



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony of Senator Jill P. Carter
In Favor of SB291
Courts – Prohibited Agreements – Recreational Facilities
Before the Judicial Proceedings Committee
On February 16, 2023**

SB-291 provides that any provision in a contract or agreement relating to the use of a recreational facility that purports to release the recreational facility from, or indemnify or hold it harmless from liability caused by its negligence or other wrongful act of its agents and/or employees is against public policy, null, void, and unenforceable.

Several recreational facilities in Maryland have contracts and/or waivers of liability provisions with their customers, in which the customer must agree to hold the recreational facility harmless for the ordinary negligence and other wrongful conduct of the facility's agents and employees. Customers have no choice but to sign the waiver of liability if they (or in most cases, their children) wish to participate.

Waivers of liability excuse recreational facilities of their ordinary negligence which cause harm to adults and children. A waiver would permit recreational facilities to negligently under-staff, fail to maintain equipment, fail to make necessary repairs, fail to follow manufacture's instructions for safe use, and NOT BE LIABLE to an

adult or child who is injured (sometimes severely injured) as a result of such negligence.

A recreational facility simply has no incentive to act in a reasonable and non-negligent manner if it is allowed to be excused of all liability and harm it caused by its negligence. An exculpatory contract that excuses unreasonable conduct will lead to more unreasonable conduct in the industry, which will, in turn, lead to a downward spiral of all standards in the industry. Lower standards will logically lead to more injuries. Also, the net effect of the exculpatory contract is to place the emotional and financial loss on the innocent participant. That is not fair and not right. Recreational facilities should be held to the SAME standards of reasonable care as all other businesses.

The law of torts is directed toward compensation of individuals for injuries sustained as the result of another's unreasonable conduct. In addition, tort law serves the "prophylactic" purpose of preventing future harm in that the payment of damages provides a strong incentive for potential future tortfeasors not to engage in the same conduct.

There are other factors, as well that support the conclusion that it is not good public policy to permit an owner/operator, who negligently injures another, to be able to contractually exculpate the owner/operator's unreasonable conduct. An exculpatory contract that excuses unreasonable conduct will lead to more unreasonable conduct in the industry, which will, in turn, lead to a downward spiral of all standards in the industry. Lower standards will logically lead to more injuries. Also, the net effect of the exculpatory contract is to place the emotional and financial loss on the innocent participant.

Adherence to principles of tort law tend to make a court reluctant to allow parties to shift by contract the burden of negligent conduct from the negligent actor to the innocent victim. As a consequence,

exculpatory contracts are generally not favored by the law because they tend to allow conduct below the acceptable standard of care applicable to the activity.

However, Maryland courts have held that such provisions are valid and enforceable. In *Seigneur v. Nat'l Fitness Institute*, 132 Md. App. 271 (2000), the Appellant Court of Maryland enforced an exculpatory agreement between a customer and a health club in which the customer sued the health club for negligence. In *BJ's Wholesale Club v. Rosen*, 429 Md. 528, 56 A.3d 1241 (2012), a divided Supreme Court of Maryland held that a waiver of liability signed by a parent excused the negligence of a play center which resulted in permanent brain damage to a child.

Maryland should join other states and make it very clear to the public and the courts that it is not the public policy of Maryland to exculpate an owner/operator from its negligence when providing opportunities for the public to participate in recreational activities. The legislatures and/or courts in the following states have declared exculpatory agreements to be null, void, and unenforceable, especially in situations where a parent executes a waiver on behalf of a minor child:

- **Florida**
- **Iowa**
- **Louisiana**
- **Maine**
- **Michigan**
- **Montana**
- **New York**
- **Utah**
- **Virginia**

This legislature has enacted statutes that prohibit exculpatory clauses as a matter of public policy in other contexts:

- **Md. Code Real Prop. Ann. §8-105 prohibits exculpatory clauses in leases that exonerate a landlord from negligence resulting in injury as void against public policy.**
- **Md. Code Real Prop. Ann. §8a-1502 (e) declares void as against public policy any provision in a mobile home park rental agreement that exonerates the owner from liability for negligence.**

Maryland should likewise protect consumers and declare that commercial recreational facilities are subject to the same standards of safety applicable to other businesses, by prohibiting waivers and exculpatory clauses that allow commercial recreational facilities to disregard their basic duty to act with reasonable care, especially where children are involved.

I respectfully request that the Committee grant a favorable report on SB291.

Sincerely,



Jill P. Carter, Esq.



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