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# Are You Free to Contract Away Your Right to Bring a Negligence Claim?

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ARE YOU FREE TO CONTRACT AWAY YOUR RIGHT TO BRING A  
NEGLIGENCE CLAIM?

SCOTT J. BURNHAM\*

INTRODUCTION

I recently satisfied a desire to jump out of an airplane. Soaring down from 14,000 feet at a speed of over 100 miles per hour, my thoughts turned to the possibility that my parachute would not open. Having been trained to think like a lawyer, I then began to wonder whether, in that event, my heirs would be able to pursue a claim against the company under whose auspices I was jumping, or whether that claim would be barred by the contract I had signed prior to boarding the airplane. That contract contained—in fact it pretty much entirely consisted of—an exculpatory clause in which I gave up the right to bring a claim against anyone remotely concerned with the skydive.

The moral problems that are often the hardest to solve are not those that involve the conflict between good and evil, but the conflict between two goods. Freedom of contract is generally believed to be a good thing. And so is the concept that one who acts negligently should be held responsible for the injury caused by his or her act. The conflict between these two concepts arises when one party to a contract agrees to give up his or her right to sue the other party for negligence. We call such a term an *exculpatory clause*. Here is an example of an exculpatory clause, taken from the skydiving contract:

6. “I” ABSOLVE THE RELEASED ENTITIES FROM ALL  
RESPONSIBILITY, LIABILITY & CLAIMS

Understanding the above Significant Risks & Dangers, I Forever Exempt, Release, & Hold Harmless the “Released Entities” from all current & future responsibility, liability, duty of care, &/or claims arising out of any loss, injury, pain, suffering, damages, death &/or “Emotional Distress” while associating with the “Covered Activities”, even if it is the result of Simple or Gross Negligence, Oversight or Error.<sup>1</sup>

The reader will deduce that my concerns about the parachute not opening were soon alleviated. Nevertheless, upon my grateful return to

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1. See Appendix for the complete agreement.

earth, I decided to pursue my question about the enforceability of the exculpatory clause. This article explores this particular aspect of aberrant contracts. It looks at the spectrum of views on the enforceability of exculpatory clauses, ranging from “always enforceable” to “never enforceable,” with “it depends” firmly holding the middle ground. It concludes with a proposed framework for analysis of the problem, followed by an examination of the skydiving contract that inspired the endeavor.

#### I. THE VIEW THAT AN EXCULPATORY CLAUSE IS ALWAYS ENFORCEABLE

The view that bargaining for an exculpatory clause, like any other contract term, is a matter of individual liberty that should be left to the market is found not in the cases, but in the writing of economists. Judge Richard Posner, for example, states generally that “[e]conomic analysis, at least, reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract.”<sup>2</sup>

In the narrower area of contracts for medical services between doctors and patients, Posner expresses the view that exculpatory clauses should be a matter of bargaining between the parties: “[I]t would often be rational for a patient to receive a lower price for medical service in exchange for surrendering his right to sue the doctor for malpractice.”<sup>3</sup> This view caught the popular imagination when it was suggested as a partial solution to the high cost of medical care in Richard H. Thaler and Cass R. Sunstein’s book *Nudge*.<sup>4</sup>

In their chapter titled “Should Patients be Forced to Buy Lottery Tickets?,” the authors assert that one way to reduce the cost of medical services is to allow patients to agree to give up the right to sue doctors and self-insure instead.<sup>5</sup> They argue that since the threat of litigation does not act as a deterrent, surrendering the right to sue would not result in increased malpractice.<sup>6</sup> Moreover, if costs were reduced, medical services would be available to more people.<sup>7</sup> Furthermore, this liberates doctors from practicing expensive “defensive” medicine and makes them more willing to report errors, which would improve the practice of medicine.<sup>8</sup> Of course, it is

2. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 87 (2d ed. 1977).

3. *Id.* at 158.

4. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 207-14 (2008).

5. *Id.* at 207-14.

6. *Id.* at 210-11.

7. *Id.* at 211.

8. *Id.* at 209.

possible that the medical provider would have it both ways—accept the surrender of the right to sue but not reduce the cost. Supposedly the market would take care of that problem.

This proposal was subject to criticism by Tom Baker and Timothy B. Lytton, who were concerned that, under the proposal, consumers could be exploited because of a lack of bargaining power, asymmetry of information, a high demand for services, and the status of physicians. But they were also concerned that even the consumer who understood the transaction would not make a rational choice because of behavioral economics—people make choices that are not in their best interests because of a preference for immediate gratification and overconfidence.<sup>9</sup> Finally, the provision would have a deleterious effect because exculpation undermines the deterrent effect of tort liability.<sup>10</sup>

These criticisms mirror the concerns expressed by courts when striking exculpatory clauses as either unconscionable or contrary to public policy. We now turn to the approaches of the courts that have taken the “it depends” view of enforcement.

## II. THE VIEW THAT AN EXCULPATORY CLAUSE MAY OR MAY NOT BE ENFORCEABLE

Analysis of unconscionability is frequently broken down into procedural unconscionability—how the contract came into being, and substantive unconscionability—the unfairness of the term. In the classical construct both factors are necessary for a finding of unconscionability.<sup>11</sup>

### A. Procedural Unconscionability

Most of the time, the exculpatory clause is going to be found in a contract of adhesion. But as the courts say *ad nauseam*, that is not enough to establish unconscionability, even procedural unconscionability.<sup>12</sup> As Karl Llewellyn noted, one issue is consent.<sup>13</sup> A person consents to the dickered terms of the contract, but except from an objectivist perspective, one does not consent to terms one is not aware of.<sup>14</sup>

9. *Id.* at 235-40.

10. *Id.* at 240-46.

11. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

12. E. ALLAN FARNSWORTH, *CONTRACTS* 302 (4<sup>th</sup> ed. 2004).

13. KARL LLEWELLYN, *THE COMMON-LAW TRADITION: DECIDING APPEALS* 370-71 (1960).

14. *Id.* This problem was captured nicely in an exchange in an episode of *South Park*:

Kyle: You guys. You gotta help me. Those business-casual G-men are trying to kidnap me.  
Stan: What?

In the context of the doctor/patient exculpatory clause, Thaler and Sunstein address this problem as one of choice:

We recognize that patients might find it hard to understand the nature of medical malpractice liability and the consequences of waiver. Waiving liability should not be done lightly or impulsively. In other domains, this view is reflected in state law, which often requires waivers to be accompanied by procedural safeguards designed to ensure that the waiving party is fully informed. Waivers generally must be in writing and must state precisely what is being waived. Most important, courts are usually unwilling to enforce waivers that are hidden in small print in long contracts.<sup>15</sup>

Baker and Lytton raised the concern that patients would be unable to enter these contracts with doctors in a meaningful way.<sup>16</sup> The problem for the drafter is to demonstrate what we might call “knowing consent” on the part of the consumer. But in a compelling case, it is not difficult for a court to find that the language of the contract, or the circumstances in which it were entered, did not provide for a sufficient consent.<sup>17</sup>

Drafters have largely learned not to hide the allegedly unconscionable term in fine print in the middle of the contract, but to objectively call it to the attention of the other party. There are many ways to accomplish this task. Some require the other party to affirmatively write a statement to the effect that “I have read and understood this contract.”<sup>18</sup> It seems to me it would be better to state the provision conspicuously in bold language on the front page of the agreement, or as a separate check box online, so if the party sees nothing else, he or she at least sees that one.

Some courts, eager to find for the injured plaintiff, will not enforce an exculpatory clause stated in general terms because it does not warn the

Kyle: It’s crazy, dude! They’re saying it’s because I agreed to the latest terms and conditions on iTunes.

Stan: Why? What did the terms and conditions for the last update say?

Kyle: I don’t know! I didn’t read them!

Butters: You didn’t read them?

Kyle: Who the hell reads that entire thing every time it pops up?

Stan: I do.

Craig: Me, too.

Kyle: You’re telling me that every time you guys download an update for iTunes you read the entire terms and conditions?

Jimmy: Of course.

Butters: Well, how do you know if you agree to something if you don’t read it?

*South Park: Humancentipad* (Comedy Central television broadcast Apr. 27, 2011), available at <http://www.southparkstudios.com/full-episodes/s15e01-humancentipad>.

15. Thaler & Sunstein, *supra* note 4, at 212.

16. Tom Baker & Timothy D. Lytton, *Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. 233, 235-240 (2010).

17. *See, e.g.*, Broemmer v. Abortion Serv. of Phx., 840 P.2d 1013, 1017 (Ariz. 1992).

18. *See, e.g.*, App. at para. 10.

person specifically what might happen.<sup>19</sup> Such a ruling leads the drafter to try to enumerate everything that might possibly go wrong.<sup>20</sup> Of course, the drafter is then caught between the Scylla of unspecified dangers and the Charybdis of unreadable language. Courts are also more likely to find that the provision is not procedurally unconscionable if there is a market for the particular service, so that the person did not have to obtain it from this party.<sup>21</sup> Similarly, if the service is not a necessity, then the person had the alternative of not entering into the contract at all.

19. See, e.g., *Bennett v. U. S. Cycling Fed'n*, 193 Cal. App. 3d 1485 (Cal. Ct. App. 1987) (refusing to grant summary judgment to defendant).

20. Here, for example, is language from the exculpatory clause commonly used in contracts for whitewater rafting:

I understand and acknowledge that the enjoyment and excitement of adventure activities is derived in part from inherent risks incurred by activity beyond the accepted safety of life at home or in my normal day to day activities and that these inherent risks contribute to my enjoyment and excitement and are an integral reason for my participation in this activity. I understand that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activity. I also understand and acknowledge that failing to use or properly use safety type equipment increases my risk of injury or of not surviving an accident or incident while rafting.

The inherent risks associated with the rafting trip in which I am about to participate include, but are not limited to: encountering whitewater rapids and changing water flows and the possibility that I will be jolted, jarred, bounced, thrown to and fro and shaken about during rides through some of these rapids or changing water flows; it is possible that I could be injured if I come in contact with food boxes, oars/paddles, other storage containers, or other fixed equipment necessary to the operation or outfitting of the raft; there may be errors in food storage or preparations; I recognize there are foot cups or foot holds in watercraft which may assist in stabilizing or holding myself or others in the watercraft but which may present an increased risk of knee, ankle or other injury as a result of restricted movement; the raft may break down or be faulty; it is possible that loss of control of the raft could occur resulting in collision or capsizing or sinking and that if a raft turns over or flips I could be "washed" overboard; rafts are slippery when wet and are naturally unstable so that I could slip and fall or be knocked out of the raft even in flat or non-moving water; while in the water I may become disoriented, panicked and/or experience trauma from rocks, boulders, etc.; I can slip or fall during hiking or portaging or getting to and from the raft and I understand that the areas in which I might hike sometimes hide dangerous obstacles such as tree wells, tree stumps, creeks, rocks and boulders, forest dead fall, etc.; the raft or any portion of it may collide with or encounter other rafts, man-made or natural objects including submerged or semi-submerged trees, rocks, branches, boulders, bridges, etc.; accidents can occur getting on and off the raft; changing weather conditions, storms or even lightening are possible; exposure to the natural elements can be uncomfortable and/or harmful and I am aware that this exposure could cause sunburn, dehydration, heat exhaustion, heat stroke, heat cramps or fatigue, some or all of which may diminish my or the other participants' ability to react or respond; I understand that prolonged exposure to cold water can result in "cold water immersion" syndrome or "cold shock," hypothermia and in extreme cases death; I may encounter dangerous wildlife, insects, etc.; communication in the river terrain in which this activity occurs is always difficult and in the event of an accident, rescue and medical treatment may not be immediately available. **I acknowledge that I AM ULTIMATELY RESPONSIBLE for my own safety during my participation in N.A. events/activities.**

Noah's Ark Rafting Release Form (2010), available at [http://augusta.younglife.org/Documents/noah-s\\_ark\\_rafting\\_release\\_form.pdf](http://augusta.younglife.org/Documents/noah-s_ark_rafting_release_form.pdf).

21. See, e.g., *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758 *passim* (Cal. Ct. App. 1989).

Perhaps the solution to the problem of contractual assent is to have a statute that prescribes a safe-harbor form for giving knowing assent to an exculpatory clause. The Uniform Law Commission may take on the project. But unless the form created an irrebuttable presumption of enforceability, it would only create a problem of circularity. A court would be free to rebut the presumption of enforceability by demonstrating that the transaction lacked procedural unconscionability because of the way in which the person came to sign the form. The drafter who overcomes the hurdle of procedural unconscionability then has to address the issue of substantive unconscionability.

### *B. Substantive Unconscionability*

A court has the power to strike oppressive clauses on the grounds that they are substantively unconscionable—terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.<sup>22</sup> For this purpose, it would not seem to matter whether the term was found in a contract of adhesion or a negotiated contract, or whether it is hidden or not—if the term is that bad, then the policy is that the parties should not have to agree to it, period. To use Irving Younger's example, if we do not want Isaac to exchange his birthright for a bowl of pottage, then it does not matter whether or not the term appeared in flashing red lights on the front page of the contract or whether he could have obtained the pottage elsewhere.<sup>23</sup> A court often finds procedural unconscionability a useful tool because it excuses the court from having to answer the difficult question—exactly what is the harm done by the offensive clause?

If the term is unfair, we may nevertheless allow it in a negotiated contract. Contracts are, of course, a bargain, so if a person affirmatively bargained for a term that would initially appear to be substantively unconscionable, it must be seen in the context of what the person got in return. Thus, the substantively unconscionable term may be permitted in a negotiated contract because presumably the individual agreeing to it got something in return. But our economist friends would say the same bargain occurs even in the non-negotiated agreement. When Ms. Williams agreed to the cross-collateralization clause in *Williams v. Walker-Thomas Furni-*

22. See, e.g., *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82, 100.

23. Irving Younger, *A Judge's View of Unconscionability*, 5 U.C.C. L.J. 348, 349 (1973) (referring to *Genesis 27*). Younger got a bit confused and writes that "Isaac purchased Esau's birthright." *Id.* Jacob impersonated Esau in order to get Isaac to give the birthright to him, which makes the conduct even worse.

ture Co., she agreed to something that looks oppressive out of context, but the store will claim that these are the only circumstances in which it is willing to extend credit.

The difficulty of enforcing even an apparently negotiated exculpatory clause is shown in the New Jersey experience. In *Kuzmiak v. Brookchester, Inc.*,<sup>24</sup> the court refused to enforce an exculpatory clause in a residential lease, recognizing the lack of bargaining power between landlord and tenant due to the scarcity of housing.<sup>25</sup> Quick on the uptake, a New Jersey landlord (or more likely the landlord's attorney) drafted a lease in which the tenant purportedly bargained for a lower rent in return for an exculpatory clause. In *Cardona v. Eden Realty Co., Inc.*,<sup>26</sup> the court described the situation as follows:

In addition to this purported exculpation of defendant from its acts of negligence, the lease also contained a novel provision in which the landlord recited that it had no public liability insurance and if the tenant desired to eliminate the exculpatory clause, written notice thereof should be given the landlord, in which event the rent would be increased \$2 a month. The agreement went on to say that following termination of the exculpatory clause by the tenant, the landlord's liability 'shall be that provided by the general laws of the State. The landlord Shall not become an insurer by vitrue [sic] of such termination.'<sup>27</sup>

The trial court fell for this ploy, finding that the evident bargaining of the parties removed the case from the *Kuzmiak* line of cases that made lack of bargaining power grounds for refusing to enforce the exculpatory clause.<sup>28</sup> The Appellate Division was not so gullible, however. Based only on its examination of the lease, it found that in fact the tenant lacked bargaining power:

We are uninformed as to the circumstances under which the lease was signed, except that the record indicates the tenant was not represented by counsel and that the landlord's manager was an attorney. However, the lease in its entirety reveals that the landlord was in an eminently superior bargaining position. The lease included provisions which clearly support this conclusion: no interest was to be paid on security deposits; the tenant (as well as the landlord) waived trial by jury in any action brought by either against the other on any matters arising out of or in any way connected with the tenant's use or occupancy of the premises or the common stairways, halls, sidewalks, etc.; the tenant waived any exemptions the

24. 33 N.J. Super. 575 *passim* (App. Div. 1955).

25. Most jurisdictions have by statute prohibited exculpatory clauses in residential leases. See, e.g., UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(a)(4) (1972). In general, the only consequence for including an exculpatory clause in a contract is that it is unenforceable. Under the Uniform Act, however, there are penalties for a knowing inclusion. *Id.* at § 1.403(b).

26. 118 N.J. Super. 381, 381-82 (App. Div. 1972).

27. *Id.* at 383.

28. *Id.*



law gave him on a distress for nonpayment of rent, and the lease attempted to release defendant from the responsibility of maintaining the building in good repair, contrary to N.J.S.A. 55:13A-1 et seq.

While it is conceivable that even in some noncommercial transactions a landlord and tenant might properly negotiate a lease to rent property ‘as is’ and in consideration of a reduced rental the tenant assume all liability for repairs and insurance coverage, it is clear that in this multiple-tenant tenement house lease, the provisions thereof were oppressively for the benefit of the landlord and against public policy.

The tenant’s option as to the landlord’s liability did not convert their obviously unequal bargaining positions into equal positions, and the exculpatory agreement, despite the method made available to remove it, is against public policy and should not be enforced. *See Mayfair Fabrics v. Henley*, 48 N.J. 483, 226 A.2d 602 (1967). The lease represents a legalistic effort to circumvent the positive public policy of this State, and the clauses in issue must be held to be invalid.<sup>29</sup>

In an earlier part of the opinion, the court noted that the lease “required the tenant to furnish his own painting, stove, heat, heating equipment, hot water, refrigerator, shades, screens, storm windows, toilet seat, door locks, and all fixtures needed in the occupation of the premises.”<sup>30</sup> It seems to me these facts also support the court’s conclusion—the fact that you agreed to provide your own toilet seat is a pretty good indication that you did not have much bargaining power.

No doubt courts would greet an exculpatory clause in a contract for medical services as advocated by the authors of *Nudge* with the same skepticism shown by this court. Faced with the strong possibility that a court would not enforce the exculpatory clause, the prudent doctor, like the prudent landlord, would still need to obtain insurance coverage, thus negating the usefulness of the clause as a cost-saving mechanism. Courts behave this way because, as a matter of policy, they object to exculpatory clauses.

### C. What is the Policy?

When a court has difficulty articulating the reason it is opposed to something, it cheerfully invokes “public policy,” rarely articulating exactly what that policy is.<sup>31</sup> In the case of opposition to exculpatory clauses, there are two policies. One is that a person ought to be compensated for an injury caused by another. We will call this the compensation policy. The second is

29. *Id.* at 36.

30. *Id.* at 35.

31. An English judge famously stated that public policy is “a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.” *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (Ex. 1824) (Burrough, J.).

the person ought to be compensated by the person who caused the injury. This partially satisfies our sense of justice and it also deters the person from causing further injury. We will call this the deterrent policy.

The deterrent policy is somewhat muddled by insurance, which allows someone other than the tortfeasor to absorb the cost of compensation. If the victim procures insurance, there is no deterrence, though the principle of subrogation would restore the balance by allowing the insurer to recover from the tortfeasor. But if the tortfeasor procures insurance, there is less deterrence. Perhaps our economist friends would say that the fact that a claim will increase the cost of insurance acts as a deterrent.

But there are other deterrents besides the cost of compensation or the cost of insurance. The toy industry relies not only on the threat of lawsuits to make toys safer, but also on the regulation of the Consumer Product Safety Commission. The work of the Commission is aided by the fact that even more than a desire to avoid lawsuits, the toymaker wishes to protect the brand.

A provider of bungee jumping has a similar incentive not to be negligent because of the bad publicity that will result from an injury. Would you go to the provider with the perfect safety record or to the provider who had two injuries in the past year? With the availability of information through the Internet, consumers are in a better position to make such choices. In fact, the Patient Protection and Affordable Care Act provides for such a system of “physician quality reporting.”<sup>32</sup>

In California, the policies surrounding exculpatory clauses were carefully examined in a case involved an exculpatory clause in a contract for admission to a hospital. In *Tunkl v. Regents of the University of California*,<sup>33</sup> the facts showed that “[p]laintiff at the time of signing the release was in great pain, under sedation, and probably unable to read.”<sup>34</sup> In spite of these favorable facts, the jury found that the plaintiff was able to comprehend the effect of his act.<sup>35</sup> Therefore, on appeal, the issue was whether the release was nevertheless unenforceable as a matter of law.<sup>36</sup>

California codified its law of Contracts when it adopted the Field Code in 1872.<sup>37</sup> Therefore, the court appropriately turned to the statute that was arguable relevant. Civil Code section 1668 provides that “[a]ll con-

32. See P.L. 111-148 (2010).

33. 383 P.2d 441 (Cal. 1981).

34. *Id.* at 442 n.1.

35. *Id.*

36. *Id.*

37. Arvo Van Alstyne, *The California Civil Code*, 6 West’s Annot. Cal. Codes 1-43 (1954). See also Scott J. Burnham, *Let’s Repeal the Field Code*, 67 MONT. L. REV. 31, 36-37 (2006).

tracts 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 law, whether willful or negligent, are against the policy of the law.”<sup>38</sup> This section has had a checkered interpretive history in California, as discussed in *Tunkl*.<sup>39</sup> Some cases used it to invalidate contracts that exempted liability for negligence. Other cases held that it exempted only gross negligence and active negligence, and not ordinary negligence. Nevertheless, the cases consistently held that an exculpatory clause is enforceable if it does not involve the public interest. The task for the court, therefore, was to determine what it means to involve the public interest. The court restated the holdings of a number of cases to arrive at “a rough outline of the type of transaction in which exculpatory provisions will be held invalid.”<sup>40</sup> As stated in a later case, *Henriouille v. Marin Ventures, Inc.*:<sup>41</sup>

In *Tunkl*, six criteria are used to identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy. “(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 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 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.”<sup>42</sup>

Importantly, this enumeration of the “criteria” makes it look as though the *Tunkl* court was enumerating elements that must be satisfied rather than factors that are to be considered. *Tunkl* itself preceded the enumeration with this language: “Thus the attempted but invalid exemption involves a transaction which exhibits *some or all* of the following characteristics,”<sup>43</sup> clearly indicating that the court intended factors rather than elements. Nev-

38. Cal. Civ. Code § 1668 (2013).

39. *Tunkl*, 383 P.2d at 442-43.

40. *Tunkl*, 383 P.2d at 444-45.

41. 573 P.2d 465 (Cal. 1963).

42. *Id.* at 468 (citation omitted).

43. *Tunkl*, 383 P.2d at 445 (emphasis added).

ertheless, I think the *Henrioulle* court got it right, as the criteria build on each other. In essence, *Tunkl* provides us with a sophisticated analysis in which courts place transactions along a spectrum, with exculpatory clauses in the “private interest” transactions on the enforceable side of the spectrum and exculpatory clauses in the “public interest” transactions on the unenforceable side. In fact, the *Tunkl* court, while restating that “the agreement need only fulfill some of the characteristics above outlined,” nevertheless found that “here, the relationship fulfills all of them.”<sup>44</sup>

Courts have subsequently applied the “*Tunkl* test” to a number of transactions, proving it to be a workable approach to the problem of distinguishing between enforceable and unenforceable exculpatory clauses. In California, for example, the court refused to enforce an exculpatory clause in a residential lease in *Henrioulle*,<sup>45</sup> but upheld an exculpatory clause in a contract for the use of an exercise facility in an apartment complex in *Lewis Operating Corp. v. Superior Court*<sup>46</sup> and in a contract signed by a race car driver who was injured during a race in *National and International Brotherhood of Street Racers v. Superior Court*.<sup>47</sup>

Exculpatory clauses are commonly found in contracts for recreational activities. If the *Tunkl* test consisted of elements, then these clauses are likely enforceable because recreational activities would probably fail the public interest analysis and be found to be a matter of private agreement. In a thoughtful article, Professor Robert Heidt decries the effect that failure to uphold exculpatory clauses has had on recreational activities.<sup>48</sup> He argues that under the Learned Hand test for negligence,<sup>49</sup> all a plaintiff has to do is show that the provider of the activity could have taken some precaution that would have avoided or reduced the injury.<sup>50</sup> Therefore, to prevent injury, the provider takes steps that weaken the experience for the sports enthusiast. Heidt argues that more expansive enforcement of exculpatory clauses would redress the balance.<sup>51</sup>

44. *Id.* at 447.

45. 573 P.2d at 466.

46. 200 Cal. App. 4th 940, 943 (2011).

47. 215 Cal. App. 3d 934 (1989; rev. denied 1990).

48. Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should be Enforced*, 38 U. RICH. L. REV. 381, 383 (2004).

49. *Id.* at 394 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“While negligence at one time meant failure to provide average care or failure to provide the care which would have been provided by a reasonable person, it has evolved to mean the mere failure to provide any cost-justified precaution. In their universal adoption of the Learned Hand test for negligence, courts have implicitly assumed that a reasonable person would take every cost-justified precaution.”)).

50. *Id.* at 394-95.

51. *Id.* at 451-59.

Heidt, however, would not protect the provider where the purchaser of the services lacks significant opportunity for self-protection.<sup>52</sup> This is the final factor expressed in *Tunkl*: “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.”<sup>53</sup> Under Heidt’s view, exculpatory clauses for a substantial number of providers of recreational activities—for example, sky diving, scuba diving, and bungee jumping—offer no protection against their negligence because the purchaser has little control over the activity.

### III. THE VIEW THAT EXCULPATORY CLAUSES SHOULD NOT BE ENFORCED

In *Boilerplate*, Margaret Jane Radin uses exculpatory clauses as one example of a contract term that should be curtailed.<sup>54</sup> Radin is unable to come up with a good explanation of why firms include exculpatory clauses. She suggests that they might be doing it because their insurers require it. Instead of procuring costly coverage, the firm shifts the cost of insuring against the involved risks to the individual.<sup>55</sup> But this of course raises the problem of moral hazard—if a firm has no liability, then will it take precaution against accidents?

Ultimately, the answer may be that because of the principle of freedom of contract, we should be indifferent to the reason a party seeks an exculpatory clause. But this argument proves too much. For some of the reasons pointed out by Radin, an exculpatory clause may appear to be unfair. So, in analyzing whether it is unconscionable, a court should take a cue from the Uniform Commercial Code and look at the clause’s “commercial setting, purpose, and effect.”<sup>56</sup> The proponents of exculpatory clauses may have done an inadequate job of articulating these justifications and, if assaults such as Radin’s have any effect, they had better get off the dime.

In the majority of states, the unarticulated policy seems to be the one articulated in *Tunkl*—in an area lacking public interest, the policy of freedom of contract outweighs other policies. However, if the policies of compensation and deterrence are truly paramount, then there should be no distinction between the treatment of exculpatory clauses in areas of public

52. *Id.* at 455-57.

53. *Tunkl*, 383 P.2d at 446.

54. MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 138-39 (2013). The other members of her rogue’s gallery of terms are arbitration clauses, choice of forum clauses, and clauses waiving the right to bring a class action.

55. *Id.* at 138-140.

56. U.C.C. § 2-302(2) (2011).

interest and areas not in the public interest. This seems to be the policy in Montana.

Montana is one of the few states that have broadly prohibited exculpatory clauses.<sup>57</sup> In *Haynes v. County of Missoula*, the plaintiffs lost two quarter horses when a barn burned down at the Missoula County fairgrounds during the Western Montana Fair.<sup>58</sup> The defendant County argued that the Haynes's claim was barred by an exculpatory clause in the entry blank they signed as exhibitors.<sup>59</sup>

I assume that economists would say that the argument for the County is that there was a bargain something like this:

The County to the Exhibitors: We know that the fairgrounds are not in good repair. The County taxpayers will not agree to put up the money to make them safer. So you have a choice. Either we can charge you \$500 to exhibit in the fair and use the surplus money to improve the buildings, or we can charge you \$50, and in return for that lower price you agree not to hold us liable for negligence and you will provide your own insurance. Which will it be?

The Exhibitors (in unison): We prefer to pay \$50.

Having made that bargain, the exhibitors came to regret it and looked to the court for relief. The trial court suppressed the release. On appeal, the court took note of the lack of uniformity in exculpatory clause cases, stating the obvious that the outcome is a matter of public policy. The court noted that one of those policies is that a person is liable for his or her negligence. Because Montana is a Field Code state, having taken the statutes from California in 1895, the court looked to the statutes for those policies. One of those statutes, Montana Code Annotated § 1-3-204, contains the freedom of contract principle that “[a]ny person may waive the advantage of a law intended solely for that person’s benefit. A law established for a public reason cannot be contravened by a private agreement.”<sup>60</sup> The court sensibly interpreted this provision as allowing an exculpatory clause in an area that does not involve the public interest. Without analysis, the court concluded

57. Virginia also has a common law prohibition on enforcement of exculpatory clauses. See *Hiett v. Lake Barcroft Cmty. Assn.*, 418 S.E.2d 894 (Va. 1992). Louisiana prohibits enforcement by a more opaque statute than was found in California and Montana:

**Clause that excludes or limits liability**

Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.

La. Civ. Code Ann. art. 2004 (2011).

58. 517 P.2d 370 (Mont. 1973).

59. *Id.* at 375-76.

60. Mont. Code Ann. § 1-3-204 (2011).

that “[w]e hold the County is precluded from disclaiming liability by virtue of the release when performing an act in the public interest.”<sup>61</sup>

In dicta, the court applied the *Tunkl* test to determine whether the transaction was within the public interest. Without analysis, it declared that “[a] majority, and arguably all, of these tests are met in the instant case.”<sup>62</sup> A closer inspection would probably have found that the transaction satisfied the last four tests; there is no doubt that the County used a contract of adhesion when exhibitors sought the services. But satisfying the first two tests is more problematic. Those tests are: “(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.”<sup>63</sup>

Is a county fair suitable for public regulation? More specifically, is it performing a service of great importance to the public—a matter of practical necessity? Is entering a horse for racing in the county fair analogous to obtaining medical care at a hospital or entering into a residential lease agreement? The problem with seeing the *Tunkl* test as factors rather than elements is that the first two factors go to the distinction between a “public” transaction and a “private” transaction. Once you get past those two factors, the remaining factors simply state that the provider of the service had the bargaining power to require a person to agree to an exculpatory clause if they wanted the services—and this is true of virtually any transaction in issue, whether public or private. Therefore, by looking at the *Tunkl* test as consisting of factors rather than elements enabled the court to conclude that an exculpatory clause in a contract for exhibitors at a county fair was not enforceable.

Thirteen years later, Montana had another occasion to explore the enforceability of an exculpatory clause. In *Miller v. Fallon County*, Cecil Miller, the husband of the plaintiff Linda Miller, was a long-distance truck driver.<sup>64</sup> Linda asked the company that used Cecil’s services if she could accompany her husband on a trip, and the company said that she could if she signed an exculpatory clause, which she did.<sup>65</sup> She was injured in an accident on the trip, and brought suit.<sup>66</sup>

61. *Haynes*, 517 P.2d at 377.

62. *Id.* at 378.

63. *Tunkl*, 383 P.2d at 445.

64. 721 P.2d 342 (Mont. 1986).

65. *Id.* at 344.

66. *Id.* at 343-44.

What followed was an amazing bit of lawyering by the plaintiff's attorney in response to defendants' claims for summary judgment. Montana had theretofore applied the doctrine of interspousal tort immunity, which prevented one spouse from recovering in tort from the other. Plaintiff was able to persuade the court to overturn precedent and change that rule.<sup>67</sup> Having overcome this obstacle, she also had to persuade the court to throw out the exculpatory clause.<sup>68</sup>

The court made nodding reference to the decision in *Haynes*, which it acknowledged implied that "private parties are allowed to contract away liability for negligent acts if the interest of the public is not involved and the contracting parties stand on equal footing."<sup>69</sup> Unlike the *Haynes* court, however, the *Miller* court did not apply the *Tunkl* test to determine whether accompanying one's spouse on a trucking run involved the public interest or was merely a private interest.<sup>70</sup> A cynic might say the plaintiff would have lost if the court had done so.

Instead, the court went back to the Field Code statute with which the California court had begun its analysis in *Tunkl*. In Montana, it is codified at Montana Code Annotated § 28-2-702:

**Contracts which violate policy of the law—exemption from responsibility.** All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.<sup>71</sup>

The court observed that when a state borrows a statute from another jurisdiction, it presumably borrows the construction placed on it by that state, but this is a rebuttable presumption, and the interpretation of the California Supreme Court in *Tunkl* was merely persuasive. Looking at the plain language of the statute, the court observed that it forbids a person from exempting himself or herself from responsibility for "violation of law, whether willful or negligent."<sup>72</sup> "What is *law*," asked the court, and concluded that it consists of constitutions, statutes, case law, and common law.<sup>73</sup> The court jumped over the next step in its rush to judgment. Presum-

67. *Id.* at 344-45.

68. For purposes of the summary judgment motions, the court assumed that Cecil Miller was an employee of the company, and therefore the company was liable for his actions under the doctrine of *respondeat superior*. At trial, plaintiff would also have to overcome the obstacle of proving that he was not an independent contractor. *Id.* at 344.

69. *Id.* at 346.

70. *Id.* at 346-47.

71. Mont. Code Ann. § 28-2-702 (2011).

72. *Miller*, 721 P. 2d at 346.

73. *Id.* at 346-47.



ably, the next step is to ask, “What does the common law say?” The answer is: it says that one owes a duty of care to another. The court then concluded: “Thus, pursuant to the clear and unambiguous language of § 28-2-702, MCA, an entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether they be rooted in statute or case law.”<sup>74</sup>

With that deft sleight of hand, the court did away with the public/private distinction embodied in the *Tunkl* test and ruled that *no* exculpatory clause is enforceable. The unfortunate breadth of this decision can be seen in the author’s own experience. Attorneys in Montana would come to him for legal advice with their thorniest questions. He would say to them:

I would like to help you, but I want you to realize that I don’t do this kind of thing often enough to justify my purchasing malpractice insurance. Therefore, I will agree to do it only if you agree to review my work and not hold me liable for malpractice.

They would of course agree. I cannot imagine a more private or more freely bargained-for agreement. Yet it would not be enforceable under the rule of *Miller*.

Do parties continue to incorporate exculpatory clauses in their contracts in Montana? Of course. Hopefully the lawyers who draft them for their clients inform the client that the clause is not enforceable and advise them to obtain insurance, which may be difficult to find. Is it ethical for an attorney to draft an exculpatory clause knowing it is not enforceable?<sup>75</sup> Model Rule of Professional Conduct 1.2(d) provides:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>76</sup>

It can be argued that putting an exculpatory clause in a contract is not criminal or fraudulent, for the only consequence is that it is not enforceable. Nevertheless, it is clearly misleading, for if the clause is not enforceable, then it is in the contract only for *in terrorem* effect, and may lead the contracting party to believe that he or she has given up the right to bring suit. In a consumer case, this could be an unfair or deceptive act or practice under a Consumer Protection Act.<sup>77</sup> The attorney including the clause in a contract might find support in the final clause of the Model Rule, which

74. *Id.* at 347.

75. See Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988).

76. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983).

77. See, e.g., Mont. Code Ann. § 30-14-103 (2011).

states that a lawyer “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>78</sup> In Montana, it is arguably necessary to put the clause in a contract in order to get the test case that might induce the court to review its decision in *Miller*.

The spouse of a truck driver recently told me that instead of asking her to agree to an exculpatory clause, her husband’s employer told her that she had to provide her own insurance. Recall that this is the justification for the exculpatory clause in a contract for medical services, with the risk undertaken by the party who exculpates the other. But would this work universally as a risk-shifting mechanism? If my insurer paid me for losses resulting from another’s negligence, then the insurer would have a right of subrogation to pursue the tortfeasor. But the tortfeasor would have against the insurance company all the defenses that it would have against me, including the exculpatory clause. If insurers knew that they were going to lose their subrogation rights because the insured had agreed to an enforceable exculpatory clause, would not they refuse to insure that risk? This may suggest another flaw in the *Nudge* argument.

## VI. A PROPOSED FRAMEWORK

In *Boilerplate*, Radin broadly condemns exculpatory clauses as part of “a boilerplate rights deletion scheme.”<sup>79</sup> Radin’s blanket condemnation of exculpatory clauses does as much of a disservice to the richness of contract law as her blanket use of the word *boilerplate*. Heretofore, boilerplate has been used to describe the miscellaneous terms at the end of the contract that are similar in all contracts, as opposed to the operative terms that differ from transaction to transaction.<sup>80</sup> Radin is of course correct that in a pre-printed form contract, the operative terms are just as non-negotiable as the boilerplate terms, and therefore similar to them. But we already have a perfectly good term for such a contract—a contract of adhesion.

Similarly, Radin’s blanket condemnation of exculpatory clauses does not recognize that there is room for freedom of contract:

If the real argument in support of allowing firms to exculpate themselves from tort liability for their own negligence is not this weak efficiency argument but is simply an argument based on “freedom of contract,” one would expect to find courts making a distinction between how they eval-

78. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983).

79. The phrase is defined as “the deployment of boilerplate to rework a system of recipients’ rights that are guaranteed by the polity in order to divest recipients of those rights, or of some substantial portion of them, for the benefit of a firm.” Radin, *supra* note 54, at 33.

80. *See, e.g.*, SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 235 (3d ed. 2003).

uate such a clause in a commercial contract between parties who have apparently engaged in cognizant risk allocation versus how they evaluate it in a boilerplate rights deletion scheme.<sup>81</sup>

But courts such as the California Supreme Court have shown that they are often willing to make such a distinction. The approach used by California in *Tunkl* provides the means for a more nuanced approach to the problem.

An example of Radin's overly zealous condemnation is found in her statement that "the UCC has a stringent rule of partial market-inalienability for consequential damages for personal injury caused by a product."<sup>82</sup> She uses this rule to support an argument that "[c]ourts are free to hold, and in some cases they should hold, that service providers as well as product providers cannot easily and as a matter of course exculpate themselves for causing personal injury."<sup>83</sup> The fact that the UCC rule is indeed one of *partial* market-inalienability weakens the analogy between the UCC provision and exculpatory clauses. The limitation of liability that she refers to in § 2-719(3) only applies to consumer goods, and even there the limitation is only "prima facie unconscionable"—presumably rebuttable.<sup>84</sup>

A good example of a nuanced analysis of UCC § 2-719(3) is found in *Mullan v. Quickie Aircraft Corp.*<sup>85</sup> The defendant sold an airplane kit to the plaintiff, who was subsequently injured when the plane crashed. When the buyer sued for negligence, the seller claimed that a disclaimer of liability shielded it from personal injuries. In a thoughtful opinion, the court first looked at procedural unconscionability. It determined that the buyer was not in an unequal bargaining position because he negotiated the contract and had other sellers to choose from.<sup>86</sup> Furthermore, the language was clear and free of legalese.<sup>87</sup>

In looking at substantive unconscionability, the federal court looked to the law of Colorado. It found an instructive case in *Jones v. Dressler*, in which the plaintiff was injured when the plane carrying him to a parachute jump crashed.<sup>88</sup> The defendant claimed that an exculpatory clause shielded it and the court analyzed factors similar to those in the *Tunkl* test.<sup>89</sup> The

81. Radin, *supra* note 54, at 140.

82. *Id.* at 184.

83. *Id.*

84. U.C.C. § 2-719(3) (2011) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.")

85. 797 F.2d 845, 848-53 (10th Cir. 1986).

86. *Id.* at 851-852.

87. *Id.* at 852.

88. 623 P.2d 370 (Colo. 1981).

89. *Mullan*, 797 F.2d at 850-53.

*Mullan* court conducted a similar analysis and concluded that because the contract did not affect the public interest, the exculpatory clause was not void as a matter of public policy.<sup>90</sup> *Mullan*'s claim for personal injury was barred in spite of the UCC provision.<sup>91</sup>

Analysis of the facts of a case in the light of the *Tunkl* test will provide a nuanced approach to the enforceability of exculpatory clauses, but that approach will be improved if courts ignore the letter of *Tunkl* in favor of its spirit and look at the six tests as elements rather than as factors.

#### V. ANATOMY OF AN EXCULPATORY CLAUSE

We will now turn to an analysis of the skydiving contract, which is reprinted in the Appendix. Based on the foregoing discussion, one would expect a contract in which the drafter wished to get maximum value from the exculpatory clause to have the following characteristics:

- Assent to the exculpatory clause should be demonstrated objectively
- The dangers of the activity should be acknowledged, and better yet, described with particularity
- The clause itself should exculpate only from ordinary negligence and not from gross negligence or intentional acts
- The clause should be written in Plain English

Let us explore one particular exculpatory clause to see the extent to which a sophisticated operator adheres to these recommendations. Recall that my analysis of exculpatory clauses was inspired by my skydiving experience. My exploration of this contract, however, proved to be not as easy as it should have been.

A van met the prospective jumpers at a designated location in a strip mall to take us to the airport. While we waited for everyone to arrive, the driver distributed contracts for us to read and sign. When I turned mine in, I asked him if I could have a copy, and he said he would arrange that when we got to the office at the airport. During the twenty-minute drive to the airport, while we were captive in the van, we were shown a video in which a representative of the operator explained to us the steps we should take for our own safety and further warned us about the risks inherent in the activity.

When we got to the office, I again asked for a copy of the contract, but the office manager refused to give me a copy. I pointed out that a contract

90. *Id.* at 852-53.

91. *Id.*

is a mutual endeavor, and that one of its purposes is to guide the behavior of the parties in the future. I could not very well perform according to its terms in the future if I did not know what those terms were. I did not point this out at the time, but an additional argument is that provisions intended to have an *in terrorem* effect would lose their punch, if I was ignorant of them. This reasoning was apparently not persuasive, and he still refused to give me a copy.

In trying to figure out why they refused to provide a copy, I first thought that they were protecting their intellectual property by keeping it out of their competitors' hands. But then I realized a more likely explanation is that the work is not entitled to copyright protection, so the only way to protect it is to keep it out of circulation. Is it entitled to copyright protection? I do not think so. It is unlikely that a form contract is the kind of original work that is entitled to copyright protection. Am I concerned that if my analysis is incorrect, I will face liability for copying it? Not really. If it is entitled to copyright protection, I think I am making a fair use of it since I am analyzing it for scholarly purposes. And if I am not making fair use of it, the damages for my infringement would likely be minimal because they did not put notice of a claim to copyright on the document and I made a good faith effort to determine whether my use was fair before I used it. The law review, however, appropriately shifted the risk of my being mistaken to me when the editors contractually asked me to warrant that in the process of writing this article I did not infringe any copyrights and asked me to agree to indemnify them for any loss resulting from breach of that warranty. I know this because they let me have a copy of the contract.

The reader will find the skydiving contract in its entirety in the Appendix to this article. A copy fortuitously fell into my hands when I found a stack of them under the box in which I deposited my evaluation form and tip for my jump-mate (well done, Kevin).

Through this contract, the company does a thorough job of warning me of the dangers of the transaction, and preparing me for the fact that I will have no recourse in the event of injury. The first thing one notices is the words "DANGER" and "WARNING" splashed across each page. Thus, the reasonable patron would have a hard time arguing that he or she did not know that he or she was about to undertake an activity that was not risk-free.

Right at the top it says, with lots of capital letters, underlining, and exclamation points to make sure it is called to my attention:

**RELEASE OF RIGHTS & LIABILITY— ASSUME SELF-RESPONSIBILITY CONTRACT**

**WARNING!!!—EXTREME & SIGNIFICANT RISK & DANGER!!!!—WARNING!!!**

After some mundane stuff, the contract states the grim statistics (“Fatality Ratio = 1:75,000”) and again warns me of the dangers. Although some courts want the provider of the activity to enumerate the things that can go wrong in detail, here the company tells me generally that “[a]ll of the potential & significant risks, dangers, & possible tragic or fatal results which may occur cannot be expressed, foreseen [sic], or predicted.”

There follows the first checkbox I have to think about. It initially reminds me of what seems to be obvious—that I do not have to skydive or sign the contract. This is followed by the first explicit language of exculpation, though it is not particularly conspicuous: “I know that if I sign this contract, I am absolving the ‘Released Entities’ of all Liability, Responsibility, & Duty of Care.” This language is followed by my choice either to pay an extra \$500 and not sign, “this binding contract,” or pay nothing extra and sign, “this legal contract of my own free will.” I assume this difference in language is not significant—I do not think there is a difference between a binding contract and a legal contract, and I think free will is implied in choice “A”.

This provision should be clearer, but I think what the company is trying to say is that I can pay an extra \$500 and hold them liable for their negligence—like the choice in the medical service agreement advocated in *Nudge*, except that this provision is designed so that no one will choose the right to sue, especially since the \$500 cost of that right is almost twice the cost of the jump itself. It is confusing that this section starts off by telling me that “I do not have to skydive or sign this contract,” for I gather that if I pay the \$500 I do in fact get to skydive. And I have a contract to do that, just one that does not give me the right to sue. If the purpose of the extra fee is to enable the company to purchase insurance, then they are not helping themselves by discouraging the purchase of the right to sue. All of which makes me wonder if they have in fact purchased insurance. None of us wants to pay an extra \$500, so I choose “Option B” and move on.

The next provision consists of representations that I do not have health issues. I assume that if I reveal too much here, I will not get to jump, so I keep it to the minimum and initial it.

The final provision on this page says it contains an “Affirmed Pledge.” I have no idea what that is, nor do I see anything in the provision that resembles that species. In that section, I agree to do various things in connection with the “Covered Activities.” It is a bit of struggle to find that defined term, but I finally located it in Paragraph 1d:

**1d. All Forms of Direct or In-direct Participation, Association, or being within close Proximity to:** Ground & Air Transport, Aviation, Training, Skydiving, Parachuting, Tandem Jumping, Rigging, Observing, & all other Related, Component, Voluntary, Optional, &/or Required Activities, including interference from each, & attempts at Rescue or First Aid, are all intentionally & specifically integrated in this Contact & shall now be referred to inclusively & collectively as the **“Covered Activities”**.

It seems to cover everything. The final sentence in that provision must be important, because it is in bold print and underlined. It also continues the German tradition of capitalizing words here and there: **“My’ actual Exit or Jump out of an Airplane will be a physical demonstration of ‘My’ Acceptance & Agreement with this Contract.”** I have no idea what that means. I assume that the document I am signing is a bilateral contract, in which the company and I have both made promises. This language, on the other hand, makes it sound like I have been offered a unilateral contract—an offer to be accepted by performing an act—and jumping constitutes that act. But if that is the case, then not jumping would be not accepting. Since the “Covered Activities,” include more than the jump—e.g., the ride in the airplane itself—I would assume the company wants me to be bound even if I chicken out and do not jump. If it is a unilateral contract, then here is the acceptance:



The second page starts with some numbered paragraphs. Paragraph 1a is captioned: **“THESE ENTITIES & ACTIVITIES ARE COVERD BY THIS CONTRACT.”** I assume the intention was for that heading to go with Paragraph 1, of which “subsection a” is the entity represented by me. There I find that I am not only me, but **“I, me, my, mine, myself; but also as the**

**customer, student, passenger, observer, jumper, skydiver, associate, or participant.”** This definition seems like overkill, as the agreement makes no other reference to me as mine, customer, student, passenger, observer, jumper, skydiver, or associate, or participant.

Furthermore, I am not only signing as myself in these capacities but also **“as the only legal representative of my: “person, property, estate, heirs, beneficiaries, dependents, children, relatives, or spouse”, if any.”** What does this mean and why is some of it in quotes? I vaguely remember from law school that *nemo est haeres viventis*, something to the effect that I do not have heirs while I am alive. I gather the intention is to remind me that I might be dead in a few minutes, and I should consider the needs of all these folks who I am leaving without a claim on my behalf. But is this purporting to say that I am signing away their rights? Can I do that without their consent?

On page 1, we saw the first hint that I am exculpating the “Released Entities.” Now in Paragraph 1b, we see that these entities are defined as including the following (in enumerated form for grater readability and bolding left on those that were originally bolded):

**SkydiveLasVegas.com LLC,  
Skydive Las Vegas,  
the City of Boulder City,  
Boulder City Municipal Airport,  
BFE LLC,  
Boulder City Airport Properties LLC,  
Volatile Aero Ventures LLC,  
Volatile Air Ventures LLC,  
Volatile Sky Ventures LLC,  
Volatile Sky Sports LLC,  
Brent Buckner,  
Pacific Aerospace Limited,  
United Parachute Technologies LLC,  
Performance Designs,  
Precision Aerodynamics,  
SSK Industries Inc.,  
Airtec GmbH,  
Advanced Aerospace Designs,  
Vigil USA,  
the United States Parachute Association,  
all Travel, Tour, & Ticket Sellers,**



Advertisers,  
Promoters,  
Land Owners,  
Transporters,  
Concessionaires,  
Concierges,  
other Participants &  
“Good Samaritans”; as well as their  
Owners,  
Management,  
Employees,  
Independent Contractors,  
Tandem Instructors,  
Instructors, &  
Camera Men;

We shall have occasion shortly to attempt to count these entities, but for now all we are interested in is the definition. The sentence is odd, however, for after this enumeration it picks up with:

[I]ncluding but not limited to all of their Singular or Collective: Inabilities, Failures, Short Comings, Bad Judgments, Wrong Decisions, Mistakes, Actions or Inactions, Errors or Omissions, & all forms of Oversight & Simple or Gross Negligence, all of which are intentionally & specifically included in this Contract, & shall now be referred to inclusively & collectively as the “Released Entities”.

I assume the intention here was to tell me that I have exculpated the released entities. Instead, their mistakes, negligence, etc. are all defined as part of the “Released Entities,” which makes no sense. I think it unlikely that a court would find that the definition is sufficient to do the substantive work of exculpating the entities. Furthermore, the drafter has made the mistake of attempting to release from “Gross Negligence.” That is a no-no, and if the provision is deemed to be an exculpatory clause, its breadth may be fatal to the effort. Most courts that enforce exculpatory clauses enforce them only if they exculpate a party from simple negligence.<sup>92</sup> By including gross negligence, the drafter has run the risk of having the exculpatory clause thrown out as overly broad. It could be saved by severance of those words, so a severability provision might also be helpful, but the contract does not contain one.

92. *Kuzniak v. Brookchester, Inc.*, 33 N.J. Super. 575 *passim* (App. Div. 1955).

In Paragraph 1c, I agree that everyone is an independent contractor and not liable for the actions of the others. All well and good, but either they are or they are not and my agreeing that they are, is not going to make them so.

Paragraph 1d is the definition of “Covered Activities” that was first used on page 1 and henceforth will be used a number of times in the agreement.

Paragraph 2 (**TANDEM HARNESS ADJUSTMENTS, & CLOSE PERSONAL CONTACT**) starts off fairly sensibly. It indicates with particularity what I can expect as a normal part of this activity, so I will not be taken by surprise. It seems to go too far, however, when it says, “I hereby accept this process and absolve the ‘Released Entities’ from any claims of inappropriate physical or sexual contact, abuse, or harassment.” What is intended is that I should not make a claim merely because of contact that is a normal part of the activity. But to release all claims goes too far, for there could be inappropriate contact that is not a normal part of the activity.

Paragraph 3 informs me that there is no insurance coverage for me and that I should obtain my own insurance to cover the people listed in Subsection 1a in the event of my death or injury. This one also seems sensible. This is not to say that the covered entities are not covered by insurance, however.

Paragraph 4 is right out of a contract for the sale or lease of goods, and probably effectively disclaims the implied warranty of merchantability and fitness for a particular purpose to the extent this is a sale of goods under Article 2 or a lease of goods under Article 2A. Most jurisdictions would find it is not, for the principal purpose of the transaction is to make a jump, of which use of the parachute is incidental.<sup>93</sup> Once again, someone is fond of unilateral contracts for the provision states that “Use of the ‘Released Entities’ items, equipment, & aircraft shall be deemed to be ‘My’ admission & endorsement as to its safe & acceptable condition.” This again seems like overkill. If I have signed an effective disclaimer, then it does not matter that I use it. This does not make it any more of a disclaimer. The final sentence is probably a good idea: “No one has any expressed or implied authority to make any warranty, representation, or guarantee of any nature on behalf of the ‘Released Entities’, nor to exclude or limit the effect of this disclaimer.” This operates to remind me that nothing anyone says to me counts. That statement should be coupled with a merger clause to help exclude parol evidence, but a merger clause is curiously lacking.

93. Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974).

Like a number of the other provisions, Paragraph 5a almost comes out and has me exculpate others from their negligence but it does not quite say that. It makes sure that I understand there will be risks. I then agree to accept all of those risks. But the drafter again goes too far, for I accept those risks “regardless of any results being **Foreseen or Unforeseen, Intentional or Accidental, Contemplated or not Contemplated, Obvious or Hidden, or through Omission or Commission.**” A previous section had me give up claims for gross negligence. This one has me accept the risk even if it is “intentional . . . contemplated, . . . or through Commission.” I very much doubt that a court is going to agree that I accepted the risk that the company was going to throw me out of a plane with the intention of killing me. And if the provision goes too far, this might be fatal to the entire attempt at exculpation.

Similarly, in Paragraph 5b, I assume all responsibility for what happens. This provision is helpful in letting me know specifically what might go wrong, but again it goes too far when I agree to be responsible for “active or passive **Simple or Gross Negligence.**”

In Paragraph 6, we finally get to the straightforward exculpatory clause. It is pretty well drafted, for it indicates that I know the “Significant Risks & Dangers,” which have been pointed out to me in other provisions. But it may also go too far in having me agree to exculpate from gross negligence.

Even if an entity has an exculpatory clause in its contract, the exculpated entity does not like to be sued, because it can cost a lot of money just to defend the suit. Therefore, the next few provisions try to discourage me from bringing suit. Paragraph 7, is straightforward in getting me to agree not to seek compensation or sue the Released Entities. Paragraph 8a, among other things, tells me that I will have to pay the attorney fees of the Released Entities, which can be another disincentive to bring a suit. But the mother of all *in terrorem* clauses trying to keep me from bringing suit is the liquidated damages clause in Paragraph 8b:

8b. IF “I” TAKE PART IN ANY LAWSUIT, I WILL PAY \$50,000 IN LIQUIDATED DAMAGES

If “I” take any part in any Lawsuit, for any reason against the “Released Entities”, “I” agree to pay \$50,000 in Liquidated Damages to each of the “Released Entities” immediately upon the filing of any Legal Action, & regardless of any future outcome. I agree that the liquidated damages are not a penalty, but rather a down payment towards the damages that I will be causing the “Released Entities.”

Liquidated damages clauses are favored by economists but not by many courts. However, everyone agrees that the purpose of a liquidated

damages clause is for the parties to make the lawsuit more efficient by agreeing to the amount of damages in advance. Therefore, the amount must represent the anticipated loss. In this provision, the damages are payable on bringing a lawsuit, not on finding that a cause of action has been proven. It seems, therefore, that these “damages” are those that result from my having breached my Paragraph 7 promise not to bring a lawsuit. The amount of these liquidated damages is \$50,000 per entity. The drafter must have known that the first rule of tort law seems to be “sue everyone in sight.” As we saw in the definition of Released Entities, here there are at least twenty-seven potential defendants to choose from. If I brought a claim against a modest ten of them, then I would have to fork over \$500,000 on bringing the suit. Is that an unreasonable amount? Apparently not, for I freely stated that “I agree that the liquidated damages are not a penalty, but rather a down payment towards the damages that I will be causing the ‘Released Entities.’” These are odd liquidated damages, indeed, for I have not only agreed that they are not a penalty, but I have also agreed that this is not even a liquidation of the damages; it is merely a down payment. So, presumably, the entities intend to recover their actual damages in spite of the presence of the liquidated damages clause. Curiously, the agreement does not otherwise state that “I” am responsible for the legal fees of the prevailing party.

Paragraph 9 is a hodgepodge. I agree that the contract and videos may be used as evidence to show that I voluntarily consented to the Contract. I would assume there is no reason those would be excluded from evidence. The next sentence turns the interpretive world upside-down: “If a Court should decide that any part of this Contract is unclear or un-enforceable, I agree that (a) any uncertainty shall be construed in a manner most favorable to the ‘Released Entities.’” The standard rule of interpretation is *contra proferentem*—the instrument is to be construed against the party who drafted it. The goal of contract interpretation is to ascertain the intention of the parties. *Contra proferentem* does not really serve that goal, for unlike the other rules, it does not represent an attempt to discover that intent. Rather, it resolves what would otherwise be a tie by putting the blame on the party who caused the ambiguity to arise through their drafting. It makes no sense to try to change that rule. First of all, in the event of ambiguity, the contract should be interpreted using all rules of interpretation in order to ascertain its meaning. Second, if those interpretive devices all fail, there is no reason to interpret it against me, who was blameless in its drafting. Can I freely agree to take the fall for the drafter? If I were the court, I would not let the

parties dictate to me what rules of interpretation I can use as a matter of law.<sup>94</sup>

The next sentence tells me that contract remains in effect, which is fine, and that it is legally binding upon everyone listed in Paragraph 1a, which is nonsense, since I do not have authority to bind them. It also has a no oral modification clause and a choice of venue and choice of law clause, which are probably fine.

For purposes of showing procedural unconscionability, Paragraph 10 is a classic. Not only do I agree to exculpate the Released Entities, but to show that I read and understood that provision, I actually have to write it out in longhand. I have no objection to this technique, and agree that it might show my agreement in the sense that I knew it was in the contract, but I am not sure that writing it shows my understanding any more than reading it did. In Montana, where courts love to throw out contract terms because people did not read or understand them, I was asked by someone to sign a letter on his behalf. This letter stated that I, as an attorney, affirmed that he had read and understood the terms! I was willing to affirm that he had read them, that I had explained them to him, and that he said he understood them, but whether he understood them would require me to construct some sort of measure and I was not willing to affirm that based just on his say-so.

The next page contains a bunch of details connected with the jump procedures that do not have much legal consequence. But there are many more opportunities for me to initial to show my agreement. The final paragraph just above my signature line contains a lot of legal stuff:

I AM AT LEAST 18 YEARS OLD AND HAVE SEEN AND HEARD THE "LEGAL CONTRACT VIDEO". I UNDERSTAND THE ABOVE INSTRUCTIONS & TRAINING. I HAVE CAREFULLY READ THIS CONTRACT; AGREE WITH ITS COMMITMENTS & AM SIGNING OF MY OWN FREE WILL WITHOUT DURESS. I HAVE NO QUESTIONS AND I AM READY TO JUMP. I UNDERSTAND BY SIGNING THIS LEGAL CONTRACT I AM FOREVER GIVING UP IMPORTANT LEGAL RIGHTS AND IT IS MY DESIRE TO DO SO.

So how does this attempt at exculpation measure up? If I were a judge, I would first apply the *Tunkl* test as elements, as I have argued it should be applied, and I would find that this is a private activity that I was free not to participate in, so an exculpatory clause is appropriate. I would also find that I manifested a real assent to the agreement and that the dangers of the activity were brought home to me. The terms were communicated to me in

94. See Scott J. Burnham, *Contracting Around Contra Proferentem*, 3 THE TRANSACTIONAL LAWYER 6 (June 2013).

plain English. However, I would be troubled by the fact that the clause went beyond exculpation from ordinary negligence, and on that basis I would throw it out.

APPENDIX: A SKYDIVING CONTRACT

**RELEASE OF RIGHTS & LIABILITY – ASSUME SELF-RESPONSIBILITY CONTRACT**  
**WARNING!!!! -- EXTREME & SIGNIFICANT RISK & DANGER!!!! -- WARNING!!!!**

Name: \_\_\_\_\_ Today's Date: \_\_\_\_\_  
(Last Name) (First Name) (Middle Name) (Month) (Day) (Year)

Address: \_\_\_\_\_ Age: \_\_\_\_\_ Weight: \_\_\_\_\_  
(Street Address) (From Scale)

Address: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(City) (State) (Zip/Postal Code) (Month) (Day) (Year)

Contact Phone: (\_\_\_\_\_) \_\_\_\_\_ E-Mail Address: \_\_\_\_\_  
 If you prefer not to receive occasional email updates from SkydiveLasVegas.com, please indicate here by writing "NONE" \_\_\_\_\_

Emergency Contact: \_\_\_\_\_ Emergency Phone: (\_\_\_\_\_) \_\_\_\_\_

HOW DID YOU HEAR ABOUT US? \_\_\_\_\_  
 WHY DID YOU BOOK WITH OUR COMPANY? \_\_\_\_\_

**U.S. PARACHUTE ASSOCIATION ANNUAL SKYDIVING STATISTICS IN THE U.S. FOR 2000-2006**  
 Average Skydives Per Year = 2.2 Million Average Injuries Per Year = 1000 Average Fatalities Per Year = 30  
 Injury Ratio = 1:2,200 Fatality Ratio = 1:75,000 \*Approximate Statistics from USPA \*Not Specific to Tandem Skydiving

**\*ALL FORMS OF SKYDIVING, AVIATION, & ALL RELATED ACTIVITIES ARE DANGEROUS & CAN RESULT IN MAJOR PERMANENT INJURY, PAIN & SUFFERING, and/or DEATH. ALL OF THE POTENTIAL & SIGNIFICANT RISKS, DANGERS, & POSSIBLE TRAGIC OR FATAL RESULTS WHICH MAY OCCUR CAN'T BE EXPRESSED, FORESEEN, OR PREDICTED.**  
 \* I AM RESPONSIBLE FOR MY OWN SAFETY AT ALL TIMES.  
 \* NO OTHER ENTITY IS EVER RESPONSIBLE OR LIABLE FOR MY SAFETY.  
 \* I will Read each Section carefully & indicate Agreement & Consent with My Initials  
 \* All Activities will be Video Taped & may be used in Court to show my Voluntary Agreement & Participation.

**! DON'T HAVE TO SKYDIVE OR SIGN THIS CONTRACT – I HAVE LEGAL OPTIONS**  
 I know that Skydiving is an Option; I can change my mind at any time. I REALIZE THAT I DON'T HAVE TO SIGN THIS LEGAL CONTRACT. I know that if I sign this contract, I am absolving the "Released Entities" of all Liability, Responsibility, & Duty of Care. **IFREELY CHOOSE EITHER OPTION A or B:**

A. **PAY AN EXTRA \$500 & NOT SIGN THIS BINDING CONTRACT**  A \_\_\_\_\_  
Initial either block A or B

B. **PAY NOTHING EXTRA & SIGN THIS LEGAL CONTRACT OF MY OWN FREE WILL**  B \_\_\_\_\_

**I have no Health Condition or Issue** that could affect my Participation, or **Circle all Health Problems:**  
 Heart, Nerves, Lungs, Breathing, Orthopedic, Prosthetics, Allergy, Sinus, Blood, Pregnancy, Diabetes, Fainting, Seizures, Hearing, Vision, Recent SCUBA (within 24 hours), Drugs/Alcohol, Psychological, Hypertension, Joints, Previous Injuries and/or Surgeries \_\_\_\_\_ Other Problem (or write "None"): \_\_\_\_\_  
**My Overall General Health is:** \_\_\_\_\_ **All of the Above is TRUE (Initial):** \_\_\_\_\_

**MY RESPONSIBILITIES & AFFIRMED PLEDGE**

I am currently now **100% ALCOHOL & DRUG free** and have not used either within the last 8 hours, nor will I in the future prior to associating within the "Covered Activities". I agree to return all equipment in the same condition and to pay for any lost, stolen, or damaged equipment. All Skydiving and Video/Picture Services are considered services rendered, are non-refundable, shall be used only for my "personal, non-commercial, non-profit" enjoyment and may be used by SkydiveLasVegas.com for any and all advertising purposes. Actual exit altitude (msl) may vary depending on several factors which may be beyond our control, such as but not limited to weather or air traffic control. I will not participate or associate unless I agree with this Contract, have been completely trained & have no further questions or concerns. **"My" actual Exit or Jump out of an Airplane will be a physical demonstration of "My" Acceptance & Agreement with this Contract.** Initial if agreed with \_\_\_\_\_

FOR OFFICE USE ONLY

JUMP	VIDEO	OTHER	TOTAL
PAID FOR	PAID BY	CASH / CC / TR	

**1a. THESE ENTITIES & ACTIVITIES ARE COVERED BY THIS CONTRACT**

I am not only signing as an individual, hereafter singularly referred to as: "I, me, my, mine, myself; but also as the customer, student, passenger, observer, jumper, skydiver, associate, or participant"; & also collectively, inclusively, on behalf of, and as the only legal representative of my: "person, property, estate, heirs, beneficiaries, dependents, children, relatives, or spouse", if any.

Initial if agreed with

**1b. SkydiveLasVegas.com LLC, Skydive Las Vegas, the City of Boulder City, Boulder City Municipal Airport, BFE LLC, Boulder City Airport Properties LLC, Volatile Aero Ventures LLC, Volatile Air Ventures LLC, Volatile Sky Ventures LLC, Volatile Sky Sports LLC, Brent Buckner, Pacific Aerospace Limited, United Parachute Technologies LLC, Performance Designs, Precision Aerodynamics, SSK Industries Inc, Alrtec GmbH, Advanced Aerospace Designs, Vigil USA, the United States Parachute Association, all Travel, Tour, & Ticket Sellers, Advertisers, Promoters, Land Owners, Transporters, Concessionaires, Concierges, other Participants & "Good Samaritans", as well as their Owners, Management, Employees, Independent Contractors, Tandem Instructors, Instructors, & Camera Men; including but not limited to all of their Singular or Collective: Inabilities, Failures, Short Comings, Bad Judgments, Wrong Decisions, Mistakes, Actions or Inactions, Errors or Omissions, & all forms of Oversight & Simple or Gross Negligence, all of which are intentionally & specifically included in this Contract, & shall now be referred to inclusively & collectively as the "Released Entities".**

Initial if agreed with

**1c. Everyone who Assists or Associates with "Me" is an independent Entity or Contractor** & therefore is not responsible or liable for any decisions, actions, in-actions, errors, or negligence of any other "Released Entity" or Independent Contractor. "I" will hold each of the "Released Entities" harmless for the Actions or Inactions of the others. For simplicity, "I" request that SkydiveLasVegas.com collect & distribute all of the fees that I owe to the other "Released Entities".

Initial if agreed with

**1d. All Forms of Direct or In-direct Participation, Association, or being within close Proximity to** Ground & Air Transport, Aviation, Training, Skydiving, Parachuting, Tandem Jumping, Rigging, Observing, & all other Related, Component, Voluntary, Optional, &/or Required Activities, including interference from each, & attempts at Rescue or First Aid; are all intentionally & specifically integrated in this Contract, & shall now be referred to inclusively & collectively as the "Covered Activities".

Initial if agreed with

**2. TANDEM HARNESS ADJUSTMENTS, & CLOSE PERSONAL CONTACT**

"I" accept that "I" will be touched & handled, without proper manners, in Personal areas that "I" consider to be Private, &/or Offensive. "I" will wear a harness that will necessitate "my" body being in tight contact with the Instructor. "I" hereby accept this process and absolve the "Released Entities" from any claims of inappropriate physical or sexual contact, abuse, or harassment.

Initial if agreed with

**3. "I" UNDERSTAND THAT THERE IS NO INSURANCE COVERAGE FOR "ME"**

"I" accept that the "Released Entities" do not provide any insurance for "Me"; neither medical, disability, completed operations, product liability, strict liability, nor life insurance for any injury, loss, damage, death, or claim which may result from "My" association within all "Covered Activities". "I" hereby give up all rights, & benefits from any insurance policy in which the "Released Entities" may be named as insured. Considering "My" lifestyle, & the manner in which "I" may be supporting everyone in Paragraph 1A above, "I" have already provided any needed insurance, & have made adequate future provisions for "Myself"; & everyone in Paragraph 1A above; so that in the event of "My" injury, disability, damage, death, or loss everyone in Paragraph 1A above will suffer no financial, economic, or recoverable loss.

Initial if agreed with

**4. All WARRANTIES, REPRESENTATIONS, GUARANTEES of MERCHANTABILITY or FITNESS FOR ANY PARTICULAR PURPOSE** of any nature are hereby expressly disclaimed. The "Released Entities" are: (a) selling, renting, lending, packing, rigging, repairing, & allowing others & "Myself" use their facility, equipment, & aircraft only on an "AS IS BASIS"; & (b) have not, & do not make, any representation, guarantee, or warranty of merchantability, nor fitness for any particular purpose, regarding any such operation(s), facility, equipment &/or aircraft. If for any reason "I" am not satisfied with any offered items, equipment, or aircraft, "I" may provide my own. Use of the "Released Entities" items, equipment, & aircraft shall be deemed to be "My" admission & endorsement as to its safe & acceptable condition. No one has any expressed or implied authority to make any warranty, representation, or guarantee of any nature on behalf of the "Released Entities", nor to exclude or limit the effect of this disclaimer.

Initial if agreed with



**5a. "I" ACCEPT ALL RISKS, DANGERS, & RESULTS IN THE "COVERED ACTIVITIES".** "My" Voluntary Association within the "Covered Activities" will expose "Me" to the **Unavoidable, Unpredictable, & Significant Risk of Permanent Major Injury, Pain, Suffering, Damage, Death, & "Emotional Distress"**. In return for the option of Associating within the "Covered Activities", "I" Freely & Voluntarily Accept **ALL** of the Inherent Significant Risks, Dangers, & Potentially Tragic &/or Fatal Results, regardless of the Cause or Reason; and regardless of any results being **Foreseen or Unforeseen, Intentional or Accidental, Contemplated or not Contemplated, Obvious or Hidden, or through Omission or Commission.**

Initial if agreed with

**5b. "I" Assume ALL Current & Future RESPONSIBILITY, LIABILITY & "DUTY OF CARE" for "Myself"; no matter what results may occur; what may happen to "Me" & regardless of the Cause or Reason.** The results of "My" association within the "Covered Activities" are dependent upon: "My" own & the "Released Entity's" **Actions or Inactions, Performance or Non-performance, & the condition, function, use, misuse & maintenance of the equipment, aircraft, airspace, & landing areas.** **I understand that each component Cannot be Relied Upon to Operate Perfectly, if at all.** Each of them may be subject to: active or passive **Simple or Gross Negligence, Physical &/or Mental Blunder, &/or mechanical malfunction,** along with defects in design, manufacture, assembly, packing, rigging, instruction, improper or careless use, weather, wind, acts of nature &/or God.

Initial if agreed with

**6. "I" ABSOLVE THE RELEASED ENTITIES FROM ALL RESPONSIBILITY, LIABILITY & CLAIMS**  
Understanding the above Significant Risks & Dangers, "I" **Forever Exempt, Release, & Hold Harmless** the "Released Entities" from all current & future responsibility, liability, duty of care, &/or claims arising out of any loss, injury, pain, suffering, damage, death, &/or "Emotional Distress" while associating within the "Covered Activities", even if it is the result of **Simple or Gross Negligence, Oversight, or Error.**

Initial if agreed with

**7. "I" PROMISE NOT TO SEEK ANY COMPENSATION, nor SUE THE "RELEASED ENTITIES"**  
Understanding the above Significant Risks & Dangers, "I" **Agree & Promise** not to seek any compensation from, nor to demand, claim, or sue, the "Released Entities" under any Cause of Action available in Law or in Equity; for any claim, loss, injury, pain, suffering, damage, death, &/or "Emotional Distress" arising from "my" or anyone else's association within the "Covered Activities".

Initial if agreed with

**8a. If "I" TAKE PART IN ANY LAWSUIT, I WILL PAY ALL COSTS, FEES, & JUDGMENTS**  
If "I" take any part in any Legal Action, for any reason against the "Released Entities", "I" agree to immediately pay all of the "Released Entity's" attorney fees, costs, awards, verdicts, & "Judgments Against the Released Entities", which may be awarded, granted, or won; regardless of any future verdict.

Initial if agreed with

**8b. If "I" TAKE PART IN ANY LAWSUIT, I WILL PAY \$50,000 in LIQUIDATED DAMAGES**  
If "I" take any part in any lawsuit, for any reason against the "Released Entities", "I" agree to pay \$50,000 in Liquidated Damages to each of the "Released Entities" immediately upon the filing of any Legal Action, & regardless of any future outcome. I agree that the liquidated damages are not a penalty, but rather a down payment towards the damages that I will be causing the "Released Entities".

Initial if agreed with

**9. THIS RELEASE & WAIVER CONTRACT & ALL VIDEOTAPES MAY BE USED IN COURT**  
I agree that: This Contract, & all Videos & Photos, may be used in any Legal Action as evidence of "My" (a) understanding & voluntary consent with this Contract, & (b) "My" voluntary association within all "Covered Activities". If a Court should decide that any part of this Contract is unclear or un-enforceable, I agree that (a) any uncertainty shall be construed in a manner most favorable to the "Released Entities" & (b) any partial un-enforceability shall not affect the validity or enforceability of the remaining parts. This Contract shall remain in full force & effect (a) now, (b) infinitely into the future, & (c) each time "I" associate within the "Covered Activities." This Contract shall be legally binding upon everyone listed in Paragraph 1A above, & may only be amended in writing. The venue of any Legal Action filed relative to this Contract shall remain in; & this Contract shall be construed & enforced with, the Laws of Clark County, Nevada.

Initial if agreed with

10. I will PROVE MY UNDERSTANDING & AGREEMENT BY COPYING THE FOLLOWING SENTENCE:  
I absolve the "Released Entities" from all Responsibility, Liability and Duty of Care for any loss, injury, death or claim resulting from my association within the "Covered Activities"

11. TANDEM TRAINING REVIEW: Please INITIAL EACH if you understand. If not, ask an instructor!  
(Initial Each)

- I know that I COULD BE INJURED OR KILLED IN THE COVERED ACTIVITIES.
- I know that the "Released Entities" have NO INSURANCE COVERAGE FOR ME.
- I know that by signing this Contract, I am giving up my Right to Sue & Recover All Claims.
- I don't have to sign this Contract or Skydive. I CAN CHANGE MY MIND ANY TIME.
- Use the Restroom, Remove & Lock-Up all Valuables, Nothing In Mouth, Tie Shoe Laces Tight.
- Wait to be escorted to the Airplane to load or practice the "Climb-Out and Exit".
- The "Arch" or "Freefall" Body Position, Breathing, Head Up, Arms Bent.
- The Canopy Opening, Loosening the Harness, Clearing the Ears, Steering the Canopy.
- The Landing Position: Lean Back, Feet Out in Front, Knees Bent, Toes Up, Land on Feet
- Land on Feet, Slide/Skid In, Don't Run or Stand upon Landing, Don't Move if you are Light-Headed.

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1. NEVER CROSS the ORANGE CONES UN-ESCORTED</li> <li>2. NEVER REACH BEHIND ME AT ANYTIME</li> <li>3. NEVER GRAB the INSTRUCTOR'S HANDS</li> <li>4. NEVER TOUCH ANYTHING in the PLANE</li> </ul> | <ul style="list-style-type: none"> <li>5. ALWAYS REMEMBER the ARCH or FREE-FALL BODY POSITION for FREE-FALL</li> <li>6. LAND with FEET OUT, KNEES BENT, TOES UP, &amp; SKID/SLIDE in for LANDING</li> </ul> |
|--|---|

I UNDERSTAND THAT MY SKYDIVE EXPERIENCE WILL TAKE APPROXIMATELY 4 HOURS TO COMPLETE AND THAT VARIOUS FACTORS WILL DETERMINE MY JUMP ORDER, SUCH AS BUT NOT LIMITED TO RESERVATION TIME, ARRIVAL TIME, GROUP SIZE, WEIGHT, ETC. ALL SALES FINAL. Initial if agreed with

I UNDERSTAND THAT MY ACTUAL EXIT ALTITUDE MAY VARY DEPENDING ON SEVERAL FACTORS WHICH MAY BE BEYOND OUR CONTROL, SUCH AS BUT NOT LIMITED TO WIND, WEATHER, TEMPERATURE, WEIGHT, AIR TRAFFIC CONTROL, ETC. ALL SALES FINAL. Initial if agreed with

I UNDERSTAND THAT IF I HAVE OPTED TO PURCHASE ANY VIDEO/PICTURE SERVICES THEY WILL BE PRODUCED FOR ME WHILE I WAIT AND GIVEN TO ME BEFORE I LEAVE. SHIPPING AND HANDLING IS NOT INCLUDED OR PROVIDED. ALL SALES FINAL. Initial if agreed with

I UNDERSTAND THAT IF I DO NOT RECEIVE MY VIDEO/PICTURE SERVICES BEFORE I LEAVE THAT I WILL BE REQUIRED TO PAY FOR SHIPPING & HANDLING WHICH IS CURRENTLY \$10 FOR THE CONTINENTAL U.S. OR \$20 FOR ANYTHING OUTSIDE THE CONTINENTAL U.S. ALL SALES FINAL. Initial if agreed with

ALL VIDEO/PICTURE SERVICES, WHETHER PURCHASED OR NOT, ARE CONSIDERED SERVICES RENDERED, ARE NON-REFUNDABLE, AND MAY BE USED BY SKYDIVE LAS VEGAS.COM FOR ANY AND ALL PURPOSES, INCLUDING BUT NOT LIMITED TO ADVERTISING, PROMOTIONS, ETC. ALL SALES FINAL. Initial if agreed with

ANY VIDEO/PICTURE SERVICES BELIEVED TO BE DEFECTIVE MUST BE RETURNED TO SKYDIVE LAS VEGAS WITHIN 30 DAYS OF RECEIPT FOR INSPECTION. DEFECTIVE ITEMS WILL BE REISSUED FREE OF CHARGE. DAMAGED ITEMS MAY BE REORDERED FOR A FEE IF STILL AVAILABLE. ALL SALES FINAL. Initial if agreed with

I VERIFY THAT I HAVE CHOSEN VIDEO SERVICE \_\_\_\_\_ WHICH CONSISTS OF THE \_\_\_\_\_ SERVICE(S) AND THAT I FULLY UNDERSTAND WHAT THE SERVICE(S) CONSISTS OF AND ANY SPECIAL SOFTWARE AND/OR HARDWARE REQUIREMENTS. ALL SALES FINAL. Initial if agreed with

I AM AT LEAST 18 YEARS OLD AND HAVE SEEN AND HEARD THE "LEGAL CONTRACT VIDEO". I UNDERSTAND THE ABOVE INSTRUCTIONS & TRAINING. I HAVE CAREFULLY READ THIS CONTRACT; AGREE WITH ITS COMMITMENTS & AM SIGNING OF MY OWN FREE WILL WITHOUT DURESS. I HAVE NO QUESTIONS AND I AM READY TO JUMP. I UNDERSTAND BY SIGNING THIS LEGAL CONTRACT I AM FOREVER GIVING UP IMPORTANT LEGAL RIGHTS AND IT IS MY DESIRE TO DO SO.

X \_\_\_\_\_ Date: \_\_\_\_\_ X \_\_\_\_\_  
My Signature (Month) (Day) (Year) Informed by a Third Party Witness (Date)

