

Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools

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Many recreation, fitness, and sport providers offer services and programs for minor participants as well as adult clients. As a line of defense against negligence claims and as a risk management tool, many recreation, fitness, and sport providers use waivers of liability. In most states, a well-written, properly administered waiver, signed voluntarily by an adult, can serve as an effective risk management tool in protecting the service provider from liability for injury resulting from the ordinary negligence of the provider (Cotten & Cotten, 2005). The question to be addressed here is "Will waivers protect the service provider when the injured participant is a minor?"

For a partial answer, one must turn to contract law, where three elements of a valid contract are competency of the parties, consideration, and legality (Contract Basics, n.d.). Under contract law, it is well established that a waiver signed only by a minor is not enforceable because a minor (one below age 18 in most states) lacks capacity and is therefore not competent to contract (Calamari & Perillo, 1977). With the exception of contracts involving necessities such as food, clothing, and medical care, contracts signed only by a minor are also voidable by the minor (Calamari & Perillo). Generally, when one contracts with a minor, that party is bound by the contract while the minor is free to disaffirm the contract because minors lack the capacity to contract. Very early on a Florida court (*Lee v. Thompson*, 1936) explained the rationale for the capacity to contract as:

Except as to a very limited class of contracts considered binding, as for necessities, etc., the modern rule is that the contract of an infant is voidable rather than void . . . To say that the executed contract of an

infant is voidable means that it is binding until it is avoided by some act indicating that the party refuses longer to be bound by it (p. 6).

A more recent Florida appellate court maintained the state's policy of protecting minors, ruling that a minor child injured because of a defendant's negligence is not bound by a contractual waiver of his or her right to file a lawsuit (*Dilallo v. Riding Safely, Inc.*, 1997). Likewise, the Colorado Supreme Court stated that it is a well-settled principle that "[a] minor during his minority, and acting timely on reaching his majority, may disaffirm any contract that he may have entered into during his minority" (*Cooper v. Aspen Skiing Company*, 2002, p. 9). Furthermore, a Massachusetts court stated "contracts of minors are voidable at the option of the minor in accordance with the policy of the law to afford protection to minors from their own improvidence and want of sound judgment" (*Frye v. Yasi*, 1951, p. 728).

Realizing that waivers signed by a minor afford no protection from negligence, many service providers require parents to sign a waiver on behalf of their minor child. This phenomenon shifts the focus of answering the question, "[w]ill waivers protect the service provider when the injured participant is a minor," to examining the validity of parental waivers – waivers signed by parents on behalf of a minor—as well as the validity of other legal tools service providers can implement. The purpose of this article is three-fold. First, a review of the case law and legislative statutes related to parental waivers will be presented, including a state-by-state description of the impact of court and legislative decisions upon how parental waivers are perceived. Second, the use of parental indemnity agreements along with a review of the outcome of court decisions involving these agreements will be discussed as another risk management tool. Finally, parental arbitration agreements will be introduced as a risk management strategy that is becoming more popular in a number of states.

PARENTAL WAIVERS

For years the conventional wisdom was that parents could not sign away the rights of their minor children. Thus, parental waivers have long been considered to be invalid and courts in many states have ruled such waivers to be voidable by the minor participant. Yet, not all states have perceived parental waivers as voidable. As a result of this contrast in the states, a historical perspective of the rationales both for and against enforcement of parental waivers follows.

Rationale for Not Enforcing Parental Waivers

It has long been believed that neither a waiver signed by a minor nor a waiver signed by the parents of a minor on his or her behalf are unenforceable. Courts have given several reasons for not enforcing waivers signed by parents on behalf of minor participants which can be summarized as four major arguments: (a) Public Policy – enforcement of parental waivers required for participation in school activities violates public policy (*Wagenblast v. Odessa School District*, 1988); (b) Protection of Minors – the general rule that a parent cannot waive the rights of an infant is in keeping with the public policy of protecting the rights of infants with respect to contractual obligations (*Childress v. Madison County*, 1989; *Hawkins v. Peart*, 2001); (c) Obligation of Care vs. Freedom to Contract – the public policy supporting the obligation of care owed by one person to another (minors) outweighs the traditional regard for the freedom to contract (Prosser & Keeton, 1984); and, (d) Post-injury vs. Pre-injury – since parents do not generally have the authority to settle a post-injury claim, it makes no sense to allow them to waive a future claim in a pre-injury setting (*Childress*, 1989; *Hawkins*, 2001; *Scott v. Pacific West Mountain Resort*, 1992). Implicit in this post- versus pre-injury argument is the fact that courts have determined parents lack authority to release the claim of a minor without court approval.

A. Public Policy

In *Wagenblast v. Odessa* (1988), the Washington Supreme Court decided it was a violation of public policy to enforce school district waivers (signed by students and their parents) releasing school districts from their negligence during school athletic activities. The Odessa School District required its students and their parents or guardians to sign a standardized form releasing the school district from "liability resulting from any ordinary negligence that may arise in connection with the school district's interscholastic activities programs" (p. 969). The court determined the waiver was against public policy by applying the *Tunkl* test presented by the California Supreme Court in *Tunkl v. Regents of University of California* (1963).

The *Tunkl* (1963) test consisted of six factors. The more the six factors appear in a given exculpatory agreement, the more likely the agreement is to be declared invalid on public policy grounds. The factors are: (a) the agreement concerns an endeavor of a type generally thought suitable for public regulation, (b) 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, (c) such party holds itself 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, (d) because 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 the services; (e) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and, (f) the person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents (*Tunkl v. Regents of University of California*, 1963, p. 443-448). All six factors in the test applied to the waiver in *Wagenblast* and as a result the court held that such a requirement was against public policy.

Four years later, the Washington Supreme Court held that parents had no authority to release or compromise claims or causes of action belonging to minors (*Scott v. Pacific West Mountain Resort*, 1992). In a case involving a 12-year-old skier, the Washington Supreme Court ruled a parent does not have legal authority to waive a child's future cause of action for personal injuries resulting from a third party's negligence. The court reasoned that since a parent cannot release a child's cause of action after an injury, the parent should not retain the authority to release the cause of action prior to an injury. The court justified their ruling by stating:

In situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur (*Scott*, 1992, p. 21).

Finally, the court in *Scott* (1992) held the act of a parent waiving their child's right to claim a negligent cause of action against a third party violated public policy. Specifically, the court stated, "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable" (*Scott*, p. 12).

In similar fashion the Tennessee Supreme Court held that a guardian could not settle an existing claim apart from court approval or statutory authority, and could not waive the statutory requirements for service of process on an infant or incompetent by accepting service of process on himself alone. The court held that the parent could release his or her own claim and could indemnify other adults (*Childress v. Madison County*, 1989). The court went

on to say their intent was not to restrict activities such as the Special Olympics, but that the law was clear

... a guardian cannot on behalf of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled. If this rule of law is other than as it should be, we feel the remedy is with the Supreme Court or the legislature (*Childress*, 1989, p. 7-8).

More recently, the Utah Supreme Court agreed with the pre-injury/post-injury rationale of other jurisdictions by ruling that policies restricting parents' abilities to compromise existing claims was more important in situations involving pre-injury exculpatory clauses than in post-injury situations. Specifically, the court in *Hawkins v. Peart* (2001) stated, "[i]ndeed, the law generally treats preinjury releases or indemnity provisions with greater suspicion than post injury releases. An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care" (p.1066).

Furthermore, the Supreme Court of Utah pointed out that Utah law places a check on parental authority in order to ensure a child's interests are protected (*Hawkins v. Peart*, 2001). These checks include two Utah statutes with the first providing that parents may act as conservators only when appointed by the court (UTAH CODE ANN. § 75-5-404), while the second statute lists parents seventh in a prioritized list of those eligible for court appointment as conservator (UTAH CODE ANN. 75-5-410(1)). The court continued its explanation that statutes and rules are indicative of public policies favoring protection of minors with respect to contractual obligations. In concluding, the Utah court agreed with *Scott* (1992) in seeing "little reason to base the validity of a parent's contractual release of a minor's claim on the timing of an injury" (*Hawkins*, 2001, p.1066).

B. Obligation of Care vs. Freedom to Contract

The *Wagenblast* (1988) court further reasoned there are instances where public policy preserving an obligation of care owed by one person to another outweighs society's traditional regard for the freedom to contract. This is true in situations involving common carriers, innkeepers, public utilities and others with similar obligations of care, like schools. The *Wagenblast* court explained their position by stating:

courts are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract... Implicit in such decisions is the

notion that the service performed is one of importance to the public, and that a certain standard of performance is therefore required (p. 970).

C. Protection of Minors

In 2002, the Colorado Supreme Court weighed in on the issue of parental waivers by voicing agreement with the *Scott* (1992) court. In the case of *Cooper v. Aspen Skiing Company* (2002), the court stated that Colorado's public policy

affords minors significant protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence. We base our holding on our understanding of Colorado's public policy to protect children as reflected by legislation protecting minors as well as decisions from other jurisdictions, which we find persuasive (p. 11).

D. Post-Injury vs. Pre-Injury

It is interesting that while the Colorado Supreme Court agreed with the decision in *Scott* (1992), it also admitted that pre- and post-injury agreements were not directly comparable. Referring to a law review article by Purdy (1993), the court stated that while post-injury releases "are vulnerable to parental mismanagement because of the financial pressure to accept inadequate settlements, outright parental dishonesty, and the existence of indemnity provisions in settlements" (p. 472), no such conflict exists for parents who release future claims – thereby, assuming the ultimate responsibility for medical care. Nevertheless, the court did not find these distinctions meaningful or persuasive, stating "the protections accorded minors in the post-injury setting illustrate Colorado's overarching policy to protect minors, regardless of parental motivations, against actions by parents that effectively foreclose a minor's rights of recovery" (*Cooper v. Aspen Skiing Company*, 2002, p. 15). Parenthetically, a year later the Colorado General Assembly passed legislation to the contrary.

Rationale For Enforcing Parental Waivers

Although the history of some states not enforcing parental waivers is clear, in recent years, courts in a number of states have elected to enforce parental waivers signed on behalf of a minor. Consequently, the enforceability of a

waiver signed by a parent on behalf of a minor participant now seems to depend upon the state in which the case is heard.

The first state to hold that parental waivers were enforceable was California. The landmark case, *Hohe v. San Diego Unified School District* (1990), involved a 15-year-old high school student who was injured while under the effects of hypnosis at a school assembly. The girl's father had signed a waiver prior to participation, but sued claiming the waiver was against public policy, was invalid because of her age, and did not clearly notify the parent of its effect. The court determined that the waiver was not against public policy reasoning that Hohe had volunteered and no essential service was involved (*Hohe*, 1990, p. 1564). The court continued by pointing out that

Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The *public* [italics added] as a whole receives the *benefit* [italics added] of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. . . . Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden (*Hohe*, p.1564-1565).

In responding to the argument that the release from liability could not be enforced against Hohe because she was a minor, the court acknowledged that a minor can generally disaffirm a contract signed by the minor alone (*Hohe v. San Diego Unified School District*, p. 1565). However, it went on to indicate that waivers signed by a parent on behalf of a minor are enforceable and may not be disaffirmed. As a result, this case broke new ground and is generally cited in cases where parental waivers are upheld. It is ironic that in spite of the fact the court ruled that such waivers were enforceable, the court did not uphold this particular waiver because it did not clearly and unequivocally release the school district from liability for negligence.

Eight years later the Ohio Supreme Court heard *Zivich v. Mentor Soccer Club* (1998) where the parents of seven-year-old Bryan Zivich sued a nonprofit youth soccer organization for negligence. After an intrasquad scrimmage, Bryan jumped on the goal post and started swinging back and forth. Not anchored to the ground, the goal tipped backwards and fell on Bryan resulting in severe injuries. Bryan's mother had signed a release on behalf of her son discharging and indemnifying the youth soccer organization

from any claim. In their ruling of the case, the Ohio Supreme Court established two fundamental principles related to the validity of parental waivers. The first postulation asserted that waivers in general are beneficial to society by allowing public agencies and volunteer organizations to provide recreational sport opportunities for youth. The court recognized that both sport opportunities and the volunteers that make those sports available to youth serve a valuable and important function in communities. To invalidate the waiver agreements between the parents of youth and the youth sport organizations might have a detrimental effect upon those organizations' abilities to continue in their service. As a result, the court reasoned such waivers are not against public policy, rather these waivers help support public policy.

The second principle from the *Zivich* (1998) decision dealt with parent's authority to make decisions regarding the rearing of their children. The court stated

. . .the right of a parent to raise his or her child is a natural right subject to the protections of due process. Additionally, parents have a fundamental liberty interest in the care, custody and management of their offspring. Further the existence of a fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court . . .(*Zivich*, 1998, p. 206).

In essence, the court decided that parents do have the authority to make contractual agreements on behalf of their children when voluntary youth sport organizations are involved and the cause of action is negligence.

In a related child custody case from the state of Washington (*Troxel v. Granville*, 2000), the United States Supreme Court made a ruling relevant to parental rights that would influence subsequent parental waiver cases. The court stated that the liberty issue in *Troxel* was the interest of parents in the care, custody, and control of their children. This is perhaps the oldest of the fundamental liberty interests recognized by the Court, and further, the liberty protected by the Due Process Clause includes the right of parents to bring up their children and control the education they receive. In a concluding discussion, the court recognized the broad parental authority of the family unit and the interest of parents in the companionship, care, custody, and management of their children (*Troxel*, 2000, p. 2063).

Consequently, the Supreme Court decision in *Troxel* (2000) impacted the Connecticut Supreme Court in their decision of *Saccente v. LaFlamme* (2003). In this case, a young girl was injured during a horseback riding lesson, and she

challenged the validity of a waiver signed by her parent prior to receiving the lesson. The court first followed the lead of the *Zivich* (1998) court by holding that parents have the authority to enter into these types of binding agreements on behalf of their minor children (*Saccente*, 2003, p. *12 & *13). Additionally, the court cited the U. S. Supreme Court decision in *Troxel* as a reaffirmation that parents have a fundamental right to make decisions concerning the care, custody, and control of their children, and concluded, "in light of a parent's right to make major decisions regarding the welfare of his child, the ability of a parent to execute a release on behalf of his child is clearly not contrary to public policy" (*Saccente*, p. 19).

In *Sharon v. City of Newton* (2002) the court said the purpose of the policy permitting minors to void their contracts was "to afford protection to minors from their own improvidence and want of sound judgment" (p. 19). The court continued by adding that this purpose comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and sound judgment on behalf of their minor children. The court stated

In the instant case, Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts (*Sharon v. City of Newton*, 2002, p. 20).

The *Sharon* court emphasized through its decision that the legal concept of the family in society is based upon the assumption that parents possess, through experience, maturity, and capacity for judgment, the maturity that is lacking in children.

In summary, the major rationales presented in support of enforcing parental waivers have included: (a) Public Benefits—enforcing parental waivers supports public policy by allowing organizations to provide recreational activities for youth (*Sharon v. City of Newton*, 2002); (b) Parental Authority—decisions regarding risk encountered by one's child comport with the fundamental liberty interest of parents rearing their children (*Zivich v. Mentor Soccer Club, Inc.*, 1998); and, (c) Act in Child's Best Interest – presuming that fit parents act in furtherance of the welfare and best interests of their child (*Sharon*, 2002).

The Positions of States on Parental Waivers

The act of parents waiving the right of their children to sue a sport, fitness or recreation service provider for negligence depends upon both the common law and statutory law in that particular state. Table 1 shows a summary of the states that have enforced parental waivers or not enforced this type of waiver based upon an analysis of case law. No cases or statutes have been found in 22 states where the question of the enforceability of parental waivers has been addressed. In these states there is no indication as to whether a parental waiver will provide protection against liability for negligence.

TABLE 1: ESTIMATED LIKELIHOOD OF COURTS ENFORCING A PARENTAL WAIVER

Insufficient Information			Do Not Currently Enforce Agreements		Very Likely to Enforce	Currently Enforce Agreements	
DE	IA	KS	AR	HI		AK	AZ*
KY	MD	ME	IL	LA	GA	CA	CO
MN	MO	NC	MI	MT	ID	CT	FL
NE	NV	NH	NJ	PA	MS	IN**	MA
NM	NY	OK	TN	TX		ND	OH
OR	RI	SC	UT	VA		WI	
SD	TX	VT	WA	WV			
WY							

*Statute provides parental waivers are enforceable for equine activities

**Statute provides parental waivers are enforceable for motorcycle and auto racing for partially emancipated minors

In 11 states, statutes or court rulings have provided information as to the perceived value of parental waivers and show some indication of how states view parental waivers. Two states, Alaska and Colorado, have recently passed legislation providing for the enforcement of parental waivers. Legislation already existed making the enforcement of parental waivers lawful for specific activities in two other states, Arizona and Indiana. At least one court in seven other states has taken the opportunity to enforce a parental waiver. A summary of the state court and legislative decisions enforcing parental waivers follows.

Alaska. The Alaska Legislature passed a statute intended to make parental waivers enforceable (ALASKA STAT. § 09.65.292, 2007). The statute states that a "parent may, on behalf of the parent's child, release or waive the child's prospective claim for negligence against the provider of a sports or recreational activity in which the child participates to the extent that the activities to which the waiver applies are clearly and conspicuously set out in the written waiver and to the extent the waiver is otherwise valid."

Arizona. In 2004, the Arizona Legislature passed a statute allowing the enforcement of parental waivers under limited circumstances (i.e., for equine activities) (ARIZ. REV. STAT. § 12-553 A.2). The Arizona Revised Statutes (2006) specifies that an equine owner is not liable for an injury to a minor if the parent or legal guardian of the minor has signed a release before taking control of the equine.

California. The first state in which courts held that parental waivers were enforceable was California. In the landmark case, *Hohe v. San Diego Unified School District* (1990) plaintiff argued the release from liability could not be enforced against her because she was a minor. Although the court acknowledged a minor can generally disaffirm a contract signed solely by the minor the court also ruled that waivers signed by a parent on behalf of a minor can be enforceable (*Hohe*, 1990, p. 1565). Since this landmark case, California courts have enforced parental waivers on numerous occasions (*Aaris v. Las Virgenes Unified School District*, 1998; *Pulford v. County of Los Angeles*, 2004).

Colorado. In 2002, the Colorado Supreme Court in ruling on *Cooper v. The Aspen Skiing Company*, held "the public policy of Colorado affords minors significant protections that preclude a parent or guardian from releasing a minor's own prospective claims for negligence" (p. 5). The court also stated that an indemnity provision by which the parent agrees to shift "the source of compensation for negligence from the tortfeasor to the minor's

parent or guardian creates an unacceptable conflict of interest between a parent/guardian and a minor and violates Colorado's public policy to protect minors" (*Cooper*, 2002, p. 9). A little more than one year after this state supreme court decision, the Colorado General Assembly enacted legislation which stated that the Supreme Court ruling in *Cooper* did not reflect Colorado public policy (COL. REV. STAT. § 13-22-107, 2005). This state statute affirmed that a parent of a child may, on behalf of the child, release or waive the child's prospective claim for ordinary negligence.

Connecticut. In a 2002 case (*Fischer v. Rivest*) involving a minor injured in a hockey game, the court relied on the *Zivich* (1998) ruling in holding that the public policy of the state supported, rather than prohibited, the use of parental waivers by such organizations as Little League and youth soccer. A year later, the court addressed the issue of whether a parent could waive his daughter's rights to a future claim (*Saccante v. LaFlamme*, 2003). The court agreed with the *Fischer* court's position that parents have the authority to execute waivers on behalf of their children.

Florida. A Florida court first upheld a parental waiver in a little-noticed 1998 case (*Lantz v. Iron Horse Saloon, Inc.*) involving a minor who was injured riding a "pocket bike." This Florida case was interesting in that the court never mentioned the fact that the injured party was a minor. In more recent cases (*Gonzalez v. City of Coral Gables*, 2004; *In re the Complaint of Royal Caribbean Cruises*, 2005; *Shea v. Global Travel Marketing, Inc.*, 2003), the courts have made it clear that parental waivers allowing minors to participate in commonplace child-oriented community or school supported activities are enforceable, but that similar waivers designed to protect a for-profit business from liability for negligence are unenforceable.

Indiana. Indiana is another state which has passed legislation allowing the enforcement of waivers affecting minors under limited circumstances. Indiana Code, § 34-28-3-2 (2006), provides that minors who have been emancipated in order to participate in automobile or motorcycle racing may not avoid a contract, a liability release, or an indemnity agreement by reason of the minor's age.

Massachusetts. Two Massachusetts cases have supported the enforcement of parental waivers. A Massachusetts court, *Sharon v. City of Newton* (2002), relied upon the *Zivich* (1998) court in ruling that a waiver signed by the parent of an injured cheerleader was enforceable. The court stated that parents can make decisions regarding care, custody, and upbringing of their children and that decisions regarding risk comport with the fundamental liberty interest of parents in rearing their children (*Sharon*, 2002, p. 20). The following year, another court (*Quirk v. Walker's Gymnastics and Dance*, 2003) enforced a

parental waiver simply stating that "such releases are clearly enforceable even when signed by a parent on behalf of their child" (p. 8).

North Dakota. In 2003, the Supreme Court of North Dakota held that a waiver and release signed by the mother of the plaintiff exonerated the Park District for its alleged negligence (*Kondrad v. Bismarck Park District*, 2003). The Bismarck Park District was conducting an after-school recreation program at an elementary school. The minority status of the subject was not among the plaintiff's claims in questioning the validity of the waiver and, subsequently, minority status was not mentioned or discussed.

Ohio. In 1998, the Ohio Supreme Court gave a ruling and rationale for enforcing parental waivers which probably had more impact than that of any court (*Zivich v. Mentor Soccer Club, Inc.*, 1998). The court held that enforcing parental waivers allowing public and volunteer agencies to provide recreational opportunities for youth is not against public policy (*Zivich*, 1998, p. 205). In fact, the court said that such waivers supported public policy since they benefit the public as a whole (*Zivich*, p. 205). The court also emphasized that the right to make decisions on risks falls within the realm of decisions appropriately made by parents (p. 206-207).

Wisconsin. A 2002 Wisconsin case, *Osborn v. Cascade Mountain, Inc.*, involved a 12-year-old girl who was injured skiing. The court upheld the waiver signed by the girl's mother and reported no discussion regarding the minor status of the injured party (*Osborn*, 2002, p. 3). The only reference to the plaintiff's minority was in a footnote stating, "it is recognized that a parent may waive a child's claim" (*Osborn*, p. 3). The plaintiffs did not claim otherwise in the case. It is of interest to note that this case involved a claim arising from a commercial recreational setting as opposed to school or community sponsored recreational activities.

States Possibly Enforcing Parental Waivers

Cases in three states indicate that parental waivers might be enforced if the waiver is well-written and signed by an adult. Although none of the courts in these states have yet enforced a parental waiver or indemnification agreement involving liability, a court in each state passed on an opportunity to declare such agreements to be unenforceable.

Georgia. Two older Georgia cases provide some indication that a parental waiver of liability might be enforced. A father wanted his son to repeat the 8th grade in order to gain some maturity. Since the boy had successfully completed the grade, the school required that the father sign an "instructional waiver" agreeing that the repeated year would count as one of

the boy's four years of athletic eligibility thereby making the boy ineligible to participate when he reached the 12th grade. When the father later filed suit challenging the waiver, the 1979 court ruled in favor of the school system by upholding the waiver (*DeKalb County School System v. White*, 1979). The issue of minority status was not addressed, and it is important to note that this case involved an instructional waiver and not a liability waiver. Therefore, it is impossible to conclude that the court would enforce a liability waiver similarly. In another Georgia case (*Smokey, Inc., v. McCray*, 1990), regarding a 14-year-old who signed a waiver alone, the court stated, "McCray was fourteen years old and unaccompanied by any adult or guardian. . ." (p. 797) which might suggest that had a parent signed, the waiver would have been enforced.

Idaho. In 1997, the *Davis v. Sun Valley Ski Education Foundation, Inc.* court ruled on a case in which a girl was injured when she went off the course while training for a ski race. Language in the waiver included. . . "parent(s) (and skier if 18 years of age or older) hereby release and forever discharge the Foundation. . ." (*Davis*, 1997, p. 21). The court held that while the waiver released any claims by Davis' parents, the waiver language did not release any claim of Davis since she was under 18 years of age. The court did not indicate whether the waiver would have protected against Davis' claim had the waiver been written properly.

Mississippi. A baseball coach in Mississippi accidentally struck a boy with a bat while instructing hitting. The father and the boy had signed a pre-participation waiver. In construing the waiver, the Mississippi Supreme Court (*Quinn v. Mississippi State University*, 1998) held that reasonable minds could differ as to the risks the plaintiffs were assuming (p. 851). At no point in the discussion did the court allude to or suggest that waivers signed by parents on behalf of a minor child are not enforceable, however, in the dissent, Justice McRae commented that neither minors nor their representatives can waive the rights of a minor (*Quinn*, 1998, p. 853). Although dissents hold no precedential value, in this case the dissent could indicate that parental waivers are not viewed favorably in the state of Mississippi.

States Not Enforcing Parental Waivers

Court decisions and/or legislation in 14 states have declared that waivers signed by parents on behalf of a minor are not enforceable. Courts in 11 states (i.e., Arkansas, Hawaii, Illinois, Michigan, New Jersey, Pennsylvania, Tennessee, Texas, Utah, Washington, and West Virginia) have prohibited the use of parental waivers to waive negligence (see Table 2). The rationale in the

majority of cases emanating from these states does not provide a great deal of explanation, but clearly indicates parents have no authority to waive the rights of the minor child and that doing so is against the public policy of the state. Furthermore, the Virginia Supreme Court held the enforcement of waivers is against the public policy of the state for both adults and minors (*Hiatt v. Lake Barcroft Community Assn*, 1992) indicating that parental waivers would also not be enforceable.

A few states have determined legislatively that parental waivers are unenforceable. Hawaii provides an illustration of this with a statute specifically prohibiting parental waivers (H. R. S. § 663-10.95). Closely related are Montana (MONT. CODE ANNO. § 28-2-702) and Louisiana (LA. C. C. ART. 2004), where state statutes prohibit the enforcement of liability waivers for both adults and minors. Likewise because waivers for both age groups are prohibited in these states, parental waivers signed on behalf of minors would also be unenforceable.

One other state may have recently joined the ranks of those that do not enforce parental waivers. The Supreme Court of Connecticut in *Hanks v. Powder Ridge Restaurant Corp.* (2005) concluded that a well drafted, clear and unambiguous exculpatory agreement intended to release a defendant from liability for ordinary negligence violated public policy and was unenforceable. In a subsequent ruling (*Reardon v. Windswept Farm, LLC*, 2006), the court once more interpreted public policy very broadly. It may be that courts in Connecticut will no longer enforce any recreational waivers, whether for a minor or an adult.

While the preceding sections have provided a review of states that enforce or do not enforce parental waivers, Table 2 provides a state-by-state summary of both statutes and case law providing insight into the likelihood of states enforcing parental waivers, parental indemnity agreements and parental arbitration agreements.

TABLE 2: STATUTES AND KEY CASES INVOLVING PARENTAL WAIVERS, PARENTAL INDEMNIFICATION AGREEMENTS, AND PARENTAL ARBITRATION AGREEMENTS¹

State	Statute or Key Case	Likely To Enforce Parental Waiver	Likely to Enforce Parental Indemnity Agreement	Likely to Enforce Parental Arbitration Agreement
AK	ALASKA STAT. §09.65.292 (2006) provides that a parent may release or waive the child's prospective claim for negligence against a provider of a sports or recreational activity.	Yes		
AR	<i>Williams v. United States</i> , 660 F. Supp. 699 (E.D.Ark. 1987)	No		
AZ	ARIZ. REV. STAT. §12-553 A.2 (2006). An equine owner is not liable for an injury if the parent or legal guardian of the minor has signed a release before taking control of the equine.	Yes (for equine activities)		
CA	<i>Doyle v. Giulucci</i> , 43 Cal.Rptr. 697 (1965); <i>Hohe v. San Diego Unified Sch. Dist.</i> , 224 Cal.App.3rd 1559 (Cal. App. Ct. 1990)	Yes		Yes
CO	COL. REV. STAT. § 13-22-107 (2005).allows a parent to sign waiver on behalf of a child releasing the provider from liability for ordinary negligence. <i>Cooper v. Aspen Skiing Company</i> , 2002 Colo. LEXIS 528 (Col. 2002)	Yes	No	

¹ Includes all states for which there is evidence regarding the enforceability of a parental waiver, a parental indemnification agreement, or a parental arbitration agreement. Column 2 shows the statute and/or the citation of the most significant cases. Blanks indicate insufficient information.

State	Statute or Key Case	Likely To Enforce Parental Waiver	Likely to Enforce Parental Indemnity Agreement	Likely to Enforce Parental Arbitration Agreement
CT	<i>Fischer v. Rivest</i> , 2002 Conn. Super. LEXIS 2778 (Conn. Super. Ct. 2002); <i>Saccette v. LaFlamme</i> , 2003 Conn. Super LEXIS 1913 (Conn. Super. Ct. 2003)	Yes	Yes	
FL	<i>Gonzalez v. City of Coral Gables</i> , 871 So.2d 1067 (Fla. Ct. App. 2004); <i>Global Travel Marketing, Inc., v. Shea</i> , 908 So.2d 392 (Fla. 2005)	Yes		Yes
GA	<i>Geo. R. Lane & Associates v. Thomasson</i> , 156 Ga.App. 313 (Ga. App. Ct. 1980); <i>DeKalb County School System v. White</i> , 260 S.E. 2d 853 (Ga. 1979)	Possibly	Possibly	
HI	HAW. REV. STAT. ANN. § 663-10.95 (2006) provides motorsport facility waiver attempting to protect the facility from liability for negligence against a minor is unenforceable against the minor or his/her representative; also prohibits enforcement of motorsport indemnity agreements against minors. HAW. REV. STAT. ANN. § 663-1.54 (2006) provides waivers will protect only against the inherent risks of recreational activity – not negligence. <i>Leong v. Kaiser Foundation Hospitals</i> , 71 Haw. 240 (1990); <i>Douglass v. Pflueger Hawaii, Inc.</i> , 110 Haw. 520 (2006).	No	No	Yes

State	Statute or Key Case	Likely To Enforce Parental Waiver	Likely to Enforce Parental Indemnity Agreement	Likely to Enforce Parental Arbitration Agreement
ID	<i>Davis v. Sun Valley Ski Education Foundation, Inc.</i> , 1997 Ida. LEXIS 82 (Idaho 1997); <i>Accomazzo v. CEDU Educational Services, Inc.</i> , 15 P.3d 1153 (Idaho 2000); <i>Lewis v. CEDU Educational Services, Inc.</i> , 15 P.3d 1147 (Idaho 2000)	Possibly		No
IL	<i>Meyer v. Naperville Manner, Inc.</i> , 262 Ill. App. 3d 141 (Ill. Ct. App.1994); <i>Wreglesworth v. ARCTO, Inc.</i> 316 Ill. App. 3d 1023 (Ill. Ct. App 2000)	No	No	
IN	<i>Huffman v. Monroe County Community School</i> , 564 N.E.2d 961 (Ind. Ct. App. 1991) IND. CODE ANN. § 34-28-3-2 (2006) provides for minors who have been emancipated to participate in automobile or motorcycle racing may not avoid a contract, a liability release, or an indemnity agreement by reason of the minor's age.	Possibly Yes (for racing)	Yes (for racing)	
LA	LA. CIV. CODE ART. 2004 (2006), provides that limitation of liability for causing physical harm to another party is null by statute. <i>Costanza v. Allstate Insurance Co.</i> , 2002 U.S. Dist. LEXIS 21991 (E. D. La. 2002)	No		Yes

State	Statute or Key Case	Likely To Enforce Parental Waiver	Likely to Enforce Parental Indemnity Agreement	Likely to Enforce Parental Arbitration Agreement
MA	<i>Eastman v. Yutzy</i> , 2001 Mass. Super. LEXIS 157 (Mass. Super. Ct. 2001); <i>Sharon v. City of Newton</i> , 2002 Mass. LEXIS 384 (Mass. 2002); <i>Quirk v. Walker's Gymnastics and Dance</i> , 2003 Mass. Super. LEXIS 210 (Mass. Super. Ct. 2003)	Yes	Yes	
ME	<i>Rice v. American Skiing Company</i> , 2000 Me. Super. LEXIS 90 (Me. Super. Ct. 2000)	No	Yes	
MI	<i>Smith v. YMCA of Benton Harbor/St. Joseph</i> , 550 N.W.2d 262 (Mich. Ct. App. 1996)	No		
MS	<i>Quinn v. Mississippi State University</i> , 720 So.2d 843 (Miss. 1998)	Possibly		
MT	MONT. CODE ANN. § 28-2-702 (2006). All exculpatory agreements attempting to relieve a party from all liability for future negligent conduct are unenforceable by statute.	No		
MO	<i>Salts v. Bridgeport Marina, Inc.</i> , 535 F. Supp. 1038 (W.D. Mont. 1982)		Possibly	
NJ	<i>Hojnowski v. Vans Skate Park</i> , 901 A.2d 381 (N.J. Super. Ct. 2006)	No	No	Yes
NY	<i>Valdimer v. Mount Vernon Hebrew Camps, Inc.</i> , 172 N.E.2d 283 (N.Y. 1961)		No	
ND	<i>Kondrad v. Bismarck Park Dist.</i> , 2003 N.D. LEXIS 3 (N.D. 2003)	Yes		
OH	<i>Cross v. Carnes</i> , 724 N.E.2d 828 (Ohio Ct. App. 1998); <i>Zivich v. Mentor Soccer Club</i> , 696 N.E.2d 201 (Ohio 1998)	Yes		Yes

State	Statute or Key Case	Likely To Enforce Parental Waiver	Likely to Enforce Parental Indemnity Agreement	Likely to Enforce Parental Arbitration Agreement
PA	<i>Simmons v. Parkette National Gymnastic Training Center</i> , 670 F.Supp. 140 (E.D. Pa. 1987); <i>Troshak v. Terminix International Co.</i> , 1998 U.S. Dist. LEXIS 9890 (E.D. Pa. 1998)	No		No
TN	<i>Childress v. Madison County</i> , 777 S.W.2d 1 (Tenn. Ct. App. 1989)	No	No	
TX	<i>Munoz v. II Jaz Inc.</i> , 863 S.W.2d 207 (Tx. Ct. App. 1993); <i>Fleetwood Enterprises, Inc. v. Gaskamp</i> , 280 F.3d 1069 (5th Cir. 2002)	No		No
UT	<i>Hawkins v. Peart</i> , 37 P.3d 1062 (Utah 2001)	No	No	
VA	<i>Hiett v. Lake Barcroft Community Asso.</i> , 418 S.E.2d 894 (Va. 1992). Public policy forbids the use of pre-injury waivers of liability for personal injury due to future acts of negligence, whether for minors or adults.	No		
WA	<i>Scott v. Pacific West Mountain Resort</i> , 834 P.2d 6 (Wash. 1992)	No		
WV	<i>Johnson v. New River Scenic Whitewater Tours, Inc.</i> , 313 F.Supp.2d 621 (S.D. Va. 2004)	No	No	
WI	<i>Osborn v. Cascade Mountain, Inc.</i> , 2002 Wisc. App. LEXIS 1216 (Wis. Ct. App. 2002)	Yes		

PARENTAL INDEMNITY AGREEMENTS

A common method for managing financial risk is through the use of indemnification agreements in leases, rental agreements, and other contracts. Such agreements are often included within waivers whereby the signing participant agrees to reimburse the provider for loss due to the participation of

the signer. It is common practice for writers of waivers used in sport, fitness and recreation activities and programs to include an indemnification clause within the document. In developing a parental indemnity agreement, the writer would require the parent signing the agreement on behalf of their minor child to agree to reimburse or repay the provider for any loss incurred by the provider resulting from the participation of the minor. Thus, if the waiver is deemed unenforceable, the signing parent might be required to reimburse the sport, fitness or recreation provider for any award paid to the minor. When a parental waiver is not enforced because of lack of parental authority to act on behalf of the minor, it is possible in such cases, that some courts will enforce a parental indemnification agreement because it is a contractual agreement between two adults and does not directly affect the minor. This could, in effect, act as an additional layer of protection for the recreation, fitness and sport service provider by acting as a backup for the waiver.

Courts in a number of states have clearly held that such agreements are against public policy and unenforceable. Illustrating this prohibition, a West Virginia court did not uphold a waiver and indemnification agreement signed by an unauthorized church employee on a church youth trip (*Johnson v. New River Scenic Whitewater Tours, Inc.*, 2004). The court said that a waiver signed by a parent or another party was voidable in West Virginia (*Johnson*, 2004, p. 634). The court went on to say that it would be inconsistent to allow a parent to indemnify another party for loss due to the participation of the minor (*Johnson*, p. 635). Yet, the court did admit that another party (e.g., an individual or an activity sponsor) could indemnify the provider for loss due to the participation of the minor (p. 637). Additionally, Missouri state law does not favor indemnity contracts where parties are of unequal bargaining power (*Salts v. Bridgeport Marina, Inc.*, 1982, p. 1040). While this does not normally translate to mean that such agreements are not allowed, the court in *Salts v. Bridgeport Marina, Inc.* (1982) failed to enforce a seemingly, all-inclusive agreement because it did not show a clear and unequivocal intent of the father to act as the insurer of the negligent acts of the marina.

Courts in a few states, however, have supported indemnity agreements involving parents and children. For example, in an early Georgia case (*Geo. R. Lane & Associates v. Thomasson*, 1980), a minor resident of an apartment complex wandered into the apartment's pool area and drowned. The court enforced the lease agreement signed by the child's father which contained a clause indemnifying the owners of the complex from liability. In similar fashion, a Maine Superior Court ruling in *Rice v. American Skiing Company* (2000) held that an indemnification agreement was enforceable. The court indicated the law viewed clauses indemnifying a party against its own

negligence with disfavor and required that courts construe them strictly against such a result. Continuing, the court stated they "may uphold an indemnification agreement that expressly indemnifies the indemnitee against its own negligence in a manner that clearly reflects the mutual intent of the parties" (*Rice*, 2000, p.13). In other words, a clear reflection of the mutual intent must be shown. However, the court did not enforce the parental indemnification agreement at issue because the agreement did not make it clear that the indemnification clause applied to the defendant's own negligence. Likewise in 2001, a Massachusetts court (*Eastman v. Yutzy*, 2001) failed to enforce a parental waiver because the defendant was not named on the waiver. The court indicated, however, that the indemnity agreement signed by the parent was enforceable if no statutory duty was violated.

A year later in Connecticut, a minor was injured when her horse tripped over a water hose left in the riding ring (*Saccente v. Laflamme*, 2003). Based upon the facts of this case, the court determined the minor's parent was bound by the indemnity agreement he signed agreeing to hold defendants harmless for liability causing injuries (*Saccente*, 2003, p. *1). The plaintiff claimed the agreement was against public policy and was invalid because of the doctrine of parental immunity. The court disagreed with plaintiff's claim and upheld the agreement (*Saccente*, p. *24). Contrasting this decision, the court in *Keeney v. Mystic Valley Hunt* (2003) held that a parental indemnity agreement was not enforceable against a father because the parent was protected by the doctrine of parental immunity. The doctrine, which bars an unemancipated minor from suing his or her parents for personal injuries, is intended to protect the relationship between parent and child.

PARENTAL ARBITRATION AGREEMENTS

A strategy that is being utilized more often in the fitness, recreation, and sport industries is the use of a mandatory arbitration agreement. The approach is to include within the liability waiver or participant agreement a clause by which the signer agrees to submit any subsequent claim to binding arbitration. Arbitration does not relieve the provider of liability, but may result in the claim being addressed in an environment that is more favorable for the provider. The Federal Arbitration Act (9, U.S.C. § 1, 2006), which applies to both federal and state court proceedings, states a strong federal policy favoring the enforcement of agreements to arbitrate, yet such enforcement is not mandated if it is counterintuitive to state law.

The validity of parental arbitration agreements has been addressed recently by two state supreme courts in recreational activity cases. In 2005,

the Florida Supreme Court (*Global Travel Marketing, Inc. v. Shea*, 2005) ruled that the use of arbitration agreements is generally favored by the courts. It stated that in determining whether to compel arbitration pursuant to an agreement, a court must consider three elements: (a) whether a valid written agreement to arbitrate exists; (b) whether an arbitrable issue exists; and (c) whether the right to arbitration was waived (*Global Travel Marketing, Inc.*, p. 403). The court went on to state that in determining the enforceability of a parental arbitration agreement, the key element is whether a valid written agreement to arbitrate exists – and no valid agreement exists if the clause is unenforceable on public policy grounds (*Global Travel Marketing, Inc.*, p. 403). Thus, the issue concerns competing interests: the state's interest to protect children versus the interests of parents in raising their children.

The court held that the parents' authority under the Fourteenth Amendment included decisions on the activities appropriate for their children, whether academic, social, or physical (*Global Travel Marketing, Inc. v. Shea*, 2005, p. 398). It stated the mother had the authority to contract for herself and her minor child to travel to Africa for a safari and that she had the authority to agree to arbitrate claims on his behalf arising from that contract – thus "an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor. . ." (*Global Travel Marketing Inc.*, 2005, p. 405).

In 2006, the New Jersey Supreme Court examined a case (*Hojnowski v. Vans Skate Park*) involving a minor who was injured while skateboarding at a skateboard park. The child suffered a broken leg when struck by an aggressive skateboarder. The court ruled the waiver signed by the mother was against public policy, but held that the agreement to arbitrate contained within the waiver was enforceable because it was in essence a choice of forum and not a release of the cause of action of the minor (*Hojnowski*, 2006, p. 392-394). Parental arbitration agreements not related to fitness, recreation, or sport activities have also been enforced in California, Hawaii, Ohio, and Louisiana (see Table 2). Conversely, courts in Pennsylvania, Idaho, and Texas have held a minor is not bound by parental arbitration agreements (see Table 2).

CONCLUSION

Based on an examination of legislation and case law, the only generalization one may draw regarding parental waivers, parental indemnification agreements, and parental arbitration agreements in sport, fitness, and recreation programs is that no general statement or general rule applies to all states. Parental waivers seem likely to be to be enforced in at

least 11 states under some circumstances. On the other hand, the likelihood of enforcement seems remote, at best, in 14 states. Keep in mind, however, that in about half of the 50 states, there is no case law or statute providing an answer to the question of enforceability of these types of contractual agreements.

Five points are worth noting when deciding whether or not to use parental waivers as a way to manage the risk of providing a sport, fitness or recreation program. First, when one considers that 15 years ago, parental waivers had not been enforced in any state, there seems to be a definite trend toward their enforcement. Second, waiver law is in constant flux. It is not uncommon for courts to reexamine past decisions and rule differently, so even in states where the supreme court has ruled against such waivers in the past, it is possible that different circumstances or changes in the makeup of the court can result in new rulings. Third, remember that courts and legislatures in about half the states have not yet addressed the issue. The odds are good that a significant number of these states will enforce parental waivers. Fourth, there is no downside to the use of parental waivers as they are virtually cost-free. Even if the waiver does not provide protection from negligence liability, the service providing organization is no worse off than it would have been without such a waiver. Finally, even in states where parental waivers are not enforced, the waiver document can be entered into evidence as proof of warning of the risks. At the very least, the language of the waiver outlining the risks of an activity or program helps trigger the assumption of risk defense by illustrating the minor and/or parent was made aware of the risks.

Based upon the review of pertinent case law, the likelihood that a parental indemnity agreement will be enforced seems to be less than that of a parental waiver, yet it remains a definite cost-free possibility. Once again there is no downside for the sport, fitness, and recreation service providers attempting to manage risks in their program through the use of this type of agreement. On the other hand, the enforceability of parental arbitration agreements seems to be very likely since courts in six of the nine states having addressed the issue have found them to be enforceable. Keep in mind that this agreement does not relieve the provider of liability for negligence, but does move the proceedings to an environment which is likely to result in less adverse publicity, involve less time, involve lower legal expenses, and result in lower damage awards.

A good strategy for sport, fitness and recreation service providers considering the use of one or more of these parental agreements is to use the agreements, but to not rely solely upon them for protection from negligence. The best advice for recreation, fitness and sport professionals is to operate as though none of these techniques will alone protect, but rather institute a

combination of different strategies that will assist in better managing the risks in the programs they provide.

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