of the waiver/release. Where the language is straightforward and specifically states the rights being waived and delineates the potential tortfeasor specifically, then Iowa courts will uphold the waiver.

5. **How do plaintiffs attempt to defeat the waiver?**

Plaintiffs attempt to defeat the waiver by arguing the language of the waiver/release is insufficient and imprecise. For example, the plaintiffs in *Sweeney*, successfully argued the following purported "permission slip" was insufficient as a waiver/release: "I hereby give permission for my child Tara M. Sweeney to attend the Bettendorf Park Board field trip to John O'Donnell Stadium with the Playgrounds Program on Monday, June 30, 2003. I realize that the Bettendorf Park Board is not responsible or liable for any accidents or injuries that may occur while on this special occasion. Failure to sign this release as is without amendment or alteration is grounds for denial of participation." There, because the

waiver/release did not specifically exempt "negligence" on behalf of the City of Bettendorf, the Court held it was insufficient to bar a claim.

6. Are there other issues regarding a waiver in the State?

The most recent issue dealt with a parent's inability to waive a minor's right for subsequent suit even if the language of the waiver/release is satisfactory. *Galloway v. State*, 790 N.W.2d 252 (Iowa 2010).

KANSAS