Edited by The Veen Firm, San Francisco

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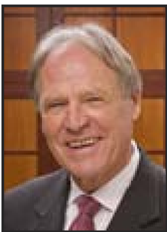
New Year's Resolution: Defeat a liability release

Can you still have a case if your client has signed a liability release?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> *It has been said that "drafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness," and that "only on Draftsman's Olympus is it feasible to combine the elegance of a trust indenture with the brevity of a stop sign." While it is true, as we have seen, that California courts hold releases of liability to a high standard of clarity, it does not in our view require Olympian efforts to meet the standard. An effective release is hard to draft only if the party for whom it is prepared desires to hide the ball, which is what the law is designed to prevent. . . . . A release that forthrightly makes clear to a person untrained in the law that the releasor gives up any claim against the releasee for the latter's own negligence or that the releasee cannot be held liable for any and all risks the releasor encounters while on the former's premises or using its facilities, ordinarily passes muster. Because the Release before us conveys neither of those ideas, we conclude that it does not exculpate respondent from its own negligence or that of an employee or agent.*

(*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1490-91 (citations omitted).)

With winter upon us and snow falling in the Sierras, we can expect yet again to field a call or two from potential clients injured on the slopes of a ski resort, on a horseback ride or while engaged in some other recreational activity. The critical first question in evaluating such cases is whether the individual signed a document purporting to release potential defendants from liability. If enforceable, the release will bar ordinary negligence claims against the released parties. However, as exemplified by the above quote in *Cohen v. Five Brooks Stable*, the drafters of purported releases often forget the "KISS" rule of drafting – keep it simple, stupid – and sloppily draft themselves out of the very protection they seek. Before taking a pass on the smashed skier or battered boarder, it is imperative to analyze the purported release closely before assuming it will be enforceable.

Prerequisites to enforceability

Signing a release from liability before undertaking an activity is also known as express assumption of risk. "Express assumption of risk is an agreement made in advance of an activity by which a party takes upon himself or herself the chance of a 'known risk' arising from what the other party does or leaves undone." (*Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1304.) California courts strictly construe such agreements, and will enforce them only where three preliminary factors are met:

- the release agreement must be clear and unambiguous;
- the injury-producing act must be reasonably related

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to the object or purpose for which plaintiff signed the release; and
• the release cannot contravene public policy.
(*Sweat v. Big Time Auto Racing, Inc, supra,* 117 Cal.App.4th at 1304-05.) Other defenses, discussed below, also apply.

First prerequisite: Is the purported release clear and unambiguous?

To be enforceable, the release must be clear and unambiguous. "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360 (internal citation omitted); *Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1356-57.)

CHECKLIST: DEFEATING PURPORTED LIABILITY RELEASES

There are many ways of defeating so-called releases from liability. Use this checklist to identify areas in your client's purported release that may be vulnerable to attack.

❑ **Release agreement must be clear and unambiguous.** (*Sweat v. Big Time Auto Racing, Inc,* 117 Cal.App.4th 1301, 1304-05.)

❍ **Ambiguities construed against the drafter**. (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 517.)

❍ **Examine extrinsic evidence**. Ambiguities can be latent – i.e., created by extrinsic "circumstances under which a release is executed." (*Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1356-57.)

❍ **Purportedly released parties not named**. (*Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1284-85 (released other members but not health club); *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1217-1218 (released organizers and sponsors of bicycle ride but not co-participants); *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1727-1730 (released ski shop and resort but not equipment distributors).)

❍ **Ambiguous as to negligence.** Release from liability "resulting from any accident or other occurrence" but not mentioning "negligence" failed. (*Celli*, 29 Cal.App.3d at 518-519.) Release for all risks inherent in horseback riding but ambiguous as to negligence of commercial trail ride operator unenforceable as to negligence claims against operator. (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476.)

❍ **Ambiguous as to activity.** Release of "skiing" did not apply to snowboarding. (*Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590.)

❍ **Multiple releases**. Two or more releases may be unenforceable if they contain conflicting language. (*Powers v. Superior Court* (1987) 196 Cal.App.3d 318, 321-322.)

❍ **Small print**. A release may not be effective if buried in the middle of a lengthy document and printed in small type. (*Leon v. Family Fitness Ctr. (No. 107), Inc., supra,* at p.1232-1233.)

❑ **Injury-producing act must be reasonably related to the object or purpose for which plaintiff signed the release.** (*Sweat*, 117 Cal.App.4th at 1304-05.)

❍ **Release for activity but not premises liability.** (*compare Benedek*, 104 Cal.App.4th at 1361 (activity and premises released) *with Sweat*, 117 Cal.App.4th at 1306-1308, and *Leon v. Family Fitness Center (No. 107), Inc.* (1998) 61 Cal.App.4th 1227, 1234-1235 (released activity but not premises liability).)

❍ **Release only encompasses reasonably foreseeable risks.** (*Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, 1491–1492 (cyclist's release of "all risks" created a triable issue of fact for collision with an automobile on a closed race course).)

❑ **Public policy limitations.**

❍ **Gross negligence, recklessness, fraud, intentional torts may not be released.** (Cal. Civil Code § 1668; *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747.)

❍ **Agreement implicating the "public interest" unenforceable.** The transaction must concern a business type generally thought suitable for public regulation; involving a service of great importance to the public; and the exculpatory agreement basically must have been a contract of adhesion. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92.)

❍ **Child care providers**. Release purporting to exculpate a child care provider from negligence is void as against public policy as affecting the "public interest." (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 671-676.)

❍ **Violation of statute or regulation**. Contracts purporting to exempt parties from liability for willful or negligent violations of statutory or regulatory law are void as against public policy. (*Capri v. L.A. Fitness Int'l, LLC* (2006) 136 Cal.App.4th 1078, 1084.)

❍ **Product liability claims**. A release from liability for a defective product is unenforceable. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1747.)

❑ **Don't forget ordinary contract defenses (fraud, lack of consideration, duress, unconscionability).**

❍ **Fraud**. (Cal Civ. Code §§ 1567, 1572.)

❍ **Unconscionability**. (Cal Civ. Code § 1670.5.)

❍ **Duress**. Includes economic duress, if the act would have caused "a reasonably prudent person, faced with no reasonable alternative, to sign an unfavorable contract." (*Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 276-277.)

❍ **Minor's release**. A release signed by a minor may be disaffirmed before reaching age of majority or within a reasonable time thereafter, but will be fully enforceable and not subject to disaffirmance where signed by a parent on the minor's behalf. (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1120.)

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Ambiguities will be construed against the drafter. (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 517.)

The following are a few examples where releases were unenforceable based on one or more ambiguities:

•Purportedly released parties not mentioned

Often the release fails to specify within the scope of the release the parties it was meant to protect. The release in *Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1284-85, is one example. It provided:

> . . . As such you understand and voluntarily accept this risk and agree that LA Workout will not be liable for injury, including without limitation, personal, bodily or mental injury, economic loss or damage to you, your spouses [sic], guests, unborn child, or relatives resulting from the negligence or other acts of anyone else using LA Workout.

(*Ibid.*)

The trial court granted summary judgment against plaintiff for claims against LA Workout arising from an injury caused by the plaintiff's foot sticking to a "sticky substance" on a treadmill. In reversing, the *Zipusch* court held:

> The assumption of risk provision of LA Workout's membership agreement contemplates two types of potential injuries: injuries to a member caused by others, and injuries to others caused by a member. . . . . For example, the health club would be exculpated if a member, either negligently or non-negligently, dropped a heavy weight on himself or another member. However, the risk section does not contemplate exculpating the health club from its own negligence.

(*Id.* at 1287.)

In other words, LA Workout's lawyers drafted a release agreement that benefited members of the club by releasing members from liability for their negligence, but failed to release the health club itself. Other cases where the purportedly released parties were not named in the release include *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1217- 1218 (release exculpated organizers and sponsors of bicycle ride but not co-participants), and *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1727-1730 (release exonerated ski shop and resort but not equipment distributors).

•Ambiguous as to whether "active" negligence released

Courts have also held releases unenforceable when they are ambiguous as to whether negligent acts are released. In *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 518519, a general release of liability for injuries "resulting from any accident or other occurrence" but not expressly releasing liability for "negligence" failed to exonerate the defendant from "active" negligence.

More recently, in *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, an inexperienced horseback rider signed up with a commercial trial ride operator to ride the Olema trails in west Marin County. During the ride, when the group was returning to the stable, the trail guide caused his horse to gallop ahead of Cohen's, which caused Cohen's horse to gallop in response. Cohen fell off the horse, and her foot remained in the stirrup; she was dragged along the ground and injured.

Before riding, Cohen had signed an agreement describing in painstaking detail that she was assuming responsibility for all risks "inherent" in horseback riding. The *Cohen* court described the purported release as follows:

> The exculpating provision of the Release that the trial court found 'clear, unambiguous, and explicit' is the language declaring that '[a]ll horses, even those that are well trained and appear calm and docile, may and will: [among other things] run and bolt uncontrollably . . . . without warning and without apparent cause'; and that this 'may be in response to external stimuli . . . which may induce feelings of fear, panic or anger, leading to some degree of reflex action on the part of the horse.' We fully agree, and indeed it is indisputable, that the risks to which the Release applies are those inherent in horseback riding. As the Release states, '[c]ertain risks cannot be eliminated [from horseback riding] without destroying the unique character of this activity. The same elements that contribute to the unique character of this activity can be causes of loss or damage to your equipment, or accidental injury, illness, or in extreme cases, permanent trauma or death. We do not want to frighten you or reduce your enthusiasm for this activity, but we do think that it is important for you to know, in advance, what to expect, and to be informed of the *inherent risks*. The following describes some, but not all, of *these risks*.' The description in the Release of 'some, but not all,' of the inherent risks, includes the risk that '[a]ll horses, even those that are well trained and appear calm and docile, may and will: buck, rear, kick, bite, run and bolt uncontrollably,' and this risk 'may occur without warning and without apparent cause . . . . in response to external stimuli (such as . . . movement of people [and] other horses . . .) . . . .' By signing the Release, appellant expressly agreed '*to assume responsibility for the risks identified herein and those risks not specifically identified*.'

(*Ibid*. (italics in original).)

The court held that the release was unenforceable. Even though the release encompassed risks that horses may ". . . . run and bolt uncontrollably," and this risk "may occur . . . . in response to . . . movement of . . . other horses," the release was ambiguous as to whether it was delimited to risks inherent in horseback riding, as described, or whether it also included the alleged negligence of the trail-ride operator. Resolving the ambiguity against the drafter, the Court held the release was unenforceable as against claims for negligence against Five Brooks or its employees.

Out of curiosity, I performed an informal desktop search engine investigation into Five Brooks' current practices following this unfavorable appellate ruling. I found that Five Brooks has a new

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and improved release accessible on its Web site (http://www.fivebrooks.com/pages/fb2release.html). The release looks much different from what was described by the Court of Appeal. Notably, the word "negligence" is now repeated within the release no less than four times.

However, Five Brooks still seems to have failed to learn the KISS lesson from its experience, and the new-and-improved agreement appears convoluted, potentially confusing, and seems to contain a few potential problems (including that it purports to release "strict products liability" and gross negligence). Five Brooks' new release is still not exactly clear.

•Other ambiguities

Ambiguities also may be found in other ways. For example, multiple releases can create unenforceable ambiguities if they contain conflicting language. (*Powers v. Superior Court* (1987) 196 Cal.App.3d 318, 321-322.) Further, a release may be unenforceable if buried in the middle of a lengthy document in small type. (*Leon v. Family Fitness Ctr. (No. 107), Inc., supra,* at pp. 1232-1233.) A release of liability for injuries sustained while "skiing" did not apply to snowboarding as a matter of law. The release was ambiguous on this issue. (*Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590.)

Examine the language of the release carefully, and the circumstances surrounding the signing of the release, to determine if any ambiguity exists.

Second prerequisite: Injury-producing act must be reasonably related to the object or purpose for which plaintiff signed the release

The second prerequisite to enforceability is that the injurious act must be reasonably related to the purpose for which plaintiff signed the release. (*Sweat, supra,* 117 Cal.App.4th at 1304-05.)

A few cases have examined whether the "object or purpose" of a release related to a particular activity also extends to claims for premises liability. A health club release for personal injury "whether using exercising equipment or not" was held to bar plaintiff's claims for injury sustained while adjusting a television set in the gym. The "reasonably related to the purpose" requirement was met by examining the purpose of the release that was signed – to release liability not just for using equipment but for entering defendant's premises for any purpose. (*Benedek v. PLC Santa Monica, LLC, supra*, 104 Cal.App.4th at 1361.)

In contrast, a release signed by an auto racetrack guest in order to sit in the pit area did not apply to bar injuries caused by alleged construction defects that caused the bleachers to collapse. (*Sweat v. Big Time Auto Racing*, 117 Cal.App.4th at 1306-1308.) The *Sweat* court distinguished *Benedek* in that, unlike *Benedek*, the *Sweat* release did not release the owner "whether or not" a race activity was occurring. Thus, the court held that the "object or purpose" of the release was not to release the owner from liability for injury resulting from premises liability, but rather to release liability for injury resulting from the activity of auto racing. (*Id.*; *see also Leon v. Family Fitness Center (No. 107), Inc.* (1998) 61 Cal.App.4th 1227, 1234-1235 (health club release appearing to have purpose of releasing liability for exercise-related injury held not to apply to injury from collapse of bench in sauna).)

Third prerequisite: The release cannot contravene public policy

There are a number of public policy based limitations on liability releases. Examples include:

•Gross negligence or recklessness may not be released

"All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the public policy of the law." (Civ. Code, § 1668.) The California Supreme Court, interpreting section 1668, held that an agreement to release liability for future gross negligence is unenforceable as a matter of public policy. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747.)

•Agreements implicating the "public interest" are unenforceable

Enforcement will also be denied if the agreement implicates the "public interest." (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92.) To affect the "public interest," the transaction must concern a business of a type generally thought suitable for public regulation; involving a service of great importance to the public; and the exculpatory agreement basically must have been a contract of adhesion. (*Ibid*.) Activities affecting the "public interest" generally involve essential services of "practical necessity" to the general public; for example, hospitals, escrow and banking transactions, and common carrier transportation. (*Buchan v. United States Cycling Federation, Inc.* (1991) 227 Cal.App.3d 134, 149-154.) Childcare services also involve the "public interest." Childcare is subject to comprehensive regulation and is a matter of practical necessity for many families. Thus, a release purporting to exculpate a childcare provider from negligence is void as against public policy as affecting the "public interest." (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 671-676.)

•Intentional or negligent violation of statute or regulation

Contracts which would have the effect of exempting parties from liability for willful or negligent violations of statutory or regulatory law are void as against public policy. In *Capri v. L.A. Fitness Int'l, LLC* (2006) 136 Cal.App.4th 1078, 1084, an otherwise valid release was not effective to bar a member's negligence *per se* claim predicated upon the club's violation of health and safety code sections requiring safe and clean swimming pools.

• Product liability claims may not be released

A release from liability for a defective

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product is unenforceable, whether the release is cast in terms of a disclaimer or express assumption of the risk. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1747.)

Other defenses and standard contract defenses to enforceability

In analyzing the release, don't forget to look at typical contract defenses.

•The release only encompasses foreseeable risks

The foreseeability test can be broad under a broad release; where the negligent act was "reasonably related to the object or purpose" of the release, "as a matter of law, it is reasonably foreseeable whether or not it was actually in the contemplation of either party." (*Madison v. Superior Court*, 203 Cal.App.3d at 601; *Paralift, Inc. v. Superior Court*, 23 Cal.App.4th at 756-757; *Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, 1491-1492 (bicycle racer's release of "all risks" created a triable issue of fact on foreseeability where plaintiff collided with an automobile on a closed race course).)

•Unconscionability

Like any contract, a release is unenforceable if "unconscionable" at the time it was executed. (Civ. Code, § 1670.5.) A release may be "unconscionable" if it is one-sided or reallocates risks in an objectively unreasonable or unexpected manner. In sports activities, it is usually held not unreasonable to allocate the risk entirely to the participant. (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1376-1377.)

•Fraud

A release may be unenforceable if induced by fraud. (Civ. Code, § 1567.) Investigate and develop facts that may support fraud in executing the release. Plaintiff generally must prove a factual misrepresentation or concealment made with the intent of inducing plaintiff to sign the release, with plaintiff justifiably relying on the misrepresentation. (Civ. Code, § 1572.)

•Duress

Duress exists when the plaintiff signed because he or she was deprived of the exercise of free will. Duress can also be economic, if the act would have caused "a reasonably prudent person, faced with no reasonable alternative, to sign an unfavorable contract." (*Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 276-277.)

•Minor's release

A release signed may be disaffirmed by the minor before minor reaches age of majority or within a reasonable time thereafter. But it will be fully enforceable against a minor when signed by a parent on the minor's behalf, and not subject to disaffirmance (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1120 (high school cheerleader).)

Conclusion

Don't take a release at face value. There are many issues that potentially negate the enforceability of your potential client's purported release. Analyze them all carefully, creatively, and methodically.

William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely-injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.

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