SPORTS LIABILITY WAIVERS AND TRANSACTIONAL UNCONSCIONABILITY

Douglas Leslie[*]

I. THE PROBLEM PRESENTED

The sport doesn't matter. It can be scuba lessons, sky diving, skiing, or the North Grounds Softball League. Before you can participate, you are given a waiver to sign. And you do sign it. Sometimes you sign it on behalf of your children.

All you may be risking in softball is the occasional arm or leg. But in scuba or sky diving, an accident can buy you the big enchilada. The waiver you quickly sign without reading (which is no excuse, you know what it says) gives the company or sport organizer permission, liability-free, to fail to take cost-effective precautions to keep you safe.

What is going on? Surely the value to you of having the company take precautions to keep you safe is greater than the cost of possible legal liability to the company. It isn't as if you can take the precautions yourself. Re-packing your parachute is not a good idea, and most of us don't want to go to the scuba shop two hours early to see that the tanks are properly filled.

But, those waivers are void, right? Against public policy. Not worth the paper they are printed on. And they are, in Virginia. But almost no where else.[1] (Maybe that is why people move to Virginia, to be free of oppressive liability waivers.)

The issue addressed here: Is there a reason why courts should not routinely zap these nasty clauses?

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[*] Charles O. Gregory Professor of Law, University of Virginia. Thanks go to Andreas Stargard for collecting cases from all the states.

1. *See, e.g.*, Banfield v. Louis, 16 Fla.L.Weekly D2909 (District Court of Appeals of Florida 1991); Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727; Vodopest v. MacGregor, 128 Wash.2d 840 (Wash. 1996).

II. A BRIEF HISTORY OF UNCONSCIONABILITY

Under the doctrine of unconscionability a court may strike down a contract clause (or, sometimes, an entire contract) because the clause is offensive.[2] Academics and first-year law students are familiar with the doctrine, and the description here is brief.

Common law courts invoked the unconscionability doctrine, but not very often. The contours of the doctrine were vague. Leave it to the writers of the Uniform Commercial Code to bring the doctrine to the fore. In section 2-302, the UCC declares:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[3]

The section's comments define unconscionability in terms of unconscionability:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract... The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.[4]

In his classic review of the 2-302 drafting process,[5] Arthur Leff described the section as "vacuous."[6] The drafters may have been on to something, but there was no understanding—or at least no agreement on—what the something was.

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2. Arthur Allen, *Unconsc. and the Code*, 115 U.Pa. L. Rev. 485 (quoting UCC 2-302).
3. U.C.C. § 2-302 (1962).
4. *Id.*
5. Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967).
6. *Id.*

The application of unconscionability reaches every first-year law student in *Williams v. Walker-Thomas*.[7] Between 1957 and 1962, Ora Lee Williams purchased many household items from the Walker-Thomas Furniture Company in Washington, DC.[8] The items were purchased on credit.[9] If you have never studied the case, or have forgotten it, see if you can figure out the effect of the following clause, which was in a long paragraph in small print:

> The amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made.

The clause means that Williams could not pay off an item, thus protecting it against repossession, until she paid off everything.[10]

The judges evaluating the clause under the unconscionability doctrine did not like it much.[11] While the limited holding of the case was that District of Columbia common law courts had the power to declare a contract clause unconscionable, there was complaining about "gross inequality of bargaining power" and "important terms hidden in a maze of fine print."[12]

Much has been written about the case, and one thing that is interesting is its popularity. *Williams* has been cited by courts 312 times since it was decided, and 431 times by commentators. This is an enviable record. But even more popular have been the phrases "unequal bargaining power" and its twin, "inequality of bargaining

7. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 448.
12. *Id.* (also cite critics).

power."[13] Since 1990, those phrases have appeared in 1181 reported cases.

Even if, as a rough look at the cases suggests, an "unequal bargaining power" argument loses more often than not, the frequency of the citations suggests that someone is taking it quite seriously. This is despite the fact that no one seems able to identify what unequal bargaining power means, at least in a way that cabins it. Here is what the term could encompass:

> One contracting party (seller, or in recent cases, employer) is large (wealthy, experienced, smart) and the other small (poor, inexperienced, dumb).
>
> The seller has a monopoly in the subject matter of the contract.
>
> The seller refuses to negotiate, the offer is take-it-or-leave it.
>
> The seller does not have a monopoly, but all sellers offer the same term(s).

The factors won't do. Almost all of our consumer transactions fit the criteria – buying a Lender's bagel at Kroger's is an example.

Now apply these factors to a clause in a written contract. See what you are likely to have? A contract of adhesion. The phrase was coined decades ago to describe form contracts offered to consumers by their giant trading partners, or to job applicants by big employers.

Following the lead of Leff's article, observers[14] have opined that to sustain an unconscionability challenge to a contract term, the plaintiff would have to show both procedural and substantive unconscionability. There must be a defect in the bargaining process and a resulting term that is naughty. It is obvious that procedural unconscionability standing alone will not a support an action since there is no damage. As one judge put it, it is like negligence that causes no harm. So, the issue is what sort of procedural irregularity—advanced age, desperation, trickery—will support the search for a naughty term.

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13. Cite critics.

14. *E.g.*, Charles L. Knapp, Taking Contracts Private: The Quiet Revolution In Contract Law, 71 Fordham L. Rev. 761 (2002).

III. RECENT UNCONSCIONABILITY CASES.

To see if unconscionability is currently a viable doctrine, I took a snapshot of the unconscionability cases reported by WestLaw in two months in 2002. This kind of data collection is subject to missampling (the months may have atypical entries), and many legal invocations of the doctrine undoubtedly go unreported because of settlements or unappealed dismissals. Still, on the premise that some data are better than none, here are the results. Unconscionability was raised in order to set aside a contract provision in 51 cases. The doctrine prevailed in 11 cases. Only one fact pattern was frequent. In 15 of the unconscionability cases, a contractual stipulation to send all disputes to arbitration was challenged. Nine of these cases involved disputes between employees and their former employers.

This data suggests that the unconscionability doctrine is alive and kicking in the world of litigated cases. The next topic is the standard currently used to decide unconscionability cases. Recall the suggestion that a finding of unconscionability is permitted only when both procedural and substantive unconscionability have been shown. Recent cases embrace this suggestion, but with two interesting wrinkles. The first wrinkle is that some courts say that procedural and substantive unconscionability are on a "sliding scale." The more you have of one, the less is needed of the other before a court should intervene.

Even more interestingly, some courts have found that the procedural prong of the unconscionability doctrine is satisfied by a finding that there was a contract of adhesion.[15] If this is taken seriously, the substance of an exchange will be up for scrutiny every time a consumer signs a form contract thrust upon her by a major player, at least where the same naughty term is found in other form contracts by competing major players.

IV. SPORTS WAIVERS IN THE COURTS, RESULTS

Every state has one or more cases on what circumstances warrant a court in refusing to enforce a liability waiver in a sports participation contract. In two states, Montana and Virginia, liability

15. Williams, 350 F.2d 445, 450 (D.C. Cir. 1965).

waivers in sports cases are never enforced. In Mississippi, such waivers are not enforceable unless they were "fairly and honestly negotiated." Probably this means dickered, and if so, Mississippi is best characterized as a non-enforcement state. In New York, by statute, waivers are not enforceable when the defendant is a for-profit entity, but applications of the statute have been problematic (e.g., statute was not applied to a company giving scuba lessons for profit). Five states have cases but not a case that yields a definitive rule in the state.

All the rest of the states enforce liability waivers in sports cases. A common qualification is that the waiver meets the standard of a California case, Tunkl v. Regents.[16] The case involved the liability of a hospital, not a sports promoter, but many state courts have adopted its standard in sports liability cases. The *Tunkl* court adopted the following test, which can be described as a "public function" test:

> [A liability waiver will not be enforced where it] involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. 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. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. 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. 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 reasonable fees and obtain protection against negligence. 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.[17]

16. *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).
17. *Id.* at 445-46.

Whatever the contours of this mud rule, it is not going to apply to ordinary sports activities unless they are conducted by a public organization.[18]

A second common qualification to enforcement is that the exculpatory clause relied upon must mention negligence if it is to be enforced in a negligence suit. Cases so holding have become less frequent as drafters of contract language catch on. They are educated by "how to" articles in bar journals and the like.

All but one of the cases that have mentioned the issue say that waivers will not be honored where intentional torts or gross negligence are proved. Only a handful of state courts have addressed whether a parent's signature on a waiver will bind the parent's minor child. Eight states have said it will not (some of the eight states will treat the parent as foreclosed from suing, but not the child), three states have said it will.

V. SPORTS WAIVERS IN THE COURTS, RATIONALES

A case sample will show the rationales used by the courts, usually to reject the unconscionability doctrine.[19] (These are typical cases, randomly selected. None are considered "leading.")

In *Banfield v. Louis*,[20] Susan Banfield signed an entry form to compete in the 1985 Bud Light United States Triathlon Series.[21] Banfield was operating her bicycle on the designated bicycle race course, when she was struck and seriously injured by a motor vehicle.[22] Branfield sued the event organizers, among others, in negligence for having failed to establish and maintain a safe bicycle course and having failed to properly control traffic around the course.[23]

The entry form signed by Banfield contained the following language, which was clearly designated as a waiver:

In consideration for the acceptance of my entry, I, for

18. *Id.* at 443.
19. E.g., *Banfield v. Louis*, 16 Fla. L. Weekly D2909 (Fla. Dist. Ct. App. 1991).
20. *Id.*
21. Tunkl, 383 P.2d at 443.
22. *Id.*
23. *Id.*

> my heirs, executors and administrators, release and forever discharge the United States Triathlon Series (U.S.T.S.), CAT Sports, Inc., Anheuser-Busch, the Quaker Oats Company, the city, county, state or district where the event is held and all sponsors, producers, their agents, representatives, successors and assigns of all liabilities, claims, actions, damages, costs or expenses which I may have against them arising out of or in any way connected with my participation in this event, including travel to or from this event, and including injuries which may be suffered by me before, during or after the event. I understand that this waiver includes any claims based on negligence, action or inaction of any of the above parties.[24]

Banfield relied on the "relative bargaining position" of the parties.[25] The court held that bargaining position (power?) was not a relevant inquiry, quoting this language from a California case:

> The service provided herein can hardly be termed essential. It is a leisure time activity put on for people who desire to enter such an event. People are not compelled to enter the event but are merely invited to take part. If they desire to take part, they are required to sign the entry and release form. The relative bargaining strengths of the parties does not come into play absent a compelling public interest in the transaction.
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> The transaction raises a voluntary relationship between the parties. The promoters and organizers volunteered to hold a race if the entrants volunteered to take part for a nominal fee and signature on the entry and release form. These are not the conditions from which contracts of adhesion arise.[26]

Remember *The Deer Hunter*, in which Nick, played by Christopher Walken, plays Russian roulette, to a not entirely successful end? If his unnamed opponent had sought to compel performance of a contractual commitment to pull the trigger, would the situation be adequately described by the language quoted in *Banfield*, making the contract enforceable? Looks like it to me.

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24. *Id.* at 443.
25. *Id.* at 444.
26. *Id.* at 444-45 (quoting *Okura v. U.S. Cycling Federation*, 186 Cal.App.3d 1462, 1468 (Cal. Ct. App. 1986).

Should Banfield have taken precautions against being run over by a car during the race? She could have hired a crew to guard every street crossing to prevent errant cars from entering the course. She could have placed her own street barriers along the course. She could have asked for help with the financing from other contestants. Hardly. Either the race organizers protected her or she wouldn't be protected at all. But that begs the question of why she volunteered for such a risky activity, made the more so by the race organizers (contractual) freedom to take sloppy measures to protect the riders.

In the second sample case, *Malecha v. St. Croix Valley Skydiving Club, Inc.*,[27] Malecha and two friends took a skydiving course at the Skydiving Club, a company operating a recreational parachuting center.[28] After five hours of instruction Malecha was allowed to make a parachute jump.[29] Unhappily, Malecha's parachute did not open properly.[30] Happily, he was not killed—which, one would think is the typical result of a malfunctioning parachute—he only suffered a fracture of the right foot, a fracture in the lumbar spine area, fractures of some teeth and some lacerations on his chin and neck.[31]

Malecha signed a broad waiver.[32] His suit in negligence was dismissed on summary judgment.[33] In affirming the dismissal, the appeals court wrote:

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27. *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 728 (Minn. Ct. App. 1986).
28. *Id.* at 728.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 728. Know all men by these presents:
That I, [Rick Malecha], the undersigned, while engaging in the sport of parachuting or skydiving, do hereby agree for myself, my heirs, executors, administrators and assigns, that neither said St. Croix Valley Skydiving Club Inc., nor any of its officers or members shall be held responsible or liable for any negligence implied or otherwise, or personal injury, or death, or property loss, or damage suffered or sustained by me in connection with or arising out of or resulting from any or all parachuting or skydiving activities engaged in by me; and further, I do hereby, for myself, my heirs, administrators, executors, and assigns, assume all risk whatsoever of personal injury or death or property damage or loss in connection with or arising out of or resulting from any or all parachuting or skydiving activities engaged in by me, and absolve and release said St. Croix Valley Skydiving Club, Inc., its officers and members, of and from all liability thereof, and further, I do hereby convent [sic] and agree for myself, my heirs, executors, administrators, and assigns,

> [W]e find no disparity of bargaining power between Malecha and the Skydiving Club. There is no evidence that the Skydiving Club's services were necessary or unavailable elsewhere. Further, Malecha was under no compulsion to make the parachute jump. He had the choice to either make the jump subject to the Skydiving Club's rules or to forego it.
>
> Malecha asserts that he was not given the waiver form to sign until just before leaving the club area for his jump. At that point, he claims he was forced to accept the exculpatory agreement on a "take it or leave it" basis. Proof that he had no opportunity to negotiate the terms of the exculpatory agreement is not enough to show a disparity of bargaining power. Malecha also had to show that the Skydiving Club's services could not be obtained elsewhere. There is evidence in the record indicating that there are other skydiving training businesses in the vicinity of the Skydiving Club. In fact, Alan Eisentrager [one of Malecha's companions] checked into at least one other skydiving business before he and Malecha decided to go to the Skydiving Club.[34]

So, Malecha was dumb and he had a dumb lawyer. Malecha was dumb for not taking precautions. He should have hired an expert parachute packer to prepare him a parachute and he should have gained a commitment from the expert to exercise due care in the packing. Hardly. Was Malecha's lawyer dumb? If you had represented Malecha would it have occurred to you to survey other parachute companies to see if they used similar waivers?

Not according to the dissenting judge, who wrote:

> The majority opinion discusses the likelihood that there were other skydiving clubs in the general area, and thus appellant had parity of bargaining power because he could take his business elsewhere. Although the record is not clear as to whether there were other businesses

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not to sue, arrest, attach, or prosecute said St. Croix Valley Skydiving Club, Inc., its officers and members for or on account of any such personal injury or death or property damage or loss, it being my express intent and purpose to bind myself, my heirs, executors, administrators, and assigns hereby.
Id.

33. *Id.* at 732.
34. *Id.* at 730.

> and, if so, how close, and whether they offered exactly the same services for the same price, I think the issue is a red herring. Even if there were one or two businesses in the same area, all each would have to do is use the same type of exculpatory clause and there would be no chance for anyone wishing to negotiate to shop around. If this exculpatory clause is countenanced for one skydiving club, it will be used by all.[35]

Nor was the dissenter convinced by the "you chose to risk your life, now don't complain" argument of the majority:

> It was a pre-printed contract given to appellant to sign on a "take it or leave it" basis. No evidence in the record indicates that the various clauses, including the exculpatory clause, were offered to appellant on a negotiable basis. He did not have a chance to offer to pay more money for instructions if the exculpatory clause would be removed. It would be foolish to ever expect that to be the case. Common sense and business experience tells us different.
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> When pre-printed forms such as those used in . . . this case are offered by companies, they have been drafted and typed up in final form to be used as is, with the only blank spaces being for date and signature. This fact situation does not represent arm's-length bargaining. It begs the question to state that if appellant did not want to sign away his right to sue for negligence, he need not have purchased the services respondent offered. The issue still remains. If there is no public policy to be served, and the contract has the indicia of a contract of adhesion, why should purveyors of services have the benefit of exculpatory clauses?[36]

The third case, *Vodopest v. MacGregor*,[37] comes from the state of Washington. Defendant MacGregor wrote an article describing a theory on a breathing technique to be used at high altitudes to alleviate "high altitude sickness."[38] It told of a trek to an Everest base camp in the Himalayas and another in a pulmonary lab during which the theory

35. 392 N.W.2d at 731 (Randall, J., dissenting).
36. *Id.*
37. *Vodopest v. MacGregor*, 913 P.2d 779 (Wash. 1996).
38. *Id.* at 780-81.

had been tested.[39] Vodopest read that article and then a follow-up in which readers were invited to join a party of fifteen trekkers who would be going to the Solo Khumbu area of Nepal to "continue research on a 'sherpa Breathing' technique for high altitude survival."[40] MacGregor, a nurse and stress-management/biofeedback therapist, was to lead the trip. Vodopest joined the trek.[41]

During the trek, Vodopest was "nauseated, had a headache, was dizzy, could not eat or drink, was not urinating, and was exhausted and dazed."[42] MacGregor said it might be a food problem. The next day was worse. "Vodopest's symptoms became life-threatening. She allegedly developed cerebral edema demonstrated by symptoms of shortness of breath, racing heart beat, terrible head pain, nausea, vomiting, loss of balance, and a swollen face. Another nurse/trekker administered simple neurological tests which Vodopest failed. Defendant MacGregor allegedly suggested that Vodopest had an ear infection.. . ."[43] MacGregor continued to have Vodopest ascend.[44] The next morning, Vodopest was sent down.[45] She was diagnosed with cerebral edema from altitude sickness and suffered permanent brain damage.[46]

Notwithstanding the fact that she had signed a pre-trip waiver form in which she released MacGregor "from all liability, claims and causes of action arising out of or in any way connected with my participation in this trek,"[47] an ungrateful Votopest sued MacGregor for negligence.[48]

For the appellate court, the enforceability of the waiver depended on whether the trek was a sports activity or a research project involving human subjects.[49] If it were the former, the waiver was binding; if it were the latter, the waiver was void as against public

39. *Id.* at 781.
40. *Id.*
41. *Id.* at 781.
42. *Id.* at 782.
43. *Id.* at 782.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 781 (quoting Release from Liability and Indemnity Agreement).
48. *Id.* at 782.
49. *Id.*

policy.[50] The court explained why the waiver was binding if a sport was involved:

> Appellate decisions in Washington have consistently upheld exculpatory agreements in the setting of adults engaging in high-risk sporting activities. Blide v. Rainier Mountaineering, Inc., 30 Wash.App. 571, 636 P.2d 492 (1981) (mountain climbing); Boyce v. West, 71 Wash.App. 657, 862 P.2d 592 (1993) (scuba diving); Conradt v. Four Star Promotions, Inc., 45 Wash.App. 847, 728 P.2d 617 (1986) (automobile demolition derby); Hewitt v. Miller, 11 Wash.App. 72, 521 P.2d 244 (scuba diving), review denied, 84 Wash.2d 1007 (1974); Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972) (ski jumping applying Washington law); Scott, 119 Wash.2d at 493, 834 P.2d 6 (adhering to prior law that an adult sports participant can waive liability for another's negligence; see also Thomas H. Winslow & Ernest J. Asprelli, Jr., Negligence Disclaimers in Hazardous Recreational Activities, 68 Conn.B.J. 356 (1994). Consistent with prior Washington law, we reiterate that releases are enforceable in the setting of adult high-risk sports activities.
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> Outside of these voluntary high-risk sports situations, our courts have often found preinjury releases for negligence to violate public policy. McCutcheon v. United Homes Corp., 79 Wash.2d 443, 486 P.2d 1093 (1971) (striking down a landlord's exculpatory clause relating to common areas in a multifamily dwelling complex); Thomas v. Housing Auth., 71 Wash.2d 69, 426 P.2d 836 (1967) (voiding a lease provision exculpating a public housing authority from liability for negligence); Reeder v. Western Gas & Power Co., 42 Wash.2d 542, 256 P.2d 825 (1953) (finding a contractual limitation on the duty of a gas company against public policy); Sporsem v. First Nat'l Bank, 133 Wash. 199, 233 P. 641 (1925) (holding a bank which rents safety deposit boxes cannot, by contract, exempt itself for liability for negligence).[51]

Ask yourself this question. Yesterday, you put $20,000 in a safe deposit box. If the bank is negligent, you can lose your money. Today, you sign up for a mountain climbing lesson on Half Dome. If the

50. *Id.*
51. *Id.* at 783.

climbing company is negligent, you can become a puddle on the floor of Yosemite Valley. In which situation do you most need protection? Isn't it obvious that there is something odd going on here where you will agree that the mountain climbing company will be blameless for not taking due care to protect you, and the court will uphold it, but you cannot make a similar agreement with your bank with respect to your money?

The point is that it is precisely in "high-risk" activities where the need for cost-effective precautions is the most necessary. The next puzzle is why sports participants sign such waivers.

VI. WHY PEOPLE SIGN

Maybe it is cognitive dissonance (the more recent term for this is optimistic bias.) Suppose you hold these thoughts in your head:

Parachuting is very dangerous.

I would be very stupid to try a very dangerous activity.

I really want to try parachuting.

I am not stupid.

One of them has got to go, right? Some of us will forgo parachuting, but others of us will just ignore the facts and conclude that parachuting isn't very dangerous. And, is it? What is the accident rate for parachuting? What are the injury outcomes in parachuting accidents? How would you find out this information, even in the Internet Age?

One of the four states that do not enforce liability waivers relies on information asymmetries. A Montana court wrote:

> These cases [refusing to enforce waivers of liability for future negligent conduct] seem to reflect a general policy of protecting those with limited ability to assess risks from those with more information or ability to recognize, remedy, or control a potential harm. It may not be possible for consumers, for example, to make informed decisions about risks known only by a seller. In these cases, the nonwaiver rule again makes sense in terms of preventing waiver from defeating the statutory

> goal of putting these groups on a more equal footing. Someone with little ability to assess the hazards of a product or activity also has little ability to make an informed decision about whether they should waive the protections of the law and assume the risk. Therefore, a statute designed to protect the public from hazards, by placing a duty of care on those with more information or ability to control outcomes, is totally defeated if those with the greater information can ask those the statute was intended to protect to waive that protection.[52]

This assumes that a small scuba shop or parachuting school has enough data to be able to assess the risk better than the customer.[53] And it might. Not only are there industry newsletters and trade journals reporting on risk data, waivers may be required by the companies' insurance carriers.[54]

Another reason that people might sign a waiver is that they do not know that they are signing a waiver. Maybe it's presented to them just before the plane takes off or the boat leaves the dock. Not likely. All of us expect to sign these things and we know exactly what we are doing. The same is true when we check "I agree" before installing new software. No one reads the disclaimer but we all know what is there.

But, people might sign a sports waiver believing that the waiver is not enforceable. As we have seen, in all but four states this is incorrect.[55] If survey evidence showed this untrue belief was widely shared, that would be a market failure.

You might sign a sports waiver because you think that it is useless to decline to sign. If you decline, you will not be allowed to participate. You are probably right. The person who hands you the form is not likely to have the authority to let you participate without signing it.

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52. *Campbell v. Mahoney*, 306 Mont. 45, 50-51 (Mont. 2001).
53. *Id.*
54. *Id.*
55. These states are Florida, Banfield v. Louis, 589 So.2d 441 (Fla. Dist. Ct. App. 1991), Minnesota, Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727 (Minn. Ct. App. 1986), Washington, Vodopest v. MacGregor, 913 P.2d 779 (Wash. 1996), and Montana, Campbell v. Mahoney, 29 P.3d 1034 (Mont. 2001).

Suppose the odds of having an injury are very low, or at least you think they are. You might then reason, "It is a pain to refuse to sign the waiver and hope the store will go along. They may refuse to let me participate and, if they were to think I am a troublemaker, I might not even be able to sign and participate. The chances of an injury are so small, I don't think it is worth the trouble to complain." This is a collective action problem. In most sports, if precautions are taken to protect one participant (check the ski slope for fallen branches), it will protect all participants. When summed over all participants, the benefit of precautions may be significant even when the chance of a mishap is small. This might explain why an individual participant would not spend effort to avoid signing the waiver.

If someone had authority to dicker with you, how much should the fee go up if you don't sign? You could let the market decide how much the fee should go up by finding a sports organizer that doesn't require a waiver and see how much more it charges. Or find one that has two-tier pricing. But the dissent in *Malecha* got it right, right?—every company offering scuba or ski rentals will have a waiver, maybe even the same waiver.[56] In fact, in all the reported sports waiver cases, there is only one where there was two-tier pricing.[57]

If sports waivers are ubiquitous, why? Case in point, the UVa North Grounds Softball League. This group of enthusiastic softball players organizes an extensive program of League play. But no one can play without signing a liability waiver. This is true even though the waiver is void in Virginia, and at least some of the League organizers know it to be void.

If the market for offering scuba lessons is competitive, all purveyors of scuba lessons will price their lessons with a waiver. The assumption is that customers, whether because of an optimistic bias or some other reason, will not chose a scuba company—or a ski resort—on the basis of whether or not a waiver is required. And even if some customers would pay to avoid a waiver, the competitive market may not offer it. Compare baby carriages for 6'4" parents (or grandparents, sigh). Such parents can only wheel infants at considerable discomfort because the carriage handle is not high enough. But it must be that there

56. Malecha, 392 N.W.2d at 732 (Randall, J., dissenting).
57. *Boucher v. Riner*, 68 Md. App. 539, 549 (Md. Ct. Spec. App. 1986).

is not enough demand to warrant the production and sale of a long-handled baby carriage because none are offered. (This was clearly the case in most cities and towns before Internet sales, and it seems to still be so. For instance, an Internet company showing 60 different strollers for sale does not advertise a single one for tall parents, and the pictures do not signal any high handles. A tall daddy could, one supposes, call the store and ask, or order all 60 in hopes one would be suitable.) This is the tyranny of the majority.

Will a wise scuba lesson seller educate the consumer? You write the script. I want you to explain to the customer how our company stands ready to respond to a court action if our carelessness should kill or maim them.

VII. WHO WINS, LOSES?

In a price unconscionability case, the seller is alleged to have charged too much for the product.[58] Where an employment contract has a waiver of court access in favor a mandatory arbitration, the challenge will be that the bargain is "such as no man in his sense and not under a delusion would make on the one hand, and as no honest man would accept on the other."[59]

It is tempting to say that in the price unconscionability cases we know the contract price and the market price and the issue is whether one so much exceeds the other that a court should intervene. But sofas may sell for one price to those who can pay by cash or credit card and another to those who must rely on an extension of store credit, as Ora Williams discovered.[60] In another case, an 81-year old woman whose husband had recently died contracted to sell a New Jersey waterfront residence for $800,000 and the property was resold it fourteen months later for $1,500,000.[61] The court found the contract unconscionable on account of the unconscionability but if the widow needed a quick sale,

58. *Rite Color Chemical Co., Inc. v. Velvet Textile Co., Inc.*, 411 S.E.2d 645, 650 (N.C. Ct. App. 1992).

59. *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 918 (N.J.Super. Ct. 2002).

60. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965).

61. Sitogum Holdings, Inc., 800 A.2d at 916-17.

the price may not have been unreasonable, especially in the uncertain market of recreational property.[62]

In price unconscionability cases and in employment arbitration cases, the gain to the seller or employer should mirror the loss to the buyer or employee. Suppose, for instance, that the predicted value of the claim owned by an employee discharged on account of gender is $100,000 if the case goes to court and $8,000 if it goes to arbitration. Being forced to agree to arbitrate gender discrimination suits costs a female employee $92,000 times the probability that she will have a claim. It also gains the employer the same amount. Absent information asymmetries, there is a wealth transfer (ignore that salary may reflect the presence of the waiver), but there are no foregone gains from trade. The same is true for the overpriced sofa: the amount the customer overpays is captured by the seller. This may bother us if the customer is Ora Williams, less so if it is Bill Gates.

Sports waiver cases are different. The thesis of this paper is that the gain to the promoter of a sports activity in securing a negligence waiver from a customer is always less than the customer's loss from giving the waiver. The thesis critically depends on the meaning of negligence: negligence is the failure to take cost-effective precautions.[63] Where the promoter is relieved of legal liability for negligence, then ceteris paribus the promoter's investment in precautions will be suboptimal. That means the value of the increased risk to the customer will be greater than the costs saved by the promoter. Where this disparity exists in a well-functioning market with rational consumers, competition will soon eliminate the practice of demanding a waiver as a price of participating. If consumers are not rational, it won't.

Another feature of sports waivers is that if there is a disparity between the gain to the promoter and the loss to the participant, third parties cannot sell the participant protection. If you want a sofa warranty, the persons to look to are the manufacturer or the retailer. But there is no particular reason why a third party cannot offer the warranty. (Such was once the practice with high-end cameras, although the practice may not now exist.) Where the promise is to use due care

62. *Id.* at 926.
63. *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 64 (Miss. 1988).

in packaging the parachute or blockading the race course, the transaction costs of securing third-party protection are typically insuperable. (Need more examples? Do skiers hire third-parties to inspect the slope for non-obvious defects before starting a run? In one case, a triathlete dove into the water and met a rock head-on.[64] Should the swimmer have contracted with a third party for an inspection prior to diving in?)

What would the world look like if courts refused to enforce liability waivers in sports cases? The price of a participation ticket would go up. The price of participation would not, because the gain from increased protection would more than cover the increase in the ticket price (again, that is implied from the definition of negligence). The sport would internalize more of its costs. Some participants would be priced out of the market, and if the sport has spectators, some will be deprived of cheap seats. That is what we want.

VIII. OBJECTIONS TO THE THESIS.

Negligence rules are costly to administer and promoters will use cost-effective measures without the threat of a law suit. The first half of the statement is true. If the second half is true, we don't need a tort system. Abolishing the tort system is beyond the scope of this paper.

Negligence determinations in cases of sports injuries are especially error-prone. They could be error-prone if decision-makers are more likely incorrectly to find negligence in sports cases than they are in other tort cases, or if decision-makers will too often overcompensate the victims of sports accidents. There is no reason to assume either assertion is correct. The objects of jury sympathy—the poor, the ignorant, the oppressed?—do not regularly participate in parachuting, scuba diving, and triathlons. Whether there has been a failure to take cost-effective precautions is easier to decide correctly in sports cases than it is in many (most?) other instances of alleged negligence. A sports activity is understood by all and the precautions seldom require technical expertise to be understood. While some defendants in sports negligence cases are deep-pockets (ski resorts?), a

64. *Hiett v. Lake Barcroft Community Ass'n, Inc.*, 418 S.E.2d 894, 895 (Va. 1992).

more typical defendant is a mom-and-pop scuba store or a local softball league.

Risk has an irreducible dimension in sports and it is appropriate to eliminate liability for the risk. The first half of the statement is certainly true, but eliminating liability for inherent risks is not accomplished by liability waivers. An inherent risk that cannot be reduced by cost-effective precautions does not occasion legal liability. A waiver of liability for inherent risks forecloses a null set. This objection really goes to the question of whether fact-finders will mistake irreducible inherent risks for reducible inherent risks. There is no viable argument that a ski resort must put padding on all the trees on the course, even though the failure to do so will impose tragic costs on errant Sonny Bonos and playful but careless Kennedys.

Liability waivers are justified because insurers demand them. Of course they do, but the sports promoter and its insurer have a unity of interest. The market conditions that persuade (compel?) a promoter to demand a liability waiver are the same conditions that persuade its insurer to reduce premiums if there is a waiver. The presence of the insurer changes the analysis not a wit.

Participant insurance substitutes for promoter liability. This would be true if participant insurance is fully compensatory and if participant insurers police promoter conduct. The first is not true, the second is neither true nor practicable.

IX. CONCLUSION: TRANSACTIONAL UNCONSCIONABILITY

At a high level of generality, the proposition put forward here is that if in a set of repeated transactions, a market defect can be supposed, and if an observer can be reasonably confident that the loss to one party is greater than the gain to its trading partner, the courts should intervene and make it right. In the context of sports, this calls for invalidation of these nasty negligence waivers.