THE PROBLEM WITH RELEASES

by

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Businesses seem to be screaming "I'm nor liable" from every street corner. The number of signs proclaiming that drivers should not "follow too close" to another vehicle or that the vehicle they are following "makes wide turns" seem to be growing exponentially. We all remember the pre-civil rights signs that proclaimed “we reserve the right to refuse service to anyone”. Yet when a business owner asks us whether such signs are actually enforceable, we lawyers give them our usual answer: "it depends". We have drawn so many distinctions among and between different forms of releases and disclaimers that we have even confused ourselves about which ones are enforceable. We can't even agree on what to call a document by which a party seeks to be excused from future liability. Is it a “disclaimer”, "waiver", "liability waiver", "liability release", "exculpatory agreement", "assumption of risk", "statement of understanding", "consent not to sue", "anticipatory release", "general liability release," "indemnity agreement," "hold harmless agreement," or "covenant not to sue"? I recently asked five distinguished lawyers which of these words or phrases were synonymous with "disclaimer" and, predictably, I received five different answers.[1] In truth, they have all been used synonymously by courts over the years.[2]

The most commonly used term is "release," which Am Jur defines as a "contract in which one party agrees to release or exculpate another from potential tort liability for future conduct covered in the agreement".[3] Note that this definition is limited to tort liability. Black's Law Dictionary, on the other hand, takes a much broader view; defining a release as a "contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility, or an agreement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved"[4]. Most of us use “disclaimer” to describe statements intended to limit a seller's liability for defects in goods sold or a “disclaimer” of an interest in property, but it actually includes any renunciation of one's legal right or claim as well as a repudiation of another's legal right or claim.[5] Even our reference materials disagree on the situations in which a release or disclaimer applies.

The problem seems to lie in what has been called the "inherent tension" between the law of contracts and the law of torts.[6] Contract law holds that parties with equal bargaining power have the right to deal with each other and conduct their private business in any way they wish. Therefore, under contract law, a voluntary agreement between two parties that gives away the rights of one party is a private affair, has no direct effect on the public, and should be enforced. However, an equally fundamental rule of tort law holds a party responsible for conduct that causes harm to another in order to protect the general public; thus a party should not be able to make an agreement that limits his liability to others. A release stands "at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts"[7] and the clash of these competing principles has produced significant confusion and uncertainty over when and under what circumstances releases will be enforced. Most courts have taken the position that releases are enforceable as part of an otherwise enforceable contract unless there is a contract reason (some special feature of the document) or a tort reason (something about the transaction) that would make the release unfair. Professor Nelson has even devised a "waiver scale" with contract theory on one side of the scale and tort theory on the other side. According to the waiver scale, releases will usually be upheld; but the contract side of the scale will receive full weight only if bedrock rules of drafting, presentation, and bargaining equality have been followed, and the tort side of the scale will receive more weight in cases involving public policy.[8] Like many other common law doctrines, the contract rule that releases are enforceable is in danger of being eclipsed by its exceptions. Drafting rules will defeat a release that is ambiguous, inconspicuous, or results from a significant disparity of bargaining power. Tort rules will defeat a release that seeks to avoid liability for willful, grossly negligent, or intentional acts or acts that adversely affect the public interest.[9] We need to explain these exceptions more clearly so that buyers and sellers will be better able to discern when problems with a document or problems with the sophistication of a party may cause a release to be void and unenforceable. In other words, we need to show them what the law will allow.

I. DRAFTING RULES

By adopting the Uniform Commercial Code, state legislatures have already determined that certain disclaimers are valid, so long as they are in a record (for consumers), conspicuous, and call the buyer's attention to the exclusion of liability.[10] While the UCC is not directly applicable to other types of contracts, UCC principles are often utilized by courts in determining the enforceability of other contracts. Moreover, sellers insert releases into their contracts for the same reason everyone else does - to minimize costs related to litigation, to express the understanding of the parties, and to reduce insurance costs,[11] so every release should be valid unless the seller has made mistakes in drafting or there is an imbalance in

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bargaining power between the parties. Can we, then, assure our business clients a summary judgment before trial? Hardly.

The first drafting rule is that the release must be "conspicuous" (readily apparent to the releasing party). A well-drafted release spells out the intention of the parties beyond doubt by using language that unambiguously conveys exactly what rights are being relinquished and mentions every conceivable risk.[12] The type size must be adequate and the word "release" should be included in the text. This generally means bold-face type, increased type size, underlining, all capital letters, different colored type, putting a box around the provision, or a combination of these techniques. Effective documents have language that draws the attention of the reader to the release and clearly demonstrate the intent of the parties. Conspicuous language usually appears on one page, on the front side of the contract, and not hidden under a separate heading or surrounded by unrelated terms. Some courts have also found "conspicuous" language on the reverse side of a purchase order where one of the provisions on the front side referred specifically to the provision on the reverse side and there was printed in large red type on the front of each page a notice that the agreement included the terms on the reverse side of the order.[13]

Releases with all the legal words in a conspicuous place may still be void on drafting grounds if "legal-eze" language renders the contract not understandable.[14] For example, when Brian Doyle wanted to play hockey at college his parents were required to sign a release which read:

> "I understand that Neither Bowdoin College nor anyone associated with the Hockey Clinic will assume any responsibility for accidents and medical or dental expenses incurred as a result of participation in this program. . . . I understand that I must furnish proof of health and accident insurance coverage acceptable to the College. . . . (signed) Leonard F. Doyle."
>
> I fully understand that Bowdoin College, its employees or servants will accept no responsibility for or on account of Any injury or damage sustained by Brian arising out of the activities of the said THE CLINIC. I do, therefore, agree to assume all risk of injury or damage to the person or property of Brian arising out of the activities of the said THE CLINIC. . . . (signed) Margaret C. Doyle."

The releases were void because they did not contain the words "indemnify," "reimburse" or "hold harmless" and made no expressed reference to the type of injuries proximately caused by negligent conduct. Furthermore, it failed to effectively convey the practical effects of the agreement and, according to the court, a reasonable person could not possibly have understood what the waiver language meant, let alone voluntarily have consented to its terms.[15]

The same result can be found in *O'Connell v. Walt Disney World*[16] and *Rosen v. LTV Recreational Development, Inc.*[17], where courts found releases signed by the users of recreational facilities insufficiently drafted. *O'Connell* involved a minor injured during a stampede while on a horseback ride at Disney World. Prior to taking the ride, Frankie O'Connell's father had signed a release which provided:

> I consent to the renting of a horse from Walt Disney World Co. by Frankie, a minor, and to his/her assumption of the risks inherent in horseback riding. I agree, personally and on his/her behalf, to waive any claims or causes of action which he/she or I may now or hereafter have against Walt Disney World Co. arising out of any injuries he/she may sustain as a result of that horseback riding, and I will hold Walt Disney World Co. harmless against any and all claims resulting from such injuries.

The release was good enough to protect the company from liability for injuries arising out of the dangers inherent in horseback riding, but it did not bar a claim for negligence because there was no language expressly indicating the intent to release the company from its own negligence.[18]

In the *Rosen case*, a skier purchasing a season pass to a ski resort agreed to the rules and regulations governing such passes, including the following stipulation:

> I understand that skiing is a hazardous sport and that hazardous obstructions, some marked and some unmarked, exist on any ski area. I accept the existence of such dangers and that injuries may result from the numerous falls and collisions which are common in the sport of skiing, including the chance of injury resulting from the negligence and carelessness on the part of fellow skiers.

Even though this release, unlike the release in *O'Connell*, did use the word "negligence" it did not contain any express consent on the part of the signer to exonerate the *ski area* for negligent conditions - only for injuries resulting from the negligence and carelessness of fellow skiers. Even though the signor acknowledged the existence of hazards and accepted the danger, the language fell short of saying that the ski area may be negligent toward the signer free of liability.[19]

As these cases indicate, general language that does not specifically shift responsibility is insufficient. Even specific language may not be sufficient, depending on how it appears in the document: was it hidden in a nondescript paragraph in the

middle of a document or stamped in small print on the back of a receipt? Was there something on the face of the contract that Some states have developed an Express Negligence doctrine which requires any valid release to express the intent to release a party from liability for its own negligence in specific terms and to put something on the face of the release to attract the attention of a reasonable person.[20] Other states, while not formally adopting the express negligence doctrine, apply a similar strict standard and require that the word "negligence," "fault," or their equivalent be used in the contract language. The remaining states continue to require merely that releases be clear and conspicuous and focus on the intent of the parties, without requiring that any specific words be used so long as the intent of the parties to preclude liability is clearly set forth.[21]rule, releases must be in capital headings, in contrasting type or color, or the only text appearing on the page of a document. The release in *Ghionis v. Deer Valley Resort Co*. was not effective because the terms "as is" were not conspicuous and because it was ambiguous as to the scope of release, despite the use of most key words in ten separate paragraphs. [22] The language used in *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd*. failed because it did not "*clearly*, explicitly and comprehensibly set forth to an ordinary person untrained in the law that the intent and effect of the document is to release all his claims". The court worried that the only time the word "release" appeared in the entire document was in its title. The only language which could possibly have been construed as releasing appeared in a convoluted 147 word sentence which, although over 55 percent the length of Lincoln's entire Gettysburg Address, never mentioned words such as "release", "remise", "discharge", "waive", or the like. [23] Some courts insist that a release also identify with specificity the activity to be released. The release in *Dobratz v. Thomson* was unduly broad, vague, and ambiguous because it did not specify the nature of the activity (a water ski stunt team), the particular stunts that were to be performed, their level of difficulty and dangerousness, or the locations covered, and it did not specifically mention "shows," as opposed to competition, practice, or preparation. [24]

Release language, including “as is”, may not be conspicuous unless the term is set apart by quotation marks or typed in bold.[25] Likewise, a release would not be conspicuous if it was hidden on the reverse side of a sales order under a paragraph entitled "Warranty" and was surrounded by completely unrelated terms, or if it was on the back side of a delivery order, or if it was in small, light type on the back of a form and was surrounded by unrelated terms.[26] Sellers who try to hide the release in a nondescript paragraph in the middle of a long document, such as a health club membership contract, will encounter additional demands, including that the language in the release not be smaller than other language used in the document and that it have a contrasting color or type. [27] Standard release forms in fine print, signed by patrons at a large event as they enter the site and wait in line for admission, are always void since the crowd has had no time to read, understand, and accept the terms of the release[28].

It is impossible, of course, for waiver language to specifically spell out *every* type of conduct and activity encompassed by the agreement. Judge Compton has summed up the inherent problem: "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. If short and to the point, a release will be challenged as failing to mention the particular risk which caused a plaintiff's injury or as insufficiently comprehensive; it will be attacked as totally ineffective if a key word is placed in the caption for emphasis but not repeated in the text or if, despite unambiguous language, the word "negligence" is not used . If the drafter avoids these shortcomings by adding details and illustrations, the plaintiff invokes the doctrine *expressio unius exclusio alterius est* and characterizes the causative hazard as one not found among those listed in the release, but if the list ends with an inclusive term--"and all other risks not specifically enumerated"--it will be argued, under the principle *ejusdem generis*, that the risk encountered is nonetheless not assumed, because its nature is different from those listed. If the drafter strives to be comprehensive, the release is attacked as unduly lengthy but if he fits it onto a single page, the type size will be criticized as inadequate. If the significance of the release is emphasized by its repetition in two documents, any variation in wording fuels a challenge. To be effective, a release need not achieve perfection; only on Draftsman's Olympus is it feasible to combine the elegance of a trust indenture with the brevity of a stop sign. "Whoever thinks a faultless piece to see, Thinks what ne'er was, nor is, nor e'er shall be." (Pope, Essay on Criticism 253-254.) 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."[29]

Since releases will be subjected to close scrutiny and courts will always interpret them against the drafter, they should be prepared with great care. They should waive the right to assert any claim of *any kind or nature whatsoever*, which will include negligent acts.[30] In addition to the language being clear, unambiguous, understandable, and conspicuous, words used in the release must express the intent to release a party and describe with particularity the activities intended to be included within the scope of the release. Some words are more magic than others. The release should include the words “release”, “hold harmless”, “indemnify”, assumption of risk, “discharge”, “covenant no to sue,” “danger, “risk of injury or death”, and set these words off in capital letters. Right above the signature line it should say: "Please Read and Sign: I have read, understood, and accepted the conditions of the Release printed above. I understand it is a release of all claims. I understand I assume all inherent risks. I voluntarily sign my name evidencing my acceptance of the above provisions. I voluntarily elect to accept all risks and I acknowledge that I assume all risk.[31] Finally, the release should be written in everyday words easily understood by an ordinary person untrained in the law. Connell and Savage have suggested “In other words, I agree that I cannot sue or recover anything if anything happens to me or to my property”.[32] Even a release drafted with much care, however, may fail for another reason.

II. RULES REGARDING UNEQUAL BARGAINING POWER

Besides drafting rules, there are other contract-based exceptions to the general rule that releases are valid, including fraud, unconscionability, and incapacity. The common law has always had this kind of hardship relief borrowed from non-contract situations and most courts will aid parties they feel have been "oppressed" by bargaining inequalities. With regard to releases this means close scrutiny of the surrounding circumstances to detect any bargaining imbalance. Any release entered into by a person who does not stand on equal footing or who is compelled to relieve another from liability is invalid,[33] as is any agreement obtained through fraud.[34] Modern contract theory, as partially reflected in the UCC, dismisses the classical theory of a bargain in which the terms have been worked out freely between parties that are equals. Most contracts these days are instead on a standard form which is often signed by consumers who understand few of the terms used and who often do not even read them. Software users are particularly used to accepting the terms in an electronic release without reading them, allowing sellers to take advantage of them in an unconscionable fashion.[35] The California court that excoriated the agreement in *Ferrell* for failing to use the proper words went on to proclaim the attempted release an "adhesive agreement presented on a take-it-or-leave-it basis done in the context of an economic setting of unequal bargaining strength"[36].

Wanda Whittington's heirs were confronted with a required release when the senior nursing student participated in a field trip to tour a hospital in Houston. The release read:

> "I, Wanda Whittington, voluntarily agree to participate in the following activity:
> List activity -- M.D. Anderson Senior Trip
> Place-- Houston, Texas
> date -- 4-6-1979
> and hereby relieve Sowela Technical Institute of any and all liability associated with the above.
> s/Wanda Whittington

On the way to Houston, Wanda's van was tailgated by an 18-wheeler. The driver lost control and overturned the van, resulting in the death of Wanda and another student, as well as multiple injuries to the other passengers.[37] The only issue was whether this release possessed the essential elements of a contract, specifically including consent as a result of "a free and deliberate exercise of the contracting party's will."[38] The context surrounding Wanda's execution of the document made it clear that her signature was neither free nor deliberate; Sowela sponsored the trip for senior nursing students annually and distributed to all of the students form releases for their signatures; Sowela awarded twelve credit hours to a nursing student for participating in the field trip (double the amount given during a normal day); Sowela did not offer alternative classes for any student who chose not to participate in the field trip; Sowela required the students to travel in a group and did not permit them to use their private vehicles; and Sowela dictated the terms of the purported release that attempted to release the school from any and all liability for a reasonably foreseeable danger. [39]

III. TORT RULES

In addition to the contract rules, releases must not result in a violation of "public policy". This means that releases that meet the contract requirements in every detail may nevertheless be voided if that would result in a greater overall social benefit for society. This usually involves releases used in the context of services that are highly important or essential to the public, those that purport to release liability for extreme conduct such as gross negligence, recklessness, or willful misconduct, those that seek to release a duty of care established by statute, or those that are being used by or on behalf of children.[40] While it is easy for courts to say they refuse to enforce releases on public policy grounds when the agreement adversely affects the "public interest," determining exactly which activities actually affect the "public interest" is a challenge, since the concept has been the subject of great debate over the course of the development of the common law. It has proven impossible to articulate a precise definition because the "social forces that have led to such characterization are volatile and dynamic"[41] and the determination of what constitutes the public interest "must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."[42] Even while admitting, however, that the concept is difficult to define, courts continue to evaluate releases for their impact on the public interest. Those deemed to intrude too much are declared void.

Contracts affected by the "public interest" traditionally were limited to innkeepers, common carriers, professional bailees, public utilities, employees, banks, and tenants before 1963, when the U.S. Supreme Court held that restaurants could not discriminate on racial grounds because they render a service which has become a "public interest".[43] That same year the California Supreme Court decided that an agreement between the University of California Los Angles Medical Center and an entering patient affected the public interest. [44] When Mr. Tunkl sued for personal injuries alleged to have resulted from the negligence of two physicians employed by the Medical Center, he was confronted with a release he had signed upon admission to the hospital that said:

> RELEASE: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefore, the patient or his legal representative agrees to and hereby releases the Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

It has been said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths[45]. The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. In Mr. Tunkl's case the California Supreme Court decided to ride the horse beyond all limits ever reached before by setting forth six characteristics of a contract concerning private affairs that transform into a contract imbued wit the public interest. Even after admitting that "no definition of 'public interest' can be contained within the four corners of a formula,"[46] the Court proceeded to set forth a formula for determining when a release violates the public interest: 1) it concerns a business of a type generally thought suitable for public regulation; 2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; 3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards (a public accommodation); 4) the party seeking exculpation holds a decisive advantage of bargaining strength against any member of the public who seeks his services; 5) the party with superior bargaining power confronts the public with a standardized adhesion contract of exculpation; and 6) the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[47] The hospital release form was invalid because Tunkl did not "acquiesce voluntarily" but, instead, entered into a "compulsory assumption of the risk of another's negligence."[48] The services of the hospital were publicly regulated, constituted a practical and crucial necessity, were open to all, the hospital had a decisive bargaining advantage, there was no debating the terms of the contract, and Tunkl placed himself in the control of the hospital, subjecting himself to the risk of its carelessness. In the "integrated and specialized society of today, structured upon mutual dependency", an individual citizen, "completely dependent upon the responsibility of others", cannot allow an immunity from careless failure to provide a service upon which he depends."[49] The six-factor test of *Tunkl*, which was originally intended to be a rough outline, may have instead become a rigid measuring stick.[50]

Every state refuses to enforce contracts that are a result of fraud and every state likewise refuses to enforce release clauses that attempt to relieve a person from his fraudulent acts, but some states go further and refuse to enforce a release that attempts to limit the liability of a person for his own negligence.[51] This expansion of the public interest test is clearly seen in the 1994 case of Kyriazis v. University of West Virginia.[52] Jeffrey Kyraizis sued the university when he suffered injuries while playing rugby in a match held by the University of West Virginia Rugby Club. One day during practice, the team captain told the players they were all required to sign a document entitled "West Virginia Sports Club Federation, Rugby Club, Release, Waiver, and Participation Agreement. The release read in part:

> In consideration of my participation, I hereby release West Virginia University, The University of West Virginia Board of Trustees, The Sports Club Federation, The Rugby Club, and any of its instructors or agents from any present and future claims, including negligence, for property damage, personal injury, or wrongful death, arising from my participation in rugby club activities.[53]

The University asserted the signed release was an absolute bar to Jeffrey's claim, citing the general rule that a person who expressly and clearly agrees to accept a risk of harm arising from another's negligence may not recover for such harm, unless the agreement is invalid as contrary to public policy.[54] It also cited precedents that hold recreational activities *not* to be a public service. The Court's agreed that the recreational activities were not public, but the entity providing the service was, since the activity in question was sponsored by a *state* university. By providing the rugby team with money, playing facilities and a coach/faculty advisor the university demonstrated that athletics were integral and important elements of its education mission and, as an entity performing a public service, the University owed a duty of due care to Jeffery regardless of the existence of an otherwise valid release.[55]

Standardized releases for participation in interscholastic sports by public school children usually violate public policy because students and their parents are required to sign a release of all potential future claims as a condition to student participation in school-related activities.[56] The Tunkl criteria are met because interscholastic sports in public schools are extensively regulated, they are a matter of public importance, they are open to all students who meet certain skill and eligibility standards, school districts possess a clear and disparate bargaining strength when they insist that students and their parents sign releases, students and their parents or guardians have no alternative but to sign the forms or have the student

barred from the program, and as a natural incident to the relationship of a student athlete to his or her coach, the student athlete is usually placed under the coach's considerable degree of control.[57]

When it comes to recreational sports generally courts have been reluctant to find a public interest prohibiting the enforcement of releases on the grounds that no one is required to participate in risk sports such as scuba diving, skiing, triathlon competitions, downhill ski racing, parachuting, automobile racing, roller skating, or bicycle racing.[58] As one court put it: "Measured against the public interest in hospitals and hospitalization, escrow transactions, banking transactions and common carriers, (a bicycle race) is not of great public importance."[59] Nevertheless some states have voided releases involving recreational activities on grounds of "public interest". The Vermont Supreme Court, for example, declined to enforce a release signed by a skier releasing the ski lift operator from "any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, [and] actions or omissions of employees or agents of the ski area ....". The court somehow found a legitimate public concern when the skier sustained serious injuries after colliding with a metal pole: "The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible." The release, with its major public policy implications, was not enforceable.[60] The next year the Virginia Supreme Court refused to uphold, on public policy grounds, a release of "any and all" injuries suffered in the Teflon Man Triathlon signed by a participant who sustained an injury which rendered him a quadriplegic.[61]

V. CONCLUSION

Business owners need to be able to negotiate their own contracts with a clear sense of what the law will allow. Releases have been considered necessary and valid for centuries but now, partly because the law surrounding them is so unsettled, there is an increasing reluctance to enforce them. This has resulted in a growing discrepancy among the states in decisions regarding the enforceability of releases, with some courts emphasizing draftsmanship while others are more concerned with the bargaining power of the parties or the implications for the public interest. Some courts still enforce releases containing broad, general language; but most do not. Some courts require that certain magic words be used in a release; others do not. Modern courts no longer demand evidence that the release was negotiated or bargained for, and many refuse to enforce releases even in situations where the activity in question is voluntary. Prosser and Keeton's famous statement that there is no public policy which prevents parties from contracting away their own liability[62] no longer applies to the ordinary case.

Refusing to enforce releases because of poor drafting or disparity in the bargaining power of the parties or because of the "public interest" seems to be the new Justice ethic. While it may indeed result in justice in individual cases, what message does it send about the moral obligation of our promises? Promises are the moral basis of contract law, which allows people to impose on themselves obligations where none existed before. Freedom to contract is based on the ethic of individualism and has been the basis of positive law developments in both English and American courts. It preserves the integrity of promises and allows people to deal and bargain as they will.[63] Allowing so-called "victims" to ignore their signed releases teaches them that the risk is always with someone else and they are not responsible for their own mistakes. Failing to honor the agreement of the parties as to where the risk will fall does not make he risk go away, it just moves it to the other party.

It has long been the law that even a well-drafted release may not exculpate someone from liability for their own negligence, so businesses should already know that such a provision is of questionable utility. Most do not know, however, that courts are becoming more and more reluctant to enforce releases and are creating more and more reasons for not doing so. While some business owners may want to continue using releases (they still deter lawsuits by scaring away would-be plaintiffs), they should not rely on any release as complete protection from liability. To judge the likelihood of a release being enforceable they must know all the drafting rules set forth by various courts, be able to discern the sophistication of the other party (is it a business? a merchant? an experienced consumer? an inexperienced consumer?), and be aware of public policy in every jurisdiction in which the release may be contested. The problem with releases is that they are increasingly unlikely to release anybody from anything.

Footnotes

[1] Lawyer 1: Release, liability waiver, liability release, waiver, general liability release, covenant not to sue
Lawyer 2: Release, liability waiver, liability release, waiver, exculpatory agreement, assumption of risk, general liability release, hold harmless agreement
Lawyer 3: Release, liability release, general liability release
Lawyer 4: Release, liability waiver, liability release, general liability release
Lawyer 5: Release, liability waiver, liability release, waiver, exculpatory agreement, general liability release, hold-harmless

[2] While "indemnity" clauses requiring a buyer to assume certain liabilities on behalf of the seller are theoretically different from disclaimers of a seller's liability, the intent is the same - to shield or release one of the parties from responsibility.

[3] 66 AM. JUR. 2D sec. 1 (2001).
[4] BLACK'S LAW DICTIONARY 21 (8th ed. 2004).
[5] BLACK'S LAW DICTIONARY 87 (8th ed. 2004).
[6] Connell and Savage, *Releases: Is There Still a Place for Their Use by Colleges and Universities*?, 29 J. C.& U. L. 579 (2003).
[7] Nichols v. Hitchcock Motor Co., 70 P.2d 654, 658 (Cal. App. 1937).
[8] Nelson, *The Theory of the Waiver Scale: An Argument why parents should be able to waive their children's tort liability Claims*, 36 U. S. F. L. Rev. 535 (2002).
[9] Connell & Savage, *supra* note 6 at 583.
[10] U.C.C. sec. 2-316 (2007).
[11] Malamud and Karayan, *Contractual Waivers for Minors in Sports-related Activities*, 2 Marq. L. Rev. 151 (1992).
[12] Morton v. Ambridge Borough, 101 A.2d 661, 663 (Pa. 1954).
[13] Ensearch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex. 1990).
[14] Arango & Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. Miami Ent. & Sports L. Rev. 1 (1977).
[15] *Id.* at 7.
[16] O'Connell v. Walt Disney World, 413 So.2d 444 (Fla.App.1982).
[17] Rosen v. LTV Recreational Development, Inc., 569 F.2d 1117 (10th Cir.1978).
[18] *O'Connel*, 413 So.2d at 453.
[19] *Rosen*, 569 F.2d at 1121.
[20] *Ensearch Corp*., 794 S.W.2d at 12.
[21] Connell and Savage, *supra* note 6, at 587.
[22] The release, in part, said:

> (1) I accept for use as is the equipment listed on this form, and accept full responsibility for the care of the equipment while it is in my possession … (3) I agree to hold harmless and indemnify the ski shop and its owners, agents and employees for any loss or damage, including any that results from claims for personal injury or property damage related to the use of this equipment, except reasonable wear and tear … (5) I understand that there are inherent and other risks involved in the sport for which this equipment is to be used, snow skiing, that injuries are a common and ordinary occurrence of the sport, and I freely assume those risks … (6) I understand that the ski-boot-bind system will not release at all times or under all circumstances, nor is it possible to predict every situation in which it will release, and is therefore no guarantee for my safety … (7) I hereby release the ski shop, and its owners, agents and employees from any and all liability for damage and injury to myself or to any person or property resulting from negligence, installation, maintenance, the selection, adjustment and use of this equipment, accepting myself the full responsibility for any and all such damage or injury which may result … (10) All instructions on the use of my rental equipment have been made clear to me, and I understand the function of my equipment.

Ghionis v. Deer Valley Resort Co 839 F.Supp. 789, 793 (D. Utah 1993).

[23] The release read:

RELEASE OF LIABILITY
ENTRANTS ARE REQUIRED TO READ AND SIGN THE FOLLOWING DECLARATION

> In consideration of the acceptance of this entry or of my being permitted to take part in this event, I … agree to save harmless and keep indemnified SNORE, Ltd., it's individual members and their respective agents, officers, officials, servants and representatives, the owner, curators, lessors, agencies, (including, but not limited to Federal, State, County and City), or managers of any lands upon which this event takes place from and against all actions, claims, costs and expenses and demands in respect of death, injury, loss of or damage to my person or property, howsoever caused, arising out of or in connection with my entry or my participation in this event, and not withstanding that the same may have been contributed, to, occasioned by, or directly caused by the negligence of the said bodies, their agents, officials, servants or

representatives. I declare that the drivers possess the standard of competence necessary and are physically fit for an event of the type to which this entry relates and the vehicle entered is suitable and road worthy for the event.

Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd., 195 Cal. Rptr. 90 (Cal. Ct. App. 1983).

[24]The release said:

> I, hereby release, and agree to hold harmless … of any and from all liability, loss, claims, and demands that may accrue from any loss, damage or injury (including death) to my person or property, in any way resulting from, or arising *in connection with this event*, and whether arising while engaged in competition or in practice or preparation therefore, or while *upon, entering or departing from said premises*, from any cause whatsoever. I know the risk and danger to myself and property while upon said premises or while participating or assisting in this event, so voluntarily and in reliance, upon my own judgment and ability, and I thereby assume all risk for loss, damage or injury (including death) to myself and my property from any cause whatsoever.

Dobratz v. Thomson, 468 NW2d 654 (Wis. 1991).

[25] Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789, 793 (D. Utah 1993)
[26] *Id.* at 799.
[27] Leon v. Family Fitness Center, 71 Cal. Rptr. 2d 923 (Cal. Ct. App. 1998). The court complained that the release was in the same, smaller eight-point font used in most of the agreement; it was not prefaced by a heading; and the title of the agreement gave no indication that it contained liability release language.
[28] Eder v. Lake Geneva Raceway, 523 N.W. 2d 429, 432 (Wis. Ct. App. 1994).
[29] National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court, 215 Cal.App.3d 934, 264 Cal.Rptr. 44 (Cal.App. 2 Dist.,1989).
[30]The release read:

> I am aware that during the raft trip in which I am participating … certain substantial risks and dangers may occur, including but not limited to, hazards of traveling on a rubber raft in rough river conditions, hiking in tough terrain, accidents or illnesses in remote places without medical facilities, the forces of nature, and travel by automobile, bus or other conveyance. In consideration of and as part payment for the right to participate in such river trips or other activities … I have and do hereby assume all of the above risks, and release, and will hold harmless from any and all liability, actions, causes of actions, debts, claims and demands <u>of every kind and nature whatsoever</u> which I now have or which may arise out of or in connection with my trip or participation in any other activity.

Krazek v. Mountain River Tours, Inc. 884 F.2d 163, 166 (4th Cir. 1989).

[31] Chauvlier v. Booth Creek Ski Holdings, 35 P.3d 383 (Wash. Ct. App. 2001).
[32] Connell and Savage, *supra* note 6, at 410.
[33] Minors and other incompetents, who traditionally have lacked capacity under the law to bind themselves to all but the most essential agreements, are not able to contractually release liability claims. Restatement (Second) of Contracts secs. 12(1)-(2) (1981).
[34]If a misrepresentation … induces conduct that appears to be a manifestation of assent by one who neither knows nor has a reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent. Restatement (Second) of Contracts sec. 163 (1981).
[35] Kansas City Power & Light Co. v. United Tel. Co. of Kan., 458 F.2d 177, 179 (10th Cir. 1972).
[36] *Ferrell*, 195 Cal. Rptr. At 99.
[37] Whittington v. Sowela Technical Institute, 438 So.2d 236, 241 (La.App. 3 Cir.,1983).
[38] *Id.* at 245.
[39] *Id.* at 249.
[40] Connell and Savage, *supra* note 6, at 603.
[41] Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).

[42] Wolf v. Ford, 644 A.2d 522, 527 (Md. 1994).
[43] Lombard v. Louisiana, 373 U.S. 83 (1963).
[44] *Tunkl*, 383 P.2d at 446.
[45] Stephens v. Southern Pacific Co., 41 P. 783 (Cal. 1895).
[46] *Tunkl* 383 P.2d at 447.
[47] *Id*. at 449.
[48] *Id*. at 451.
[49] *Id*. at 453.
[50] *Wolf*, 644 A.2d at 532.
[51] Spencer v. Killington, Ltd., 702 A.2d 35 (Ver. 1997). The ski area was liable because 1) it operated a facility open to the general public, 2) it advertised and invited people onto its premises, 3) it had the expertise and opportunity to foresee and control hazards, and 4) it was in a better position to insure against risks. This despite the fact that, unlike the *Daltry* case below, this case involved competition skiers.
[52] 450 S.E.2d 649 (W. Va. 1994).
[53] *Id.* at 653.
[54] *Id.* at 658.
[55] *Id*. at 660.
[56] See, e.g. Wagenblast v. Odessa School District No. 105-157-166J, 758 P.2d 968 (Wash. 1988).
[57] *Id.* at 975.
[58] Connell and Savage, *supra* note 6, at 587.
[59] Okura v. United States Cycling Federation, 231 Cal. Rptr. 429, 431 (Cal. Ct. App. 1968).
[60] Dalury v. S-K-I, Limited , 670 A.2d 796 (Ver. 1991).
[61] Hiett v. Lake Barcroft Community Ass'n, Inc., 418 S.E. 2d 894 (Va. 1992).
[62] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS, sec. 68, at 482 (5th ed. 1984).
[63]C. FRIED, CONTRACT AS PROMISE (1981).