I. Are pre-injury waivers/releases of claims for injury or death enforceable in Kentucky?

Yes. Kentucky courts will uphold a pre-injury waiver or release of claims. See, e.g., Cumerland Valley Contrs., Inc. v. Bell County Coal Corp., 238 S.W.3d 644, 654 (Ky. 2007); Hargis v. Baize, 168 S.W.3d 36, 47 (Ky. 2005). But there are limitations.

The waiver is valid only to the extent that it releases a defendant from injuries resulting from ordinary or gross negligence as opposed to willful and wanton negligence. Donegan v. Beech Bend Raceway Park, Inc., 894 F.2d 205, 207-08 (6th Cir. 1990); Cumberland Valley, 238 S.W.3d at 654-55. Further,

a pre-injury release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word "negligence;" or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision.

Hargis, 168 S.W.3d at 47 (citing 57A Am.Jur.2d, Negligence § 53 (2004)). Basically, the release “must be so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away” and must “clearly set out the negligence for which liability is to be avoided.” Id. (citations omitted).

Pre-injury waivers and releases of claims are disfavored in Kentucky. Id. To that end, they “are strictly construed against the parties relying upon them.” Id. A pre-injury waiver or release is most likely to be held valid where sophisticated parties with equal bargaining power engaged in an arm’s-length transaction in agreeing to the release. See Cumberland Valley, 238 S.W.3d at 654.

A party “cannot contract away liability for damages caused by that party’s failure to comply with a duty imposed by a safety statute.” Hargis, 168 S.W.3d at 47. Thus, if an injury results from a party’s failure to abide by a statutory requirement regarding safety then the release will not bar recovery against that party.

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

Yes. Kentucky has passed a Uniform Arbitration Act, codified at Kentucky Revised Statutes (KRS) Chapter 417. The Act provides that a “written agreement to submit any existing controversy to arbitration…is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.” KRS 417.050. Here again, there are limitations.

Kentucky’s Uniform Arbitration Act does not apply to agreements “between employers and employees or between their respective representatives” and insurance contracts between the policy holder and the insurer. Id.; Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., 983 S.W.2d 501, 502 (Ky. 1998).
Courts have consistently held that arbitration is favored in Kentucky, and that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Mortg. Elec. Registration Sys. v. Abner, 260 S.W.3d 351, 353 (Ky. Ct. App. 2008) (citations and quotations omitted).

However, “the existence of a valid arbitration agreement as a threshold matter must first be resolved by the court.” Id. While an arbitration agreement may be upheld even if the underlying contract was procured through fraud, the agreement will fail if a party specifically attacks it as fraudulently procured. Id. Kentucky courts have also shown a willingness to hold arbitration agreements invalid based upon the equitable doctrine of unconscionability. For instance, when the agreement prevents a party from meaningfully pursuing her statutory remedies, or is so broad so as to waive a party’s rights to recover for actions that have nothing to do with the underlying contract, then the agreement is likely unconscionable and unenforceable. See Mortg. Elec. Registration Sys. v. Abner, 260 S.W.3d 351 (Ky. Ct. App. 2008) (holding an arbitration agreement invalid when it foreclosed the plaintiff’s ability to meaningfully pursue his statutory claims and prohibited the arbitrator from awarding anything other than actual damages); Valued Servs. of Ky., LLC v. Watkins, 309 S.W.3d 256, 261-63 (Ky. Ct. App. 2009) (holding an arbitration agreement invalid when it “encompassed[d] an intentional tort with so little connection to the underlying agreement that it could not have been foreseen by [plaintiff] when he signed [it].”). Kentucky’s Supreme Court has also indicated that an arbitration agreement that waives a fundamental right will be upheld only if assented to knowingly and voluntarily. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 330-31 (Ky. 2015).

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

Yes. Kentucky’s Uniform Arbitration Act is broad, and Kentucky has long-favored the resolution of claims through arbitration. See KRS 417.050; Ky. Const. § 250; Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, n. 17 (Ky. 2015). Moreover, Kentucky courts have clearly indicated that an arbitration agreement restricting claims for injury to binding arbitration are enforceable, so long as the agreement is valid under Kentucky’s general rules of contract interpretation. See id. at 318-22; Kindred Healthcare, Inc. v. Cherolis, 2016 Ky. App. Unpub. LEXIS 707, 6-8 (Ky. Ct. App. October 21, 2016). Here, too, there are limitations.

Kentucky’s Supreme Court has expressly held that “a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.” Ping v. Beverly Enters., 376 S.W.3d 581, 599 (Ky. 2012). In Ping, the Court also indicated that individuals who are neither parties to nor third-party beneficiaries of a contract cannot have their claims extinguished by an arbitration agreement that they did not sign. Id. at 599-600. A third-party beneficiary’s tort claims may be subject to a contract’s arbitration clause, but only “where the tort and the contract are significantly intertwined.” Id. at 599. Thus, in general, an arbitration agreement only binds those who are either parties to or third-party beneficiaries of the contract. See id.