LIABILITY WAIVERS: RETHINKING THE IMPACT ON SPORTS AND RECREATIONAL ACTIVITIES

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INTRODUCTION

Pre-injury liability waivers now hold a new rank of relevancy with collegiate sports teams following the outbreak of COVID-19 (COVID).[1] The constant demonstrations of uncertainty by collegiate sports teams are complicated debates about conducting regular-season games throughout the spring of 2020.[2] Although colleges and universities still shoulder massive liability dealing with students during COVID, there is an associated higher risk when athletes contract the virus during university-related participatory sports.[3] Surprisingly, some schools appear to believe that the simple solution is to have players sign liability waivers,[4] allow players to assume all the risks associated with the sport, and waive any potential COVID-related claims.[5] However, Congressional power players' viewpoints seem to differ on liability waivers.

In June of 2020, United States (U.S.) Senators Richard Blumenthal (Blumenthal) and Cory Booker (Booker) wrote a letter to the National Collegiate Athletic Association (NCAA)[6] urging the NCAA to prohibit member colleges and universities from requiring

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[1] See Annette Lopez & Christopher Hood, Fair or Foul?: College Sports and COVID-19 Liability Waivers, Boies Schiller Flexner (June 29, 2020), https://www.bsfllp.com/news-events/fair-or-foul-college-sports-and-covid-19-liability-waivers.html.

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] See Richard Blumenthal & Cory A. Booker, NCAA Revokes COVID-19 Liability Waivers for College Athletes in Response to Blumenthal & Booker Demand, Richard Blumenthal (Aug. 5, 2020), https://www.blumenthal.senate.gov/newsroom/press/release/ncaa-revokes-covid-19-liability-waivers-for-college-athletes-in-response-to-blumenthal-and-booker-demand (advocating for student-athletes' scholarships to be honored during the COVID pandemic if opting not to play).

student-athletes to sign COVID liability waivers to participate in their sport.[7] A portion of the letter states:

> These broad liability waivers are not only legally dubious, but they are also morally repugnant. Many students depend on their athletic scholarships to attend college. Threatening to revoke athletes' scholarships if they do not sign away their rights forces these students into making an impossible decision: risk contracting COVID-19 or giving up on their college education. That is entirely unacceptable.[8]

Senators Blumenthal and Booker concluding statements in the letter indicate a strong recommendation that COVID waivers should include strong, clear, and enforceable standards.[9] In response to the Senators' letter, the NCAA prohibits COVID liability waivers and requires colleges and universities to honor the athletes' scholarships if the athlete is in opposition to participating in the regular season.[10] The NCAA states, "[s]tudent athletes should never feel pressured into playing their sport if they do not believe it is safe."[11]

Yet, some college sports fans seemingly do not understand a waiver's legal gravity. Waivers are legally binding contracts where one party waives their right to bring future negligence claims against another party, implicating contract and tort law.[12] The two areas of law collide in the realm of waivers because of competing public policy interests.[13] Contract law allows people to freely and voluntarily enter into agreements with legal certainty.[14] Tort law

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[7] See Blumenthal and Booker, supra note 6.

[8] Id.

[9] Id.

[10] See Board Directs Each Division to Safeguard Student Athlete Well Being, scholarships and eligibility, NCAA (Aug. 5, 2020, 11:44AM), http://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility.

[11] Id.

[12] See Curtis Bridgeman & John C.P. Goldberg, Do Promises Distinguish Contract from Tort 45 Suffolk Univ. L. Rev. 873 (2012).

[13] See Feleccia v. Lackawanna Coll., 215 A.3d 3, 24 (2019) (citing Saylor, C.J., concurring in part and dissenting in part).

[14] See Berlangieri v. Running Elk Corp., 76 P.3d 1098, 1105 (2003) ("The Court of Appeals characterized the policies underpinning tort law as public concerns, while characterizing the policies underlying our notions of freedom of contract as private; on

shifts the cost of injury from the party it initially falls on to the party who causes the harm, effectively deterring what society deems unreasonable or intentional conduct.[15] Courts have gone back and forth on which law's public policy interests should prevail in deciding whether to enforce a waiver.[16]

Today, a court first examines whether its state legislature supports a public policy interest for or against enforcing a waiver in a particular claim or category of activities.[17] If the state's legislature is silent on the matter, a court will generally enforce the waiver if it satisfies the requirements of a valid contract.[18] Confusion exists regarding waivers' enforceability because states' public policies vary widely.[19] Some states call for enforcing waivers and broad categories of activities in a specific activity.[20] It seems that the black-and-white approach taken by courts fails to consider whether the offeror is the cause of the participant's injury and if it is fundamentally fair to prevent a particular participant from recovering from injuries arising from the offeror.

The proposing legal arguments suggest a new analytical framework for courts to utilize when ruling on liability waivers to effectively balance the public interests, contract and tort law, and the enforceability in sports and recreational activities. While sports

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this basis, the Court of Appeals majority concluded the scales balanced in favor of tort policies. We disagree. We do not think the underlying policies can be easily separated into neat categories. Freedom of contract serves public policies that are no less important to society as a whole and the common good than those policies that undergird the law of tort.").

[15] See *Feleccia*, 215 A.3d at 24 (citing Saylor, C.J., concurring in part and dissenting in part).

[16] See, e.g. Tayar v. Camelback Ski Corp., 47 A.3d 1190, 1203 (finding public policy prohibits pre-injury waivers from releasing reckless behavior); See also *Feliccia*, 215 A.3d at 19 ("A determination that a contract is unenforceable because it contravenes public policy 'requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards.'"); See Ryan Martins et al., Contract's Revenge: The Waiver Society and The Death of Tort, 41 Cardozo L. Rev. 1265, 1282 (2020).

[17] See *Berlangieri*, 76 P.3d at 1103-06.

[18] Id. ("The statutes that have been adopted in other jurisdictions illustrate the range of options available in addressing the policy issues that arise from the importance of recreational facilities economically and the risk of personal injury many popular activities present. Courts are generally less well-equipped to address complex policy issues than legislatures.").

[19] Id.

[20] Id.

and recreational activities are inherently risky, the cost of potential injury initially falls on those who provide or sponsor them (offerors).[21] Waivers allow offerors of dangerous activities to cut costs by shifting all possible risks of injury to the participant, providing the offerors with a complete shield of liability.[22] For this reason, participation in such activities is typically conditioned on consent to a waiver.[23]

The premise of the legal note's arguments centers around the notion that requiring waivers in sports and recreational activities creates two issues for a participant: (1) increased risk of injury and (2) an inability to recover if an offeror wrongfully causes injury or death. While participants are subject to such a high risk of injury by simply choosing to participate, they must maintain a legal right to recourse when engaging in these activities.[24] Waivers, however, prevent participants from recovering from injuries of any degree, even those caused by negligence.[25] This complete shield of liability gives offerors a "get-out-of-negligence-free" pass.[26]

With the existence of a guarantee that offerors will not have to pay for any injury participants sustain, offerors no longer have an incentive to take cost-effective or reasonable measures to minimize the inherent risks of the activity they provide.[27] It seems that the solution to this problem may be a partial shield of liability. Offerors will only expose themselves to liability when they negligently

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[21] See *Feleccia*, 215 A.3d at 13.

[22] Id. at 24 (Saylor, C.J., concurring in part and dissenting in part).

[23] See Douglas Leslie, Sports Liability Waivers and Transactional Unconscionabiliy , 14 Seton Hall J. Sports & Ent. L. 341 (Spring 2004) ("The sport doesn't matter. It can be scuba lessons, sky diving, skiing, or the North Grounds Softball League. Before you can participate, you are given a waiver to sign.").

[24] See generally id.

[25] See Leslie, supra note 23, at 341 ("The waiver you quickly sign without reading …gives the company or sport organizer permission, liability-free, to fail to take cost-effective precautions to keep you safe.").

[26] Id.

[27] See id. at 358 ("[T]he gain to the promoter of a sports activity in securing a negligence waiver from a customer is always less than the customer's loss from giving the waiver. [This] critically depends on the meaning of negligence: negligence is the failure to take cost-effective precautions. Where the promoter is relieved of legal liability for negligence, then ceteris paribus the promoter's investment in precautions will be suboptimal. That means the value of the increased risk to the customer will be greater than the costs saved by the promoter.").

increase the inherent risks of injury to participants.[28] The proposed partial-liability shield will not bar personal injury claims arising from reasonable, unforeseeable risks.[29] The partial shield will also not prevent personal injury claims when the risk of such injury was foreseeable, but the offeror did not take reasonable precautions to reduce the risk and severity.[30]

Part I of this legal note describes the evolution of waiver-enforceability analyses used by courts and the competing public policies of different states that currently determine enforceability. Part II attempts to advance the central proposing recommendation of making sports and recreational liability waivers fair for all parties by only offering partial liability shields for personal injury claims that directly relate to a foreseeable risk of participation and reasonable mitigation of precaution. Finally, Part III concludes the Note by outlining how the proposal can create predictability for offerors and participants and illustrates how the proposal effectively balances the public interests in contract and tort law.

I. HOW COURTS DETERMINE WAIVER ENFORCEABILITY

A. The Development of Waiver Law

Since the creation of liability waivers, courts determine their enforceability by construing the contractual language of the waiver against the drafter.[31] This approach, known as the strict construction doctrine, requires the waiver drafter to spell out the terms with particularity, acknowledge the possibility of negligence and list the types of tentative claims under consideration to be released.[32] The strict requirements reduce the drafter's likelihood of avoiding a negligence claim because the waivers are subject to

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[28] Leslie, supra note 23, at 360 ("[E]liminating liability for inherent risks is not accomplished by liability waivers. An inherent risk that cannot be reduced by cost-effective precautions does not occasion legal liability.").

[29] Id.

[30] See Leslie, supra note 23, at 360.

[31] See Ryan Martins et al., Contract's Revenge: The Waiver Society and The Death of Tort, 41 Cardozo L. Rev. 1265, 1282-83 (2020).

[32] See Martins et al., supra note 31, at 1265.

high standards.[33] The doctrine rejects waivers that appear to trick the participant into waiving their rights.[34]

Ironically, the interpretation of clear and unambiguous terms is becoming challenging.[35] As courts expand the standard of enforceability, it is no longer apparent when a waiver should be enforceable.[36] Presently, courts evaluate waivers by using public policy considerations.[37] The court's approach seems straightforward and consistent in ruling that liability waivers that adversely affect the public interest are void as against public policy.[38]

Instead of focusing heavily on the contractual language of the waiver to reduce the risk of offerors avoiding negligence claims, a court's prohibition surrounding liability waivers is categorical.[39] In *Tunkl*, the Court establishes six public function factors to determine whether a waiver is a void against public policy: 1.) It concerns a business of a type generally thought suitable for public regulation; 2.) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some public members; 3.) The party is willing to perform this service for any public member who seeks it, or at least for any member coming within specific established standards; 4.) As a result of the service's essential nature, in the transaction's economic setting, the party invoking exculpation possesses a decisive advantage of bargaining strength against any public member who seeks his services; 5.) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay reasonable additional fees and obtain protection against negligence; and 6.) As a result of the transaction, the person or property of the purchaser is placed under

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[33] See Martins et al., supra note 31, at 1285.
[34] Id. at 1282.
[35] See Martins et al., supra note 31, at 1282.
[36] Id.
[37] Id. at 1285-86.
[38] See Martins et al., supra note 31, at 1285-86.
[39] See Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963).

the seller's control, subject to the risk of carelessness by the seller or his agents.[40]

Courts still loosely consider the *Tunkl* public function factors today and generally refuse to enforce liability waivers where the party seeking exemption is publicly regulated or serves a public interest.[41] The *Tunkl* court analyses the enforceability of waivers in seeking medical treatment[42] but does not address waivers in sports and recreational activities. Whether sports and recreational activities implicate the public interest is later discussed in *Holzer v. Dakota Speedway, Inc.*[43]

Building on *Tunkl*, the *Holzer* court categorizes automobile racing as "dealing with a fairly narrow segment of the public participating in a relatively dangerous sporting activity" where "[t]he general public as a whole is minimally affected."[44] Instead of using public policy to invalidate the waiver at issue, the *Holzer* court seemingly recognizes a public policy reason to enforce the waiver.[45] The court reasons that "fewer promoters would be willing to hold automobile races if courts refused to permit them to limit their exposure to liability for racetrack accidents, in what is undeniably a dangerous sport."[46] Essentially, allowing promotors of such activities to limit their liability exposure for accidents that are bound to occur in an inherently dangerous sport will encourage automobile races and thus lead to more private transactions.[47] The *Holzer* court innovates a public policy rationale for promoting the contract, absent clear direction from the legislature.[48]

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[40] See *Tunkl,* 383 P.2d at 445-46.

[41] Id. at 441-46; See also Martins et al., supra note 31, at 1289.

[42] See *Tunkl*, 383 P.2d 441 ("[H]olding a waiver signed by patient to receive medical treatment does not preclude recovery for personal injuries where patient alleges injuries were caused by negligence of treating physicians, reasoning that waivers involving hospitals are void as against public policy.").

[43] See Holzer v. Dakota Speedway, Inc. 610 N.W.2d 787, 794 (S.D. 2000).

[44] Id.

[45] See *Holzer*, 610 N.W.2d; See Martins et al., supra note 31, at 1296 ("[T]he South Dakota court concluded that public policy favored enforcing the waiver, now not so much on free contract grounds as on the grounds of a public policy in favor of racetrack pit volunteering. The activity in question, the court reasoned, could only take place if the organizers were shielded from liability.").

[46] See *Holzer*, 610 N.W.2d at 795.

[47] Id.

[48] Id.

As the Court in *Holzer*, most state legislatures consider sports and recreational activities private, voluntary transactions; yet they do not support public policies against waiver enforcement.[49] Many states' public policies explicitly promote the enforcement of waivers in particular sports and recreational activities.[50] Although the strict construction doctrine and public function factors guide courts in evaluating liability waivers, modern approaches are mainly based on the most vital public policy interests identified by each state's legislature.[51]

B. Waiver Law Today

Courts consistently refuse to enforce a waiver that constitutes a contract of adhesion,[52] lacks a clear statement of intention by a party to release themselves from liability for future negligence,[53] or appears to waive liability for intentional conduct that causes injury.[54] A contract of adhesion is one in which the parties to the agreement are vastly disparate in bargaining power, there is no opportunity for negotiation, and the services cannot be obtained elsewhere.[55] A court considers a waiver unclear and ambiguous when the face of the waiver does not express the intent of one party to waive claims of future injury caused by the other party's negligence.[56]

While the purpose of a liability waiver is to release a party of liability from negligence, some jurisdictions require the waiver to include the word negligence.[57] In contrast, other jurisdictions consider the phrase 'any claims' sufficient to encompass negligence claims.[58] Despite the specific contractual language used to describe

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[49] See *Holzer*, 610 N.W.2d at 794-95; See also supra note 45 and accompanying text.

[50] See supra note 45 and accompanying text.

[51] See Martins et al., supra note 31.

[52] See Bradley v. Nat'l Collegiate Athletic Ass'n, 464 F.Supp.3d 273, 293-94 (D.C. 2020).

[53] See *Feleccia*, 215 A.3d at 18.

[54] See *Bradley*, 464 F.Supp.3d at 294.

[55] See id.

[56] Id.

[57] Id.

[58] See *Feleccia*, 215 A.3d at 17.

waived claims, liability waivers never preclude claims for intentional conduct, including gross negligence.[59]

The confusion around whether a waiver is enforceable arises out of the inability of state courts to regulate public policy versus the state legislature.[60] Each state's legislature recognizes specific public policies unique to that state's interests.[61] Some states have general policies against waiver enforcement.[62] Other states have specific guidelines that encourage or prohibit waiver enforcement in broad categories of activities, narrow classes of activities, or particular activities.[63] Courts must look to the states' public policies and defer to a statute in determining whether to enforce a waiver.[64]

A small minority of states, including Virginia, broadly prohibit liability waivers that prospectively waive personal injury claims.[65] Virginia has a firm public policy against recognizing such waivers to preserve the incentives for conduct that protect people from the risk of bodily injury. On the opposite end of the spectrum, some states widely enforce liability waivers, requiring only that they are clear and unambiguous.[66] The general public policy of states that widely enforce waivers promotes the freedom to contract.[67] Thus, contract law trumps tort law.[68]

States falling in the middle of the spectrum will enforce waivers but take different approaches to balance the competing public interests of contract and tort law.[69] Some state legislatures enact various statutes that encourage the enforcement of waivers in specific or broad categories of activities based on public policy

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[59] See Restatement (Second) of Contracts § 195 (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on groun ds of public policy."); See also *Bradley*, 464 F.Supp.3d at 294.

[60] See *Feleccia*, 215 A.3d at 13.

[61] See Martins et al., supra note 31.

[62] See id. at 1288.

[63] See Martins et al., supra note 31, at 1289 ("Many state courts adopted partial or modified versions of Tunkl, some of which seemed to narrow the scope of the public interest grounds for nonenforcement.").

[64] Id.; See also Berlangieri v. Running Elk Corp., 76 P.3d 1098, 1103 (2003) ("Jurisd ictions that disallow the use of liability releases for personal injury usually do so as a matter of statutory enactment, rather than common law.").

[65] See Jaffe v. Pallotta TeamWorks, 374 F.3d 1223, 1225-26 (D.C. Cir. 2004).

[66] See Martins et al., supra note 31, at 1292.

[67] See Leslie, supra note 23, at 1070.

[68] See Martins et al., supra note 31, at 1294-1295.

[69] See id. at 1294-98.

reasons.[70] For example, New Mexico's Equine Liability Act identifies public policy reasons that support the enforcement of waivers for horse-related activities:[71]

> The legislature recognizes that persons who participate in or observe equine activities may incur injuries due to the numerous inherent risks involved in such activities. The legislature also finds that the state and its citizens derive numerous personal and economic benefits from such activities. It is the purpose of the legislature to encourage owners, trainers, operators, and promoters to sponsor or engage in equine activities by providing that no person shall recover for injuries resulting from the risks related to the behavior of equine animals while engaged in any equine activities.[72]

Unlike states that recognize public policies that encourage waivers in specific activities, others recognize public policies prohibiting waivers in broad categories of activities.[73] For example, in New York, waivers exempting pools, gymnasiums, public amusement or recreation places, and similar establishments from liability for negligence are "void as against public policy and wholly unenforceable."[74] In general, if a waiver is facially valid and if a state's legislature has not identified whether it is in the public interest to enforce such a waiver, courts tend to implement it.

II. THE PROPOSAL: DETERMINING ENFORCEABILITY: SPORTS AND RECREATIONAL WAIVERS

When an injured participant challenges the enforceability of a waiver, a court needs to ask. "who should pay," consider the cause of the injury, and whether the offeror could have taken precautions. Courts consider waivers as 'public' instead of 'private' law, evidenced by automatic deference to the legislature when presented

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[70] Id.
[71] N.M. Stat. Ann. § 42-13-2 (1978).
[72] See generally id.
[73] See Martins et al., supra note 31, at 1289.
[74] N.Y. Gen. Oblig. Law § 5-326 (McKinney 1976).

with a waiver enforceability question.[75] Courts need to alternatively consider looking at a private parties' waiver and the individual circumstances of each case to determine liability based on fairness.[76] The goals of the proposed analysis include reducing the scope of liability waivers, allowing participants to recover for wrongfully caused injuries, and convincing courts to take fairness into account during their evaluations of waivers.

In order to properly examine the pre-injury liability waiver, Courts need to ask: 1.) Would a reasonable person foresee the particular risk of injury associated with participating in the activity? If yes, continue to the second step of the analysis. If no, the pre-injury liability waiver is unenforceable against the claim for personal injury from participation in the activity. A person may not waive claims for unforeseeable harm.

The second question is 2.) Did the offeror of the activity take precautions that a reasonably prudent offeror would take in the same or similar circumstances to minimize the foreseeable risk of such injury? If yes, the pre-injury liability waiver is enforceable and precludes the negligence claim. If no, the pre-injury liability waiver is unenforceable because the offeror of the activity did not exercise reasonable care in minimizing the foreseeable risk of such injury.

A. Examples and Explanations

Some legal analysts believe it is unfair to participate in a high-risk activity that hinges on unforeseeable risks of injury to a participant; yet, it is fair to participate in an activity with known and common knowledge of the risk associated with the activity.[77] For instance, imagine a situation where a woman who signs a waiver for a horseback-riding lesson falls off a horse and breaks her wrist. The risk of falling off and breaking a bone is foreseeable to

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[75] See generally John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917 (2010) (discussing why torts should be thought of as wrongs to individuals that trigger private rights of actions, as opposed to a method by which costs of accidents are allocated among the public).

[76] Id.

[77] See Foreseeable Risk, Legal Info. Inst. (Updated Aug. 2021), https://www.law.cornell.edu/wex/foreseeable_risk (explaining and giving examples of foreseeable risk along with defenses that can be used in certain circumstances).

any good horseback rider.[78] Foreseeable risks to the participant are foreseeable to the riding instructor.[79] Therefore, the instructor is liable for taking all reasonable precautions to mitigate foreseeable risks of injury.[80] Therefore, if an instructor carelessly saddled the horse, which causes the participant to fall off, the instructor is responsible for the participant's injury, and the waiver should not be enforceable.[81]

On the other hand, some legal scholars seem to believe that Courts need to enforce pre-injury liability waivers when an inherent risk of the activity causes a participant's injury, and the offeror did not increase such risk by wrongful action or inaction. The foreseeability of the risk in the proposed analysis reflects the principle that offerors should be liable for conduct they know will create or increase the risk of harm to participants.[82] For example, a university cheerleader may waive liability to a university due to the inherent risks of the sport; however, the cheerleader did not release the university from its duty to provide reasonable supervision during her participation.[83] Therefore, if a cheerleader injures her ankle during practice while performing a stunt[84] and brings a negligence claim against the school concerning the coach's failure to ensure spotters during the stunt,[85] the Court may reason the coach increased the inherent risk of the activity by failing to take reasonable precautions.[86]

Offerors are not always liable for injuries that stem from foreseeable risks. If the injury was foreseeable, the next step in the analysis asks whether the offeror of the activity takes reasonable

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[78] See Melissa Subjeck, Equine Liability: Am I Responsible if my Horse Injures Someone?, Hodgson Russ LLP (Mar. 6, 2015), https://www.hodgsonruss.com/newsroom-publications-horse-injury-lawsuit.html [hereinafter Equine Liability].

[79] Id.

[80] Id.

[81] See generally id.

[82] See Subjeck, supra note 78.

[83] See Nova Univ. v. Katz, 636 So. 2d 729, 730 (Fla. Dist. Ct. App. 1994), appeal denied, 639 So.2d 979 (Fla. 1994).

[84] See *Katz,* 636 So. 2d at 729.

[85] Id.

[86] Id. at 730.

precautions to minimize the risk of the particular harm.[87] What is reasonable depends on the specific activity.[88]

In signing a waiver, a participant only waives foreseeable risks of injury.[89] Whereas unforeseeable risks of injury are more likely to be created by an offeror's negligence.[90] For example, if a heavy beam falls from the barn's ceiling and hits the horseback-riding student on the head while waiting for her instructor to saddle up a horse, some legal advocates appear to believe that the instructor may need to pay. The associated risk with falling ceiling beams is an unexpected and unforeseeable risk of horseback-riding lessons and will not be legally covered by the waiver.

Today, a waiver serves as a defense to negligence, known as an express assumption of the risk.[91] To raise this defense, an offeror need only show the participant was aware of the risks of engaging in the activity and signed a valid waiver.[92] Express assumption of the risk, and decisions on waiver enforceability, in general, do not consider the offeror's negligence or the type of risk causing the injury.[93] However, the two factors are necessary, and courts need to include them when considering whether to enforce a waiver.

B. Justifications

Participants in any sports or recreational activity need the ability to recover from the: (1) unforeseeable harms arising out of the activity; and (2) foreseeable harms for which the offeror did not take all reasonable precautions to prevent or mitigate. An approach of this nature balances the main interest of both offerors of risky activities and participants by allocating risk and legal recourse for wrongfully-caused injury.

The justification of the proposed partial-liability shield is based on fundamental notions of fairness. It is seemingly

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[87] See Subjeck, supra note 78.

[88] Id.

[89] Waiver and Release Language, Rancho Santiago Cmty. Coll. Dist., https://www.rsccd.edu/Departments/Risk-Management/Pages/Waiver-and-Release-Language.aspx (last visited Oct. 22, 2021).

[90] Id.

[91] Id.

[92] Id.

[93] Waiver and Release Language, supra note 89.

instinctively unfair to force an offeror to pay for a participant's injuries if they stem from an ordinary, foreseeable risk, and the offeror takes all reasonable precautions to mitigate such risk. Allowing participants to hold offerors liable when they increase inherent risks incentivizes offerors to act reasonably. If the offeror is prudent, they will not be liable. By signing a sports or recreational waiver, the only injuries a participant should have to pay for are ordinarily sustained while participating in that activity – but not those suffered due to the offeror's negligence.

Another perspective suggests that if a participant in such activities is likely to sustain an injury during said activity, the offeror must take precautions to minimize foreseeable risks that a reasonable person or business in the same or similar circumstances would take. Offerors of such activities are in the best position to take precautions to minimize the risks of an activity. They have better knowledge of the foreseeable dangers presented by the activity.[94] Hence, waivers potentially discourage offerors from taking reasonable precautions to reduce risks. Waivers give offerors a false sense of protection from all liability, leading to behavior failing to seek out resources to heighten precautions.[95]

III. APPLYING THE PROPOSAL: SHARON, BRADLEY, AND COVID-19 WAIVERS

A. Sharon v. City of Newton

In the case of *Sharon*,[96] a public high school student's father signs a liability waiver on his daughter's behalf in order to join the school's cheerleading team.[97] During a particular practice, the daughter falls and injures her arm.[98] The father brings a negligence claim against the school and the cheerleading coach.[99] The Court deliberates and grants summary judgment to the school because of

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[94] See Leslie, supra note 23.

[95] See Leslie, supra note 23, at 358 ("[T]he gain to the promoter of a sports activity in securing a negligence waiver from a customer is always less than the customer's loss from giving the waiver.").

[96] See Sharon v. City of Newton, 769 N.E.2d 738, 741 (Mass. 2002).

[97] Id.

[98] See *Sharon*, 769 N.E.2d at 741.

[99] Id.

the student's waiver and enforceability challenges.[100] The Massachusetts Supreme Judicial Court ultimately holds that the waiver is enforceable due to the jurisdiction's "policy of encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect their students."[101]

The *Sharon* court bases the waiver's enforceability on the state's public policy of encouraging waiver enforcement in the context of youth sports. The anchor of the Court's prudence centers around the fact that: (1) The student's injury is a foreseeable risk of participating in the activity;[102] and (2) the school's mitigating actions of taking precautionary measures to minimize the foreseeable risk of injury.[103]

Lastly, the Court correctly enforces the waiver to bar a negligence claim against the school. Waivers that shield offerors from liability for ordinary risks of participation provide more than enough protection for both offerors and participants. No matter the activity's risk, an offeror will not be held liable for foreseeable injuries if he exercises reasonable care.

B. Bradley v. National Collegiate Athletic Association

In *Bradley*,[104] a former university field hockey player brings a medical malpractice negligence claim against the NCAA and the university sports medicine staff.[105] After sustaining a head injury during a game and complaining of concussion-like symptoms, the university sports doctor diagnoses Bradley with a sinus condition and clears the female athlete to continue playing in a game.[106] While experiencing concussion symptoms after the initial head injury, Bradley sees her primary care physician, ultimately diagnosing her with post-concussive syndrome.[107]

Bradley's concussion symptoms worsened without the proper treatment because the university medical staff negligently

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[100] See *Sharon*, 769 N.E.2d at 742-43.
[101] Id. at 747.
[102] Id. at 741.
[103] Id.
[104] See *Bradley*, 464 F.Supp.3d at 273.
[105] Id. at 278-79.
[106] Id. at 281.
[107] Id.

misdiagnosed her concussion.[108] Bradley's post-concussive disorder requires her to withdraw from the university before completing her degree.[109]

Despite the apparent negligence of the university sports doctor, the Court enforces the waiver signed by Bradley as a condition of participation on the field hockey team.[110] The Court acknowledges that the jurisdiction has "no recognizable policy, either way, on the acceptability of prospective liability waivers for personal injury claims."[111] In the absence of such precedent, Bradley argues that the waiver is unenforceable under *Tunkl*, which deals with a hospital-patient contract affecting the public interest.[112] The Court rejects this argument and holds that the private, voluntary transaction did not affect the public interest. The Court reasons that the student-athlete is objectively a healthy and mentally active adult when signing the agreement, she did not receive treatment for an existing injury in consideration for signing the contract, and she should have been reasonably familiar with the nature of field hockey.[113]

In *Bradley*, the Court bases its analysis on whether the transaction affects the public interest because of the lack of a public policy for enforcing or refusing to enforce the waiver in personal injury claims.[114] Accordingly, the *Bradley* court should have refused to enforce the waiver.[115] If properly applying the proposed analysis, a reasonable field hockey player would foresee the risk of sustaining a head injury during play.[116] However, the injury Bradley is suing for concerns a post-concussive disorder.

Although Bradley assumes the foreseeable risks of injury associated when participating in field hockey, she did not assume the risk of receiving subpar treatment from the university sports

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[108] See *Bradley*, 464 F.Supp.3d at 273, 280-81.

[109] Derek Helling, Jennifer Bradley's Case Highlights the NCAA's Cherry-Picking, Advoc. For Fairness in Sports (Dec .28, 2019), https://advocacyforfairnessinsports.org/current-litigation/jennifer-bradley-v-ncaa/jennifer-bradleys-case-highlights-the-ncaas-cherry-picking/.

[110] *Bradley*, 464 F.Supp.3d at 280-81, 297.

[111] Id. at 295.

[112] Id.; See also *Tunkl,* 383 P.2d at 441-46.

[113] See *Bradley*, 464 F.Supp.3d at 295.

[114] Id. at 290-295.

[115] Id.

[116] Id.

doctor, failing to misdiagnose a common injury. The misdiagnosis causes additional unforeseen harm to Bradley. Therefore, getting a concussion was foreseeable, but the risk of misdiagnosis is not. In hindsight, the Court's refusal to enforce the waiver and allow Bradley to bring a negligence action is unfair. At the same time, it seems the Court unjustly allocates an unforeseeable harm to Bradley when Bradley relied on the doctor's knowledge reading the head injury.

C. COVID-19 Waivers

To fully understand the proposed approach the court should utilize when ruling on COVID-19 waivers, assume that during the initial season of the COVID breakout, a Division I college football player contracts COVID. The player brings a claim against the university, alleging the university sports staff negligently failed to enforce a health and safety plan to prevent the spread of COVID, causing him to become infected with the virus. The first issue is determining whether contracting a virus during a global pandemic is foreseeable.

Unmistakably, a football player assumes the risk of sustaining a concussion, breaking an ankle, pulling a hamstring, or becoming dehydrated while playing football. The risks flow directly from football, and the injuries that may result from such risks are predictable. The COVID outbreak is a rare, extreme event. A pre-pandemic contraction of the virus during football activities is an unforeseeable harm. However, with COVID cases, contact sports have a foreseeable risk of contraction.[117] A football player assumes only the ordinary, foreseeable risks of playing football by signing a waiver. They do not assume the risk of injuries that are so unforeseeable that it would be unfair to allocate the costs of such injuries to them.

After determining that contracting COVID is a foreseeable risk of playing college football, the next step in the analysis requires asking whether the university is taking reasonable precautions to mitigate such risk. A reasonable university, in most cases, should

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[117] See How to Protect Yourself & Others, Ctrs. for Disease Control & Prevention (Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/playing-sports.html.

take mitigating measures by adopting certain best practices recommended by the Centers for Disease Control and those identified by the university's health and safety plan to prevent the spread of the virus. The school cannot absolve itself from negligence that increases or creates foreseeable risks of injury.

CONCLUSION

To establish fairness among all parties, courts must start by refusing to enforce sports or recreational waivers that exempt offerors from negligence. Courts should only enforce waivers to bar personal injury claims where the injury arises from a foreseeable risk of participation, and the offeror takes all reasonable precautions to mitigate the particular risk of injury. Only then is it fair for a court to tell injured sports or recreational participants to "rub some dirt on it."