Fox Rothschild LLP
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The Outer Limits of Limited Liability

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Bio

What We Will Cover

- The standard for enforcing exculpatory clauses in North Carolina.
- The exceptions to enforcing exculpatory clauses.
- Particular cases addressing the exceptions.
- Trends in North Carolina.
- Other jurisdictions' application of NC law.
- Relevant quirks: arbitration waivers and jury trial waivers.

Favorite Quote from Today's Cases

- Plaintiff yanked on a stuck rolling door to a storage unit:

"*Acting on the basis of a belief that he could pull the door down past the point at which it was stuck*, Plaintiff attempted to close the door with some force, at which point the door came off of its tracks and struck Plaintiff in the head, causing him to sustain personal injuries."

- Judge Sam Ervin, *Hyatt v. Mini Storage on the Green*, 763 S.E.2d 166 (N.C. App. 2014) (italics added)

General Rule on Exculpation Clauses in NC

- Contracts exempting liability for negligence are disfavored.
- Even if a contract clearly and explicitly waives liability for negligence, courts will not enforce it if it:
  - (1) violates a statute,
  - (2) is gained through inequality of bargaining power, **or**
  - (3) is contrary to a substantial public interest.

Fortson Doctrine

- *Fortson v. McClellan*, 131 N.C.App. 635, 508 S.E.2d 549 (1998).
- Anne Fortson injured her leg and knee while riding a motorcycle on the second day of a two-day motorcycle safety program at Lenoir Community College because of a throttle malfunction to a motorcycle that defendant knew had given another participant difficulties with the throttle.
- Fortson sued under a negligence theory.
- Fortson had signed a waiver and release, which stated that she:

"Hereby releases, waives, discharges, and covenants not to sue the North Carolina Motorcycle Safety Program ... the promoters, other participants, operators, officials, any persons in a restricted area ... whether caused by the negligence of the releasees or otherwise while the undersigned is ... participating in the course...."

Fortson Doctrine

- Court drew on prior case law holding that:
- Contracts exempting liability for negligence are disfavored in NC.
- Even if a contract clearly and explicitly waives liability for negligence, courts will not enforce it if it:
  - (1) violates a statute,
  - (2) is gained through inequality of bargaining power, **or**
  - (3) is contrary to a substantial public interest.

Pre-*Fortson*

- Prior to *Fortson*
- Case of *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F.Supp. 565, 566 (W.D.N.C. 1995), discussed in *Fortson*, deemed pre-race waivers enforceable as not involving a public interest.
- That is, a race car driver who signs a waiver is stuck with the waiver.
- So, will a two-day motorcycle course be enough of a public policy interest to invoke a public interest exception?

Forston Rejects Waiver for Public Interest Exception

- Yes.
- Two-day motorcycle course invokes public policy exception
- “There is an enormous difference between the situation of professional race car drivers racing around a course designed for that sport, and an inexperienced member of the public seeking training in the safe use of a motorcycle on the public highway. The public interest in minimizing the risks associated with motorcycle use have been recognized in case law and regulated by statute.”
- Note: Court did not hold that any particular safety statute was violated.

Violation of Statute: Case in Point

- Another Pre-*Fortson* case*: Waggoner v. Nags Head Water Sports. Inc.*, 141 F.3d 1162, 1998 WL 163811 (4th Cir. Apr. 6, 1998) (unpublished table opinion)
- Patsy Waggoner was injured while riding a jet ski rental from Nags Head Water Sports.
- She signed a waiver that purported to release Nags Head from "all claims ... That may arise from [her] use of the craft."
- She sued for failure to maintain the jet ski.
- Waggoner claimed violation of NC Boating Safety Act, N.C. Gen. Stat. § 75A-1 to -19, which states that it is the policy of North Carolina to promote boating safety.
- Was this enough to invoke either the safety statute exception or the public interest exception?

Violation of Statute: Case in Point

- No.
- The court rejected use of the statute in any form, stating:

"[I]ts terms deal almost exclusively with the operation of water craft and do not address the duties owed by one who rents such craft for recreational use. The closest provision is section 75A-8, which provides that: It shall be unlawful for the owner of a boat livery to rent a vessel to any person unless the provisions of this Chapter have been complied with. It shall be the duty of owners of boat liveries to equip all vessels rented as required by this Chapter. However, Waggoner does not assert that there has been any violation of this provision, nor do we find that there has been any such violation. Waggoner merely asserts that the statute as a whole exhibits a policy toward promoting boating safety. This is a far cry from a prohibition of exculpatory clauses in recreational rental agreements."

- QUERY: *Fortson* also did not cite to any particular statutory violation. What if *Fortson* had been decided prior to this opinion?

Public Interest?: Wash. Rejects North Carolina

- 5 years after *Fortson* and many miles away ….
- Opposite result in *Petersen v. Sorensen*, No. 50579-3-I (Wash. App. 2003), which rejected *Fortson*.
- Same situation of motorcycle training accident.
- Witness this judicial body slam in the next slide.

Petersen Slams *Fortson*'s Public Interest View

"[I]t is clear that North Carolina case law recognizes a very different determination of what kinds of activities are of such great interest to the public as to prevent the use of exculpatory releases. The court in *Fortson* relied on its earlier determination, in *Alston v. Monk*,35 that the practice of cosmetology, involving the use of hazardous chemicals, extensively regulated by the state with training and licensing requirements, and having the capacity to affect the health of the general public, was such a matter of public interest that exculpatory releases could not be enforced.36 Thus, the plaintiff's claim that she was injured when the defendants' negligence caused her hair to fall out was not barred by an exculpatory release she signed. The *Fortson* court noted that a `motorcycle safety training program evokes the same, if not greater, important level of public interest as cosmetology.'37 While the public interest in cosmetology is undoubtedly strong, it does not rise to the level of interests that Washington courts have thus far held to preclude the enforcement of exculpatory releases. North Carolina precedent is not persuasive in this case."

Statutory Violation: NC Federal Case in Point

- *Strawbridge v. Sugar Mountain Resort, Inc.*, 320 F.Supp.2d 425 (W.D. N.C. 2004)
- Vincent Strawbridge skied on a bare spot (allegedly), paralyzing him.
- The back of his lift ticket said he agreed to the following:

"To assume all risk of personal injury or loss or damage to property as a result of all the inherent risks of skiing whether said risks are known to user. The purchaser or user of this ticket agrees and understands that skiing can be hazardous. Variations in snow, ice, and terrain along with bare spots, bumps, moguls, stumps, forest growth, rocks and debris, and many other hazards or obstacles, including lift towers, snowgroomimg equipment, snowmobiles, and other skiers exist within this ski area. In using this ticket and skiing at the area, such dangers are recognized and accepted whether they are marked or unmarked. The skier realizes that falls and collisions do occur and therefore assumes all the risk of injuries or loss or damage to property and the burden of skiing under control at all times."

- He also rented ski equipment with similar waivers that he signed.

Statutory Violation: Case in Point

- Strawbridge argued that the release language violated statutes governing ski resorts.
- He cited § 99C of the North Carolina General Statutes, entitled "Actions Relating to Skier Safety and Skiing Accidents."
- That statute imposes on ski area operators the duty "[n]ot to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties." N.C. Gen.Stat. § 99C-2 (c)(7).
- Did the court reject this as not specific enough?

Statutory Violation: Case in Point

- No. The court bought it and voided the release.
- The court stated:

“Plaintiffs' case is built on the claim that Sugar Mountain acted negligently and injured them by allowing a bare spot to exist and failing to mark it. If such conduct constitutes negligence, then allowing Sugar Mountain to contract its way out of liability would undercut the statute. Therefore, the exculpatory language on the lift ticket is unenforceable, and this action is not barred.”

- Note: the court also considered the industry sufficiently heavily regulated to also invoke the public policy exception.

Statutory Violation: NC Federal Case in Point

- *McMurray v. United States*, No. 4:12-CV-86 (E.D. N.C. 2012) (Judge James C. Dever, III)
- Debra Rose McMurray was injured as a passenger to a U.S. Marines driver who was driving her to an Educators' Workshop at the Marin's Recruit Depot in Parris Island, South Carolina.
- The marine allegedly ran a red light.
- McMurray had signed a release stating she waived any right to sue the United States arising from the United States' negligence, including during transportation to and from the seminar.
- McMurray cited *Fortson's* violation of statute exception and cited NCGS § 20-158(b)(2), which prohibits a driver from running a red light.
- Did the court deem this violation a basis to void the release?

Statutory Violation: Case in Point

- No.
- Court stated:

"T]his statute merely deals with operating a motor vehicle. As the Fourth Circuit explained in *Waggoner*, in order for the statutory exception to apply, the statute must (at a minimum) mandate a specific standard of care for a waiver to violate the statute.… This is a far cry from a prohibition of exculpatory clauses in [jet ski] recreational rental agreements."); *cf. Strawbridge v. Sugar Mountain Resort. Inc.*, 320 F. Supp. 2d 425,433 (W.D.N.C. 2004) (disallowing enforcement of a waiver when it conflicted with a statute imposing a specific duty on ski operators not "to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties"). **Unfortunately for McMurray**, the statute that she cites does not provide a specific standard of care applicable to the facts of this case. In fact, the statute explicitly states that the failure to stop at a red light shall not be considered negligence *per se*. See N.C. Gen. Stat. § 20-158(d); *Lewis v. Brunston*, 78 N.C. App. 678, 682, 338 S.E.2d 595, 598-99 (1986). Accordingly, the Release does not violate this statute. [boldface added]

- QUERY: Did *Fortson* require violation of a specific statute? How did *Waggoner* come to dominate the discussion over *Fortson*? Don't the statutes cited in *Fortson* "deal[] with operating a motor[cycle]"? Is it really necessary to twist the knife with "[u]nfortunately for McMurray"? Do N.C. Gen. Stat. § 20-158(d) and *Lewis* really say what court said they say?

N.C. Gen. Stat. § 20-158(d) and *Lewis v. Brunston*

- § 20-158(d):
  - "No failure to stop as required by the provisions of this section shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, **but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence**." (boldface added)
- *Lewis*:
  - Reversed a directed verdict against plaintiff who had stopped at stop sign, turned left, and was then hit by two cars racing each other at 80 mph.
  - Court said that while there was evidence that plaintiff was contributorily negligent for pulling from his stopped position, it was not enough to require a finding as a matter of law but was **a fact question for the jury** given defendants' high speeds.

Inequality of Bargaining Power

- *Finch v. Lowe's Home Centers, LLC*, No. 3:20-cv-02981 (D.S.C. July 15, 2021) (applying NC law) (Judge J. Michelle Childs).
- Perry Finch, a Lowe's installer, filed class action suit against Lowe's seeking benefits as employee rather than independent contractor.
- Finch signed Lowe's contracts for over 20 years but then got a new onerous one by email that he signed electronically Dec. 10, 2014 with an arbitration provision.
- Finch argued that the arbitration clause is unenforceable because
  - (1) illusory in that it has one-side modification clause,
  - (2) unconscionable procedurally due to unequal bargaining power,
  - (3) unconscionable substantively due to oppressiveness of the requirements.

Inequality of Bargaining Power

- Modification clause said that Lowe's can modify terms but must make efforts to notify installer by email or otherwise.
- Did not require Lowe's to confirm receipt or take other measures to assure modification was actually received and acknowledged.
- Says installers will be deemed to have accepted the modifications merely by undertaking the next installation job.
- Did Judge Childs deem this modification clause to be so one-sided as to make the arbitration clause illusory?

Inequality of Bargaining Power

- No.
- Modification clause did not give Lowe's "unfettered discretion."
- The installers are "masters of their acceptance" because acceptance is not automatic.
- Again, installers are deemed to "accept" merely by doing the work the next time asked.

Inequality of Bargaining Power

- Procedural unconscionability in *Finch v. Lowe's*
- Five-factor test in NC for unconscionability of arbitration clauses under *Tillman v. Com. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008) :
  - (1) the plaintiffs were rushed through signing the contract;
  - (2) the closing officer indicated where to sign;
  - (3) there was no mention of the arbitration clause at the closing;
  - (4) the defendants admitted they would have refused to complete the deal rather than negotiate terms of the arbitration agreement; and
  - (5) "the bargaining power between [the] defendants and [the] plaintiffs was unquestionably unequal in that [the] plaintiffs [were] relatively unsophisticated consumers contracting with corporate defendants[.]"
- Did Judge Childs in *Finch* feel these factors were met?

Inequality of Bargaining Power

- No.
- Two reasons:

"(1) Plaintiff had sufficient time to read the contract and inform himself of its contents before signing it, and (2) the entire arbitration clause is printed in all bold font and large sections of it are in all capital letters."

Inequality of Bargaining Power

- Substantive unconscionability in *Finch v. Lowe's*
- Finch argued the terms on their face are oppressive in that:
  - Indemnification provision is onerous.
  - Waives class action rights.
  - Has one-sided modification provision.
- Did court feel there was a basis for the substantive unconscionability argument?

Inequality of Bargaining Power

- No.
- Indemnification provision is limited.
- Supreme Court allows waiver of class action rights.
- Already addressed one-side modification provision.
- Has operated under this agreement for 7 years already.
- PRACTICE TIP: Put language in bold and caps, don't make provisions too one-sided, and provide some means for acceptance of modifications.

Public Interest Exception

- *Hyatt v. Mini Storage on the Green*, 763 S.E.2d 166 (N.C. App. 2014)
- Suit against storage company.
- David Hyatt yanked down on roller door to his storage unit when it got stuck.
- As described by Judge Sam Ervin of the NC Court of Appeals:

"Acting on the basis of a belief that he could pull the door down past the point at which it was stuck, Plaintiff attempted to close the door with some force, at which point the door came off of its tracks and struck Plaintiff in the head, causing him to sustain personal injuries."

- Rental agreement provided, among other things, that "[l]andlord [shall not] be liable to tenant and/or tenants guest or invitees for any personal injuries sustained by tenant and/or tenants guest or invitees while on or about landlord's premises."
- Did the court void the waiver?

Public Interest

- No. Waiver stands.
- Statutory violation? No.
  - "As an initial matter, we note that Plaintiff has not cited any statute that is inconsistent with the exculpatory provision at issue here, and we have not located any such statute in the course of our own research. For that reason, the first *Fortson* exception does not bar enforcement of the exculpatory clause at issue here."
- Unequal bargaining power? No.
  - "In addition to admitting that he had read and understood the provisions of the rental agreement before signing it, Plaintiff acknowledged that there was another storage facility 'up the road' that he considered dealing with before electing to obtain a storage unit from Defendant Mini Storage. As a result, given that Plaintiff had other options for obtaining the storage unit that he needed, we are unable to conclude that the exculpatory provision contained in the rental agreement resulted from the exercise of unequal bargaining power."
- Public interest exception? No.
  - "The self-storage industry is not, unlike the industries to which the public interest exception has been deemed applicable, extensively regulated by North Carolina law."

NOTES ON HYATT

- QUERY:
  - Did other storage place “up the road” have a similar waiver?
  - Would this have mattered to the court? (Court did its own research on statutes.)
- PRACTICE TIPS:
  - Defendants seeking to enforce release:
    - Get evidence that plaintiff read, signed, or otherwise acknowledged.
    - Get evidence of other options available to plaintiff.
    - Argue no direct statutory violation.
    - Argue activity at issue is not heavily regulated.
  - Plaintiffs seeking to void release
    - Be detailed in your complaint as to relevant statutes.
    - Be detailed in your complaint as to both procedural unconscionability and substantive unconscionability to establish inequality of bargaining power.
    - Don’t aggravate the court by being lazy.

Negligence "Outside Scope of Agreement"?

- *Thackurdeen v. Duke University*, No. 1:16CV1108 (M.D. N.C. 2018).
- Ravi Thackurdeen drowned from rip currents at a Costa Rica beach while a student enrolled in Duke's Global Health and Tropical Medicine Program.
- His parents sued for negligence, wrongful death, and intentional infliction of emotional distress against Duke and the Organization for Tropical Studies (OTS).
- Duke moved to dismiss for lack of service of process but also sought judgment on the pleadings as to the causes of action for negligence and wrongful death due to waivers of liability.
- Ravi signed two waivers, one for Duke and one for OTS
- Main argument: Beach trip was unexpected lark outside scope of the education program, so negligent conduct was outside scope of the waiver.
- Did the court buy this argument and deem waivers unenforceable?

Waiver "Outside Scope of Agreement"?

- No. Waivers enforceable.
- Note: court rejected argument that education is a highly regulated activity by noting that the situation involved swimming, which is not a highly regulated activity.
- Court then said the swimming activity was not outside scope of the agreement because the agreement generally covered anything that would be done during the Costa Rica trip.
- PRACTICE TIP: Include broad language in the waiver.

Recent Waiver Case of Interest to Corporate Counsels

- *Feenix Payment Sys. v. Steel Capital Mgmt.*, No. 20-1519 (D. Del. Aug. 24, 2021)
- No waiver of LLC's right to jury trial for trade secrets claims against former General Counsel and Investment Officer.
- Suit by LLC against recently departed GC and investment officer for stealing trade secrets
- Both had signed Operating Agreements when they became members of the LLC but these had no clause waiving right to jury trial.
- Both signed Redemption Agreement when they departed but these had a jury trial waiver.
- Court deemed jury trial waiver did not apply to trade secrets claims that relate to the original Operating Agreements because the Redemption Agreement did not expressly apply the waiver to such claims.
- PRACTICE TIP: If you want jury trial waived as to all claims generally, say so in departing documents.

Recent Case of Interest: *Klink* and "the Click"

- *Klink v. ABC Phones of N.C., Inc.*, No. 20-cv-06276 (N.D. Cal. Aug. 20, 2021)
- Arbitration agreement enforceable by merely clicking online.
- Ariel Klink filed class action suit against ABC Phones of North Carolina, Inc. for failure to pay proper wages, etc. and demanded jury trial.
- ABC moved to compel arbitration because Klink clicked the "acknowledge" button in an online form agreeing to arbitration on Sept. 24, 2018.
- Klink denied making such click, said her supervisor, the store manager, did it.
- Court held evidentiary hearing on whether the parties agreed to arbitration.
- Court found they had, rejecting the claim that the store manager did it.

Klink Judge Rejects Unequal Bargaining Power Argument

- Court rejected defenses of procedural unconscionability and substantive unconscionability, using California substantive law on contracts.
- Court found "a minimal amount of procedural unconscionability," but said that is not enough if there is not also substantive unconscionability.
- Klink argued substantive unconscionability because of:
  - (1) cost sharing provision as to arbitration costs,
  - (2) ABC gets unilateral modification rights, and
  - (3) the waiver of the Private Attorneys General Act (PAGA), a California statute that lets workers sue employers for labor violations
- Did the court find substantive unconscionability?

Klink Judge Rejects Unequal Bargaining Power Argument

- No.
- Court found no substantive unconscionability because
  - (1) California law forbids such cost sharing provision and waiver of PAGA and both can be severed from the arbitration agreement, and
  - (2) ABC's unilateral modification rights are only a factor of unconscionability and this also can be severed from the arbitration agreement.
- QUERY: What if your state does not bar cost-sharing clauses or labor law suits?
- QUERY: Why didn't court allow a jury trial on whether Klink did the "click"?

Klink's Jury Trial Waiver Trap

- The FAA's § 4 (9 U.S.C. § 4) allows a jury trial on the issue of formation of arbitration agreement, stating:

  "[T]he party alleged to be in default may ... **on or before the return day of the notice of application**, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." (boldface added)

- The "return day" is typically 30 days after filing of an arbitration petition.
- Klink's complaint demanded a jury trial, so jury demand was sought "before the return day of the notice of application," even if you consider the Motion to Compel to be the "notice of application."
- So why did the court conduct a bench trial, not a jury trial, on formation?

Klink's Jury Trial Waiver Trap

- Court considered the jury trial demand to be too general.
- "Klink you stink": No "special" demand in response to Motion to Compel:

"[H]er opposition did not contain a special demand for a jury trial on whether an arbitration agreement existed. See Opp'n. Instead, Ms. Klink "request[ed] leave to conduct discovery relating to the formation of the purported agreement, including a deposition of Ms. Patel and Ms.Klink's former direct supervisor." Opp'n. at 24. The Court therefore concluded that Ms. Klink waived her right to a jury trial because she failed to specifically demand a jury trial on the issue of arbitration **on or before the motion to compel arbitration was filed**. See Opp'n." (emphasis added)

- QUERY: How do you respond to a motion to compel **before** it is actually filed? (Uh, maybe with a jury demand on all issues triable by a jury?)

Klink's Jury Trial Waiver Trap

- Klink court cited 4th Circuit case of *Berkeley Cty. Sch. Dist. v. Hub Int'l. Ltd.*, 944 F.3d 225, 242 (4th Cir. 2019) ("the party alleged to be in default of the arbitration clauses, could have demanded a jury trial on the Arbitration Motion ... [and] also presumably have waived a jury and accepted a bench trial.")
- This was a throwaway line in *Berkeley*.
- Plaintiff's complaint demanded jury trial, but wanted bench trial on issue.
- No ruling on whether jury trial demand in a complaint "covers" the issue.
- Because it was not argued.

Recent Cases of Interest

- PRACTICE TIPS TO REDUCE CHANCE OF SUBSTANTIVE UNCONSCIONABILITY DEFENSE IF DEFENDANT:
  - Whether to impose cost sharing?
  - Impose unilateral modification rights?
  - Waiver of other statutory labor law rights?
- PRACTICE TIPS AS TO JURY TRIAL DEMANDS IF PLAINTIFF:
  - Jury trial demand should specifically seek the right of determination that no arbitration agreement was reached;
  - Immediately file a Demand for Jury Trial on Issue of Arbitration;
  - Opposition to Motion to Compel Arbitration should specifically seek jury trial on issue of arbitration.