Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron

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A release signed by a patron exempting the owner or operator of an amusement facility from liability may be enforceable provided that the form and language of the release are in a form which is conspicuous, legible, and recognizable by a reasonable person as a release from liability. In the absence of specific state statutes nullifying such releases, the courts have generally applied the rules of contract law to the interpretation of releases printed on tickets or other agreements purporting to exonerate owners and operators from liability for death or injury to patrons of amusement facilities. For example, in Huber v Hovey (1993, Iowa) 501 NW2d 53, 54 ALR5th 867, the plaintiff signed a release in order to enter the pit area of an automobile racetrack. The plaintiff was hit by a wheel. The court dismissed the plaintiff's attempts to prevent the effect of the release based on his failure to read it and the alleged ambiguity of the release, holding that failure to read a contract would not negate it and that the release was not ambiguous. This annotation collects and analyzes cases involving releases or other exculpatory agreements which have been used to defend against claims by patrons or their heirs for injury or death at amusement facilities.
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Mettler ex rel. Burnett v. Nellis, 2005 WI App 73, 280 Wis. 2d 753, 695 N.W.2d 861 (Ct. App. 2005) — 4[a]

Yauger v Skiing Enters. (1996) 206 Wis 2d 75, 557 NW2d 60 — 3[a], 5[a], 8

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Undefined Jurisdiction


§ 1[a] Introduction—Scope

This annotation[1] collects the cases in which operators of amusement facilities, including schools or those businesses providing instruction in various recreational pursuits, attempt, by agreement with the patron, to exempt themselves from liability for personal injury to the patron. Because the term "agreement" implies a contractual or quasi-contractual relationship between patron and proprietor, as in the purchase of a ticket or the signing of a membership agreement, cases have been omitted in which the only attempt on the part of the proprietor to limit his liability was the posting of a sign or signs stating that he would not be held responsible for injury to patrons, or that the customer assumed the risk. Not within the scope of this annotation are insurance contracts or indemnification provisions as between the lessor and lessee of the premises or facilities. Indemnification agreements, however, between lessors and lessees of equipment, vehicles, horses, and the like, used for sport or amusement purposes, are covered hereby. Also not within the scope of this annotation are contracts exempting owners/operators from liability to performers or participants during athletic events, races, or other contests. Releases signed by members of pit crews or mechanics at auto races are excluded unless it is apparent from the reported case that the pit crewman or mechanic paid an admission like an ordinary spectator. This annotation also does not discuss cases involving injury to spectators at athletic events, such as baseball, basketball, football, hockey, soccer, and the like. Cases which primarily focus on the applicability of state statutes which deny legal effect to exculpatory clauses are omitted.

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing upon this subject. Since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulat-
ory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Summary and comment—Generally

The owner or operator of an amusement facility may place reasonable conditions on the terms of admission to the facility.[2]

In general, courts have enforced exculpatory agreements between proprietors of amusement facilities and their patrons, so long as there is no statutory prohibition against such clauses, the facility is not providing an essential or public service, and there is not a great deal of disparity in bargaining power between the sellers and buyers of such amusements, as is the case in so-called adhesion contracts (§ 3). Exculpatory agreements are subject to the rules of contract interpretation, and, therefore, the language of the agreements is critical in determining their validity and applicability to particular circumstances. It has often been noted that exculpatory agreements are looked upon with disfavor by the law and therefore are strictly construed against the party seeking to be exonerated (§ 3–5). A number of courts have refused to enforce an exculpatory agreement which did not clearly state that it was intended to relieve the party proffering the release as a defense, from its own negligence (§ 4[a]). Many courts have enforced such clauses, however, even though the word "negligence" did not appear in the releasing document (§ 3[b]). Courts also have refused to uphold exculpatory agreements in some cases because of other reasons involving interpretation or validity (§ 4[c]).

The enforcement of some exculpatory agreements has turned upon whether the circumstances were considered to be within the contemplation of the parties at the time the agreement was entered into (§ 3[c], § 4[b]). The fact that a patron did not read the document he or she was signing has generally been to no avail provided there has been sufficient opportunity to read the document (§ 3–5). In several cases, releases have been held invalid based on inadequacy of notice to the patron (§ 8). While only one case has been found which characterizes an amusement facility as an essential public service,[3] in a number of cases courts have invalidated exculpatory clauses which violated the public policy of a statute enacted for public safety or due to considerations of unequal bargaining power, or because the clause was overly broad and sought to exonerate the defendant from gross negligence or willful misconduct (§ 5[a]). In other cases, public-policy exceptions to the enforcement of releases have been rejected (§ 5[b]).

In a number of cases, courts have refused to enforce exculpatory agreements exempting operators of amusement or recreational activities from liability for claims based upon gross negligence, willful acts, or strict liability (§ 6[b]), but other courts have given effect to releases in such cases (§ 6[a]). Unsigned agreements (§ 9) and agreements signed by others persons on behalf of the injured patron (§ 7) have been held ineffective.

§ 2[b] Summary and comment—Practice pointers

Because exculpatory agreements are strictly construed against the drafter, it is advisable for attorneys called upon to prepare an exculpatory agreement or release for a client who owns or operates an amusement facility to familiarize themselves with any rules of drafting or interpretation imposed in the state where the facility is loc-
ated. A specific statutory prohibition—for example, NY Gen Oblig Law § 5-346—may prevent or impede the use of exculpatory clauses for amusement facilities. As a general rule, a release should be conspicuous, legibly printed in large type, and easily understandable. Although not required in all states, a specific release from the facility operator's own negligence and references to the more commonly expected types of accident or injury inherent to the activity should be included. On the other hand, an overly broad release which might be construed to cover more than ordinary negligence is susceptible to attack in some jurisdictions, and for this reason, care in drafting is necessary. A severability clause to preserve some parts of an exculpatory agreement if one or more parts are invalidated is also advisable, since it might save an overly broad agreement from invalidation in total.

§ 3[a] Release or exculpatory agreement given effect—Generally

[Cumulative Supplement]

In the following cases, it was held or recognized that an agreement between a patron and the operator of an amusement device or facility exempting the latter from liability for ordinary negligence, resulting in personal injury or death, is valid and enforceable against the patron or his or her estate.

Valley Nat'l Bank v National Ass'n for Stock Car Auto Racing (1987, App) 153 Ariz 374, 736 P2d 1186

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Palmquist v Mercer (1954) 43 Cal 2d 92, 272 P2d 26

Hulsey v Elsinore Parachute Center (1985, 4th Dist) 168 Cal App 3d 333, 214 Cal Rptr 194, CCH Prod Liab Rep ¶10581

Coates v Newhall Land & Farming, Inc. (1987, 2nd Dist) 191 Cal App 3d 1, 236 Cal Rptr 181

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Kurashige v Indian Dunes, Inc. (1988, 2nd Dist) 200 Cal App 3d 606, 246 Cal Rptr 310, review den (Jun 8, 1988)

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Brooks v Timberline Tours (1996, DC Colo) 941 F Supp 959

Heil Valley Ranch, Inc. v Simkin (1989, Colo) 784 P2d 781

Jones v Dressel (1978) 40 Colo App 459, 582 P2d 1057, affd (Colo) 623 P2d 370

Fla

Gambino v Music TV (1996, MD Fla) 932 F Supp 1399, 10 FLW Fed D 91

Ga

Carrion v Smokey, Inc. (1982) 164 Ga App 790, 298 SE2d 584

Lovelace v Figure Salon, Inc. (1986) 179 Ga App 51, 345 SE2d 139

My Fair Lady, Inc. v Harris (1987) 185 Ga App 459, 364 SE2d 580

Day v Fantastic Fitness, Inc. (1989) 190 Ga App 46, 378 SE2d 166

Hembree v Johnson (1997) 224 Ga App 680, 482 SE2d 407, 97 Fulton County D R 622

Hawaii

Wheelock v Sport Kites (1993, DC Hawaii) 839 F Supp 730

Ill

Moore v Edmonds (1942) 316 Ill App 453, 45 NE2d 190, affd 384 Ill 535, 52 NE2d 216

Owen v Vic Tanny's Enterprises (1964, 1st Dist) 48 Ill App 2d 344, 199 NE2d 280, 8 ALR3d 1388 (criticized by Larsen v Vic Tanny International (5th Dist) 130 Ill App 3d 574, 85 Ill Dec 769, 474 NE2d 729)

Kubisen v Chicago Health Clubs (1979, 1st Dist) 69 Ill App 3d 463, 26 Ill Dec 420, 388 NE2d 44

Rudolph v Santa Fe Park Enterprises, Inc. (1984, 1st Dist) 122 Ill App 3d 372, 78 Ill Dec 38, 461 NE2d 622

Poskozim v Monnacep (1985, 1st Dist) 131 Ill App 3d 446, 86 Ill Dec 663, 475 NE2d 1042

Neumann v Gloria Marshall Figure Salon (1986, 2d Dist) 149 Ill App 3d 824, 102 Ill Dec 910, 500 NE2d 1011

Neumann v Gloria Marshall Figure Salon (1986, 2d Dist) 149 Ill App 3d 824, 102 Ill Dec 910, 500
NE2d 1011

Garrison v Combined Fitness Centre, Ltd. (1990, 1st Dist) 201 Ill App 3d 581, 147 Ill Dec 187, 559 NE2d 187

Bien v Fox Meadow Farms, Ltd. (1991, 2d Dist) 215 Ill App 3d 337, 158 Ill Dec 918, 574 NE2d 1311, app den 142 Ill 2d 651, 164 Ill Dec 914, 584 NE2d 126

Masciola v Chicago Metro. Ski Council (1993, 1st Dist) 257 Ill App 3d 313, 195 Ill Dec 603, 628 NE2d 1067

Ind

La Frenz v Lake County Fair Board (1977) 172 Ind App 389, 360 NE2d 605

Shumate v Lycan (1997, Ind App) 675 NE2d 749, transfer den (Jun 19, 1997)

Iowa

Huber v Hovey (1993, Iowa) 501 NW2d 53, 54 ALR5th 867

Md

Boucher v Riner (1986) 68 Md App 539, 514 A2d 485

Mass

Kushner v McGinnis (1935) 289 Mass 326, 194 NE 106, 97 ALR 578

Brennan v Ocean View Amusement Co. (1935) 289 Mass 587, 194 NE 911

O'Brien v Freeman (1937) 299 Mass 20, 11 NE2d 582


Cormier v Central Mass. Chapter of the Nat'l Safety Council (1993) 416 Mass 286, 620 NE2d 784, summary op at (Mass) 22 MLW 278

Mich


Minn

Schlobohm v Spa Petite, Inc. (1982, Minn) 326 NW2d 920

Malecha v St. Croix Valley Skydiving Club, Inc. (1986, Minn App) 392 NW2d 727

Mo

Vergano v Facility Management (1995, Mo App) 895 SW2d 126

NJ

Demarest v Palisades Realty & Amusement Co. (1925) 101 NJL 66, 127 A 536, 38 ALR 352, appeal after remand 5 NJ Misc 268, 136 A 337

NY

Ciofalo v Vic Tanney Gyms, Inc. (1961) 10 NY2d 294, 220 NYS2d 962, 177 NE2d 925 (superseded by statute as stated in Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107)[4]

Putzer v Vic-Tanny-Flatbush, Inc. (1964) 20 App Div 2d 821, 248 NYS2d 836

Franzek v Calspan Corp. (1980, 4th Dept) 78 App Div 2d 134, 434 NYS2d 288


Baschuk v Diver's Way Scuba, Inc. (1994, A D 2d) 209 A D 2d 369, 618 NYS2d 428

Chieco v Paramarketing, Inc. (1996, App Div, 2d Dept) 643 NYS2d 668

Ohio

Hine v Dayton Speedway Corp. (1969, Montgomery Co) 20 Ohio App 2d 185, 49 Ohio Ops 2d 249, 252 NE2d 648

Cain v Cleveland Parachute Training Center (1983, Geauga Co) 9 Ohio App 3d 27, 9 Ohio BR 28, 457 NE2d 1185

Finkler v Toledo Ski Club (1989, Lucas Co) 63 Ohio App 3d 11, 577 NE2d 1114, motion overr 46 Ohio St 3d 705, 545 NE2d 1283

Toth v Toledo Speedway (1989, Lucas Co) 65 Ohio App 3d 166, 583 NE2d 357

SD


Tenn

Moss v Fortune (1960) 207 Tenn 426, 340 SW2d 902

Buckner v Varner (1990, Tenn App) 793 SW2d 939, app den (June 11, 1990)

Tex


Vt

Szczotka v Snowridge, Inc. (1994, DC Vt) 869 F Supp 247 (applying Vt law)

Nishi v Mount Snow, Ltd. (1996, DC Vt) 935 F Supp 508, vacated, remanded, motion den 1997 WL 176825 (2nd Cir (Vt))

Wash

Hewitt v Miller (1974) 11 Wash App 72, 521 P2d 244, review den 84 Wash 2d 1007

Blide v Rainier Mountaineering, Inc. (1981) 30 Wash App 571, 636 P2d 492, review den 96 Wash 2d 1027

Wis

Yauger v Skiing Enters. (1996) 206 Wis 2d 75, 557 NW2d 60

Wyo

Schutkowski v Carey (1986, Wyo) 725 P2d 1057

Distinguishing between implied and express assumption of risk, the court in Allan v Snow Summit, Inc. (1996, 4th Dist) 51 Cal App 4th 1358, 59 Cal Rptr 2d 813, 97 CDOS 13, 97 Daily Journal DAR 9, upheld summary judgment for the defendant ski resort based upon a signed release. The plaintiff received back injuries as a result of falls which occurred during a ski lesson with a ski instructor employed by the defendant. Prior to beginning ski lessons, the plaintiff signed a release by which he expressly assumed the risk of falls from skiing and released the defendant from liability and agreed not to sue for injuries caused by the alleged negligence of the
The plaintiff fell numerous times when encouraged by the instructor to leave the beginner's area and to ski from the "top of the mountain." Finding that summary judgment was proper based upon the release, the court rejected the plaintiff's contentions that the student-instructor relationship involved a "secondary assumption of risk" in which a duty of care was owed to the plaintiff. The court said the defendant only owed a duty to the defendant not to increase the risks inherent in the sport and that the distinction between primary and secondary assumption of risk was not applicable where there was an express assumption of risk, as contained in the release. The court also rejected the plaintiff's contentions that the release violated public policy, was an adhesion contract affecting the public interest, and was unconscionable.

Citing the general rule in Colorado, that in the absence of a duty to the public, fairly made exculpatory agreements would be enforced, the court in Jones v Dressel (1978) 40 Colo App 459, 582 P2d 1057, affd (Colo) 623 P2d 370, applied the rule to a suit for injuries which the plaintiff incurred in an airplane crash preparatory to a parachute jump. The plaintiff had signed a contract with the defendant for parachute jumping services, while he was still a minor, which released the defendants from any and all liability while participating in the activities contemplated by the agreement. The court found that the plaintiff had ratified the agreement after reaching the age of majority and that the agreement could not be considered an unenforceable adhesion contract because there was not a great disparity in bargaining power, and the services could have been obtained elsewhere. Since the release specifically covered injury while in the defendant's airplane, the court found the agreement express, unequivocal, and therefore enforceable.

The appeals court in Deboer v Florida Offroaders Driver's Ass'n (1993, Fla App D5) 622 So 2d 1134, 18 FLW D 1805, determined that the trial court had properly granted summary judgment to the defendant promoters and given effect to a release signed by an off-road automobile race spectator in an action by the spectator's estate. The court determined that the release signed by the spectator as a condition of admission to the racing facility was unambiguous and gave ample notice that the spectators assumed the obvious risks of attendance at auto races and that the release extended to the decedent's act of walking across the racetrack during the event and being struck and killed by a race car. The court emphasized the obvious risk taken by the spectator when she entered a restricted area, for example, the surface of the race course.

In Day v Fantastic Fitness, Inc. (1989) 190 Ga App 46, 378 SE2d 166, the court rejected the plaintiff's contention that because she canceled her membership after the accident (slipping and falling while exiting a shower stall) and obtained a refund of her membership fee, the exculpatory clause in her membership agreement would be treated as if it never existed. The court said that termination of a contract canceled further transactions thereunder, but obligations, such as the release, which had previously accrued, would not be affected. The plaintiff could not change the terms of the contract by canceling it, according to the court, which stated the rule thus: "[O]nce a known right, benefit, or advantage has been waived, it cannot be reclaimed."

In Kubisen v Chicago Health Clubs (1979, 1st Dist) 69 Ill App 3d 463, 26 Ill Dec 420, 388 NE2d 44, the plaintiff sustained injuries when she fell in the steam room of the defendant's athletic club. Upon joining the club, the plaintiff had signed a retail installment contract which contained an exculpatory clause releasing the defendant from injuries sustained as a result of using the facilities. The plaintiff appealed from a summary judgment in favor of the defendant, alleging that there was an issue of fact as to whether the plaintiff had notice or knowledge of the exculpatory clause which was printed on the back of the agreement. The court said, however, that the plaintiff had not previously asserted a lack of knowledge as to the existence of the exculpatory clause in its answer to the complaint or in other documents. The court said that it would not presume that the defendant was unaware of the clause merely because it appeared on the back of the agreement. Further, the court noted that there was a reference on the front page of the agreement to the terms contained on the reverse side. The court also rejected the plaintiff's due-process claim and her argument that there was a great disparity of bargaining power between her and the defendant, as unsupported by the facts. Finally, the court said that a provision of
state law which voided exculpatory agreements in favor of lessors did not evince an intent to void all exculpatory clauses, because if that were the legislature's intention, it would have so stated.

Finding fraud neither in the inducement nor in the execution, the appeals court affirmed the lower court's summary judgment for the defendant owner of the racetrack and its agents, in Rudolph v Santa Fe Park Enterprises, Inc. (1984, 1st Dist) 122 Ill App 3d 372, 78 Ill Dec 38, 461 NE2d 622. In that case, the plaintiff had signed an exculpatory agreement before being allowed entry to the infield area of the automobile racetrack where he was struck by a vehicle. The plaintiff had signed the same form several times before the day of the accident but nevertheless advanced various reasons to set aside the agreement, such as not reading or not knowing what he was signing. The court said, however, that the release was conspicuously titled "waiver and release" and that none of the proffered reasons would support the allegations of fraud.

In Huber v Hovey (1993, Iowa) 501 NW2d 53, 54 ALR5th 867, the court found no facts which indicated that the accident was so unusual as to justify a belief that the plaintiff was not aware of the risk at the time he signed the release. The plaintiff paid a $10 admission fee and signed a printed form which was captioned, "Release and Waiver of Liability and Indemnity Agreement," in order to enter the pit area of an automobile racetrack. The form explicitly released the track owner and others from liability for injuries incurred in a "restricted area" even if caused by the negligence of the owner or the others released. The plaintiff signed the form without reading it. The plaintiff entered the pit area and was hit by a wheel which was lost by one of the race cars. The court dismissed the plaintiff's attempts to prevent the effect of the release based on his failure to read it and the alleged ambiguity of the release, holding that failure to read a contract would not negate it and that the release was not ambiguous. The plaintiff also alleged that he was not knowledgeable about the risks of entering the pit area and that the release should be valid only if he were informed about the risk or if he were a participant and therefore presumed knowledgeable. The court stated that unless the plaintiff could show that the risk was so unusual or exceptional as to raise a fact issue as to whether he was truly aware of the risk, then the plaintiff would be bound by the release. The court found that detached wheels had hit the fence in the past, though none had gone through same. Apparently, this was sufficient proof for the court to find that the risk was not so unusual or exceptional as to nullify the release.

Sustaining the defendant's objections to a judgment which awarded the plaintiff damages for injuries sustained when he was struck by a wheel which had become detached from a racing car at a speedway, the court in Lee v Allied Sports Associates, Inc. (1965, Mass) 209 NE2d 329, held that a release signed by the plaintiff as a condition precedent to entering the pits at the speedway operated as a matter of law to bar his claim. The plaintiff's failure to read the release could not prevent its effects, in the absence of fraud or duress, said the court.

In an action by a sprint car owner with only a second- or third-grade reading ability, against the racetrack owner and the promoter of the racing event for injuries sustained when the car owner was struck by his own race car, the court in Haines v St. Charles Speedway, Inc. (1989, CA8 Mo) 874 F2d 572 (applying Mo law), held that the release signed by the race car owner before the defendants allowed him to enter the infield of the racetrack was an enforceable contract of adhesion. The appellate court sustained the District Court's summary judgment for the defendants because the race car owner was familiar with the risks of car racing, including the possibility of injury in the infield, his signing of the release was not a product of duress, a reasonable person would have understood the significance of the release, and the release was not ambiguous and did not purport to exempt the defendants from liability for gross negligence and, therefore, was not overly broad.

In Ciofalo v Vic Tanney Gyms, Inc. (1961) 10 NY2d 294, 220 NYS2d 962, 177 NE2d 925 (superseded by statute as stated in Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107),[5] the court held that in an action for personal injuries sustained from a fall at the edge of a swimming pool on the plaintiff's premises, which the plaintiff alleged was a result of the defendant's negligence, a clause in the plaintiff's membership con-
tract wherein she agreed to assume full responsibility for injuries to herself on or about the defendant's premises, including any claims arising from the defendant's negligence, constituted a valid affirmative defense. Stating the general principle that exculpatory provisions in contracts, though closely scrutinized, are enforceable if there is no special legal relationship between the parties (such as employer-employee), and no overriding public interest (such as common carrier-passenger situations), the court held further that where the parties express their intentions in clear and unequivocal language, a provision which absolves a party from liability for his negligence is valid. The court emphasized the voluntary nature of the contracting relationship, stating that the defendant, a private corporation, had no duty to accept the plaintiff as a patron, nor was the plaintiff required to assent to unacceptable terms. As a result, the court continued, plaintiff's voluntary acceptance of the terms upon which her membership was granted in the defendant's organization would operate to insulate the defendant from liability.

A release contained in a club-membership application which had not yet been renewed at the time of the accident in which the plaintiff drowned was upheld in Finkler v Toledo Ski Club (1989, Lucas Co) 63 Ohio App 3d 11, 577 NE2d 1114, motion overr 46 Ohio St 3d 705, 545 NE2d 1283. The plaintiff drowned on a canoe trip sponsored by the defendant club approximately one and one-half months after the plaintiff's one-year term of membership had expired. The evidence was that the plaintiff was a dues-paying member of the club at the time of the accident and that the completion of a renewal application was a mere formality and that payment of the dues renewed the contract of membership. The appeals court therefore upheld the dismissal of the plaintiff's case on the basis of the clearly stated release contained within the original membership application.

In Moss v Fortune (1960) 207 Tenn 426, 340 SW2d 902, the court held that the plaintiff, by signing a written agreement that he assumed the risk upon hiring and riding a horse from the defendant's stable, was prohibited from suing for personal injuries resulting from the negligence of the defendant. Affirming a judgment dismissing the action, the court held that since the plaintiff had actual knowledge of the terms of the agreement which he signed, his suit was barred, stating the general holding in Tennessee that parties may contract that one shall not be liable to another for his negligence.

In Szczotka v Snowridge, Inc. (1994, DC Vt) 869 F Supp 247 (applying Vt law), the court rejected the plaintiff's argument that the release signed by a ski resort patron as a condition of equipment rental should be invalidated because of the public policy against exempting parties charged with duties of public service from tort liability. The court found that the ski resort was not a public service within the meaning of the rule prohibiting a public-service provider from disclaiming liability. The court found the release effective in barring the resort operator's liability for its alleged negligence in selecting and fitting equipment, even though the law disfavored exculpatory agreements, since the release was unambiguous, and the conditions of the patron's injury were within the terms of the release.

CUMULATIVE SUPPLEMENT

Cases:

Under Colorado law, mother's release of her developmentally disabled blind child's prospective negligence claim against nonprofit corporation that sponsored ski trip for disabled skiers was "voluntary and informed," since mother had sufficient notice and knowledge of activities that her daughter would be participating in and was aware of the associated risks; mother was informed of Colorado location where child would be skiing, she had been advised that child would be seated when skiing and that instructor would use guide ropes to steer skiers down mountain, release specifically referred to outdoor activities and associated risks, it was clearly identified as a waiver and release of liability, release was accompanied by a cover letter that explained risks involved with ski lessons, including possibility of serious injury and even death, and prior to signing release mother had made inquiries about the forms and the child's trip. West's C.R.S.A. § 13–22–107(1)(a)(V). Squires ex rel. Squires v.
Record indicated that horseback rider was given sufficient time to read and understand release before signing it, such that the release could support riding stable operator's statutory immunity from ordinary negligence liability for injuries subsequently sustained by rider when she was thrown from a horse; rider never indicated before beginning her ride that she did not have time to read the release or that she did not understand it, and record reflected that rider joked about parts of the release with her companion and thought it "wasn't a big deal." A.R.S. § 12–553, subd. A, par. 2. Lindsay v. Cave Creek Outfitters, L.L.C., 88 P.3d 557 (Ariz. Ct. App. Div. 1 2003), review denied, (Apr. 19, 2004).

Statutory definition of "release," found in statute limiting the liability of equine owners for injury or death of equine rider if rider signed a release, did not limit riding stable operator's immunity to injuries arising from the inherent risks of activities related to horseback riding, and thus release signed by horseback rider immunizing stable operator from all claims of negligence supported operator's statutory immunity from negligence liability for injuries sustained by rider, although statutory definition of "release" required only an acknowledgement that signor was aware of inherent risks of horseback riding. A.R.S. § 12–553, subds. A, par. 2, E, par. 2. Lindsay v. Cave Creek Outfitters, L.L.C., 77 P.3d 47 (Ariz. Ct. App. Div. 1 2003).

Under California law, to be effective, a release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties; the release need not achieve perfection. Wallace v. Busch Entertainment Corp., 837 F. Supp. 2d 1093 (S.D. Cal. 2011) (applying California law).

Under Connecticut law, as predicted by District Court, waiver signed by climbing gym patron releasing gym owner from liability arising from its negligence was valid and enforceable, where the exculpatory clause clearly and expressly purported to absolve owner of liability resulting from its own negligence. Delk v. Go Vertical, Inc., 303 F. Supp. 2d 94 (D. Conn. 2004) (applying Connecticut law).

Waiver provision contained in health club's membership agreement clearly and unequivocally released health club from liability for its own negligent acts, and thus exculpatory clause was enforceable in members' negligence action against health club. Shaw v. Premier Health and Fitness Center, Inc., 937 So. 2d 1204 (Fla. Dist. Ct. App. 1st Dist. 2006).

Although Minnesota law recognizes the validity of exculpatory clauses, such clauses are generally disfavored, and thus, courts strictly construe exculpatory clauses against the party who benefits from the clause. Whyte v. American Bd. of Physical Medicine and Rehabilitation, 393 F. Supp. 2d 880 (D. Minn. 2005) (applying Minnesota law).

Exculpatory agreement signed by horseback rider releasing ride operator from liability for ordinary negligence was enforceable since exculpatory agreement was neither overbroad nor ambiguous in scope, nor did it purport to release operator from greater than ordinary negligence, for purposes of negligence action brought against operator by rider who was injured during horseback trail ride. Beehner v. Cragun Corp., 636 N.W.2d 821 (Minn. Ct. App. 2001).

Although snowboarder, who was injured when she was involved in a collision with a snowmobile operated by employee of the ski resort, was required to sign the application and liability release agreement before obtaining her season ski pass, she was under no physical or economic compulsion to do so, and resort's service was not an essential service, so there was no advantage in bargaining strength in that regard, and therefore, there was no disparity in bargaining power, and release agreement would be enforced. McGrath v. SNH Development, Inc., 969 A.2d 392 (N.H. 2009).

Liability release for personal injury sufficiently and clearly expressed intent of parties that patron of lodge would not hold lodge liable for its negligent acts, and thus, release was not unenforceable for ambiguity or inconspicuousness, even though release contained language that one would not expect laypersons to understand, where it clearly stated that patron relieved the lodge from all liability for injury resulting from the negligent act.

Under New York law, scuba diving school and deep sea expedition company were not subject to statute prohibiting owners of recreational facilities from exonerating themselves from liability for their own negligence, and thus liability release and express assumption of risk agreements signed by scuba diver in connection with trip to explore shipwreck were enforceable, even though trip during which diver died had recreational aspects, where school and company provided instructional services, and diver was at site of shipwreck primarily to practice his deep sea diving techniques under close guidance and direction of his diving instructor so that he could obtain his diver certification card. N.Y. McKinney's General Obligations Law § 5–326. Murley ex rel. Estate of Murley v. Deep Explorers, Inc., 281 F. Supp. 2d 580 (E.D. N.Y. 2003) (applying New York law).

Stable was a "recreational facility," rather than an instructional facility, so that release purporting to hold stable harmless from liability arising from use of horses or equipment was void, under New York statute voiding releases from liability for recreational facilities, and thus, release did not bar minor horseback rider from recovery, in personal injury action against stable; although stable provided some instruction in horseback riding, and rider was receiving some instruction at the time of her injury, stable was part of vacation resort in which riding instruction was one of options available, rider was not at the stable for the sole purpose of receiving riding instructions, but was on vacation with her family and riding was one of many recreational activities. N.Y.McKinney's General Obligations Law § 5–326. Applbaum ex rel. Applbaum v. Golden Acres Farm and Ranch, 333 F. Supp. 2d 31 (N.D. N.Y. 2004) (applying New York law).

Participant in high-performance automobile driving school was not a "user" of racetrack within meaning of section of New York General Obligations Law providing that exculpatory clauses in admission tickets for places of amusement or recreation were unenforceable; thus, release signed by participant precluded imposition of liability against racetrack, sponsor of driving school and other defendants for injuries sustained by participant in automobile collision. N.Y. McKinney's General Obligations Law § 5-326. Lux v. Cox, 32 F. Supp. 2d 92, 43 Fed. R. Serv. 3d 546 (W.D. N.Y. 1998) (applying New York law).

Under Pennsylvania law, risk that chair on chair lift would not have seat in place was a risk inherent in sport of downhill skiing, and thus, it was covered by ski area patron's release of liability as to inherent risks of skiing, including use of lifts, in rental agreement pursuant to which patron rented ski equipment. Savarese v. Camelback Ski Corp., 417 F. Supp. 2d 663 (M.D. Pa. 2005) (applying Pennsylvania law).

In order for exculpatory language to be enforceable: (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention 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. Tayar v. Camelback Ski Corp., Inc., 47 A.3d 1190 (Pa. 2012).

Release signed, before being allowed to participate, by patron who was injured while participating in paintball game was sufficient to release indoor playground from all liability in this incident; release explicitly and unambiguously limited playground's liability, release was voluntarily signed and specifically stated that patron assumed the risks, whether known or unknown, and that she released playground from liability even from injuries sustained because of playground's own negligence, release did not contravene public policy, release was neither ambiguous nor overbroad, and release did not preclude recovery for a cause of action involving gross negligence. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 612 S.E.2d 462 (S.C. Ct. App. 2005).

Waiver and release provisions in contract customer signed with health club which provided that health club was not liable for ordinary negligence was conspicuous and enforceable, where several lines above customer's signature agreement in bold type warned customer not to sign agreement before he read it, immediately below
customer's signature agreement stated in bold and capital letters that agreement contained a waiver and release, and paragraph on waiver and release in agreement discussed only customer's agreement to release health club from liability for its negligence. Stokes v. Bally's Pacwest, Inc., 54 P.3d 161 (Wash. Ct. App. Div. 1 2002).

[Top of Section]

[END OF SUPPLEMENT]

§ 3[b] Release or exculpatory agreement given effect—Language of agreement deemed sufficient for valid and binding release

[Cumulative Supplement]

In the cases that follow, the courts specifically discussed the wording of the agreements purporting to release or exonerate the owner/operator of an amusement facility and determined that the language was sufficient to indemnify the owner/operator from liability for its own negligence but did not otherwise violate principles of contract drafting to such an extent as to negate validity.

In Powers v Superior Court (1987, 3rd Dist) 196 Cal App 3d 318, 242 Cal Rptr 55, the appeals court considered the effect of the plaintiff's signing of two separate releases in connection with the rental of an ultra-light aircraft prior to her first solo flight. The aircraft's engine failed, causing a crash and injuries to the plaintiff. The court found that both release agreements were clearly written, easily legible, and specifically phrased. The fact that the agreements contained two somewhat different exculpatory clauses, which did not conflict, did not create any ambiguity, according to the court.

The death of a scuba-diving student who was left alone by his instructor and drowned was the subject of Madison v Superior Court (1988, 2nd Dist) 203 Cal App 3d 589, 250 Cal Rptr 299, opinion modified (Sep 01, 1988), review denied (Oct 13, 1988). In that case, the court refused to nullify a release which reiterated in bold type, after other exculpatory language, that it was the intention of the student to exempt and relieve the defendants from "liability for personal injury, property damage or wrongful death caused by negligence." The court said that although the words "assumption of risk" were not used, it was clear that the student had expressed the intent to assume all risk, even those risks of which he had no specific knowledge at the time he signed the release. The court also stated that scuba-diving instruction did not involve a public interest and that the alleged act of negligence was reasonably related to the purpose for which the release was given.

In Saenz v Whitewater Voyages, Inc. (1990, 1st Dist) 226 Cal App 3d 758, 276 Cal Rptr 672, 91 CDOS 165, 91 Daily Journal DAR 170, review den (Mar 21, 1991), the decedent signed a release before embarking on a whitewater-rafting trip, guided by the defendant. Near the end of the trip, the decedent fell out of a raft and drowned. The court said that although the release used "hold harmless" rather than "releasing" language, did not explicitly mention the defendant's negligence, and did not mention death or drowning, these "imperfections" did not render the release ambiguous. The court said that the message was conveyed by the release that the releaser assumed all risks on the trip and relieved the defendant from any liability except for gross negligence and that, therefore, a specific reference to ordinary negligence was unnecessary.

In Heil Valley Ranch, Inc. v Simkin (1989, Colo) 784 P2d 781, the plaintiff was injured when a horse rented to the plaintiff by the defendant ranch reared up and fell upon her. The plaintiff had signed a release prior to mounting the horse. The Colorado Supreme Court reversed the lower appellate court and reinstated the District Court's judgment in favor of the defendant based upon the release signed by the plaintiff, finding that same was clear and unambiguous and that a release did not have to use the word "negligence" in order to be effective. The court reasoned that the agreement was written in clear and simple terms, free from legal jargon, and was apparently understood by the plaintiff. The release noted that a horse may act unpredictably, which is an inherent risk.
assumed in horseback riding. The court said that this adequately described the circumstances of the plaintiff’s injury. The court also noted that the plaintiff was an experienced rider, and it should have been foreseeable to her that the horse could rear and injure her. The majority opinion indicated that to interpret the agreement in any way other than as excusing the defendant's negligence would render the agreement meaningless.[6]

In Gambino v Music TV (1996, MD Fla) 932 F Supp 1399, 10 FLW Fed D 91, (applying Florida law), the plaintiff was injured in a fall from monkey bars which were part of an obstacle course, while participating in a sports festival sponsored and organized by the defendant. The registration form signed by the plaintiff contained an exculpatory clause. The court granted summary judgment for the defendant because the clause clearly stated that the participant assumed all risks, including falls, and the plaintiff released the sponsors from all liabilities of any kind which might arise from the defendant's negligence or carelessness.

In Wheelock v Sport Kites (1993, DC Hawaii) 839 F Supp 730, applying Hawaiian law, the court found the release signed by a decedent prior to paragliding to be unambiguous and enforceable as to the defendant's negligence, but void insofar as it concerned claims of gross negligence and strict liability. The plaintiff's husband was killed while paragliding when the lines connecting him to the canopy broke and he fell to the ground. The decedent had signed a release purporting to exonerate the owner of the premises and others from liability caused by the negligence of the released parties and assumed all risk of death or injury while paragliding. The court construed the release agreement as an adhesion contract, but nevertheless enforceable, because it clearly stated that the decedent assumed the risk of death, and the cause, equipment failure, was an obvious risk in the sport of paragliding. The court also determined that the existence of a confusing clause in the agreement concerning the purchase of a waiver of contractual defenses did not invalidate the release, because, taken as a whole, the contract was unambiguous.

In Neumann v Gloria Marshall Figure Salon (1986, 2d Dist) 149 Ill App 3d 824, 102 Ill Dec 910, 500 NE2d 1011, the patron of the health salon signed a contract which provided that she assumed all risks of injury while using the equipment or facilities and waived all claims against the salon, its owners, and employees. The plaintiff claimed she suffered a back injury which required surgery after using one of the defendant's exercise machines, with the assistance of a salon employee. Although she experienced pain while using the machine, she continued to stay on the machine in order to complete the exercise. The court determined that the language of the release was not ambiguous since it specifically mentioned "injury while using any equipment."

In Falkner v Hinckley Parachute Center, Inc. (1989, 2d Dist) 178 Ill App 3d 597, 127 Ill Dec 859, 533 NE2d 941, a wrongful-death action by the administrator of the estate of a deceased parachute student against the parachute school, the deceased student had signed an exculpatory training agreement exempting the school from "any and all liability claims, demands or causes of action whatsoever arising out of any damage, loss or injury. ..." The exculpatory agreement was enforced because the agreement was not against the settled public policy of the state, and the agreement constituted an express assumption of risk insofar as the deceased expressly consented to relieve the parachute school of an obligation of conduct otherwise owed to him. The court said that the accident was within the scope of the broadly worded exculpatory agreement which expressly relieved the school from liability for any of the activities contemplated by the agreement, including injury resulting from the negligence of the school. However, an exculpatory clause was said to be void and against public policy insofar as it was asserted as a bar to liability for willful or wanton misconduct. The court therefore reversed the lower court's summary judgment insofar as the plaintiff alleged acts by the defendant which could be considered willful and wanton.

A release executed by a health-club patron was held to apply to a claim of inadequate training of staff with regard to the heart attack suffered by the patron in Skotak v Vic Tanny Int'l (1994) 203 Mich App 616, 513 NW2d 428, app den 447 Mich 970, 523 NW2d 632. The plaintiff surviving spouse sued the defendant as a result of the fatal heart attack suffered by her husband while sitting in the defendant's steam room. The plaintiff al-
leged that the defendant's employees were not adequately trained to respond to such emergencies. The court held, however, that the exculpatory clause in the membership contract which released the defendant from "any and all claims, demands, causes of action … arising out of the Member's … use of the … facilities" clearly expressed the defendant's intention to disclaim all negligence, including its own. The court said that the danger of negligent training of staff was just as foreseeable as a slip-and-fall injury.

In Malecha v St. Croix Valley Skydiving Club, Inc. (1986, Minn App) 392 NW2d 727, the court found the language of the release at issue to be unambiguous and found that despite the mere fact that parachute jumping was the subject of some federal regulation, it was not the type of activity generally thought suitable for public regulation, such as services provided by common carriers, hospitals, and the like. The plaintiff was injured in his first jump after receiving instructions from the defendant. The release exonerated the defendant from "negligence implied or otherwise." The court said that while the release was unnecessarily wordy, it was subject to only one interpretation, and that although it could be construed to extend beyond acts of negligence, it did not exonerate the defendant specifically for intentional or willful and wanton acts and was therefore valid.

Determining that a release did not have to specifically use the word "negligence," the court in Hine v Dayton Speedway Corp. (1969, Montgomery Co) 20 Ohio App 2d 185, 49 Ohio Ops 2d 249, 252 NE2d 648, upheld the validity of a release signed by an owner of a race car who was struck by another race car in the pit area. The court did not find any evidence of wanton misconduct on the part of the racetrack owner/operator or racing association which sponsored the event. The court emphasized that the release encompassed all causes of action and released the defendants from all liability for injuries. Accordingly, it was not necessary to use the word "negligence" when the intent of the parties was so clearly expressed.

In Swartzentruber v Wee-K Corp. (1997, Ohio App 4 Dist) 1997 WL 28537, the court held that the agreement in question was unambiguous and construed it to release a riding stable from all liability for its negligent acts. The plaintiff rented both a horse and riding equipment from the defendant and then went riding, whereupon she was thrown from her horse and sustained injuries. She brought an action alleging that the defendant had been negligent in selecting an appropriate horse, in providing the appropriate equipment, and in designating an appropriate trail for her to ride. It was further averred that the defendant's actions were "willful, wanton, and malicious." The defendant asserted that the release signed by the plaintiff barred her from any recovery. The plaintiff contended that the release was vague and overbroad, and thus unenforceable. The court stated that as a general rule, exculpatory provisions in contracts are to be strictly construed so as not to relieve one from liability for his own negligence unless it is "expressed in clear and unequivocal terms." The court noted that the operative sentence in the exculpatory provision stated that the horseback rider "hereby releases and all others associated with it, from any and all claims[,] … actions and causes of action of every kind and nature which he/she … might have arising out of any and all personal injuries. …" Acknowledging that this sentence did not expressly use the term "negligence," the court said that nevertheless, it is difficult to construe a release "from any and all claims" that arise "out of any and all personal injur[y]" as anything but a release of liability for negligence. The court also conceded that the sentence failed to expressly specify who was being released from "all claims" of personal injury; however, it deemed it obvious that the defendant was the party being referred to in this provision. Construing the agreement as a whole, the court found that it sufficiently provided for the release of the defendant from liability for its own negligence. The court pointed out, however, that even a valid and enforceable exculpatory contract would not relieve the defendant from liability for willful or wanton misconduct. Noting that one of the plaintiff's claims alleged "willful, wanton, and malicious" misconduct, the court ruled that it was clearly error for the trial court to enter summary judgment for the defendant on this claim and remanded the matter for further proceedings.

In Weiner v Mt. Airy Lodge, Inc. (1989, MD Pa) 719 F Supp 342, the court considered an exculpatory clause which released the resort ski lodge as a renter of ski equipment "from any liability for damage and injury
to myself or to any person or property resulting from the use of this equipment. ..." The court upheld summary judgment for the defendant ski lodge in a suit by a ski student who fell and sustained injuries, insofar as the plaintiff’s complaint related to the use of the rented ski equipment. The court declined, however, to exonerate the defendant for the plaintiff’s claim relating to improper selection of the ski slope and faulty skiing instruction and for a strict-liability claim for improper maintenance, assembly, fit, and the like of the equipment.

Finding that a release from "any liability" included negligent conduct, the court in Zimmer v Mitchell & Ness (1978) 253 Pa Super 474, 385 A2d 437, affd 490 Pa 428, 416 A2d 1010, upheld a finding of summary judgment for the defendant ski rental shop. The plaintiff was a novice skier who rented equipment from the defendant and signed a rental agreement which contained an exculpatory clause and warning that bindings may not always release under all circumstances. The plaintiff was injured in a fall when the bindings on his skis did not release. The court emphasized that the rental agreement, while not indicating that it was a release in its title, did clearly indicate the plaintiff’s intent to exculpate the ski shop by placing "full responsibility for any and all 85 damage and injury" on the renter of the equipment. The court said that the absence of the word "negligence" was not fatal to the defense and that the release from "any liability 85 resulting from use of the equipment" was sufficient.

In Nishi v Mount Snow, Ltd. (1996, DC Vt) 935 F Supp 508, vacated, remanded, motion den 1997 WL 176825 (2nd Cir (Vt)), the court upheld a release signed by an entrant in a bicycle race for injuries sustained when he was "clotheslined" by a rope strung across the bicycle course, after the race, when the plaintiff rode his bike on the defendant's race course on his way back to a location near his parked vehicle. The release was for the benefit of the defendant bicycle association as a requirement of membership and specifically mentioned the defendant's negligence and included travel to and from racing or sporting events, regardless of whether as a rider, team member, or spectator. The court found the plaintiff's argument that it was inapplicable because the accident did not occur during a race to be unavailing, because of the specific unambiguous language which covered the type of negligence alleged and travel after the race.

In Hewitt v Miller (1974) 11 Wash App 72, 521 P2d 244, review den 84 Wash 2d 1007, an action for the wrongful death of a scuba-diving student who failed to surface after a dive, the release was found to be valid and barred recovery where, by signing the release, the decedent acknowledged the possibility of his own death from the "inherent dangers" of scuba diving and agreed that the school and its instructors were not to be deemed guardians of his safety. The language of the release form was found to be so conspicuous that reasonable persons could not reach different conclusions on the question whether the decedent had unwittingly signed the document.

In Craig v Lake Shore Athletic Club, Inc. (1997, Wash App Div 3) 1997 WL 305228, an action by a 73-year-old man who was injured at an athletic club while using a piece of exercise equipment, the court held that the release signed by the plaintiff was sufficiently conspicuous and comprehensive to cover his claim. The plaintiff sued the club for negligence, alleging that the club had failed to properly anchor the equipment to the floor, had failed to post warning signs describing the inherent risks associated with normal use of the equipment, and had placed the equipment too close to other exercise equipment. Addressing the plaintiff’s contention that the language of the release was not sufficient to cover claims related to defective equipment, the court pointed out that the release clearly stated the plaintiff’s intent to "waive and release" the club from "all … claims for damages … for any and all injuries suffered … while … participating in Lake Shore Athletic Club's exercise classes and fitness programs." An injury arising from defectively installed exercise equipment is not a calamity unrelated to the club’s exercise program, the court said, adding that although the plaintiff may not have contemplated this specific risk when he signed the waiver, the language of the waiver encompassed risks such as this that are an integral part of the exercise program. Further finding that the waiver was not so inconspicuous as to be unenforceable, the court affirmed the judgment in favor of the club.
In Krazek v Mountain River Tours, Inc. (1989, CA4 W Va) 884 F2d 163, reh den, en banc (Oct 02, 1989), the federal appeals court, applying West Virginia law, found that a document signed by a patron of a whitewater-rafting tour was valid and enforceable even though it did not specifically exonerate the defendant from its own negligent acts in those words. The court said that the waiver of "any claim of any kind or nature whatsoever," was sufficient to waive a negligence action.

A release by a skydiving student who was injured on her first jump was upheld in Schutkowski v Carey (1986, Wyo) 725 P2d 1057. Considering all of the language of the exculpatory agreement as a whole, the court said that the party's intent to release the skydiving school and its employees from liability for negligence was clear. The court emphasized the fact that the release discharged the defendants from "any and all claims … both in law and in equity … and in any way resulting from personal injuries. …"

CUMULATIVE SUPPLEMENT

Cases:

Release patron signed before taking part in bungee cord trampoline jumping at amusement park was enforceable under California law, and therefore, precluded his negligence claims against park after he was injured; release was clear, unambiguous and explicit, and release clearly expressed intent to release park from all personal injury claims, except gross negligence, resulting from bungee cord trampoline activities. Wallace v. Busch Entertainment Corp., 837 F. Supp. 2d 1093 (S.D. Cal. 2011) (applying California law).

Under Florida law, while waivers are generally disfavored and will be construed strictly, exculpatory clauses are enforceable where the intention to be relieved was made clear and unequivocal in the contract, and the wording is so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away. Mayfield v. National Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369 (4th Cir. 2012) (applying Florida law).

Racing association's liability release that released a large group of individuals from all liability, even when caused by the negligence of the released parties, and that provided an acknowledgement that activities of events were very dangerous, was enforceable to release association and promoter from liability for racing participants' injuries when fireworks exploded in pit area, even though participants may not have known about fireworks, where release required the signer to continuously inspect the restricted areas and leave such areas if he felt unsafe, and release identified released parties. Grabill v. Adams County Fair and Racing Ass'n, 666 N.W.2d 592 (Iowa 2003).

Exculpatory clause in release document providing that skier would accept all risks inherent to skiing, including use of lifts, and that skier would not sue ski resort if injured regardless of any negligence on part of resort or its employees, was valid and enforceable so as to bar skier's negligence action against resort arising out of skier's fall from ski lift, notwithstanding skier's arguments that term "negligence" was not defined or illustrated in release such that release was adhesion contract; document was entitled "release from liability" and language regarding release of liability was clearly visible, release related to private affairs of skier's voluntary use of resort's facilities, skier was under no compulsion to participate in skiing, and skier did not attempt to negotiate terms of release. Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174 (Pa. 2010).

Release signed by skier before receiving discount ski pass was not inconspicuous, which would render the release void, and thus skier could not maintain personal injury action against ski company, although skier claimed he did not have time to read the agreement, where release, entitled "Liability release & promise not to sue," was not hidden, words "release" and "hold harmless and indemnify" were set off in capital letters throughout agreement, release contained language above signature line indicating signer read and understood agreement, and no one was rushed to sign the document. Chauvlier v. Booth Creek Ski Holdings, Inc., 35 P.3d
§ 3[c] Release or exculpatory agreement given effect—Injury within the contemplation of parties

The following cases determined that the type of injury involved was sufficiently foreseeable or actually contemplated so as to be within the scope of the release sought to be enforced.

Coates v Newhall Land & Farming, Inc. (1987, 2nd Dist) 191 Cal App 3d 1, 236 Cal Rptr 181, involved a wrongful-death action initiated as a result of an accident to a motorcycle dirt-bike rider against the defendant owner of a private recreational park. The court rejected the contention that a triable issue of fact was presented whether the decedent had sufficient knowledge of the particular risk which resulted in his death, saying that knowledge of a particular risk was unnecessary when there is an express agreement to assume all risk. The court said that clairvoyance to foresee the exact accident and injury which occurred was not required. Further, implicit in the knowledge that motorcycling was dangerous, as recited in the release, was the knowledge that riding over rough, uneven terrain posed a risk of injury from a fall.

In Garrison v Combined Fitness Centre, Ltd. (1990, 1st Dist) 201 Ill App 3d 581, 147 Ill Dec 187, 559 NE2d 187, the appellate court considered the case of a plaintiff member of a health club who was injured when a barbell rolled off the grooved rest at the top of a bench-press apparatus and crushed his trachea. The court upheld the exculpatory clause in the membership contract, finding that the injury was clearly within the scope of possible dangers ordinarily accompanying the activity of weight lifting. The court rejected the plaintiff's public-policy arguments relating to defective equipment and products-liability claims.

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, release sent by bicycle tour operator after tour participant had paid full amount for tour was supported by sufficient consideration, even though participant was not aware of exact terms of release at time she signed contract for tour, where contract required participant to execute release. Milgrim v. Backroads, Inc., 142 F. Supp. 2d 471 (S.D.N.Y. 2001).

§ 4[a] Release or exculpatory agreement denied effect due to reasons of contract interpretation—Language of agreement not sufficient for valid and binding release

In accordance with principles applicable generally to contracts exempting persons from liability, contracts purporting to exempt an amusement operator from liability to his or her patron are closely scrutinized and strictly construed against the operator. Therefore, some courts have construed as ineffective, agreements which did not specifically exempt the amusement operator from liability for "negligence" or from risk of injury from a specific cause, such as equipment failure. In such cases, the exculpatory agreements were held not to present an...
obstacle to the plaintiff's offer of proof regarding the defendant's negligence or fault leading to the injury. Ariz
Sirek v Fairfield Snowbowl (1990, App) 166 Ariz 183, 800 P2d 1291, 72 Ariz Adv Rep 63
Cal
Celli v Sports Car Club, Inc. (1972, 1st Dist) 29 Cal App 3d 511, 105 Cal Rptr 904
Conservatorship of Link (1984, 1st Dist) 158 Cal App 3d 138, 205 Cal Rptr 513 (criticized by Bennett v
United States Cycling Federation (2nd Dist) 193 Cal App 3d 1485, 239 Cal Rptr 55)
Scroggs v Coast Community College Dist. (1987, 4th Dist) 193 Cal App 3d 1399, 239 Cal Rptr 916
Colo
Rosen v LTV Recreational Development, Inc. (1978, CA10 Colo) 569 F2d 1117 (applying Colorado law)
Conn
Fedor v Mauwehu Council, Boy Scouts of America, Inc. (1958) 21 Conn Supp 38, 143 A2d 466
Fla
O'Connell v Walt Disney World Co. (1982, Fla App D5) 413 So 2d 444
Witt v Dolphin Research Center, Inc. (1991, Fla App D3) 582 So 2d 27, 16 FLW D1509
Ill
Calarco v YMCA of Greater Metropolitan Chicago (1986, 2d Dist) 149 Ill App 3d 1037, 103 Ill Dec 247, 501 NE2d 268, app den 114 Ill 2d 543, 108 Ill Dec 414, 508 NE2d 725
Ind
Reuther v Southern Cross Club, Inc. (1992, SD Ind) 785 F Supp 1339
Mo
Handwerker v T.K.D. Kid, Inc. (1996, Mo App) 924 SW2d 621
NY
Ciofalo v Vic Tanney Gyms, Inc. (1961) 10 NY2d 294, 220 NYS2d 962, 177 NE2d 925 (superseded by
statute as stated in Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107)[7]
Ny
Gross v Sweet (1979) 49 NY2d 102, 424 NYS2d 365, 400 NE2d 306
NY
Hertzog v Harrison Island Shores, Inc. (1964) 21 App Div 2d 859, 251 NYS2d 164
Geise v County of Niagara (1983) 117 Misc 2d 470, 458 NYS2d 162
Bernstein v Seacliff Beach Club, Inc. (1962, Dist Ct) 228 NYS2d 567
Jones v Walt Disney World Co. (1976, WD NY) 409 F Supp 526 (applying Florida law)
Pa
Tex
Rickey v Houston Health Club (1993, Tex App Texarkana) 863 SW2d 148, grant of writ withdrawn,
writ den (Tex) 888 SW2d 812
Utah
Zollman v Myers (1992, DC Utah) 797 F Supp 923
Wis
Eder v Lake Geneva Raceway (1994, App) 187 Wis 2d 596, 523 NW2d 429

In Sirek v Fairfield Snowbowl (1990, App) 166 Ariz 183, 800 P2d 1291, 72 Ariz Adv Rep 63, the court considered a release signed by a renter of skis and bindings from a ski-rental shop. The ski bindings did not release when the plaintiff fell while skiing, causing injury. The appellate court reversed the trial court's granting of summary judgment for the defendant, finding that the language of the release did not alert a renter of equipment that the rental shop was being released from its own negligence in selecting appropriate skis or properly setting the bindings. The release could be construed as only absolving the rental shop from liability growing out of equipment defects and hence did not clearly reflect an intent to bargain away the right to hold the defendant responsible for its own negligence.

Distinguishing the facts from those in Palmquist v Mercer (1954) 43 Cal 2d 92, 272 P2d 26, discussed in § 8 , the court in Celli v Sports Car Club, Inc. (1972, 1st Dist) 29 Cal App 3d 511, 105 Cal Rptr 904, said that the rule in California was that an exculpatory instrument must clearly and explicitly express the intent of the parties to exonerate a party from its own negligent conduct. In this action for injuries received by the plaintiffs as spectators at an auto race sponsored by the defendant, the appeals court determined that the trial court did not err in excluding from evidence "pit passes" which were issued to and signed by the plaintiffs to enable them to view the race from the area set aside, and adjoining the final straightaway, as "pits" for servicing cars, where such passes, which stipulated that the holder released the defendant from any claim for damages arising out of any accident or occurrence in connection with the race, did not provide for release of the defendant from its own negligence. The court held that the pit-pass releases, phrased in general language, were insufficient to release the defendants from their active negligence in not disqualifying a dangerous driver and other reasons, which active negligence caused the injuries.

Rules and regulations for season passes were considered in Rosen v LTV Recreational Development, Inc. (1978, CA10 Colo) 569 F2d 1117 (applying Colorado law). The plaintiff was injured when he collided with a metal pole in an open area near the intersection of a ski-lift termination point and a ski run. The plaintiff and another skier collided, and the plaintiff was thrown into the pole, breaking his leg in several places. The defendant operator of the ski area asserted that the rules-and-regulations slip signed by the plaintiff as a condition of purchasing a season pass barred his recovery. The court said, however, that stipulations relieving the seller of liability are generally not enforced in instances in which the seller is engaged in a business which has a public interest. The court termed the season pass rules and regulations slip, an adhesion contract which must be interpreted strictly because of its one-sided character, and additional provisions would not be implied therein. Therefore, because the slip signed by the plaintiff did not expressly exonerate the ski area for its negligence it did not relieve the operator from such liability.

In O'Connell v Walt Disney World Co. (1982, Fla App D5) 413 So 2d 444, the court held that the language of a release signed by a father on behalf of his minor son was not sufficient to relieve the defendant from liability for a horse stampede because it did not specifically release the defendant from its own negligence.

Injuries from negligent maintenance of equipment were not adequately stated in the exculpatory clause involved in Calarco v YMCA of Greater Metropolitan Chicago (1986, 2d Dist) 149 Ill App 3d 1037, 103 Ill Dec 247, 501 NE2d 268, app den 114 Ill 2d 543, 108 Ill Dec 414, 508 NE2d 725. The plaintiff was injured when she attempted to assist another YMCA patron who was having difficulty with a Universal weight machine. The weights fell on her hand, fracturing same. The exculpatory clause released the YMCA from liability for claims "connected with my participation in any of the activities of the YMCA." The court distinguished this case from other health-club injury cases on the basis of the wording of the release, saying that the same was not sufficiently clear and explicit to show an intention to protect the YMCA from liability from the use of its equipment.

An accident which occurred on the boat bringing SCUBA divers to the dive site was determined not to be
within the scope of the release signed in Reuther v Southern Cross Club, Inc. (1992, SD Ind) 785 F Supp 1339. The accident occurred while the plaintiff was vacationing in the Cayman Islands. The dive boat intended to take SCUBA divers to their dive site was struck by a wave which injured the plaintiff. The release at issue recited that it was executed in consideration for allowing the plaintiff to participate in SCUBA diving. The risks of SCUBA diving were mentioned in detail, but the release did not mention any risk from the boat ride. The court said that the circumstances and context of the release led to the conclusion that the object and purpose of the release was to waive liability while SCUBA diving only, and the release had no effect on the injury which occurred on the boat.

In Boucher v Riner (1986) 68 Md App 539, 514 A2d 485, the release signed by the plaintiff when he joined the health club stated that he assumed all risks of injury and discharged the owners from all claims for injury "due to negligence or any other fault." The court said that the language of the release did not unambiguously release the owners from their own negligence, and could be interpreted as only relieving the club from liability resulting from the plaintiff member's participation in certain activities, and, hence, it would not absolve them from liability for their negligence in maintaining the shower facilities where the plaintiff slipped and fell.

Reversing the appeals court, the Supreme Court of Missouri in Alack v Vic Tanny Int'l (1996, Mo) 923 SW2d 330, affirmed the jury verdict rendered in the trial court for the plaintiff, finding that the exculpatory clause was ambiguous. The plaintiff was injured when a handle on a rowing machine detached and struck the plaintiff in the face, causing injuries which required extensive dental treatment and surgery. Upon joining the gymnasium, the plaintiff had signed a membership contract which contained an exculpatory clause. The plaintiff testified that upon reading the language when he signed the contract, he thought that he was releasing the defendant from self-inflicted injuries, such as if he attempted to lift too much. The court reviewed the analysis applied by other courts to exculpatory clauses and, in particular, discussed cases which had decided that it was necessary for such clauses to reference "negligence" or similar intent, in order to be effective. Ultimately, the court decided that the clause, which stated that the defendant would not be liable to the plaintiff "for any damages arising from personal injuries sustained … in, on or about the premises of the said gymnasium or as a result of [his] … using the facilities and the equipment therein," was not adequate to reflect the plaintiff's intent to release the facility from its own negligence. The court stated that the "bright-line" rule for enforcement of an exculpatory clause was clear, unambiguous, and conspicuous language which exonerationed the exculpated party from liability for its future negligence. The court said that the use of broad exculpatory language which purported to include even gross negligence and intentional torts demonstrated the ambiguity of the language, because such claims could not be waived.

In Gross v Sweet (1979) 49 NY2d 102, 424 NYS2d 365, 400 NE2d 306, the plaintiff was injured upon landing during his first parachute jump after enrolling in the defendant's parachute school. The plaintiff signed a "responsibility release" upon enrollment which waived any and all claims against the defendant for injuries sustained from parachute jumping. The plaintiff was instructed for an hour before the first jump and was not required to provide a medical certificate even though he informed the defendant that he had an orthopedic pin in his leg. The court refused to apply the liberalized construction sometimes given to indemnification clauses, signed between sophisticated business entities, which shift the risk of liability to insurers, but determined the rule of strict construction, requiring unambiguous terms which clearly exempt the defendant from the consequences of his own negligence, to be appropriate. The court said that the release could be construed as merely relieving the defendant from responsibility for injuries which inevitably would occur without his fault, and, therefore, the release did not bar the plaintiff's suit.

In a personal-injury action by the plaintiff member against a beach and yacht club, the court in Hertzog v Harrison Island Shores, Inc. (1964) 21 App Div 2d 859, 251 NYS2d 164, granted the plaintiff's motion to dismiss the affirmative defense of a clause in the membership application which attempted to exempt the defendant
from liability. The court said that the words in the membership agreement, that the member agreed to “waive claim for any loss to personal property, or for any other personal injury while a member of said club,” did not possess the clarity or explicitness necessary in an exculpatory agreement to express the intention of the parties to absolve one of them from liability for negligence.

Although it determined that NY Gen Oblig Law § 5-326 did not void the release because the plaintiff had not paid a fee for admission to the park, at which he was injured while tobogganing, the court in Geise v County of Niagara (1983) 117 Misc 2d 470, 458 NYS2d 162, nevertheless found the release inadequate to relieve the defendant from liability. Strictly construing the release against the drafter, the court held that the release was ineffective as to the plaintiff, since the release did not employ the word "negligence" and was couched in general terms, referring to a release "from any liability for any harm, injury, or damage … including all risks … whether foreseen or unforeseen …” where, notwithstanding the first paragraph of the agreement listing a series of risks that the plaintiff acknowledged could be part of tobogganing, such language lacked the clarity and precision necessary to explicitly inform the plaintiff that he was accepting the enhanced risks resulting from the defendant's negligence in operating or maintaining its facility.

In Bernstein v Seacliff Beach Club, Inc. (1962, Dist Ct) 228 NYS2d 567, the court held that a clause in the plaintiff's membership application to the effect that all claims for injury to person or property were waived was ineffective to relieve the defendant beach club from liability for negligence.

A Federal District Court, sitting in New York but applying Florida law, in Jones v Walt Disney World Co. (1976, WD NY) 409 F Supp 526 (applying Florida law), construed a waiver and hold-harmless agreement to be ineffective because an intent to indemnify the defendant for his own negligence was not specifically stated therein. The plaintiff was injured when thrown from a horse rented from the defendant's stable. Upon purchasing a ticket for the horseback tour, she signed the waiver, which waived any and all claims and held the defendant harmless from any and all claims for injuries sustained from horseback riding. The court applied a ruling by the Florida Supreme Court which had held that the use of general terms which indemnify against any and all claims did not exhibit an intent to indemnify for the negligence of the indemnitee. The court further found that exculpatory clauses had received similar treatment as indemnification clauses by Florida courts and would be enforced only if such clauses clearly evinced an intention by the releasing party to exonerate the released party from the consequences of his negligence.

In Rickey v Houston Health Club (1993, Tex App Texarkana) 863 SW2d 148, grant of writ withdrawn, writ den (Tex) 888 SW2d 812, the court held that an injury to a patron while jogging on its Astroturf-covered indoor track was not barred by the release signed by the patron. The release provided that the health-club member assumed all risk of injury and waived any claim or rights to sue the club for injury. The court said, however, that the release did not meet the express-negligence doctrine which requires that a specific intent to release another from the consequences of his or her own negligence be specifically expressed within the four corners of the document.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Release signed by student horse rider that purported to release stable owner and instructor from any and all liability for injury resulting from use of facility was unenforceable, in student's personal injury action against instructor and stable owner: top portion of form merely recited statute that barred suit for injuries from accident resulting from inherent risk of equine activities, and form did not signify clear and unmistakable waiver and shifting of risk. V.A.M.S. § 537.325. Frank v. Mathews, 136 S.W.3d 196 (Mo. Ct. App. W.D. 2004).

Release from liability executed by patron of horse riding facility did not clearly and unequivocally insulate

facility operators from liability for their own negligent acts and, thus, was not enforceable against any negligent acts of operators resulting from patron's fall from horse. Conteh v. Majestic Farms, 739 N.Y.S.2d 728 (App. Div. 2d Dep't 2002).

Unless the intention of the parties to insulate one of them from liability for its own negligence is expressed in unequivocal terms, an exculpatory clause will not operate to have such an effect. Weissman v. City of New York, 860 N.Y.S.2d 393 (N.Y. City Civ. Ct. 2008).

Exculpatory clauses in releases signed by horseback riding student were void as against public policy; releases were not limited to horse-related activities, but extended to cover "any liability or responsibility for any accident damage, injury, or illness," releases were excessively broad in the number and category of individuals and entities released, releases were confusing and ambiguous, and releases did not define the "unavoidable risks inherent in all horse-related activities." Mettler ex rel. Burnett v. Nellis, 2005 WI App 73, 695 N.W.2d 861 (Wis. Ct. App. 2005).

§ 4[b] Release or exculpatory agreement denied effect due to reasons of contract interpretation—Circumstances not within contemplation of parties

In some cases, although the patron may have signed or accepted a valid release, the courts have determined that the circumstances which led to the injury of the patron were not within the contemplation of the parties, and the release would not apply to such a circumstance of injury, or that a factual issue of the intent of the parties was presented, which would prevent enforcement of a release through summary judgment.

Holding that the breaking of a neck-yoke ring on a horse-drawn wagon was not an obvious risk, the court in Day v Snowmass Stables, Inc. (1993, DC Colo) 810 F Supp 289, applying Colorado law, denied the defendant's motion for summary judgment based upon a release signed by the plaintiff. The plaintiff was injured while on a horse-drawn-wagon ride conducted by the defendant when a neck-yoke ring on the rear wagon broke. This caused the horses to bolt and the rear wagon to strike the first wagon, throwing the plaintiff from the first wagon and causing injuries. The plaintiff argued that the risk created by the faulty equipment was not an inherent risk to such an outdoor activity. The court said, however, that the release was not limited to inherent risks. Nevertheless, the court quoted approvingly from Heil Valley Ranch, Inc. v Simkin (1989, Colo) 784 P2d 781, discussed in § 3[b], that the coverage of a broadly worded release should be only, "as broad as the risks that are obvious to experienced participants." Since the plaintiff had no experience with horse-drawn wagons, the court would not uphold summary judgment for the defendant because the intent of the plaintiff when signing the broad release had not been determined, in light of such inexperience.

In Edwards v Wilson (1988) 185 Ga App 514, 364 SE2d 642, the court held that a release on the back of a pit pass purchased to enter an automobile race was ineffective to insure the racetrack owner from liability for the negligent directions of its employee which caused a vehicle accident near the entrance to the track. The plaintiffs had purchased pit passes which provided that "by acquiring and using this Pit Pass, [they] waive[d] all claims of personal injury and property damage, … occasioned while in attendance at the race meet." The court relied on the language of the pit pass to find that the plaintiffs had not used the passes and had not incurred property damage while in attendance at the race meet and that the release on the pit pass was not intended to relieve the track owner from liabilities from the negligent direction of traffic prior to the commencement of a race and outside the pit area.

Distinguishing the facts from those involved in Owen v Vic Tanny's Enterprises (1964, 1st Dist) 48 Ill App
2d 344, 199 NE2d 280, 8 ALR3d 1388, the facts of which are discussed in § 5[b], the court in Larsen v Vic Tanny International (1984, 5th Dist) 130 Ill App 3d 574, 85 Ill Dec 769, 474 NE2d 729, found that whether the conduct and danger to which the plaintiff was subjected was of a type intended to be excused by the exculpation clause was an issue of fact which precluded summary judgment. The plaintiff, a member of the defendant's health club, alleged that he suffered severe internal injuries as a result of inhaling gaseous vapors caused when an employee of the defendant negligently combined cleaning compounds which produced an explosion of hydrochloric acid with resulting gas. The plaintiff's membership agreement contained language relieving the facility's owner from liability for injuries incurred by members as a result of using the facility and its equipment and acknowledging that members assumed responsibility for any injuries occurring while on the premises. The court said that a contractual assumption of risk presupposes that the plaintiff knows the danger and the possibility of injury prior to its occurrence, and, therefore, foreseeability of a specific danger defines the scope of an exculpatory clause. In dicta, the court opined that as a result of an evolution in societal attitudes, there was doubt as to whether the reasoning behind the Owen case should be affirmed.

In an action by an injured skier against the operator of a ski lodge, the court in Weiner v Mt. Airy Lodge, Inc. (1989, MD Pa) 719 F Supp 342, held that the exculpatory language in a ski-equipment rental agreement did not bar an action relating to selection of an icy ski slope not adaptable for use by a skiing novice and to improper instructions by the defendant's ski instructor, where the agreement applied to injuries arising only out of use of the equipment, because that was not within the contemplation of the parties when the release was given.

An injury to a spectator at an automobile race who was struck by a maintenance vehicle and not by a vehicle involved in the race was determined by the court in Johnson v Thruway Speedways, Inc. (1978, 3d Dept) 63 App Div 2d 204, 407 NYS2d 81 (superseded by statute as stated in Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107),[8] to be not within the contemplation of the parties at the time of execution. The court said that the instrument of release must be strictly construed and the general language in the release could lead to a conclusion that the release only applied to injuries sustained by a spectator which were associated with the inherent risks of automobile racing. The court determined that the doubt as to whether such an injury was within the contemplation of the parties created a triable issue of fact, and reversed the lower court's summary judgment for the defendant.

The court in Zollman v Myers (1992, DC Utah) 797 F Supp 923, applying Utah law, found the release agreement ambiguous as to the intent of the parties regarding the circumstances of the accident and denied the defendant's motion for summary judgment. The plaintiff rented a snowmobile at the defendant's snowmobile recreation park. Under the direction of a guide provided by the defendant, the plaintiff collided with another snowmobiler at the crest of a hill and was injured. A clause in the release signed by the plaintiff before renting the snowmobile and guide provided "that if I encounter a situation or problem which was not covered by the training or instruction … I hereby agree to stop my snowmobile and wait for proper instructions. Otherwise, I expressly agree to assume the risk presented by the situation or problem." The court determined that the release was ambiguous because of the quoted language, which could be interpreted as meaning that if the plaintiff stopped and waited for instructions from her guide, as was done in this case, then the risk of accident was not assumed. The court said that a factual question was presented as to whether the parties intended the defendant to be released from liability if an injury occurred to a snowmobiler while following the defendant's instructions.

§ 4[c] Release or exculpatory agreement denied effect due to reasons of contract interpretation—Other problems of interpretation or validity

[Cumulative Supplement]

Agreements purporting to release owners or operators of amusement facilities were denied effect in the fol-
lowing cases because of problems of interpretation or validity other than those discussed in § 4[a], 4[b].

In Conservatorship of Link (1984, 1st Dist) 158 Cal App 3d 138, 205 Cal Rptr 513 (criticized by Bennett v United States Cycling Federation (2nd Dist) 193 Cal App 3d 1485, 239 Cal Rptr 55),[9] the court held that a release was invalid where it was printed in type so small that it could not be easily read by a person of ordinary vision, and because it was too lengthy and convoluted to be comprehensible. The plaintiff conservator sued as a result of injuries sustained by a racing-pit crewman who paid an admission fee, signed two releases to enter the pit area, and was struck by a wheel while watching the race from a restricted area. The court noted that the first release document, included on a sign-in sheet, was printed in 51/2-point type. The court stated that typeface smaller than eight-point is unsatisfactory. The court also said that a release should be placed in a position which compels notice and must be distinguished from other sections of the document. The first release was also incomprehensible, according to the court, because the exculpatory language was contained in a 193-word convoluted sentence. As to the second release of "all liability for personal injury," which was contained in the pit pass, the court ruled that such broad exculpatory language was ineffective to relieve the defendant from active negligence. The court also mentioned that the use of two release documents created an ambiguous, confusing situation which it resolved against the defendants.

In Dilallo by & Through Dilallo v Riding Safely (1997, Fla App D4) 687 So 2d 353, 22 FLW D396, an action brought against a riding stable to recover for injuries sustained by a minor rider, the court held that the minor was not bound by her contractual waiver of her right to file suit. The minor, who was just under 14 years of age, signed a "release-and-assumption-of-risk" form, which was required before she could ride. She was injured when the horse she was riding began to run and caused her to collide with a tree branch. The court acknowledged that the release clearly stated that the stable was released from liability for its own negligence, and it would have supported a summary judgment in favor of the stable had the plaintiff, the person signing this complete waiver of her rights, not been a minor. Pointing out that the question whether a minor child injured because of a defendant's negligence can effectively contractually waive her right to hold the defendant liable was an issue of first impression in Florida, the court found persuasive the reasoning of courts in cases from jurisdictions that the state policy of protecting minors by denying enforcement of their contracts, other than contracts for necessities, was especially applicable where the minor had contracted away his or her right to recover damages. The court explained that the contract of an infant is voidable, which means that it is binding until it is avoided by some act indicating that the party refuses longer to be bound by it. The plaintiff's act of filing a lawsuit for damages clearly indicated her refusal to be bound by her waiver, the court said.

Sexton v Southwestern Auto Racing Asso. (1979, 5th Dist) 75 Ill App 3d 338, 31 Ill Dec 133, 394 NE2d 49, involved a "pitman" who nevertheless paid a fee to enter the racetrack's pit area and signed a release. The pitman slipped and fell in a mudhole in the racetrack infield and claimed injuries. The trial court ruled for the defendants on their motion to dismiss the complaint based upon the signed release. The plaintiff contended on appeal that he did not know that the document he signed was a release from liability; that same had been misrepresented or was fraudulently induced; that the agreement was not supported by consideration; and that the agreement was signed in haste, due to circumstances surrounding the execution of same. The appellate court reversed the trial court and ruled that the plaintiff had raised issues of material fact which should have been submitted to the jury.

The effect of qualifying words and phrases served to obscure the release language, the court concluded in Wright v Loon Mountain Recreation Corp. (1995) 140 NH 166, 663 A2d 1340. The plaintiff was injured when kicked by a horse ridden by a guide employed by the defendant, which operated an equestrian center. Before beginning a horseback-riding tour, the plaintiff signed an exculpatory agreement which recited a number of inherent risks in horseback riding and then provided, "I therefore release [defendant] FROM ANY AND ALL LIABILITY … FOR PERSONAL INJURY … RESULTING FROM THE NEGLIGENCE OF [DEFENDANT] TO
INCLUDE SELECTION, ADJUSTMENT OR ANY MAINTENANCE OF ANY HORSE. "..." The court said that the use of the term "therefore" in the quoted clause referred the reader to the antecedent clause which mentioned some inherent dangers of horseback riding. The court determined that being kicked by a horse due to the negligence of a guide in failing to control the animal was not such an inherent risk. The court also found that the clause might be read as being limited to relieving negligence in the selection, adjustment, or maintenance of a horse and that maintenance might refer only to upkeep, and not control, of a horse. The clause, according to the court, was also unclear with regard to injuries from horses not ridden by the plaintiff.

In Cunningham v State (1942, Ct Cl) 32 NYS2d 275, mod 264 App Div 811, 34 NYS2d 903, the court held that a minor was not bound by a waiver of liability executed by her before she embarked on a bobsled operated by the defendant, on the grounds that her disaffirmance was effective to invalidate the waiver.

After determining that a college could be considered a proprietor of recreational activities and as such free to contract to relieve itself of liability for its negligence and that the contract was not one of adhesion, because the student plaintiff was not required to take the equestrian course, the court in Thompson v Otterbein College (1996, Ohio App) 1996 WL 52901, appeal not allowed 76 Ohio St 3d 1424, 667 NE2d 26 (Ohio, Jul 17, 1996),[10] then turned to issues of ambiguity in the language of the release. The plaintiff was injured in a horseback-riding class offered by the college. She signed a release prior to beginning the course. In the release, she acknowledged that she was responsible for injuries "except in the event of the stable's wanton and willful negligence. ..." The release then recited that the plaintiff did "release and discharge the owners, operators and sponsors of THIS STABLE ... and all other participants of ... all claims ... for injuries. ..." The court, in dicta, said that the release of essentially everyone from any type of misconduct is so general that similar clauses had been held meaningless, and included claims of which the plaintiff was ignorant and, thus, not within the contemplation of the parties. The court also found that terms such as "wanton and willful negligence" were misnomers and added to the confusing nature of the release, which required that the case be remanded to the trial court for determination of what the parties intended by the release.

Reversing the trial court, the appeals court in Eder v Lake Geneva Raceway (1994, App) 187 Wis 2d 596, 523 NW2d 429, concluded that the exculpatory agreement was not made through a process of bargaining which had integrity and therefore violated freedom-of-contract principles since there had not been a meaningful opportunity to read the release form, and, hence, the contract was not freely and voluntarily made. The plaintiffs were injured when struck by a motorbike which left the racetrack. The plaintiffs had signed a release document upon entering the parking lot of the motorcycle raceway where the admission fee was being collected. The print on the release form was small, there was no explanation offered as to what the document was, and there were other spectators waiting in line to get in behind the plaintiffs at the time they were requested to sign the form. Under the circumstances, the court determined that there was no bargain freely made when there was no opportunity to read and ask questions about the form.

CUMULATIVE SUPPLEMENT

Cases:

Facilities that are places of instruction and training, rather than amusement or recreation, have been found to be outside the scope of the statute voiding covenants exempting owner's of places of amusement or recreation from liability. McKinney's General Obligations Law § 5–326. Lemoine v. Cornell University, 769 N.Y.S.2d 313 (App. Div. 3d Dep't 2003).

Release form signed by patron of snowtubing facility, which stated patron would not sue and would release from liability snowtubing facility for injuries as a result of negligence or any "other improper conduct" of the facility, though sufficient to release facility for claims resulting from its negligence or the negligence of its em-
ployees, did not immunize facility from liability for allegedly reckless conduct of marketing family slopes as safe areas but then allowing snow tube to go down family slope without checking that prior tube’s occupants had left receiving area, resulting in collision in which patron was injured, though release specifically mentioned risks of collision in receiving area; release did not clearly convey that releasor was surrendering right to compensation for intentional and reckless torts. Tayar v. Camelback Ski Corp., Inc., 2008 PA Super 204, 957 A.2d 281 (2008).

§ 5[a] Public-policy exceptions to the enforcement of releases—Public-policy exceptions allowed

In the following cases, the court acknowledged public-policy exceptions to the validity of exculpatory clauses.

Applying Colorado law, the court in Rosen v LTV Recreational Development, Inc. (1978, CA10 Colo) 569 F2d 1117, more fully discussed in § 4[a], indicated in dicta that the exculpatory agreement required by the defendant was of the "character" of adhesion contracts which are not enforced because the seller is engaged in a business which has a public interest.

In an action for injuries and damages the plaintiff sustained when he collided with trail-grooming equipment at the defendant's ski area, the court in Phillips v Monarch Recreation Corp. (1983, Colo App) 668 P2d 982, said that the trial court properly excluded evidence of language on the back of the plaintiff's lift ticket by which a skier was purported to have agreed that he understood and assumed the risk of skiing. The court reasoned that the language on the ticket violated the public policy expressed in the Ski Safety Act of 1979, Colo Rev Stat § 33-44-104 (1982, cum supp), and that the provisions of the act could not be pre-empted by private agreement.

Finding an exculpatory agreement contrary to public policy because it imposed an unfair burden on families wishing to send their sons to the defendant's camp, the court in Fedor v Mauwehu Council, Boy Scouts of America, Inc. (1958) 21 Conn Supp 38, 143 A2d 466, subscribed to the view that agreements attempting to confer immunity from liability for negligence should be construed so as not to confer immunity in cases where there is unequal bargaining power between the parties. The court found that in requiring all boys who attended the camp to have a waiver-of-liability provision in the camp contract signed for them by a parent, the camp was requiring all families who desired to send their boys to the camp to accept the terms of the contract and assume whatever risks might flow from possible negligence on the part of the camp.

The court in Coughlin v T.M.H. Int'l Attractions (1995, WD Ky) 895 F Supp 159 (applying Kentucky law), found that a release signed by a participant in a guided cave tour should be treated differently, for public-policy reasons, than a release used to exonerate the owners or sponsors of other events, such as automobile or bicycle racing. In this case, the plaintiff's estate sued the cave-tour operator and tour guide as a result of the death of a man who fell and sustained a head injury while on a cave tour and was not rescued promptly, dying from his injuries. The court determined that the Kentucky courts would look to whether the public interest favored enforcing the release and whether the parties to the release stood on an equal footing. The court found that the Kentucky legislature had evidenced an intent not to encourage the commercial exploitation of caves and that Kentucky courts would therefore disfavor releases which would encourage cave owners to promote tours. Having found an insufficient public interest to be fostered in validating a release for such an activity and that the man was not experienced in cave exploration, did not appreciate the dangers inside the cave, and was not on an equal footing with the cave-tour operator when asked to sign the release, the public policy disfavoring exculpatory agreements was to be followed.
An overly broad release was struck down in Farina v Mt. Bachelor, Inc. (1995, CA9 Or) 66 F3d 233, 95 CDOS 7320, 95 Daily Journal DAR 12521, applying Oregon law. The plaintiff was injured when he struck a boulder which was obstructed from view at the defendant's skiing facility. The plaintiff had signed a season-pass application which contained a release and indemnity in favor of the defendant covering any and all claims "based upon negligence or any other theory of recovery." The court held that the attempt to escape liability for more than ordinary negligence rendered the exculpatory agreement invalid. The court also refused to enforce only part of the release because the clause did not say that it was severable.[11]

Injuries sustained at a health spa was the subject of Leidy v Deseret Enterprises, Inc. (1977) 252 Pa Super 162, 381 A2d 164. The plaintiff was referred to the spa by her doctor for postoperative treatment following surgery on the lumbar area of her spine. The plaintiff alleged that the treatment was directly contrary to the doctor's instructions. The spa sought judgment on the pleadings based upon a provision in the membership agreement purporting to release the spa from liability for injuries resulting from the negligence of the spa or its employees. The plaintiff contended that the exculpatory clause was unconscionable. The court said that a contract against liability would be upheld if it involved a matter not of interest to the state. In this case, however, the court said that there was a state interest in contracts involving health and safety and that the public had an interest in assuring that those claiming to be qualified to follow a doctor's orders in the area of physical therapy were so qualified and would accept responsibility for their actions. Accordingly, the appellate court ruled that the lower court's judgment on the pleadings for the spa should have been denied, and the case was remanded.

Finding a major public-policy interest in assuring that premises to which customers are invited are safe, the Supreme Court of Vermont, in Dalury v S-K-I, Ltd. (1995, Vt) 670 A2d 795, held an exculpatory agreement in favor of a ski resort unenforceable. The plaintiff was injured when he collided with a metal pole that was a part of the control maze for a ski-lift line. The plaintiff had purchased a season pass to use the defendant's skiing facilities, which contained an exculpatory provision which the court found to be unambiguous. In what the court said was a case of first impression in Vermont, the court rejected the holdings and dicta from other courts and jurisdictions and determined that a facility for skiing, even though used for recreational pursuits and not for essential public services, involved a question of public policy. The court said that the defendant's facility was visited by thousands of people every day and that due to such a volume of sales to the public, a public interest was involved. The court relied upon the law of premises liability to find that a ski area owes its customers a duty to keep its premises reasonably safe and that the principles underlying this duty to business invitees were not restricted to those services of an essential nature, but were also applicable to this recreational facility.

The court in Baker v Seattle (1971) 79 Wash 2d 198, 484 P2d 405, 9 UCCRS 226, expressly overruled Brodersen v Rainier Nat. Park Co. (1936) 187 Wash 399, 60 P2d 234, insofar as it held that a plaintiff who unwittingly signed a disclaimer was not relieved from the consequences of his act. The court found that a lessee of a golf cart who signed a rental agreement containing a disclaimer in favor of the lessor, relieving him of all liability whatsoever for damages arising out of use of the cart, was not precluded from recovery from the lessor for injuries suffered when the cart overturned owing to defective brakes. The court reasoned that there was no proper distinction between a sale and a rental of a chattel for purposes of applying Uniform Commercial Code sections as adopted in Washington, Wash Rev Code §§ 62A.2-316(2) and 62A.2-719(1), (3), which provided that in order to modify or exclude warranties of merchantability and fitness, the disclaimer had to be conspicuous and that a limitation of consequential damages for injury to a person, in the case of consumer goods, was prima facie unconscionable. The court determined that the disclaimer was in the middle of the golf-cart rental agreement and not conspicuous, and it would have been unconscionable to permit the lessor to exclude himself from liability by such disclaimer.

Summary judgment was improperly granted to the defendant based on a release signed by the plaintiff, the appeals court found in Murphy v North Am. River Runners, Inc. (1991) 186 W Va 310, 412 SE2d 504. The
plaintiff was injured while she was a paying passenger in the defendant's raft during a whitewater-rafting trip. The guide operating the raft in which the plaintiff was riding attempted to rescue another raft owned by the defendant which was trapped among rocks, by intentionally bumping same with the raft in which the plaintiff was riding. The court discussed the West Virginia Whitewater Responsibility Act, W Va Code §§ 20-3B-1 et seq., which imposes liability on whitewater guides for violation of statutory duties and requires guides to conform to the standard of care expected of members of their profession. While the statute immunized guides from liability for the inherent risks of whitewater rafting, the plaintiff had offered evidence that there were reasonable alternatives to the rescue operation which would not have exposed the plaintiff to harm. The court said that an exculpatory clause which attempts to exempt a party from liability for failure to conform to the statutory standard is unenforceable. Further, the court said that an exculpatory agreement or anticipatory release would not be construed to absolve a defendant from intentional or reckless misconduct unless such were clearly indicated to be the plaintiff's intention. Since issues of material fact were raised concerning the standard of care and the circumstances surrounding the execution of the release, the trial court had improperly granted summary judgment to the defendant.

Reversing the trial court, the appeals court in Eder v Lake Geneva Raceway (1994, App) 187 Wis 2d 596, 523 NW2d 429, concluded that the exculpatory agreement was not binding for public-policy reasons because the contract was not made through a process of bargaining which had integrity and violated freedom-of-contract principles, since there had not been a meaningful opportunity to read the release form, and hence, the contract was not freely and voluntarily made. The plaintiffs were injured when struck by a motorbike which left the racetrack. The plaintiffs had signed a release document upon entering the parking lot of the motorcycle racetrack where the admission fee was being collected. The print on the release form was small, there was no explanation offered as to what the document was, and there were other spectators waiting in line to get in behind the plaintiffs at the time they were requested to sign the form. Under the circumstances, the court determined that there was no bargain freely made when there was no opportunity to read and ask questions about the form.

In Yauger v Skiing Enters. (1996) 206 Wis 2d 75, 557 NW2d 60, the court held that an exculpatory clause in an application for a season pass at a ski area that recognized that skiing had inherent risks and released the defendant operator of the ski area from injuries that occurred at the ski area was void as against public policy. The decedent, a minor, was killed when she struck the concrete base of the defendant's ski lift. Her father had signed an application for a season pass for his family to use the defendant's skiing facilities; the application contained an exculpatory clause. In an action by the parents of the decedent skier, based on the allegation that the defendant was negligent in failing to pad the chair-lift tower, the court held that the exculpatory clause was void for two reasons: (1) it failed to clearly, unambiguously, and unmistakably explain to the signer that he was accepting the risk of the defendant's negligence; and (2) the form looked at in its entirety failed to alert the signer to the nature and significance of the document being signed.

CUMULATIVE SUPPLEMENT

Cases:

Release signed by lodge guest purporting to relieve the lodge, which offered its guests horseback riding expeditions, from liability for its failure to exercise ordinary care to protect its guests from risks of serious physical injury was unenforceable, as public policy imposes on commercial operators of recreational or sports facilities a nondisclaimable duty to exercise due care to avoid risks of physical injury to consumers. Berlangieri v. Running Elk Corp., 2002-NMCA-060, 48 P.3d 70 (N.M. Ct. App. 2002), cert. granted, 47 P.3d 447 (N.M. 2002).

Patron, who was injured when she tripped over rolls of carpet stored next to the tennis court while particip-
ating in a tennis tournament held at hotel, could not contract away hotel's liability, with respect to patron's negligence claim, because patron did not know she would be playing at hotel, the identity of the tortfeasor was not known to patron at the time she executed exculpatory contract, there was no intent, and thus no meeting of the minds, to exculpate hotel, and the language of the exculpatory contract was vague and ambiguous. Burd v. KL Shangri-La Owners, L.P., 2003 OK CIV APP 31, 67 P.3d 927 (Okla. Civ. App. Div. 2 2002), cert. denied, (Feb. 18, 2003).

[Top of Section]

[END OF SUPPLEMENT]

§ 5[b] Public-policy exceptions to the enforcement of releases—Public-policy exceptions rejected

[Cumulative Supplement]

In the following cases, public-policy exceptions to the enforcement of exculpatory clauses were rejected.

Cal Hulsey v Elsinore Parachute Center (1985, 4th Dist) 168 Cal App 3d 333, 214 Cal Rptr 194, CCH Prod Liab Rep ¶10581

Kurashige v Indian Dunes, Inc. (1988, 2nd Dist) 200 Cal App 3d 606, 246 Cal Rptr 310, review den (Jun 8, 1988)

Madison v Superior Court (1988, 2nd Dist) 203 Cal App 3d 589, 250 Cal Rptr 299, opinion modified (Sep 01, 1988), review denied (Oct 13, 1988)


Randas v YMCA of Metropolitan Los Angeles (1993, 2nd Dist) 17 Cal App 4th 158, 21 Cal Rptr 2d 245, 93 CDOS 5387, 93 Daily Journal DAR 9098


Allan v Snow Summit, Inc. (1996, 4th Dist) 51 Cal App 4th 1358, 59 Cal Rptr 2d 813, 97 CDOS 13, 97 Daily Journal DAR 9

YMCA of Metropolitan Los Angeles v Superior Court (1997, 2nd Dist) 55 Cal App 4th 22, 63 Cal Rptr 2d 612, 97 CDOS 3835, 97 Daily Journal DAR 6450

Colo

Anderson v Eby (1996, CA10 Colo) 83 F3d 342

Jones v Dressel (1978) 40 Colo App 459, 582 P2d 1057, affd (Colo) 623 P2d 370

Ill

Owen v Vic Tanny's Enterprises (1964, 1st Dist) 48 Ill App 2d 344, 199 NE2d 280, 8 ALR3d 1388 (criticized by Larsen v Vic Tanny International (5th Dist) 130 Ill App 3d 574, 85 Ill Dec 769, 474 NE2d 729)

Kubisen v Chicago Health Clubs (1979, 1st Dist) 69 Ill App 3d 463, 26 Ill Dec 420, 388 NE2d 44
Boucher v Riner (1986) 68 Md App 539, 514 A2d 485

Malecha v St. Croix Valley Skydiving Club, Inc. (1986, Minn App) 392 NW2d 727

Mann v Wetter (1990) 100 Or App 184, 785 P2d 1064, review den 309 Or 645, 789 P2d 1387

Harmon v Mt. Hood Meadows (1997) 146 Or App 215, 932 P2d 92

Szcztoka v Snowridge, Inc. (1994, DC Vt) 869 F Supp 247

Hewitt v Miller (1974) 11 Wash App 72, 521 P2d 244, review den 84 Wash 2d 1007

Blide v Rainier Mountaineering, Inc. (1981) 30 Wash App 571, 636 P2d 492, review den 96 Wash 2d 1027

The court in Kurashige v Indian Dunes, Inc. (1988, 2nd Dist) 200 Cal App 3d 606, 246 Cal Rptr 310, review den (Jun 8, 1988), upheld a release exonerating a park owner from injury to a motorcycle dirt-bike rider. The court disagreed with the plaintiff's contention that the general release he signed as a condition of entry to the park was unconscionable. The court found that the instrument was labeled as a release numerous times on its face and explicitly released the park's owners from negligence. The court found that the private motorcycle-park facility did not involve the public interest, in that it was not a business generally thought to be suitable for public regulation, it was not a service of great importance to the public, it was not a matter of practical necessity for the public, and the customers did not place their persons under the defendant's control. Further, the court found that the release was neither procedurally unconscionable in that the plaintiff had a choice not to ride his cycle in the park nor substantively unconscionable because the waiver of liability was boldly and clearly set forth.

The court in Randas v YMCA of Metropolitan Los Angeles (1993, 2nd Dist) 17 Cal App 4th 158, 21 Cal Rptr 2d 781, 93 CDOS 5387, 93 Daily Journal DAR 9098, refused to invalidate a release on public-interest grounds in a case where the plaintiff slipped and fell on wet poolside tile. The court said swimming was not an essential implicating the public interest and quoted prior authority which said that there was good reason to uphold releases for groups such as Boy and Girl Scouts, Little League, and other recreational and sports activities for children which might otherwise be damaged by the risks and costs of litigation.

In Westlye v Look Sports (1993, 3rd Dist) 17 Cal App 4th 1715, 22 Cal Rptr 2d 781, 93 CDOS 6319, 93 Daily Journal DAR 10825, review denied (Nov 24, 1993), the court considered an injury to a snow skier as a result of the failure of boot bindings to properly release. The defendant ski-rental shop required the plaintiff to sign a release upon renting the equipment which indicated that the bindings sometimes fail to release. Although the court said that the release was ineffective as to a strict-products-liability claim, there was no public interest in the ski industry or in recreational sports, in general, which would invalidate an exculpatory agreement on the basis of public policy.

After deciding that a release embodied a clear and unambiguous express assumption of the risk by a student skier, as discussed in § 3[a], the court in Allan v Snow Summit, Inc. (1996, 4th Dist) 51 Cal App 4th 1358, 59 Cal Rptr 2d 813, 97 CDOS 13, 97 Daily Journal DAR 9, recited the general principle that there was no public policy which opposes private, voluntary transactions which shift risk from one party to another for a consideration. The court found that a ski resort was not generally considered a business suitable for public regulation, and not of great importance to the public, or of practical necessity, and therefore the release signed by the student did not violate public policy. The court also found that the release was not a prohibited type of adhesion contract.
since voluntary participation in **sports** or recreation did not implicate the public interest, and skiing was not an essential activity. It was also determined that the release was not unconscionable for the aforesaid reasons, and because the reallocation of risk associated with skiing lessons to the student was not objectively unreasonable or unexpected since the risk also involved the student's individual actions and abilities, which were not entirely under the control of the ski instructor.

The terms of a special-use permit issued by the US Forest Service to the defendants enabling them to operate snowmobile tours on federal lands located in a national forest, was determined to be a third-party-beneficiary contract, which, due to its ambiguity, prevented summary judgment for the defendant on the basis of the release signed by the plaintiff in **Anderson v Eby** (1993, CA10 Colo) 998 F2d 858 (not followed by **Del Bosco v United States Ski Ass'n** (DC Colo) 839 F Supp 1470) and summary judgment gr, on remand (DC Colo) 877 F Supp 537, affd (CA10 Colo) 83 F3d 342 (Anderson I). After remand to the District Court, however, the appeals court in **Anderson v Eby** (1996, CA10 Colo) 83 F3d 342 (Anderson II), upheld summary judgment for the defendant based upon the release. The plaintiff suffered injuries as a result of a snowmobile crash while on a trip organized by the defendant tour operator. The court in Anderson I, applying Colorado law, held that the release signed by the plaintiff was unambiguous. The court found, however, that the special-use permit issued by the Forest Service to the defendant contained terms for the benefit of the public, including the plaintiff, specifying that the defendant was responsible for the health and safety of clients guided in the National Forest. The court said that the meaning of such terms was unclear and that same might be construed as precluding the defendants from contracting away their own negligence. Accordingly, extrinsic evidence was necessary to determine whether the special-use permit voided the release. After remand to the District Court where the deposition of a Forest Service staff officer was taken, the District Court granted the defendant's motion for summary judgment. In Anderson II, the appeals court rejected the plaintiff's contention that Agriculture Dept. regulations as contained in the Forest Service manual allowed a permittee to absolve him- or herself from liability only for certain inherent risks of the activity. The court said the manual did not indicate a Forest Service policy which prohibited the defendant from obtaining and enforcing a voluntary release.

Although recognizing the general rule that an exculpatory clause will be strictly construed against the party whom it favors, the court in **Owen v Vic Tanny's Enterprises** (1964, 1st Dist) 48 Ill App 2d 344, 199 NE2d 280, 8 ALR3d 1388 (criticized by **Larsen v Vic Tanny International** (5th Dist) 130 Ill App 3d 574, 85 Ill Dec 769, 474 NE2d 729), held that such a clause in the plaintiff's contract of membership in the defendant's gymnasium, which required the member to assume responsibility for injuries occurring to him on or about the gymnasium premises, including those caused by the negligence of the operator, effectively prevented the plaintiff's recovery. The plaintiff sued for personal injuries arising from a fall in the shower room next to the swimming pool at the gym and alleged negligence on the part of the defendant in allowing a "smooth spot" on the floor. Reversing a judgment for the plaintiff and entering judgment for the defendant, the court cited **Ciofalo v Vic Tanney Gyms, Inc.** (1961) 10 NY2d 294, 220 NYS2d 962, 177 NE2d 925 (superseded by statute as stated in **Lago v Krollage**, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107),[12] discussed in § 3[a], and found no disparity of bargaining power between the parties to the agreement so as to warrant a conclusion that the exculpatory clause would be void as against public policy, as in common-carrier situations. The court stated further that any pronouncement as to whether the public interest was involved in the matter of exculpatory clauses would have to be made by the legislature and that in the absence of such a pronouncement, the plaintiff's suit was barred.

In **Boucher v Riner** (1986) 68 Md App 539, 514 A2d 485, the court upheld a release in a suit against, among others, the owner of a parachute drop zone, which facility was rented to a Parachuting Club, of which the plaintiff was a member. The plaintiff was injured when he came into contact with live electrical wires when descending on his first parachute jump. Prior to jumping, he signed a release document, which was intended to exempt the owner of the drop zone from liability. The court said that the release was valid unless there was such an
obvious disadvantage in bargaining power as to put the plaintiff at the mercy of the defendant's negligence or if the transaction was affected with a public interest. There was no disadvantage as to bargaining position because the plaintiff could have chosen to nullify the release and waiver of the right to sue by paying an additional $300, and because he was under no compulsion to make a parachute jump. Also, the court determined that the transaction had none of the characteristics of one affected by a public interest.

A claim of unequal bargaining power was dismissed in Mann v Wetter (1990) 100 Or App 184, 785 P2d 1064, review den 309 Or 645, 789 P2d 1387. In that case, a student died while attending an instructional scuba-diving course. Both the operator of the scuba-diving school and one of its instructors were sued by the deceased's estate. The plaintiff contended that the release signed by the decedent before the accident was ineffective because it was not presented to the decedent until he had already attended some of the classes and had paid his fees in total. Notwithstanding, the court said that these circumstances did not result in unequal bargaining power that would require invalidating the release because the decedent had been free to discontinue the program rather than sign the release.

In Harmon v Mt. Hood Meadows (1997) 146 Or App 215, 932 P2d 92, the court held that enforcement of a release against the plaintiff skier in an action for negligence against the defendant ski resort did not offend public policy. The plaintiff executed the release as part of her season-pass application. She was injured while attempting to board a chair lift at the defendant's facility. The court stated that the enforcement of the release provisions to bar the plaintiff's negligence claim would not offend public policy, despite the contention that the provisions relieved the defendant not only from liability for negligence but from "any and all liability," which encompassed conduct beyond mere negligence. The plaintiff's claim was one for mere negligence, the court explained, and thus the provisions were not unenforceable as applied to her even if they might be unenforceable as to the plaintiffs asserting other claims.

CUMULATIVE SUPPLEMENT

Cases:

Snowboarder, who was injured when she was involved in a collision with snowmobile operated by employee of ski resort, had voluntarily agreed not to hold ski resort, or its employees, liable for injuries resulting from negligence so that she could obtain a season ski pass, and this release agreement did not contravene public policy as injurious to the interests of the public, violative of public statute, or interfering with public welfare, and thus, release agreement was not barred by public policy; fact that exculpatory agreement waived right to bring negligence action arising out of activity that was regulated by statute was not determinative of a public policy violation, and interests of the public were protected by State's ability to enforce statute governing operation of snowmobiles. RSA 215–C:32. McGrath v. SNH Development, Inc., 969 A.2d 392 (N.H. 2009).

New York law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and though, with certain exceptions they are enforceable, such agreements are subject to close judicial scrutiny. Williams v. J.P. Morgan & Co. Inc., 248 F. Supp. 2d 320 (S.D. N.Y. 2003) (applying New York law).

The court in Holzer v. Dakota Speedway, Inc., 2000 SD 65, 610 N.W. 2d 787 (S.D. 2000), that a release signed by a volunteer pit crew member at the time the crew member paid the entry fee, in which the crew member specifically agreed to waive his right to bring action against the race track owner for injuries sustained as result of being permitted to enter the restricted "pit" area, was enforceable, and thus the crew member was precluded from bringing a negligence action against the race track after he was struck and severely injured by a wheel which detached from a stock car during the race; release was a private agreement which did not involve a matter of public interest.

The court held in Street v. Darwin Ranch, Inc., 75 F. Supp. 2d 1296 (D. Wyo. 1999), that under Wyoming
law, recreational trail rides were neither of great importance to the public, nor a practical necessity to any member of the public, and thus, a dude ranch operator owed no public duty, for purpose of deciding whether an exculpatory agreement signed by a horse rider asserting a negligence claim contravened public policy, despite a claim that all recreational activity providers owed a public duty under general premises liability principles, and that Wyoming’s Recreation Safety Act established a public policy which created a public duty for equine providers. (applying Wyoming law).

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[END OF SUPPLEMENT]

§ 6[a] Gross negligence and strict liability—Release or agreement given effect

[Cumulative Supplement]

In the following cases, the courts held or recognized that exculpatory agreements exempting operators of amusement or recreational activities from liability could be enforceable, as to claims brought by the plaintiffs allegedly based upon gross negligence, willful acts, or strict liability.

The court in Hulsey v Elsinore Parachute Center (1985, 4th Dist) 168 Cal App 3d 333, 214 Cal Rptr 194, CCH Prod Liab Rep ¶10581, considered a claim by a parachutist that the release he signed in favor of the parachute-jumping school was invalid because parachute jumping is an ultrahazardous activity. The court rejected the plaintiff's contention as to the ultrahazardous nature of parachute jumping, because such an activity could be performed safely, it was not an uncommon activity, and the plaintiff as a participant in the activity was not within the class of persons which the strict-liability doctrine for ultrahazardous activities was designed to protect.

Prior to deciding that the release was unambiguous, as discussed in § 3[b], the court in Gambino v Music TV (1996, MD Fla) 932 F Supp 1399, 10 FLW Fed D 91, applying Florida law, found no willful and wanton misconduct in a situation where the plaintiff fell from monkey bars which were part of an obstacle course, allegedly because the defendant allowed the monkey bars to become "slippery, sweaty, and slick." The court noted that the plaintiff's complaint did not allege that the defendant consciously disregarded the plaintiff's safety, or recklessly or intentionally caused the plaintiff's injury, and the court therefore enforced the release.

The court in Boucher v Riner (1986) 68 Md App 539, 514 A2d 485, determined that there was not enough evidence to support an inference of gross negligence which would overcome the effect of the release signed by a parachute-jumping student before his first jump. The plaintiff was injured when he came into contact with live electrical wires when descending. The court rejected the plaintiff's public-interest arguments, as discussed in § 5[b], and found that the evidence of gross negligence was insufficient where the testimony indicated that the parachute instructor was attentive to the student's descent. The testimony supported a finding of, at most, poor judgment by the instructor, in calling out instructions during the descent, but not indifference or reckless disregard for the student's safety.

In Guysinger v K.C. Raceway, Inc. (1990, Ross Co) 54 Ohio App 3d 17, 560 NE2d 584, patrons who were standing in the pit area were struck by a car which left the racetrack. The court discussed the issue whether the defendant was guilty of willful and wanton negligence. Finding that the defendant's conduct did not exhibit a total absence of care, the court upheld the summary judgment of the lower court which had dismissed the actions based upon the release.

In Craig v Lake Shore Athletic Club, Inc. (1997, Wash App Div 3) 1997 WL 305228, an action by a 73-year-old man who was injured at an athletic club while using a piece of exercise equipment, the court held that the plaintiff failed to show that the club had been grossly negligent so as to affect the enforceability of the release signed by the plaintiff. The plaintiff contended that even if the waiver was effective in shielding the club
from ordinary negligence, in this case it was inadequate because the club was grossly negligent in its installation and placement of the equipment and in its failure to warn about the dangers inherent in its use. Acknowledging that a preinjury waiver or release will not exculpate a defendant from liability for damages resulting from gross negligence, the court said that a plaintiff seeking to overcome an exculpatory clause by proving gross negligence must supply substantial evidence that the defendant's act or omission represented care appreciably less than the care inherent in ordinary care. The court concluded that the plaintiff failed to meet this burden in regard to his specific charges that the club was grossly negligent in failing to anchor the equipment, in failing to warn that the equipment could tip over, and in placing the equipment in close proximity to other equipment, thereby increasing the likelihood that a user who tipped the apparatus over would sustain even greater injuries.

In Murphy v North Am. River Runners, Inc. (1991) 186 W Va 310, 412 SE2d 504, more fully discussed in § 5[a], which involved injury to the plaintiff resulting from an intentional bumping of a raft by a whitewater-rafting guide, the court, in dicta, indicated that injuries resulting from intentional acts, reckless conduct, or gross negligence could be exonerated in a preinjury exculpatory agreement, if the circumstances clearly showed that such was the releasing party's intention.

CUMULATIVE SUPPLEMENT

Cases:

Under Massachusetts law, conduct of ski area operator, college that hosted ski racing competition, and competition's technical delegate, among others, in failing to install safety netting between race trail and lift tower stanchion, into which member of visiting college's ski racing team crashed after losing control, sustaining serious injuries, was simple inadvertence, and thus could not constitute gross negligence, as would render defendants liable for member's injuries, despite exculpatory agreement entered into between member and ski and snowboard association which sanctioned competition. Brush v. Jiminy Peak Mountain Resort, Inc., 626 F. Supp. 2d 139 (D. Mass. 2009).

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[END OF SUPPLEMENT]

§ 6[b] Gross negligence and strict liability—Release or agreement denied effect

Exculpatory agreements releasing the operators of amusement or recreational facilities from liability for injury to patrons were denied effect in the following cases involving claims brought by the plaintiffs based upon gross negligence, willful acts, or strict liability.

After deciding that there was no public interest in recreational sports such that a release would be invalidated on public-policy grounds, the court in Westlye v Look Sports (1993, 3rd Dist) 17 Cal App 4th 1715, 22 Cal Rptr 2d 781, 93 CDOS 6319, 93 Daily Journal DAR 10825, review denied (Nov 24, 1993), held that a release in favor of a ski-rental shop was ineffective to bar a strict-products-liability cause of action. The plaintiff was injured when a binding on a ski boot, rented from the defendant, failed to release. The court found that the release required by the defendant at the time of rental effectively barred a claim for negligent adjustment of the bindings by the ski-rental shop. The court decided, however, that neither a disclaimer nor assumption-of-risk language would bar a strict-products-liability claim against a product supplier based on the public policy behind strict products liability.

Where there was evidence that race officials had knowingly failed to fill barrels with water which formed the barrier in the pit area of an automobile racetrack, the court in Barker v Colorado Region—Sports Car Club,
Inc., 35 Colo App 73, 532 P2d 372, determined that due to the jury’s finding of willful and wanton negligence on the part of the defendant race sponsor’s chief steward, the release would not bar recovery by a spectator’s wife as conservator of his estate for injuries suffered. The court said that under Colorado law, an exculpatory agreement could be enforced to prevent recovery for injuries caused only by simple negligence. It was also held that the exculpatory agreement signed by the injured spectator would not bar his wife’s recovery for loss of consortium, regardless of whether the injury to her husband was caused by simple or wanton negligence.

After deciding that a release precluded a claim for ordinary negligence, as discussed in § 3[b], the court in Wheelock v Sport Kites (1993, DC Hawaii) 839 F Supp 730, applied Hawaiian law, based on its best judgment of how the Hawaiian Supreme Court would rule on the issues of whether a recreation-related waiver of liability was applicable to claims of gross negligence and strict products liability. The patron was killed when his connecting lines broke while paragliding. The plaintiff surviving spouse claimed gross negligence for misrepresenting the safety of the paraglider and strict products liability against the lessors of the equipment. The court held that the release was void as against public policy insofar as it applied to claims of gross negligence and strict liability.

Whether an exculpation clause contained in a rental ticket issued for the rental of a golf cart from a country club would defeat a strict-liability action for products liability was decided in Sipari v Villa Olivia Country Club (1978, 1st Dist) 63 Ill App 3d 985, 20 Ill Dec 610, 380 NE2d 819. The plaintiff leased the three-wheeled cart from the defendant country club and signed the rental ticket containing the exculpatory clause. While in use on the golf course, the cart stopped suddenly and threw the plaintiff out and then rolled onto him, breaking his foot. The court adopted the precedent of prior cases supporting the plaintiff’s position that the law in Illinois did not allow strict liability imposed on dealers and sellers of defective products to be contracted away. The court cited cases which held that strict liability is imposed independently of contractual considerations and a seller cannot protect him- or herself from liability by expressly negating implied warranties or strict tort liability; otherwise, the public-policy reasons for the imposition of strict liability in such cases would be defeated.

In Falkner v Hinckley Parachute Center, Inc. (1989, 2d Dist) 178 Ill App 3d 597, 127 Ill Dec 859, 533 NE2d 941, a wrongful-death action by the administrator of the estate of a deceased parachute student against the parachute school, the court, as discussed in § 3[b], said the exculpatory agreement which exempted the parachute school from "any and all liability, claims, demands or causes of action whatsoever arising out of any damage, loss or injury," relieved the school from liability for any of the activities contemplated by the agreement, including injury resulting from the negligence of the school. An exculpatory clause, however, was said to be void and against public policy insofar as it was asserted as a bar to liability for willful or wanton misconduct. The court therefore reversed the lower court’s summary judgment insofar as the plaintiff alleged acts by the defendant which could be considered willful and wanton.

In Swartzentruber v Wee-K Corp. (1997, Ohio App 4 Dist) 1997 WL 28537, discussed in more detail in § 3[b], an action for injuries brought by a horseback rider against the stable which provided the horse and equipment, the court held that the release signed by the plaintiff would not relieve the defendant from liability for willful or wanton misconduct, and noting that one of the plaintiff’s claims alleged "willful, wanton, and malicious" misconduct, the court ruled that it was clearly error for the trial court to enter summary judgment for the defendant on this claim and remanded the matter for further proceedings.

In Weiner v Mt. Airy Lodge, Inc. (1989, MD Pa) 719 F Supp 342, the court, applying Pennsylvania law, upheld a ski resort’s summary-judgment motion based upon exculpatory language in a ski-equipment rental agreement, insofar as it related to the plaintiff’s use of ski equipment rented from the resort. The court denied the summary-judgment motion by the defendant, however, insofar as it involved the plaintiff’s strict-liability claim for improper maintenance, assembly, fit, installation, adjustment, and care of the equipment, because that claim was considered one for products liability, which was founded not upon negligence, but rather upon strict liabil-
ity, so that dealers in consumer products could not nullify their responsibility with disclaimers or other agreements, as explained in comment m to the Restatement (Second) of Torts § 402A (1965).

§ 7[a] Agreement signed by person on behalf of patron—Agreement signed by another ineffective

In the following cases, agreements signed by a person allegedly acting on behalf of the patron and purporting to relieve the amusement operator from liability to the patron were held ineffective.

Having decided that agreements attempting to confer immunity from liability for negligence should be construed so as not to confer immunity in cases where there is unequal bargaining power between the parties, as discussed in § 5[a], the court in Fedor v Mauwehu Council, Boy Scouts of America, Inc. (1958) 21 Conn Supp 38, 143 A2d 466, further stated that it was doubtful whether a parent had the authority to waive the rights of his or her child against the defendant, for the defendant's negligent acts.

In O'Connell v Walt Disney World Co. (1982, Fla App D5) 413 So 2d 444, an action against an amusement park alleging that a minor was injured during a stampede proximately cause by the negligent act of the employees conducting the horseback ride, the agreement signed by the minor's father did not, as a matter of law, bar recovery where there was no language in the agreement indicating an intent to either release or indemnify the defendant for its own negligence.

In Kotary v Spencer Speedway, Inc. (1975, 4th Dept) 47 App Div 2d 127, 365 NYS2d 87 (superseded by statute as stated in Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107), the court held that releases signed by both father and son in order to enter the pit area of an automobile racetrack were ineffective to discharge the father's derivative cause of action to recover medical expenses incurred due to the son's injuries sustained when an out-of-control stock car crashed into bleachers erected in the pit area. The court focused on the language of the release which was limited to the release of claims for injuries "suffered … by virtue of his being upon said premises," which the court equated to spectator status. The court said that the father's derivative cause of action was not a result of his (the father's) presence upon the premises as a spectator, but was grounded upon the minor's cause of action which was not extinguished by the release signed by the son, due to his minority.

And see Cohen v New York (1947) 190 Misc 901, 75 NYS2d 846, where the court indicated that the agreement might have been valid if it had been signed by the patron.

Exculpatory by-laws of a private ski club were held ineffective in Blanc v Windham Mountain Club, Inc. (1982, Sup) 115 Misc 2d 404, 54 NYS2d 383, affd (1st Dept) 92 App Div 2d 529, 459 NYS2d 447. The plaintiff husband had joined the defendant private ski club, the by-laws of which recited that each member agreed to hold the club harmless from claims of any kind arising out of use of the club's facilities by a member or his family. The plaintiff wife was injured at the club's facilities allegedly due to a club employee's negligence. The court held that the club's by-laws were not binding upon the wife, who was not a club member. Moreover, the court found that although he was a club member, the plaintiff husband was never apprised of the required indemnification of the club by its members, by way of the by-laws, and therefore did not have an opportunity to elect to either maintain or withdraw his membership.

Granting a judgment for the plaintiff in a personal-injury action against a beach club and its operator, the court in Bernstein v Seacliff Beach Club, Inc. (1962, Dist Ct) 228 NYS2d 567, held that a clause in the membership application which said that the applicant would waive all claims for injury to person or property which occurred in the use of the club did not operate to relieve the defendants from liability for negligence as to the plaintiff, who had not signed the application, which read in the first-person singular. The court stated that the clause alone would fail to be an effective exculpatory clause also because it did not state that it relieved the defendants from liability for "negligence." The application had been signed by a friend of the plaintiff, and the de-
fendants contended that the friend acted as the plaintiff's agent in signing the application, which contained the purported release, and hence that the plaintiff was bound by its terms. Even assuming the clause to be effective, the court said that the authority to execute on behalf of another, a contract containing a clause exempting a third person from liability for negligence, would have to be clearly spelled out, and the court felt that no such authority could be inferred from the proof.

In Guysinger v K.C. Raceway, Inc. (1990, Ross Co) 54 Ohio App 3d 17, 560 NE2d 584, however, the court acknowledged that releases had been signed by the wives of patrons injured or killed by a race car which left the racetrack and struck the patrons who were standing in the pit area. The issue in the case was whether the defendant was guilty of willful and wanton negligence. Finding that the defendant's conduct did not exhibit a total absence of care, the court upheld the summary judgment of the lower court, which dismissed the actions based upon the releases signed by the wives. There was no discussion by the court concerning the issue of the signing by parties other than those who were injured or killed.

§ 8. Inadequacy of notice to patron

While recognizing that a patron who signs an agreement exempting an amusement operator from liability for his negligence may be barred thereby from recovering for personal injuries, some courts have declined to release the operator where notice to the patron of the agreement is not adequately shown.

Palmquist v Mercer (1954) 43 Cal 2d 92, 272 P2d 26, was an action by an equestrian against a riding academy from which he rented the horse which eventually injured him. At the time he rented the horse, the plaintiff signed a release discharging the academy from any and all claims, and on this basis he was nonsuited in the trial court, and the judgment was affirmed by the Court of Appeal ((Cal App) 263 P2d 341), on the grounds that the release amounted to a complete acquittance of the academy. Reversing, the Supreme Court ruled that the question of the validity of the release was properly for jury determination to be considered with events surrounding the execution of the release and that there was sufficient evidence of fraud on the part of the defendant in the execution of the release to find that the lower court erred in ruling that the release was binding as a matter of law. Pointing out that the defendant knew of the plaintiff's equestrian inexperience and yet gave the plaintiff a horse with known dangerous propensities, the court said that this failure to disclose a material fact could affect the release to the extent of vitiating it and concluded that the determination of the existence of fraud would remain for the jury.

In Moore v Edmonds (1942) 316 Ill App 453, 45 NE2d 190, affd 384 Ill 535, 52 NE2d 216, the defendant was held not released from liability for an injury to the plaintiff on the defendant's toboggan slide, by a small printed statement on the ticket. Affirming a judgment for the plaintiff, the court stated that while the part of the ticket which contained the purported release had been signed by the plaintiff, as the defendant had requested, the defendant's cashier retained it, and no actual notice was given to the plaintiff that the ticket was supposed to be a release. The court said that whether the release had been knowingly obtained was properly a jury question below and that the defendant could not rely on the release, absent a showing of proper notice to the plaintiff. The fact that the plaintiff filled in his name and address on the ticket, as the cashier requested, did not constitute a knowing acceptance of the terms of the release, said the court, or an assumption of risk.

While holding that a paragraph in the plaintiff's contract of membership in the defendant's gymnasium, which purported to exempt the defendant from liability for any injury to the plaintiff caused by the defendant's negligence, was valid as a covenant not to sue, the court in Putzer v Vic-Tanny-Flatbush, Inc. (1964) 20 App Div 2d 821, 248 NYS2d 836, held also that the question whether the restriction was called to the plaintiff's attention at the time of execution would be for the trier of fact to determine, since the paragraph was in fine print on the reverse side of the instrument which the plaintiff admitted signing.
In Yauger v Skiing Enters. (1996) 206 Wis 2d 75, 557 NW2d 60, discussed more fully in § 5[a], the court held that an exculpatory clause in an application for a season pass at a ski area that recognized that skiing had inherent risks, and released the defendant operator of the ski area from injuries that occurred at the ski area, was void as against public policy. In reaching the result, the court reasoned that the clause failed to clearly, unambiguously, and unmistakably explain to the signer that he was accepting the risk of the defendant's negligence and that the form looked at in its entirety failed to alert the signer to the nature and significance of the document being signed.

§ 9. Unsigned agreements

Unsigned agreements, such as may be printed on the patron's admission ticket, are ordinarily held ineffective to relieve an amusement operator from liability for personal injuries to the patron.

In Hook v Lakeside Park Co. (1960) 142 Colo 277, 351 P2d 261, 86 ALR2d 339, the court, although denying the plaintiff recovery for injuries she received on a "Loop-O-Plane," for failure to make a submissible case, said, in passing, that it attached no "legal significance" to the express waiver which was printed on the back of her ticket.

Language on the back of the plaintiff's ski-lift ticket was not allowed to modify the provisions of the Ski Safety Act of 1979, Colo Rev Stat § 33-44-104 (1982, cum supp), by which a skier was purported to have agreed that he understood and assumed the risk of skiing, in Phillips v Monarch Recreation Corp. (1983, Colo App) 668 P2d 982. The plaintiff was injured when he collided with a trail-grooming machine which was parked on a trail used by skiers in violation, the court held, of the Ski Safety Act. The court said that statutory provisions could not be modified by private agreement if same would violate the public policy expressed in the statute.

In Edwards v Wilson (1988) 185 Ga App 514, 364 SE2d 642, the court held that a release on the back of a pit pass purchased to enter an automobile race was ineffective to insulate the racetrack owner from liability for the negligent directions of its employee which caused a vehicle accident near the entrance to the track. The plaintiffs had purchased pit passes which provided that "by acquiring and using this Pit Pass, [they] waive[d] all claims of personal injury and property damage, … occasioned while in attendance at the race meet." The court relied on the language of the pit pass to find that the plaintiffs had not used the passes and had not incurred property damage while in attendance at the race meet and that the release on the pit pass was not intended to relieve the track owner from liabilities from negligent direction of traffic prior to the commencement of a race and outside the pit area. Due to the rationale employed by the court in dismissing the defense based upon the release printed on the passes, the court did not address whether the release might otherwise have been effective, although not signed.

Discussing the proper application of the doctrine of assumption of risk, the court in Russo v Range, Inc. (1979, 1st Dist) 76 Ill App 3d 236, 32 III Dec 63, 395 NE2d 10, reversed the trial court's summary judgment for the defendant. The plaintiff was injured on a "giant slide," a ride at the defendant's amusement park. The back of the ticket and a sign warned that patrons would slide at their own risk. The court said, however, that it is essential in all applications of assumption of risk that there is specific knowledge of the subject risk, and it was incumbent on the defendant to prove that the plaintiff appreciated the specific risk which caused the injury. The court held that there was a factual dispute whether the plaintiff was aware, in spite of the warning on the ticket and the sign, that his body would leave the surface of the slide and bounce, causing his injury.

The defendant's exceptions to a judgment for the plaintiff were overruled in Kushner v McGinnis (1935) 289 Mass 326, 194 NE 106, 97 ALR 578, a case involving a printed disclaimer of liability on the back of a ticket for the "Dragon Ride." The plaintiff was injured sliding down a chute in the ride, and the court upheld the lower court's finding that the negligence of the defendant's employees produced the injury, in that the attendant at the
top of the slide had failed to provide a burlap bag upon which the patron would sit to slow the speed on the slide, as was customary, and the other attendant at the bottom of the slide had failed to attempt to stop the plaintiff before she crashed into the wall. While agreeing that the defendant could lawfully have exempted himself from liability for the accident, the court stated that adequate notice of the qualified and conditional nature of the invitation to the patron is a requisite. In this case, the plaintiff, a Russian, was unable to read the English on the ticket, but the court said that the means of notice would have been defective even if the plaintiff had been able to read, in that the ticket was taken from the patron and torn up within about four or five steps after it was purchased. A person of average alertness would be unlikely to observe what was on the ticket, said the court.

A printing on a ticket which the defendant claimed limited his liability for an accident which the plaintiff suffered when riding on the defendant's roller coaster was held insufficient to justify a directed verdict for the defendant, in Brennan v Ocean View Amusement Co. (1935) 289 Mass 587, 194 NE 911, where the plaintiff's objections to the verdict were sustained. Whether notice of the attempted limitation was sufficient, since the ticket resembled a token or check more than a contract, and the plaintiff admitted not having read the ticket although he knew of the printing on it, was held to be properly a question for jury determination. The court said that a liability limitation could operate effectively in favor of the operator of the amusement facility, only if it was properly brought to the patron's attention.

Overruling the defendant's exception to the denial of his motion for a directed verdict, the court in O'Brien v Freeman (1937) 299 Mass 20, 11 NE2d 582, held that in an action by the plaintiff for injuries suffered at the defendant's roller-skating rink, the jury could properly have found that a statement printed on the ticket purchased by the plaintiff that patrons assumed the risk and that the management would not be responsible for accidents on the premises, did not effect an exoneration from liability, because the condition was not properly brought to the plaintiff's attention. The ticket was purchased at a cage and then taken by a man at the door a few feet away. The plaintiff testified that although she had skated at the rink before, she had never bothered to read the ticket, and the court held that a person of ordinary intelligence in the plaintiff's position would not have known of or understood the conditions and limitations which the ticket attempted to impose on the invitation to patrons. The court did state by way of dicta, however, that the plaintiff would be bound by conditions imposed by the defendant on the invitation if they were properly brought to her attention.

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Forms


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Section 1[a] Footnotes:

[FN1] This annotation supersedes the one at 8 ALR3d 1393.

Section 2[a] Footnotes:


[FN3] Dalury v S-K-I, Ltd. (1995, Vt) 670 A2d 795, which is discussed in § 5[a]. Also see Leidy v Deseret Enterprises, Inc. (1977) 252 Pa Super 162, 381 A2d 164, § 5[a], which considered physical therapy at a health spa under a doctor's orders as a public health interest, and Rosen v LTV Recreational Development, Inc. (1978, CA10 Colo) 569 F2d 1117, discussed in § 5[a], which indicated in dicta that the seller of skiing services was engaged in a business which had a public interest.

Section 3[a] Footnotes:

[FN4] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation as it involved the death of a racetrack mechanic, the court held that an auto racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation," within the meaning of statute providing that agreements exempting places of public amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).

[FN5] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation, as it involved the death of a racetrack mechanic, the court held that an auto racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation," within the meaning of statute providing that agreements exempting places of public amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).

Section 3[b] Footnotes:

[FN6] The dissent, however, felt that the release did not express an intent to absolve the defendant from using due care in providing a horse suited to the rider's abilities and with characteristics suitable for recreational riding.

Section 4[a] Footnotes:
[FN7] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation as it involved the death of a racetrack mechanic, the court held that an auto-racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation" within the meaning of a statute providing that agreements exempting places of public amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).

Section 4[b] Footnotes:

[FN8] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation, as it involved the death of a racetrack mechanic, the court held that an auto-racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation," within the meaning of a statute providing that agreements exempting places of public amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).

Section 4[c] Footnotes:

[FN9] The court in the Bennett case stated that it believed that the Link case should be read in the context of the facts that it considered: a statement buried in the midst of a highly prolix sentence, which was itself surrounded by paragraphs of fine print. To the degree that Link may be read to state a rule of law denying effect to any release printed in less than eight-point type, regardless of other circumstances, the court stated that it declined to follow it. Print size is an important factor, the court said, but not necessarily the only one to be considered in assessing the adequacy of a document as a release.

[FN10] This case contains the following, "NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS."

Section 5[a] Footnotes:

[FN11] The holding in the Farina case was criticized in Harmon v Mt. Hood Meadows (1997) 146 Or App 215, 932 P2d 92, discussed in § 5[b].

Section 5[b] Footnotes:

[FN12] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation, as it involved the death of a racetrack mechanic, the court held that an auto-racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation," within the meaning of a statute providing that agreements exempting places of public amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).

Section 7[a] Footnotes:

[FN13] In Lago v Krollage, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107, a case not within the scope of this annotation, as it involved the death of a racetrack mechanic, the court held that an auto-racing association that sponsored a racing event was not an "owner or operator of any place of amusement or recreation," within the meaning of a statute providing that agreements exempting places of public
amusement or recreation from liability for negligence are void and unenforceable (NY Gen Oblig Law § 5-326).


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