

**R**eleases, waivers of liability, assumption of risk agreements and prospective exculpatory covenants—these are all words expressing the singular concept that an injured party cannot be made whole because he signed a piece of paper. And use of those words is becoming more and more prevalent. It is the rare activity that does not require a participant to sign a release or that has one preprinted on the back of an admission ticket.

The circumstances surrounding the reading of the release are generally the same. Moments before starting an activity, a dense document is presented for signature. The only explanation from the provider about the document is that it is “a formality” or “procedure.” Worse are the cases where the release is preprinted on the back of an admission ticket—where mere entry into a facility consents to all but the most egregious acts.

Arizona law disfavors these attempts by defendants to avoid responsibility for actions, and our courts examine releases with a skeptical eye.<sup>1</sup> In personal injury cases, especially, trial lawyers should take an aggressive approach and challenge the validity and application of the release. Recent developments, both in Arizona and other states, provide support for the proposition that unless a defendant meaningfully educates a participant as to both the release and the risks involved, the release is invalid as a matter of law.

To see the proposition in action, let’s examine the case of a motocross participant

who is injured.

While riding motocross at his local track, Michael Rogers crashed into the bucket of a front-end loader that Wallace Saunders, the track operator, improperly hid behind a tabletop obstacle. Rogers shattered both of his legs and brought suit against Saunders and his track. Saunders raised the defense that Rogers’ claim was barred because he signed a document titled “Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement” before riding. The release

approach to releases in personal injury actions, combined with similar decisions in other jurisdictions, trial lawyers should aggressively challenge any argument that attempts to insulate a defendant from liability based on a release, especially when the injured client is a minor.

### What Do Releases Limit?

Although Arizona jurisprudence traditionally has recognized a strong policy of freedom of contract,

there are instances in which public policy considerations for preserving an obligation of care about one person to another outweigh traditional regard for a freedom of contract. The Arizona Supreme Court has ruled that contracts intending to release one’s self from liability must be strictly construed against the enforcing party.<sup>2</sup> Our Supreme Court has recognized that, “The law disfavors contractual provisions by which one party seeks to immunize himself

against the consequences of his own torts.”<sup>3</sup>

And under long and well-established Arizona law, releases only limit a defendant’s liability for risks specifically contemplated by the release. In *Valley National Bank v. Tang*,<sup>4</sup> one of the earliest Arizona cases dealing with the issue of the prospective release of liability, the court noted, “It is ... necessary that the express terms of the



## Please Release Me

### Prospective Exculpatory Covenants in Arizona

BY DEV K. SETHI

contained language that insulated Saunders from liability—even liability created by his own negligence. Does this release protect Saunders from liability? Would it make a difference if Rogers had been a minor and had his parent sign the document?

Under current Arizona law, a court should hold that the release has no application—regardless of whether Rogers was an adult or minor. Given Arizona courts’

agreement be applicable to the particular misconduct of the defendant.”<sup>5</sup> This does not mean that the release must expressly list every potential situation. To be valid, however, the document and the circumstances surrounding its execution must meaningfully educate the signer as to its effect and scope.

*Maurer v. Cerkevnik-Anderson Travel*<sup>6</sup> is a good example of this proposition. In *Maurer*, the plaintiff’s signing of a waiver did not constitute an express assumption of risk because the waiver was too general and did not “alert plaintiff’s decedent to the specific risks she was supposedly waiving.”<sup>7</sup>

*Maurer* involved a young woman who was killed in an accident on a train vacation package through Mexico. The decedent was killed when she fell through the connecting areas between two cars of the train. The Arizona Court of Appeals held that the release in *Maurer* failed to alert the plaintiff to the risks being waived. Under Arizona law, the key to enforceability of a release is the knowledge on the part of the releasor of the exact nature of the agreement.<sup>8</sup> For the release to be enforceable, it must appear that the terms of the release were brought home to the person signing the release, or, if he or she did not know of the provision, that a reasonable person in his or her position would have known of it.

### Interpreting and Applying Waivers

Perhaps the most well-reasoned and instructive Arizona case dealing with the interpretation and application of release and waiver documents is *Morganteen v. Cowboy Adventures, Inc.*<sup>9</sup> *Morganteen* involved a plaintiff who was injured while participating in a guided horseback ride under the watch of defendant Cowboy Adventures. When the plaintiff brought a negligence suit for injuries that Geraldine Morganteen sustained when she was bucked off a horse on a Cowboy Adventures ride, the defendant sought protection behind its “Release and Waiver of Liability, Assumption of Risk, and Indemnity Agreement.” The court, in a unanimous opinion written by Judge Noel

Fidel, rejected defendant’s position. In strong words, the court stressed the baseline point of law that courts are to express great disfavor and skepticism toward release documents.

This is not a point to be taken lightly. If a defendant seeks sanctuary behind a release, that defendant must come forward with proof that the release was bargained for and that even after strictly construing the release against the defendant, it still has application.

The court in *Morganteen* compared the application and validity of a release in a personal injury tort case with the application of a release in a commercial tort case, *Salt River Project v. Westinghouse Electric Corp.*<sup>10</sup> The Supreme Court of Arizona addressed the validity of a limitation of liability provision in a commercial case in *Salt River Project*. In a section of its opinion titled “Can Liability in Tort be Bargained Away,” the Supreme Court answered with a qualified yes.<sup>11</sup> In *Salt River Project*, the Court stressed its reluctance to enforce release agreements, stating, “The law disfavors contractual provisions by which one party seeks to immunize himself against the consequences of his own torts.”<sup>12</sup> However, the Court went on to recognize that sound reasons in a few, discreet commercial settings existed to create an exception for the law’s general disfavor.

However, the *Salt River Project* Court made it clear that three conditions would be placed upon the enforcement of any release document:

1. that there is no public policy impediment to the limitations
2. that the parties did, in fact, bargain for the limitations
3. that the limiting language be strictly construed against the party seeking to enforce it

Judge Fidel in *Morganteen* recognized that the Arizona Supreme Court placed special emphasis on the second factor in discussing the law of waiver, which requires “an intentional relinquishment of a known right.” And the *Salt River Project* Court stated, “Tort remedies may not be waived in an unknowing exchange of forms. ... An actual bargain must be made by those responsible for the transaction.”<sup>13</sup>

In evaluating the effectiveness of the release in *Morganteen*, the Court of Appeals found that for a release to have application, it must be specifically negotiated and bargained for. That is a requirement for the application of a release in a commercial setting, and the analysis in the personal injury setting must be at least as stringent.

To that end, *Morganteen* seems to suggest that for a release to be effective, a defendant must do more than simply secure a signature on a boilerplate, form document. Instead, to comply with the “bargained for” requirement, it seems that a personal injury defendant would have to have someone explain to the lay participant what the terms of the release entailed. Anything less simply does not meet the requirement of the law. Furthermore, for a release to have application, it would need to be worded in plain language to bring its terms home to the participant. Broad, loosely phrased releases simply can have no application under the current state of the law.

### A Restrictive Approach to Waivers

*Benjamin v. Gear Roller Hockey Equipment*<sup>14</sup> stands as the Arizona courts’ most recent comment on the subject of prospective liability releases. The rationale underlying the holding of the case provides clear support for the very limited and rare application of releases in personal injury actions.

As a starting point, the court in *Benjamin* continued to recognize the well-established rule of law that Arizona courts look upon releases with disfavor out of concern that they may encourage carelessness. Accordingly, the court recognized the need to construe the language of a release strictly against the party, here the defendants, relying on it.

In *Benjamin*, the court held that in certain circumstances a defendant can protect itself from liability by procuring a release signed by the plaintiff that absolves the defendant from liability due to the defendant’s own negligence. The court, however, made it clear that such a general release

is disfavored and will apply only in those specific instances in which the signing party understands the type of risks covered by the release.

*Benjamin* is a good example of the specific facts that must be present before a release can apply. Numerous factors lined up perfectly such that the court was able to follow the law and give effect to a release. Absent the unique confluence of facts, a prospective liability release should not apply in the personal injury context. Indeed, the facts of most cases are much closer to those of *Morganteen* and *Maurer*.

The court enforced a liability release in favor of a roller skating rink against the plaintiff—a 32-year-old lawyer who had participated in the sport of roller hockey for 15 years. The plaintiff had deep knowledge of both releases and tort law as well as the sport of roller hockey. Most important, the court enforced the release particularly because the plaintiff was aware of the nature of the risks involved in roller hockey, and the cause of the plaintiff's injury was precisely one of those risks—uneven flooring:

The court wrote:

Plaintiff was an experienced skater, familiar with the risks of roller hockey. He knew that problems with the skating surface—such as “debris”—could cause an accident. The Release itself warned participants to inspect the “facilities” for “unsafe” conditions, thus providing notice (if such were needed) that unsafe conditions could exist in the facilities and could cause an accident.<sup>15</sup>

What does this analysis mean in relation to our injured motocross rider?

In the case of the adult Michael Rogers, the release he signed should be declared meaningless as a matter of law. Although Rogers did sign a release document, and although he was aware of the risks inherent in motocross—going down in a corner, overshooting a jump or getting tangled up with another rider—he was unaware of the risks of crashing into a front-end loader hidden on the track. The presence of the front-end loader in this case is exactly the type of “extraordinary and unknown risk” identified in *Benjamin* and *Maurer*.

Imagine if the defendant had been cleaning a gun at trackside that accidentally discharged, hitting Rogers. There would be no doubt that the release would not apply in that situation. The hidden front-end loader is really not that different.

The perfunctory scanning and signing of a release by individuals who engaged in activities cannot provide a careless defendant with an absolute shield from responsibility. Unless the terms and application of the release have been meaningfully explained to the plaintiff, a release in a per-

**Courts  
express  
great disfavor  
and  
skepticism  
toward  
release  
documents.**

sonal injury action should have no application. The plaintiff can, and should, raise this issue early on in a motion for partial summary judgment. Success on this motion will mean that the court has either rejected this defense in its entirety, or, at the very least, it has determined that the issue is a question of fact for a jury. Either way, it will limit the defense's ability to posture.

With the *Benjamin* decision, defense counsel will often express a confidence that is unfounded. Seizing this issue early will give the plaintiff the upper hand as the matter progresses.

**Even More Problems for  
Reliance on Releases**

In late June 2000, the Colorado Supreme Court issued an *en banc* decision setting out what is really no more than common sense. Before *Cooper v. Aspen Skiing Co.*,<sup>16</sup> however, Colorado courts were silent on the issue of whether a parent can sign an effective prospective exculpatory covenant on behalf of his or her minor child. In *Cooper*, the Colorado Supreme Court answered with a resounding “no.”

Arizona courts have yet to weigh in on this issue. *Cooper*, and the majority of cases from other jurisdictions that have considered the issue, provide sound, persuasive authority that will help an Arizona trial judge reach a just decision until the matter makes it to Arizona appellate courts.

Seventeen-year-old David Cooper was a fantastic skier. He was an accomplished competitive ski racer and had been a member of the Aspen Valley Ski Club for several years. At the beginning of the 1995 ski season, Cooper and his mother signed a form titled “Aspen Valley Ski Club, Inc. Acknowledgement and Assumption of Risk and Release.” The release from the ski club contained standard language, relieving it from:

Any liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of persons or entities mentioned above. The undersigned participant and parent or guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.

While training for a competitive, high-speed alpine race, on a course designed by his coach, Cooper fell and collided with a tree. He sustained severe injuries including the loss of vision in both his eyes, and he brought a claim against several defendants, including his coach and the ski club. The defendants argued that the release barred Cooper's actions.

The defendants were successful at both the trial court and appellate level. The Supreme Court of Colorado reversed.

Colorado, like Arizona, recognizes the principle of freedom of contract and the

notion that prospective liability releases are disfavored and must be strictly construed. Relying on policy that protects minors from parental actions that foreclose a minor's rights to recovery, the Colorado court held that, because a parent may not release a child's cause of action after injury, it makes no sense to authorize a parent to release a child's cause of action prior to an injury.

The court reasoned that allowing such a result would render meaningless the special protections historically accorded minors. For example, in Colorado, like Arizona, the statute of limitations for a minor's tort claim does not begin to run until the minor reaches the age of majority. This delayed countdown to a filing deadline preserves the minor's rights in the event that his or her parents fail to take steps to preserve them.

In deciding *Cooper*, the Colorado Supreme Court conducted a survey of other jurisdictions' approaches to this issue. The overwhelming majority of jurisdictions that have considered the issue hold that a parent's attempts to waive a child's liability claim are void as they violate public policy considerations. No fewer than 11 states subscribe to this position.<sup>17</sup>

### Parent Waiver Upheld

At least two states—California and Ohio—suggest that a parent may prospectively waive a child's rights to bring a tort action. Given California's influence on Arizona courts, practitioners should be aware of *Hohe v. San Diego School District*.<sup>18</sup>

Sarah Hohe was a 15-year-old junior attending a public San Diego high school. She was injured during a school-sponsored hypnotism show. Once Hohe brought suit, the defendants relied on a release signed by Hohe and her father. With little analysis, the California Court of Appeals rejected Hohe's argument that the release could not be enforced because she was a minor. The court did not consider the safeguards in place to protect minors, nor did it consider the issue of whether a parent can prospectively sign away a minor's rights. Instead, the court simply conducted—

without any mention of the specific concerns associated with prospectively releasing personal injury liability to a minor—that Hohe could not disaffirm the release because she was a minor.

Given Arizona law and public policy concerns, it is unlikely that an Arizona judge would find *Hohe* persuasive.

What *Cooper* suggests for Arizona litigants is that releases signed by parents before their minor children can participate in activities are most likely invalid. Although no Arizona case addresses this issue, the policies relied on in *Cooper* and its supporting cases, combined with Arizona's clear disfavor of releases in general, suggest that a defendant will have an extremely difficult time advancing a defense based on a waiver signed by a parent.

Therefore, in the motocross rider's case, a court considering the issue on an early motion for partial summary judgment need not even reach the standard analysis of *Morganteen*, *Maurer* and *Benjamin* before finding that the release has no application. A minor injured in an endeavor should not be precluded from being made whole because of the actions of his or her parents.

### New Mexico and Waivers

Practitioners should refer to *Berlangieri v. Running Elk Corp.*,<sup>19</sup> a recent New Mexico case. There, the court held that a waiver of liability regarding horseback riding was unenforceable as a matter of public policy. Berlangieri was injured while riding at a lodge. The trial court granted defendant's motion for summary judgment, citing the waiver the plaintiff had signed. The appeals court reversed.

The court held that in determining whether a waiver is effective to relieve the commercial enterprise from liability for failing to exercise ordinary care to protect patrons, more is at stake than the question of whether one plaintiff is compensated. A private agreement cannot nullify society's interest in deterring conduct that society regards as unreasonable.

Furthermore, the court held that the fact that a recreational activity involves some inherent risk of physical injury does not justify relieving the operator of a recreational facility of a duty of care to protect patrons against unreasonable and unnecessary risks. Jurors are capable of distinguishing between the risk of injury that cannot be eliminated without depriving a sport of its essential character and those unnecessary risks that arise as a result of the proprietor's failure to exercise due care for its patrons. The court held that the release was void.

### Addressing Releases in Your Practice

Releases are standard fare in a variety of tort actions. People sign releases in endeavors ranging from apple picking to zoo tours. Activity providers have become increasingly reliant on boilerplate, convoluted and difficult-to-read documents that they believe insulate them from all but their most egregious acts. Some releases even attempt to provide protection for gross negligence and intentional acts. The validity of these prospective releases must be challenged.

Too often these documents are presented for signature in a cursory manner. When questioned about them, the service provider is often ill equipped to respond to even the most basic inquiries. Signing a release has become a meaningless hoop that people step through without a second thought.

By setting up the process in this way, the defendant seeks to have it both ways. He does not want to invest any time or resources in educating the participant as to the actual effect of the release, nor does he want to scare away potential customers with an explicit description of the risks. At the same time, he seeks to use the signed release as an absolute shield for any legal liability.

Arizona jurisprudence rejects this approach. Through the discovery stage of any case involving a release, it is imperative to fully explore, both with your client and the defendant, the circumstances sur-

rounding the signing of the release. In addition, it is important to explore how the defendant came to use the release involved. Did he hire a lawyer to draft it? Is it one provided by a trade group? Or is it simply something that he copied from a competitor? In any event, it is important to find out whether the defendant himself has an understanding of the terms and the effect of the document.

Once this information has been collected, it is the plaintiff who should take hold of this issue. In those cases in which the defendant has not taken the time to “bring home” the terms of the release to your client and where the cause of injury is something other than the normal and anticipated risk associated with the activity, the plaintiff should file an early partial motion for summary judgment. An aggressive approach to these releases will force defendants to recognize that a signed release is not an absolute shield to civil liability. ▀

*Dev K. Sethi is an attorney with Kinerk Beal Schmidt & Dyer PC in Tucson. His practice is plaintiffs' products liability, personal injury and wrongful death.*

## endnotes

1. *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Electric Corp.*, 694 P.2d 198 (Ariz. 1984).
2. *Id.*
3. *Id.* at 213.
4. 499 P.2d 991 (Ariz. Ct. App. 1972).
5. *Id.* at 994, *citing* PROSSER, THE LAW OF TORTS § 57 (3rd ed. 1964).
6. 890 P.2d 69 (Ariz. Ct. App. 1994).
7. *Id.* at 73.
8. *Morganteen v. Cowboy Adventures, Inc.*, 949 P.2d 552 (Ariz. Ct. App. 1997).
9. *Id.*
10. 694 P.2d 198 (Ariz. 1984).
11. *Id.* at 212–215.
12. *Id.*
13. *Id.*
14. 11 P.3d 421 (Ariz. Ct. App. 2000).
15. *Id.* at 424.
16. 48 P.3d 1229 (Colo. 2002) (en banc).
17. Colorado, Connecticut, Illinois, Maine, New Jersey, New York, Pennsylvania, Tennessee, Texas, Utah and Washington.
18. 274 Cal. Rptr. 647 (Ct. App. 1990).
19. 48 P.3d 70 (N.M. Ct. App. 2002).