MATTHIESEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW

MATTHIESEN, WICKERT & LEHRER, S.C.
Wisconsin ❖ Louisiana ❖ California
Phone: (800) 637-9176
gwickert@mwl-law.com
www.mwl-law.com

EXCULPATORY AGREEMENTS AND LIABILITY WAIVERS IN ALL 50 STATES

Society has become very risk-averse. It is hard to participate in any activity without being asked to read and sign some sort of exculpatory agreement or liability waiver in advance. A key tool of risk management is the **exculpatory agreement** - a generic term which can refer to a provision in a contract, the back of a receipt or invoice, or simply a statement posted in a prominent location, in which one of two things is stipulated:

(1) One party is relieved of any blame or liability arising from the other party's wrongdoing regarding a particular activity, and/or
(2) One party (usually the one that drafted the agreement) is freed of all liability arising out of performance of that contract.

An exculpatory agreement is usually a provision contained in a contract between a service provider and a participant, relieving the service provider from any liability resulting from loss or damage sustained by the participant. The terms "waiver" and "release of liability" are usually used interchangeably. An example of an exculpatory clause is a dry cleaner's receipt that includes a disclaimer purportedly relieving the dry cleaner from any liability for damage to the clothing during the dry-cleaning process. Disclaimers can appear as warning signs posted on playgrounds, sports arenas, constructions sites or other areas involving risk of physical injury ("enter at your own risk" or "use at your own risk"). It is common to see signs like the following in places of business: "Park at your own risk!"; "Swim at your own risk!"; "Enter at your own risk!"; or "The occupier is not liable for any item damaged or stolen from this property however caused!" They can appear as part of the packaging or advertising for consumer products. They can also be found as a "license" allowing a person to be on business premises or to use certain property, subject to limitations. Sometimes they take the form of "*click-wrap*" or "*shrink-wrap*" agreements - the fine print you see, among other things, when you click through terms and conditions in accessing an online service or as part of the installation of a piece of software. A typical waiver of liability form may read as follows:

> *I expressly, willing, and voluntarily assume full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities with Company whether during flight preparation, take-off, flight, landing, travel to or from the take-off or landing areas, or otherwise. Without limiting the generality of the foregoing, I hereby irrevocably release Company, its employees, agents, representatives, contractors, subcontractors, successors, heirs, assigns, affiliates, and legal representatives (the "Released Parties") from, and hold them harmless for, all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the ballooning activities….*

An exculpatory clause may be invalidated by courts if it is found to be unreasonable in any way. Exculpatory agreements come in all shapes, sizes, and types. They include liability waivers, releases of liability, assumption of risk agreements, pre-injury releases, disclaimers of liability, sign postings, etc. Most people are unaware of what rights, if any, they are giving up or waiving, when they sign such exculpatory agreements. For many years, many professionals labored under the misconception that waivers are not worth the paper they are written on. Over time, this erroneous notion was replaced by the equally-erroneous belief that waivers can offer total liability protection for all facility and service providers under all circumstances. Neither belief is correct. Insurance and subrogation professionals must become familiar with the legal and binding effect of such exculpatory agreements to evaluate both liability claims and subrogation potential. It is the purpose of this article and the

chart below to provide a *general* overview of the subject and a summary of the general law in all 50 states regarding whether and to what extent such agreements and waivers are binding and of legal effect.

History of Exculpatory Agreements

At common law, a party to whom a duty of care was owed could sue another party for acts which breach that duty, if those acts were reasonably foreseeable to lead to damage or injury. In the late 19th Century and early 20th Century, in a series of cases involving injury to people or property, the U.S. Supreme Court created a hard and fast rule that demanded reasonable care from contracting parties regardless of any contractual limitation of negligence or liability. In *The Syracuse*, 79 U.S. 167 (1870), the Supreme Court ruled that an exculpatory clause contained in a contract for towing a canal boat from Albany to New York City, which stated that the boat was being towed "at the risk of her master and owner," was unenforceable and could not eliminate the tug master's duty of reasonable care. It held that the exculpatory language in the contract was ineffective because the damage to the canal boat was the result of negligence. As a result, the tug company was liable for the damage notwithstanding the contractual limitations.

The period from 1897 to 1937 became known as the "*Lochner* Era." This was a period during which the U.S. Supreme Court routinely struck down economic regulations adopted by individual states, using due process and infringement on individual contract rights arguments, based on the Court's own notions of the most appropriate means for the State to implement its intra-state policies. The era takes its name from the 1905 Supreme Court decision of *Lochner v. New York*. Even during the *Lochner* Era and its increased emphasis on freedom of contract, the Court held accountability for negligent actions to an even higher priority than freedom of contract. It felt that even though the freedom to contract is held in high regard, courts will nullify exculpatory agreements if they perceive significant unfairness, unequal bargaining power, or the potential for lack of reasonable care. In his Supreme Court nomination proceedings, Justice Robert Bork referred to the Lochner Era as the "quintessential judicial usurpation of power." Later, Justice John Roberts suggested that *Lochner* was clearly a case of making the law, rather than interpreting the law.

The modern era of exculpatory clauses saw competing economic theories influencing the courts. These included the "efficiency" theory, which hypothesized to encourage and promote productive economic growth, predictability and reliability of laws relating to property and contracts was necessary. The modern era saw courts tending to limit judicial interference with and invalidation of exculpatory agreements between parties. Modern courts also began to stress that if a contract involved a purely private transaction, they became reluctant to invalidate contractual provisions on public policy grounds. Private parties became freer to allocate risk among themselves in any manner they felt appropriate. Despite a continued disfavor of exculpatory clauses, the courts began to discount concerns over the bargaining process and public policy vigilance and instead, began to favor strict construction. Today, courts construing exculpatory clauses do so using two important safeguards:

(1) The exculpatory clause must be strictly construed against the party relying on it; and
(2) The exculpatory clause must conspicuously and clearly describe the liability to be limited.

From there, the states have each developed their own case decisions and legislation about the enforcement of exculpatory provisions in contracts. Some states, such as **Wisconsin**, heavily disfavor their use and invalidate them if they are presented on a "take-it or leave-it" basis, with no opportunity to bargain. For example, in *Atkins v. Swimwest Family Fitness Center*, 691 S.W.2d 334 (Wis. 2005), the Wisconsin Supreme Court held that a guest registration and waiver form signed by a woman who drowned in a lap pool was an invalid exculpatory provision and against public policy, because it was overly broad and all-inclusive. The Court held that (1) the term "fault" did not make clear that the guest was releasing others from intentional, as well as negligent, acts, (2) the form served two purposes - guest registration and waiver of liability for "fault", and (3) the guest did not have the opportunity to bargain - she either signed or she couldn't swim. Other states invalidate them if they are overly broad and all-inclusive. Still others find a variety of public policy reasons for striking them down and/or place significant restrictions on their use.

Other states, like **Ohio,** have looked to the complexity of the language within the document to determine if an "ordinarily prudent and knowledgeable individual would have understood the provision as a release from liability for negligence." *Hall v. Woodland Lake Leisure Resort Club*, 1998 WL 729197 (Ohio App. 1998). **California** courts have identified six criteria established to 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, which is often a matter of practical necessity for some member 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 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 or exculpation, and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence; and
(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. *Tunkl v. Regents of the University of California*, 60 Cal.2d 92 (Cal. 1963).

In many states, to be enforceable, waivers need to be narrowly and clearly drafted to fully notify the parties of the significance of the document and inform them as to the specific nature of what is being waived. In some jurisdictions, the waiver must be a separate document with its own signature line, should not use excessive legal jargon, and should discuss only the risks associated with the activity and the release from liability due to negligence. Some states even require that the party waiving rights must be provided with an opportunity to bargain over the terms of the waiver. The text of the waiver itself should provide for the opportunity to bargain or at a minimum demonstrate that the waiving party considered bargaining prior to executing the release.

Generally, even if the waiver is held valid, it will apply only to ordinary negligence. A majority of states hold that such agreements generally are void on the grounds that public policy precludes enforcement of a release that would shelter aggravated misconduct or gross negligence. *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747 (Cal. 2007). Some states, such as **Connecticut**, do not recognize degrees of negligence and, consequently, do not recognize the tort of gross negligence as a separate basis of liability. Such courts have nevertheless limited the application of the releases to situations in which considerations relating to public policy and good conscience are not implicated. *Hanks v. Powder Ridge Restaurant Corp., et al*., 885 A.2d 734 (Conn. 2005). In addition, some state statutes affect the viability of an exculpatory clause. In **New York,** any assumption of risk/waiver in connection to any pool, gymnasium, amusement park, or any other similar facility is deemed statutorily void as against public policy – most notably when the plaintiff pays a fee to use the facility. They cite N.Y. Gen. Oblig. § 5-326. **New Jersey** has held that a release signed by a decedent with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death was void as against public policy because of its Wrongful Death Act.

Types of Exculpatory Agreements

As stated above, exculpatory agreements come in all shapes, sizes, and types.

LIABILITY WAIVER. A waiver is a contract between a service provider and a participant signed prior to participating in an activity. In it, the participant agrees to waive liability against the provider for any fault or liability for injuries resulting from the ordinary negligence of the provider, its employees, or its agents. The agreement attempts to relieve the service provider of liability for injuries resulting from mistakes, errors or faults of the provider and, in effect, relieves the provider of the duty to use ordinary care in providing for the participant. The waiver often states that the participant agrees to "release, waive, discharge, hold harmless, defend, and indemnify [the gym] and its [staff] from any and all claims, actions, or losses for bodily injury, property damage, wrongful death, loss of services or otherwise" arising out of the participant's use of the gym facilities and equipment. Please note that indemnity agreements are not covered by or discussed in this article.

ASSUMPTION OF RISK AGREEMENT. Assumption of risk refers to situations in which an individual acknowledges the risks associated with any activity but chooses to take part anyway. At common law, "assumption of the risk" is an affirmative defense where the defense claims that the plaintiff knowingly exposed himself to the hazards that caused injury or damages. It alleges that the risks assumed are not those created by the defendant's negligence, but rather by the nature of the activity

itself. The rationale is that some activities are inherently dangerous and imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation. To avoid this chilling effect, owners or occupiers of premises or businesses in which a plaintiff engages in these activities, have no duty to eliminate those risks.

In the *Restatement (Second) of Torts*, the discussion regarding express assumption of risk is explained is follows:

> *The risk of harm from the defendant's conduct may be assumed by express agreement between the parties. Ordinarily such an agreement takes the form of a contract, which provides that the defendant is under no obligation to protect the plaintiff and shall not be liable to him for the consequences of conduct which would otherwise be tortious. Restatement (Second) of Torts § 496B.*

An individual can assume the risks involved in an activity in one of two ways: (1) expressly, by signing an agreement, or (2) by his conduct. Express assumption of risk involves a written agreement in which an individual acknowledges the risk of injury or other damages and agrees to assume those risks. A "Waiver of Liability" usually includes language that the participant understands the risks inherent in certain activities and that participation in such activities could result in injury. The participant usually acknowledges that the risks and dangers may be caused by the negligence of the staff of the business, accidents, breaches of contract, or other causes, and that the participant assumes all risks and dangers, including the responsibility for any losses or damages, whether caused in whole or in part by the negligence or conduct of service provider. To prevail on an assumption of risk affirmative defense, the defendant must show the court that the plaintiff knew there was a risk of injury or other harm, and knowingly engaged in the activity which resulted in his injury or damages anyway.

PRE-INJURY RELEASE. A pre-injury release or waiver is a written document that a participant signs prior to engaging in an activity, which purports to *release* the service provider from claims an individual may bring as a result of the provider's negligence. This release of future liability is a contractual arrangement where one party surrenders legal rights or obligations. *American Jurisprudence* states that "[a] valid release continues to be a complete bar to recovery in negligence actions in every jurisdiction." 30 Am. Jur. Proof of Facts 3d 161 § 3. What courts consider to be a "valid release", however, varies from state to state. A properly-worded pre-injury release can be an effective way to limit liability. However, there are many ways injured parties can defeat a poorly-worded pre-injury release. States such as **Texas** require that for a pre-injury release to be effective, it must (a) meet the fair notice requirements, (b) constitute a meeting of the minds, and (c) be supported by valid consideration. *Dresser Indus., Inc. v. Page Petroleum, Inc*., 853 S.W.2d 505 (Tex. 1993).

INDEMNITY AGREEMENT. To "indemnify" means to reimburse another party for loss or damage suffered because of a third party's or one's own acts or omissions. It is a promise to reimburse another for such a loss and to give security against such a loss. It is a promise to do something in the future, should injury or damage result from an activity. An agreement to indemnify is often coupled with a promise to "hold harmless" another party:

> *Seller shall hold harmless and indemnify Buyer against any losses, liabilities, and claims arising out of or relating to this transaction.*

HOLD HARMLESS AGREEMENT. A hold harmless agreement is one in which the participant absolves the service provider from any responsibility for damage or other liability arising from a transaction or activity. *Black's Law Dictionary* says that the two terms have the same meaning whereas *Mellinkoff's Dictionary of American Legal Usage* says that one can also distinguish the two terms - that "hold harmless is understood to protect another against the risk of loss as well as actual loss" whereas indemnify can also mean "reimburse for any damage," a narrower meaning than that of hold harmless. Technically, the former is defensive, while the latter is offensive. The participant agrees to "hold harmless" (*i.e.,* indemnify) a service provider even before any injury or damage is sustained. A "hold harmless" agreement protects against losses and liabilities, while an indemnity agreement protects against losses alone. Indemnity agreements are much different than waivers of liability and releases and are not discussed at length in this article.

DISCLAIMER/SIGN POSTING. A disclaimer is any statement or posting that is used to specify or limit the scope of obligations and rights that are enforceable in a legally recognized relationship (such as host/visitor, manufacturer/consumer, etc.). The disclaimer usually acts to relieve a party of liability in situations involving risk or uncertainty. A very common method of communicating this attempted limitation on liability is posting a sign, such as "Use or Enter at Your Own Risk." The sign on the

back of a tractor-trailer which reads: "Stay Back: Not Responsible for Broken Windshields" is not a contract that would prevent a motorist from presenting a claim for damages against a trucking company. At best an attorney for the trucking company would argue that the sign was a warning which creates some contributory negligence on the part of the damaged motorist. A sign which warns of dangers or conditions of real property won't exonerate premises liability or a duty owed by a property owner, but it may serve to put an occupier on notice of a condition and will allow the owner to argue contributory negligence or "assumption of the risk." In some states, a person who is found to have "assumed the risk" might not be able to recover at all. However, other states treat the assumption simply as a way to reduce, but not eliminate, the owner's legal liability.

Signs which purport to limit liability for injuries or accidents simply because they are posted are found everywhere. Some signs serve a legitimate function, such as notifying people of "hidden" hazards such as wet floors, steps, or uneven surfaces. That's why every time there is a spill in a store, out comes the "wet floor" sign. While "wet floor" signs may fulfill a duty to warn others, other signs attempt to limit liability. A sign which reads "Not Responsible for Stolen Vehicles" is attempting to shirk a duty a valet service owes to its customers to safeguard and protect items left in their care and custody.

COVENANT NOT TO SUE. This agreement provides that the participant agrees or covenants not to sue the service provider for any loss, damage, or injury to their person or property which may occur from any cause whatsoever during the event or service provided.

TICKETS/RECEIPTS. An exclusion clause, waiver or disclaimer may appear on a document which does not appear to be a contract. These may be found on the back of tickets to a basketball game, amusement park, concert, etc. Exculpatory clauses are often found on the back of a ticket or a receipt that you have not signed. The theory is that the act of purchasing the ticket is all that is needed for an agreement to form between the parties in which one promises not to sue the other in the event of an injury. Disclaimers can often be seen where information, products, or services are supplied. The disclaimer and other terms and conditions should be available for viewing at the point in time that the contract is entered into, before the purchaser or user agreed to proceed. The effectiveness of such an exclusion clause is assessed by considering whether actual or constructive notice occurred prior to the contract forming. It is harder to prove notice was given in the case of unsigned disclaimers or disclaimers printed on receipts issued after payment. In such cases, a court considers whether a reasonable person would consider the receipt, voucher, or ticket to be part of the contract and know that they should read it. In some states, the courts hold that that the release on a ski ticket stating that the skier "assumes the inherent risks of skiing" does not clearly and unambiguously release the operator from liability for the operator's negligence. *Steele v. Mt. Hood Meadows Oregon, Ltd*., 974 P.2d. 794 (Or. Ct. App. 1999). They are frequently held to the same standards as waivers and exculpatory clauses found in written and signed contracts. In **Wisconsin**, for example, the only issue is whether the language is against public policy. *Yauger v. Skiing Enterprises, Inc.,* 557 N.W.2d 60 (Wis. 1996). Other states make their ultimate determination on the effectiveness of such "agreements" based on what constitutes the public interest after considering the totality of the circumstances of any given case. *Wolf v. Ford*, 644 A.2d 522 (Md. App. 1994).

CLICK-WRAP / SHRINK-WRAP. "Shrink-wrap" and "click-wrap" agreements are the fine print you see, among other things, when you click through terms and conditions in accessing an online service (*e.g.,* in connection with a purchase or an online service) or as part of the installation of a piece of software. The term "shrink-wrap" comes from the packaging method of computer installation disks and associated documentation sealed by shrink-wrap cellophane. The purported end user license agreement was often itself packaged in shrink-wrap cellophane and placed on the outside of the package or included as the top most item in the package. Shrink-wrap agreements can take a variety of forms and are found in both software and hardware acquisitions. However, they all have a common structure: essentially non-negotiable terms and conditions that accompany the product. The terms are often used interchangeably. Although this article doesn't deal with these types of agreements, courts have tended to uphold as enforceable "shrink-wrap" and "click-wrap" agreements, even if the consumer fails to read them. The terms and conditions found in shrink-wrap and click-wrap agreements vary greatly, but include such terms as warranty terms, licensing use restrictions, limitations on liability, indemnity, and arbitration and venue terms. These clandestine agreements may also be encountered as part of the documentation provided with new software or a hardware component. They may even be found, with some searching, in a file entitled "license.txt" or similar name on the installation CD on which a new piece of software is delivered. Businesses seldom read these terms in any detail, generally view them as non-negotiable, and accept them as a necessary evil.

Enforcement Generally

The enforcement of exculpatory clauses is very state-specific. Each state can be classified as to its enforcement of such waivers. Some are very lenient, others moderate, and many have very strict requirements. Three states disallow such waivers entirely. Because exculpatory clauses are widely disfavored, a majority of state courts *strictly construe* the terms and conditions against the party seeking to enforce them and require that the contract "clearly set out what negligent liability is to be avoided." *Ingersoll-Rand Co. v. El Dorado Chem. Co.*, 283 S.W.3d 191 (Ark. 2008). This generally means that the courts require the exculpatory clause to be clear and unambiguous. Any such release must clearly, explicitly, and comprehensibly set forth to an ordinary person untrained in the law the intent and effect of the document. *Cohen v. Five Brooks Stable*, 72 Cal. Rptr.3d 471 (Cal. App. 2008). Some courts require that the word "negligence" be specifically included and that the waiver explicitly state the type of negligence being waived to distinguish between losses resulting from inherent risks and those resulting from fault or wrongdoing *Slowe v. Pike Creek Court Club, Inc*., 2008 WL 5115035 (Del. Super. 2008).

The most common reason waivers are not enforced is because they are poorly written. Courts in all states require that the language be clear and unambiguous. In addition, many states require specific language for the waiver to be enforceable. For instance, **New York** courts (and the courts in several other states) require that the waiver include language specifying the "negligence" of the provider. Failure to use the word "negligence" in those states causes an otherwise enforceable waiver to fail.

Most states will not enforce waivers intended to protect the provider against liability for gross negligence, reckless conduct, willful/wanton conduct, or intentional acts. Ordinary negligence is the failure to take the prudence and care that a reasonable, prudent professional would take under the circumstances. Gross negligence is an extreme form of negligence in which the party fails to take the care that even a careless person would take under the circumstances. It is sometimes said that gross negligence includes a reckless disregard for the rights and welfare of others.

In some states a waiver signed by a spouse protects the provider from litigation by the non-signing spouse in the event of injury or death of the signing spouse. In other states, such a waiver has no effect on the right of the non-signing spouse to bring suit.

Some states, such as **Arizona**, have held that the validity of an express contractual assumption of risk is a question of fact for a jury, not a judge. *Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003 (Ariz. 2005). States such as **Virginia** "universally prohibit" any "provision for release from liability for personal injury which may be caused by future acts of negligence" and only allow releases of liability for property damage. The Supreme Court of Virginia has clearly held that public policy forbids the enforcement of a release or waiver for personal injury caused by future acts of negligence. *Johnson's Adm'x v. Richmond and Danville R.R. Co.*, 11 S.E. 829 (Va. 1890). **Louisiana** has a statute that declares as null any clause that limits liability based on intentional fault or gross fault or for physical injury. *Ostrowiecki v. Aggressor Fleet, Ltd.,* 965 So.2d 527, (La. App. 2007). **Montana** similarly prohibits exculpatory clauses that purport to release a party from negligence. In Montana, "it is statutorily prohibited for any contracts to have as their object, directly or indirectly, the exemption of anyone from responsibility for their own fraud, their willful injury to the person or property of another, or for their willful or negligent violation of the law." Montana Code Ann. § 28-2-702.

In at least 46 states, a well-written, properly administered waiver, voluntarily and knowingly signed by an adult, can protect the drafter of the waiver from liability for injuries resulting from ordinary negligence. Not all waivers, however, are well-written and properly administered. Some states, such as **Louisiana**, **Montana**, and **Virginia**, simply refuse to enforce such exculpatory agreements. Twenty (20) states have very strict standards which must be adhered to for an exculpatory agreement to be effective. These include **Alaska**, **Arizona**, **Arkansas**, **California**, **Connecticut**, **Delaware**, **Hawaii**, **Indiana**, **Kentucky**, **Maine**, **Mississippi**, **Missouri**, **Nevada**, **New Hampshire**, **New Jersey**, **New York**, **Pennsylvania**, **Utah**, **Vermont**, and **Wisconsin.** Sixteen (16) states have more moderate standards for such an exculpatory clause to be valid. They include **Colorado**, **District of Columbia**, **Florida**, **Idaho**, **Illinois**, **Iowa**, **Minnesota**, **New Mexico**, **North Carolina**, **Oklahoma**, **Oregon**, **South Carolina**, **South Dakota**, **Texas**, **Washington**, and **West Virginia**. Ten (10) states have very lenient standards and tend to enforce sloppily-drafted exculpatory agreements. They include **Alabama**, **Georgia**, **Kansas**, **Maryland**, **Massachusetts**, **Michigan**, **Nebraska**, **North Dakota**, **Ohio**, and **Tennessee**. **Rhode Island** hasn't clearly defined its requirements and is hard to classify.

Parental Waivers Signed on Behalf of Minors

An issue which is developing in many states is the restriction on enforcing waivers signed by minors or signed by the parents of minors (parental waivers). Until recent years, the general rule was that waivers signed by minors or waivers signed by the parents of minor children were not enforceable. In the past few years, courts in several states have begun to enforce parental waivers. Additionally, two states (**Alaska** and **Colorado**) have passed statutes enabling the enforcement of such agreements.

Application to Business Losses

Whether the same public policy concerns and applications which govern the efficacy of exculpatory clauses involving personal injury claims applies equally to the release of business losses in a contract between two commercial entities is also an area that varies from state to state. Although there is often a correlation between the two, the subject of exculpatory agreements between two commercial entities is not covered in the chart below. As an example of its treatment, however, in *Discount Fabric House v. Wisconsin Telephone, Inc.,* 345 N.W.2d 417 (Wis. 1984), the plaintiff, a drapery business, sued the Wisconsin Telephone Company for omitting the plaintiff's trade name from an advertisement in the Yellow Pages. The court noted that the nature of the telephone company's business gave it a "decisive advantage of bargaining strength." Therefore, the exculpatory clause was held invalid.

Posted Warning and "Not Responsible for Injuries" Signs

Many businesses are choosing to display warning signs about potentially dangerous conditions on a property or inside a building. A "Do Not Enter" sign may transform social guests or invitees into trespassers, altering the duty owed to the injured party. But, it doesn't necessarily relieve the premises owner of premises liability. A "Beware of Dog" sign may actually be used against the property owner, who apparently is aware that people must be "warned" about the dangerous propensity of the dog. At the same time, it may allow the dog owner to argue that the person assumed the risk of a dangerous dog after reading the sign. A "Caution: Wet Floor" sign may serve as notice to invitees and social guests of a hazardous condition. However, they open a new area of litigation regarding their visibility and specificity. A tractor-trailer may have a sign on the back of the trailer which reads, "Warning: Stay Back 200 Feet. Not Responsible for Broken Windshields." However, these are often of little legal effect. In **Florida**, for example, F.S.A. § 316.520 states that a vehicle may not be driven or moved on any highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, shifting, leaking, blowing, or otherwise escaping therefrom, except that sand may be dropped only for the purpose of securing traction or water or other substance may be sprinkled on a roadway in cleaning or maintaining the roadway. It is the duty of every owner and driver, severally, of any vehicle hauling, upon any public road or highway open to the public, dirt, sand, lime rock, gravel, silica, or other similar aggregate or trash, garbage, any inanimate object or objects, or any similar material that could fall or blow from such vehicle, to prevent such materials from falling, blowing, or in any way escaping from such vehicle. No sign will erase the legal duty which the statute creates. A sign in a hotel lobby that states "This hotel is not responsible for any stolen or lost items" may be enough for hotels to avoid liability in some states. However, other states hold that a simple sign without any other precautions is not enough.

Drafting Effective Exculpatory Agreements

it is not possible to draft a release/waiver that will withstand judicial scrutiny in every state given the variations in standards for each state. Moreover, because state statutes can affect whether an exculpatory clause will be enforced (for example, whether it will be effective against one's heirs/assigns), a "one size fits all" approach is simply not feasible. It is still possible to create enforceable exculpatory agreements; there remain numerous traps for non-vigilant drafters. Throughout this last 25 years, the courts have repeatedly said that waivers of liability clauses are and will continue to be looked at with disfavor. Waivers of liability (*i.e.,* an exculpatory clause) are not invalid *per se*. Rather, provisions of any such waiver must be closely scrutinized and strictly construed against the party seeking to rely on it.

Drafters of exculpatory agreements are not always given clear guidance as to what is and what isn't acceptable. The Wisconsin Supreme Court has now considered exculpatory agreements in six cases in the past 25 years, and each time has found the agreement as drafted to be unenforceable. It isn't so much that lawyers and

businesses that draft such agreements are ignoring what the Court is telling them, as much as it is that the Supreme Court has not formulated a clear, uniform test for these agreements. Until the Court announces such a test, lawyers who draft exculpatory agreements must carefully apply what the Court has said so far and give thorough consideration to the circumstances surrounding the signing of the agreement.

Despite their unpredictability, exculpatory agreements are the best risk-management tool available to businesses and service providers. Put succinctly, they can't hurt. Frequently, exculpatory agreements are accompanied by such contractual risk management tools as indemnification agreements, covenants not to sue, a severability clause, a venue and jurisdiction clause, a mediation/arbitration provision, and an assumption of risk statement. Interpreting the interplay between all these usually requires engaging qualified counsel. The following chart provides a brief and general summary of how exculpatory clauses are treated in all 50 states. Exculpatory agreements most commonly fail because they are poorly drafted. For a more detailed and case-specific evaluation of the effect an exculpatory agreement may have on a claim or matter, contact Gary Wickert at gwickert@mwl-law.com or submit the matter to MWL for review and handling HERE.

STATE	EXCULPATORY AGREEMENTS	STATUTE	DRAFTING GUIDELINES	COMMENTS
ALABAMA	Valid, unless it releases a party for wanton or willful conduct. *Barnes v. Birmingham Intern. Raceway, Inc*., 551 So.2d 929 (Ala. 1989); *Young v. City of Gadsden*, 482 So.2d 1158 (Ala. 1985) (overruled by *Barnes*).	N/A	Contract of adhesion are unenforceable in Alabama. These are contracts in which the principal obligation of the adhering party is the payment of money. Ensure that the major obligation of the contract is to participate in an activity or obey certain rules – not to secure the payment of money. *Dudley v. Bass Anglers Sportsman Soc*., 777 So.2d 135 (Ala. Civ. App. 2000).	An exculpatory agreement between parties with unbalanced bargaining powers (*e.g.,* landlord/tenants) are scrutinized more thoroughly. *Morgan v. South Cent. Bell Tel. Co*., 466 So.2d 107 (Ala. 1985). The mere fact that a party did not understand the release is an insufficient defense for voluntary hazardous activities. *Rommell v. Automobile Racing Club, Inc.,* 964 F.2d 1090 (11th Cir. 1992).
ALASKA	Valid if it reflects "conspicuous and unequivocally expressed" intent to release a party from liability. *Kissick v. Schmierer*, 816 P.2d 188 (Alaska 1991).	Alaska Stat. § 05.45.120 (Skiing)	(1) Risk clearly set forth (2) using the word "negligence"; (3) clear simple words and capital letters; (4) doesn't violate public policy; (5) must state if seeking to release for negligence unrelated to inherent risks; and (6) can't suggest standards of safety. *Donahue v. Ledgends, Inc*., 331 P.3d 342 (Alaska 2014).	Ambiguities are strictly construed against the party seeking immunity. *Ledgends, Inc. v. Kerr*, 91 P.3d 960 (Alaska 2004). In *Kissick*, plaintiff was not barred from bringing a wrongful death claim since the term "injuries" was ambiguous regarding whether it included death. Further, in *Moore v. Hartley Motors, Inc.*, plaintiff's claim was not barred because the scope of the exculpatory agreement only covered the inherent dangers of riding an ATV and not the dangers of an unnecessarily dangerous course. *Moore v. Hartley Motors, Inc.*, 36 P.3d 628 (Alaska 2001).

STATE	EXCULPATORY AGREEMENTS	STATUTE	DRAFTING GUIDELINES	COMMENTS
ARIZONA	Valid. The validity of every exculpatory agreement is constitutionally required to be a jury question. *Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003 (Ariz. 2005); AZ Const. Art. 18, § 5.	AZ Const. Art. 18, § 5 A.R.S. § 5-706 (Skiing) A.R.S. § 12-556 (Motor Sport Facilities) A.R.S. §12-553 (Equestrian)		Although a party may effectively use a release to avoid liability, there is a duty to disclose all facts which they know or should know would reasonably affect the releasing party's judgment, unless the releasing party knows such facts or that he does not care to know them. *Maurer v. Cerkvenik-Anderson Travel, Inc.*, 890 P.2d 69 (Ariz. App. 1994).
ARKANSAS	Valid, but strongly disfavored based on the encouragement of exercising care. *Jordan v. Diamond Equipment & Supply Co.*, 207 S.W.3d 525 (Ark. 2005). Exculpatory contracts are strictly construed against the party relying on them and must clearly set out the liability which is being avoided. *Plant v. Wilbur*, 345 Ark. 487 (Ark. 2001).	N/A		Courts do not limit interpretations to the literal language of the release, but also consider the facts and circumstances surrounding the release to determine the intent of the parties. *Miller v. Pro-Transportation*, 77 S.W.3d 551 (Ark. App. 2002).
CALIFORNIA	Valid, except when involving the public interest. *Sproul v. Cuddy*, 280 P.2d 158 (Cal. Ct. App. 1955) Must be "clear, unambiguous, and explicit in expressing the intent of the parties." *Paralift, Inc. v. Superior Court*, 23 Cal.App.4th 748 (Cal. Ct. App. 1993).	Cal. Civ. Code § 1668	The inclusion of the term "negligence" is not required if the agreement's intent is reasonably clear. *Sanchez v. Bally's Total Fitness Corp.*, 68 Cal.App.4th 62 (Cal. Ct. App. 1998).	A list of characteristics is provided in *Tunkl v. Regents of Univ. of Cal.* to determine when the public interest is affected. *Tunkl v. Regents of Univ. of Cal.,* 383 P.2d 441 (Cal. 1963).

STATE	EXCULPATORY AGREEMENTS	STATUTE	DRAFTING GUIDELINES	COMMENTS
COLORADO	Valid, although disfavored. Not strictly against public policy "if one party is not at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence." *Heil Valley Ranch v. Simkin*, 784 P.2d 781 (Colo. 1989). Can't be used to shield against a claim of willful/wanton negligence. *McShane v. Stirling Ranch Property Owners Ass'n*, Inc., 393 P.3d 978 (Colo. 2017).	C.R.S. § 33-44-101 to 114 (Skiing) C.R.S. § 13-21-119 (Equestrian)	Courts consider four elements: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention is expressed in clear and unambiguous language. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).	A waiver may violate public policy "if it involves a service that a defendant is obligated to provide for the public." *Chadwick v. Colt Ross Outfitters, Inc*., 100 P.3d 465, 467 (Colo. 2004). However, businesses offering recreational activities, which are non-essential, such as horseback riding and snowmobiling, do not owe a special duty to the public. *Id.*
CONNECTICUT	Reluctantly valid. However, exculpatory agreements must be expressed in clear and unmistakable language. *Hanks v. Powder Ridge Rest. Corp*., 276 Conn. 314 (Conn. 2005); *Hyson v. White Water Mountain Resorts of Conn., Inc*., 265 Conn. 636 (Conn. 2003).	C.G.S.A. § 29-212 (Skiing) C.G.S.A. § 52-557p (Equestrian)		Although Connecticut does not recognize degrees of negligence in the law of torts (*Decker v. Roberts*, 125 Conn. 150 (Conn. 1939)), Connecticut courts are careful not to allow the release of defendant from conduct which violates public policy. *Reardon v. Windswept Farm, LLC,* 280 Conn. 153 (Conn. 2006). Releases have been considered against public policy when it's a "take-it or leave-it" situation or when the party seeking the release invites the public to use their facilities regardless of ability level. *Id*.
DELAWARE	Valid if clear and unequivocal; not unconscionable; and not against public policy. *Ketler v. PFPA, LLC*, 132 A.3d 746 (Del. 2016).	Del. Code Ann. tit. 6, § 2-302 (Unconscionable Contract)	Courts have found a release for a party's own negligence to be sufficiently "crystal clear" when they include language "specifically referring to the negligence of the protected party. *Slowe v. Pike Creek Court Club, Inc*., 2008 WL 5115035 (Del. Super. Ct. 2008). Release does not have to specifically name a party to be enforceable. *Evans v. Feelin' Good, Inc.*, 1991 WL 18066 (Del. Super. Ct. 1991).	Can be a general release, including a release of third parties. *Chakov v. Outboard Marine Corp.,* 429 A.2d 984 (Del. 1981).

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DISTRICT OF COLUMBIA	Valid if clear and unambiguous. *Maiatico v. Hot Shoppes, Inc.,* 287 F.2d 349 (D.C. Cir. 1961). Must not violate public policy. *Godette v. Estate of Cox*, 592 A.2d 1028 (D.C. 1991).	N/A	To be enforceable, an exculpatory provision must clearly, unequivocally, specifically, and unmistakably express the parties' intention to exculpate from its own negligence. *Moore v. Waller*, 930 A.2d 176 (D.C. 2007). Must expressly refer to releasing the release from negligence claims. *Id.*	Cannot limit a party's liability for gross negligence, recklessness, or intentional torts. *Moore v. Waller*, 930 A.2d 176 (D.C. 2007).
FLORIDA	Valid if the intention is clear and unequivocal and the wording so clear and understandable that an ordinary party will know what he is contracting away. *Brooks v. Paul*, 219 So.3d 886 (Fla. Dist. Ct. App. 2017).	F.S.A. § 773.02 - 03 (Equestrian) F.S.A. § 773.05 (Making Land Available to Public)	The word "negligent" not required but highly suggested. *Sanislo v. Give Kids the World, Inc*., 157 So.3d 256, 270 (Fla. 2015). An exculpatory agreement need not list every possible way plaintiff could be injured. *Id*. Suggested that agreements be dated, signed, witnessed, and the exculpatory language be clearly visible in conspicuous print.	An exculpatory agreement cannot be used to release a party for an intentional tort. *Mankap Enterprises, Inc. v. Wells Fargo Alarm Servs., a Div. of Baker Protective Servs., Inc.*, 427 So.2d 332 (Fla. Dist. Ct. App. 1983).
GEORGIA	Valid if not against public policy. *Cash v. St. & Trail, Inc.,* 221 S.E.2d 640 (Ga. Ct. App. 1975). Whether "against public policy" is a decision for the General Assembly. *McFann v. Sky Warriors, Inc.,* 603 S.E.2d 7 (Ga. Ct. App. 2004).	O.C.G.A. § 1-3-7; O.C.G.A. § 13-8-2 (Contracts Against Public Policy)	Exculpatory waivers do not need to use the word "negligence." *Neighborhood Assistance Corp. of Am. v. Dixon*, 593 S.E.2d 717 (Ga. Ct. App. 2004).	An exculpatory agreement may not relieve a party from liability for willful or wanton conduct. *McFann v. Sky Warriors, Inc*., 603 S.E.2d 7 (Ga. Ct. App. 2004).
HAWAII	Valid if it does not "exempt a party from negligence in the performance of a public duty, or where a public interest is involved." *Fujimoto v. Au*, 19 P.3d 699 (Haw. 2001).	Haw. Rev. Stat. § 663-10.95 (Motorsport) Haw. Rev. Stat. § 663(B) (Equestrian) Haw. Rev. Stat. § 663-1.54 (Recreational Activity)	(1) Provide full disclosure of the inherent risks; and (2) Take steps to ensure patron is physically able to participate and is given the necessary instruction to safely participate.	Waiver can release you for inherent risks when providing recreational activities. Haw. Rev. Stat. § 663-1.54 defines "inherent risks."

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IDAHO	Valid - subject to certain exceptions. *Steiner Corp. v. Am. Dist. Tel.*, 683 P.2d 435 (Idaho 1984). Exceptions include (1) disparity in bargaining power, and (2) a public duty is involved. *Lee v. Sun Valley Co.*, 695 P.2d 361 (Idaho 1984).	Idaho Code § 6-1206 (Hiking) Idaho Code § 6-1107 (Skiing)	The release must be (1) clear and ambiguous, and (2) must address the conduct that caused the harm. However, there is no need to state the precise occurrence which could cause injury, rather adopt broad language to cover a wide range of accidents. *Morrison v. Northwest Nazarene Univ.*, 273 P.3d 1253 (Idaho 2012).	Contributory negligence is not a complete bar to recovery. Liability is apportioned between the parties based on the degree of fault. *Salinas v. Vierstra*, 695 P.2d 369 (Idaho 1985).
ILLINOIS	Valid, but generally disfavored and will be construed against the drafter. *Chicago & N.W. Ry. Co. v. Chicago Packaged Fuel Co.*, 195 F.2d 467 (7th Cir. 1952).	740 I.L.C.S. § 35/1 (Construction)	(1) Clearly spell out the intention of the parties; (2) No social relationship between the parties preventing enforcement; and (3) not against public policy. *Evans v. Lima Flight Team, Inc.*, 373 Ill. App.3d 407 (Ill. App. Ct. 2007). Must contain clear, explicit, and unequivocal language referencing the types of activities, circumstances, or situations that may occur. Not specific instances. *Garrison v. Combined Fitness Ctr., Ltd.*, 559 N.E.2d 187 (Ill. App. Ct. 1990); *Oelze v. Score Sports Venture, LLC*, 927 N.E.2d 137 (Ill. App. Ct. 2010).	A release can be set aside if there is fraud in the execution or fraud in the inducement. *Bien v. Fox Meadow Farms Ltd.*, 574 N.E.2d 1311 (Ill. App. Ct. 1991).
INDIANA	Valid. "Parties may agree that one is under no obligation of care for the benefit of the other and shall not be held liable for the consequences of conduct which would otherwise be negligent." *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92 (Ind. Ct. App. 1994).	N/A	To ensure a party's acceptance, a release must specifically and explicitly refer to the negligence the party is being released from. *Powell v. Am. Health Fitness Ctr. of Fort Wayne, Inc.*, 694 N.E.2d 757 (Ind. Ct. App. 1998). However, this does not specifically require the use of the word "negligence." *Avant v. Cmty. Hosp.*, 826 N.E.2d 7 (Ind. Ct. App. 2005).	Three exceptions: (1) release invalid where legislature has deemed it so, (2) if release affects public interest, and (3) unequal bargaining power between parties. *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605 (Ind. Ct. App. 1977).

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IOWA	Valid and not contrary to public policy. *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993).	N/A	A release need not specify that it covers negligent acts if the clear intent is to provide for such a release. *Hysell v. Iowa Pub. Serv. Co*., 534 F.2d 775 (8th Cir. 1976). The parties don't need to contemplate the precise occurrence if the parties reasonably contemplated a similar range of accidents. *Korsmo v. Waverly Ski Club,* 435 N.W.2d 746, 749 (Iowa Ct. App. 1988).	Releases will be upheld even when it was not read before signed - absent fraud or mistake. See *Huber*.
KANSAS	Valid, unless contrary to public policy, illegal, or a disparity in bargaining power. *New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc*., 457 P.2d 133 (Kan. 1969); *Corral v. Rollins Protective Servs. Co*., 732 P.2d 1260 (Kan. 1987).	N/A	Not necessary that the release contain express language covering the party's negligence. However, the intention to exculpate the party from liability must be clear. *Fee Ins. Agency, Inc. v. Snyder*, 930 P.2d 1054 (Kan. 1997).	A release must be "fairly and honestly negotiated and understandingly entered into" determined by examining the totality of the circumstances. *Ki Ron Ko v. Bally Total Fitness Corp.,* 2003 WL 22466193 (D. Kan. 2003).
KENTUCKY	Valid. *Cumberland Valley Contractors, Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644 (Ky. 2007). However, a release will be invalid if it releases a party for willful or wanton negligence. *Coughlin v. T.M.H. Int'l Attractions, Inc*., 895 F. Supp. 159 (W.D. Ky. 1995).	K.R.S. § 411.190 (Recreational Land Use) K.R.S. § 433.883 (Caves)	(1) Explicitly use of the word "negligence"; or (2) Clearly and specifically indicate an intent to release from liability caused by that party's own conduct; or (3) Protection against negligence is the only reasonable construction of the language; or (4) The hazard is clearly within the contemplation of the release. *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005).	Courts have carved out an exception for racetracks. *Dunn v. Paducah Int'l Raceway*, 599 F. Supp. 612 (W.D. Ky. 1984).
LOUISIANA	Invalid. Any clause that limits the future liability of one party for causing physical injury to the other party is invalid. *Ramirez v. Fair Grounds Corp*., 575 So.2d 811 (La. 1991).	La. Civ. Code Ann. art. 2004		Any clause that limits liability based on intentional fault or gross fault or for physical injury is unenforceable. *Ostrowiecki v. Aggressor Fleet, Ltd*., 965 So.2d 527 (La. Ct. App. 2007).

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MAINE	Valid, however must "expressly spell out … the intention of the parties contractually to extinguish negligence liability." *Hardy v. St. Clair*, 739 A.2d 368 (Me. 1999).	N/A	Including a specific reference in the release to the negligence sufficiently "spells out" the intent of the party seeking immunity. *Lloyd v. Sugarloaf Mountain Corp*., 833 A.2d 1 (Me. 2003).	Releases signed by parents on behalf of a child are invalid. *Rice v. Am. Skiing Co*., 2000 WL 33677027 (Me. 2000).
MARYLAND	Valid, with three exceptions: (1) cannot release for intentional harms or the more extreme forms of negligence, (2) obvious disparity in bargaining power, and (3) cannot affect the public. *Wolf v. Ford*, 644 A.2d 522 (Md. Ct. Spec. App. 1994); *Winterstein v. Wilcom*, 293 A.2d 821 (Md. Ct. Spec. App. 1972).	Md. Code, Real Prop. § 8-105 (Landlords) Md. Code, Cts. & Jud. Proc. § 5-401 (Construction)	There is no requirement to use the word "negligence" or other specific phrase for a release to be valid. *Adloo v. H.T. Brown Real Estate, Inc*., 686 A.2d 298 (Md. Ct. Spec. App. 1996). A release must clearly and specifically indicate the release's intent. *Id*.	Gyms or health spas are not activities of great public importance nor of practical necessity. *Seigneur v. Nat'l Fitness Inst., Inc*., 752 A.2d 631 (Md. Ct. Spec. App. 2000).
MASSACHUSETTS	Valid. Enforcement of waivers for ordinary negligence has long been favored. *Sharon v. Newton*, 437 Mass. 99 (Mass. 2002).	N/A	A party who signs a release is bound by its terms whether he reads and understands the release. The time for performance of a release does not extend forever but only for a reasonable time. *Borges v. Sterling Suffolk Racecourse*, 2000 WL 1298805 (Mass. 2000).	Waiver will not be enforced if: (1) Obtained by fraud, duress, deceit or ones that go against public policy, *Lee v. Allied Sports Assocs., Inc.*, 209 N.E.2d 329(Mass. 1965). (2) Releases a party for an injury caused by gross negligence, *Zavras v. Capeway Rovers Motorcycle Club, Inc,* 687 N.E.2d 1263 (Mass. App. Ct. 1997). (3) If the conduct violates a statute. *Henry v. Mansfield Beauty Academy*, 233 N.E.2d 22 (Mass. 1968).

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MICHIGAN	Valid if clear and unambiguous. *Cole v. Ladbroke Racing Michigan, Inc*., 614 N.W.2d 169 (Mich. Ct. App. 2000).	M.C.L.A. § 691.1664 (Equestrian) M.C.L.A. § 554.633 (Landlord)	"A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not establish an ambiguity." See *Cole.*	A failure to read a release is not a defense unless induced by fraud. Requesting the release be signed is enough to demonstrate the release has been read. *Faranso v. Cass Lake Beach Club, Inc*., 1998 WL 1991226 (Mich. Ct. App. 1998). Party may not insulate himself against liability for gross negligence or willful and wanton misconduct. *Lamp v. Reynolds*, 645 N.W.2d 311 (Mich. Ct. App. 2002).
MINNESOTA	Valid only when releasing for negligent conduct. *Schlobohm v. Spa Petite, Inc*., 326 N.W.2d 920 (Minn. 1982).	M.S.A. § 604A.11 (Volunteer Coaches, Officials) M.S.A. § 604A.12 (Livestock)	Valid if: (1) not ambiguous; (2) does not purport to release a defendant from liability for intentional, willful, or wanton acts; and (3) does not violate public policy. *Malecha v. St. Croix Valley Skydiving Club*, 392 N.W.2d 727 (Minn. App. 1986).	
MISSISSIPPI	Valid, but very disfavored. Subject to scrutiny if the intention of the parties is not expressly and unmistakably clear. *Farragut v. Massey*, 612 So.2d 325 (Miss. 1992).	M.C.A. § 93-19-13 (Minors)	An exculpatory contract should waive negligence as clearly and precisely as possible. *Leach v. Tingle*, 586 So.2d 799, 801 (Miss. 1991).	The waiver must be fairly and honestly negotiated, and the person must understand what they are entering. *Turnbough v. Ladner*, 754 So.2d 467 (Miss. 1999).
MISSOURI	Valid, but disfavored. Courts will enforce contracts according to the plain meaning, unless induced by fraud, duress, or undue influence. *Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910 (Mo. 2005).	N/A	"Consumer contracts must conspicuously use the terms 'negligence,' 'fault' or equivalent words so that a clear and unmistakable waiver of risk occurs." *Milligan v. Chesterfield Village. GP, LLC,* 239 S.W.3d 613 (Mo. Ct. App. 2007).	Requires clear, unambiguous, unmistakable, and conspicuous language for an exculpatory contract to release for one's future negligence. *Milligan*, 239 S.W.3d 613 (Mo. Ct. App. 2007).
MONTANA	Invalid, it is statutorily prohibited for any contracts to have the exemption of anyone from responsibility for their own fraud, willful injury to person or property, or violation of the law.	Mont. Stat. § 28-2-702		

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NEBRASKA	Valid for cases involving ordinary negligence. *Mayer v. Howard*, 370 N.W.2d 93 (Neb. 1985).	NA/	Whether a contract violates public policy must be considered based on the facts surrounding the agreement. *OB-GYN v. Blue Cross*, 361 N.W.2d 550 (Neb. 1985).	Can't be exempt from liability for gross negligence or willful misconduct. *New Light Co. v. Wells Fargo Alarm Servs.*, 525 N.W.2d 25 (Neb. 1994).
NEVADA	Valid. *Agricultural Aviation Eng. Co. v. Bd. of Clark Cty. Comm'rs*, 794 P.2d 710 (Nev. 1990).	N/A	To relieve yourself of statutory liability: (1) must be construed strictly; (2) must spell out the intention of the party with the greatest particularity and show the intent to release from liability beyond doubt by express stipulation and no inference from the words of general import can establish it; (3) must be construed with every intendment against the party who seeks immunity; and (4) the burden to establish immunity from liability is upon the party who asserts such liability. *Id.* (quoting *Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n*, 224 A.2d 620 (Pa. Super. Ct. 1978).	See also, *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172 (Nev. 2008).
NEW HAMPSHIRE	Valid. Generally prohibited but in limited circumstances, can expressly consent to waive the liability of another who causes injury. *Dean v. MacDonald*, 786 A.2d 834 (N.H. 1986).	N/A	Will be enforced if: (1) does not violate public policy; (2) plaintiff understood the agreement or a reasonable person in his position would have understood; and (3) plaintiff's claims were within the contemplation of the parties when contract was executed. See *Dean.*	An exculpatory contract completely bars a plaintiff's recovery, and, therefore, the comparative fault statute does not apply. *Allen v. Dover Co Recreational Softball League*, 807 A.2d 1274 (N.H. 2002). Failure to read the entire release does not preclude enforcement of the agreement. *Barnes v. New Hampshire Karting Ass'n*, 509 A.2d 151 (N.H. 1986). Contract will violate public policy if a special relationship exists or if there's a disparity in bargaining power. *Id.*

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NEW JERSEY	Valid, but generally disfavored and subject to scrutiny. *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678 (N.J. 2010). Unenforceable when adverse to the public interest. *Frank Briscoe Co. v. Travelers Indem. Co.*, 65 F. Supp.2d 285 (D.N.J. 1999).	N.J.S.A. § 5:13-3 (Ski Lift) N.J.S.A. § 5:14-1 (Skating Rink) N.J.S.A. § 5:15-1 (Equestrian)	To be enforceable: (1) must demonstrate that party assented voluntarily, intelligently and with full knowledge of its consequences, and (2) can't be obtained via fraud, or unconscionable means. *Knorr v. Smeal*, 836 A.2d 794 (N.J. 2003); *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006).	Courts deem exculpatory clauses contrary to the public interest when they: (1) release party for intentional, reckless, or grossly negligent conduct. *Vitale v. Schering-Plough Corp.*, 146 A.3d 162(N.J. App. Div. 2016); (2) waive liability for a duty imposed by statute. *Marcinczyk v. State of New Jersey Police Training Comm'n*, 5 A.3d 785 (N.J. 2010); and (3) release a public utility or common carrier. *Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Center, Inc.*, 845 A.2d 720 (N.J. App. Div. 2004). Release signed by a decedent with the express purpose of barring potential heirs from bringing a claim in the event of death is void as against public policy. N.J.S.A. § 2A:31-1.
NEW MEXICO	Valid, unless they violate law or contrary to public policy. *Sw. Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 353 P.2d 62 (N.M. 1960).	N.M.S.A. § 42-13-1 (Equestrian) N.M.S.A. § 24-15-1 (Skiing)	Two-Pronged Test. (1) A person without legal training could understand the agreement; and (2) Not contrary to public policy. *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003) (*Berlangieri* lists six factors for guidance on violation of public policy).	Public policy favoring the invalidation of a release can be furnished either through statutory or common law. See *Berlangieri.*
NEW YORK	Valid, except where prohibited by statute. *Gross v. Sweet*, 400 N.E.2d 306 (N.Y. Ct. App. 1979).	N.Y. Gen. Oblig. § 5-326 (Public Recreation) N.Y. Gen. Oblig. § 5-321(Lessor) N.Y. Gen. Oblig. § 5-322.1 & §5-323(Construction) N.Y. Gen. Oblig. § 5-325 (Garage)	To be enforceable: (1) intention of parties is in unmistakable language; (2) the agreement is clear and coherent and; (3) does not violate public policy. See *Gross.*	Will be deemed against public policy if it conflicts "with a public interest or constitutes an abuse of a special relationship (employer/ employee, common carrier/passenger). See *Gross*.

STATE	EXCULPATORY AGREEMENTS	STATUTE	DRAFTING GUIDELINES	COMMENTS
NORTH CAROLINA	Valid, except where it violates a statute, inequality of bargaining power, or is contrary to a substantial public interest. *Fortson v. McClellan*, 508 S.E.2d 549 (N.C. Ct. App. 1998).	N.C.G.S.A. § 99C-2(c) (Skiing)	The exculpatory clause being in all capital letters and specifically mentioning the word "negligence" are factors the court looks at to determine conspicuousness. *Waggoner v. Nags Head Water Sports, Inc*., 141 F.3d 1162 (4th Cir. 1998) (unpublished).	A defense based on a release is an affirmative defense. Therefore, the defendant bears the burden of proof. *Lyon v. Shelter Resources Corp*., 253 S.E.2d 277 (N.C. Ct. App. 1979). North Carolina has not decided whether a waiver for gross negligence is enforceable.
NORTH DAKOTA	Valid, unless the exculpatory contract is ambiguous or releases a party for intentional, willful, or wanton acts. *Reed v. Univ. of N. Dakota*, 589 N.W.2d 880 (N.D. 1999).	N.D.C.C. § 9-08-02 N.D.C.C. § 9-08-02.1 (Construction)	Interpretation of releases is governed by N.D.C.C. § 9-08-02. The language for "any claims" and "all responsibility" is limited to negligent acts as a matter of law. See *Reed.*	Any provision of a contract is unlawful if it is: (1) Contrary to an express provision of law; (2) Contrary to the policy of express law, though not expressly prohibited; or (3) Otherwise contrary to good morals. N.D.C.C. § 9-08-01.
OHIO	Valid, if the intent of the parties, regarding exactly the type of liability and who is being released, is stated in clear/unambiguous terms. *Hague v. Summit Acres Skilled Nursing & Rehab*., 2010 WL 5545386 (Ohio Ct. App. 2010).	N/A	A pre-injury release is unenforceable "where party seeking protection failed to exercise any care whatsoever, willful or wanton misconduct, or if clause is against public policy, unconscionable, or vague/ambiguous." *Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg., Inc*., 2009 WL 2356849 (Ohio Ct. App. 2009). Courts determine ambiguousness by asking whether an ordinarily prudent and knowledgeable individual would have reasonably understood it was a release. *Hall v. Woodland Lake Leisure Resort Club, Inc*., 1998 WL 729197 (Ohio Ct. App. 1998). Use phrases such as "at their own risk," "Company will not be responsible or liable," "Company has no duty." The specific use of the word "negligence" or "release" not required. *Id.*	A waiver signed by a participant in a sports activity does not waive the participant's right to bring a product liability claim. *Curtis v. Hoosier Racing Tire Corp.*, 299 F. Supp.2d 777 (N.D. Ohio 2004). A decedent can only waive their own claims and not the claims a survivor. *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258 (Ohio 2007).

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OKLAHOMA	Valid, if clear/unambiguous and would not be injurious to public health or morals or against public policy. *Schmidt v. U.S.*, 912 P.2d 874 (Okla. 1996).	Okla. Const. art. XXIII, § 6	Must identify the tortfeasor to be released, the nature of the wrongful act, and the type and extent of damages covered. *Linda Wright v. W. Shamrock Corp*., 2016 WL 4386038 (N.D. Okla. 2016). The more unusual the activity, the more explanation in a release is required for a waiver to be upheld. *Manning v. Brannon*, 956 P.2d 156 (Okla. Civ. App. 1997).	Three conditions must be satisfied to be enforceable: (1) clear, definite, and unambiguous language; (2) no vast disparity of bargaining power between the parties; and (3) the exculpation is not contrary to statute or public policy. *Manning v. Brannon*, 956 P.2d 156 (Okla. Civ. App. 1997).
OREGON	Valid, however determined on a case-by-case basis. Will be enforceable when the court determines its neither unconscionable nor against public policy. *Bagley v. Mt. Bachelor, Inc*., 340 P.3d 27 (Or. 2014).	N/A	Public policy considerations: (1) release is conspicuous/unambiguous; (2) is there disparity in bargaining power; (3) was it offered on a take-it-or-leave-it basis; and (4) did it involve a consumer transaction. Substantive considerations: (1) release causes a harsh or inequitable result; and (2) releasee serves an important public interest or function. See *Bagley.* Release language should be in a different typeface and larger size compared to the rest of agreement. *Landgren v. Hood River Sports Club, Inc.*, 2001 WL 34041883 (D. Or. 2001).	Releases for gross negligence, reckless, or intentional conduct are unenforceable. See *Bagley.*
PENNSYLVANIA	Valid if (1) not against public policy, (2) between persons relating entirely to their own private affairs, and (3) each party must be free to bargain the agreement. *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98 (Pa. 1993).	N/A	Must clearly state the intention of the parties, by express stipulation; any ambiguous language of the contract will be construed against the party seeking immunity. *Vinikoor v. Pedal Pennsylvania, Inc.*, 974 A.2d 1233 (Pa. Cmwlth. 2009). Courts look for the words "waiver, release, or waiver of liability," or any other words of similar import and effect to determine the clear intention of the contract. *Fay v. Thiel Coll.*, 2001 WL 1910037 (Pa. Cmwlth. 2001).	Release of reckless conduct is against public policy. *Tayar v. Camelback Ski Co.*, 47 A.3d 1190 (2012). Only "individuals of 18 years and older shall have the right to enter into binding and legally enforceable contracts…". 23 Pa. C.S. § 5101.
RHODE ISLAND	Valid if it "sufficiently specific." *Corrente v. Conforti & Eisele Co.*, 468 A.2d 920 (R.I. 1983).	R.I.G.L. § 7-6-9 (Non-profits)	The intent of the parties must be clearly and unequivocally expressed in the contract. See *Corrente.*	Courts examine the specific language of the exculpatory contract to determine its intent. *Brown v. Wakefield Fitness Ctr, Inc*., 1994 WL 930947 (R.I. Super. Ct. 1994).

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SOUTH CAROLINA	Valid, however not favored by the law and will be strictly construed against the party relying on them. *Fisher v. Stevens*, 584 S.E.2d 149 (S.C. Ct. App. 2003).	N/A	Will be against public policy if it does not inform the plaintiff he is waiving all claims due to defendant's negligence. *Fisher v. Stevens*, 584 S.E.2d 149 (S.C. Ct. App. 2003). The phrase "Any person in any restricted area" was overly broad and unenforceable. *Id.*	See *McCune v. Myrtle Beach Indoor Shooting Range*, *Inc*., 612 S.E.2d 462 (S.C. Ct. App. 2005) for proper waiver.
SOUTH DAKOTA	Valid if fairly and knowingly made. *Holzer v. Dakota Speedway, Inc*., 610 N.W.2d 787 (S.D. 2000).	S.D.C.L. § 42-11-3 (Equestrian)	More likely to be enforceable if written on a separate document. The more inherently dangerous an activity, the more likely an exculpatory contract will be valid. See *Holzer.*	Releases that cover willful or intentional torts are not valid and against public policy. *Id.*
TENNESSEE	Valid. Such agreements are of a contractual nature and will generally be enforced unless contrary to public policy. *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994).	T.C.A. § 68-114-103 (Skiing) T.C.A. § 47-18-303 (Health Clubs)	In *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977), the court lays out six factors to consider when determining if an exculpatory contract is against public policy. Not having the word "negligence" in the agreement is not fatal. *Henderson v. Quest Expeditions, Inc*., 174 S.W.3d 730 (Tenn. Ct. App. 2005).	Releases for gross negligence or willful conduct are against public policy. *Adams v. Roark*, 686 S.W.2d 73 (Tenn. 1985). As well as releases for fraud or intentional misrepresentation. *Houghland v. Sec. Alarms & Servs., Inc*., 755 S.W.2d 769 (Tenn. 1988).
TEXAS	Valid, if it complies with both fair notice doctrines: (1) conspicuousness, and (2) express negligence. *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990).	Tex. Bus & Com. Code § 1.201(10) (Definition of Conspicuousness) Texas Labor Code § 406.033 (Workplace Injuries)	Express Negligence Doctrine: Requires a party seeking release to express such intent in specific terms within the four corners of the document. *Atl. Richfield Co. v. Petroleum Pers., Inc.,* 768 S.W.2d 724 (Tex. 1989). Conspicuousness: Release language should appear in larger type, contrasting colors, or otherwise call attention to itself. *Storage & Processors* 134 S.W.3d 190 (Tex. 2004).	If both parties have actual knowledge of the contract's terms, the fair notice requirements need not be satisfied. *Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505 (Tex. 1993). A waiver of gross negligence is against public policy. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915 (Tex. App. 2013). As well as waivers for intentional or reckless conduct. *Zachry Constr. Corp. v. Port of Hous. Auth. of Harris Cty*., 449 S.W.3d 98 (Tex. 2014).

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UTAH	Valid, except for releases that (1) offend public policy, *Rothstein v. Snowbird Corp*., 175 P.3d 560 (Utah. 2007); (2) fall within the public interest exception, *Berry v. Greater Park City Co*., 171 P.3d 442 (Utah 2007); and (3) are unclear or ambiguous, *Pearce v. Utah Auth. Found*., 179 P.3d 760 (Utah. 2008).	U.C.A. § 78B-4-401 (Skiing) U.C.A. § 78B-4-203 (Equestrian) U.C.A. § 57-14-101 (Recreational Use of Land)	Do not need to include the word negligence if the intent to release liability is clearly and unequivocally expressed. *Russ v. Woodside Homes*, 905 P.2d 901 (Utah Ct. App. 1995).	A waiver of gross or wanton negligence is unenforceable. *Russ v. Woodside Homes*, 905 P.2d 901 (Utah Ct. App. 1995).
VERMONT	Valid, but must meet higher standards for clarity and must pass public policy inspection. *Provoncha v. Vermont Motocross Ass'n, Inc*., 974 A.2d 1261 (Vt. 2000).	N/A	Releases are valid when they sufficiently and clearly reflect the parties' intent. *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 658 A.2d 31 (Vt. 1995). A specific reference to negligence is not essential to effectively immunize a party from such liability, but "words conveying a similar import must appear." *Colgan v. Agway, Inc*., 553 A.2d 143 (Vt. 1988).	Courts consider "the nature of the parties' relationship, including whether the party granting exculpation is in a position of dependency, and the type of service provided by the party seeking exculpation, including whether the service is laden with public interest." *Thompson v. Hi Tech Motor Sports, Inc.,* 945 A.2d 368 (Vt. 2008).
VIRGINIA	Invalid. Public policy forbids the enforcement of a release or waiver for personal injury caused by future acts of negligence. *Hiett v. Lake Barcroft Community Assoc*., 418 S.E.2d 894 (Va. 1992).	N/A		Court will uphold exculpatory contracts when involved with an auto race due to its inherent danger. *Elswick v. Lonesome Pine Int'l Raceway, Inc.,* 2001 WL 1262224 (Va. Cir. 2001).
WASHINGTON	Valid, unless against public policy, inconspicuous, or the negligent act falls below the legal standard for protection of others. *Johnson v. NEW, Inc.,* 948 P.2d 877 (Wash. Ct. App. 1997).	R.C.W.A. § 79A.45.030 (Skiing)	Need not specifically mention that it releases the service provider from liability or negligence – just clearly state the intent. *Craig v. Lake Shore Athletic Club, Inc.,* 1997 WL 305228 (Wash. Ct. App. 1997). The waiver being a separate document using the word "Waiver" as a title in large type, with the sentence "Please Read Carefully and Sign" are factors the court looks at to determine conspicuousness. *Id.*	See *Wagenblast v. Odessa Sch. Dist*., 758 P.2d 968 (Wash. 1988) for 6 factors to determine if an exculpatory release violates public policy. Must show that plaintiff: (1) Had full subjective understanding; (2) of the nature of the specific risk; and (3) voluntarily chose to encounter that risk. *Kirk v. Washington State Univ.,* 746 P.2d 285 (Wash. 1987).

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WEST VIRGINIA	Valid, if the agreement expressly and clearly includes a waiver of liability and is made freely and fairly between parties in equal bargaining position, unless there is a contrary safety statute or public interest. *Murphy v. N. Am. River Runners, Inc.,* 412 S.E.2d 504 (W. Va. 1991).	W. Va. Code § 20-3B-3 (Whitewater Rafting)		Releases for party's intentional/reckless/gross negligence are unenforceable unless the release clearly indicates that such was the releasing party's intention. *Murphy v. N. Am. River Runners, Inc*., 412 S.E.2d 504 (W. Va. 1991).
WISCONSIN	Valid. However, when overly broad it will be invalid and will only bar claims which were within the contemplation of the parties at the time of signing. *Arnold v. Shawano Cty. Agr. Soc.*, 330 N.W.2d 773 (Wis. 1983).	Wis. Stat. § 895.481 (Equestrian) Wis. Stat. § 895.482 (Ski Patrol) Wis. Stat. § 895.52 (Recreational Activities)	Exculpatory agreements are unenforceable when (1) there is not adequate notice of the agreement's significance; (2) there is no opportunity to bargain; and (3) the scope of the release expands beyond negligence claims. *Brooten v. Hickok Rehab. Servs., LLC,* 831 N.W.2d 445 (Wis. Ct. App. 2013); *Atkins v. Swimwest Family Fitness Ctr.,* 691 N.W.2d 334 (Wis. 2005).	Two-fold test to determine enforceability (1) agreement must clearly, unambiguously, and unmistakably inform what is being waived, (2) must alert signer to the significance of what is being signed. *Yauger v. Skiing Enterprises, Inc*., 557 N.W.2d 60 (Wis. 1996).
WYOMING	Valid, only if it does not contravene public policy. *Schutkowski v. Carey*, 725 P.2d 1057 (Wyo. 1986) Claims for willful/wanton misconduct cannot be waived by an exculpatory agreement. *Street v. Darwin Ranch, Inc*., 75 F.Supp.2d 1296 (D. Wyo. 1999).	N/A	Language of the release should clearly state the intention to release a party from liability and, in plain reading of the language in the context of the release, should show no other rational purpose for which it could have been intended. *Massengill v. S.M.A.R.T. Sports Med. Clinic, P.C*., 996 P.2d 1132 (Wyo. 2000).	Court considers: (1) whether a duty to the public exists; (2) nature of the service performed; (3) if contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. *Id.*