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New Mexico Board of Bar Examiners

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Memorandum

To: Deanna Hall

From: Applicant

Date: February 26, 2008

RE: Liability waiver for Velocity Park

I am writing this memorandum in response to your request to provide advise on specific questions raised by our client, Zeke Oliver (hereafter, "Client") with regard to a liability waiver for his new business venture, Velocity Park (hereafter "the Park") located in Banford, Franklin. You requested guidance regarding possible problems with a draft liability waiver provided by Client including recommended revisions that may better ensure the waiver will be upheld in court should there be an accident at the Park. Further, you asked me to review whether a waiver signed by a minor would be enforceable in a court of law.

Enforceability of Liability Waivers

"Waivers of liability, also know as exculpatory contracts, are permitted under Franklin law except when prohibited by statute or public policy." (Lund v. Wim World, Inc., FSC, 2005). However, public policy can restrict freedom of contract for the good of the community if the contract, or waiver, allows a tortfeasor to contact away responsibility for negligent acts and therefore encourages conduct below a socially acceptable standard of care. (Id.) In this case, therefore, Client may limit or lessen his liability at the Park by contract with a written waiver. The key to an enforceable waiver is the nature of the waiver, its contents and the capacity of signators to sign away certain legal rights.

In Lund, quoting from Schmidt v. Tyrol Mountain, the Court set forth two requirements for an enforceable exculpatory clause. (Note that the Court uses words of "release", "waiver" and "exculpatory agreement" interchangeably for purposes of this discussion.) "First, the language of

the waiver cannot be overbroad but must clearly, unambiguously, and unmistakably inform the signer of what is being waived. Second, the waiver form itself, viewed in its entirety, must alert the signer to the nature and significance of what is being signed." (Id.) Therefore, overly broad language such as contained in the Client's waiver, including text that calls for "forever release, acquit, covenant not to sue, and discharge ... employees, event sponsors, and any third parties from any and all legal liability ...of whatever kind I have and which hereafter accrue to me ..." would be interpreted by the Court as overbroad and therefore unenforceable as against public policy.

Furthermore, the Court provides certain guidelines for waivers. First, waivers generally are construed against the party seeking to shield itself from liability. Ambiguous, overbroad and overreaching language would be construed, therefore, against the Client. In addition, release forms such as the Client's draft waiver that serve two purposes and those that are not conspicuously labeled as waivers are held insufficient. Waivers also must be clear, and expressly indicate the signor's intent to release the Park from its own negligence, if indeed that is intended by the waiver. "Negligence" must be clearly waived, and not merely assumed when the release provides of a undefined "risk" as contained in the Client release. An enforceable waiver cannot waive intentional or reckless acts in any case. In sum, waivers only will bar claims that the parties contemplated when they executed the contract. The waiver must be clear on its face regarding the bargained for agreement.

Our Client also should be made aware of circumstances in the execution of the waiver that may make the waiver ineffective. In *Lund*, patrons were waiting in line behind the plaintiff, thus appearing to pressure her to sign the agreement. This circumstance also is relevant to the Court's consideration of the bargaining power and positions between the parties. Although an unequal bargaining position may not automatically render the waiver void, it will be considered by the Court. In our case, it is easy to anticipate that lines of children awaiting entry to the Park will be viewed by a Court as pressure to sign.

Finally, there is law in the neighboring state of Columbia that provides that certain waivers are

enforceable as against minor children and their parents when applied to nonprofit organizations. In the Columbia case, parents signed a waiver of liability for physical injuries as a result of soccer play. The case is distinguishable on several fronts, including the limited nature of the waiver under review, the Court's discussion of public policy focused on non-profit and volunteer organizations, and the fact that the law is not binding in our state.

Revisions to Client's Waiver

I would recommend the following revisions to the waiver as written:

Waiver should be on a separate form/document clearly titled as a waiver

Waiver should be in clear, bold type, perhaps on a different color paper as the Park rules.

Waiver should be signed by parents and child (see below)

Waiver should clearly release Park from negligent acts of our Client, and from specific injury conditions such as pebbles, bottle caps and other material that may cause injury.

Waiver should list specific injuries that might result from skateboarding, including those listed in the newspaper article. (Client also should require additional protective gear as mentioned in article).

Signors should be provided time to read the waiver, and be asked by employees if they understand the waiver. I would recommend that employees be well versed in the provisions of the waiver and be able to clearly explain their meaning to each minor or skater before signing.

Minor Signing of Waiver

Franklin statutory law provides that minors may not enter into contracts for real property.

While not specifically on point, it is most likely the Court would find that minors may not enter into contracts that restrict their right to enforce claims against Client in the event of personal injury or death and that such agreements would be void. The newspaper article gives notice to the fact that skateboarding is a dangerous sport resulting in injury. Such injury arguably is more important than an injury that might come from breach of a real estate contract. We can infer from the statute that a minor would not be able to legally sign away his rights here. Further, the Court in the Lund case cited above states that the bargaining positions of the parties will be taken into effect. Even assuming that a calm, contemplated atmosphere will be available for minors in which to read and sign the waiver, the Court may find that given the age and reasoning of the parties, the release is ineffective and void when signed solely by the minor. Therefore, all children under the age of 18 must have their parents sign the release as modified as well in the circumstances discussed, i.e., with as full disclosure and clearly explained as possible.

END OF EXAM