

**FEBRUARY 2008
MULTISTATE PERFORMANCE TEST (MPT)**

The MPT Question administered by the State Board of Law Examiners for the February 2008 bar examination was *In re Velocity Park*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website, and the February 2008 MPT is now available there.

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MULTISTATE PERFORMANCE TEST

REPRESENTATIVE ANSWER 1

Hall & Gray LLP
Attorneys At Law
730 Amsterdam Ave.
Banford, Franklin 33701

To: Deanna Hall
From: Applicant
Re: Liability Waiver for Velocity Park
Date: February 26, 2008

You have asked me to analyze the waiver our client, Zeke Oliver, proposes to use to reduce his liability to those who may be injured while skateboarding at Mr. Oliver's soon-to-be-opened skate park. My analysis is as follows:

I. Protection from Liability.

As a preliminary matter, waivers of liability are permitted under Franklin law except where prohibited by statute or public policy. Lund. There is no statute here, so the enforceability of the waiver will depend on whether it complies with public policy.

In addition, it should be pointed out that exculpatory contracts or waivers will be construed against the party seeking to protect itself from liability. Lund.

In Lund, the Franklin Supreme Court, citing Schmidt, set forth a two-part test for determining whether a waiver (or exculpatory contract) is void for public policy reasons, supplemented by a third relevant condition. Each prong of the test is discussed below.

A. The Language of the Waiver. The first prong of the test is that the language of the waiver "cannot be overbroad but must clearly, unambiguously and unmistakably inform the signer of what is being waived." In Lund, the court held that a waiver was void where the signer released a swim club from all liability, without regard to fault. In Schmidt, a release was unenforceable where it failed to mention the word "negligence" and was vaguely worded. The Lund court, while noting that including the word "negligence" is not required, does state, following the Restatement of Contracts, that a waiver may not exculpate from harm caused by a defendant's intentional or reckless conduct, but only from ordinary negligence. Mr. Oliver's proposed waiver is overbroad,

since it attempts to release the skate park from liability for all damages, whatever their cause, including any actions by the park or its employees. A Franklin court could likely find this waiver, as drafted, unenforceable.

B. Waiver Form. The second prong of the test used in Franklin is whether the waiver, “viewed in its entirety [alerts] the signer to the nature and significance of what is being signed.” In Lund, the court held that where a registration form and waiver were on the same pre-printed card, all the print was of equal size and prominence, and the waiver was not conspicuously labeled as such, the waiver was insufficient to inform the signer of the rights being waived. The court’s holding in Schmidt was exactly the same. Further, in Lund, the court noted that the form was not explained to the plaintiff and that she was under time pressure to sign, with no opportunity to negotiate. Mr. Oliver’s proposed arrangement has many of the same flaws. The registration and waiver are on the same form, the print size on the waiver is smaller than the rest of the form, and there is only one place to sign. In addition, Mr. Oliver explained in his client interview that the park guests will sign the form at the cash register, where they will be waiting on line, as in Lund, with no opportunity to negotiate and without having the form explained. Therefore, unless changes are made, the waiver will likely fail the second prong of the Lund test.

C. Bargaining Power. In addition to the two prong test, the Lund court stated that it also considers whether there is unequal bargaining power between the parties. As discussed above, teenagers will be under pressure to sign quickly, and have essentially no opportunity to negotiate, if they want to be admitted. This will be the only skate park in town; also, public spaces are increasingly being forbidden to skateboarders. Thus, anyone who wishes to skateboard will have no choice but to sign the waiver. This is an additional argument against enforceability.

II. Suggested Changes to the Waiver.

A. The form stating park rules and the waiver should be split into two separate documents, each with a signature line at the bottom. The agreement to abide by park rules should be part of the registration form, and the agreement to waive liability should be part of the second form.

B. The print size of the waiver, or its operative provisions, should be more conspicuous, in larger type, bolded, or capitals.

C. The waiver language should be revised to waive liability only with respect to negligence by the park, and only with respect to foreseeable types of injury. It should be made clearer, with less redundancy, and put in language a teenager would understand. It should also be much shorter over-all.

D. I would also suggest adding to the prohibition on alcohol and drugs a prohibition on entering the park under the influence, since the newspaper article indicates that drunken skateboarding is an increasing problem.

III. Signature by a Minor

Franklin law provides that contracts made by minors are voidable by them unless ratified upon reaching majority. The law specifically excepts contracts made on behalf of a minor by a parent or guardian. Here, Mr. Oliver proposes to have just the minor sign. This is unadvisable. Minors should print the form out from the website or pick it up at the park, have it signed by their parents, and return it to the park. This would have the added benefit of giving them more time to look it over.

There is no case law in Franklin as to whether the parent's signature will be sufficient to avoid liability as against the child. However, Columbia, also in the 15th Circuit, has held that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence." [emphasis added] Holum. The circumstances here are different. This is a for-profit park that will be charging admission, selling merchandise, and selling food and drink. In addition, the public policy of encouraging sports does not apply as strongly, if at all, to skateboarding as to soccer. Skateboarding is an activity that the town is trying to limit, not increase; it results in many injuries and according to the news article has been associated with anti-social behavior in teens. Although Mr. Oliver obviously wants to help kids out, there is no denying that his primary goal is pecuniary gain. The best course of action is to prepare a waiver that will be signed by both the child and his or her parents.

I note, as an aside, that we should encourage Mr. Oliver to incorporate his business, if he has not already, to avoid personal liability for any injuries.

MULTISTATE PERFORMANCE TEST

REPRESENTATIVE ANSWER 2

Hall & Gray LLP
Attorneys At Law
730 Amsterdam Ave.
Banford, Franklin 33701

To: Deanna Hall
From: Applicant
Re: Liability Waiver for Velocity Park
Date: February 26, 2008

Introduction

This memorandum is to apprise you of the statutory and case law that governs liability waivers.

A. Does the proposed waiver protect Velocity Park from liability.

Public policy concerns govern over waivers. Lund. The court will not uphold a waiver that creates a tension between the right to contract freely and when a tortfeasor contracts away responsibility for negligent acts that would encourage substandard behavior. Lund. Here, the skate park waiver appears to contract away any liability of the skate park with the following language “forever release.....from all legal liability including but not limited.....of whatever kind I have or which hereafter accrue to me..... whether such injuries result from equipment failure or conditions in the park.”

A waiver must satisfy two requirements for it to be enforceable and not against public policy. Lund. First, it must be clear and not overbroad language to inform the signer of what is

being waived. Lund. Second, the waiver form must alert. Lund. A factor that the court will consider is whether there is substantial disparity in bargaining power between the parties. Lund.

Broad language includes language that shifts liability for a tortfeasor's conduct including reckless and intentional conduct will not be enforced. Lund. Here, the language of the waiver as stated above can be construed to mean that any reckless or intentional conduct of the employees or owners of the skate park cannot be the basis of a cause of action. This will not be upheld if the courts enforce the holding in Lund.

The Lund court upheld the Schmidt court finding that a pass that contains a broad exculpatory clause will not be upheld. Schmidt v. Tyrol Mountain (Franklin Sup. Ct. 1996). In Schmidt and Lund, the waiver was within the actual registration form. The courts found that the form did not fully communicate the waiver's significance and nature because it served a dual purpose. Lund & Schmidt.

Waivers should be separate documents that give notice. The signature of waiver should be a different and separate signature from entrance or registration signature. The waiver needs to be conspicuous. It is irrelevant of the size of the letters or fonts.

The skate park form also serves two purposes. It is a registration form as well as waiver. The release section is not conspicuously labeled and will be found to be insufficient to alert the signer of the waiver of liability for their own negligence and for other's negligence.

For the waiver to be enforceable, it should be a separate form. The waiver's language does not have to include the word "negligence", but should state terms that the party signing is releasing others from their negligent act. Lund and Schmidt.

If the skate park is sued for a tort, the waiver form, according to the above holdings, will not be upheld.

The waiver will only bar claims that the parties contemplated when they executed the contract. The Banford Courier illustrated many types of injuries that can occur while skating or in a skate park. Some injuries include: wrist injuries, rare deaths from falls, injuries caused by surface conditions, beginner skateboarders, and intoxicated skateboarders. Based on the interview with Zeke Oliver, the owner of the skate park, he only contemplates bruises and scrapes. The terms of the proposed waiver would not cover these other types of injuries since it was not contemplated by the owner.

Bargaining power is a factor that the courts will consider. This includes whether the registrants have an opportunity to negotiate, or if they were simply told to sign the form. Pointing out the waiver and explaining it is also an important factor that the courts will consider. Finally, the court will consider whether the waiver had to occur in line while other patrons are putting pressure on the registrant.

B. Specific revisions, including replacement language and layout.

1. The waiver should be a separate form.
2. The waiver should have a conspicuous title.
3. The waiver should be more specific, and include what types of negligent acts the parties are waiving liability. The waiver should include the types of injuries that are typical in skateboarding as described above. Factors to consider are how well the skate park will keep its grounds safe and free of dangers. Another factor to include will be how well trained and paid the staff will be.
4. The waiver should include what type of first aid will be administered and that it will be minimal.
5. A child should not be permitted to sign the waiver. A parent or guardian should sign. This does not mean that a waiver must be signed every time the child enters. Perhaps, a different waiver form for children should be designed, including that the parent waives liability for their own claims and the claims of their child. The form should state that the waiver is good for a certain period. Upon the expiration of that period, another form must be signed before the child is permitted to use the park again.
6. The form should state that it waives liability if the participant enters while intoxicated.

Other things that I would consider informing our client is that he should request beginners to take a certain number of classes before using the skate park at their own discretion. This will minimize injury and any potential litigation. The park should require more safety gear such as slip resistant shoes, and wrist guards. The staff at the park should be trained to look for potential hazards in the surface of the park and warn or eliminate risks to users.

C. Will any waiver be enforceable if signed only by a minor.

Waiver of a child signing?

In the State of Franklin, the law for waivers in contract is explicitly stated in the decision of *Lund v. Swim World, Inc.*, Franklin Supreme Court (2005) (“Lund”).

Waivers of liability are permissible in Franklin, except when prohibited by statute or public policy. In Franklin, the only types of contracts that are prohibited are contracts that minors entered into. Section 41 (a) and (b) of the Franklin Statutes - Civil Action (hereinafter referred simply by statute name). A contract made on behalf of a minor is not prohibited. See Section 41(b)(3).

Therefore, any contracts that a minor signs is unenforceable because it is expressly prohibited in the State of Franklin.

Waiver of a parent signing on behalf of a child?

The Franklin Supreme Court has not weighed in on whether parents who sign contract for their minors are enforceable. However the language of Section 41 (b)(3), and the weight of the Columbia Supreme Court, a jurisdiction within the 15th circuit, provides guidance.

In *Holum v. Bruges Soccer Club Inc.*, Columbia Supreme Court (1999) (“Holum”), the court held that a parental or guardian waiver is enforceable. It is important to note that Holum decided that a stronger public policy exists to uphold contracts that benefit the community, than to strike down waivers.

In Columbia, the general rule is that adults who waive liability from negligent acts arising from recreational activities are enforceable whether or not the negligent acts results from the participant or the provider of the activity. Holum. This supports an individual autonomy and freedom. Holum.

In that case the waiver of a child’s participation in soccer was broad, and included in the registration form. The court upheld the appellate court’s finding that release applied to the parent’s cause of actions.

The court examined whether the parent’s may release their children’s claims. Holum. The court discussed how recreational activities provide kids with an opportunity to develop skills. The court recognized that assistance of volunteers allows organizations to offer activities at minimal costs, and the threat of liability should not outweigh the benefit of providing the activity.

The Holum court held that the invalidation of waivers would reduce the activities offered. In so finding, the court found that the parent’s agreed to shoulder the risk, and that they have the authority to enter into these types of binding agreements for their child. This also supports the policy that parent’s have authority to make decisions for their children. It is comparable to the state statute permitting contracts of necessity.

The Holum court did not state that their holding extended to organizations that were for profit.

Based on the laws stated above, it is clear that parents should sign the waivers for their children at a minimum. Only one parental signature is required. Both would be better.

Although the courts have not clearly stated that the Holum holding will apply to the skate park as a profit organization, there are factors that could aid in finding that parent’s waivers are enforceable.

First, the Franklin statute explicitly stated that contract formed into by a guardian or parent for the benefit of a child are not prohibited. Second, the skate park is charging a minimum fee right now so that children can use the park. Third, the owner of the park intends to eventually

offer this activity free at cost to help kids who want to take out their energy in a constructive fashion. These facts would lend to a strong argument that for public policy purposes, parent's waiver should be enforceable.

Conclusion:

This skate park has a great deal of public value, which has been recognized by the courts. The skate park however should make itself more aware of the risks of liability and how to avoid litigation.