Nothing is quite as exhilarating as flying down the slopes, fresh powder underneath your skis and brilliant sunshine in a cloudless blue sky. As you stand in the long line for ski rentals with your six-year-old son, you cannot wait to introduce him to your favorite winter sport. By the time you get to the counter, you pay your money, sign a paper and grab your skies. You worry that your little guy may have some trouble with the lift, so you ask the attendant to stop it so the two of you can hop on safely. Although he agrees, the lift does not stop and you struggle to get your son up onto the lift. After a valiant effort, you lose the battle and fall with him to the snow below. He escapes with a couple of bruises. You dislocate a shoulder and fracture a hip. Suit is filed against the ski resort, alleging that your injuries are due to the negligence of the lift operator. But wait…remember that paper you signed? That card contained a release of liability and an exculpatory clause that promised that a skier would accept all of the risks inherent to skiing, including use of the ski lift, and would not sue the resort for any negligence on the part of the resort or its employees. That cannot be enforceable, can it? After all, who reads those things?

Liability waivers and exculpatory clauses are valuable tools for those who operate recreational and entertainment facilities such as ski resorts, gyms, skating rinks, paintball courses, and other venues in which sporting and recreational activities take place. The common law doctrine of assumption of the risk may bar some actions by plaintiffs who are injured due to an inherent risk of the recreational activity. However, whether a plaintiff knowingly assumed the risk of injury is typically a jury question and requires a defendant to take a case through trial to be vindicated. Express liability waivers and exculpatory clauses provide a better chance for a defendant to make an early exit from litigation though summary judgment. These waivers and clauses constitute an express assumption of the risk by a party who is engaging in an activity or sport with inherent dangers of personal injury. But because these waivers and clauses protect commercial enterprises from the consequences of their own negligence, they are generally disfavored in the law and are subject to the strictest scrutiny.

When handling any type of matter involving an express liability waiver or exculpatory clause, it is vital to understand how the jurisdiction treats these attempts to avoid liability. Are they even enforceable in the jurisdiction or are they void as against public policy? If not void, what characteristics must the provision possess to be enforceable? Does it make a difference if the claimant has paid a fee for use of the facility or participation in the event? Can parents effectively waive the rights of a minor child to bring a personal injury claim? The enforceability of liability waivers and exculpa-
tory clauses in recreational settings is rarely as simple as reading the contractual provision and requires an understanding of how those provisions will be treated in your jurisdiction.

**ARE THEY ENFORCEABLE?**

Two states, Louisiana and Montana, have enacted statutes adopting the extraordinary position that liability waivers and exculpatory clauses are unenforceable as a matter of law. These statutes render null and void any clause that excludes or limits the liability of a party for negligent conduct. Virginia has limited the enforceability of exculpatory clauses in cases involving personal injury, enforcing the clauses only in cases involving property damage.

A few other states generally permit liability waivers and exculpatory clauses, but limit their enforceability under certain circumstances. For example, New York has enacted a statute which renders null and void any exculpatory clause pertaining to proprietary amusement and recreational activities and venues. The statute renders “[a]greements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable.” As another example of a state that limits the enforceability of exculpatory clauses under certain circumstances, New Jersey courts have held that exculpatory clauses are unenforceable as to a decedent’s heirs, indicating that the clauses are never enforceable against anyone other than the individual who signed the waiver. These states constitute the small minority holding that exculpatory clauses are unenforceable as a matter of law.

**ENFORCEABILITY: THE MAJORITY VIEW**

Generally, exculpatory clauses will be enforceable in the vast majority of states where three conditions are met: (1) the clause must not contravene public policy; (2) the contract must be between persons relating entirely to their own private affairs; and (3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. Public policy plays an important role in determining the enforceability of liability waivers and courts have developed a list of factors to identify waivers and exculpatory clauses that violate public policy interests in protecting consumers who participate in recreational and sporting activities. For example, courts consider whether a certain business or activity is the subject of public regulation which mitigates against enforcing a liability waiver. Other considerations include whether the party seeking the waiver is performing a necessary service or a service which constitutes a public accommodation. If the business possesses either a “decisive bargaining strength” or the waiver is contained in standard contract of adhesion, the waiver will likely be unenforceable. As a practical matter, liability waivers and exculpatory clauses in recreational settings rarely provide the public the opportunity to “bargain” with respect to the clauses. However, courts have held that, when a consumer has the ability to choose to forego the activity without suffering damage, the contract does not present a contract of adhesion. For example, a plaintiff who was injured on a piece of exercise equipment while working out in a gym argued that the exculpatory clause in the membership agreement should not be enforced because it constituted a contract of adhesion. In rejecting that argument, the court recognized that the plaintiff could have freely chosen not to become a member of the gym and, therefore, the membership contract was not a contract of adhesion and the exculpatory clause was enforceable.

Those states that will enforce liability waivers and exculpatory clauses impose exacting requirements on the language and appearance of the waiver. Generally, courts require the clauses to state the intention of the parties with the greatest particularity, so that there can be no doubt regarding the intent of the parties. Because the clauses are disfavored in the law, the language is strictly construed and any ambiguity is interpreted against the party seeking protection of the waiver. Some courts require use of the word “negligence,” as well as language that expressly states that the waiver releases the owner for its own fault and/or wrongful acts. Most states do not permit exculpatory clauses to protect against gross negligence or reckless conduct. Regarding appearance of the waiver, courts are much more likely to enforce a clause that is prominently featured within the text, set off by a larger, different font in a conspicuous location in the document. Thus, although the majority of jurisdictions will enforce liability waivers, they are reviewed by the courts with a critical eye that will focus on any reason that the clause should not be enforced.

**ENFORCEABILITY AGAINST MINORS**

Most courts that have considered the question have held that a parent or guardian may not bind a minor child to a pre-injury release of a prospective tort claim arising from the minor’s participation in a recreational activity or use of a commercial recreational facility. Public policy protects the best interests of the child, and courts have therefore been reluctant to enforce any waiver by parents or guardians of personal injury claims. A small minority of states have held that a parent does have the ability to bind a minor child to a waiver of liability, especially in the context of public school extracurricular activities and school-sponsored events.

Given the disfavor with which courts view liability waivers and exculpatory clauses, enforceability will always prove to be a risky proposition for any recreational or sporting facility. Even in those jurisdictions that will enforce such a provision, the courts will subject the clause to microscopic evaluation. In order to maximize the potential for enforceability of the waiver, the clause should be drafted with every consideration given to including the characteristics that have been found to be enforceable in the jurisdiction. As discussed above, some state courts require very specific wording and the best chance of success can be created by incorporating the wording of a clause that has been found enforceable by the highest appellate court. It is clear that expansive, boilerplate language will simply not be enforced.