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Contractual Waivers for Minors in Sports-Related Activities

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CONTRACTUAL WAIVERS FOR MINORS IN SPORTS-RELATED ACTIVITIES

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> We do not deny that there are good and logical reasons for giving effect to exculpatory and indemnification clauses executed by parents and guardians on behalf of infants and incompetents. Risk is inherent in many of the activities that make the lives of children richer. A world without risk would be an impoverished world indeed. . . . Ultimately, this case is a determination of who must bear the burden of the risk of injury to . . . minors.[1]

Businesses, public entities and charities which furnish sports activities to children are requiring participants and their parents to sign form waivers prior to engaging in the activities.[2] The forms usually purport to release providers from any legal liability arising out of an activity.[3] Although waivers in sports-related activities generally are legally enforceable,[4] there are exceptions based on grounds of both public policy considerations and mutuality of assent.[5] There also is a trend to disallow releases where the

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1. Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989).

2. Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140, 144 (E.D. Pa. 1987); RONALD KAISER, LIABILITY & LAW IN RECREATION, PARKS & SPORTS 82 (1986). *See* Phoebe Carter, Annotation, *Validity, Construction and Effect of Provision Releasing School from Liability for Injuries to Students Caused by Interscholastic and Other Extracurricular Activities*, 85 A.L.R. 4th 342 (1991).

3. *E.g.*, O'Connell v. Walt Disney World Co., 413 So. 2d 444, 444 n.2 (Fla. Dist. Ct. App. 1982). Providers seeking model language or forms should start by reading ROBERT C. BERRY & GLENN M. WONG, 2 LAW AND THE BUSINESS OF THE SPORTS INDUSTRIES § 4.50 (1986). Forms are reproduced both for participants who are adults and for those who are minors. *Id.* at 414-15.

4. *See* Brown, *The Impact of Case Law on Liability Waivers*, 3 JOURNAL OF SPORTS MANAGEMENT 5, 5-6 (1989). For an analysis of the factors affecting the enforceability of waivers, see Kevin F. Harrison, *Taking the Tort Out With a Contract: Liability Release Contracts in California*, 15 WESTERN STATE U. L. REV. 781 (1988).

5. *See* SPORTS AND LAW: CONTEMPORARY ISSUES § 2.3 (Herb Appenzeller ed., 1985). *See also* GEORGE SCHUBERT, RODNEY K. SMITH & JESSE C. TRENTADUE, SPORTS LAW § 7 (1986).

participants are minors.[6] However, neither providers nor parents appear to appreciate fully the legal significance or insignificance of these waivers.[7]

This article examines the validity of waivers when signed by or for minors involved in sports-related activities. The remainder of the article is divided into six parts:

1) Background;
2) The business rationale for waivers;
3) The legal rationale for waivers;
4) Services to children: parental waivers and indemnification;
5) Effect of a child's signature; and
6) Conclusion.

Only waivers of ordinary negligence are dealt with in this article because exculpation rarely is allowed for gross negligence or intentional torts.[8] In addition, discussion is limited to the impact of the principles of contract law on the enforceability of these waivers because a tort defense is not necessary if the plaintiff's tort rights have been validly waived by contract. Thus, the effects of tort defenses, such as whether providers are the proximate or actual cause of injuries, whether participants assume the risk of injuries, or whether a complete or partial defense exists under the theories of either contributory or comparative negligence, are not analyzed.[9]

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6. KAISER, *supra* note 2, at 84; Brown, *supra* note 4, at 10. *But see* Note, *School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics,* 102 HARV. L. REV. 729 (1989) (reporting the result but questioning the reasoning in Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 758 P.2d 968 (1988)).

7. Brown, *supra* note 4, at 5. For a concise yet cogent analysis of the basic issues presented by the use of waivers in sports-related activities, *see* Jeffrey S. Klein & Louis M. Brown, *Finding Fault When Someone Takes Risk, Gets Hurt,* L.A. TIMES, Mar. 14, 1991, at E17, col. 1.

8. *See* Doyle v. Bowdoin College, 403 A.2d 1206, 1207-08 (Maine Sup. Ct. 1979); Note, *supra* note 6, at 732-33.

9. Waiver of minors' rights to sue for negligence involves a variety of issues and policies which cross over the boundary separating contracts from torts. *See* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791, 800 (1966). One prime area is recent developments in the assumption of risk doctrine, especially as it relates to comparative negligence. James Glassford, *Assumption of Risk on Trial,* 11 CAL. LAWYER 55 (1991).

However, an analysis of tort law implications and developments would require so much additional material that it is best to deal with it in a separate article. Furthermore, a tort defense is not even necessary if the plaintiff's rights have been validly waived by contract. Thus, neither assumption of the risk nor other tort defenses are dealt with in this article. Counsel nevertheless should carefully consider the effect of a written waiver that also purports to act as an express assumption of the risk. For a discussion of these defenses, see 4 FOWLER V. HARPER, FLEMING JAMES & OSCAR S. GRAY, THE LAW OF TORTS 239-260 (2d ed. 1986).

Several cases and articles have discussed comparative negligence and assumption of the risk. *See* Knight v. Jewitt, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2 (1992); Knight v. Covin, 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30 (1992); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference,* 67 B.U. L. REV. 213 (1987); and John L. Diamond, *Assumption of*

I. BACKGROUND

Two types of waivers commonly are used by sports providers.[10] A general waiver typically is used by providers offering services to adults.[11] However, for services targeted at minors, more specific language is common[12] which often includes an indemnity clause.[13] As to activities targeted at adults, language of indemnity is rare and the document normally functions solely as a waiver. A typical form for an adult activity, entitled "Voluntary Release", reads in pertinent part as follows:

> In consideration of . . . I . . . for myself, my personal representatives, heirs, next of kin, spouse and assignees, DO HEREBY:
>
> 1. RELEASE, DISCHARGE AND COVENANT NOT TO SUE . . . each of them, their officers, agents and employees (. . . 'releasees') from any and all claims and liability or ordinary negligence . . .
>
> 2. UNDERSTAND that my entry . . . contains DANGER AND RISK OF INJURY OR DEATH . . . nevertheless, I VOLUNTARILY ELECT TO ACCEPT ALL RISKS connected with my entry . . . .
>
> 3. ACKNOWLEDGE that . . . I ASSUME ALL RISK for myself and assume all lability to others . . ., and I hereby RELEASE . . . .
>
> 4. AGREE that this agreement shall apply to any incident, injury, accident or death . . . I HAVE READ THIS DOCUMENT. I UNDERSTAND IT IS A RELEASE OF ALL CLAIMS.
>
> I UNDERSTAND I ASSUME ALL RISK INHERENT IN RACING.
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> I VOLUNTARILY SIGN MY NAME EVIDENCING MY ACCEPTANCE OF THE ABOVE PROVISIONS.[14]

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the Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine, 52 OHIO ST. L.J. 717 (1991).

10. *See* BERRY & WONG, *supra* note 3, at 414-15. *See also* the language excerpted from various cases discussed in Harrison, *supra* note 4, at 785, 790-91, and 793-94.

11. A terse example can be found in Rogers v. Donnelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 243-44 (Tenn. Ct. App. 1990) (the waiver was in a handwritten note consisting of only two sentences, the latter being "Under no circumstances will anyone or anything be liable in case of an accident.").

12. Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140, 141 (E.D. Pa. 1987).

13. A good example can be found in Childress v. Madison County, 777 S.W.2d 1, 5 (Tenn. Ct. App. 1989).

14. Nat'l and Int'l Bhd. of Street Car Racers, Inc. v. Super. Ct., 215 Cal. App. 3d 934, 936, 264 Cal. Rptr. 44, 45 (1989) (based on the waiver language, the court of appeals reversed the trial court and granted summary judgement to the provider).

In contrast, the following is more typical of a form targeted at minors. It is a document, entitled simply "Permission Slip", required by a private elementary school to be signed by both parents before a first grader is allowed to attend a field trip. Unlike the general waiver reproduced above, this form contains an indemnification clause but the participant's (child's) signature is not required.[15] The waiver states:

> [T]he Undersigned . . . assume all risk associated with participation in the above Program, . . . agree to indemnify, defend, and hold harmless . . . and fully and forever release and discharge such parties from any and all claims, demands, actions, causes of actions, suits, controversies, obligations and liabilities of any kind and nature whatsoever . . . relating to personal injury or property damage sustained directly or indirectly from the aforedescribed Program . . .

This, or similar exculpatory[16] language, is becoming standard throughout the country for childrens' extra-curricular activities.[17] In the context of schools, permission slips have long been required to be signed by parents (or guardians) before a child was allowed to participate in extra-curricular activities.

In recent years, however, the "permission" provisions have been expanded to include waiver provisions.[18]

As the above example illustrates, these provisions not only may purport to waive all legal rights against the service provider, but also may profess the service user's obligation to indemnify and defend the provider if a claim arises. Whether this is consistent with or contrary to public policy is far from clear.[19]

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15. Although the language is more elegant, it is similar to that involved in Childress v. Madison County, 777 S.W.2d 1, 9-10 (Tenn. Ct. App. 1989). In sports activities provided to the general public, as opposed to those specifically designed for minors, typically no indemnification is involved and the signature of the participant (minor) is required along with that of only one parent. *See* Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140, 141 (E.D. Pa. 1987). Interestingly, the same is true for traditional violent contact sports, such as high school tackle football, involving only minors. *See* BERRY & WONG, *supra* note 3, at 414.

16. With few exceptions, the terms waiver, exculpatory clause, and release are used both by the courts and by businesses interchangeably.

17. *See* Childress v. Madison County, 777 S.W.2d 1, 5 (Tenn. Ct. App. 1989); O'Connell v. Walt Disney World Co., 413 So. 2d 444, 444-45 (Fla. Dist. Ct. App. 1982).

18. Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140, 144 (E.D. Pa. 1987).

19. *Compare* Brown, *supra* note 4, at 10 (waiver on behalf of a child is *per se* invalid) *and* KAISER, *supra* note 2, at 84 (the validity of such waivers is "tenuous") *with* BERRY & WONG, *supra* note 3, at 392 (waivers for school sports activities are valid). *See* Note, *supra* note 6 (reporting a 1988 Washington Supreme Court ruling invalidating waivers for interscholastic athletics but questioning the reasoning given in the ruling).

Parents who balk at signing these forms, or who cross out one or more of the clauses contained in the waiver, may find that the service provider is unwilling to do business with the minor. This could result in a severe detriment to the education of a child who, for example, is denied access to the high school football team.[20] On the other hand, unless service providers spread risks back to participants, it is likely that many sporting events will no longer be sponsored.[21]

An understanding of the reasons why businesses seek the protection of waivers should help in understanding the competing interests which courts balance when using public policy to decide law.

II. THE BUSINESS RATIONALE FOR WAIVERS

A. The Purpose of Waivers: To Shift Risk

Waivers are incorporated into contracts for several reasons. The purpose may be any one of the following:

1) To minimize costs of the business protected by the waiver related to claims of negligence;[22]

2) To explicitly state and make certain which costs (risks) will be borne by which party;[23]

3) To reduce the cost of litigation by waiving the rights of one of the parties to sue the other for negligent acts;[24] and

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20. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 853-54, 758 P.2d 968 (1988).

21. Dunn v. Paducah Int'l Raceway, 599 F. Supp 612, 613 (W.D. Ky. 1984), *cited with approval in* Korsmo v. Waverly Ski Club, 435 N.W.2d 746, 749 (Iowa Ct. App. 1988).

22. Damage awards (not to mention litigation costs) can have a devastating effect on either a private "for profit" business or a public "non-profit" enterprise. Indeed, waivers may be most important in ensuring the viability of many smaller organizations, whether for profit and not-for-profit. Small organizations often lack either the resources to effectively self-insure or sufficient dollar volume to easily absorb the additional cost of an insurance policy.

Private organizations can try to protect the individuals who organize sporting activities by incorporating and using the bankruptcy court. Public organizations and municipalities may lack this flexibility. A city can not as easily declare bankruptcy, change its name and begin business again. Furthermore, public entities often have substantial assets which they may not wish to put at risk in exchange for a relatively small user fee, such as a child's price for the use of a municipal swimming pool. Where juries can award millions of dollars of damages to an injured participant, will cities continue to furnish swimming, tennis, skiing and other facilities if they can not find or afford adequate insurance? They may if they can rely on a waiver.

23. *See* LISA GARN & JOHN S. DIACONIS, *Liability Release Forms: How Valid?*, 92 BEST'S REVIEW: PROPERTY AND CASUALTY INSURANCE EDITION 52 (1991).

24. Even a valid waiver may be unsuccessful protection from increased costs if the provider must go to trial to defend a lawsuit. Just hiring an attorney to answer a complaint and ask the court to uphold a waiver in a summary judgement motion is expensive. A good example of the

4) To reduce the cost of insurance by passing on the risk to the other party.

Business entities offer their services in the hopes of receiving a return on their investment.[25] Having to bear the economic risk of loss resulting from negligence can be very expensive to the service provider. When faced with the prospects of an otherwise desirable market which is subject to uncertain risks of negligence litigation, businesses often have responded by incorporating exculpatory language into their contracts.[26]

The language usually purports to waive some or all liability for negligent action or inaction on the part of the service provider. The purpose of the waiver is to reduce the provider's costs by identifying those risks that will be borne by the buyer. However, if the waiver is invalidated by the courts, the risk will revert to the service provider.

B. Alternatives to Waivers

Providers have powerful incentives to insulate themselves from the risks associated with harm suffered by participants or third parties as the result of a sporting event. When a plaintiff prevails in litigation, uninsured or underinsured verdicts can be very expensive. Even when a plaintiff is unsuccessful, the cost of legal defense just to prove that a waiver is valid can be staggering.[27] Potential lawsuits mean higher risk and ultimately higher costs which providers will try to pass on to the consumer. If successfully passed on, the consumer winds up paying more. If not passed on, profits may be reduced or eliminated.[28] In the hopes of reducing their share of the

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costs incurred even where a waiver is ultimately held to be valid is Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa Ct. App. 1988).

In that case, summary judgment was granted by the trial court on the grounds that plaintiff had signed a release. Plaintiff appealed, contending that there were genuine issues of fact concerning whether he had knowingly and voluntarily assumed the risk of the release. Although the summary judgment was affirmed on appeal, the cost of briefing each court and of taking depositions prior to each decision most likely was high. It could have been more expensive if the trial court had ordered a trial rather than granting summary judgment.

On the other hand, even an invalid waiver can minimize costs, either by discouraging injured parties from suing or by enhancing defenses such as assumption of the risk. KAISER, *supra* note 2, at 84.

25. For the relationship between the risk of a venture and the corresponding return demanded by investors, see RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 117-75 (2d ed. 1984).

26. For an extensive discussion of several cases in the area, see Brown, *supra* note 4, at 781-796 (1988).

27. *See* BREALEY & MYERS, *supra* note 25, at 117-75. Even an insured defendant may pay the cost of covered claims through higher future premiums.

28. Even if the provider is able to increase its price to the consumer, it may determine that all of the risk can not be offset because the risk can not be quantified or fully covered by insurance.

costs, providers may incorporate waivers into their contracts to minimize the risk of loss caused by either defending or paying claims filed by their customers.

There are many ways for providers to deal with the risks without relying on waivers. However, these alternatives may be more expensive. One way is to invest in safety, but the cost of making an activity as injury-free as possible may be prohibitive. Furthermore, many events, such as contact sports, do not lend themselves to this approach.

Another way is to exit the market. A provider perceiving a significant increase in risk may respond with a strategic reduction in effort in the line of projects affected. Providers may even decide to withdraw from the market sector altogether rather than face unlimited or unacceptable uncertainty over possible losses from lawsuits based on purportedly negligent behavior. A withdrawal may be forced on a venture which seeks bankruptcy protection as a result of successful claims. On the other hand, withdrawal may be unsatisfactory because its full cost includes the profits lost by not serving an otherwise lucrative market.

These two alternatives to waivers may not be satisfactory to providers. If available, investing in safety may not be affordable, and otherwise profitable opportunities may be lost when a provider withdraws from a market. To capture those opportunities without undue cost, providers may seek to protect themselves in yet another way, with insurance.

A third way for providers to shift risks to others is to insure the risk. This allows the potential for liability to be paid explicitly in the form of insurance premiums. However, insurance must be available to be an effective means to protect providers. Even if available, insurance also must be affordable.

Where adequate insurance is not affordable, providers may seek to lower the premiums by reducing the liability limits, restricting the type of activities covered, or narrowing the types of costs that will be reimbursed. To the extent such reductions are made, the cost to the provider of bearing the risk is not explicit. The cost nevertheless remains in the possibility that the provider may have to pay on a claim that otherwise would have been covered

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Accordingly, continuing to provide services to minors in a high risk venture may not be economically justified unless valid waivers can be entered into. The impact of the economics of risk sharing on the contracting process is powerfully analyzed in Ronald Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS 1 (1960). (The development of the theory first postulated in this article may have earned Professor Coase the Nobel Prize in Economics. *See* Donald Wootat, L.A. TIMES, Oct. 16, 1991, at 1.) For a more current view, see Elizabeth Hoffman & Matthew Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 JOURNAL OF LAW AND ECONOMICS 73 (1982).

by a more extensive policy.[29] Rather than making such reductions, providers instead may include waivers into their contracts in the hopes of reducing insurance premiums.

III. THE LEGAL RATIONALE FOR WAIVERS

A. Legislative Versus Judicial Action

Although legislatures can address the issue of whether waivers in sports-related activities should be upheld, they generally have failed to do so.[30] This is not because legislators lack the power or ability to deal with the issue by statute. Legislatures have enacted statutes explicitly permitting waivers in other areas. For example, the Uniform Commercial Code allows parties to waive consequential damages unless the "limitation or exclusion is unconscionable."[31] Similarly, the enactment of workers' compensation laws legislatively eliminates the use of waivers in the employer-employee relationship.[32] These laws provide strict limits to injured employees' damage awards in exchange for employers giving up the opportunity to protect

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29. An alternative for providers that cannot pass on the risk through a waiver and cannot afford insurance is "self-insurance". When done by a wealthy enterprise, it merely represents another business risk. When done by an undercapitalized business, however, self-insurance may be more than just another risk: it may lead to bankruptcy if a successful claim is filed.

In effect, incorporation of a risky venture is a form self-insurance. If the corporate form is respected by the courts and the owner is not personally negligent, a plaintiff may be left with a judgement against a judgement-proof corporation. Because the corporate form is likely to be respected by the court where there is either minimal insurance or some reasonable net worth in the venture, incorporation may effectively shift the risk of loss to the consumer even in the absence of a waiver. For the value of incorporating non-profit organizations, see MALVERN J. GROSS, JR., WILLIAM WARSHAUER, JR. & ROBERT LARKIN, FINANCIAL AND ACCOUNTING GUIDE FOR NOT-FOR-PROFIT ORGANIZATIONS 1-25 (4th ed. 1991).

30. KAISER, *supra* note 2, at 84. There have been state statutes prohibiting releases on sports admission tickets. *Id.* (noting that New York enacted such a statute after the decision upholding an adult's waiver in Ciofalo v. Vic Tanney Gyms, Inc., 10 N.Y.2d 294, 177 N.E.2d 925 (1961)). However, none of the sources cited in this article refers to any state statute specifying the treatment of sports-related waivers on behalf of minors, nor could any such statute be found.

There are many references to limitations on waivers in general, however, such as those found in the Field Codes adopted by many states in the late 1800s, *e.g.*, Note, *supra* note 6, at 732 (explaining CAL. CIV. CODE § 1668 (West 1985)), or in judicial public policy analyses. *Id.* (citing Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941)). On the other hand, some state statutes specifically allow waivers, GA. CODE ANN. §§ 102-06 (1980), and have rejected judicial public policy analyses, Williams v. Cox Enterprises, 159 Ga. App. 333, 283 S.E.2d 367 (Ga. Ct. App. 1981), *cited with approval in* Wade v. Watson, 527 F. Supp. 1049, 1051-52 (N.D. Ga. 1981).

31. *See* U.C.C. §§ 2-316 and 2-719 (1977).

32. Whether the model of the workers' compensation law is an appropriate legislative solution to the high cost of negligence litigation is beyond the scope of this article. However, it is one possibility that may be better than the all or nothing approach forced on courts when faced with deciding the validity of a waiver.

themselves with waivers, along with giving up virtually all common law defenses.[33]

As opposed to legislative action, the courts have been much more active in addressing the validity of waivers. An example is in "contracts of adhesion," where waivers will not be upheld because one party has virtually no bargaining power.[34] Except in contracts of adhesion, however, courts generally will not invalidate a waiver unless it either violates public policy or the waiving party did not knowingly and voluntarily agree to waive his or her rights.[35]

B. Waiver Unenforceable Unless Knowing and Voluntary

Many courts have focused on a variety of drafting flaws when determining that a participant did not knowingly and voluntarily waive rights.[36] As one court wisely observed:

> Drafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness. Apparently, no release is immune from attack . . . . [but to] be effective, a release need not achieve perfection; only on Draftsman's Olympus is it feasible. . . . It suffices that a release be clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence. . . .[37]

Dealing with the issue by private contract rather than by public fiat may not be optimal in the eyes of service providers. Including an exculpation clause may not relieve a provider of all litigation costs even if the waiver ultimately proves enforceable: there still may be an issue of fact as to whether the waiver was entered into knowingly or voluntarily. If so, summary judgement can be denied and thus the service provider may have to bear the costs of a trial and appeals.[38]

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33. The employer is forced to give up the defense of contributory negligence (or comparative negligence) and that of assumption of the risk; waivers are specifically prohibited. P. DELANEY & I. GLEIM, BUSINESS LAW 431-34 (1991).

34. Madison v. Super. Ct., 203 Cal. App. 3d 589, 598, 250 Cal. Rptr. 299, 304-05 (1988).

35. Nat'l and Int'l Bhd. of Street Racers v. Super. Ct., 215 Cal. App. 3d 934, 937-38, 264 Cal. Rptr. 44, 46-47 (1989).

36. Terry Ann Halbert, *Setting Aside Releases for Personal Injury*, 53 PENN. BAR ASS'N Q. 209, 209-14 (1982).

37. Nat'l and Int'l Bhd. of Street Racers v. Super. Ct., 215 Cal. App. 3d 934, 937-38, 264 Cal. Rptr. 44, 46-47 (1989) (citations omitted).

38. *Compare* Rogers v. Donnelson-Hermitage Chamber of Commerce, 807 S.W.2d 242 (Tenn. Ct. App. 1990) (decision after full trial was appealed) *with* Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa Ct. App. 1988) (summary judgement was appealed).

Furthermore, courts have invalidated waivers by finding that the provision was not adequately disclosed to the service user. Reasons given by the courts range from the type size being inadequate,[39] the word "release" being used only in the title of the document,[40] the word "equipment" not being used although the word "activity" was,[41] and a variety of other points.[42] In contrast to these cases decided on technical flaws, some courts do not even require that the word "negligence" be used when liability is being waived.[43]

When deciding whether a waiver is valid, most courts look to the "four corners of the instrument" to determine both the intent of the parties and whether the contract notifies the releasor of the effect of entering into the agreement.[44] In making this determination, courts deem that a party signing a contract has read the contract.[45] This approach normally results in a contract waiver being upheld unless the waiver violates public policy.[46]

C. The Judicial Public Policy Test

Where parties have entered into an otherwise valid waiver, the plaintiff may try to invalidate the waiver on the basis that the waiver violates public policy. Courts generally recognize that no public policy prevents parties from agreeing that the consumer has the responsibility of looking out for his or her own interests.[47]

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39. Conservatorship of Link, 158 Cal. App. 3d 138, 205 Cal. Rptr. 513 (1984) (printing should not be smaller than 8 to 10 points). Note that this holding has been distinguished in subsequent cases. *E.g.*, Bennett v. U.S. Cycling Federation, 193 Cal. App. 3d 1485, 239 Cal. Rptr. 55 (1987).

40. Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd., 147 Cal. App. 3d 309, 195 Cal. Rptr. 90 (1983).

41. Calarco v. YMCA of Greater Metropolitan Chicago, 149 Ill. App. 3d 1037, 501 N.E. 2d 268 (1986).

42. *See* Harrison, *supra* note 4, at 788.

43. Morrow v. Auto Championship Racing Ass'n. Inc., 8 Ill. App. 3d 682, 291 N.E.2d 30 (Ill. Ct. App. 1972).

44. Nat'l and Int'l Bhd. of Street Racers v. Super. Ct., 215 Cal. App. 3d 934, 938, 264 Cal. Rptr. 44 (1989).

45. Although notice of an exculpatory clause is a prerequisite to its validity, a party's failure to read does not constitute a lack of notice to that party. Dixon v. Manier, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976).

46. KAISER, *supra* note 2, at 84.

47. *See* Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 851, 758 P.2d 968 (1988); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSOR AND KEETON ON TORTS 482 (1984).

In the seminal case in the area, *Tunkl v. Regents of the Univ. of Cal.*,[48] the court tested against six standards to determine whether an exculpatory clause violated public policy.[49] This six part test has been followed by many states.[50]

Under the test, waivers are enforceable unless:

1) The business involved is of a type generally thought suitable for public regulation;

2) The party seeking relief from negligence liability performs services of great importance to the public, a service often a matter of practical necessity for some members of the public;

3) The party seeking relief offers to serve any member of the public who seeks it, or at least anyone whose ability meets certain established standards;

4) The essential nature of the service gives the party seeking relief a decisive advantage in bargaining power;

5) This results in the public being confronted with taking or leaving a standardized contract, with no provision for paying reasonable additional fees to obtain protection against negligence; and

6) As a result of the contract, members of the public utilizing the services are under the control of, and thus subject to the risk of carelessness by, the party seeking to avoid responsibility for his own negligence.[51]

In applying this public policy analysis to sports-related waivers, almost all courts have focused on the second standard to determine whether the sport is the type of activity that is of public necessity.[52] One court dealt

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48. 60 Cal. 2d 92, 383 P.2d 441 (1963). For a discussion of *Tunkl*'s importance in establishing the approach taken by most courts see Note, *supra* note 6, at 732.

49. Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 98-101, 383 P.2d 441, 445-46 (1963).

50. Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985); Municipality of Anchorage, Alaska v. Locker, 723 P.2d 1261, 1265 (Alaska 1986); LaFrenz v. Lake County Fair Board, 172 Ind. App. 389, 395, 360 N.E.2d 605, 608-09 (1977); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 296-98, 522 A.2d 1316 (1987); Lynch v. Santa Fe National Bank, 97 N.M. 554, 558-59, 627 P.2d 1247 (N.M. Ct. App. 1981); Lee v. Consolidated Edison Co., 95 Misc. 2d 1290, 1304, 407 N.Y.S.2d 777, 787 (N.Y. Civ. Ct. 1978), *reversed on other grounds*, 413 N.Y.S.2d 826 (N.Y. App. Term. 1978); Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977); Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 851-52, 758 P.2d 968 (1988).

51. Sports participants often are at the control of a provider seeking to avoid responsibility for negligence. However, injuries can be caused by parties other than the provider, such as unruly fans, participants' unsportsmanlike behavior, or negligent third parties. *See* Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 857, 758 P.2d 968 (1988).

52. The Washington Supreme Court has stated in the context of public policy:

> In reviewing these decisions, it is apparent that the court has not always been particularly clear on what rationale it used to decide what type of release was and was not violative of 'public policy'. Undoubtedly, it has been much easier for courts to simply declare releases

with the issue by summarily concluding that "[a]lthough a popular sport, . . . mountaineering, like scuba diving, does not involve public interest. . . . Therefore, the exculpatory clause is . . . enforceable."[53] Similarly, in a case involving a waiver by a motorcyclist at a recreational park, another court concluded that only a strained construction would label a sports-related activity as involving a public interest.[54]

In upholding a waiver used in a bicycle competition,[55] a court cogently summarized this approach:

> The service provided here was the organization and running of competitive bicycle races. . . . This is very similar to the organization and sponsorship of numerous 10-kilometer and marathon running events that have blossomed since the mid to late 1970's. . . . Without such organization and sponsorship, those that desire to enter bicycle racing would undoubtedly have no chance to do so under organized settings. Therefore, there is no doubt but that respondents offer a public service. However, does it measure up to the public importance necessary to void the release? . . . Measured against the public interest in hospitals . . . escrow transactions, banking . . . and common carriers, this transaction is not one of great public importance.[56]

Relying on this approach, courts have upheld waivers of rights to sue for negligence in cases involving mountain climbing,[57] skydiving,[58] motorcycle "dirt biking",[59] running,[60] scuba diving,[61] stock car racing,[62] swimming,[63] ski jumping,[64] and water skiing.[65]

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violative of public policy in a given situation than to state a principled basis for so holding. . . . Obviously, the more of the foregoing six characteristics that appear in a given exculpatory agreement, the more likely the agreement is to be declared invalid on public policy grounds.

Id. at 851.

53. Blide v. Rainier Mountaineering, Inc., 30 Wash. App. 571, 572-73, 636 P.2d 492, 493 (1981).

54. Coates v. Newhall Land & Farming, Inc., 191 Cal. App. 3d 1, 8, 236 Cal. Rptr. 181, 188 (1987).

55. Okura v. U.S. Cycling Federation, 186 Cal. App. 3d 1462, 231 Cal. Rptr. 429 (1986).

56. *Id.* at 1466-67.

57. Blide v. Rainier Mountaineering, Inc., 30 Wash. App. 571, 636 P.2d 492 (1981).

58. Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985).

59. Kurashige v. Indian Dunes, Inc., 200 Cal. App. 3d 606, 246 Cal. Rptr. 310 (1988).

60. Williams v. Cox Enterprises, 159 Ga. App. 333, 283 S.E.2d 367 (Ga. Ct. App. 1981), *cited with approval in* Wade v. Watson, 527 F. Supp. 1049, 1051-52 (N.D. Ga. 1981).

61. Hewitt v. Miller, 11 Wash. App. 72, 521 P.2d 244 (1974).

62. Grbac v. Reading Fair Co., 521 F. Supp. 351 (W.D. Pa.), *aff'd*, 688 F.2d 215 (3d Cir. 1981).

63. Owen v. Vic Tanney Enterprises, 48 Ill. App. 2d 344, 199 N.E.2d 780 (Ill. S. Ct. 1964).

64. Garretson v. U.S.A., 456 F.2d 1017 (9th Cir. 1972).

The courts of some states have refrained from adopting this public policy approach, albeit usually arriving at the same result as if they had followed *Tunkl*.[66] For example, in upholding a waiver signed by a runner in the 1977 Peachtree Road Race against a claim that the agreement violated public policy under Georgia law, the court stated that a contract will be contrary to public policy only if the General Assembly has declared it to be invalid or enacted a statute forbidding it expressly or impliedly, the consideration is contrary to good morals, or the contract is entered into for the purpose of effecting an illegal or immoral agreement.[67]

D. Public Policy Favors Waivers in Sports-Related Activities

One can easily argue that public policy favors waivers, as some courts have done.[68] Waivers and exculpatory clauses promote public policy because without such releases it is doubtful that some hazardous activities would occur.[69] As one court poignantly observed, "many popular . . . recreational activities [would be] destined for extinction" unless waivers are enforceable.[70] Public policy also is served by allowing people the freedom to enter into contracts.[71] In addition, it favors voluntary risk shifting arrangements.[72]

Following this line of reasoning, providers of sport services generally have been allowed to exculpate themselves from liability for their negligence, as against adults who sign the contract.[73]

That is not to say that all waivers are held to be valid. Some contracts have been held to violate public policy[74] because courts are reluctant to allow those charged with a public duty to rid themselves of their duty of

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65. Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa Ct. App. 1988) (summary judgement was granted on the grounds that plaintiff's suit was barred by a release he had signed).

66. *See, e.g.*, Williams v. Cox Enterprises, 159 Ga. App. 333, 335, 283 S.E.2d 367, 368-69 (Ga. Ct. App. 1981), *cited with approval in* Wade v. Watson, 527 F. Supp. 1049, 1051-52 (N.D. Ga. 1981); Rawlings v. Layne & Bowler Pump Co., 93 Idaho 496, 465 P.2d 107 (1970); Hunter v. American Rentals, Inc., 189 Kan. 615, 371 P.2d 131 (1962); Papakalos v. Shaka, 91 N.H. 265, 266 (1941).

67. Williams v. Cox Enterprises, 159 Ga. App. 333, 283 S.E.2d 367 (Ga. App. 1981), *cited with approval in* Wade v. Watson, 527 F. Supp. 1049, 1051-52 (N.D. Ga. 1981).

68. Dunn v. Paducah Int'l Raceway, 599 F. Supp 612, 613 (W.D. Ky. 1984), *cited with approval in* Korsmo v. Waverly Ski Club, 435 N.W.2d 746, 756 (Iowa Ct. App. 1988).

69. *Id.*

70. Nat'l and Int'l Bhd. of Street Car Racers, Inc. v Super. Ct., 215 Cal. App. 3d 934, 938 (1989).

71. Schlessman v. Henson, 83 Ill. 2d 82, 413 N.E.2d 1252 (1980).

72. Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 101, 383 P.2d 441, 446 (1963).

73. Brown, *supra* note 4, at 5-14.

74. *See* Halbert, *supra* note 36, at 209-10.

care by contract.[75] Thus, common carriers, innkeepers, professional bailees and public utilities which try to use waivers to shift the risk of loss for their negligent behavior have found that such provisions violate public policy.[76]

This is based on the conclusion that these types of services are so important to the public that a certain level of performance therefore is required.[77] Businesses such as banks that provide safe deposit boxes and landlords trying to exculpate liability for safety in common areas have had their waivers invalidated by the courts on public policy grounds.[78] In certain transactions where waivers violate public policy, some states have enacted statutory limitations.[79] Sport services, however, generally have been viewed in a different light. They are not seen as so important as to rise to the level of a necessary public service. Thus, sports providers typically have been allowed to exculpate themselves as against adults who sign the contract.

IV. SERVICES TO CHILDREN: PARENTAL WAIVERS AND INDEMNIFICATION

As discussed above, the law generally allows providers to require adults participating in sporting events to waive their rights to sue for negligence. Many providers of sports services to children, including schools, gyms, and sports leagues, whether non-profit or for profit, similarly require waivers of rights to sue for harm suffered by children participating in these events.[80] Normally only parents are required to sign the waivers, but some forms also require the child's signature.[81] This may not be necessary in states such as Texas which have enacted statutes specifically permitting parents to waive their childrens' rights.[82]

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75. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 849, 758 P.2d 968 (1988).

76. *Id.* at 849-50.

77. *Id.* at 850.

78. *Id.* at 850-51.

79. KAISER, *supra* note 2, at 84 (New York statute prohibits waivers on tickets for sporting events). For an interesting legislative balancing of the competing interests involved with waivers, consider CAL. BUS. & PROF. CODE § 6146 (West 1991) (health care providers cannot enforce waivers, but in turn some types of medical malpractice claims are limited to damages of $250,000).

80. *See* Kaiser, supra note 2.

81. In most running events, such as 10 kilometer road races, it is customary for both the parent and the minor to sign. *See* BERRY & WONG, *supra* note 3, at 414.

82. TEX. FAM. LAW § 12.09 (1989) provides in pertinent part that:
"[T]he parent of a child has the following rights, privileges, duties, and powers:
. . . .
(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child . . . ."
This section was held to bind an infant to a contract which a parent signed on the child's behalf in Faollana v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985), *aff'd*, 700 F.2d 1000

Sports providers have included exculpation language in the hopes that it will restrict the rights of both children and parents.[83] Providers also may hope that even if a release is not valid, a potential plaintiff may believe that it is valid and therefore refrain from bringing a lawsuit.[84] Some may even include exculpatory language merely because it was seen in a competitor's contract.[85]

Two issues are raised by a waiver which is signed by a parent on behalf of a child. To what extent is the agreement enforceable,[86] and if it is enforceable, against whom does it apply? In the case of an indemnity provision, an additional issue is raised: is the signing parent jointly and severally liable as an indemnitor?[87]

A. Waivers

1. The *Wagenblast* Public Policy Approach

Although public policy generally has been held to favor waivers in sports-related activities, recent cases suggest a different result where minors are involved.[88] When the Washington Supreme Court considered the issue on first impression in 1988, it held in *Wagenblast v. Odessa School Dist.*[89]

(5th Cir. 1986). *See also* CAL. CODE OF CIV. PROC. § 1295(d), which provides that a minor may not disaffirm a contract for medical services if it is signed by a parent or guardian.

83. For a comprehensive discussion of sports liability in general, see GEORGE W. SHUBERT, RODNEY K. SMITH & JESSE C. TRENTADUE, *supra* note 5, CYM H. WEINSTART & JOHN C. LOWELL, THE LAW OF SPORT (1976), and HERB APPENZELLER, PHYSICAL EDUCATION AND THE LAW (1978).

84. KAISER, *supra* note 2, at 84. This brings up an interesting point of legal ethics. Does an attorney's suggestion to place a knowingly invalid waiver into a contract, in the hopes that an uninformed party may be tricked into believing that the waiver is valid, violate the lawyer's ethical duties? No ruling could be found where an attorney had been disciplined for such an action.

85. *Id.*

86. *Cf.* Brown, *supra* note 4, at 5. In a non-random sample interview of parents of children involved in sports activities, many indicated their belief that the waiver forms they sign are not enforceable.

87. If so, does this effectively eviscerate the child's potential recovery by forcing the parents to pay the legal fees of both sides, in addition to providing the funds to pay the damages inflicted by the negligent service provider? Probably not, as indemnity clauses are generally interpreted in the same manner as exculpatory clauses. O'Connell v. Walt Disney World Co., 413 So. 2d 444, 446 (Fla. Dist. Ct. App. 1982). *But see* Childress v. Madison County, 777 S.W.2d 1, (Tenn. Ct. App. 1989) (wife who signed ruled jointly liable with other defendants for damages awarded to husband, who did not sign). *See also infra* text accompanying notes 118-122.

88. Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989); Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140 (E.D. Pa. 1987); O'Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. Dist. Ct. App. 1982); Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 758 P.2d 968 (1988).

89. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 758 P.2d 968 (1988).

that public schools could not enforce releases required as a condition to student participation in certain school-related sports activities.

The court first reviewed the *Tunkl* six-pronged public policy test,[90] and then adopted it.[91] Applying the test, the court determined that, in the case of participation in a public school interscholastic activity, a waiver violates all six prongs.[92] "Given this emphasis on sports by the public and the school system, it would be unrealistic to expect students to view athletics as an activity separate and apart from the remainder of their schooling."[93] Accordingly, the court found that exculpatory clauses used by school districts for children's sports violates public policy and thus will not be given effect, either against a minor or a parent who signs the form.[94] It is unclear how many states will adopt this reasoning[95] and what other businesses[96] will be held to the same standards.[97]

2. The *Childress* Disaffirmance Approach

Based on contract principles rather than public policy, other courts have invalidated waivers as to a child participating in a sports activity,[98] but not necessarily as to a parent who signs the waiver.[99] In *Childress v.*

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90. *See supra* text and accompanying notes 48-72.

91. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845, 851-52, 758 P.2d 968, 972-74 (1988).

92. *Id.* at 857.

93. *Id.* at 853-54.

94. *Id.* at 858. The court also stated that "If the release is against public policy, however, it is also against public policy to say that the plaintiff has assumed that particular risk." *Id.* at 856. However, the Court noted that the minor assumed the risk of injuries not caused by the school district, such as recklessness of an opponent, which no amount of reasonable supervision or training can eliminate. *Id.* at 857.

95. The case is criticized in Note, *supra* note 6, at 729.

96. The *Wagenblast* court determined that there is an intimate relationship between interscholastic sports and other aspects of public education. Thus, it noted that this serves to distinguish interscholastic activities from those involving adult education for hazardous activities such as skydiving and mountain climbing. *Wagenblast*, 110 Wash. 2d at 854. Accordingly, this case may be limited to public (and possibly private) schools.

97. The *Wagenblast* court pointed out that "Many students cannot afford private programs or the private school where such releases might not be employed." *Id.* at 855. Does this mean that private schools can continue to insist on waivers, because the student always has the ability to enroll in public schools where the waiver is invalid?

98. *E.g.*, Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989); Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140 (E.D. Pa. 1987); O'Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).

99. Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989). For purposes of contract law, a minor and a mentally retarded individual are treated similarly. *Id.* at 6. They are both electively incompetent to enter into contracts, if they wish to disaffirm. In this case, the student did not sign the contract. Thus, the sole issue as to the student was whether his parent could waive the child's rights by signing the permission slip.

Madison County,[100] the mother of a mentally retarded twenty year old who was enrolled in a special school run by the County and the Y.M.C.A. signed a standard waiver, but neither the father nor the child signed. A parent's signature on the release was a precondition to the child's participation in training for the Special Olympics in the Y.M.C.A. swimming pool.[101] The alleged negligence occurred when the teacher turned her back to the pool after all of the children had left the pool. She did not notice when the plaintiff later re-entered the pool and nearly drowned.[102]

The trial court held that, by signing the permission slip, the mother waived all of the family's rights.[103] Thus, she could not sue for her own emotional distress when her child almost died.[104] Nor could the father sue for his suffering because the trial court ruled that the mother acted as the father's agent when she signed the slip in her capacity as a parent giving permission.[105] The trial court held that she also waived the child's rights to sue for damages.[106] Because all actions against the defendants were dismissed, the court did not discuss the effect of the indemnity clause contained in the waiver.

The appellate court upheld the trial court's ruling as to the mother, but reversed as to the father and the child.[107] The mother who had signed was held to have validly waived her rights to sue on her own behalf for her own damages. This was based on her actual or constructive notice of the waiver.

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100. *Id.* at 5. The waiver read in pertinent part:
"I . . . individually and on behalf of the above-named entrant, acknowledge that the entrant will be using facilities at his/her own risk. I, on my own behalf, hereby release, discharge and indentify (sic) Special Olympics . . . from all liabilities for damage, injury or illness to the entrant or his/her property . . ."
Id. at 5.

101. *Id.* at 5-6.

102. *Id.* at 6.

103. *Id.* at 1.

104. Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

105. *Id.* This is interesting in and of itself because the father never raised the issue of whether he had granted permission for the child to participate at all. Had he refused permission, he may have had an additional cause of action, albeit perhaps with no easily proven damages, for wrongful asportation of the child by the service provider. Consider the effect had the father been able to show a bona fide religious belief against the activity, or if the father was in the process of divorcing the mother.

This leads to questions beyond the scope of this paper. Whose signature should be required when parents are divorced? Especially if they are remarried? Are grandparents' signatures necessary? What if they are the primary care providers?

106. *Id.*

107. *Id.* at 8.

It also was based on the legal conclusion that her waiver of an emotional distress claim did not violate public policy.[108]

As to the father, who had not signed the waiver, the court noted that there was no indication that Mrs. Childress was authorized to release his rights. Thus, the father could recover for his own personal injuries.[109]

As to the child, the appellate court ruled that as a matter of law a parent cannot waive a child's rights.[110] In support of its conclusion, the court first determined that the ability of the mother to waive the student's rights is the same for a minor as it is for an incompetent.[111] The court then cited numerous examples of the inability of a parent or guardian to waive a minor's rights. As the court strongly concluded: " 'Minors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them.' "[112]

In rejecting the waiver, the court was aware of the negative economic effect of its decision on service providers, explaining that "there are good and logical reasons for giving effect to exculpatory and indemnification clauses executed by parents and guardians on behalf of infants and incompetents."[113]

The court had another opportunity to deal with the issue in late 1990, and again refused to enforce a very broadly worded waiver signed by a mother.[114] This time the event involved a charity equestrian event.[115]

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108. Note that the release of the mother's claims for her own damages would not act as a release of her derivative claims were she to sue on behalf of a deceased child in a wrongful death action. Rogers v. Donnelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 242-43 (Tenn. Ct. App. 1990).

109. Childress v. Madison County, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989).

110. *Id.* at 15-16.

111. *Id.*

112. *Id.* at 7, *citing* Khoury v. Saik, 203 Miss. 155, 33 So. 2d 616, 618 (1948).

113. *Id.* (citations omitted).

114. Rogers v. Donnelson-Hermitage Chamber of Commerce, 807 S.W.2d 242 (Tenn. Ct. App. 1990). Here, the appellate court reversed the trial court's holding that a release signed by a mother was valid against the child. The release consisted of the mother's handwritten note which stated "[u]nder no circumstances will anyone or anything be liable in case of an accident." *Id.* at 244. Even though the mother clearly understood what she was signing, the court followed *Childress*, holding that a mother can only waive her own rights and not those of her child. *Id.* at 246-47.

115. *Id.* at 243-44. Although the language was dictated by the minor-participant, she did not sign the waiver. Instead it was contained in her mother's handwritten note. The note was the result of a telephone call the night before it was written. The call came from the teenaged daughter who participated in the event, and the daughter "told her [mother] what to say." *Id.* The event was an annual horse race celebrating Andrew Jackson at his home, The Hermitage. The daughter was killed as she maneuvered her horse to avoid vehicles which had crossed her path. *Id.*

The conclusion that contract law principles render waivers unenforceable against minors has been reached in other jurisdictions.[116] For example, the Superior Court of Connecticut has held that parents of a minor cannot waive the minor's rights as a condition for attending a camp.[117]

The Supreme Court of Maine has reached the same conclusion, stating that if the agreement in question were a release, it would have been ineffective because a parent cannot release a child's rights.[118]

Thus, although there are few cases dealing with the waiver of rights for minors in sports-related activities, the weight of the decisions is that the waivers cannot be enforced against the minors. Courts which follow the *Wagenblast* public policy approach would not allow the waiver to be enforced against any party. However, a court taking the *Childress* disaffirmance approach may hold the agreement enforceable against a parent who signs the form. Thus, a parent who signs a waiver may lose the right to sue a provider for harm suffered by the PARENT, but a parent's agreement to waive the CHILD'S rights will not be enforced.

B. Indemnification

Courts also have decided the legal effect of indemnification clauses included in waiver forms. These clauses require that the participant pay any damages awarded against the provider, and in addition may also require that the participant shoulder the cost of the provider's legal defense. If they are enforceable, the child's only remedy effectively could be against his or her parent(s).[119]

The same analysis which bars waivers of childrens' rights to sue for negligence should also free children from any obligations to indemnify. Recognizing this, courts invalidating waivers also have struck down indemnification clauses as to children:

> Indemnification agreements executed by a parent or guardian in favor of [parties] . . . committing torts against an infant or incompetent, are invalid as they place the interests of the child or incompetent against those of the parent or guardian. 'Clearly, a parent who

116. *See supra* note 88.

117. Fedor v. Mauwehu Council, Boy Scouts of America, Inc., 21 Conn. Supp. 38, 40, 143 A.2d 466, 448 (Conn. Super. Ct. 1958).

118. Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n.3 (Maine Sup. Ct. 1979).

119. Childress v. Madison County, 777 S.W.2d 1, 14 (Tenn. Ct. App. 1989). Would a parent with substantial assets file the child's lawsuit, knowing that the parent ultimately may be forced to pay the judgement?

has placed himself in the position of indemnitor will be a dubious champion of his infant child's rights.'[120]

Courts have stated that this result is compelled by the common law, in particular the long standing policy allowing minors to disaffirm contracts.[121] The *Childress* court noted that if social policy favors a different conclusion, legislatures and not courts should balance the interests:

> It is not our intention, nor do we feel the result of this case will be, to put a chill on activities such as the Special Olympics. The law is clear that 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 [State] Supreme Court or the legislature.[122]

As suggested above, it is not clear whether an indemnification clause will be struck down as to a parent who signs. If not, a provider's liability either to a child or to a non-signing parent might have to be paid by the parent who signed: "However, Mrs. Childress did clearly agree to indemnify the Special Olympics 'from all liabilities . . .' Therefore, to the extent the defendants are liable to Mr. Childress, Mrs. Childress, as indemnitor, must compensate him."[123]

The result depends on whether the court adopts the *Wagenblast* approach or the *Childress* approach. The former, which bars exculpation as a matter of public policy, may apply to all parties involved and thus free not only children but also parents from waivers they have signed. The latter, which is based on a minor's common law right to disaffirm contracts, may only free the minor and not to a parent who signs a waiver.

V. EFFECT OF A CHILD'S SIGNATURE

Providers of sports-related activities to children often require that both parents and children sign a waiver.[124] However, the child's signature

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120. *Id.* at 7 (citations omitted).

121. *Id.*

122. *Id.* at 7-8.

123. *Id.* at 6. It is unlikely that a parent would be insured against such an obligation because the agreement to indemnify was voluntary. Even where the liability is covered by parents' own insurance, the policy's limits could be inadequate where a child has been severely injured.

Furthermore, unless the couple is divorced, the father's suit might be valid but recovery illusory. If the couple is living together, payment would occur, if at all, to the extent the signor has the economic ability to pay the non-signing parent. The paying spouse might be required to draw on separate rather than joint funds. Sources of funds becomes even more interesting in community property states.

124. *See supra* notes 2-3.

should have no legal effect because minors can only enter into a voidable contract.[125] These contracts are subject to disaffirmance prior to and for a reasonable time after reaching majority.[126]

One court described the reason for the rule:

> All lawyers know that the protection of infants is one of the chief concerns of the law. The rule is that no one may deal with a minor, except for necessaries. . . . This positive inhibition is the way of the law to protect infants against their own lack of discretion and against the snares of designing persons.[127]

Although the *Childress* approach suggests that minors' common law rights to disaffirm contracts render waivers unenforceable against children, that is not the actual holding in *Childress* because there the minor did not sign the release.[128] In cases where the minor did sign the waiver, however, other courts have held that the signature did not bind the minor due to disaffirmance rights.[129] Disaffirmance has been allowed even where a minor misrepresented his age to be that of an adult's.[130]

This brings up an interesting issue. Can a minor sue a provider for breach of contract while at the same time trying to disaffirm only a part of the contract, the waiver? In *Holland v. Universal Underwriters Ins. Co.*,[131] the court held that when disaffirming an insurance contract, the minor plaintiff can not affirm the insurance policy yet disaffirm the uninsured motorist portion. Following this logic, in order to be effective a disaffirmance must be complete.[132]

Based on case law, minors should be able to disaffirm contracts which contain waivers.[133] The effect is that minors, or persons acting on behalf of the minor, have an option, at any time during minority and for a reasonable

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125. RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981).

126. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

127. O'Leary Estate, 352 Pa. 254, 259, 42 A.2d 624, 625 (1945).

128. Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

129. *E.g.*, Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140 (E.D. Pa. 1987) (both the minor and her mother signed the waiver); Celli v. Sports Car Club of America, Inc., 29 Cal. App. 3d 511, 517-18, 105 Cal. Rptr. 904 (1973).

130. Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605 (D.C. Cir. 1960).

131. 270 Cal. 2d 417, 75 Cal. Rptr. 669 (1969).

132. The minor plaintiff thus pays the price of giving up a breach of contract lawsuit by disaffirming the contract. The only remaining cause of action will be in tort. That may be harder to prove than breach of contract because in tort the plaintiff must show that the defendant is the proximate cause of the injury. In addition, the defendant may have one of several tort defenses. These could include contributory negligence, comparative negligence, express assumption of the risk, or implied assumption of the risk. Although tort law implications in this area are interesting, as noted above they are beyond the scope of this article. *See supra* notes 9 and 94.

133. Some states have enacted limited exceptions to common law disaffirmance rights. *See, e.g.*, TEX. FAM. LAW § 12.09 (1989); CAL. CIV. CODE §§ 25.5-25.7, 25.9, 34.3-34.10 (1991) (mi-

time thereafter, to decide whether to be bound by the contract. Thus, minors who sign a waiver nevertheless are able to sue a service provider.

This does not mean that a child's signature on a waiver will have no effect as a matter of fact. Some potential plaintiffs may not file a lawsuit if they signed a waiver, either because they do not know it is unenforceable or because they feel morally bound by their signature.[134] A minor's signature also may be useful to the provider during settlement negotiations or in proving a tort defense such as that the minor knowingly and expressly waived the risk of injury or that the minor was contributorily negligent.[135]

VI. CONCLUSION

This article examined the current state of contract law dealing with waivers for minors participating in sports-related activities. Although waivers are an effective method of shifting the risk of damage awards away from a sponsoring organization to an adult participant, the scant authority dealing directly with the issue suggests that neither waivers nor indemnification clauses will be enforceable against minors. However, they may be enforceable against parents who sign releases. That is, in some jurisdictions a parent who signs a waiver may lose the right to sue a provider for harm suffered by the parent, but a parent's agreement to waive the child's rights will not be enforced.

Because courts consistently have refused to enforce waivers against children, in the absence of legislation to the contrary, sports providers most likely will continue to bear the costs of injuries regardless of whether a parent or a minor signs a waiver. Both providers and parents should be aware,

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nors can be bound to certain health-related contracts), and CAL. CIV. CODE § 36 (1991) (certain employment agreements for artists or athletes).

In contrast to contractual liability, minors are held responsible for their torts unless they are too young to understand the consequences of their acts. Moreover, although too young to be bound to a contract which may include a waiver, minors have the ability to waive their constitutional rights under the Fifth Amendment if the waiver is knowing and intelligent. People v. Lara, 67 Cal. 2d 365, 62 Cal. Rptr. 586 (1967). Thus, even though a minor is incompetent to enter into a contract to purchase a car, (s)he is allowed to waive procedural rights which may result in a lifetime in jail.

134. *See supra* § IV.

135. Thus, the service provider may not be financially responsible if a minor is injured. The plaintiff must still prove that the service provider was negligent, and overcome tort defenses available to the service provider. The defense of express assumption of the risk may be a complete bar to the minor's recovery because the waiver form that the minor signed may be proof that the minor was aware of the risks, and undertook to assume the risks, associated with the activity. However, some courts have held that if contractual waivers are against public policy, the use of these waivers to construct a tort defense also would violate public policy. *See supra* note 94. As noted above, a discussion of tort implications is beyond the scope of this article. *See supra* note 9.

however, that there is no case law in most jurisdictions. Organizations seeking protection from the hazards of an increasingly litigious society should look to means other than exculpation clauses to ensure limited liability. This may result in service providers investing more in safety, but also may result in fewer activities being sponsored for children.