

AVOIDING EXPRESS ASSUMPTION OF THE RISK: COMMON CONTRACT DEFENSES AND ALTERNATE THEORIES OF LIABILITY IN CALIFORNIA

A skillfully drafted release and waiver of liability is the most effective defense to a claim of negligence in the sports and recreation context, but plaintiffs have options to defend against the enforcement of the contract that they signed. These defenses to the contract are variations on legal presumptions, favoring persons who are in an inferior bargaining position, which are intended to prevent unfairness, oppression, surprise, or generally unreasonable results in enforcing the contract. These defenses to the contract are discussed in Part I, below. Plaintiffs may also “plead around” the complete defense of express assumption of the risk by alleging causes of action other than negligence. These alternate causes of action are discussed in Part II.

I. Contract Defenses: Avoiding Enforcement of an Express Assumption of the Risk

A plaintiff may oppose the enforcement of an express assumption of the risk by claiming it is “unconscionable,” “adhesive,” or against public policy. These are common defenses in contract cases generally. A clear and unambiguous release and waiver agreement is a significant factor in overcoming these various contract defenses. If the release and waiver provision is clearly drafted it is difficult for the plaintiff who signed the agreement to retrospectively, in the context of the litigation, claim unfairness, oppression, surprise or unreasonable enforcement, or to identify a public interest in preventing enforcement.

A. Unconscionability: Unreasonably Unfavorable and Oppressive Provision

One defense to a contract is to claim it is “unconscionable.” This defense has been raised, so far unsuccessfully, in several California cases regarding sports and recreation liability waivers/releases.¹ This defense has had some success in other states.

California Civil Code section 1670.5 addresses unconscionable contracts or clauses.

Subsection (a) states that “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

Subsection (b) states that “When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.”

¹ Allan v. Snow Summit, Inc. (1996) 15 Cal.App.4th 1358; Kurashige v. Indian Dunes, Inc. (1988) 200 Cal.App.3d 606, 615; Hulsev v. Elsinore Parachute Center (1985) 168 Cal.App.3d 333.

An “unconscionable” contract or provision has a procedural element in that there is an absence of meaningful choice on the part of one of the parties, and a substantive element in that the terms unreasonably unfavorable to one of the parties.²

Procedural unconscionability requires “oppression” arising from unequal bargaining power and “surprise” arising from terms hidden in a “prolix printed form drafted by the party seeking to enforce the disputed term.”³ Accordingly, the clarity of the terms of the release/waiver are a significant factor in the unconscionability analysis. In *Hulsey v. Elsinore Parachute Center* the court found it unlikely that the plaintiff, “having initialed the [“Agreement and Release of Liability”] in three places and signed it in one could have harbored any reasonable expectations other than what was unambiguously recited in the title and text of the agreement.”⁴ In *Allan v. Snow Summit, Inc.*, the court noted that the release provided “clear, express notice of the risks.”⁵

Substantive unconscionability is the reallocation of the risks of the bargain in an objectively unreasonable or unexpected manner.⁶ Although sports and recreation waivers/releases are one-sided, courts have determined that the reallocation of the risk to the user is not unconscionable.⁷ In *Kurashige*, the court observed that “[t]here is no evidence plaintiff could not have ridden his motorcycle elsewhere without the constraints imposed upon him by defendants.”⁸

B. Contract of Adhesion: Standardized Form Contract

A “contract of adhesion” is a common type of “unconscionable” contract. An “adhesion contract” is “a standardized contract, which is imposed and drafted by the party of superior

² *A&M Produce v. FMC Corp.* (1992) 135 Cal.App.3d 473, 486.

³ *A&M Produce v. FMC Corp.* (1992) 135 Cal.App.3d 473, 486.

⁴ *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 345

⁵ *Allan v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358, 1377

⁶ *A&M Produce v. FMC Corp.*(1992) 135 Cal.App.3d 473, 487.

⁷ *Allan v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358, 1377; *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606.

⁸ *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 614. See also, *Szczotgka v. Snowridge, Inc.* (1994) 869 F.Supp. 247 (Vermont). See also, *Malecha v. St. Croix Valley Skydiving Club, Inc.* (1986) 392 N.W.2d 727 (parachute jumping is not suitable for public regulation). But c.f., *Rosen v. LTV Recreational Development, Inc.* (1978) 569 F.2d 1117 (Colorado) (court found that ski resort’s liability release was to be strictly construed due to public interest and was ineffective for failure to expressly exonerate ski resort for negligence).

bargaining strength, and relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”⁹ Most waiver and release agreements are per force adhesion contracts as they are standardized forms, prepared by the party with superior bargaining power.

A contract of adhesion is fully enforceable unless it (1) does not fall within the reasonable expectations of the weaker (“adhering”) party, and (2) is unduly oppressive or “unconscionable.”¹⁰

California case law has consistently held that ordinary liability releases are not adhesion contracts unless they implicate public policy.¹¹ In *Allan v. Snow Summit, Inc.*, the court noted that the plaintiff could not show that the contract did not meet his reasonable expectations since he had adequate notice of the terms of the exculpatory contract and subjectively demonstrated that notice.¹² The court also noted that sports and recreational activities are not “essential” activities such as would implicate the public interest.¹³ Again, a clearly drafted release/waiver agreement is a significant factor in avoiding a claim that the exculpatory provision is an unenforceable contract of adhesion.¹⁴

C. Public Policy: Protects Consumers of Essential Services

Another defense to sports and recreation liability waivers and releases is to argue that the contract is contrary to public policy as placing a consumer of essential services in an onerous bargaining position. There have been repeated attempts in California to void sports and recreation releases and waivers as contrary to public policy under California Civil Code section 1668. To date, none of these efforts have been successful.

California Civil Code section 1668 states that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law.

⁹ *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.

¹⁰ *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820.

¹¹ *Allabach v. Santa Clara County Fair Association, Inc.* (1996) 46 Cal.App.4th 1007, 1016; *Allan v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358, 1375-76; *McAtee v. Newhall Land & Farming Co.* (1985) 169 Cal.App.3d 1031, 1034.

¹² *Allan v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358

¹³ *Allan v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358, 1375-76.

¹⁴ See also, *Haines v. St. Charles Speedway, Inc.* (1989) 874 F.2d 572 (Missouri); *Wheellock v. Sport Kites* (1993) 839 F.Supp. 730 (Hawaii) (enforceable adhesion contracts in non-California jurisdictions).

The broad language of Civil Code section 1668 does not apply to every contract.¹⁵ It only applies to contracts that involve the “public interest.”¹⁶

Tunkl v. Regents of the University of California,¹⁷ outlines the characteristics of the type of “public interest” transaction in which a release/waiver agreement will be held invalid:

- (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.
- (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
- (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
- (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.¹⁸

To date there are no California cases that have voided a sports and recreation release or waiver on the ground that it is contrary to public policy.¹⁹

¹⁵ *Vilner v. Crocker National Bank* (1979) 89 Cal.App.3d 732, 735.

¹⁶ *Cregg v. Ministor Ventures* (1983) 148 Cal.App.3d 1107, 1111.

¹⁷ *Tunkl v. Regents of the University of California* (1963) 60 Cal.2d 92 (hospital-patient contract)

¹⁸ *Tunkl v. Regents of the University of California* (1963) 60 Cal.2d 92, 96, 98-101, fns. in *Tunkl* omitted See also, *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713 (auto garage disclaimer an invalid exculpatory provision).

¹⁹ *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333 (parachute jumping); *McAtee v. Newhall Land & Farming Corp.* (1985) 169 Cal.App.3d 1031 (motocross race); *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462 (bike race); *Coates v. Newhall Land & Farming Corp.* (1987) 191 Cal.App.3d 1 (dirt bike park); *Madison v. Superior Court (Sulejman Sulejmanagic)* (1988) 203 Cal.App.3d 589, 598 (scuba diving); *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606; *Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764; *Buchan v. United States Cycling Federation, Inc.* (1991) 227 Cal.App.3d 134 (international bike racing competition); *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715 (skiing); *YMCA of Metropolitan Los Angeles v. Superior Court (Mary Clark)* (1997) 55

“There is no public policy which opposes private, voluntary transactions in which one party, for consideration, shoulders a risk which the law would otherwise have placed upon the other party.”²⁰

D. Execution of Contract Presumes that Contract Read and Understood

“Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him.”²¹

E. Unsigned Contract is Not Valid

A release is not valid unless it is signed.²² Similarly, an agreement that is signed on behalf of another person is generally ineffective.²³

F. Minors May Disaffirm their Contracts

California Family Code section 6710 states that a contract of a minor made while under the age of 18 may be disaffirmed by the minor himself either before his majority or within a reasonable time thereafter. Disaffirmance may be made by any act or declaration and express notice to the other party is unnecessary. The filing of an action is sufficient.²⁴ However, in some states a minor may also ratify the agreement after reaching the age of majority.²⁵

II. Alternative Causes of Action: Gross Negligence/Strict Liability/Fraud

Express assumption of the risk is a complete defense to causes of action based on the

Cal.App.4th 22, 27.

²⁰ *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606.

²¹ *Randas v. YMCA of Metropolitan Los Angeles* (1992) 17 Cal.App.4th 158,163 (plaintiff did not speak English but gave no notice to defendant that could not read release); *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 339.

²² *Wattenbarger v. Cincinnati Reds* (1994) 28 Cal.App.4th 746.

²³ See, e.g., *Fedor v. Mauwehu Council, Boy Scouts of America* (1958) 21 Conn. Supp. 38, 143 A.2d 466; *Kotary v. Spencer Speedway, Inc.* (1975) 47 App.Div.2d 127, 365 N.Y.S.2d 87; *Cohen v. New York* (1947) 190 Misc. 901, 75 N.Y.S.2d 846; *Blanc v. Windham Mountain Club, Inc.* (1982, Supp.) 115 Misc.2d 404, 54 N.Y.S.2d 447; *Bernstein v. Seacliff Beach Club, Inc.* (1962) 228 N.Y.S.2d 567; but cf., *Guysinger v. K.C. Raceway* (1990) 54 Ohio App.3d 17.

²⁴ Family Code §6710; *Celli v. Sports Car Club of America* (1972) 29 Cal.App.3d 511, 517.

²⁵ See, e.g., *Jones v. Dressel* (1978) 40 Colo.App. 459.

theory of negligence. However, a plaintiff may be able to “plead around” the application of the defense of express assumption of the risk, given the correct fact pattern, by alleging fraud or even strict products liability.

A. Wrongful Death Actions/Gross Negligence

An exculpatory agreement is an express assumption of the risk and is a complete defense in negligence and wrongful death actions.²⁶ Be sure to include a term in the release/waiver that operates to bind the heirs/survivors of the releasors.²⁷

California does not recognize a cause of action for “gross negligence” independent of a statutory basis.²⁸

B. Strict Liability

Disclaimers of strict products liability and express assumptions of the risk of a product (as opposed to a service) by the consumer are void.²⁹ Including a provision disclaiming or assuming the risk of strict liability is an invitation to a court to find the release/waiver to be overreaching and thus unenforceable.

The policy supporting the law of strict products liability is to protect consumers from injuries caused by defective products.³⁰ In furtherance of this policy, strict products liability eliminates the requisites of negligence and contract law; the consumer need not prove negligence or contractual privity but only that the product is defective and caused his damages.³¹ Given that

²⁶ *Knight v. Jewett* (1992) 3 Cal.4th 296, 308 n. 4; *Allen v. Snow Summit, Inc.* (1996) 15 Cal.App.4th 1358, 1372; *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 597-602 (wrongful death action); *Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1, 9-10 (wrongful death action).

²⁷ See, e.g., *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 348; *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 594, 603; *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 616; *International and National Brotherhood of Street Racers, Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 940; *Allabach v. Santa Clara County Fair Association, Inc.* (1996) 46 Cal.App.4th 1007, 1014-15.

²⁸ *Continental Ins. Co. v. American Protection Industries* (1987) 197 Cal.App.3d 322, 328-30; *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 108, n. 5.

²⁹ *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1741-47 (plaintiff injured by defective ski boot binding rented from defendant ski shop).

³⁰ *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57.

³¹ *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1056; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57.

the contractual relationship between product seller and consumer is irrelevant, strict products liability doctrine voids manufacturer/seller contractual liability disclaimers.³²

However, express assumption of the risk is probably effective to bar a cause of action for strict liability for “ultrahazardous activities”. A recreational activity is not “ultrahazardous” where it can be performed safely, is not uncommon, and where the plaintiff is a participant in the activity and therefore not within the class of persons which the strict liability doctrine for ultrahazardous activities was designed to protect.³³ The reasoning of the Hulsey court could easily be extended to any high risk recreational activity/extreme sport so long as it can be performed safely (allows participants some control over their own fate) and is not uncommon. Participants in the “ultrahazardous” activity are not within the class of persons which this doctrine is intended to protect.³⁴

C. Fraud and Misrepresentation

Express assumption of the risk does not automatically bar a cause of action for fraud or misrepresentation in California.³⁵ The failure to disclose relevant facts affecting the essence of a release agreement or waiver may constitute “actual fraud” invalidating the contract.³⁶ Such statements may also constitute conflicting parol evidence that could void the language of the release.

Including a provision disclaiming or assuming the risk of fraud or misrepresentation is an invitation to a court to find the release/waiver to be overreaching and thus unenforceable. Exculpatory clauses have been found to be void and against public policy insofar as they assert a bar to liability for willful or wanton misconduct.³⁷

One court observed that a plaintiff should not be “relieved of the legal consequences of the things he signed because he did not realize what he was signing or that somehow he was

³² *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.

³³ *Hulsey v. Elsinor Parachute Center* (1985) 168 Cal.App.3d 333, 345-46 (parachute jumping not an “ultrahazardous” activity).

³⁴ *Luthringer v. Moore* (1948) 31 Cal.2d 489, 498.

³⁵ *Palmquist v. Mercer* (1954) 43 Cal.2d 92.

³⁶ *Palmquist v. Mercer* (1954) 43 Cal.2d 92, 100 (plaintiff was an inexperienced horseback rider who requested a gentle horse and was not given one).

³⁷ *Falkner v. Hinckley Parachute Center, Inc.* (1989) 178 Ill.App.3d 597.

distracted or misled from a fair realization of what was involved.”³⁸

Also, in an unusual case, a plaintiff was found by the court to have expressly assumed the risk of the recreational activity despite the defendant’s conflicting representations regarding the terms of the release. Defendant’s statement to plaintiff that the release was meaningless, simply an insurance prerequisite, was not held to be fraudulent given that plaintiff was an attorney who used releases in her legal practice, and that therefore her reliance on defendant’s statement was not justifiable.³⁹ Most plaintiffs are not attorneys, however, and verbal statements by employees that conflict with the terms of the release should be discouraged as they will create a question of fact for a jury to determine the existence of fraud, and vitiate the effect of the exculpatory agreement.

III. Conclusion

This is a general summary and overview of the current state of the law. Changes occur from time to time in this specialized practice area. Experienced counsel should be consulted with regard to the defense of a sports and recreation exculpatory agreement.

An appendix of release and waiver agreements published in California case law is attached hereto. Some of these agreements were found to be enforceable under the specific factual circumstances presented in the case, and some were not. PLEASE NOTE that different courts interpret contracts differently under different factual scenarios and that these agreements should serve as guideposts and references, and not as blueprints.

The required elements for contract formation, and other useful contractual provisions to be included in an exculpatory agreement, are the topic of a separate article. Drafting techniques to promote effective judicial interpretation of an exculpatory (waiver and release) agreement are covered in a separate article.

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³⁸ *Hulsey v. Elsinor Parachute Center* (1985) 168 Cal.App.3d 333, 339 (emphasis added).

³⁹ *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843-45.

About Howie & Smith, LLP

Howie & Smith, LLP is a full service AV-rated firm providing effective and efficient civil litigation and legal counseling services to clients in a broad range of businesses with an emphasis on sports and recreation commercial enterprises and products.

Our practice includes trial and appellate advocacy, client counseling, and transactional services. The firm and its lawyers hold active memberships with the American Bar Association Product Liability and Torts and Insurance Practice sections, Association of Defense Counsel, the Defense Research Institute, local bar associations, and the San Mateo Chamber of Commerce.

APPENDIX

Release and Waiver of Liability and Indemnity Agreement

In Consideration of being permitted to enter the YMCA for any purpose, including, but not limited to observation, use of facilities or equipment or participation in any way, the undersigned . . . hereby acknowledges, agrees and represents that he or she has or immediately upon entering will, inspect such premises and facilities. It is further warranted that such entry in the YMCA for observation, participation or use of any facilities or equipment constitutes an acknowledgment that such premises and all facilities and equipment thereon have been inspected and that the undersigned finds and accepts same as being safe and reasonably suited for the purposes of such observation or use.

I[n] Further Consideration of Being Permitted to Enter the YMCA for Any Purpose Including, but Not Limited to Observation, Use of Facilities or Equipment, or Participation in Any Way, the Undersigned Hereby Agrees to the Following:

The Undersigned Hereby Releases, Waives, Discharges and Covenants Not to Sue the YMCA . . . (hereinafter referred to as 'releasees') from all liability to the undersigned . . . for any loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise, while the undersigned is in, upon, or about the premises or any facilities or equipment therein.

The Undersigned Hereby Agrees to Indemnify and Save and Hold Harmless the releasees and each of them from any loss, liability, damage or cost they may incur due to the presence of the undersigned in, upon or about the YMCA premises or in any way observing or using any facilities or equipment of the YMCA whether caused by the negligence of the releasees or otherwise.

The Undersigned Hereby Assumes Full Responsibility for and Risk of Bodily Injury, Death or Property Damage due to the negligence of releasees or otherwise while in, about or upon the premises of the YMCA and/or while using the premises or any facilities or equipment hereon.

The Undersigned further expressly agrees that the foregoing Release, Waiver and Indemnity Agreement is intended to be as broad and inclusive as is permitted by the law of the State of California and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

The Undersigned Has Read and Voluntarily Signs the Release and Waiver of Liability and Indemnity Agreement, and further agrees that no oral representations, statements or inducement apart from the foregoing written agreement have been made.

I Have Read This Release

DATE:

Signature of Applicant

Randas v. YMCA of Metropolitan Los Angeles (1993) 17 Cal.App.4th 158, 162-63 (enforceable)
YMCA of Metropolitan Los Angeles v. Superior Court (Clark) (1997) 55 Cal.App.4th 22, 26 n.1
(Enforceable release)

Agreement and Release of Liability

I, _____, have voluntarily enrolled in a ski lesson offered by Snow Summit, Inc. I am aware that my participation in the ski lesson and the Sport of Skiing Involves Numerous Risks of Injury, including, but not limited to, falls, loss of control, collisions with other skiers and natural and man-made objects and I Freely Assume Those Risks.

As lawful consideration for being permitted to enroll in the ski lesson, I Agree to Release From Any Legal Liability and Agree Not to Sue Snow Summit, Inc., their owners, officers, directors, members, agents and employees, for any and all injuries caused by or resulting from any participation in the ski lesson or the sport of skiing whether or not such injury or death was caused by alleged negligence.

I Am Aware That This Contract Is Legally Binding and That I Am Releasing Legal Rights by Signing It.

.. /s/

Allan v. Snow Summit, Inc. (1996) 51 Cal.App.4th 1358, 1362-63 (valid/enforceable release)

NAUI WAIVER, RELEASE AND INDEMNITY AGREEMENT

For and in consideration of permitting (1) Ken Salejmanajie to enroll and participate in diving activities and class instruction of skin and/or scuba given by (2) Norman Madison/Westchester YMCA, in the City of Los Angeles, County of Los Angeles, and State of California, beginning on the 29 day of July, 1986, the Undersigned hereby voluntarily releases, discharges, waives and relinquishes any and all actions or causes of action for personal injury, property damage or wrongful death occurring to him/herself arising as a result of engaging or receiving instructions in said activity or any activities incidental thereto wherever or however the same may occur and for whatever period said activities or instructions may continue, and the Undersigned does for him/herself, his/her heirs, executors, administrators and assigns hereby release, waive, discharge and relinquish any action or causes of action, aforesaid, which may hereafter arise for him/herself and for his/her estate, and agrees that under no circumstances will he/she or his/her heirs, executors, administrators and assigns prosecute, present any claim for personal injury, property damage or wrongful death against (2) Norman Madison/Westchester YMCA or any of its officers, agents, servants or employees for any of said causes of action, whether the same arise by the negligence of any of said persons, or otherwise. IT IS THE INTENTION OF (1) BY THIS INSTRUMENT, TO EXEMPT AND RELIEVE (2) Norman Madison/Westchester YMCA FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH CAUSED BY NEGLIGENCE.

The Undersigned, for him/herself, his/her heirs, executors, administrators or assigns agrees that in the event any claim for personal injury, property damage or wrongful death shall be prosecuted against (2) Norman Madison/Westchester YMCA he/she shall indemnify and save harmless the same (2) Norman Madison/Westchester YMCA from any and all claims or causes of action by whomever or wherever made or presented for personal injuries, property damage or wrongful death.

The Undersigned acknowledges that he/she has read the foregoing two paragraphs, has been fully and completely advised of the potential dangers incidental to engaging in the activity and instructing of skin and/or scuba diving, and is fully aware of the legal consequences of signing the within instrument.

WITNESS:

Signature of Student

DATED: 7-29-86

Signature of Parent or Guardian - where applicable

-- THIS FORM IS TO BE RETURNED BY SECOND COURSE MEETING --

VOLUNTARY RELEASE - ASSUMPTION OF RISK AND INDEMNITY AGREEMENT

Track Name Date 1-15-84

Each undersigned person requests and is granted permission (1) to enter the **RESTRICTED AREA**, (2) to participate as driver, crew or assistant in racing events, (3) to compete for money, prizes, recognition or reward, (4) to be covered by participants' hospitalization insurance, if applicable, as limited by the master insurance policy (all collectively herein called "permissive entry").

In consideration of "permissive entry" to the restricted area, which is the area from which admission to the general public is restricted, which includes but is not limited to the pit area, racing surface, infield, adjacent walkways, concessions, and other appurtenances, I (each of the undersigned) for myself, my personal representatives, heirs, next of kin, spouse and assigns, **DO HEREBY:**

1. RELEASE, DISCHARGE AND COVENANT NOT TO SUE the track operators, track owners, land owners, racing association, and each of them, their officers, agents and employees (all hereinafter collectively referred to as "releases from any and all claims and liability arising out of strict liability or ordinary negligence of releases or any other participant which causes the undersigned injury, death, damages or property damage. I hereby covenant to hold releases harmless and indemnify releases for any claim judgment or expense releases may incur arising out of my activities [***10] or presence in the restricted area.

2. UNDERSTAND that my entry into the restricted area and/or participation in racing events contains **DANGER AND RISK OF INJURY OR DEATH**, that conditions of the racing surface change from time to time and may become more hazardous, and that there is **INHERENT DANGER** in racing which I appreciate and voluntarily assume, because I choose so to do. I have observed many races of the type that I seek to participate in, I have inspected the racing surface, access roads, shoulders, equipment, barriers or lack thereof, lighting or lack thereof, and the weather conditions, I further know that other contestants and participants pose a danger to me, nevertheless, I **VOLUNTARILY ELECT TO ACCEPT ALL RISKS** connected with my entry into the restricted area and/or participation in any racing events.

3. ACKNOWLEDGE that I am aware of all track and equipment safety regulations and I have complied with each regulation. If I have failed so to do, I **ASSUME ALL RISK** for myself and assume all liability to others for such failure, and I hereby **RELEASE** releases for any failure in inspecting my vehicle or others. I am not an agent, servant or employee of releases and [***11] no oral representations or inducements have been made to me to sign this agreement. If any portion of this agreement is held invalid, it is agreed that the balance thereof shall continue in full legal force and effect.

4. AGREE that this agreement shall apply to any incident, injury, accident or death

occurring at the captioned track on the above date, and to any incident, injury, accident or death occurring within a period of one (1) year after the execution of this agreement.

I HAVE READ THIS DOCUMENT. I UNDERSTAND IT IS A RELEASE OF ALL CLAIMS.

I UNDERSTAND I ASSUME ALL RISK INHERENT IN RACING.

I VOLUNTARILY SIGN MY NAME EVIDENCING MY ACCEPTANCE OF THE ABOVE PROVISIONS.

AGREEMENT & RELEASE OF LIABILITY

I, _____, HEREBY ACKNOWLEDGE that I have voluntarily applied to participate in parachuting instruction and training, culminating in a parachute jump at the premises of Elsinore Parachute Center.

I AM AWARE THAT PARACHUTE INSTRUCTION AND JUMPING ARE HAZARDOUS ACTIVITIES, AND I AM VOLUNTARILY PARTICIPATING IN THESE ACTIVITIES WITH KNOWLEDGE OF TH DANGER INVOLVED AND HEREBY AGREE TO ACCEPT ANY AND ALL RISKS OF INJURY OR DEATH. PLEASE INITIAL. _____

AS LAWFUL CONSIDERATION for being permitted by Elsinore Parachute Center or one of its affiliated organizations to participate in these activities and use their facilities, I hereby agree that I, my heirs, distributees, guardians, legal representatives and assigns will not make a claim against, sue, attach the property of, or prosecute Elsinore Parachute Center, Parachutes, Inc., and or one of its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. For injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of Elsinore Parachute Center or its affiliates, as a result of my participation in parachuting activities. In addition, I hereby release and discharge Elsinore Parachute Center, Parachutes, Inc., Skydive, Skydive II, and its affiliated organization, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc., and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. from all actions, claims or demands, I, my heirs, distributees, guardians, legal representatives, or assigns now have or may hereafter have for injury or damage resulting from my participation in parachuting activities.

I HAVE CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY AND A CONTRACT BETWEEN MYSELF AND ELSINORE PARACHUTE CENTER AND/OR ITS AFFILIATED ORGANIZATIONS AND SIGN IT ON MY OWN FREE WILL.

DATED:

WITNESS _____

SIGNATURE _____

DATE _____

Hulsey v. Elsinore Parachute Center (1985) 168 Cal.App.3d 333, 348 (enforceable release)

PLEASE READ & SIGN THIS AGREEMENT **IT RELEASES US FROM LIABILITY**

The undersigned accepts for use **as is** the equipment listed on this form and accepts full responsibility for the care of this equipment while it is in his or her possession, and agrees to reimburse the Klein's Ski Shop for any loss or damage other than reasonable wear resulting from use.

It is understood the bindings furnished herewith are bindings designed to reduce the risk or degree of injuries from falling, and that despite the fact that adjustments are according to manufacturers recommendations, it is understood that the bindings will not release under ALL circumstances and are no guarantee for the user's safety.

It is understood how the bindings works. Do not change any binding adjustments, come back to the rental shop for free assistance. The undersigned acknowledges that there is an inherent risk of injury in the sport of skiing, and use of any ski equipment, and expressly assumes the risks for any damages to any persons or property resulting from the use of this equipment.

It is furthermore expressly agreed that the undersigned shall hold the Klein's Ski Shop and/or its employees, the Sugar Bowl Corporation and/or its employees harmless and release them from any and all responsibility or liability for damages and injury to the equipment user or to any person or property whether resulting from the negligence (active or passive/past, present or future) or whether resulting from the selection, inspection or adjustment of this equipment (active or passive/past, present or future) by the Klein's Ski Shop and/or its employees or whether resulting from the use of this equipment by the user.

Signature of person responsible for equipment

Westlye v. Look Sports, Inc. (1993) 17 Cal.App.4th 1715, 1755 (enforceable release)

Release and Waiver of Liability. Assumption of Risk and Indemnity Agreement.

In consideration of being permitted to compete, officiate, observe, work for, or participate in any way in the Event(s) or being permitted to enter for any purpose any Restricted Area (defined as any area requiring special authorization, credentials, or permission to enter or any area to which admission by the general public is restricted or prohibited), Each of the Undersigned, for himself, his personal representative, heirs, and next of kin:

2. Hereby Releases, Waives, Discharges and Covenants Not to Sue [promoters, participants, etc. (releasees)] . . . for Any and All Loss or Damage, and Any Claim or Demands Therefor on Account of Injury . . . Arising out of or Related to the Event(s), Whether Caused by the Negligence of the Releasees or Otherwise.

3. Hereby Agrees to Indemnify and Save and Hold Harmless the Releasees and each of them From Any Loss, Liability, Damage, or Cost they may incur arising out of or related to the Event(s) Whether Caused by the Negligence of the Releasees or Otherwise.

4. Hereby Assumes Full Responsibility for Any Risk of Bodily Injury, Death or Property Damage arising out of or related to the Event(s) whether caused by the Negligence of Releasees or otherwise.

5. Hereby acknowledges that the Activities of the Event(s) are Very Dangerous and involve the risk of serious injury and/or death and/or property damage. Each of the Undersigned also expressly acknowledges that Injuries Received May Be Compounded or Increased by Negligent Rescue Operations or Procedures of the Releasees.

6. Hereby agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of negligence by the Releasees, Including Negligent Rescue Operations and is intended to be as broad and inclusive as is permitted by the laws of the Province or State in which the Event(s) is/are conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

I Have Read This Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement, Fully Understand Its Terms, Understand That I Have Given Up Substantial Rights by Signing It, and Have Signed It Freely and Voluntarily Without Any Inducement, Assurance, or Guarantee Being Made to Me and Intend My Signature to Be a Complete and Unconditional Release of All Liability to the Greatest Extent Allowed by Law.

Allabach v. Santa Clara County Fair Association, Inc. (1996) 46 Cal.App.4th 1007, 1014-15 (enforceable release)

Southern California Cycling Federation Standard Athlete's Entry Blank and Release Form

In consideration of the acceptance of my application for entry in the above event, I hereby waive, release and discharge any and all claims for damages for death, personal injury or property damage which I may have, or which may hereafter accrue to me, as a result of my participation in said event. This release is intended to discharge in advance the promoters, the sponsors, the U.S.C.F., the S.C.C.F., the promoting clubs, the officials, and any involved municipalities or other public entities (and their respective agents and employees), from and against any and all liability arising out of or connected in any way with my participation in said event, even though that liability may arise out of negligence or carelessness on the part of the persons or entities mentioned above.

I further understand that serious accidents occasionally occur during bicycle racing; and that participants in bicycle racing occasionally sustain mortal or serious personal injuries; and/or property damage, as a consequence thereof. Knowing the risks of bicycle racing, nevertheless, I hereby agree to assume those risks and to release and hold harmless all of the persons or entities mentioned above who (through negligence or carelessness) might otherwise be liable to me (or my heirs or assigns) for damages.

It is further understood and agreed that this waiver, release and assumption of risk is to be binding on my heirs and assigns.

I agree to accept and abide by the rules and regulations of the United States Cycling Federation.

Bennett v. United States Cycling Federation (1987) 193 Cal.App.3d 1485, 1487 (not enforceable)

Okura v. United States Cycling Federation (1986) 186 Cal.App.3d 1462 (enforceable)

"Pit Pass

"Deposit at gate; not good if detached
Release of Liability and Agreement"

Holder "releases, re mises and forever discharges San Francisco Region, Sports Car Club of America, its officers, governors, members, agents and employees and all participants in the above mentioned event, and any individual, group or association or corporation, if any, sponsoring the event or owning property on which the event is held, and each of them, and the heirs assigns, administrators and executors of each of them of and from any and every claim, demand, action or right of action whatsoever kind or nature, in law or in equity, arising from or by reason of any injury to or death of any person, or any damage to or destruction of property resulting or alleged to result from or arise out of any accident or other occurrence during or in connection with the foregoing event and/or any practice session in connection therewith, and/or any use of the course and/or facilities provided for such event."

Celli v. Sports Car Club of America, Inc. (1972) 29 Cal.App.3d 511, 525 (release not enforced)

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, for myself, my heirs, executors, administrators, successors and assigns [*sic*] agree to save harmless and keep indemnified SNORE, Ltd., it's [*sic*] 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 [*sic*] 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. (1983) 147 Cal.App.3d 309, 312 (not enforceable)

THIS IS A RELEASE OF LIABILITY/REQUEST AND RELEASE OF LIABILITY

Each of the undersigned hereby request permission to enter upon the premises We each have inspected the track premises, know the risks and dangers inherent in entering the premises and participating in, observing the qualifying, and practicing for motor racing events held on race premises, realize that conditions may become more hazardous while each of us are on the premises, that unanticipated and unexpected dangers may arise during said events. We each enter the premises voluntarily and assume every risk for loss, damage or injury

[Each] of the undersigned, for himself, his heirs, next of kin, personal representatives and assigns hereby Releases, Remises and Forever Discharges and Agrees to Save and Hold Harmless and Indemnify Nascar and . . . the Promoters . . . From all Liability Claims, Demands, Causes of Action and Possible Causes of Action Whatsoever, Arising Out of or Related to Any Loss . . . That May Be Sustained by Our Respective . . . Negligence"

Pit Pass (kept by plaintiff)

". . . hereby release Speedway operator, promoter, NASCAR and any other person or persons connected with this race from all liability for personal injury or property damage while preparing, practicing or participating in this race meet. I am not an employee but a contestant and independent contractor competing for prize money under NASCAR rules, regulations, and specifications. I am a duly licensed member of NASCAR, subject to rules and regulations of NASCAR. This permit issued subject to the terms and conditions of 'release' executed by NASCAR members to whom this permit is issued"

Link v. National Association for Stock Car Auto Racing, Inc. (1984) 158 Cal.App.3d 138, 144 (not found to be enforceable)

Release and Assumption of Risk Agreement

"I am aware that certain risks and dangers may occur on any river trip with Whitewater These risks include, but are not limited to, hazards of and injury to person and property while traveling in rafts on the river, accident or illness in remote places without medical facilities, the forces of nature

". . . I hereby assume all of the above risks and, except in the case of gross negligence, will hold Whitewater . . . harmless from any and all liability, actions, causes of action, debts, claims, and demands of every kind and nature whatsoever which I now have or which may arise out of or in connection with my trip or participation in any activities with Whitewater"

[The agreement further stated it operated as a release and assumption of risk for his heirs.]

Saenz v. Whitewater Voyages, Inc. (1990) 226 Cal.App.3d 758, 763 n.7 (enforceable)