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Ticket Stub Waivers - Status and Proposed Risk Mitigation Strategies

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Ticket Stub Waivers - Status and Proposed Risk Mitigation Strategies

By David J. Rodziewicz ¹

I. Introduction

Sally finally found the perfect gift for her husband Jim on the racetrack's ticket site.² To call Jim a NASCAR® fan would be an understatement. He watches every race on TV, knows all the gossip about the teams, and has a slew of shirts, hats, and miniature racecars. Jim started to get his daughter, Sarah, age nine, interested in watching a race or two. Sarah thinks Dale Earnhardt, Jr. is "really cute." Sally found tickets to the NASCAR® race in Section W, Row 21: front straightaway, about halfway between the last turn and the start/finish line, about twenty rows up from the track. Enter the credit card, click the box agreeing to *everything* (who really reads that stuff), and get the tickets; this was quick and easy. They were going to love this.

Race day arrived before they knew it. Jim and daughter Sarah left home early in the morning to get to the facility; parking is always a nightmare there. Walking from their car, they passed all the NASCAR® team's merchandise trailers. Sarah tugged on her Dad's sleeve to stop at "Jr.'s" merchandise trailer to pick up a hat and sunglasses. Jim beamed as his daughter donned her new gear for race day.

Spectator entry to the racetrack was uneventful, other than the wait in line to have any bags screened before entering the facility. Jim handed both tickets to the attendant, who used some kind of scanner to check-in the ticket, and then pointed toward the grandstands. They were off to find their seats.

Nothing prepares the uninitiated for the noise an unrestricted race engine makes at full

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² This is a fictional account for illustrative purposes only.

song. Multiply that noise level by the forty-three cars grouped in a quarter mile train, all trying to be first in line. Sally left bruises gripping her Dad's arm, screaming, the first time they went by. Father and daughter settled in for an exciting afternoon of racing.

Competition between race teams was close this year. The race officials decided to allow "bump drafting," where cars nudge each other from behind at speed, to make the races more exciting for spectators. By this time in the season, a few drivers and teams were looking toward a good finish. A few drivers and teams were making it race to race. For fans, racing is a sport; for the teams, owners, drivers and many others, racing is a business.

There always seems to be a yellow flag and restart within the last twenty or thirty laps of a race. A flat tire, debris, or fluids from a blown engine cause these yellow-flag caution periods. Sometimes the sanctioning body has the officials wave a yellow flag (aka a "NASCAR® yellow") for an invisible piece of debris in order to regroup the field for a more exciting finish. Today, the invisible debris appeared with four laps to go.

Jim and daughter Sarah were on their feet with eighty thousand other fans at the speedway for the restart. The field of thirty cars bunched up to take the green flag signaling the restart of the race. The cars stayed in a cluster for the entire lap. Exiting turn four, heading down the front straightaway, the front two cars bumped but something went horribly wrong.

It happened so fast, most spectators only felt the breeze of the cars, heard the screech of tires, and smelled the acrid odor of brakes melting rubber into pavement. As the lead car flipped, it hit the engineered catch fence at approximately 160 miles per hour. At this speed, a 3,000 pound racecar covers 230 feet per second. The occupants of Section W, rows fifteen through thirty-two, never stood a chance. And for the first time in hours, things went quiet at the track.

II. Background

In the decade since the twin tragedies at Michigan International Speedway³ in 1998 and Lowes Motor Speedway (in Charlotte, North Carolina)⁴ in 1999, much has changed yet little has changed. Racetrack facilities have increased aspects of spectator safety⁵ but fan fatalities still occur. In February 2010 in Phoenix, Arizona, a wheel from a crashing drag race car bounded into the spectator area killing a wheelchair-bound patron at an National Hot Rod Association (NHRA) drag race.⁶

Spectator claims against facilities, teams, sponsors, drivers, and organizers generally arise either in claims of negligence or as violations of statute.⁷ In either case, claims arise as creatures of state law. Courts vary widely in decisions across the country and favor neither plaintiff nor defendant statistically.⁸

Race facilities, organizers, and sponsors have utilized a variety of methods to limit liability. This article will examine one tactic of limitation - a ticket stub waiver. We will then examine some modalities used to present waivers in 2010, review some selected state's statutes and case law, and finally propose business process and legislative remediation.

A. An Introduction to Ticket Stub Waivers

³ Dave Woolford, *Speedway Debris Kills Three*, THE TOLEDO BLADE, July 27, 1998, at A1.

⁴ Associated Press, *Three Fans Killed At Indy Race*, CBSNEWS.COM, May 1, 1999, available at: <http://www.cbsnews.com/stories/1999/05/01/sports/main45325.shtml>. The race organizers had the good sense to stop the race and direct all medical personnel on-site to the injured spectators. A photo printed by *Sports Illustrated* (not included here) showed the sheet-draped bodies of the three spectators lying on blood stained concrete. *SI* lost their press credentials to many motorsports races subsequently in protest.

⁵ David Newton, *Catch Fence System To Be Evaluated*, ESPN.COM, May 1, 2009, available at: <http://sports.espn.go.com/rpm/nascar/cup/news/story?id=4105669>.

⁶ Bob Henry, *Debris From NHRA Crash Kills Spectator*, THE NEWS & OBSERVER, Feb. 22, 2010, available at: <http://www.newsobserver.com/2010/02/21/351366/fan-badly-hurt-at-nhra-event.html>.

⁷ Jason R. Jenkins, *Not Necessarily the Best Seat in the House*, 35 TULSA L.J. 163, 165 (1999).

⁸ *Id.*

Ticket stub waivers date back to the grand days of hat and coat check claim areas at trendy nightspots in the United States of the early 1900s.⁹ A waiver of responsibility was printed in small letters, usually on a claim stub approximately one inch by two and a half inches long in very small print, in case an individual's checked goods were lost or stolen.¹⁰ Arising in contract,¹¹ these early attempts to limit liability fostered today's ubiquitous exculpatory language found on receipts, form contracts, and event tickets. Blacks Law Dictionary defines an exculpatory clause as, "A contractual provision relieving a party from liability resulting from a negligent or wrongful act."¹²

A spectator's ticket to a sporting venue, like a racetrack, also arises in contract.¹³ In this case event tickets are *offered* for sale, spectators or intermediaries *accept* the offer of sale (subject to terms), and the ticket price is the *consideration* exchanged for the transaction.¹⁴ We will focus upon the validity *or* invalidity of these terms, printed on the back of an admission ticket or otherwise agreed as part of a ticket sale transaction, given the most grave of outcomes.

One evaluation of these tickets-as-agreements will be familiar to those versed in contracts. A contract of adhesion exists when a business uses a standard form contract, drafted by the party with greatest bargaining leverage, with flexibility on few terms (or no terms in the case of an event ticket, other than the seat assigned).¹⁵ Starting in the 1950s, courts began more closely scrutinizing adhesion contracts and exculpatory agreements.¹⁶ Three issues are common to cases relating to litigation surrounding avoidance of these types of contracts: 1) whether a

⁹ *American Cultural History, 1920-1929*, available at: <http://kclibrary.lonestar.edu/decade20.html>.

¹⁰ *Id.*

¹¹ JOHN P. DAWSON & WILLIAM BURNETT HARVEY, ET AL., *CONTRACTS*, 656-75 (9th ed. 2008).

¹² BLACK'S LAW DICTIONARY 648 (9th ed. 2009).

¹³ *Supra* Note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Supra* note 11.

reasonable person would recognize the ticket as being contractual in nature, 2) whether the agreement or term in question either violates reasonable expectation of the litigant or is otherwise unconscionable, and 3) Whether the agreement is void as being contrary to public policy.¹⁷ Below, we will examine these elements of these and other arguments¹⁸ in more detail. For now, it is sufficient to contend that if a person knew that a ticket purchase was a contract, and knew there was a possibility that they would be killed by merely occupying their seat, their knowing assent to release terms might be questionable. Would a reasonable person willingly trade a few dollars in consideration for a spectator event ticket with knowing assent to a term that would hold all parties harmless if the most grave outcome occurred? Some might. By the same token, businesses prefer loyal repeat customers...alive.

Mere form printing on the back of a ticket is not a talismanic incantation wiping clean the sins of an issuer. As we will examine, courts evaluate a number of factors in order to balance “between the interest of spectators seeing the race . . . and [expectation the facility is] safeguarding them from dangers.”¹⁹

B. Modalities and Layering

In the scope of this research, we examine tickets, ticket purchase websites, examples of standard language, and even signage on event physical sites (for highly dangerous areas). A spectator is assured to encounter at least one of these modalities during an event.

A layering of contracts occurs when a spectator purchases an event ticket from an

¹⁷ *Id.* More on procedural versus substantive unconscionability to follow.

¹⁸ *Supra* note 7. Arguments have attacked “ambiguity, clarity as to significance, sufficient opportunity to examine, fulfillment of one’s duty to read the release, duress and/or compulsion, voluntary execution, fair bargain [aka bargained for exchange], familiarity with risks and typeface [conspicuousness].”

¹⁹ *Id.* at 191.

intermediary online, agreeing to a set of terms and conditions of purchase, then agrees to additional terms by mere presentation of the ticket at the venue.²⁰ Today, ticket sale intermediaries (associated neither with track or sanctioning body) commonly include a waiver of liability in their terms of use.²¹

The web-based ticket entity for Daytona International Speedway (DIS), although separated in business organization under the same holding company (International Speedway Corp. or ISC), requires agreement with complex terms to simply purchase a ticket. These terms encompass an expansive limitation of liability, choice of law (although Florida's conflict of law provisions are expressly excluded), extra-territorial consent to service, and *indemnification* of most every party involved in promoting, producing, and operating a race event.²²

²⁰ This interaction of ticket sales and racetrack entities is troubling. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Plaintiff could accept (as he did) by clicking through acceptance screens. The court held that his alternative was to return the software to the point of purchase for refund. That alternative doesn't exist here. One of the intermediary's terms of purchase is "no refunds, no exchanges, no exceptions." The specific *ticket* terms are not reviewable until purchase and possession of the paper tickets. By then it is too late and no refund is possible.

²¹ For example -- "Auto racing events can be dangerous and myRacetravel.com shall not be responsible for any injuries or death resulting from an accident at any track or while on a Tour. By embarking upon this Tour, Participant voluntarily assumes all risks, and is advised to obtain appropriate insurance coverage against them. Your signature on the Form shall constitute consent to the above terms and conditions and to myRacetravel.com engaging arrangements on his/her behalf, and further signifies agreement that restitution or damages, if any are claimed, shall be sought directly from the suppliers, not myRacetravel.com." Available at: <http://www.racetickets.com/purchase-policy.cfm>.

²² For example, the DIS ticket site terms and conditions language follows. For the price of an admission ticket, purchased on this website, a purchaser agrees to (partial list):

LIMITATION OF LIABILITY

UNDER NO CIRCUMSTANCES SHALL DIS OR ITS SUBSIDIARIES, AFFILIATES, LICENSORS, SPONSORS, OR PROMOTIONAL PARTNERS BE LIABLE FOR ANY DIRECT OR INDIRECT LOSS, DAMAGE (WHETHER PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL), INJURY, CLAIM, LIABILITY OR OTHER CAUSE OF ANY KIND RESULTING FROM OR IN ANY WAY ASSOCIATED WITH THE SITE, THE CONTENTS, ANY LINKED SITES, OR ANY USE THEREOF. THIS LIMITATION APPLIES TO THE FULLEST EXTENT PERMITTED BY ANY APPLICABLE LAW AND WHETHER THE ALLEGED LIABILITY IS BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER BASIS, EVEN IF ISC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

CHOICE OF LAW AND FORUM

These Terms of Use and the Privacy Policy shall be governed by and construed in accordance with the laws of the State of Florida, USA, excluding its conflicts of law rules. You expressly agree that the exclusive jurisdiction for any claim or action arising from or relating in any way to these Terms of Use, the ISC Sites and Contents, or your use thereof shall be filed only in the state or federal courts located in Volusia county in the State of Florida. You also agree and submit to the exercise of personal jurisdiction of such courts for the purpose of litigating any such claim

III. Problem Statement

In considering this hypothetical scenario, it is important to remember that contracts, claims, and defenses herein are creatures of state law. This observation introduces natural variability in evaluating similar facts -- in different jurisdictions varied verdicts may result.

A. Our scenario

In our scenario, a person purchases race event tickets via a race facility's assigned website, ticket office, or intermediary (like TicketMaster®). This person's spouse and child gain admission to the event and facility using physical paper tickets purchased from the website. Once admitted, those individuals are injured or killed when a car leaves the paved racing surface, penetrates or clears the safety barrier, and lands in the spectator seating area. The website terms and conditions and tickets used exculpatory terms, including express assumption of risk, waiver of liability, and indemnification.²³

Plaintiff(s) will seek to file any available claim against the track owner, race teams, competitors, sponsors, or any other potential defendant. Defendants, particularly the track owner and event sponsor, will attempt to mitigate risk of liability through various means described below. In particular, this article is focused on the contractual and business process techniques

or action, and consent to extra-territorial service of process. This Agreement shall be interpreted according to its express terms, with no presumptions against the drafting party.

INDEMNIFICATION

Upon request by DIS, you agree to defend, indemnify, and hold harmless DIS, its parent, subsidiaries, limited liability and other affiliated companies, and their respective shareholders, members, employees, contractors, officers, and directors (the "Indemnified Parties") from all liabilities, claims, and expenses, including attorney's fees, that arise from your violation of this Agreement or your use of the Site other than as permitted herein. DIS reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you, in which event you will cooperate with DIS in asserting any available defenses. Your obligations hereunder shall extend to claims alleging an Indemnified Party's negligence, willful misconduct or violation of law unless adjudicated as such by a court of common law.

Complete release *available at*: <http://www.daytonainternationalspeedway.com/About/Terms-of-Use.aspx>.

²³ *Id.*

defendants employ to limit liability in advance. A business might seek to limit liability through express contractual terms, waivers, or statements acknowledging assumption of risk on the part of the ticket holder.

The prospective tension is intuitive: enterprises wish to attract as many customers as possible, while not scaring away paying customers with language too explicit, while forming and deploying legally effective liability mitigation vehicles, all without violating state statute or offending public policy as judged by the courts of the state in question. The result seems like a tightrope walk between fair disclosure and sharp dealing.

B. Elements of Prospective Liability Claims

One could write a book on the proper crafting of a tort claim in preparation for litigation (as dozens have). Here, we limit our focus to the components of a negligence claim at a summary level: *Duty, Breach, Harm, and Causation*.²⁴

Duty here is a duty of reasonable care owed by the track owner, race teams, competitors, sponsors, or any other potential defendant to the plaintiff(s) bringing suit.²⁵ The amount of care needed is directly related to the amount of danger associated with the event in question. In a dangerous situation, the level of care that is considered reasonable changes but the standard is still “reasonable care.”²⁶ A track owner and other parties mentioned owe a reasonable duty of care to spectators. A foreseeable outcome, defined as what a reasonable person would take into account when monitoring his or her conduct, may temper the duty requirement.²⁷ If an event is

²⁴ DAN B. HOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION, 114, 115-343 (5th ed. 2005).

²⁵ *Id.*

²⁶ *Supra* note 24.

²⁷ *Id.*

not reasonably foreseeable, there may be no duty owed.²⁸ Reaching back to (then) Judge Cardozo's logic in *Palsgraf v. Long Island Railroad Co.*, the "zone of risk" concept taken literally, could mean that a duty is owed to some ticket holders and not others.²⁹ If a race car is capable of being ejected from the track surface and into the stands, perhaps only the first fifty rows are in danger, but certainly not the 100th or 150th row. Does that mean the closer seats are within the "zone of risk" or would a track simply contend that no seats are within the "zone of risk" since the facility took reasonable safety measures in erecting an engineered catch fence? As speeds and technologies change, does the "zone of risk" change with regard to spectators? These nuances are present in our hypothetical.

Breach is an act outside of that duty of reasonable care, perhaps by action or inaction (where action would be reasonably required), by one of the defendants.³⁰ Generally, if the defendant acted reasonably, there was no breach. In some cases, breach may be proven by preponderance of evidence that the defendant(s) did not act reasonably.³¹ Alternatively, violation of a state statute might provide the basis of breach. The Risk/Utility test, significant in determining breach, looks at three variables: a) the probability of injury, b) the gravity (cost) of the resulting injury, and c) the burden (cost) of adequate precautions needed to prevent the injury in question.³² The defendant is liable if the burden is less than the injury times the probability ($B < I \times P$).³³ This equation presents a recurring theme in litigation when evaluating safety

²⁸ *Id.*

²⁹ *Id.*, quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

³⁰ *Id.*

³¹ *Id.*

³² *Supra* note 24.

³³ *Id.*, quoting *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). The precise quote from Judge Learned Hand follows, "Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this

equipment investment and efficacy as a trigger to liability.

Harm here is the injury or death resulting from an incident. The burden of proof is on the plaintiff to show that defendant caused the harm.³⁴ Based upon an assumption of serious bodily injury or death as harm, emotional distress may be available as an additional harm.

Causation has two required elements.³⁵ First, legal cause-in-fact or “but-for” cause is the notion that the harmful incident would not have occurred without the occurrence of an action or inaction on the part of a given defendant.³⁶ Second, proximate cause is a reasonable connection between the alleged omission or breach and the Plaintiff’s harm.³⁷ Additionally, the harm in question must have been foreseeable (i.e., reasonably able to be predicted) within the scope of risk set forth by the Plaintiff’s original duty.³⁸ Here, the point of view of the parties impacts advocacy. Plaintiff’s counsel will try to define scope of risk as broadly as possible because more breaches and harms will be scrutinized. Defense counsel will try to define the scope of risk narrowly in an attempt to limit liability.

C. Defenses: Assumption of Risk (AOR) & Comparative/Contributory Fault

One potential defense against a negligence claim is that the plaintiff assumed the risk of the activity simply *by choosing to participate* as a spectator. An *express* AOR term can function as a complete defense in cases where AOR language was included in a ticket purchase terms and

notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.”

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

conditions or on the ticket form itself.³⁹

In a traditional contract setting, an AOR term could easily be included as both parties bring their negotiators and counsel to bear, hammering out a bargained-for exchange a term at a time. This is not the case here. An imbalance in negotiating power between a vendor of event ticket and an individual purchaser can exist when terms and conditions are bargained only in the “take it or leave it” sense. The terms themselves, while present, may be buried within a web page,⁴⁰ “jump page,” or microprint on the back of a three by six inch admission ticket. Camouflaged exculpatory terms present potential complications discussed below.

Additionally, there is an argument of *implied* AOR available to defendants and left to the trier of fact.⁴¹ A very summary notion of *implied* AOR is that the Plaintiff a) had or should have had knowledge of the risk, or b) appreciated or should have appreciated the risk of the activity, or c) voluntarily exposed himself to the risk.⁴² The result of this logic is that, in some way, the injured were somewhat responsible for his or her own harm.

This tempering of fault by the plaintiff’s contributory action or inaction is another potential defense. The defense is contributory/comparative fault, where a defendant’s responsibility is reduced by a percentage to account for the Plaintiff’s unreasonable behavior.⁴³

³⁹ RESTATEMENT (SECOND) OF TORTS, § 496B (1977). “[P]laintiff who by contract or otherwise explicitly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.”

⁴⁰ In common experience, and on the sites I visited as part of this research, these “terms pages” were presented as a link to another web page. These looked like: a checkbox next to a statement, “I accept the following terms and conditions,” where the words “terms and conditions” were highlighted to indicate a hyperlink. Software vendors approach this differently, presenting full terms windows imbedded within consent/authorization pages. Those vendors require a user to at least scroll through the agreement before being able to agree to terms. Perhaps this method of contractual assent is more effective than the presence of a “jump page” used by ticket providers.

⁴¹ *Supra* note 24.

⁴² *Id.*

⁴³ *Supra* note 24.

States vary in their approach to apportionment of damages using this approach.⁴⁴ New York, for example, is a *pure comparative fault* state and assigns a percentage of damages based on the percentage fault of the defendant.⁴⁵ Wisconsin, for example, is a modified comparative fault state where a plaintiff receives damages reduced by his percentage of fault, provided that his fault does not exceed fifty percent. If greater than fifty percent at fault, the plaintiff is awarded no damages.⁴⁶ For example, an individual willfully ignores every safety device and warning, enters the paved track surface during a race and is subsequently struck and killed by a racecar at speed. On these simplified facts, the actions of that individual would indicate (at least) contributory/comparative fault.⁴⁷

Alex Drago wrote an article discussing the difference between AOR and contributory/comparative fault.⁴⁸ He quotes a comment to the Restatement (Second) of Torts, highlighting the difference between the concepts by the following example:

[Defendant] is setting off dangerous fireworks in a public place with reckless indifference to a serious risk of harm to persons in the vicinity. [P1] and [P2] approach the place where [defendant] is acting.

[P1], fully aware of the risk, approaches for the purpose of enjoying the spectacle.

[P2] is not aware of the risk, but in the exercise of reasonable care for his own protection should discover or appreciate it.

[P1] and [P2] are injured by a rocket which goes off at the wrong angle.

[P1] is barred from recovery against [the defendant] by his assumption of risk, but [P2] is not barred from recovery for [the defendant's] reckless conduct by his

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ As the FL Appeals court held in *Deboer v. Fla. Offroaders Driver's Ass'n*, 622 So. 2d 1134 (Fla. App. 1993), where a spectator crossed a "hot" race track during an event, was hit and killed. The court highlighted the obvious risk when entering this restricted area and upheld the signed event release.

⁴⁸ Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 585 (2002).

contributory negligence.⁴⁹

So in our scenario, when our father and daughter take their seats to watch the event, one should ask if they either expressly or impliedly assumed risk, or were in some way contributorily or comparatively at fault.

D. Additional Concepts and Selected Statutes

1. Unconscionability

In understanding how to evaluate public policy concerns, more information is required on the topic of unconscionability. Generally, a court must find a term or contract both procedurally and substantively unconscionable before it is rendered void.⁵⁰ Procedural unconscionability occurs when the lead-up to a transaction is inherently unfair for one of several potential reasons.⁵¹ For example, an imbalance in bargaining power, hidden terms, or educational or language disadvantages can trigger a finding of procedural unconscionability.⁵² The resulting information imbalance prevents the contracting party from making an informed choice. Substantive unconscionability occurs when the resulting agreement is unfair.⁵³ For example, prices three or four times normal for the transaction in question, terms egregiously unfavorable to one party, or an allocation of risk egregiously one sided or otherwise unfair might qualify as

⁴⁹ *Supra* note 48, quoting RESTATEMENT (SECOND) OF TORTS § 496A comment d.

⁵⁰ “Unconscionability has both a “procedural” and a “substantive” element, the former focusing on “oppression” or “surprise” due to unequal bargaining power, the latter on “overly harsh” or “one-sided” results. ... Both [must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Supra* note 50.

substantive unconscionability.⁵⁴ Courts require both for a finding of unconscionability but an overflowing amount of one can lessen the required amount of the other.⁵⁵

In our scenario, a plaintiff could argue that the hidden nature of exculpatory terms on the website or ticket produced an imbalance of information, and the lack of real bargaining deprived them of a real choice; hence, the agreement was procedurally unconscionable. Further, the Plaintiff would argue that the resulting agreement's hidden terms were overly harsh; hence, substantively unconscionable. Plaintiff may also argue the common-law doctrine of void as to public policy based on lack of negotiation and lack of knowledge.⁵⁶

2. State Statutes

Some states have enacted legislation to address policy questions surrounding ticket terms and spectator event safety. A New York state statute deems exculpatory agreements in admission tickets, and other writings, for a wide variety of recreational venues, void for public policy:

Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents,

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ “The rigid scrutiny which the courts give to attempted limitations of warranties and of the liability that would normally flow from a transaction is not limited to the field of sales of goods. Clauses on baggage checks restricting the liability of common carriers for loss or damage in transit are not enforceable unless the limitation is fairly and honestly negotiated and understandingly entered into. If not called specifically to the patron's attention, it is not binding.” *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 396 (N.J. 1960). *See also Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445, 450 (D.C. Cir. 1965) (evaluating reasonableness of contract at time it was made); RESTATEMENT (SECOND) OF CONTRACTS § 178.

servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.⁵⁷

The Wisconsin State Legislature passed the “Safe Place” statute that applies to owners of facilities and employers.⁵⁸ This statute holds facility owners to a higher degree of safety than a common law duty of reasonable care.⁵⁹ This law applies to racetracks and all commercial facilities in Wisconsin. In a different approach, Florida enacted the “Motorsport Non-spectator Release.”⁶⁰

Any person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or her or his heirs, representative, or assigns for negligence which proximately causes injury or property damage to the nonspectator within a nonspectator area during the period of time covered by the release.⁶¹

This legislation targets workers or paying visitors within restricted areas of motorsports facilities, generally off limits to spectators unless an additional specific waiver is signed.⁶² Note that the legislation *expressly releases* those “owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event” from liability for negligent acts upon signature of a release as condition of admission.⁶³ This is an important business process lever for Florida facilities.

⁵⁷ N.Y. CLS GEN OBLIG § 5-326 (2010). Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable (*emphasis added*).

⁵⁸ WIS. STAT. § 101.11 (2010).

⁵⁹ *Id.*

⁶⁰ FLA. STAT. § 549.09 (2010).

⁶¹ *Id.*

⁶² On a personal note, I signed waivers like these since the early 1980s while instructing, driving, racing, or crewing at tracks across North America. The Sports Club Car of America (SCCA) uses a two-step process for access to a given facility during race events. On a daily basis, *everyone* is required to sign a facility waiver, including ticket holders. For restricted areas (e.g., grid, hot pits during open track sessions and race) only SCCA licensed individuals (drivers or crew) are admitted after a check of credentials. SCCA Pro, Trans Am, Indy Car, and IRL events use a similar approach to restricted areas but do not require ticketholders to sign waivers on race day.

⁶³ *Supra* note 58.

A topic related to our scenario is a parent's authority to waive their child's rights. Many jurisdictions exclude parental waivers or simply toll claims until children reach the age of majority.⁶⁴ California, however, upholds parental waivers.⁶⁵ In Florida, Governor Crist signed SB 2440 into law on April 27, 2010.⁶⁶ This bill expressly upholds a parent's right to waive and release their minor child's rights to pursue claims against a wide range of commercial entities. In our scenario, in Florida after April 27, 2010, the minor child's rights would be considered waived if the facility's ticket complied with the statutory requirement of specific language and minimum font size.

⁶⁴ In summary, Colorado, Connecticut, Illinois, Maine, New Jersey, New York, Pennsylvania, Tennessee, Texas, Utah, and Washington exclude parental waivers. "See, e.g., *Apicella v. Valley Forge Military Acad. & Junior Coll.*, 630 F. Supp. 20, 24 (E.D. Pa. 1985) ("Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship."); *Fedor v. Mauwehu Council, Boy Scouts of Am.*, 21 Conn. Supp. 38, 143 A.2d 466, 468 (Conn. Super. Ct. 1958) (ruling that "it is doubtful that either the mother or father of this minor plaintiff had the power or authority to waive his rights against the defendant arising out of acts of negligence on the part of the defendant" and sustaining the demurrer of the plaintiff to the special defense that the waiver of all claims for damages absolved the defendant of liability); *Meyer v. Naperville Manner, Inc.*, 262 Ill. App. 3d 141, 634 N.E.2d 411, 415, 199 Ill. Dec. 572 (Ill. App. Ct. 1994) ("Since the parent's waiver of liability was not authorized by any statute or judicial approval, it had no effect to bar the minor child's (future) cause of action . . ."); *Doyle v. Bowdoin Coll.*, 403 A.2d 1206, 1208 n.3 (Me. 1979) (stating in dicta that "a parent, or guardian, cannot release the child's, or ward's, cause of action"); *Fitzgerald v. Newark Morning Ledger Co.*, 111 N.J. Super. 104, 267 A.2d 557, 559 (N.J. Super. Ct. Law Div. 1970) (concluding that release and indemnity provision signed by father on behalf of his minor son was void as against public policy); *Alexander v. Kendall Cent. Sch. Dist.*, 221 A.D.2d 898, 634 N.Y.S.2d 318, 319 (N.Y. App. Div. 1995) (stating in dicta that "a minor is not bound by a release executed by his parent"); *Childress v. Madison County*, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989) (holding that mother could not execute a valid release or exculpatory clause on behalf of her minor son); *Munoz v. II Jaz Inc.*, 863 S.W.2d 207, 209-10 (Tex. Ct. App. 1993) ("We hold that section 12.04(7) of the Family Code, which empowers a parent to make legal decisions concerning their child, does not give parents the power to waive a child's cause of action for personal injuries. Such an interpretation of the statute would be against the public policy to protect minor children."); see also *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 213, 113 L. Ed. 2d 158, 111 S. Ct. 1196 (1991) (White, J., concurring) (stating the general rule that parents cannot waive causes of action on behalf of their children). But see *Hohe v. San Diego Unified Sch. Dist.*, 224 Cal. App. 3d 1559, 274 Cal.Rptr. 647, 649-50 (Cal. Ct. App. 1990) (holding that parent may contract for child and therefore release signed on child's behalf by parent is valid); *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St. 3d 367, 696 N.E.2d 201, 207 (Ohio 1998) (holding that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sports activities where the cause of action sounds in negligence"); *Mohney v. USA Hockey, Inc.*, 77 F. Supp. 2d 859 (E.D. Ohio 1999) (applying *Zivich* holding and ruling that "nothing in the *Zivich* opinion indicates that its holding should be limited to nonprofit sports organizations that are local in scope"), *aff'd in part, rev'd in part on other grounds*, *Mohney v. USA Hockey, Inc.*, 248 F.3d 1150 (6th Cir. 2001).⁶⁷ *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1236-1237 (Colo. 2002).

⁶⁵ *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747. In this CA case, parental rights to waive were upheld though the term in question was held void for public policy as an attempt to waive future gross negligence.

⁶⁶ FL SB 2440, *available at*: www.flsenate.gov/data/session/2010/Senate/bills/billtext/pdf/s2440c1.pdf.

IV. Analysis of Law

The United States Supreme Court is a good starting point for analysis of exculpatory terms void for public policy. In *Bisso v. Inland Waterways Co.*, 349 U.S. 85 (1955), the Court writes in their holding why commercial exculpatory clauses should be carefully analyzed:

This rule [voiding unfair exculpatory agreements] is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. . . . The dangers of modern machines make it all the more necessary that negligence be discouraged.⁶⁷

Although this case can be distinguished from our hypothetical by dealing with issues related to common carriers, the Court highlights concern for “release-from-negligence” terms. The Court’s words from 1955 ring true today regarding capabilities of “modern machines” and the need for consumer protection. By inference, one “overreaching” technique is creating an imbalance of information by hiding an exculpatory term in any of a variety of ways discussed below.

There is a common theme seen in the preamble of many decisions in the following states. To summarize, courts generally disfavor and closely scrutinize exculpatory clauses relieving the defendant of liability for their own negligence.⁶⁸

In evaluating individual state treatment of spectator claims, we follow a format that examines pertinent state statutes (if any), case law related to general negligence claims and a

⁶⁷ *Bisso v. Inland Waterways Co.*, 349 U.S. 85, 90-91 (1955). *See also* RESTATEMENT (SECOND) OF CONTRACTS, § 195 Comment b (1981) (noting relation to other rules regarding release from negligence).

⁶⁸ *See* *Lago v. Krollage*, 78 N.Y.2d 95, 99-100 (N.Y. 1991); *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 212-15 (Ariz. 1984), for example.

brief analysis of our hypothetical claim's prospects in the individual state.

A. State of Arizona

The NASCAR® track in Arizona is Phoenix International Raceway, a super speedway with spectator viewing in grandstands and the infield. Arizona does not have a statute pertaining specifically to ticketholder waiver. Arizona case law, however, is rich with direction.

Salt River Project Agricultural Improvement & Power District v. Westinghouse Electric Corporation is the leading case on exculpatory waivers and involves two commercial entities.⁶⁹ The court proposed a roadmap of an acceptable set of circumstances under which a party could waive the other party's liability in tort and factors to used in evaluation:

That relinquishment will be permitted where [parties] have equal bargaining positions so that the choice was freely and fairly made and not forced by the circumstances. Further, the parties must have negotiated the specifications of the product and have knowingly bargained for the waiver. Under these circumstances our courts will enforce the bargain, even if it turns out to have been a bad bargain for one party or the other. The agreement will not be enforced, however, when it is the product of coercion or inadvertence. Tort remedies may not be waived in an unknowing exchange of forms between shipping clerk and order clerk. An actual bargain must be made by those responsible for the transaction. . . . On this issue, the parties should be allowed to present evidence on the following: 1) the parties' actual bargaining strength, 2) the existence of any bargaining regarding product specifications, and 3) the existence of any actual bargaining or negotiation concerning allocation of risks and limitation of liability. On the basis of the evidence presented, the court can decide whether SRP waived its tort remedies. If the court finds that there was not an effective waiver, the tort action may proceed in the usual manner.⁷⁰

The court also highlighted that a contracting party must meet three conditions to overcome the court's general disfavor for exculpatory agreements: 1) no violation of public policy, 2) real

⁶⁹ *Salt River*, 694 P.2d 198 at 212-14.

⁷⁰ *Supra* note 69 at 215.

bargaining between parties for limitations, and 3) “the limiting language be construed most strictly against the party relying on it.”⁷¹

In a more recent case, *Benjamin v. Gear Roller Hockey*, the Arizona Court of Appeals held *general* waivers for tort release invalid when risks are known to the holder of the waiver but not the grantor.⁷² Again, here, an information imbalance signals the court to invalidate the offending waiver. In *Valley National Bank v. NASCAR*, the Arizona Court of Appeals wrote that ticket waivers had been upheld in a number of jurisdictions and found no reason to hold them void for public policy intrinsically.⁷³

In evaluation of our scenario in Arizona, plaintiffs will argue that an absence of real bargaining for the release existed, an imbalance of bargaining strength harmed the plaintiffs, and risks were known to defendants and not disclosed to plaintiff ticketholders. Defendants will argue that the purchase of an event ticket itself was a bargained for exchange; plaintiffs had an equal bargaining position - purchase was not required, it was chosen; and the layers of warnings on the website and ticket itself were ample disclosure. The outcome in Arizona is close because the plaintiff and defendant both have gaps based on existing Arizona case law.

B. State of California

The NASCAR® tracks in California are Infineon Raceway in Sonoma, a road course

⁷¹ *Id.* at 213.

⁷² *Benjamin v. Gear Roller Hockey*, 11 P.3d 421, 424 (Ariz. Ct. App. 2000).

⁷³ “*Gore v. Tri-County Raceway, Inc.*, 407 F.Supp. 489 (M.D.Ala.1974); *Morrow v. Auto Championship Racing Ass'n Inc.*, 8 Ill.App.3d 682, 291 N.E.2d 30 (1972); *LaFrenz v. Lake County Fair Board*, 172 Ind.App. 389, 360 N.E.2d 605 (1977); *Winterstein v. Wilcom*, 16 Md.App. 130, 293 A.2d 821 (1972); *Lee v. Allied Sports Associates, Inc.*, 349 Mass. 544, 209 N.E.2d 329 (1965); *Theroux v. Kedenburg Racing Assoc.*, 50 Misc.2d 97, 269 N.Y.S.2d 789 (1965); *Seymour v. New Bremen Speedway, Inc.*, 31 Ohio App.2d 141, 287 N.E.2d 111 (1971); *French v. Special Services, Inc.*, 107 Ohio App. 435, 159 N.E.2d 785 (1958).” *Valley National Bank v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 376 P.2d 1186, 1189 (1987). Additionally, the court noted the plaintiffs were not 1) employees, 2) under unequal bargaining power, 3) under no compulsion to agree, 4) were not members of a protected class.

(i.e., turns left, right, with elevation up and down) with spectator viewing in grandstands and on grassy hills throughout, and Auto Club Speedway in Fontana, a super speedway with spectator viewing in grandstands and the infield. California does not have a statute pertaining specifically to ticketholder waiver. There is little language in California case law disfavoring recreational exculpatory agreements. There is, however, specific case law encouraging validity of these waivers for recreational activities and clear boundaries for valid waivers.

National and International Brotherhood of Street Racers, Incorporated v. Superior Court, is a case where a race participant sued the event organizers and landowner for negligence based on additional injuries suffered during his extraction from a vehicle crash. The court disfavors the notion of mandated risk sharing, specifically:

In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.⁷⁴

Later in the same decision, the court speaks to the level of specificity required to make an exculpatory term effective in this setting:

To be effective, a release need not achieve perfection; only on Draftsman's Olympus is it feasible to combine the elegance of a trust indenture with the brevity of a stop sign. "Whoever thinks a faultless piece to see, Thinks what ne'er was, nor is, nor e'er shall be." (Pope, *Essay on Criticism*, pp. 253-254.) It suffices that a release be clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence. This was accomplished here.

The waiver in this case was upheld. This is unusual since the terms of the release were held effective though unlimited in scope.⁷⁵

In *Celli v. Sports Car Club of America, Incorporated*, general spectators with an

⁷⁴ Nat'l and Int'l Bhd. of St. Racers, Inc., 215 Cal. App. 3d 934, 938 (Cal. App. 4th 1987).

⁷⁵ *Supra* note 74 at 940.

additional ticket watched oval track races from the pit area. A small group of spectators was injured in the pit area during an event in 1964. California's First District Court of Appeals excluded a waiver from evidence since the waiver did not explicitly release the defendant from its own negligence and uncontroverted evidence indicated that the defendant's negligence was the proximate cause of the plaintiff's injuries.⁷⁶

Additionally, in *Conservatorship of Link v. National Association for Stock Car Auto Racing, Incorporated*, the court held an exculpatory release used as a condition of admission to a racetrack unenforceable since: 1) a release written in five point type is unacceptable (the court held anything less than 8 pt minimum unsatisfactory for readability); 2) the position within the document must be conspicuous, and 3) a 193 word, convoluted sentence made the plain meaning of the exculpatory term incomprehensible.⁷⁷ In reversing and siding with the plaintiff, this court held the resulting information imbalance rendered the waiver void.

In evaluation of our scenario in California, some facts specific to this state's case law are missing and would more clearly delineate an outcome. As above, the ticket waiver must: 1) clearly, explicitly, and unambiguously identify the parties' mutual intent to exclude liability of one party; 2) the position of ticket waiver must be conspicuous; and 3) the language of the waiver must be understandable. Depending on the facts, the plaintiff might attack the waiver based on one of these three requirements using the previous cases. The defendant would argue *National and International Brotherhood of Street Racers* in that the waiver need not be perfect and the costs of compliance or defense would bankrupt an entire industry if the waiver is not upheld.

⁷⁶ *Celli v. Sports Car Club of America, Inc.*, 29 Cal App 3d 511, 519 (1st Dist 1972). This case is frequently quoted in CA and other western jurisdictions.

⁷⁷ *Conservatorship of Link v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 158 Cal. App. 3d 138, 139-44 (Cal. App. 1st Dist. 1984).

C. State of Florida

The NASCAR® tracks in Florida are Daytona International Speedway in Daytona Beach and Homestead-Miami Speedway in Homestead; both are super speedways with spectator viewing from grandstand and infield areas. Florida enacted a statute expressly releasing owners of motorsports facilities (and others) from liability associated with negligent acts when individuals entering restricted areas execute a waiver as a term of admission.⁷⁸ Also as above, Florida recently enacted a statute that permits a parent to waive his or her child's rights to sue for damages against a recreational facility (and others) when the parent signs an admission waiver that meets certain minimum standards.⁷⁹

In the 1950s, the Florida Supreme Court decided *Schweikert v. Palm Beach Speedway, Incorporated*, holding that an amusement facility owner (a racetrack in this case) had to maintain the facility so “premises and appliances [were] reasonable safe” for their ordinary use and the customary use as made by patrons of the facility.⁸⁰ Plaintiffs might argue that with changing technology and vehicle capabilities, a racetrack is required to maintain an effective “catch fence” for patrons to be safe in the track's ordinary use.

As above, a Florida District Court of Appeals (“DCA”) upheld an exculpatory release in *Deboer* when a spectator crossed a “hot” racetrack during an event, was hit and killed. The court highlighted the obvious risk when entering this restricted area in upholding the signed event release.⁸¹ Another Florida DCA upheld a ticket waiver in *East Bay Raceway v. Parham* when the court held that the plaintiff failed to show how a safer fence would have prevented the specific

⁷⁸ *Supra* note 60.

⁷⁹ *Supra* note 66.

⁸⁰ *Schweikert v. Palm Beach Speedway, Inc.*, 100 So. 2d 804, 805 (Fla. 1958).

⁸¹ *Supra* note 47.

injury.⁸² But in *O'Connell v. Walt Disney World Company*, another Florida DCA held a waiver insufficient when minimum required language was missing and would not be inferred, specifically:

While exculpatory clauses are enforceable, they are looked upon with disfavor; and any attempt to limit one's liability for his own negligent act will not be inferred from an agreement unless such intention is expressed in clear and unequivocal terms. Similarly, unless an indemnity agreement clearly and unequivocally provides for indemnification for the indemnitee's own negligence, that obligation will not be inferred.

In the agreement here, there is a complete absence of any language indicating the intent to either release or indemnify the defendant for its own negligence, so we will not read that language into it. Thus, as to these issues, the agreement did not, as a matter of law, bar plaintiffs' recovery.⁸³

In evaluating our scenario in Florida, one statute is neutral to the plaintiffs, and a recent statute may knock out an argument for the minor. Specifically, since the individuals injured were sitting in the normal spectator area and not a restricted area, Florida's Motorsports non-spectator statute would not apply. Additionally, if facts not in our scenario indicate that the waiver met statutory minimum requirements, the parent's waiver of their child's rights would be effective. If we use the DIS waiver,⁸⁴ the intention to exclude a large potential group's negligent acts and indemnification is clearly and unequivocally expressed. Plaintiffs might argue that, like *Schweikert*, the track owner has a duty of reasonable care to maintain a safe catch fence. Defendants would contend the fence was reasonably safe, and a battle of the experts would ensue. The outcome is uncertain but the defendants seem to have more favorable statutes and case law at their disposal in Florida.

But if there was significant risk to spectators within the first 100 rows, why wouldn't the

⁸² *East Bay Raceway v. Parham*, 497 So. 2d 719 (Fla. Dist. Ct. App. 1986).

⁸³ *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 446-47 (Fla. Dist. Ct. App. 1982).

⁸⁴ *Supra* note 22.

race facility simply declare those seats within a restricted area and require a ticket *and* an additional signed waiver to be eligible for statutory protection in Florida? More on this follows below.

D. State of New York

The NASCAR® track in New York is Watkins Glen International Speedway in Watkins Glen, New York. This facility is a road course with spectator viewing in grandstands and on grassy hills along straightaways.

New York is unusual in that it has a current statute that holds liability releases and waivers on recreational admission tickets (and others) void for public policy, as discussed above.⁸⁵ When evaluating our scenario through the lens of New York law, the entirety of waivers and releases from website to paper ticket, will be void for public policy by statute.

A leading case in New York, *Green v. WLS Promotions, Incorporated*, held that racetracks are “establishments within the contemplation” of the statute. Further, the court held spectators are not involved in the inherently dangerous activities of racetracks, so those facilities are not relieved of liability for negligent conduct.⁸⁶ This case speaks to two important facets: 1) racetracks are facilities within the scope of the statute, and 2) spectators attending events at raceways are within scope of the statute. So, in our scenario, the father and daughter attending a race as spectators at Watkins Glen would be within scope.

Facilities, sponsors, and race teams are able to seek protection from liability involving restricted areas of a race facility through special, written waivers. In *Lago*, the court held that

⁸⁵ *Supra* note 57.

⁸⁶ *Green v. WLS Promotions, Inc.*, 132 A.D.2d 521, 521-22 (N.Y. App. Div. 1987).

waivers specially created for access to restricted areas were exempt from § 5-326.⁸⁷ The key factual differences were: a separate signed waiver document, the bargained aspect of the release, and entrance to the restricted (and highly dangerous) area in exchange for a waiver.

On the facts in our hypothetical, the plaintiff has a good chance of recovery in New York because of a favorable statute voiding ticketholder waivers and existing case law favorable to plaintiffs on similar facts.

E. State of Wisconsin

The NASCAR® track in Wisconsin is Road America in Elkhart Lake, a road course with spectator viewing in grandstands and on grassy hills along straightaways. Wisconsin enacted a “Safe Place” statute, discussed above, that heightens a facility owner’s duty of care beyond reasonable care.⁸⁸ A leading motorsports case dealing with the safe place statute was decided by the Wisconsin Supreme Court in 1975. In *Kaiser v. Cook*, the court held a race track owner liable when a tire flew off a race car and injured spectators watching from a parking lot. The spectator area was known to be dangerous as tires and debris had flow into the area before. The court wrote:

[B]ear in mind that this case arises under the safe-place statute where the duty of the defendants is to maintain their racetrack in a reasonably safe condition. Of course, "the mere fact that an accident has happened does not demonstrate that the place was unsafe." Thus, the specific question here is whether these defendants have maintained and operated their racetrack as safely as the nature of a racetrack will reasonably permit. We conclude that they have not.⁸⁹

This case did not involve a waiver of any sort.

⁸⁷ *Supra* notes 57 & 68.

⁸⁸ *Supra* note 58.

⁸⁹ *Kaiser v. Cook*, 227 N.W. 2d 50, 53 (Wis. 1975).

Two cases form the bookends of acceptability in waiver enforceability in Wisconsin case law. In *Rose v. National Tractor Pullers Association*, the court upheld an exculpatory agreement the plaintiff signed, finding the waiver to be unambiguous, in a proper and conspicuous form, and plaintiff had opportunity to discuss or bargain but did not.⁹⁰ But in *Eder v. Lake Geneva Raceway*, the Wisconsin Court of Appeals held that circumstances surrounding the plaintiff's inspection and signature of the waiver defeated a meaningful opportunity to read and negotiate.⁹¹ The court reasoned that if there was no bargaining, the process violated freedom of contract principles.⁹² Since there was no meaningful opportunity to read and negotiate, the plaintiffs did not freely, voluntarily sign the waiver.⁹³ Hence, the waiver was held invalid. In effect, this court refused to uphold a waiver based on an information imbalance.

Additionally, in *Mettler v. Nellis*, a recreational activity waiver case, the Wisconsin Court of Appeals held a recreational waiver void as against public policy because of an information imbalance :

Exculpatory clauses, such as those contained in the releases, are not favored in Wisconsin. That is because they often "allow conduct below an acceptable standard of care." While not invalid per se, exculpatory clauses are closely scrutinized by courts and are strictly construed against the party that seeks to rely on them. Exculpatory clauses are void if they violate public policy. . . . Because [in the instant case] the releases are broad and all-inclusive, do not clearly inform the signer of what was being waived and do not, when viewed in their entirety, alert the Mettlers to the significance of what they were signing, the releases are void as against public policy.⁹⁴

Evaluating our scenario in Wisconsin, the "Safe Place" legislation advances the plaintiffs

⁹⁰ *Rose v. National Tractor Pullers Ass'n*, 33 F. Supp. 2d 757, 766 (W.D. Wis. 1998).

⁹¹ *Eder v. Lake Geneva Raceway*, 523 N.W.2d 429, 432-33 (Wis. App. 1994).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Mettler v. Nellis*, 695 N.W.2d 861, 865-66 (Wis. Ct. App. 2005).

in one of their claims by enhancing the defendant's duty of care. The bookend cases present arguments for both plaintiff and defendant. Plaintiff will argue *Eder's* logic in inability to meaningfully negotiate, *Mettler's* logic in an overly broad waiver, and distinguish *Rose* by asserting (at least) that the waiver was not conspicuous and there was no opportunity to negotiate. The defense will contend, likely in a battle of the experts, that the facility met all foreseeable safety requirements of § 101.11, therefore the plaintiff failed to meet their prima facie case for negligence. Additionally, the defendants will analogize *Rose* in that the waivers are unambiguous, prominent, and the plaintiffs elected not to discuss or negotiate terms. The defendants will distinguish *Eder* by observing that tickets were purchased weeks before the event, the exculpatory clauses were visible or accessible online the entire time, and plaintiffs never elected to negotiate. The defendants will distinguish *Mettler* by contending that the waiver is as broad as possible, yet not unlimited, as part of the basis of controlling costs; hence, providing evidence of one side of a bargained-for exchange (other side being acceptance of terms by purchase of the ticket at face price). Based on the "Safe Place" statute and case law above, the plaintiffs have a good chance of recovery in Wisconsin.

F. The Intersection of Business Process and Counsel

Chief Executive Officers are fundamentally portfolio managers. Risk management initiatives and business practice (process) remediation are investments within their portfolio. But when an enterprise chooses to invest in one thing, it is implicit that they cannot invest in another. Enterprise resources are not infinite. Attorneys have an opportunity to add instant value to the short and long term operational success of an enterprise in an advisory role by evaluating and prioritizing legally sensitive initiatives.

Attorneys functioning as counselors, perhaps within an enterprise's Office of General Counsel (OGC), have the ability to advise on the current state of the law within jurisdictions of note and suggest prospective business practices to consider in remediating risk. This is less of a lawyerly "yes or no" answer, and more of "how and when" advice. If a sensitive question arises, the OGC attorney can orchestrate the analysis of risk, cost, and process remediation. In this model, the OGC attorney may use resources internal and external to the enterprise. The resulting advice and related analysis are then privileged communication.⁹⁵ To render this explicit, consider the impact during discovery of a non-privileged risk-utility cost analysis of an improvement to a catch fence.

1. The Liability Versus Profits Puzzle

Courts across the jurisdictions surveyed above identified *information asymmetry* as a reason to void terms or entire agreements. Yet some businesses continue an attempt to have it both ways. Dev Sethi wrote about this concisely:

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.⁹⁶

When waivers like these are drafted or implemented poorly, they are an explosion waiting to go off. An OGC attorney could centrally manage a set of waiver guidelines to easily, quickly, and

⁹⁵ The reality of this is that some corporate cultures value their OGC more than others. Some OGCs are more (or less) capable of functioning as a business advisor in addition to a legal advisor.

⁹⁶ Dev K. Sethi, *Please Release Me: Prospective Exculpatory Covenants In Arizona*, 39 AZ ATTORNEY 36, 40 (2003).

inexpensively deploy based on jurisdiction, remediating this risk.⁹⁷

Facilities and the racing sanctioning body (i.e., NASCAR®) encounter liability triggers in their management of dynamic events during a racing season. Consider how the waiver discussed herein would fare under the following circumstances. In April 2009, a driver deliberately impacted another driver's car, admittedly in anger, causing a spectacular crash resulting in injuries to seven spectators.⁹⁸ The crashed driver was quoted in a nascar.com article saying, "[The other driver] did a great job. Congrats to him on the win, but [NASCAR] put us in this box and I guess we'll race like this until we kill somebody. And then they'll change it. . . . I'm glad the car didn't go up in the grandstands and hurt somebody."⁹⁹ The driver was informed later that fans were, in fact, injured.

After this incident, the two facilities decide to increase the height and support for their safety "catch fences" in the fall of 2009.¹⁰⁰ In delaying implementation until six months later, and resisting suggestions to improve safety since the twin tragedies in 1998,¹⁰¹ one wonders if the delay was a decision to wait until the economy improved and ticket sales increased.¹⁰²

In June 2009, NASCAR® decided to adopt "Double-File Restarts -- Shootout Style" to make "racing closer" and "more exciting for the fans."¹⁰³ A driver quoted in the announcement

⁹⁷ Quality control sampling could be included in the process. This way, even junior attorneys could attend races across the country.

⁹⁸ Joe Menzer, *Seven Fans Are Injured In Last-Lap Crash At Talladega*, NASCAR.COM, April 28, 2009, available at: http://www.nascar.com/2009/news/headlines/cup/04/26/post.race.fans.injured.talladega.cedwards/story_single.html.

⁹⁹ *Id.*

¹⁰⁰ Bob Pockrass, *Talladega, Daytona Raising Height Of Catch Fences To Enhance Safety At Tracks*, scenedaily.com, Oct. 6, 2009, available at: http://www.scenedaily.com/news/articles/sprintcupseries/Talladega_Daytona_raising_height_of_catch_fences_to_enhance_safety_at_tracks.html.

¹⁰¹ *Supra* notes 3 & 4.

¹⁰² *Supra* note 100.

¹⁰³ NASCAR Official Release, *NASCAR Adopts Double-File Restarts In Cup Series Races*, NASCAR.COM, June 4, 2009, available at: <http://www.nascar.com/2009/news/headlines/cup/06/04/double.file.restarts/index.html>.

article said, “[T]here will definitely be more accidents, more action and probably more people mad at each other.”¹⁰⁴

The probability of a finding of negligence may be increased by these facts and quotations. The more troubling question is whether, in sum, the facts indicate gross negligence on the part of NASCAR® or a track facility through wanton, reckless acts. Gross negligence cannot be waived and would extinguish the effect of any exculpatory agreement in question.

The pressure to increase fan interest is understandable. Anecdotally, the recession between 2008 and 2010 seems to have hit NASCAR® event ticket sales hard. There is considerably more advertising, more discounting, and more “value offers” available to fans than in the boom years of the early 2000s. Costs are up and revenues are down. But after the twin tragedies in 1998,¹⁰⁵ spectators injured in 2009,¹⁰⁶ and vocal driver concern regarding the safety of the current race format,¹⁰⁷ decisions like these warrant thoughtful consideration from a systemic risk perspective. In this way both market demand and risk, push and pull the prevailing price of an admission ticket.

2. Tools Of The Trade - Prioritization Models, Spreadsheets, and Simulations

There are several common consultative tools for sorting, ranking, and prioritizing business investments. The first tool is the simple spreadsheet used for cost benefit analysis. Here, simple means easy. Unfortunately this tool is best for tangible costs and benefits, not intangible benefits (cost avoidance or decreased risk). Although tracking all costs and benefits is important, the risks herein are complex enough that use of this tool alone will not suffice.

¹⁰⁴ *Id.*

¹⁰⁵ *Supra* notes 3 & 4.

¹⁰⁶ *Supra* note 98.

¹⁰⁷ *Supra* note 103.

The next toolset, called a “four-box model” (a two by two matrix of high/low times two orientations) or a “nine-box model” (a three by three matrix of high/medium/low times two orientations), has been used for decades. This tool is useful when advising enterprises on investment priority related to risk. Imagine a list of prospective projects: a) creating a new multi-state waiver, b) scanning tickets twice - once at security, next at certain designated seats, and c) reinforcing and elevating a facility’s catch fence ten feet. In a four-box model we could sort prospective projects by cost and projected impact to liability (where low cost and high impact is best). The resulting chart would show the waiver in the low cost high impact box, the double scan of tickets occupies the low cost low impact box, and the catch fence construction is in the high cost high impact box. Mapping these projects could provide the basis for discussion and prioritization. As the number of alternatives increases, the value of this technique increases.

Finally, there are leading edge relational/behavioral tools in decision processing. After sorting prospective projects at a high level, one approach is to assemble a multi-disciplinary team of internal and external resources to document pros/cons of the list. After a full set of factors is revealed by this process, the OGC attorney produces a prioritized list and rationale. This group facilitation approach works well if high performing individuals from groups throughout the organization participate. In our scenario, consider a broad sample from a senior ticket taker to a senior finance analyst, for example. Next, some organizations have deployed a technology solution called a prediction market to sample and prioritize alternatives. At a high level, prediction markets utilize a secure website open to employees and select others. The site facilitates voting on the likelihood of alternatives presented. Prediction markets are predicated on the notion that knowledge and insight are hidden within the minds of individuals within the organization. To harvest that insight, ask the proper question and monitor the voting.

G. Business Process Improvement

The following business process alternatives were noted while preparing the research for this article, in conversation with advisors and attorneys, and based on personal experience in consulting and as a spectator and participant in professional racing.

An enterprise would be wise to review its current release process from an end-to-end perspective (i.e., from legal drafting to customer order to execution) to ensure efficacy. In the research above, courts have been clear: exculpatory language must be explicit, conspicuous, and readable. Customers appreciate, user-friendly experiences, as well.

The layering of contracts encountered may produce a resulting agreement that is held void as ambiguous, especially if terms collide. It may be wise to recraft this approach to limitation of liability. In cases where the sales intermediary and track facility are part of the same holding company, consider a single uniform agreement.

The current approach to a purchaser's acceptance of exculpatory terms online or at the ticket office needs review. Consider conspicuously noting that the ticket purchase agreements and admission tickets are contracts. As mentioned above, software companies force scrolling through terms before a customer is given an opportunity to accept terms.¹⁰⁸ In some cases, the act of scrolling is required to assent to terms and continue a purchase transaction or activation of software. This technique of assent could be implemented on a ticket sales website by using an imbedded textual terms page as opposed to a check box and "jump page" used today. It could also be implemented via a credit card access terminal in a ticket office or in a handheld device for ticket-taker use at the track.

¹⁰⁸ *Supra* note 40. Also consider the duty to read doctrine.

Consider offering event insurance to fans for a set fee, perhaps five to eight dollars a ticket. A ticket holder opting in defers the real cost of insurance, and opting out is evidence of a real bargained-for exchange between provider and ticketholder.¹⁰⁹

From a facility operational standpoint, consider two ticket screening points - one for admission and one for consent to terms, perhaps including a pamphlet about AOR. The second scan could be an affirmation (i.e., evidence) of the specific ticketholder's consent to terms and conditions as part of a real bargained-for exchange. If a fan refuses to give assent to terms in this way, consider a process to refund his ticket at face value and allow him or her to leave the premises.

Consider, on the basis of safety analysis, declaring certain seating "restricted non-spectator area," similar to the pits or paddock areas currently. Admission to this area would require a ticket *plus* a signature on a separate paper waiver or handheld device used by a ticket-taker at the facility. In Florida, this may make a facility's release eligible for statutory protection.¹¹⁰

H. Legislative Mitigation

States vary widely on statutory approaches to enforcement of fairness in exchanges of this sort. Florida favors support of commerce,¹¹¹ New York favors protection of their citizenry,¹¹² Wisconsin is focused on safety of commercial facilities.¹¹³ Though regional business culture and statutes vary, states should consider adopting a more standard set of

¹⁰⁹ Thanks to Professor Daniel P. O'Gorman for this observation.

¹¹⁰ *Supra* note 60.

¹¹¹ *Id.*

¹¹² *Supra* note 57.

¹¹³ *Supra* note 58.

provisions, much like the Uniform Commercial Code, for transactions of this sort. If those statutes were then to focus on protocols for fairness of disclosure and communication of terms within a bargain - business to business, business to consumer, or consumer to consumer - the resulting efficiency might bear fruit for businesses and our economy.

V. Conclusion

Enduring enterprises are better risk managers; they are not bigger risk takers. Firms like NASCAR® and ISC will never extinguish litigation risk entirely, nor likely will any commercial enterprise in business today. The key to success for businesses like these is balancing many financial, operational, and economic risks simultaneously and nearly flawlessly. As technologies and customer demographics change, the likelihood of flawless execution decreases.

Revisit the legal process of waiver creation, the business process of waiver execution, and the operational alternatives mentioned herein. Also, adopt a schedule for periodic review of a) potential changes in law, and b) technological capability related to execution of these waivers. A penny of prevention may be worth dollars in return.

But what happens when the next change in automotive capability occurs, or next on-track feud explodes, or the next piece of legislation disfavors businesses? With luck the OGC attorney in the spotlight will simultaneously think like a lawyer and deploy like a seasoned business executive.