Waiver of Minors' Prospective Claims

Yes, a waiver agreement signed by minor plaintiff's mother clearly and unambiguously exonerates defendant from injuries sustained by minor plaintiff while participating in program and which were allegedly caused by negligent conduct of defendant. ***Konrad***, 655 N.W.2d 411.

4. Willingness of Courts to Enforce Waivers

As long as the release is clear and unambiguous, North Dakota courts are willing to enforce waivers.

5. Defenses to Liability Waivers

Plaintiffs will allege ambiguity (too broad or did not contemplate injuries incurred); that the release is against public policy; or that the parties had disparate bargaining power (i.e., participant did not have ability to negotiate elimination of the relevant waiver clauses). Pre-injury releases will not be enforced if they are ambiguous or release the benefitted party from liability for intentional, willful, or wanton acts. Also, a release will not be enforced if it is against public policy. In considering whether a release is against public policy, courts generally consider: (1) the disparity of bargaining power between the parties in terms of compulsion to sign the agreement and lack of ability to negotiate elimination of the clause, and (2) the types of services provided by the party seeking exoneration, including whether they are public or essential services. ***Reed***, 589 N.W.2d 880.

6. Other Issues

None are really applicable at this time.

OHIO

PRE-ACCIDENT WAIVERS AND RELEASES

Ohio Law in a nutshell

Pre-accident waivers and releases, also known as exculpatory clauses are enforceable. There are no Ohio statutes pertaining specifically to exculpatory clauses. A Parent is permitted to execute a Release on behalf of a minor.

Participants in sporting or recreational activities are free to contract with the proprietor to relieve the proprietor of responsibility to the participant for the proprietor's negligence, but not for the proprietor's willful or wanton misconduct. *Bowen vs. Kil-Kare,* 63 Ohio St. 3d 84, 585 N.E. 2d 384, 390 (Ohio 1992). Willful misconduct is defined as conduct involving an intent, purpose or design to injure. Wanton misconduct is defined as conduct where one fails to exercise any care whatsoever toward those to whom he owns a duty of care, and this failure occurs under circumstances in which there is a great probability that harm will result.

Releases from liability for future tortious conduct are generally not favored by the law and are narrowly construed. *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 505 N.E. 2d 264 (Ohio 1987). Nonetheless, courts routinely apply such releases to bar future tort liability as long as the intent of the parties, with regard to exactly what kind of liability and what persons and/or entities are being released, is stated in clear and unambiguous terms. *Lamb v. University Hospital's Healthcare Enterprises, Inc.,* (Clause including word "release" and "negligence" as well as specifically identifying persons released from liability was sufficiently clear to release fitness club from liability for injuries.); *Swartzentruber vs. Wee-K Corp.*, 690 N.E. 2d 941 (Ohio 1997) (Language released livery stable from any and all claims that arose out of any and all

personal injuries was sufficiently clear and specific to bar injured horseback rider's negligence claim.).

On the other hand, where the language of the release is ambiguous or too general, courts have held that the intent of the parties is a factual matter for the jury. *Homes vs. Health and Tennis Corp. of America*, 103 Ohio app. 3d 364, 659 N.E.2d 812 (1995) (Health club membership contract stating that member used facilities at his own risk and that club would not be liable for any injury or damage resulting from use of the facilities failed to express a clear and unambiguous intent of member to release health club from its negligence.); *Tanker v. N. Crest Equestrian Center*, 86 Ohio app. 3d 522, 621 N.E.2d 589 (1993) (Language that horseback rider assumed "full responsibility and liability" for any and all personal injury associated with the riding of any horse at equestrian center was so general as to be meaningless.).

A comparison of language found to be enforceable compared with language found to be inadequate appears to be somewhat inconsistent.

It is imperative that such agreements contain explicit statements releasing the Defendant from its own negligence or the negligence of its agent. Ohio courts recommend that the words "release" and "negligence" be included and that the individuals, companies or corporations being released from liability be identified.

Ohio courts routinely enforce exculpatory agreements, even where a party signed but did not read the agreement and where a party was illiterate. *Pippin v. M.A. Hauser Ent. Inc.*, 676 N.E. 2d 932 (1996)

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OKLAHOMA

Validity of Liability Waivers/Releases – Oklahoma

1. Controlling Law

1. Equine Liability Act. Okla. Stat. tit. 76, §§ 50.1 to 50.4 (Supp. 2001).

2. Waiver Requirements

A contractual exculpatory clause for personal injury is valid and enforceable only if 1) it evinces a clear and unambiguous intent to exonerate the would-be defendant from liability; (2) when the contract was executed, there must have been no vast difference in bargaining power between the parties; (3) it is not injurious to public health, public morals or confidence in administration of the law and (4); it does not so undermine the security of individual rights vis-a-vis personal safety or private property as to violate public policy. *Schmidt v. U.S*, 912 P.2d 871, 875 (Okla. 1996) (answering certified question on this issue for federal court); *see also Martin v. A.C.G., Inc.*, 965 P.2d 995, 996 (Okla. Civ. App. 1998) (upholding release for "any and all liability resulting from plaintiff's use of a health club facility and assuming all known and unknown risks in connection with the facility.")

An exculpatory contract in the context of a high-risk sport is not against the public policy of the state. *See Manning v. Brannon*, 956 P.2d 156 (Okla. Civ. App. 1998) (upholding liability waiver for skydiving). However, Oklahoma has rejected public policy attacks to exculpatory contracts in other situations. *See Elsken v. Network*, 838 P.2d 1007 (Okla. 1992) (holding limitation of liability clause in exculpatory contract not void as against public policy even though burglar alarm company allegedly failed to respond to a break-in); *Fretwell v. Protection Alarm Co.*, 764 P.2d 149 (Okla. 1988) (holding that where alarm company allegedly violated duty to protect homeowners from criminal activity, limitation of liability clause not void as against public policy).

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether courts will permit parents to waive minors' prospective claims.

4. Willingness of Courts to Enforce Waivers

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

5. Defenses to Liability Waivers

1. Language was unclear or ambiguous. In Martin, the court found an agreement's language to be clear and unambiguous because it contained capitalized headings, including "RELEASE FROM LIABILITY, COVENANT NOT TO SUE, INDEMNIFICATION AND HOLD HARMLESS, and LIMITATION OF WARRANTY," all applying specifically to the plaintiff and the defendant. The court found the language to be clear to a layperson because it said that parachuting was dangerous and could lead to death or injury, that participation therein was purely voluntary, and that the risk of injury was assumed by the plaintiff even if due "to

equipment malfunction from whatever cause, inadequate training, and deficiencies in the landing area, or any other fault of the defendant."

2. The parties lacked equal bargaining power. To ascertain the relative bargaining power of the parties, courts assess both "the importance of the subject matter to the physical or economic well-being of the party agreeing to the release" and "the amount of free choice that party could have exercised when seeking alternate services." *Schmidt*, 912 P.2d at 874.

6. Other Issues

Under Okla. Const. art. 23, § 6., a court can take the issue of assumption of risk away from the jury.

OREGON

Validity of Liability Waivers/Releases – Oregon

1. Controlling Law

1. Skiing Liability Act. Or. Rev. Stat. § 30.970-990 (1988 & Supp. 1998).
2. Equine Liability Act. Or. Rev. Code. §30.687-97 (Supp. 1998)

2. Waiver Requirements

Courts have upheld releases for various activities not regulated by statutes. *See, e.g., Mann v. Wetter*, 785 P.2d 1064, 1066 (Or. Ct. App. 1990) (scuba diving as part of a scuba diving course); Edmonds v. Pollock Enterprises, Inc., 67 Ore. App. 798, 799 (Or. Ct. App. 1984) (denying summary judgment after finding genuine issues of material fact were raised by validity and scope of four exculpatory releases for injuries suffered during stock car racing competition).

An agreement limiting liability is governed by principles of contract law and will be enforced in the absence of some consideration of public policy derived from the nature of the subject of the agreement or a determination that the contract was adhesionary. *See, e.g., Mann v. Wetter*, 785 P.2d 1064, 1066 (Or. Ct. App. 1990). A liability release will be upheld when it is part of a bargain in fact between business concerns that have dealt with one another at arm's length in a commercial setting. *K-Lines v. Roberts Motor Co.*, 541 P.2d 1378 (Or. 1975).

An attempt to escape liability for more than ordinary negligence renders the entire release clause invalid. *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995). In *Farina*, the clause stated: "THIS RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO CLAIMS BASED UPON NEGLIGENCE *AND FOR ANY OTHER THEORY OF RECOVERY.*" *Id.* (Emphasis added.) The italicized portion of the clause thus exculpated defendant from liability for more than ordinary negligence, including gross negligence and wanton or willful misconduct. *Id.* This italicized portion made the entire release clause invalid. *Id.*

In *Nolan v. Mt. Bachelor, Inc.*, 836 P.2d 770 (Or. App. 1992), *aff'd sub nom. Nolan v. Mt. Bachelor, Inc.*, 317 Or. 328 (1993) a student was injured during a skiing lesson with an instructor employed by the ski area operator. The court held that the Skiing Liability Act did not shield ski area operators from liability for collisions caused by an employee's negligence: "[W]hen both an inherent risk and a ski operator's negligence assertedly contribute to an injury, the questions of liability and apportionment of fault are for the trier of fact." *Id.* at 773 (holding that the combination of a jury instruction, that collisions with other skiers are an inherent risk of skiing, and a verdict form, which required jury to treat inherent risk defense as absolute bar to recovery, improperly denied skier, injured in collision with ski instructor, a jury determination on her negligence allegations against ski area operator). When a preinjury release does not expressly mention defendants' liability for injuries incurred in the operation of the ski school, it may or may not apply to claims arising from negligent instruction and supervision during ski school lessons. *Pierce v. Mount Hood Meadows Oregon, Ltd.*, 118 Or. App. 450, 454-55 (Or. Ct. App. 1993).

3. Waiver of Minors' Prospective Claims

Parents cannot waive minors' prospective claims. *See Ohio Casualty Ins. Co. v. Mallison*, 354 P.2d 800, 802-03 (Or. 1960) (holding that in post-injury parental indemnification setting, reasoning that a child would be unlikely to pursue claims if agreement required parent to indemnify defendant).

4. Willingness of Courts to Enforce Waivers

Courts seem willing to uphold liability releases.

5. Defenses to Liability Waivers

1. Contract void as against public policy. Exculpatory agreements that require skiers to release ski areas from all liability resulting from negligence are void as contrary to public policy. *Harmon v. Mount Hood Meadows, Ltd.*, 146 Or. App. 215, 220 (Or. Ct. App. 1997) (citations omitted). Public policy precludes enforcement of agreements that limit liability where one of the parties is providing "an essential public service" under the agreement. Mann, 785 P.2d at 1066. Unequal bargaining power is not created by any economic advantage a small business providing a non-essential service may have over its customers since the customers have a multitude of alternatives. *Mann v. Wetter*, 785 P.2d 1064, 1066 (Or. Ct. App. 1990) (citing *K-Lines, Inc. v. Roberts Motor Co.*, 541 P.2d 1378, 1384 (Or. Ct. App. 1975)).

2. Contract was adhesionary. Where public policy considerations are not at issue, courts will enforce agreements limiting liability, unless the contract is adhesionary. *Mann v. Wetter*, 785 P.2d 1064, 1066 (Or. Ct. App. 1990). When the parties are business concerns dealing in a commercial setting and entering into an unambiguous agreement with terms commonly used in commercial transactions, the contract will not be deemed a contract of adhesion in the absence of evidence of unusual circumstances. *K-Lines, Inc. v. Roberts Motor Co.*, 541 P.2d 1378, 1384 (Or. Ct. App. 1975). Whether a "provision [limiting liability] was part of [the parties"] bargain in fact depends on whether it was conspicuous. 589 P.2d at 1136.

3. The release language was not conspicuous. A disclaimer clause beginning in bold, large capital letters is conspicuous as a matter of law. *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 589 P.2d 1134, 1135-36 (Or. Ct. Ap. 1979) (upholding release waiver and affirming summary judgment for defendant).

4. Plaintiffs have both successfully and unsuccessfully argued 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. The Ninth Circuit found that since a defendant made an unenforceable bargain in trying to escape liability for gross negligence and willful misconduct, the entire release provision in the season pass application, including the limitation of liability for ordinary negligence, was unenforceable. *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995) (applying Oregon law). "It is not our role to enforce only part of the release clause where it is not obvious from the language of the clause that the parties intended the clause to be severable." *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995) (applying Oregon law).

An Oregon appellate court disagreed with the Ninth Circuit's "overbreadth/anti-severability" analysis in *Farina*. *See Harmon v. Mount Hood Meadows, Ltd.*, 146 Or. App. 215, 221-22 (Or. Ct. App. 1997). The *Harmon* court emphasized that a party must show that, as applied to that party, a contractual term is unenforceable on grounds of public policy, not just that a release contains unconscionable provisions. In *Harmon*, the plaintiff argued the liability waiver was void because the release impermissibly purports to shield defendant from claims other than negligence. Since the plaintiff pled only negligence and the release explicitly barred negligence claims, the court refused to strike the waiver as whole, even though it also illegally barred gross negligence and willful/wanton conduct.

5. Waiver Inconspicuous. If a limitation of liability provision was neither bargained for nor expressly pointed out, it is enforceable only if it was conspicuous. *Oregon Freeze Dry, Inc. v. Americold Logistics, LLC*, CV 05-1119-ST, 2006 WL 2707967 (D. Or. Sept. 18, 2006). A term is conspicuous if "[i]t is so written that a reasonable person against whom it is to operate ought to have noticed it." Or. Rev. Stat. § 71.2010(10). The Oregon Legislature has determined that certain provisions are conspicuous as a matter of law: "A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color." *Id.*

6. Other Issues

Disclaimers of warranties and the exclusion or limitation of remedies are "substantially identical." *K-Lines, Inc. v. Roberts Motor Co.*, 541 P.2d 1378, 1381 (Or. Ct. App. 1975)).

PENNSYLVANIA

PRE-ACCIDENT WAIVERS AND RELEASES

Pennsylvania Law in a nutshell

Pre-accident waivers and releases, also known as exculpatory clauses are enforceable if seven requirements are satisfied. There are no Pennsylvania statutes pertaining specifically to exculpatory clauses. Parents do not possess the authority to release the claims of their minor children.

An exculpatory clause will be deemed valid if it meets the following conditions:

1) The clause must not contravene public policy;

2) The contract must be between person relating entirely to their own private affairs; and

3) Each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion.

Once an exculpatory clause is determined to be valid, it will not be enforceable unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence. In interpreting such clauses, four guiding standards have been established:

1) The contract language must be construed strictly, since exculpatory language is not favored by the law;

2) The contract must state the intentions of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties;

3) The language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and

4) The burden of establishing immunity is upon the party invoking protection under the clause.

Pennsylvania state and federal courts have enforced various exculpatory clauses in a variety of recreational activities. *Wilson v. American Honda Motor Co.*, 693 F.Supp. 228, 230

(M.D.Pa. 1988) (Plaintiff who signed release was free bargaining agent as he was under no compulsion to engage in ATV riding.); *Schillachi v. Flying Dutchmen Motorcycle Club*, 751 F.Supp. 1169 (E.D. Pa. 1990) (Plaintiff who signed release before participating in ATV race was a free bargaining agent because the activity did not involve a necessity of life, Plaintiff could have engaged in the activity at other locations and there was no evidence that Plaintiff tried to negotiate the terms of the agreement.); *Grbac v. Reading Fair Co., Inc.*, 521 F.Supp. 1351 (W.D. Pa. 1981), aff'd, 688 F.2d 215 (3d Cir. 1982) (Widow whose husband was killed while driving in a stock car race could not maintain a wrongful death action because her husband had signed a release, waiver of liability and indemnity agreement.); *Valeo v. Pocono International Raceway, Inc.*, 347 Pa. Super. 230, 500 A.2d 492 (1985) (Exculpatory clause in agreement, whereby race driver released owner of track and sponsor of race from liability for personal injury or property damage, whether caused by negligence or otherwise, was enforceable against driver when entered into without compulsion.); *Gimpel v. Host Enterprises, Inc.*, 640 F.Supp. 972 (E.D. Pa. 1986), aff'd mem., 813 F.2d 397 (3d Cir. 1987) (Bicycle lessee's negligence action against lessor for injuries allegedly caused by malfunction of bicycle brakes was barred by valid exculpatory clause in pre-printed rental agreement.); *Zimmer v. Mitchell & Ness*, 253 Pa. Super. 474, 385 A.2d 437 (1978) (Exculpatory clause in rental agreement valid and enforceable against Plaintiff who was injured when skiing equipment which he had rented at a resort allegedly malfunctioned.); *Dohm v. Ponderosa Riding Stables, Inc.*, 41 Pa. D. & C. 2d 307 (C.P. York Co. 1996) (Plaintiff who signed document releasing Defendant of all liability for injuries accrued while renting the animal precluded Plaintiff's claim for falling off the horse due to an improperly saddled horse.)

Courts, however, have refused to enforce exculpatory clauses in instances where the language did not preclude claims for reckless conduct of an employee. *Tayar v. Camelback Ski Corp., Inc.*, 957 A.2d 281 (Pa. Super 2008). Where a release signed by the Plaintiff specifically stated that he agreed not to sue for damages related to the use of a snow tube or the lift, a trial court held that allegations of negligence pertaining to the design of the snow tubing trail, and not the equipment, precluded enforcement of the agreement. *Martin v. Montage Mountain*, 46 Pa. D. & C. 4th 225 (C.P. Lackawanna County 2000)

It is neither practical nor advisable to prepare and use a standard exculpatory agreement that will cover any and all recreational activities. Instead, the particular recreational activity, the equipment to be used, as well as the venue, must be taken into consideration in drafting a valid and enforceable exculpatory clause. The drafter should make certain that the agreement clearly sets forth that it and its employees will be relieved of liability for their own negligence and gross negligence. Public policy precludes such exculpatory clauses from covering wanton and willful misconduct and likely reckless conduct as well, which can form the basis of a punitive damages claim.

SOUTH CAROLINA

Validity of Liability Waivers/Releases – South Carolina

1. Controlling Law

1. Ice Skating and Roller Skating. S.C. Code Ann. §§ 52-21-10 to 52-21-60 (Law. Co-op. Supp. 2000).
2. Equine Liability Act. S.C. Code Ann. §§ 47-9-710 to 47-9-730. Law. Co-op. Supp. 2000).

2. Waiver Requirements

Exculpatory contracts have often been upheld. *See Huckaby v. Confederate Motor Speedway, Inc.*, 281 S.E.2d 223, 224 (S.C. Ct. App. 1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by "waiver and release" voluntarily signed by plaintiff prior to entering the race track); (*McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 247-50 (S.C. Ct. App. 2005) (upholding liability waiver for paintball game). Yet, since exculpatory contracts "tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." *Fisher v. Stevens*, 584 S.E.2d 149, 152 (S.C. Ct. App. 2003) (granting partial summary judgment to plaintiff on grounds that release did not bar his claims as a matter of law after he was injured while working on a wrecking crew at a speedway).

Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. *Pride v. Southern Bell Tel. & Tel. Co.*, 138 S.E.2d 155, 157 (S.C. 1964). An exculpatory clause will never be construed to exempt a party from liability for his own negligence "in the absence of explicit language clearly indicating that such was the intent of the parties." *South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 322 S.E.2d 453, 458 (S.C. Ct. App. 1984) (quoting *Hill v. Carolina Freight Carriers Corp.*, 71 S.E.2d 133, 137 (N.C. 1952)).

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether courts will permit parents to waive minors' prospective claims.

4. Willingness of Courts to Enforce Waivers

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

5. Defenses to Liability Waivers

A release entered into by the parties contravenes public policy. *But see, e.g., Pride v. Southern Bell Tel. & Tel. Co.*, 138 S.E.2d 155, 157–58 (S.C. 1964) (holding that it was not violative of public policy for telephone company to legally limit its liability by contract for negligence in the publication of a paid advertisement in the yellow pages of its telephone directory). Defendants will reply that "[i]f these [exculpatory] agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or

sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest." *Huckaby*, 281 S.E.2d at 224 (quoting *Gore v. Tri–County Raceway, Inc.*, 407 F. Supp. 489, 492 (M.D. Ala. 1974)).

6. Other Issues

None.

SOUTH DAKOTA

VALIDITY OF LIABILITY WAIVERS/RELEASES – SOUTH DAKOTA

1. Controlling Law

There is applicable case law, but no statute, except as it concerns what may *not* be released.

2. Waiver Requirements

A participant may contractually agree to assume risks that are part and parcel of the recreational activity. Therefore, anticipatory and pre-injury releases limiting liability for ordinary negligence are valid, absent fraud, misrepresentation, or other wrongful act by another contracting party. ***Holzer v. Dakota Speedway, Inc.***, 610 N.W.2d 787 (S.D. 2000).

A review of cases involving releases concerning recreational activities establishes two general trends: (1) anticipatory, pre-injury releases are much more likely to be deemed valid and enforceable when they are written on a separate document and not embedded in an application or sign-up sheet; and (2) the more inherently dangerous or risky the recreational activity, the more likely an anticipatory release will be held valid (mountain climbing, parachute jumping, and the like). ***Holzer***, 610 N.W.2d 787; ***Johnson v. Rapid City Softball Ass'n,***, 514 N.W.2d 693 (S.D. 1994).

A release should be a separate document, reflecting and evoking the participant's knowledge and voluntariness. The intention of the parties must be expressly written and in unmistakable language. Terms must be unambiguous and understandable (clear and coherent). A release should include a plain and clear statement, directly before the signature lines, stating that the participant acknowledges reading and understanding the release. ***Johnson,*** 514 N.W.2d 693 (Wuest, J. concurring in result and concurring specially).

3. Waiver of Minors' Prospective Claims

There is no case law or statute on point. However, considering the state's statutory scheme, it is unlikely that a minor's prospective claims can be waived. For instance, **S.D.C.L. § 25-5-6**, states that a parent has no control over the property of his or her child, and **S.D.C.L. § 25-5-7.2**, allows a residential parent to make only "routine decisions" concerning the child. Moreover, **S.D.C.L. § 25-5-14**, makes neither parent nor child answerable for the act of the other.

Section 26-2-1, S.D.C.L., provides that no minor may make a contract relating to real property or personal property not in his or her immediate possession or control. It also provides that a minor's parent may sign a minor's name for and on behalf of the minor, for the purposes of establishing an account with a financial institution, and that such subscription shall constitute a binding agreement between the financial institution and the named parties to the account. It

makes no mention of any other types of contracts signed by a minor's parent for or on behalf of a minor.

Finally, **S.D.C.L. § 53-2-1**, states that all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights.

4. Willingness of Courts to Enforce Waivers

As noted, South Dakota's state courts are ***not*** reluctant to uphold waivers of an *adult's* prospective claims that comply with case-law requirements. A court is unlikely to enforce waivers of a minor's claims.

5. Defenses to Liability Waivers

Plaintiff will likely allege that the exculpatory agreement is ambiguous and/or raises public interest concerns. Anticipatory and pre-injury releases violate public policy when they involve a matter of interest to the public at large or the state. The public interest in recreation typically involves a facility providing an essential or public service. Other matters of interest to the public or state include the employer-employee relationship, public service, public utilities, common carriers, and hospitals. ***Holzer***, 610 N.W.2d 787; *see* ***Lee v. Beauchene,*** 337 N.W.2d 827, 828 (S.D.1983).

Releases that are construed to cover willful and gross negligence or intentional torts, however, are invalid and against public policy. **S.D.C.L. § 53-9-3** ("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 from violation of law whether willful or negligent, are against the policy of the law."); ***Holzer***, 610 N.W.2d 787.

6. Other Issues

Through its Recreational Use Statutes (**S.D.C.L. §§ 20-9-11, *et seq.***), South Dakota has legislatively limited landowners' liability in situations where an entrant comes upon a landowner's property for recreational purposes without conferring any economic benefit or consideration upon the landowner. Such entrants are substantively treated as "trespassers," and liability attaches only to the landowner's gross negligence or willful or wanton misconduct. Nothing in the statutes limits any liability that would otherwise exist for injuries suffered where the landowner charges the entrant a fee. The category of "licensee" is essentially eliminated in these circumstances. ***Johnson***, 514 N.W.2d 693.

South Dakota has further limited liability through its enactment of **S.D.C.L. §§ 42-11-1, *et seq.***, which provides that "[n]o equine activity sponsor, equine professional, doctor of veterinary medicine, or any other person, is liable for an injury to or the death of a participant resulting from the inherent risks of equine activities."

TENNESSEE

Validity of Liability Waivers/Releases – Tennessee

1. Controlling Law

1. Tennessee Ski Area Safety and Liability Act, Tenn. Code Ann. §§ 68-114-101 – 68-114-107 (1996).
2. Unenforceable health club agreements. Tenn. Code Ann. § 47-18-303.
3. Tennessee Equine Activities Act. Tenn. Code Ann. § 44-20-101 to 44-20-105 (2000).
4. Assumption of Risk by Participants in Auto Racing Events: Tenn. Code Ann. § 55-22-105 ("The practice of participants in motor racing events of releasing the promoters thereof from liability and of assuming liability for any injuries sustained is expressly approved.")

2. Waiver Requirements

Parties may contract so as to release one of the parties from liability for damages resulting from his negligence. *See Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973) (upholding liability waiver in health club agreement); *Petry v. Cosmopolitan Spa International, Inc.*, 641 S.W.2d 202, 203 (Tenn. Ct. App. 1982) (same); *Moss v. Fortune*, 207 Tenn. 426, 340 S.W.2d 902 (1960) (upholding liability waiver stating, "I am hiring your horse to ride today and all future rides at my own risk" since "plaintiff assumed the risk incident to the riding of the horse", which included his injury which occurred when the left stirrup strap broke and threw him to the ground). An exculpatory clause is not void merely because defendants failed to incorporate certain statutorily-required language in an exact and verbatim manner. *Floyd v. Club Sys., Inc.*,1999 Tenn. App. LEXIS 473 (1999) (analyzing contract provisions purportedly failing to comply with financial and membership requirements of unenforceable health club agreement statute and finding that contract's failure to comply with these provisions would not obviate waiver of liability for personal injuries in contract).

Tennessee courts have upheld liability waivers in numerous cases involving recreational activities. *See, e.g., Empress Health & Beauty Spa, Inc.*, 503 S.W.2d at 191 (upholding a release from liability for injuries in favor of a health club); *Moss*, 207 Tenn. at 429 (upholding a release from liability for injuries in favor of the operator of a horse-riding rental business); *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730 (Tenn. Ct. App. 2005) (upholding a release from liability for injuries in favor of a white water rafting company after finding that public policy protected commercial white water rafting companies from claims for injuries to patrons, that parties may contract that one shall not be liable for his negligence to another but that such other shall assume the risk incident to such negligence, and that it is not necessary that the word negligence appear in the exculpatory clause); *Tompkins v. Helton*, No. M2002-01244-COA-R3-CV, 2003 Tenn. App. LEXIS 433, 2003 WL 21356420, *6 (Tenn. Ct. App. June 12, 2003) (upholding a release from liability for injuries in favor of the owners of a motor speedway); *Burks v. Belz-Wilson Props.*, 958 S.W.2d 773, 776 (Tenn. Ct. App. 1997) (upholding a release from liability for injuries related to an employee's use of a "gymnastics pit" at an employer-sponsored event); *Dixon v. Manier*, 545 S.W.2d 948 (Tenn. Ct. App. 1976) (upholding a release from liability for injuries arising from a hair-straightening treatment in favor of a cosmetology school and its operator).

In *Teles v. Big Rock Stables*, L.P., 419 F. Supp. 2d. 1003, 1008 (E.D. Tenn. 2006), the plaintiff fell while riding and alleged that the saddle was faulty with stirrups too long for her legs. She had signed a waiver releasing the stable of all claims whether "due to THIS STABLE'S and/or ITS ASSOCIATES ordinary negligence." The defendants claimed exemption from liability under the Tennessee Equine Activities Act and based on the waiver. The court held the waiver did not release the liability for violation of a statutory duty because T.C.A. § 44-20-104 (1)(A) specifies that nothing shall prevent the liability of an equine sponsor who "Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause injury."

3. Waiver of Minors' Prospective Claims

Tennessee prohibits the use of parental waivers and indemnity agreements for minors' prospective claims. *Childress v. Madison County*, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989) ("Minors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them." *Id.* at 7. (citations omitted)). The general rule that a parent cannot waive the rights of a child aligns with the public policy of protecting the rights of children with respect to contractual obligations. *Childress v. Madison County*, 777 S.W.2d 1, 15-16 (Tenn. Ct. App. 1989) (holding that a parent's ability to waive a child's rights is the same for a minor as it is for an incompetent). In *Childress*, a mother signed a release form acknowledging that her son was participating in Special Olympics training exercises at his own risk, and she agreed to release, discharge, and indemnify the Special Olympics from liability for injury to her son. Although she thought she was signing a permission slip, the court found she had adequate notice of the exculpatory clause. However, the father had not signed the waiver, and the court found no indication that the mother was authorized to release the father's rights. Thus, the mother who signed the waiver was held jointly liable with other defendants for damages awarded to the father, who was able to recover for his own personal injuries.

In *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Tenn. Ct. App. 1990), a case involving a girl killed during an annual horse race, the Tennessee Appellate Court refused to uphold a handwritten release signed by a mother against her child which stated that "[u]nder no circumstances will anyone or anything be liable in case of an accident." *Id.* at 244. The court found that the mother clearly understood what she was signing, and the language was dictated by the child participant and not the mother. *Id.* at 246. Nevertheless, the court held that after *Childress*, a mother cannot waive the rights of her child. *Id.* at 246-47.

4. Willingness of Courts to Enforce Waivers

The courts seem willing to enforce liability waivers against adults, even though parents cannot sign waivers on behalf of their minor children.

5. Defenses to Liability Waivers

1. The Agreement is void against public policy because it absolves the defendant's liability for gross negligence. *See Adams v. Roark*, 686 S.W.2d 73, 76 (Tenn. 1985). In *Adams*, the court found an agreement may have violated public policy for absolving defendant from liability for "any and all loss or damage and any claim or demands therefore on account of injury to the person or property." The plaintiff was seriously injured during a motorcycle race when he lost control of his motorcycle and struck a steel photo-electric cell reflector located near the finish line. The court found possible gross negligence on the part of the defendant because the photo-electric reflector should have been made of plastic or some other resilient material due to the "known dangers by the operators of the track" that a motorcycle may be slightly out of control when it approaches the reflector. The affidavits of the plaintiff and the nine other drivers filed in response to defendants' motion for summary judgment supported the view that the metal reflector was dangerous, that striking a reflector in the course of a race was not uncommon, that the drivers were not told that a steel reflector was in use and were not allowed to inspect it, and that they would not have raced on defendants' track had they known of the use of a metal reflector. The court denied summary judgment for the defendants because a genuine issue of material fact existed as to whether their use of the metal reflector was grossly negligent.

The Tennessee Supreme Court adopted the criteria for assessing to determine whether exculpatory agreements are void against public policy. The Tennessee Supreme Court has adopted the six-factor test from *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). *Olson v. Molzen*, 558 S.W.2d 429 (Tenn.1977).

Speedway races are not an essential public service because a patron can observe the races from areas other than the restricted areas and need not sign any release. *Tompkins v. Helton,* 2003 Tenn. App. LEXIS 433 (2003) (finding release not against public policy).

2. The failure of a party to read a release and waiver before signing in the absence of fraud or duress, does not affect its validity. *Dixon v. Manier*, 545 S.W.2d 948, 949 (Tenn. App. 1976) (upholding liability release when plaintiff sought to recover from beauty school for damages sustained from defendant straightening her hair); *Adams v. Roark*, 686 S.W.2d 73, 76 (Tenn. 1985).

1. Other Issues

None.

TEXAS

TEXAS

169. Are releases enforceable? Yes.

It is well recognized in Texas that a party may exempt itself from liability based on its own negligence in a properly drafted release. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). A release is valid and enforceable unless it is contrary to public policy. *Id.* at 508-509.

Texas has adopted the fair notice requirement as a requirement for a valid and enforceable release. *Dresser*, 853 S.W.2d at 508. The fair notice requirement as applied in the State of Texas consists of the express negligence doctrine and the conspicuous requirement. The purpose of these requirements is to ensure that the release will clearly display the intent of the parties. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990).

The express negligence doctrine was adopted by the Texas Supreme Court in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex. 1987). It requires that the intent of the parties be specifically stated within the four corners of the document. *Id.* This has been construed to require that parties specifically take into account what they are releasing each other from.

But, in the case of *Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148, 150 (Tex. App.BTexarkana 1993, writ denied) the Texarkana Court of Appeals held that the express negligence doctrine was not satisfied as to a health club membership. In *Rickey* the Court held that the release at issue was not effective because it failed to meet the express negligence doctrine by failing to specifically state that claims based on Anegligence@ were being released. Specifically, the Court stated, AThe express negligence doctrine provides that, in order to require one party to release or indemnify another party against the consequences of that party=s own negligence, the intent of the parties to do so must be expressed in specific terms within the four corners of the contract. *See Page Petroleum*, 853 S.W.2d at 508-509; *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707-08 (Tex. 1987). The contract provision at issue in the present case (*Rickey*) does not expressly list negligence as a claim being relinquished by the buyer. This provision does not meet the express negligence doctrine.@ *Rickey*, 863 S.W.2d at 150. Thus the term "negligence" should be included in the release as a claim being released.

The second requirement of the fair notice requirement is the conspicuousness test. This test requires the use of clear and unequivocal language in releases and indemnity agreements to ensure that the party assuming the risk is given fair notice of the risk shifting provisions in the contract.

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

Tex. Bus & Com. Code ' 1.201 Contains General Definitions and sub-part (10) contains the following definition of "conspicuous":

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

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

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

172. Can a signing spouse bind a non-signing spouse? Probably.

See *In Re Rangel* 45 S.W. 3d 783 (Tex. App. - Waco 2001, no writ), which held that a non-signing spouse was a third party beneficiary who accepted benefits from the contract and was bound by the terms of the contract, including an arbitration clause.

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

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

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

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

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

Facts - The school admitted Plaintiff and the parties executed an Enrollment Agreement, which released the school from any liability for negligence. He was subsequently injured during a training session at the wrestling school and sustained injuries leaving him in a coma. Plaintiffs ask that the Enrollment Agreement be voided because disparate bargaining power existed between the parties, evidence by the student=s enthusiasm for becoming a student at the school and the school=s alleged control over a student=s future in wrestling.

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

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

Tamez v. Southwestern Motor Transport, Inc., 155 S.W. 3d 564 (Tex. App – San Antonio 2004, no petition)

Facts – One plaintiff was killed and another seriously injured when the tractor trailer which they were driving crashed into an interstate overpass. Plaintiffs were team co-drivers operating a tractor trailer that was leased to Southwestern Motor Transport, Inc. ("Southwestern") pursuant to an independent contract or service agreement. Plaintiffs were employees of another company and had signed a pre-injury release agreement with Southwestern. Southwestern was granted summary judgment.

Rationale – Although Plaintiffs claim that they had limited ability to read, write and understand English, a person who signs a contract must be held to have known what words were used in the contract and to have known their meaning and to comprehend the legal affect of the contract. There was consideration supporting the release because there was a benefit to the plaintiffs in having the ability to participate as lease co-drivers for the company and being afforded occupational health insurance.

Holding - While an employee may not waive a cause of action against his employer for injury or death, Southwestern was not the plaintiffs' employer, statutory or otherwise. Plaintiffs were merely lease drivers to Southwestern Motor Transport, Inc. and accordingly, the release is not against public policy, is valid and enforceable and the trial courts granting

of the summary judgment was affirmed.

Last v. Quail Valley Country Club, L.P., 01-08-00759-CV (TX App – Houston [First District], 2010)

Facts – In this case the plaintiff was injured while riding a mechanical bull. Prior to being able to ride the mechanical bull he was required to obtain a ticket and sign a release form releasing the operator from liability. At the trial, the jury ruled in favor of the defendant and held that the plaintiff had failed to prove that the defendant was negligent as to the circumstances surrounding the operation of the mechanical bull.

Rationale – While the affect of a release is generally a question of law, the trial court ruled that it did satisfy the fair notice requirements, it was enforceable under the Unity of Release rule and was supported by adequate consideration. There was not a material breach of it and it did not violate public policy. However, the trial court did submit their issue regarding fraud, misrepresentation and fair notice to the jury who ruled in favor of the defendant.

Holding – The Court of Appeals overruled all of the points of error raised by the plaintiff regarding the release and affirmed the judgment of the trial court that plaintiff take nothing.

UTAH

VALIDITY OF LIABILITY WAIVERS/RELEASES – UTAH

1. Controlling Law

There is applicable case law, but no statute.

2. Waiver Requirements

People may contract away their rights to recover in tort for damages caused by ordinary negligence, but not for harm willfully inflicted or caused by gross or wanton negligence. ***Pearce v. Utah Athletic Found.***, 179 P.3d 760 (Utah 2008). To be enforceable, the intent of a release must be communicated in clear, unequivocal, and unambiguous language. ***Id.***; *see* ***Rothstein v. Snowbird Corp.***, 175 P.3d 560 (Utah 2007). As a general rule, recreation activities do not constitute a public interest; therefore, pre-injury releases for recreation activities cannot be invalidated under the public-interest exception. ***Pearce***, 179 P.3d 760.

3. Waiver of Minors' Prospective Claims

A parent may ***not*** release a child's prospective claim for negligence, ordinary or otherwise; public policy favors protecting minors with respect to contractual obligations. ***Hawkins ex rel. Hawkins v. Peart***, 37 P.3d 1062 (Utah 2001) (parent's pre-injury release of any claims child might have against owner of horseriding business was invalid).

4. Willingness of Courts to Enforce Waivers

Utah courts will uphold an adult's pre-injury release of an ordinary negligence claim as long as the release is clear, unequivocal, and unambiguous; is not against public policy; or does not fall within a public interest. However, summary judgment may be unavailable if the issue of gross negligence cannot be clearly determined.

5. Defenses to Liability Waivers

Pre-injury releases are not unlimited in power and can be invalidated in certain circumstances. For instance, releases that offend public interest or public policy are unenforceable. The traits of an activity for which pre-injury releases may be invalid under the *public-interest* exception are those in which: (1) the transaction concerns business of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform such service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, a party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract

of exculpation and makes no provision whereby the purchaser may pay additional reasonable fees and obtain protection against negligence; and (6) as a result of the transaction, the person or property of purchaser is placed under the control of seller, subject to risk of carelessness by seller or his agents. ***Pearce***, 179 P.3d 760; ***Berry***, 171 P.3d 442; ***Hawkins***, 37 P.3d 1062.

A pre-injury release for recreation skiing offends public policy, because it runs contrary to Utah's Inherent Risks of Skiing Act, **U.C.A. §§ 78B-4-401, *et seq.*** ***Rothstein v. Snowbird Corp.***, 175 P.3d 560 (Utah 2007) ("The bargain struck by the [Skiing] Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for non-inherent risks by purchasing insurance.").

A pre-injury release is also invalid if it applies to harm willfully inflicted or caused by gross or wanton negligence. Gross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result. ***Pearce***, 179 P.3d 760 (although release sign by bobsled passenger was ambiguous and released ordinary negligence claim against owner and operator of bobsled track, where there was no identified and applicable standard of care, court could not properly grant motion for summary judgment); ***Berry v. Greater Park City Co.***, 171 P.3d 442 (Utah 2007) (same; reversing summary judgment for ski-race organizer in suit filed by paralyzed ski racer). ***Cf. Milne v. USA Cycling Inc.***, 575 F.3d 1120 (10th Cir. 2009) (*aff'g* 489 F.Supp.2d 1283 (D.Utah 2007), and recognizing that although Utah substantive law was to the contrary, federal law required court to determine whether plaintiffs provided enough evidence elements to withstand summary judgment, and where plaintiffs failed to provide evidence of gross negligence, summary judgment was properly granted).

Finally, liability releases that are unclear or ambiguous are unenforceable. ***Rothstein***, 175 P.3d 560; *see* ***Ghiones v. Deer valley Resort Co.***, 839 F.Supp 789 (D.Utah 1994) (general language of release without specificity as to shifting of responsibility is not enough to relieve party at fault from liability).

6. Other Issues

Under Utah's Inherent Risks of Skiing Act, **U.C.A. §§ 78B-4-401, *et seq.***, skiers assume the inherent risks of skiing. Operators, however, remain liable for negligence. ***Rothstein***, 175 P.3d 560, 564 ("Act is most clearly not . . . intended to protect ski area operators by limiting their liability exposure generally. It is rather a statute that is intended to clarify those inherent risks of skiing to which liability will not attach so that ski resort operators may obtain insurance coverage to protect them from those risks that are not inherent to skiing.)

Utah's Equine Activity Liability Act, **U.C.A. §§ 78B-4-201, *et seq.***, also limits liability by requiring that participants of equine or livestock activities assume the inherent risks in the equine or livestock activity.

Pursuant to **U.C.A. § 78B-4-509**, persons participating in certain recreational activities (rodeo, equestrian, skateboarding, skydiving, paragliding, hang gliding, roller skating, ice skating, fishing, hiking, walking, running, jogging, biking, or in-line skating on property owned by a county or municipality) may not make a claim against the county or municipality for any injury or damages resulting from the inherent risks of participating in a recreational activity.

VIRGINIA

VIRGINIA

1. Is there a state statute that applies or only case law. There is no statute that speaks to the enforceability of pre-accident waivers. However, case law in Virginia is solid that a contract or document containing language where a party releases himself or his servants from liability due to his own negligence is void as against public policy. Admr of Johnson's Admn'r v. D.R. Railroad, 89 Va. 975, 11 S.E. 829 (1890); Heitt v. Lake Barcroft Community Ass'n, 244 Va. 191, 418 SE 2d 894 (1992) (pre-injury release provision signed by a participant in a sporting event was prohibited by public policy and is void). *But see* Rhea v. Horn-Keane Corp., 582 F. Supp 687 (W.D. Va. 1984)(pre injury waiver at race track with consideration was enforceable because it did not involve a public utility or quasi governmental situation) and Elswick v. Lonesome Pine Int'l Raceway, 54 Va. Cir. 368 (J. Stump, 2001).

2. What does the statute or case law say with respect to what language needs to be in the waiver. The courts will void any pre-injury release if it extinguishes a right of action prior to the misconduct taking place. However, indemnity provisions that do not extinguish the right of action but merely transfer the risk of loss are valid. Estes Express Lines, Inc. v. Chopper Express, Inc., 273 Va. 358, 641 S.E. 2d 476 (2007).

3. can an adult sign for a child, i.e. is the waiver effective as to minors. Pre-injury releases are void. Beyond that, a parent's release is enforceable only as to the parent's derivative claim for recovery of medical bills. To enforce a minor's post injury release, court approval of the settlement is necessary.

4. Are the courts reluctant to uphold the waiver. Courts will be reluctant to uphold pre-accident waivers.

5. How does one try to defeat the waiver. Because of the Heitt and Johnson cases discussed above, a plaintiff has the upper hand in having the releases declared unenforceable. The harder challenge for the plaintiff is to overcome the assumption of risk argument that the release will create. In addition, because the Rhea case cited above has never been overruled by the 4Th Circuit, a defendant is best served removing the case to Federal Court, which may be more included to uphold a release. However, it is worth noting that the Heitt case was decided by the Va. Supreme Court 8 years after Rhea without consideration of the analysis of the ruling.

6. Other issues re waivers particular to your state. In addition to not enforcing pre-injury releases, Virginia courts also do not follow the inherent risk doctrine. Nelson v. Great Eastern Resort Management, Inc., 265 Va. 98, 574 S.E.2d 277 (2003). However, it does not do so, because Virginia's common law defenses of contributory negligence and assumption of risk are very broad and strong. Id. It is recommended that any pre-injury release clearly identify the risk involved due to the nature of the activity. The document should then state above the signature line that the participant has been advised of clearly identified risks and potential injuries that can occur from participation in the activity and voluntarily chooses to participate with full knowledge of those risks. Indeed, the release may not be dispositive of the lawsuit, but will be powerful evidence that the plaintiff has been fully educated in the risks of the activity and has assumed the risk of injury.

In addition, if a party signs a post accident release, Virginia statute 8.01-425.1 provides that any person who, without the assistance of counsel, settles his personal injury claim within thirty days of the accident may rescind the settlement before midnight of the third business day after the release was executed. Additionally, any release signed within 30 days of an accident must conspicuously state the party's right to rescind.

WASHINGTON

Validity of Liability Waivers/Releases – Washington

1. Controlling Law

1. Prohibited conduct for Skiing and Commercial Activity. Wash. Rev. Code Ann. § 9A.45.030 (West Supp. 2001).

2. Limitations on Liabilities for Equine Activities. Wash Stat. § 4.24.530 – 540 (West Supp. 2001). This act imposes certain affirmative duties on employers. *See Patrick v. Sferra,* 855 P.2d 320, 322-23 (Wash. Ct. App.1993).

2. Waiver Requirements

The general rule in Washington is that a liability waiver is unenforceable if (1) it violates public policy, (2) the negligent act falls greatly below the legal standard for protection of others, or (3) it is inconspicuous. *Johnson v. UBAR, L.L.C.*, 210 P.2d 1021, 1023 (2009). These three factors are discussed below.

1. Public Policy

Exculpatory clauses in liability waivers are invalid if they violate a public policy interest of this state. *Shields v. Sta-Fit, Inc.*, 903 P.2d 525, 526 (Wash. App. 1995). An agreement violates public policy if it has a tendency to be against the public good, or to be injurious to the public. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1005 (Wash. 2007). Contract provisions that exculpate the author for wrongdoing undermine the public good. *Id.* at 854, 161 P.3d at 1006. Furthermore, "[c]ontracts against liability for negligence are not favored by law" and are strictly construed against parties relying thereon. *Glant v. Lloyd's Register of Shipping*, 251 P. 274, 277 (Wash. 1926). Courts are therefore reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract. *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (Wash.1988).

The *Wagenblast* court used the public policy test from *Tunkl. v. Regents of the Univ. of California*, 383 P.2d 441, 446 (Cal. 1963), which establishes six exclusive factors that determine whether a liability waiver violates public policy. *Id.* at 971. Under *Tunkl*, the enforceability of a release depends on whether: (1) the agreement concerns an endeavor of a type thought suitable for public regulation; (2) the party seeking to enforce the release is engaged in performing an important public service, often one of practical necessity; (3) the party provides the service to any member of the public, or to any member falling within established standards; (4) the party seeking to invoke the waiver has control over the person or property of the party seeking the service; (5) there is a decisive inequality of bargaining power between the parties; and (6) the release is a standardized adhesion contract. *Tunkl,* 383 P.2d at 446. The first four factors address the substance of the exculpatory clause, while the last two factors concern the procedural fairness of the release. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383, 387 (Wash. App. 2001). Finding all six *Tunkl* factors is not necessary to invalidate an exculpatory clause, but "the more of the foregoing six characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on public policy grounds."

Wagenblast, 758 P.2d at 971) (finding *Tunkl* factors met given the intense self-regulation of interscholastic sports; the public importance of sports; the open nature of the program to all students who meet certain skill and eligibility standards; the lack of alternative programs for interested public school students; the requirement of the release form for participation; and the school's control over the student athlete). *Id.* at 972-74.

Cases in which exculpatory clauses in waiver provisions have been found to be void as against public policy all involve important public services: hospitals, housing, public utilities, and public education. *Shields*, 903 P.2d at 528. The Washington Supreme Court has noted that "a survey of cases assessing exculpatory clauses reveals that the common determinative factor for Washington courts has been the services' or activities' importance to the public." *Wagenblast*, 35 P.3d at 388 (*citing Vodopest v. MacGregor*, 913 P.2d 779, 788 (Wash. 1996)).

2. Negligent Act Falls Greatly Below Legal Standard

A party may not exempt itself from liability for its own negligence if its negligent act falls greatly below the standard established by law for the protection of others against unreasonable risk of harm. *McCutcheon v. United Homes Corp.*, 486 P.2d 1093, 1095, 1097 (Wash. 1971) (striking down as being against public policy a disclaimer of liability agreement which purported to relieve a lessor of a multi-family dwelling complex, and his agents, from all liability resulting from their own negligence in maintaining the common passageways, stairs, and other areas of the premises under their dominion and control but available for the tenants' use. *Id.* at 1097.) Courts are reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to free themselves of that obligation by contract. *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (1988). Courts thus usually hold businesses, such as banks and common carriers, and individuals, such as landlords and innkeepers, to a higher standard of care. *Id.* (recognizing courts do not usually uphold waiver of public officials).

3. Inconspicuousness of Waiver

The general rule in Washington is that a waiver provision is unenforceable if it is inconspicuous. *Johnson v. UBAR, L.L.C.*, 210 P.2d 1021, 1023 (Wash. Ct. App. 2009). A person who signs without reading an instrument whose meaning is plain and unambiguous "is nevertheless bound by its terms so long as there was "ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons." *McCorkle v. Hall*, 782 P.2d 574, 577 (1989) (quoting *National Bank v. Equity Investors*, 506 P.2d 20, 47 (1973)). But a liability waiver will not be upheld if the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383, 386 (2001). Factors in deciding whether a waiver and release provision is conspicuous or inconspicuous include: (1) whether the waiver is set apart or hidden within other provisions, (2) whether the heading is clear, (3) whether the waiver is set off in capital letters or in bold type, (4) whether there is a signature line below the waiver provision, (5) what the language says above the signature line, and (6) whether it is clear that the signature is related to the waiver. *Johnson*, 210 P.2d at 1023 (*citing Baker v. City of Seattle*, 484 P.2d 405 (1971)). In *Baker v. City of Seattle*, the Washington Supreme Court invalidated a disclaimer inconspicuously placed in the middle of

a golf rental agreement in exactly the same print as the rest of the rental agreement. 484 P.2d 405,406-07 (1971).

Conversely, a Washington appellate court found a waiver conspicuous when the waiver appeared in a separate section of the Questionnaire under the word waiver set in large type, and the parenthetical sentence directly below this title directed the prospective signer to "Please Read Carefully and Sign," thereby underscoring the importance of the exculpatory language. *Craig v. Lake Shore Ath. Club*, No. 20063-5-II, 1997 Wash. App. LEXIS 907, *8-9 (June 6, 1997); *see also Hewitt v. Miller,* 521 P.2d 244, 247 (Wash. App. Ct. 1974) (holding document enforceable entitled "SAFETY AFFIRMATION AND RELEASE (Read Carefully, then sign)"). When a health-club-membership waiver was embedded in a portion of the application under the title, "LIABILITY STATEMENT," a Washington appellate court concluded that there was a genuine issue of material fact as to whether this waiver was so inconspicuous that the plaintiff unwittingly signed it. *McCorkle v. Hall*, 782 P.2d 574, 577-78 (1989).

Releases are enforceable in the setting of adult high-risk sports activities. *Vodopest v. MacGregor*, 128 Wash. 2d 840, 848-49 (Wash. Ct. App. 1996). Washington appellate courts have consistently upheld exculpatory agreements in the setting of adults engaging in high-risk sporting activities. *See, e.g., Blide v. Rainier Mountaineering, Inc.*, 636 P.2d 492 (Wash. App. Ct. 1981) (mountain climbing); *Boyce v. West,* 71 Wash.App. 657, 862 P.2d 592 (Wash. App. Ct. 1993) (scuba diving); *Conradt v. Four Star Promotions, Inc.*, 728 P.2d 617 (Wash. App. Ct. 1986) (automobile demolition derby); *Hewitt v. Miller,* 521 P.2d 244 (Wash. App. Ct. 1974) (scuba diving in course); *Garretson v. United States*, 456 F.2d 1017 (9th Cir.1972) (ski jumping applying Washington law).

3. Waiver of Minors' Prospective Claims

Parents generally cannot waive their minors' prospective claims. *See, e.g. Wagenblast*, 758 P.2d at 971, 973 (conditioning participation in public school interscholastic athletics on the students and their parents releasing the school district from all potential future negligence claims violated public policy). "Since parents do not generally have the authority to settle a post-injury claim, it makes no sense to allow them to waive a future claim in a pre-injury setting." *Scott v. Pacific West Mountain Resort*, 834 P.2d 6, 11 (1992). The *Scott* court reasoned that "[i]n situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur." *Id.* at 11-12. *But see* Angeline Purdy, Note, Scott v. Pacific West Mountain Resort: *Erroneously Invalidating Parental Releases of a Minors' Future Claim*, 68 WASH. L. REV. 457, 464 (1993) ("In reaching its conclusion that parental preinjury releases violate public policy, the *Scott* court failed to follow the precedent established in *Wagenblast.*").

Waivers of public school interscholastic activities violate all six prongs of the *Tunkl* test. *See Wagenblast*, 758 P.2d at 972 (affirming educational and cultural value of interscholastic athletic programs). In *Wagenblast*, the court recognized sports as "part and parcel" of the overall educational scheme in Washington. *Id.* Further, the court noted that sports represent a significant link between the public and the system of public education. *Id.* The court also noted that some students remain in school and maintain academic standing due to athletic participation.

Id. The court concluded that "[g]iven this emphasis on sports by the public and the school system, it would be unrealistic to expect students to view athletics as an activity separate and apart from the remainder of their schooling." *Id.*

Liability waivers for children's sports used by school districts violate public policy and thus unenforceable against either a minor or a parent who signs the form. Based on this relationship, the court explicitly distinguished interscholastic activities from hazardous activities involving adult education such as mountain climbing and skydiving. *Id.* At 854.

It is not clear if the *Wagenblast* holding extends to private schools. The court noted that "many students cannot afford private programs or the private school where such releases might not be employed." *Id.* at 155. Perhaps then, private schools can continue to enforce waivers since students who wish not to sign these waivers can instead attend public school where such waivers are not allowed. *See* Angeline Purdy, Note, Scott v. Pacific West Mountain Resort: *Erroneously Invalidating Parental Releases of a Minors' Future Claim*, 68 WASH. L. REV. 457, 464 (1993) (arguing court's subsequent analysis of *Wagenblast* in *Scott v. Pacific West Mountain Resort* limits *Wagenblast's* holding to public schools).

A valid waiver need not specifically mention negligence, provided that language manifests the parties' intention to shift the risk of loss. *Craig v. Lake Shore Ath. Club*, No. 20063-5-II, 1997 Wash. App. LEXIS 907, *8-9 (June 6, 1997) (holding that language that released defendant's liability for "any and all injuries suffered . . . while . . . participating in . . . exercise classes and fitness programs" encompassed the risk that exercise equipment subject to unsupervised use by numerous individuals would occasionally have defects that could cause injury).

4. Willingness of Courts to Enforce Waivers

Washington courts seem quite willing to uphold express releases of liability for adults. A Washington appellate court upheld a liability waiver signed by participants in scuba diving classes even though their involvement resulted in their death. *Hewitt v Miller*, 521 P.2d 244, 247 (Wash. App. 1974). The *Hewitt* court ruled in favor of the defendants because the release had been signed by the plaintiff, the acts involved fell within the language of the release, there was no willful or wanton misconduct on the part of the defendants, the release was part of the overall scuba diving course, and the release was not against public policy.

The Washington Supreme Court has also seemed very willing to strike down releases waiving minors' prospective claims, even if it has relied on different reasons for doing so. *Compare Wagenblast*, 758 P.2d at 971 (adopting *Tunkl* and holding exculpatory releases invalid as violating public policy), *with Scott*, 834 P.2d at 10 (denying *Tunkl* factors and finding parent has no legal authority to waive child's negligence claim).

5. Defenses to Liability Waivers

The general rule in Washington is that a liability waiver is unenforceable if (1) it violates public policy, (2) the negligent act falls greatly below the legal standard for protection of others, or (3) it is inconspicuous. *Johnson v. UBAR, L.L.C.*, 210 P.2d 1021, 1023 (2009).

6. Other Issues

None.

WEST VIRGINIA

WEST VIRGINIA

1. Is there a state statute that applies or only case law. There is no statute that speaks directly to the enforceability of pre-accident waivers. West Virginia Courts generally will enforce pre-injury releases subject to some important exceptions. A general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include damage resulting from the defendant's intentional, reckless misconduct or gross negligence-- unless waiver and the circumstances surrounding the waiver clearly indicate that such was the plaintiff's intention.

Another major exception to the enforceability of pre-accident waivers is that they are **not** enforceable when the defendant violates a safety statute enacted for the purpose of protecting the public. See Murphy v. North American River Runners, Inc., 186 W.Va. 310, 412 S.E.2d 504 (1991) The West Virginia Department of Labor has promulgated the Amusement Rides and Amusement Attraction Safety Act as well as the Commercial Bungee Jumping Safety Act that contains multiple safety regulations regarding the inspection, maintenance and operation of amusement rides and attractions. A violation of one of these safety regulations that leads to the injury of the plaintiff will not be subject to a pre-injury waiver. There is also the West Virginia Whitewater Responsibility Act *W.Va.Code,* 20-3B-3 and the West Virginia Skiing Responsibility Act, *W.Va.Code,* 20-3A-1 to 20-3A-8 [1984]. A defendant's violation of these statutes/regulations that results in an injury would also not be subject to a pre-accident waiver.

2. What does the statute or case law say with respect to what language needs to be in the waiver. The West Virginia Supreme Court has approved pre-injury release language stating that a defendant was relieved in effect from "all liability for any future loss or damage." The Court noted that such language was sufficiently clear to waive a common-law negligence action, even though the language did not include explicitly the words "negligence" or "negligent acts or omissions" as such "magic words" are not essential to a clear waiver of the right to bring a common-law negligence action, if the contract as a whole and the circumstances at the time of its execution indicate that both parties intended that waiver. See Murphy v. North American River Runners, Inc., 186 W.Va. 310, 412 S.E.2d 504 (1991) However, no language will waive a tort claim based upon an alleged breach of a *statutory* safety standard designed to protect the public. (See above). Such language will generally not effect claims of gross negligence unless it can be shown that this was the plaintiff's intent. Accordingly, the release should include language waiving all claims and causes of action for all injuries whether the result of negligence or willful and wanton conduct or gross negligence.

3. Can an adult sign for a child, i.e. is the waiver effective as to minors. A parent's pre-injury release on behalf of their child is generally not enforceable. See Johnson v. New River Scenic Whitewater Tours, 313 F.Supp.2d 621 (S.D. W.Va. 2004) The parents could waive the parents' derivative claim for recovery of medical bills, subject to the rules noted above. Moreover, to enforce a minor's post injury release, court approval of the settlement is necessary.

4. Are the courts reluctant to uphold the waiver. West Virginia Courts will consider the waivers but will be very reluctant to uphold pre-accident waivers in cases involving an alleged violation of a safety statute or regulation or allegations of gross negligence.

5. How does one try to defeat the waiver. By alleging gross negligence, willful and wanton misconduct and breach of a public safety statute or regulation.

6. Other issues re waivers particular to your state. West Virginia does recognize the affirmative defense of assumption of risk. Accordingly, any pre-injury release should clearly and specifically identify the risks involved due to the nature of the activity. The document should then state above the signature line that the participant has been advised of clearly identified risks and potential injuries that can occur from participation in the activity and voluntarily chooses to participate with full knowledge of those risks. Indeed, the release may not be dispositive of the lawsuit, but will be powerful evidence that the plaintiff has been fully educated in the risks of the activity and has assumed the risk of injury.

WISCONSIN

VALIDITY OF LIABILITY WAIVERS/RELEASES - WISCONSIN

1) CONTROLLING LAW

Wisconsin has no specific statute addressing these issues. However, case law has developed discussing various issues raised in this arena.

2) WAIVER REQUIREMENTS

In Wisconsin parties can contractually agree to limit liability. The Wisconsin Supreme Court has addressed the issue of whether exculpatory language in a waiver/release was contrary to public policy. Atkins v. Swim West Family Fitness Center, 277 Wis. 2d 303, 691 N.W.2d 334 (2005). Exculpatory clauses are not invalid *per se*, however, such provisions will be construed strictly against the party seeking to rely on it. A waiver may be found to be unenforceable if the exculpatory language is overly broad and all inclusive. In general, exculpatory clauses will likely be found to violate public policy if they are so broad that they would absolve a party from any injury to the signor for any reason. The waiver must clearly, unambiguously, and unmistakably inform the signor of what he or she is waiving. In addition, the form, viewed in its entirety, must alert the signor to the nature and significance of what is being signed. Yauger v. Skiing Enterprises, Inc., 206 Wis. 2d 76, 557 N.W.2d 60 (1996).

Wisconsin courts have also suggested that exculpatory clauses are more enforceable if they are a separate form and conspicuously labeled so as to put the person on notice that he or she is signing a waiver. Richards v. Richards, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994). Wisconsin courts have in particular examined whether a form, in fact, serves a dual purpose. If the form is a registration or application form, and includes a release of liability waiver, it runs the

risk of being unenforceable. The courts have suggested that there should not be a dual purpose to these types of forms.

3) **WAIVER OF MINORS PROSPECTIVE CLAIMS**

It is unlikely Wisconsin courts would waive such a claim. Given the general approach that exculpatory language is strictly construed against the party seeking to rely on it, the courts would likely favor the minor in such an instance.

4) **WILLINGNESS OF COURTS TO ENFORCE WAIVERS**

Wisconsin courts will clearly review waivers and releases with great scrutiny. Waivers containing exculpatory clauses are not invalid *per se*, but should meet certain standards. They should be conspicuous, unambiguous and in plain and simple language to set forth exactly what claims may be waived and should contain the actual term of negligence. The waiver should identify by name, the parties that are seeking to enforce the waiver. The waiver should be its own form, not have a dual purpose, and should describe the types of risks being contemplated by the signor. Finally, Wisconsin courts will also consider whether the signor had an opportunity to bargain over the exculpatory language. Simply saying the signor is left with the choice of either signing the contract or not participating in the activity altogether may not be enough in Wisconsin. The waiver should likely contain language that if the applicant does not agree to the terms of the waiver, he or she can contact someone and discuss the options.

5) **DEFENSE TO LIABILITY WAIVERS**

Plaintiffs will likely attack each and every issue discussed above. They will obviously raise the argument that the language is ambiguous, overly broad and therefore violates public policy. A waiver is likely more enforceable when it discusses in detail the risks associated with

the particular activity, identifies the parties being released, uses plain and simple language, is conspicuous and addresses a particular event. In the instance of a single day event, the waiver should be crafted so that it covers only that event and discusses some of the particulars associated with that venue.

6) **OTHER ISSUES**

Wisconsin has established a recreational use statute, Wis. Stat. § 895.525, which provides immunity to private property owners who open up their property for defined recreational uses. The recreational immunity statute may come into play if an event is held on private property such as a club or even a city's park. In addition, in Wisconsin, non-profit organizations also enjoy some immunity as they may owe a lesser or no duty to persons entering on their property for recreational purposes.

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WYOMING

VALIDITY OF LIABILITY WAIVERS/RELEASES – WYOMING

1. Controlling Law

In Wyoming, liability waivers are governed primarily by the case law, but there is also a limited statutory waive for minors' claims, and statutes that limit liability for recreational activities appear to apply to minors well, but do not effect any actual waiver of liability.

2. Waiver Requirements

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. ***Schutkowski v. Carey***, 725 P.2d 1057 (Wyo. 1986); *accord* ***Massengill v. S.M.A.R.T. Sports Med. Clinic, P.C.***, 996 P.2d 1132 (Wyo. 2000). As in other jurisdictions, the focus is on whether a public duty exists, and the courts have had little trouble holding that "[p]rivate recreational businesses generally do not qualify as services demanding a special duty to the public, nor are their services of a special, highly necessary nature." ***Schutkowski***, 725 P.2d at 1060; *see* ***Boehm v. Cody Country Chamber of Commerce***, 748 P.2d 704 (Wyo. 1987); ***Street v. Darwin Ranch, Inc.***, 75 F.Supp.2d 1296 (D.Wyo.,1999). No special terminology is required, and the release need not mention the word "negligence." ***Schutkowski***, 725 P.2d 1057. A release has also been held effective even though it part of the engagement contract plaintiff signed at his home in North Carolina and was not presented to plaintiff until he arrived in Wyoming, the evening before the hunting party left. ***Hall v. Perry***, 211 P.3d 489 (Wyo. 2009)

Liability waivers have been upheld in cases involving numerous recreational activities: *E.g.*, ***Id.*** (hunter thrown from horse); ***Massengill***, 996 P.2d 1132 (weightlifter injured at health club); ***Milligan v. Big Valley Corp.***, 754 P.2d 1063 (Wyo. 1988) (skier injured in decathalon ski race); ***Boehm***, 748 P.2d 704 (participant injured in mock gun fight); ***Schutkowski***, 725 P.2d 1057 (skydiving); ***Street***, 75 F.Supp.2d 1296 (horse rider injured at dude ranch).

By statute, there is also a limited waiver of liability for negligence for participation in amateur rodeos. **W.S. § 1-1-118(a)** ("No public school or nonprofit organization sponsoring an amateur rodeo is liable for injuries suffered by a contestant as a result of his voluntary participation in a rodeo event except for injuries caused by the willful, wanton or reckless act of the sponsoring organization or its employees.").

3. Waiver of Minors' Prospective Claims

There is no Wyoming authority allowing liability waivers for minors' pre-injury claims, except in the limited circumstances where they participate in amateur rodeos sponsored by public schools or nonprofit organizations. *See* **W.S. § 1-1-118(b)** ("A minor shall be deemed to be a voluntary participant for purposes of this section if he has signed a written consent to participate in the rodeo event and the consent is also signed by one (1) of the minor's parents or by his legal

guardian."). Given that express, statutory authorization, it is likely significant that the legislature has not provided for such waivers elsewhere.

As discussed in § 6, below, the Recreation Ski Safety Act does now expressly apply to minors as well, but it does not necessarily operate to effect a liability release for those subject to it. *See* **W.S. § 1-1-123(d)** (effective March 2, 2011).

4. Willingness of Courts to Enforce Waivers

Wyoming state and federal courts are not reluctant to uphold waivers that fulfill the case-law requirements.

5. Defenses to Liability Waivers

Liability waivers will not apply when a defendant's conduct was willful and wanton. ***Milligan***, 754 P.2d 1063; ***Schutkowski***, 725 P.2d 1057; ***Street***, 75 F.Supp.2d 1296, or if they violate public policy. ***Massengill***, 996 P.2d 1132; *see* **W.S. § 1-1-118(a)**. As previously noted, because they are to be strictly construed, waivers may be defeated if they do not clearly and unequivocally reflect the intent to extinguish liability. ***Schutkowski***, 725 P.2d 1057. Plaintiffs have also argued unsuccessfully that a liability waiver was offered on a "take-it-or-leave-it" basis. ***Milligan***, 754 P.2d 1063.

The Wyoming courts have also rejected arguments that reliance on a liability waiver was foreclosed by the creation of duties in the Recreation Safety Act. ***Massengill***, 996 P.2d 1132; ***Street***, 75 F.Supp.2d 1296.

6. Other Issues

Wyoming has an unusual Recreation Safety Act ("RSA"), because instead of having, for example, specific statutes that govern skiing and horseback-riding, Wyoming's RSA concerns inherent risks in *any* "[s]port or recreational opportunity" [which] means commonly understood sporting activities including baseball, softball, football, soccer, basketball, swimming, hockey, dude ranching, nordic or alpine skiing *and other alpine sports, snowboarding*, mountain climbing, *outdoor education programs,* river floating, hunting, fishing, backcountry trips, horseback riding and any other equine activity, snowmobiling and similar recreational opportunities and includes the use of private lands for vehicle parking and land access related to the sport or recreational opportunity." **W.S. § 1-1-122(a)(iii)** (italicized portions were added by a 2011 amendment, effective as of March 2, 2011) The Act further provides as follows:

> (a) Any person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury

or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity.

(b) A provider of any sport or recreational opportunity is not required to eliminate, alter or control the inherent risks within the particular sport or recreational opportunity.

(c) Actions based upon negligence of the provider wherein the damage, injury or death is not the result of an inherent risk of the sport or recreational opportunity shall be preserved pursuant to W.S. 1-1-109.

(d) The assumption of risk provisions in subsections (a) through (c) of this section apply irrespective of the age of the person assuming the risk.

W.S. § 1-1-123) (italicized subsection was added by a 2011 amendment, effective as of March 2, 2011).

By and large, the courts have held that the intent behind this Act was not to preclude parties from suing for a provider's negligence, but rather, merely to stop people from suing for those risks that were inherent to a sport. ***Madsen v. Wyoming River Trips, Inc.***, 31 F.Supp.2d 1321 (D.Wyo. 1999). Further, whether some occurrence constituted an inherent risk of a particular activity is a jury question, typically precluding summary judgment. ***Halpern v. Wheeldon***, 890 P.2d 962 (Wyo. 1995) (fact issues re whether owners of facility could have assisted rider in mounting horse in different manner and thereby reduced or eliminated risks associated with mounting); ***Dunbar v. Jackson Hole Mtn. Resort Corp.***, 392 F.3d 1145 (10th Cir. 2004) (fact issues re whether ski resort's warning signs and double-black designation properly applied to area that skier actually traversed in attempting to leave terrain park in accordance with ski resort employee's instructions or if they were limited to physical space containing dangerous terrain features, what duty was owed to skier if her accident was not product of inherent risk of her recreational activity, and whether ski resort fulfilled that duty); ***Sapone v. Grand Targhee, Inc.***, 308 F.3d 1096 (10th Cir. 2002) (fact questions precluded summary judgment on issue of whether fall from horse was inherent risk of horseback riding under Act); ***Carden v. Kelly***, 175 F.Supp.2d 1318 (D.Wyo. 2001) (fact question existed re whether horse (which experienced difficulty throughout day trail ride) stumbling and falling and consequently causing injury to inexperienced rider, is inherent risk of guided day-trip trail horseback ride onto steep rocky slope with no marked trail); ***Madsen***, 31 F.Supp.2d 1321 (D.Wyo. 1999) (fact question existed re whether being jostled around and bumping heads while people are in front of boat and not in seats was "inherent risk" of river-rafting); *see also* ***Muller v. Jackson Hole Mtn. Resort***, 139 P.3d 1162 (Wyo. 2006) (ski lift may be "inherent risk"

of skiing, for purposes of RSA, even if skiers may not be wearing skis while boarding ski lift). *But see* ***Cooperman v. David***, 214 F.3d 1162 (10th Cir. 2000) (presenting testimony that saddle was not cinched tightly enough was not sufficient to create fact question).

Notably, where the danger in question is considered an inherent risk of the subject activity, it implicates the doctrine of primary assumption of risk, and the defendant cannot be liable to the plaintiff, "because there is no negligence on the part of the defendant to begin with; the danger is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence." ***Cooperman***, 214 F.3d at 1165 (quoting from Hansen & Doerr, "Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act-An Update," 33 Land & Water L.Rev. 249, 253 (1998), *cited in* ***Halpern***, 890 P.2d at 565). Although the Wyoming legislature has amended the Act more than once since *Halpern*, the Wyoming Supreme Court has reaffirmed that the RSA still invokes the doctrine of primary assumption of risk. ***Keller v. Merrick***, 955 P.2d 876 (Wyo.1998).

As noted previously, the RSA does not prevent those conducting activities subject pursuant to it from utilizing liability waivers. *See* ***Massengill***, 996 P.2d 1132 (Act did not foreclose invocation of contractual release or waiver for negligent conduct that is not released by assignment of inherent risk to person participating in sport or recreational opportunity); ***Street***, 75 F.Supp.2d 1296 (release unambiguously specified that rider waived negligence claims against operator for all injuries resulting from participation in the recreational activity).