I. Are pre-injury waivers/releases for injury or death enforceable in Georgia?

In Georgia, a party may generally exempt itself from its own simple negligence through exculpatory clauses as long as the clause is not “void as against public policy.” Except in cases prohibited by statute and cases where a public duty is owed, “the general rule in Georgia is that a party may exempt himself by contract from liability to the other party for injuries caused by negligence, and the agreement is not void for contravening public policy.” Porubiansky v. Emory Univ., 156 Ga. App. 602, 603 (1980). And, “a contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law.” McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 757, 603 S.E.2d 7, 14 (2004). Put another way, “where the performance of a contractual condition would be contrary to the health, safety or welfare of others, it may be considered unenforceable.” Reaugh v. Inner Harbour Hosp., 214 Ga. App. 259, 261 (1994).

Georgia courts have noted that:

It is the paramount public policy of this state that courts will not lightly interfere with the freedom of parties to contract. A contracting party may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest. See O.C.G.A. § 1-3-7. Exculpatory clauses in Georgia are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence. Parties to a contract are presumed to have read their provisions and to have understood the contents. One who can read, must read, for he is bound by his contracts. My Fair Lady v. Harris, 185 Ga. App. 459, 460 (1987) (internal citations omitted).


One main limitation on pre-injury waivers and releases in Georgia is in the distinction of claims arising from acts of negligence versus gross negligence. As stated above, a party may generally exempt itself from its own negligence through waivers and releases in Georgia. On the other hand, an injured party may recover for acts of gross negligence despite a valid release for negligence, where there is evidence of such actions. See Turner v. Walker County, 200 Ga. App. 565, 566 (1991). Gross negligence is the absence of “that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.” Colonial Properties Realty v. Lowder Constr. Co., 256 Ga. App. 106, 112-113 (5) (2002). See O.C.G.A. § 51-1-4.
Additionally, O.C.G.A. § 13-8-2 outlines several other specific contracts that the Georgia General Assembly has found violative of public policy. O.C.G.A. § 13-8-2 (a) provides: “A contract that is against the policy of the law cannot be enforced.” Contracts deemed contrary to public policy include but are not limited to: (1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty. Additionally, O.C.G.A. § 13-8-2(b) and 13-8-2(c) generally prohibit as contrary to public policy agreements to indemnify or release parties in connection with the construction or maintenance of a building structure and in connection with engineering, architectural, or land surveying services, respectively.

There are other situations in which Georgia courts have found that exculpatory clauses and waivers were not enforceable because they were against public policy. For example, in Emory Univ. v. Porubiansky, 248 Ga. 391 (1981), the Georgia Supreme Court found that the waiver in the consent form signed by a patient as a condition of receiving treatment at a dental school clinic was invalid as contrary to public policy, especially where the doctor was under a duty to exercise that reasonable degree of care and skill of his profession. “It is against the public policy of this state to allow one who procures a license to practice dentistry to relieve himself by contract of the duty to exercise reasonable care.” Emory Univ., 248 Ga. at 394. See also Stockbridge Dental Grp., P.C. v. Freeman, 316 Ga. App. 274, 728 S.E.2d 871 (2012).

II. Are pre-injury waivers of jury trials enforceable in Georgia?

Generally, pre-injury and pre-litigation waivers of civil jury trials are not enforceable in Georgia. Georgia courts have compared the similarity of waivers of jury trial and confessions of judgment and found, partly because of the magnitude of rights involved and the potential for abuse, that waivers of jury trials are sufficiently similar so as to apply the same rule, and that “pre-litigation contractual waivers of the right to trial by jury are not enforceable in cases tried under the laws of Georgia.” Bank S., N.A. v. Howard, 264 Ga. 339, 340-41, 444 S.E.2d 799, 800 (1994). See also Hipster, Inc. v. Augusta Mall P’ship, 291 Ga. App. 273, 661 S.E.2d 652 (2008). Similarly, see Ekereke v. Obong, 265 Ga. 728, 729 (1995) holding that “pre-litigation contractual waivers of the right to a jury trial are not enforceable.” However, once litigation has commenced Georgia case law recognizes that a waiver will be honored if made during the pendency of litigation. O.C.G.A. § 9-11-39.

Two federal district court judges in Georgia have also recently found that pre-injury waivers of rights to a jury trial are unenforceable in Georgia. In LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 15 F. Supp. 3d 1295 (N.D. Ga. 2013), Judge Totenberg found certain pre-litigation jury trial waivers unenforceable where Georgia law does not permit pre-litigation jury trial waivers whatsoever and “since the state law that presumptively applies does not diminish a federal right that either party possesses, it must be applied under Erie.” 15 F. Supp. 3d at 1310 (internal citations omitted). And, Judge Lawson of the District Court for the Middle District of Georgia noted:

This Court finds that when faced with an ambiguous situation without clear precedent, it is preferable to favor the preservation of rights as opposed to
the extinction of rights. In this case, Georgia law is more stringent than federal law and preserves the right to a jury trial by disallowing pre-litigation waivers. This Court finds that Georgia law is more in line with the intent of the Supreme Court to uphold jury trials, and therefore, based on an application of Georgia law to the issue of jury waiver, Defendant Fred’s Motion to Strike is denied. Plaintiff Odom’s right to a trial by jury remains intact.


III. Are agreements restricting claims for injury or death to binding arbitration enforceable in Georgia?

Generally, Georgia courts have upheld agreements restricting claims for injury or death to arbitration, and it has been specifically held numerous times that “Georgia courts are required to uphold valid arbitration provisions in contracts.” *Bishop Contracting Co. v. Center Bros.*, 213 Ga. App. 804, 805 (1) (1994); *Saturna v. Bickley Constr. Co.*, 252 Ga. App. 140, 142 (2001). “Where the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, construction of the contract is not permitted, and the language of the contract is given effect.” *JOJA Partners, LLC v. Abrams Props.*, 262 Ga. App. 209, 211 (2003). Of course, “an individual who has not consented to an arbitration agreement cannot be compelled to arbitrate claims. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Helms v. Franklin Builders, Inc.*, 305 Ga. App. 863, 865 (2010).

Georgia has its own Arbitration Code at O.C.G.A. § 9-9-1 et seq., which provides the means by which agreements to arbitrate disputes may be enforced. Specifically, “a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.” O.C.G.A. § 9-9-3 (emphasis added).

Georgia’s Arbitration Code also provides for certain limitations. See O.C.G.A. § 9-9-2(c) which limits, and in some respects excepts, several topics from Georgia’s exclusive arbitration provisions. These include, for example, medical malpractice claims (9-9-2(c)(1)), requirements for documents to be separately initialed (9-9-2(c)(8-9)), employment agreements (9-9-2(c)(9)), torts for bodily injury or wrongful death (9-9-2(c)(10)).

However, many arbitration agreements will also implicate the Federal Arbitration Act, and the FAA will often preempt state law, especially when the state law conflicts with the FAA. “Under the FAA, written agreements to arbitrate contained in contracts involving interstate commerce are valid and enforceable in federal and state courts.” *Wise v. Tidal Const. Co., Inc.*, 261 Ga. App. 670, 676 (2003). See also *Davidson v. A. G. Edwards & Sons, Inc.*, 324 Ga. App. 172 (2013), which noted that “although this Court has not previously addressed whether the FAA preempts O.C.G.A. § 9-9-2(c)(10), insofar as it exempts from arbitration ‘personal bodily injury’ claims, we find no reason why there should not be preemption in this regard as well. The FAA preempts any state law that conflicts with its provisions or undermines the enforcement of
private arbitration agreements.” 324 Ga. App. 172, 173, 748 S.E.2d 300, 302 (2013). The Court in Davidson also found the separate initialing requirements of O.C.G.A. § 9-9-2(c)(9) to conflict with the FAA and thus were preempted.

Additionally, in a very recent opinion, the Georgia Supreme Court held that even an arbitration agreement governed by the FAA and entered into by the decedent and/or her power of attorney, which binds the decedent and her estate to arbitration, is also enforceable against the decedent's beneficiaries in a wrongful death action. The Court noted in United Health Servs. of Ga., Inc. v. Norton, 300 Ga. 736, 797 S.E.2d 825 (2017), that the derivative nature of wrongful death actions has been recognized repeatedly, “and it has previously been held that settlements, see, e.g., Cassin, supra, and waivers, see, e.g., Currid v. DeKalb State Court Probation Dept., 285 Ga. 184 (2009), made by decedents have bound their beneficiaries, despite the fact that the beneficiaries were not parties to the agreements in question.” Because wrongful death claims are wholly derivative, all defenses which could have been made against a decedent also bind the beneficiaries when they pursue a wrongful death claim, including the affirmative defense of the duty to arbitrate. United Health Servs. of Ga., Inc., 300 Ga. 736, 739, 797 S.E.2d 825, 828 (2017).

See also Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 208-09 (2009), for more commentary on the preemption of Georgia’s Arbitration Code by the FAA.