MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP

ANTHONY J. ELLROD
AJE@MANNINGLLP.COM
15TH FLOOR AT 801 TOWER
801 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 624-6900
FACSIMILE: (213) 624-6999
WEB SITE: WWW.MANNINGLLP.COM

SUMMARY OF STATE'S VIEW OF EXCULPATORY AGREEMENTS

The following is a brief summary of how each state applies, or refuses to apply exculpatory agreements as a bar to personal injury claims. Please note that we are not licensed to practice law in the vast majority of states referenced, and therefore all information provided is of a general nature and is not intended nor represented to replace professional, specialized legal advice from legal counsel in each state, nor should the information be relied upon as same. This information is offered in order to provide a starting point for your further investigation and we recommend that you formally consult legal counsel in the applicable state for a legal opinion on the rights and/or obligations of the parties under applicable law.

ALABAMA

Rigorous: Releases are effective to bar claims for negligence, but will not bar claims for wanton or willful conduct. In Alabama, willfulness or wantonness imports premeditation or knowledge and consciousness that the injury is likely to result from the act done or from the omission to act, while negligence involves inadvertent action. Further, exclupatory agreements that affect the public interest are invalid as contrary to public policy. Six criteria identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy: (1) It concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public. (3) The party holds himself out as willing to perform this service for any member of the public who seeks it. (4) As a result of the essential nature of the service, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. (5) The party confronts the public with a standardized adhesion contract and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence. (6) As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. *Barnes v. Birmingham Int'l Raceway* (1989) 551 So. 2d 929.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

ALASKA

Rigorous: Pre-recreational exculpatory agreements are held to a very high standard of clarity and any ambiguity in that regard has to be strictly construed against the party seeking exculpation. The use of the word "negligence" alone in a release does not definitively establish the scope of the release. It must clearly and unequivocally express an intent to release defendant for liability for its own future negligence. *Ledgends, Inc. v. Kerr* (2004) 91 P.3d 960. To be enforced, the intent to release a party from liability for future negligence must be conspicuously and unequivocally expressed. It must clearly notify the prospective releasor of the effect of signing the release. To bar wrongful death claims the word "death" must be included in the covenant. The term "injury" by itself has been found to be ambiguous and was to be construed to exclude death. If ambiguity exists, the rule of construction disfavoring exculpatory agreements applies and an exculpatory covenant will not be enforced. *Kissick v. Schmierer* (1991) 816 P.2d 188.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

ARIZONA

Rigorous: Waivers are not looked upon with favor since this would tend to encourage carelessness. Three requirements must be met for an enforceable waiver: 1) There must be no public policy impediment to the limitation of liability; 2) The parties must have, in fact, bargained for the limitation --- an actual bargain rather that the use of a preprinted release is necessary; 3) The limiting language must be construed most strictly against the relying party. Although it may sometimes be possible to absolve oneself of liability for negligence, agreements must be strictly construed and use clear and unequivocal language. They must alert the party that it is giving up a substantial right. Courts suggest that waivers must alert signers to the specific risks that are being waived and must reflect the clear intent to release the relying party from liability for negligence. Courts do not specifically require the use of the word 'negligence,' but strongly imply it. The court ruled that a waiver affecting a minor was not enforceable due to ambiguity of wording. Parents of a 10-year old signed the waiver prior to an accident involving a horse. The court made no mention that a waiver signed for a minor by a parent was unenforceable. In view of the nature of the ruling, it may be that a waiver signed by a parent on behalf of a minor participant is enforceable in Arizona.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

ARKANSAS

Rigorous Exculpatory contracts are not invalid per se. But because of the disfavor with which exculpatory contracts are viewed, two rules of construction apply to them. First, they are to be strictly construed against the party relying on them. Second, the contract must at least clearly set out what negligent liability is to be avoided. *Jordan v. Diamond Equip. & Supply Co.* (2005) 362 Ark. 142. An exculpatory clause may be enforced: (1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefitting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

CALIFORNIA

Moderate to Rigorous: No public policy opposes private, voluntary transactions in which one party agrees to waive rights to redress. Waivers are not contrary to the public interest in that the public as a whole benefits from such waivers since they allow groups to sponsor recreational and sports activities. A release is valid and need not achieve perfection as long as it is clear and unequivocal with specific reference to a defendant's negligence. It must clearly, unambiguously, and explicitly express the intent of the parties and will be strictly construed against the relying party. A valid release must be simple enough for a layperson to understand and additionally give notice of its import. When the signer expressly consents to relieve the relying party from a known risk, the relying party is relieved of any duty and cannot be charged with negligence. While some California cases have suggested that the word 'negligence' must be used to protect against 'active' negligence, others have ruled that the intent of the parties and not the presence or absence of the word 'negligence' is the key.

Exculpatory agreement cannot release gross negligence, recklessness or intentional tort. Further, agreement attempting to release liability for violation of law is void.

Since the law is not totally clear regarding whether the term 'negligence' is mandatory, the safest policy is to include the term in all liability waivers. California and Ohio are the only states in which it is well established that a parent may execute a release on behalf of a minor child. Section 35 of the Civil Code states that a section prohibiting the enforcement of waivers signed by minors . . . does not apply to contracts between adults and is therefore not controlling of the question of a parent's power to bind his child to arbitrate by entering into a contract of which the child is a third party beneficiary. Thus contracts signed on behalf of a minor by a parent or guardian may not be disaffirmed by the minor participant.

Protects if parent of minor signs on behalf of minor? YES. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal. 4th 747.)

COLORADO

Moderate: An exculpatory clause relating to recreational activities will be effective where the intent is clearly expressed and public interest is not involved. Exculpatory agreements are disfavored and are strictly construed against the drafter. Colorado uses four factors to determine their validity: (1) whether a duty to the public exists; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. Language should be free from legal jargon and not inordinately long and complicated. It is reasonable to interpret the broad language of a release to cover claims based on negligence; otherwise, the agreement would be essentially meaningless.

Waivers --- even 'take-it-or-leave-it' contracts --- are not considered adhesionary unless they involve a service which cannot be readily obtained elsewhere. Under Colorado law, use of the term 'negligence' is not required, but the intent to extinguish liability must be clearly and unambiguously expressed. Colorado courts have ruled that waivers seeking to protect against

reckless conduct are enforceable, but that those seeking to protect against willful and wanton acts are not enforceable.
Protects if parent of minor signs on behalf of minor? YES (as of 2003). (C.R.S. 13-22-107.)

CONNECTICUT

Moderate to Rigorous: Almost universally not enforced against employee in favor of employer. *Brown v. Soh* (2006) 280 Conn. 494. Analysis of an exculpatory agreement is guided by certain factors, such as whether (1) the exculpatory agreement concerns a business of a type generally thought suitable for public regulation, (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public, (3) the party holds himself out as willing to perform this service for any member of the public who seeks it or at least for any member coming within certain established standards, (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services, (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a signatory may pay additional reasonable fees and obtain protection against negligence, and (6) the person or property of the signatory, as a result of the transaction, is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or his agents.

An exculpatory agreement may affect the public interest adversely even if some of the foregoing factors are not satisfied. Moreover, review is not limited to those factors. Courts also consider, in an analysis of the totality of the circumstances, any other factors that may be relevant given the factual circumstances of the case and current societal expectations.

Protects if parent of minor signs on behalf of minor? YES. (*Fischer v. Rivest* (2002) 2002 Conn. Super. LEXIS 2778.)

DELAWARE

Rigorous: Parties are generally free to use signed liability waivers to contractually redistribute risk. Such waivers of liability in the sports and recreation context usually do not implicate the public interest, and are thus not intrinsically void as against public policy, because recreational activities are considered "non-essential." The waiver must meet the requirements for enforceability under Delaware law and will not be given effect if it is ambiguous, unconscionable, or contrary to public policy. *Slowe v. Pike Creek Court Club, Inc*.(2008) 2008 Del. Super. LEXIS 377. However the law disfavors contractual provisions releasing a party from the consequences of its own fault or wrong. A provision exonerating a party for its own negligence will only be given effect if the language makes it “crystal clear and unequivocal” that the parties specifically contemplated such a release. Consistent with this requirement, Delaware courts have found provisions exculpating a party for its own negligence to be sufficiently "crystal clear" when they include language specifically referring to the negligence of the protected party. *J. A. Jones Constr. Co. v. Dover* (1977) 372 A.2d 540.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

FLORIDA

Rigorous: While it is the public policy in Florida to NOT interfere lightly with the freedom to contract, waivers attempting to relieve one of a positive statutory duty are void as contrary to public policy. While waivers are not looked upon with favor, they are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal. The use of the term 'negligence,' when not limited, is interpreted to include both simple and gross negligence. Relative bargaining strength is irrelevant when there is no compelling state interest. A waiver releases all sponsors or parties, even if not named in the waiver. Some courts have held that no defense for the negligence claim is provided if there is no specific reference to the word 'negligence'. One court, however, has ruled that the test is the extent that the intention to be relieved from liability was made clear and unequivocal in the waiver --- not whether or not the word 'negligence' was used.

Florida courts have ruled that waivers will protect against ordinary negligence and gross negligence, but will not protect against intentional acts. In Lantz v. Iron Horse Saloon, Inc., the court upheld a waiver signed by the parent on behalf of a minor. The court found the waiver to be clear and unambiguous, never commenting on the issue of age. While it is clear in Florida that a minor cannot disaffirm a waiver signed by the minor, the same may not be true of a waiver signed by a parent.

Protects if parent of minor signs on behalf of minor? PERHAPS. (*Kirton v. Fields* (2008) 997 So. 2d 349, *not effective when minor participating in commercial activity*.)

GEORGIA

Moderate: It is the paramount public policy of Georgia that courts will not lightly interfere with the freedom of parties to contract. With some statutory exceptions, a contracting party may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest. Exculpatory clauses in Georgia are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence. However they will not be enforced to relieve a party from gross negligence or willful or wanton conduct, which is defined as the want of slight care and diligence, such care as careless and inattentive persons would usually exercise under the circumstances, want of that diligence which even careless men are accustomed to exercise, carelessness manifestly materially greater than want of common prudence. *McFann v. Sky Warriors, Inc.* (2004) 268 Ga. App. 750.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

HAWAII

Moderate: Waivers are an accepted method by which businesses can limit their liability.

Courbat v. Dahana Ranch, Inc. (2006) 111 Haw. 254.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

IDAHO

Moderate: Freedom of contract is a fundamental concept underlying the Idaho law of contracts and is an essential element of the free enterprise system. Express agreements exempting one of the parties for negligence are to be sustained except where: (1) one party is at an obvious disadvantage in bargaining power; (2) a public duty is involved such as public utility companies and common carriers. *Steiner Corp. v. American Dist. Tel*. (1984) 106 Idaho 787.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

ILLINOIS

Moderate: Public policy strongly favors freedom to contract as is manifest in both the United States Constitution and the Illinois. Regarding contracts that shift the risks of one's own negligence to another contracting party, the general rule is to enforce exculpatory contracts unless (1) it would be against a settled public policy of the State to do so, or there is something in the social relationship of the parties militating against upholding the agreement. However exculpatory clauses are not favored and must be strictly construed against the benefitting party, particularly one who drafted the release. *Harris v. Walker* (1988) 119 Ill. 2d 542. A contract provision will be found to be against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time. *Zerjal v. Daech & Bauer Constr., Inc*.(2010) 939 N.E.2d 1067.

In addition, a special relationship between the parties may make exculpatory clauses unenforceable. These include those (1) between an employer and employee; (2) between the public and those charged with a duty of public service, such as involving a common carrier, an innkeeper, a public warehouseman or a public utility; and (3) between parties where there is such a disparity of bargaining power that the agreement does not represent a free choice on the part of the plaintiff, such as a monopoly or involving a plaintiff without a reasonable alternative. *Hamer v. City Segway Tours of Chi., LLC* (2010) 402 Ill. App. 3d 42.

Protects if parent of minor signs on behalf of minor? NO. *Meyer by Meyer v. Naperville Manner* (1994) 262 Ill. App. 3d 141.

INDIANA

Rigorous: Exculpatory agreements are not against public policy. Generally, parties are permitted to agree that a party owes no obligation of care for the benefit of another and, thus, shall not be liable for consequences that would otherwise be considered negligent. *Anderson v. Four Seasons Equestrian Ctr., Inc.* (2006) 852 N.E.2d 576. However an exculpatory clause must both specifically and explicitly refer to the negligence of the party seeking release from liability.

The release need not include the word "negligence" so long as it conveys the concept specifically and explicitly through other language, such as terms associated with negligence--"claims," "causes of action," "acts," "damage," "responsibility," and "injury". *City of Hammond v. Plys* (2008) 893 N.E.2d 1. Exculpatory agreements in residential leases are void as against public policy. *Ransburg v. Richards* (2002) 770 N.E.2d 393.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

IOWA

Moderate: Broad exculpatory provisions will rarely immunize a defendant for acts of affirmative negligence, and contract provisions will not be held to relieve a party of liability for its own negligence unless the intention to do so is clearly expressed. *Sweeney v. City of Bettendorf* (2009) 762 N.W.2d 873. However the release need not expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such a release. For example the words "any and all rights, claims, demands and actions of any and every nature whatsoever . . . for any and all loss, damage or injury" is clearly intended to cover negligent acts. Further, the parties need not have contemplated the precise occurrence which occurred as long as it is reasonable to conclude the parties contemplated a similarly broad range of accidents. *Korsmo v. Waverly Ski Club* (1988) 435 N.W.2d 746.

Protects if parent of minor signs on behalf of minor? NO. (*Galloway v. State* (2010) 790 N.W.2d 252.)

KANSAS

Moderate: The general principle is that exculpatory agreements voluntarily entered into by parties standing on an equal footing are enforceable as between the contracting parties themselves. However a bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation. *Talley v. Skelly Oil Co*. (1967) 199 Kan. 767.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

KENTUCKY

Moderate: An exculpatory agreement releasing an individual from the consequences of his own negligence is invalid as being against public policy in those instances in which the parties involved stood on an unequal footing, or when the negligent behavior involved the performance of a service of public interest. However a party can be released from its own acts of negligence when the enterprise involved is inherently dangerous and where such danger is obvious to the parties entering the contract. Such releases and indemnity agreements are clearly not against public policy. Clear public policy exists to uphold such an agreement absent any evidence of

fraud or overreaching. *Boggs v. Harrison* (1986) 1986 Ky. App. LEXIS 1176.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

LOUISIANA

Moderate: Louisiana organic law allows an individual to contract concerning liability for negligence in all cases where such a contract is not contrary to public policy. *Diamond Crystal Salt Co. v. Thielman* (1968) 395 F.2d 62. However a release of an intentional tort or for actions taken in bad faith or with ill will or malice will not be enforced. *Elmer v. Coplin* (1986) 485 So. 2d 171.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

MAINE

Rigorous: In order for the releases to absolve parties of its own negligence, they must expressly spell out with the greatest particularity the intention of the parties contractually to extinguish negligence liability. Releases are strictly construed against the party seeking immunity from liability. There must be specific reference in the release to the negligence of the parties seeking immunity. *Lloyd v. Sugarloaf Mt. Corp.* (2003) 2003 ME 117.

Protects if parent of minor signs on behalf of minor? NO. (*Rice v. American Skiing Co.* (2000) 2000 Me. Super. LEXIS 90.)

MARYLAND

Moderate to Rigorous: It is well settled in this State, consistent with the public policy of freedom of contract, that exculpatory contractual clauses generally are valid. Aside from legislation proscribing such clauses, there are three circumstances in which exculpatory clauses in contracts are invalid and will not be enforced: when a party to the contract attempts to avoid liability for intentional conduct or harm caused by reckless, wanton, or gross behavior; when the contract results from grossly unequal bargaining power; and when the transaction is one adversely affecting the public interest. This last exception includes the performance of a public service obligation, e.g., public utilities, common carriers, innkeepers, and public warehousemen. It also includes those transactions, not readily susceptible to definition or broad categorization, that are so important to the public good that an exculpatory clause would be patently offensive, such that the common sense of the entire community would pronounce it' invalid. *Adloo v. H.T. Brown Real Estate* (1996) 344 Md. 254, 260.

Given the judiciary's reluctance to interfere with the right of parties to contract, courts are almost universal in holding that health clubs, in their membership agreements, may limit their liability for future negligence if they do so unambiguously. In Maryland, for an exculpatory clause to be valid, it need not contain or use the word 'negligence' or any other 'magic words. An exculpatory clause "is sufficient to insulate the party from his or her own negligence 'as long as its language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence. *Seigneur v. National Fitness Inst., Inc*. (2000) 132

Md. App. 271.

Protects if parent of minor signs on behalf of minor? UNKNOWN

MASSACHUSETTS

Generous: Massachusetts law favors the enforcement of releases. A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence. In the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf. Whether such contracts be called releases, covenants not to sue, or indemnification agreements, they represent a practice Massachusetts courts have long found acceptable.

The courts have not had occasion to rule on the validity of releases required in the context of a compelled activity or as a condition for the receipt of essential services (e.g., public education, medical attention, housing, public utilities), and the enforceability of mandatory releases in such circumstances might well offend public policy. *Sharon v. City of Newton* (2002) 437 Mass. 99, 105.

Protects if parent of minor signs on behalf of minor? YES.

MICHIGAN

Generous: A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become subjective, and irrelevant, and the legal effect of the language is a question of law to be resolved summarily. A release is knowingly made even if it is not labeled a "release," or the releasor fails to read its terms, or thought the terms were different, absent fraud or intentional misrepresentation designed to induce the releasor to sign the release through a strategy of trickery. *Xu v. Gay* (2003) 257 Mich. App. 263.

Protects if parent of minor signs on behalf of minor? NO. (*Woodman v. Kera LLC* (2010) 486 Mich. 228.)

MINNESOTA

Rigorous: Exculpatory clauses are not favored, and they are strictly construed against the benefited party. An exculpatory clause is unenforceable if it is ambiguous in scope, purports to release the benefited party from liability for intentional, willful or wanton acts; or contravenes public policy. In determining whether an exculpatory clause violates public policy, they consider (1) whether there was a disparity in bargaining power between the parties and (2) the types of services being offered or provided, taking into consideration whether they are public or

essential services. In examining whether the service being offered is a public or essential service, they consider whether it is the type generally thought suitable for public regulation. Types of services thought to be subject to public regulation have included common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities. In contrast, courts generally have held that contracts relating to recreational activities do not fall within any of the categories where the public interest is involved. *Yang v. Voyagaire Houseboats, Inc*. (2005) 701 N.W.2d 783.

Protects if parent of minor signs on behalf of minor? YES. (*Moore v. Minn. Baseball Instructional Sch.* (2009) 2009 Minn. App. Unpub. LEXIS 299.

MISSISSIPPI

Rigorous: The law does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence although, with some exceptions, they are enforceable. However, such agreements are subject to close judicial scrutiny and are not upheld unless the intention of the parties is expressed in clear and unmistakable language. The wording of an exculpatory agreement should express as clearly and precisely as possible the extent to which a party intends to be absolved from liability. Failing that, the courts do not sanction broad, general waiver of negligence provisions, and strictly construe them against the party asserting them as a defense. In further determining the extent of exemption from liability in releases, the courts look to the intention of the parties in light of the circumstances existing at the time of the instrument's execution. The released negligent acts must have been contemplated by the parties. With respect to instructors, by executing a release one does not knowingly waive his right to seek recovery for injuries caused by a failure to follow basic safety guidelines that should be common knowledge to any instructor of novice students. *Turnbough v. Ladner* (1999) 754 So. 2d 467.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

MISSOURI

Rigorous: Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not prohibited as against public policy. However, contracts exonerating a party from acts of future negligence are to be strictly construed against the party claiming the benefit of the contract, and clear and explicit language in the contract is required to absolve a person from such liability. It is a well-established rule of construction that a contract provision exempting one from liability for his or her negligence will never be implied but must be clearly and explicitly stated. Additionally, there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest. A contract that purports to relieve a party from any and all claims but does not actually do so is duplicitous, indistinct and uncertain. Should expressly refer to defendant's negligence. *Alack v. Vic Tanny Int'l* (1996) 923 S.W.2d 330. Releases in residential leases are enforced. *Warren v. Paragon Techs. Group* (1997) 950 S.W.2d 844.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

MONTANA

Not Enforced: A pre-tort release is illegal. A prospective release from liability for negligence--a violation of law--is against the policy of the law and illegal, despite being a private contract between two persons without significant public implications. The general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid. *McDermott v. Carie* (2005) 2005 MT 293.

Protects if parent of minor signs on behalf of minor? NO.

NEBRASKA

Moderate: Releases and express assumption of risk will be enforced unless the exculpatory clause in a contractual agreement violates public policy. This depends upon the facts and circumstances of the agreement and the parties involved. The right of contract may be restricted for the public good. The greater the threat to the general safety of the community, the greater the restriction on the party's freedom to contractually limit the party's liability For example, a contractual agreement to dig a ditch does not have the same public policy considerations as would the installation of a fire alarm system in a school, hospital, nursing home, restaurant, or other heavily occupied building. Common sense tells us that the greater the risk to human life and property, the stronger the argument in favor of voiding attempts by a party to insulate itself from damages caused by that party's gross negligence or willful and wanton misconduct. *New Light Co. v. Wells Fargo Alarm Servs*. (1994) 247 Neb. 57.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

NEVADA

Rigorous: The assumption of risk doctrine, with the single exception of express assumption of risk, has been subsumed by the comparative risk statute. A party signing an express assumption of risk (waiver) has consented to bear the consequences of a voluntary exposure to a known risk. A risk is voluntarily assumed by a person only if the risk was known to the signer and signer fully appreciated the danger. The court seems to indicate that an enumeration of the risks of the activity, providing actual knowledge of and appreciation of the danger to be encountered, is necessary for a waiver to be valid.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

NEW HAMPSHIRE

Moderate: Although New Hampshire law generally prohibits exculpatory contracts, they will

be enforced if: (1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract. A defendant seeking to avoid liability must show that an exculpatory agreement does not contravene public policy; i.e., that no special relationship existed between the parties and that there was no other disparity in bargaining power. Agreements have been found to be against public policy if, among other things, they are injurious to the interests of the public, violate some public statute, or tend to interfere with the public welfare or safety. *McGrath v. SNH Dev., Inc.* (2009) 158 N.H. 540.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

NEW JERSEY

Rigorous: Contracts that purport to exculpate a party from its future carelessness are subject to special rules. They are disfavored, essentially because they violate the aims underlying our tort law: deterrence of careless behavior and compensation by the wrongdoer for injuries sustained by victims. As a result, exculpatory contracts are closely scrutinized and must clearly and unambiguously reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences. Any doubts or ambiguities as to the scope of the exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief. Even if unambiguous, it is well-established that exculpatory contracts will not be enforced where they are contrary to public policy. An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society and is in conflict with public morals. In other words, contractual provisions that tend to injure the public in some way will not be enforced. Because public policy is made up of principles regarded by the legislature or by the courts as being of fundamental concern to society, one looks to legislation and judicial opinions as sources of public policy. *Marcinczyk v. State of New Jersey Police Training Com'n* (2010) 203 N.J. 586.

Protects if parent of minor signs on behalf of minor? NO. *Hojnowski v. Vans Skate Park* (2006) 187 N.J. 323.

NEW MEXICO

Moderate: Generally agreements that exculpate one party from liability for negligence will be enforced, unless they are violative of law or contrary to some rule of public policy. A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy, except that they will not enforce a release from liability for reckless conduct in some contexts. A public policy exception applies to employer-employee contracts, public service contracts, and other contracts involving a protected class.

Releases are strictly construed. One must look to the specific language of the release to

determine whether it is sufficiently clear and unambiguous that it would inform the person signing it of its meaning. Drafting a release can be a difficult balancing act because releases must be written to be understood by those without legal training, but they also must contain sufficient legal terminology to survive a legal challenge. *Berlangieri v. Running Elk Corp.* (2003) 134 N.M. 341.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

NEW YORK

Moderate to Rigorous: In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced. Such an agreement will be viewed as wholly void, however, where it purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual . *Lago v. Krollage* (1991) 78 N.Y.2d 95.

Protects if parent of minor signs on behalf of minor? NO. (*Alexander v. Kendall Cent. Sch. Dist.* (1995) 221 A.D.2d 898.)

NORTH CAROLINA

Moderate: A comprehensively phrased general release, in the absence of proof of contrary intent, is usually held to discharge all claims between the parties. The public interest exception to the enforceability of exculpatory contracts is applicable only to heavily regulated activities, such as contracts between physician and patient. An activity falls within the public policy exception when the activity is extensively regulated to protect the public from danger. *Brown v. Robbins* (2007) 2007 N.C. App. LEXIS 2271.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

NORTH DAKOTA

Moderate to Rigorous: Generally, the law does not favor contracts exonerating parties from liability for their conduct. However, the parties are bound by clear and unambiguous language evidencing an intent to extinguish liability, even though exculpatory clauses are construed against the benefitted party. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. The construction of a written contract to determine its legal effect is a question of law for the court to decide. The courts construe all provisions of a contract together to give meaning to every sentence, phrase, and word. The assumption of risk and waiver clauses are separate and distinct. Each contains a clearly

expressed meaning and consequence. Under the assumption of risk clause, the party agrees to assume the full risk of injury and damages resulting from participating in the activities associated. In addition, under the waiver and release clause, the party waives and relinquishes all claims for injuries or damages incurred on account of participation in the activities. *Kondrad v. Bismarck Park Dist*. (2003) 2003 ND 4.

Protects if parent of minor signs on behalf of minor? YES. (*Kondrad v. Bismarck Park Dist*. (2003) 2003 ND 4.)

OHIO

Moderate: The paramount public policy is that courts are not to lightly interfere with the freedom to contract. Waivers which clearly and unequivocally relieve one from the results of his or her own negligence are generally not contrary to public policy, but will be strictly construed against the relying party. Waivers are generally upheld in Ohio if they are absent 1) unconscionability, 2) ambiguity, and 3) important public policy considerations. The fundamental principle of 'freedom to contract' justifies the general rule that courts will not meddle with an allocation of risk provision. Thus a participant in a recreational activity is free to contract with the proprietor of that activity to relieve the proprietor of liability for injury to the participant caused by the negligence of the proprietor. Such a waiver must indicate a conscious choice to accept the consequences of the other party's negligence. The agreement must state a clear and unambiguous intent to release the party from liability for its negligence. The intention of the parties governs the interpretation of a waiver.

A release that is so general that it includes within its terms claims of which the releasor was ignorant, and thus not within the contemplation of the parties, will not bar recovery. It is not necessary to expressly use the word 'negligence' in the waiver if the waiver as a whole is such that the intent of the parties is clear with regard to exactly what kind of liability is being released. Nevertheless, the better practice would be to refer to the 'negligence' of the provider. No service provider can avoid liability for reckless or willful or wanton conduct by use of a waiver. Recently, two Ohio courts went against precedent and ruled that a waiver signed by a parent on behalf of a minor child is enforceable in protecting sponsors of nonprofit sport activities. It is worthy of note that the court stated that the child's claim could still be pursued -- pointing out that the child could pursue the matter through a guardian ad litem or by waiting until reaching the age of majority.

Protects if parent of minor signs on behalf of minor? UNCLEAR.

OKLAHOMA

Rigorous to Moderate: Acts against public policy are those that 1) are injurious to public health, public morals, or confidence in administration of law; and 2) so undermine the security of individual rights vis a vis personal safety or private property as to violate public policy. The public policy of Oklahoma does not prohibit exculpatory contracts, including those used by high-risk sports. In Oklahoma, the general rule is that people have the freedom to bind themselves as they see fit. The Supreme Court has long recognized that waivers may be valid and enforceable,

provided 1) the intent to excuse one party from liability for the party's own negligence is expressed in clear, definite and unambiguous language, 2) the agreement was made at arm's length with no vast disparity of bargaining power between the parties, and 3) the circumstances must not be contrary to statute or public policy. The waiver must clearly and cogently 1) demonstrate an intent to relieve that person from fault and 2) describe the nature and extent of damages from which the party seeks to be relieved. Equality of bargaining power is determined by 1) the importance of the subject matter to the physical or economic well-being of the party signing the waiver and 2) the amount of free choice the signer could have exercised when seeking alternate services.

A waiver that injures public morals, public health or confidence in the administration of the law or destroys the security of individuals' rights to personal safety or private policy is contrary to public policy. Contracts exempting persons from liability for negligence, however, are not favored by the courts and are strictly construed against those relying thereon. An Oklahoma statute provides that notices or disclaimers which are unilateral and unbargained-for and by which the business seeks to avoid liability are not enforceable. Waivers granted relief from negligence by use of broad or general terms, indicating that the use of the word 'negligence' is not necessary. Oklahoma statute 15 O.S. 1991 section 212 prohibits enforcement of waivers seeking to avoid liability for willful injury.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

OREGON

Moderate: Courts have ruled that waivers relating to sport activities (e.g., skiing, scuba diving, auto racing) are not against public policy. Since sport businesses do not provide an essential public service, any economic advantage in bargaining that a small business may have over customers will not create unequal bargaining power since customers have a multitude of alternatives. A court ruled that a business had no advantage in bargaining power even though they required the waiver to be signed after the client had paid for the program since he still remained free to not continue the diving program and the waiver was upheld. It has been acknowledged that waivers between employee and employer are against public policy; however, one court decided that since the employee was only part time and this employment was not the source of his livelihood, there was no economic coercion on the part of the employer. Waivers between the employer and a full-time employee would probably be ruled unenforceable. The Oregon Supreme Court has said that waivers to exempt one from liability for negligence are not favored in the state, but they are not automatically void. A waiver is governed by the principles of contract law and will be enforced if there is 1) no violation of public policy or 2) if the waiver is not adhesionary (where one party has an advantage in bargaining power).

The Supreme Court has stated that 'There is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest.' The U.S. Court of Appeals for the Ninth Circuit ruled that a waiver referring to 'negligence' was not enforceable because the term encompassed gross negligence as well as ordinary negligence. Since exculpating for gross negligence is against public policy, the court ruled the waiver to be invalid. In sharp contrast, the Oregon Court of Appeals, in a very similar case, disagreed with the reasoning of the U.S. court

and ruled that the use of the word 'negligence' was not violative of public policy in the instant case. While Oregon does not require the use of the term 'negligence,' in light of the preceding cases, it seems advisable that clubs should make certain that club waivers specify that the waiver applies to claims based upon 'ordinary negligence.' Waivers seeking to protect from liability for gross negligence or willful and wanton acts are invalid.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

PENNSYLVANIA

Rigorous: It is generally accepted that an exculpatory clause is valid where three conditions are met. First, the clause must not contravene public policy. Secondly, the contract must be between persons relating entirely to their own private affairs and thirdly, each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. Once an exculpatory clause is determined to be valid, it will, nevertheless, still be unenforceable unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence. In interpreting such clauses there are guiding standards that: 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 the immunity is upon the party invoking protection under the clause. Not reading the release will not affect its application. *Chepkevich v. Hidden Valley Resort* (2010) L.P., 2 A.3d 1174.

Protects if parent of minor signs on behalf of minor? NO. (*Myers v. Sezov* (1966) 1966 Pa. Dist. & Cnty. Dec. LEXIS 343.)

RHODE ISLAND

Rigorous: Courts will uphold exculpatory-indemnification clauses that negate liability for an individual's own negligence if the clause is sufficiently specific. A contract will not be construed to indemnify the indemnitee against losses resulting from his or her own negligent acts unless the parties' intention to hold harmless is clearly and unequivocally expressed in the contract. Clear and unambiguous language contained in a contract is controlling in regard to the parties' intent. It is not violative of public policy for individuals to limit liability for their own negligence through an exculpatory-indemnification clause. Exculpatory clauses illustrate the contractually expressed intent of the parties and are to be strictly construed against the party seeking to be exonerated, and they will be enforced if clear and unambiguous. *Rhode Island Hosp. Trust Nat'l Bank v. Dudley Serv. Corp*. (1992) 605 A.2d 1325.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

SOUTH CAROLINA

Moderate to Rigorous: The courts of South Carolina have analyzed express assumption of the risk cases in terms of exculpatory contracts. Exculpatory contracts are upheld by the courts of this state. However, notwithstanding the general acceptance of exculpatory contracts, since such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon. Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. An exculpatory clause will never be construed to exempt a party from liability for his own negligence in the absence of explicit language clearly indicating that such was the intent of the parties. *McCune v. Myrtle Beach Indoor Shooting Range, Inc.* (2005) 364 S.C. 242.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

SOUTH DAKOTA

Moderate to Rigorous: Anticipatory, pre-injury releases are much more likely to be deemed valid and enforceable when they are written on a separate document and not as part of separate written material and (2) the more inherently dangerous or risky the recreational activity, the more likely an anticipatory release will be held valid. Absent a legislative directive, releases have withstood attacks that they are contrary to public policy. In South Dakota no such legislative directive exits. However, releases that are construed to cover willful negligence or intentional torts are not valid and are against public policy. Willful and wanton misconduct is something more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a possible (ordinary negligence), result of such conduct. *Holzer v. Dakota Speedway, Inc*. (2000) 2000 SD 65.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

TENNESSEE

Moderate: It is well settled in Tennessee that parties may agree by contract that one will not be liable for negligence to another, and the word "negligence" need not appear in the exculpatory clause. With the narrow exceptions of common carriers and professionals operating in areas of public interest and pursuing a profession subject to licensure by the state, Tennessee has universally upheld exculpatory agreements. *Lovell v. Sonitrol of Chattanooga, Inc.* (1983) 674 S.W.2d 728, 731-32 (Tenn. App. 1983). The public policy exception applies only to businesses of a type generally thought suitable for public regulation. *Riddle v. Universal Sport Camp* (1990) 786 P.2d 641.

Protects if parent of minor signs on behalf of minor? NO. (*Rogers v. Donelson-Hermitage Chamber of Commerce* (1990) 807 S.W.2d 242.)

TEXAS

Rigorous: Sport-related releases are not against public policy in Texas. A waiver must be

narrowly construed, but is valid unless it is contrary to public policy. In Texas, waivers are valid and enforceable if they meet the requirements of fair notice. The two fair notice requirements are: 1) the express negligence doctrine and 2) the conspicuousness requirement. The conspicuousness requirement mandates that something must appear on the face of the contract to attract the attention of a reasonable person when one looks at it (e.g., capitals, different type size, color). The express negligence doctrine provides that to release a party from liability for negligence, the intent of the parties to do so must be expressed in specific terms within the four corners of the contract. A clause will not be construed to include an exemption for negligence unless it does so in the clearest terms, as by using the word negligence, or language so broad and sweeping that it must be taken to have given fair notice that it includes negligence. Waivers will protect against reckless conduct, but will not protect one against gross negligence.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

UTAH

Moderate: People may contract away their rights to recover in tort for damages caused by the ordinary negligence of others. Utah's public policy does not foreclose the opportunity of parties to bargain for the waiver of tort claims based on ordinary negligence. Preinjury releases are not unlimited in power and can be invalidated in certain circumstances. Three such limitations are (1) releases that offend public policy are unenforceable; (2) releases for activities that fit within the public interest exception are unenforceable; and (3) releases that are unclear or ambiguous are unenforceable. Preinjury releases must be compatible with public policy. *Pearce v. Utah Ath. Found.* (2008) 2008 UT 13. Further, releases that attempt to release harm willfully inflicted or caused by gross or wanton negligence will not be enforced. 6A Arthur L. Corbin, *Corbin on Contracts* § 1472, at 596-97 (1962). (*Russ v. Woodside Homes* (Utah Ct.App. 1995) 905 P.2d 901, 904.)

Protects if parent of minor signs on behalf of minor? NO. (*Pearce v. Utah Ath. Found.* (2008) 2008 UT 13.)

VERMONT

Rigorous: Generally speaking, exculpatory contracts are disfavored, and are subject to close judicial scrutiny; to be effective, such contracts must meet higher standards for clarity than other agreements, and must pass inspection for negative public policy implications. A release can be sufficiently clear for purposes of exculpating negligence liability notwithstanding its failure to include the word "negligence" in its terms. Public policy counsels in favor of upholding releases, with a commitment to the dual clarity/public-policy inquiry by strictly construing an exculpatory agreement against the party relying on it, and considering whether a release is void as contrary to public policy. *Provoncha v. Vt. Motocross Ass'n* (2009) 2009 VT 29.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

VIRGINIA

Moderate to Rigorous: A party should be liable for the consequences of the negligent breach of a duty owed to another, however contraposed against this basic rule of tort law is the principle that, as a matter of efficiency and freedom of choice, parties should be able to contract freely about their affairs. Parties may bargain for various levels of risk and benefits as they see fit. Thus, a plaintiff may agree in advance that the defendant has no legal duty towards him and thereby assume the risk of injury arising from the defendant's conduct. A defendant seeking to avoid liability under an exculpatory agreement must show (1) that the agreement does not contravene public policy, (2) that it could be readily understood by a reasonable person in the plaintiff's position, and (3) that it clearly and unequivocally releases the defendant from precisely the type of liability alleged by the plaintiff. Certain parties have been prohibited as a matter of public policy from contractually limiting their tort liability, including common carriers, furnishers of telephone service and employers as a condition of employment. *Hiett v. Barcroft Beach, Inc*. (1989) 18 Va. Cir. 315.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

WASHINGTON STATE

Moderate. Exculpatory clauses in preinjury releases are strictly construed and must be clear if the exemption from liability is to be enforced. If a release is clear, the general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others (gross negligence), or (3) they are inconspicuous. *Vodopest v. MacGregor* (1996) 128 Wn.2d 840.

Protects if parent of minor signs on behalf of minor? NO. *Scott v. Pac. W. Mt. Resort* (1992) 119 Wn.2d 484.

WEST VIRGINIA

Moderate: Generally, in the absence of an applicable safety statute, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy. When such an express agreement is freely and fairly made, between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes, it generally will be upheld. A clause in an agreement exempting a party from tort liability is, however, unenforceable on grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs. An example of the second situation is that when a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable. Thus, a plaintiff's express agreement to assume the risk of a defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced; the safety obligation created by the statute for such purpose is an

obligation owed to the public at large and is not within the power of any private individual to waive. *Murphy v. N. Am. River Runners* (1991) 186 W. Va. 310.

Protects if parent of minor signs on behalf of minor? UNKNOWN.

WISCONSIN

Rigorous: Wisconsin case law does not favor exculpatory agreements. While the courts have not held exculpatory clauses invalid per se, they have held that such a provision must be construed strictly against the party seeking to rely on it. Generally, exculpatory clauses have been analyzed on principles of contract law, and on public policy grounds. Recently the contractual analysis has not been emphasized. The courts need only look to the contract itself to consider its validity. Specifically, they examine the facts and circumstances of the agreement to determine if it was broad enough to cover the activity at issue. If not, the analysis ends and the contract is determined to be unenforceable in regard to such activity. If the language of the contract does cover the activity, they proceed to an analysis on public policy, which is the germane analysis for exculpatory clauses. However the Wisconsin public policy analysis is actually whether the release clearly, unambiguously, and unmistakably informs the signer of what is being waived, and whether the form, looked at in its entirety, alerts the signer to the nature and significance of what is being signed. The word "negligence" generally should be used. *Atkins v. Swimwest Family Fitness Ctr*. (2005) 2005 WI 4.

Protects if parent of minor signs on behalf of minor? YES. *Osborn v. Cascade Mt., Inc*. (2003) 2003 WI App 1.

WYOMING

Moderate: Exculpatory clauses or releases are contractual in nature, and the courts interpret them using traditional contract principles and considering the meaning of the document as a whole. If the release is clear and unambiguous it will be enforced. A contract limiting liability for negligence may be enforced only if it does not contravene public policy. The courts apply a four-part test for evaluating a negligence exculpatory clause. The factors the court considers are: (1) whether a duty to the public exists; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. A duty to the public exists if the nature of the business or service affects the public interest and the service performed is considered an essential service. A release agreement affecting the public interest is that which concerns a business of a type generally thought suitable for public regulation; the party seeking exculpation is engaged in performing a service of great importance to the public; which is often a matter of practical necessity for some members of the public; the party holds himself out as willing to perform this service for any member of the public who seeks it; and as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. Examples of services which are typically subject to public regulation and which demand a public duty or are considered essential include common carriers, hospitals and doctors, public utilities,

innkeepers, public warehousemen, employers, and services involving extra-hazardous activities. *Massengill v. S.M.A.R.T. Sports Med. Clinic, P.C.* (2000) 996 P.2d 1132.

Protects if parent of minor signs on behalf of minor? UNKNOWN.