

Waivers, Releases, Exculpatory Contracts



Torts

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Some initial observations:

- This slideshow concerns defenses - *waiver*, *release*, and *exculpatory contract* - not explicitly covered in the casebook, but this material should be considered alongside *assumption of risk*, which is covered in the casebook.
- Whether "waiver," "release," or "exculpatory contract," we are talking about the idea that the defendant should be off the hook (i.e., have an affirmative defense), based on the fact of the plaintiff's agreement or intent not to pursue a claim.
- Various jurisdictions might draw distinctions among waiver, release, and exculpatory contract, or they might consider them to be overlapping or different labels for the same thing.
- Courts may also mash any or all of these things together with assumption of risk.
- The fact is, the law gets pretty messy here. When you read the cases, the doctrine tends to be unclear and confused.

Our questions:

- What are those things they make you sign at the trampoline / indoor-skydiving / bounce-house / etc. place?
- What legal effect do that have and why?

According to a sports insurance specialist and risk manager:

"A waiver/release agreement has two primary protective purposes: 1) "Contractual Exculpation" which uses contract law principles (waiver/release is a contract) to excuse a sports organization for its simple negligence and 2) provides "real evidence" of the sports organization's warning of inherent and other risks thereby triggering the common law Assumption Of Risk (AOR) defense under tort law."

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But waiver, release, and exculpatory contract can be thought of as separate theories themselves.

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Let's stop and talk
about equity for a
second ...

A bit about equity ...

- In pre-1776 England*, there were two separate court systems, "courts of law" and "courts of equity."
- Courts of law worked on precedent, had juries, and awarded damages as well as some limited non-damages remedies.
- Courts of equity worked on broad principles of fairness, didn't have juries, and awarded injunctions and non-damages-based monetary awards like restitution. Their authority derived from the king/queen.
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Largely this means that if it's equitable, it won't be decided by a jury. Also, there can be leeway to explicitly argue fairness.

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 - A release ...

What is the difference between a "waiver" and a "release"?

- The terms are sometimes used interchangeably.
- People tend to say "waiver" in a before-the-fact context.
 - E.g., a suspect "waives" their right to counsel.
- People tend to say "release" in an after-the-fact context.
 - In a settlement, the plaintiff gets money in exchange for a "release" of claims.
- So why, in the trampoline-park context, is it "waiver and release"?
 - Maybe it's belt-and-suspenders/pile-it-on drafting. But who is going to change now?

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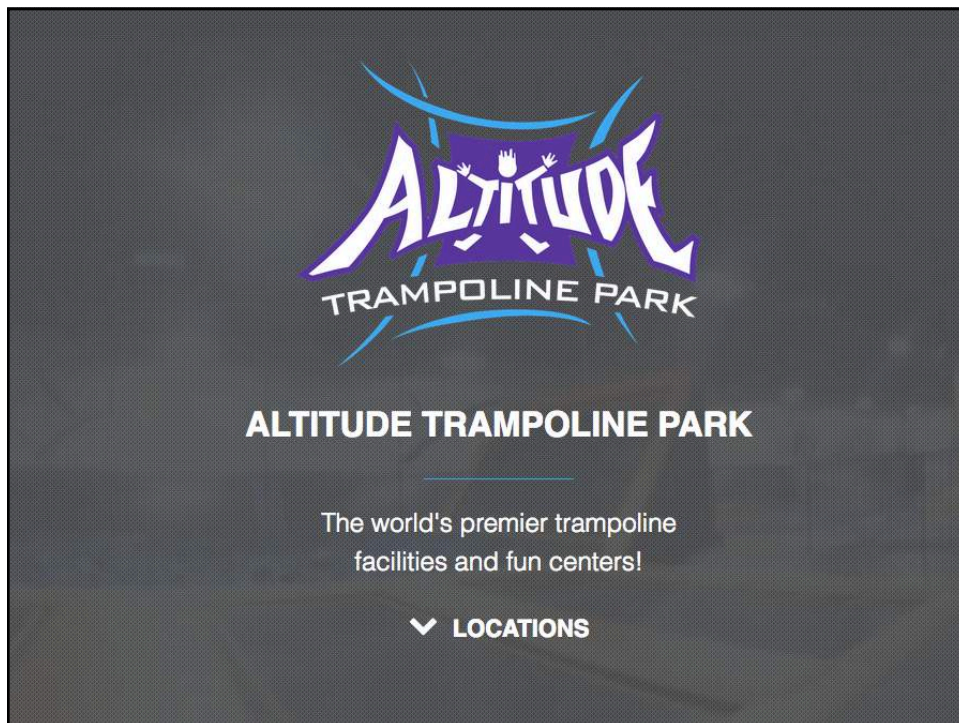
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 - A release can be thought of as the thing being exchanged on one end of the contract.

Ramifications for validity in a given case:

- The validity of assumption of risk depends on the tort doctrine.
 - And it doesn't need contractual validity (for instance, no consideration is needed!).
- The validity of an equitable defense of waiver depends on fairness.
 - And it doesn't need contractual validity (for instance, no consideration is needed!).
- The validity of a defense based on an exculpatory contract depends on contractual validity.
 - That means you need offer-and-acceptance and consideration!

- But in real cases, courts are often unclear about whether they are talking about an affirmative defense of assumption of risk (tort doctrine), waiver (i.e., as a theory of equity), or some contract-based entitlement (that requires applying contract law).
- **It's super frustrating!!**
- But the real world is filled with "waivers to sign" ...



VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC – ALTITUDE TRAMPOLINE PARK
PARTICIPANT AGREEMENT
WAIVER, RELEASE AND ASSUMPTION OF RISK

PARTICIPATION IN TRAMPOLINE COURT ACTIVITIES ENTAILS KNOWN AND UNANTICIPATED RISKS THAT COULD RESULT IN PHYSICAL AND/OR EMOTIONAL INJURY, PARALYSIS, DEATH OR DAMAGE TO YOURSELF AND/OR TO OTHERS. RISKS MAY INCLUDE, BUT ARE NOT LIMITED TO, SLIPPING AND FALLING, COLLISIONS WITH FIXED OBJECTS AND/OR OTHER PEOPLE WHICH MAY RESULT IN SPRAINS, FRACTURES, BREAKS, SCRAPES, BRUISES, DISLOCATIONS AND INJURIES TO HEAD, BACK AND NECK.

In consideration of the services provided by VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC, a Texas limited liability company, who is the owner and operator of ALTITUDE TRAMPOLINE PARK (the "Park") and my desire to spectate and/or participate in the activities and services provided by VERTICAL TRAMPOLINE PARK ENTERPRISES, LLC at the Park (*Vertical Trampoline Park Enterprises, LLC and its individual members, managers, directors, officers, agents, employees, volunteers, representatives, servants, predecessors, successors, assigns, affiliated entities, heirs, personal representatives and all other persons, firms, or entities claiming by or through them are hereinafter known as "Vertical"*):

I, _____ (*print name*), on behalf of myself, my spouse, my child(ren), minor child for whom I am appointed guardian, my parent(s), my heirs, assigns, personal representative and estate hereby:

(a) agree to use the Park and its facilities in a safe and responsible manner;

(b) agree to abide by the Park rules and instructions and the directions of Park employees and representatives, whereby I acknowledge that (i) those rules, instructions and directions are intended to promote the safety of both myself and others; (ii) my failure or refusal to abide by those rules, instructions and directions can lead to the immediate revocation of my right to use the Park and its facilities, without any right to refund of any payments made; and (iii) in the event of sickness, accident or injury, I authorize the Park employees and representatives to obtain, on my behalf, emergency medical treatment and to secure such medical treatment at my expense;

(c) agree to fully and forever waive, release and discharge Vertical from any and all claims, actions, causes of action,

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(d) agree to indemnify and hold Vertical harmless from and against any and all losses, liabilities, claims, obligations, costs, damages, and/or expenses whatsoever, including, but not limited to, any and all attorneys' fees, costs, damages and/or judgments directly or indirectly arising out of, or relating to my acts or omissions while participating in any activities at the Park;

(e) agree to accept and assume all of the risks which accompany the Park's activities and represent that my participation in the activities is purely voluntary and I elect to participate in the activities notwithstanding the risks;

(f) fully understand that participating in the activities within the Park involves physical exertion; and accordingly represent that I (i) am in sufficient good health to participate in activities within the Park; (ii) I do not have any pre-existing physical or medical condition, including without limitation pregnancy, orthopedic problems, including back problems; heart problems; and/or breathing problems, that might be impacted or worsened by my use of the Park; and (iii) will not use the Park and its facilities while under the use of any drugs, alcohol or medications that may impair my physical abilities or judgment; and,

(g) certify that I have adequate insurance to cover any injury or damage I may cause or suffer while participating in the activities within the Park, or if not, I agree to bear the costs of such injury or damage to myself and others.

I agree that any legal proceeding shall be filed solely in the state of Texas and I further agree that the substantive law of Texas shall apply in that action without regard to the conflict of law rules of that state. I agree that if any portion of this agreement is found to be void or unenforceable, the remaining portions shall remain in full force and effect.

By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have agreed to hold to maintain a lawsuit against Vertical on the basis of my claim from

- You should understand the conceptual distinctions among:
 - assumption of risk as an affirmative defense and a doctrine of tort law
 - a valid release as something exchanged in a binding contract
 - a waiver upheld as an equitable matter
- But because the law gets so doctrinally confused in this area, it's important to understand this from a practical/general perspective ...

Practicalities/Generalities

- Waiver/release/assumption-of-risk/etc. documents can have practical effect by discouraging would-be plaintiffs from suing or seeking legal counsel in the first place.
- Courts often seem compelled to side with the defendant where there's a waiver/release/assumption-of-risk/etc. document out of a sense of respecting individual liberty and freedom of contract.
- Courts often seem compelled to side with the plaintiff where there's a waiver/release/assumption-of-risk/etc. document out of fairness, expectations, public policy, or a lack of meaningful choice.
- These sorts of defenses generally will not work in cases of gross negligence or intentional actions (i.e., beyond "ordinary negligence."

Some key takeaways: (1/3)

Where the plaintiff has signed some kind of form before visiting some place or engaging in some recreational activity:

- One way it can have legal force and create a winnable affirmative defense is through assumption of the risk doctrine.
 - For this to work, the elements of assumption of the risk must be met.
- A separate way, outside of tort doctrine, is a contractual and/or equitable theory that the plaintiff agreed to give up the right to sue.
 - For this to work, you'll need fairness for an equitable theory
 - or consideration and other necessities of contractual validity for a contractual theory

Some key takeaways: (2/3)

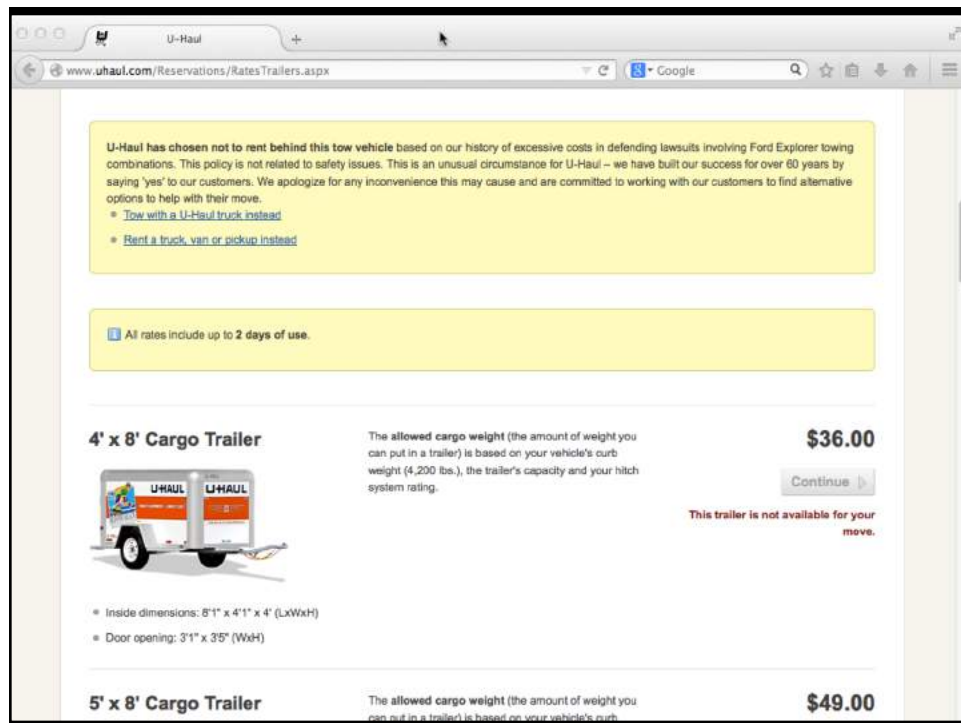
- Yet courts may gloss over the doctrinal distinctions and uphold an affirmative defense based on a broad principle of freedom of contract or the idea of an individual having made a choice that should be binding.
- No matter what, courts may reject you-signed-something defenses (regardless of type), for any of the following reasons:
 - Public policy grounds.
 - Rejection is more likely where the business is viewed as a necessity.
 - Rejection is less likely where the business is viewed as leisure.
 - Rejection is more likely where bargaining power was unequal.
 - Rejection is more likely where offered on a take-it-or-leave-it basis.
 - Plaintiff's lack of understanding of the document or its effect.
 - Plaintiff's lack of appreciation of the danger involved.
 - The negligence is more than ordinary negligence (e.g., gross negligence, "extreme" negligence).

Some practical takeaways: (3/3)

- Expect courts to be unclear, and expect doctrine to be confused and thus often manipulable in any given case.
- Understand that waiver/release/assumption-of-risk/etc. documents can have real-world force even without legal force because they may discourage people from pursuing a claim.

Here's a puzzle:

Assuming signing something can protect business from consumer claims, what do we make of this ...



One more thing: Indemnification

- We didn't even talk about indemnification clauses in these sorts of documents.

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- We will talk about indemnification later in the course - but know that in waiver/release/assumption-of-the-risk-type documents, having the signer agree to indemnify the business is yet another way to discourage or repel negligence lawsuits.