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## **CAN SCHOOLS LIMIT LIABILITY** **THROUGH EXCULPATORY CLAUSES?**

### **WHAT IS THE LAW?**

#### **Validly Waiving Claims**

Maryland and the District of Columbia hold that exculpatory clauses are valid and enforceable when the agreement clearly and expressly states the intent to release the entity from liability caused by negligent acts.<sup>1</sup> Both jurisdictions, however, have three public policy exceptions to the validity of exculpatory clauses:

1. torts arising from intentional or reckless conduct or gross negligence;
2. grossly unequal bargaining power; and
3. transactions affecting the public interest.

#### **Public Policy Exception**

What is a transaction affecting the public interest? The Court of Appeals of Maryland states that when determining whether a transaction is a matter within the public interest, the court must analyze the "totality of the circumstances of any given case against the backdrop of current societal expectations."<sup>2</sup> There is a six-factor test that some courts have used to analyze whether an exculpatory clause violates public policy. Exculpatory clauses may be held unenforceable based on factors including:

1. there is a business that is regulated;
2. the business performs a service of great importance to the public;
3. the business provides this service to the general public;
4. the business has a decisive position of bargaining power;
5. the business provides the public with a standardized adhesion contract; or
6. the person signing the contract is subject to the control of the business.<sup>3</sup>

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<sup>1</sup> See *Seigneur v. Nat'l Fitness Instit., Inc.*, 132 Md. App. 271, 280 (2000); *Moore v. Waller*, 930 A.2d 176, 181 (D.C. 2007).

<sup>2</sup> *Wolf v. Ford*, 335 Md. 525, 535 (1994).

<sup>3</sup> *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445-46 (Cal. 1953).

## Analyzing Children's Releases under the Public Policy Exception

In *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714 (2013), the Court of Appeals of Maryland addressed whether an exculpatory clause signed by a parent on behalf of his child was void against public policy. In this case, the plaintiffs sued BJ's for negligence after their five-year old son sustained serious head injuries after he fell off of a play apparatus on a concrete floor covered only by a thin layer of carpet. The court held that BJ's exculpatory agreement was not void against public policy and thus it was valid and enforceable. Moreover, the court held that parents can execute an exculpatory agreement on behalf of their child and the agreement will be enforceable under Maryland law.

Maryland and D.C. case law is unclear on how courts would enforce a waiver of liability contract between an independent school and a student participating in an educational school trip. In *Rosen*, the court analyzed whether the agreement was void against public policy on the basis of the parent signing away the child's future claims, whereas the district court in *Munn v. Hotchkiss School* analyzed the exculpatory clause under a different approach.<sup>4</sup> In *Munn*, the court analyzed whether a release of claims for an educational, off-campus trip was void against public policy, which it answered affirmatively.

In *Wolf v. Ford*, 335 Md. 525, 532 (1994), Maryland's highest court explained that the performance of public service obligations would fall under the public interest exception, which it included "public utilities, common carriers, innkeepers, and public warehousemen." Then, in *Seigneur v. Nat'l Fitness Instit., Inc.*, 132 Md. App. 271, 280 (2000), Maryland's intermediate appellate court explained that these public services are socially important institutions and included schools among its list. Thus, it is arguable that schools could fall under the public interest exception based on *Wolf* and *Seigneur*, but it is still unclear considering the reading of the *Rosen* case.

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<sup>4</sup> See *Munn v. Hotchkiss Sch.*, 933 F. Supp. 2d 343 (D. Conn. 2013).

## **SAMPLE FORM RELEASES**

### **Example #1:**

**Student's Name:** \_\_\_\_\_ has my permission to participate in the [School] off-campus activity/trip described above. I fully understand and expressly assume the risks involved in this activity/trip, including that of transportation to and from the site and those associated with participating in any and all activities throughout. I hereby release and hold [School] and its employees harmless from any and all liabilities, actions, and damages arising primarily from the actions or omissions of any person or entity other than [School] or its paid employees acting within the scope of their employment.

### **Example #2:**

I agree to release, hold harmless, and indemnify [the School], its agents, representatives and employees from all claims, damages, or other liabilities for injuries to my child which are not the result of gross negligence or willful misconduct by the school, or its agents, representatives, or employees acting within the scope of their employment. I acknowledge that this release, hold harmless, and indemnity provision bars any claim for ordinary negligence by the school or its employees acting within the scope of their employment.