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

The enforceability of pre-injury waiver clauses in New Jersey is suspect. Exculpatory clauses in contracts, although enforceable, are generally disfavored and subject to close judicial scrutiny. *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 688 (N.J. 2010). To be enforceable, the party seeking to enforce the exculpatory clause must demonstrate that the other party assented to the clause voluntarily, intelligently and with the full knowledge of its legal consequences. *Knorr v. Smeal*, 836 A.2d 794, 798 (N.J. 2003). In addition, “[a]ny doubts or ambiguities as to the scope of the exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief.” *Gershon*, 845 at 726. Additionally, exculpatory clauses are unenforceable where they are found to be obtained through fraud, duress or unconscionable means. *Hojnowski*, 901 A.2d at 394.

As a general rule, exculpatory clauses are unenforceable where they are adverse to the public interest. *Id.; Frank Briscoe Co. v. Travelers Indem. Co.*, 65 F. Supp. 2d 285, 312 (D.N.J. 1999) (“An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, or tends to interfere with the public welfare or safety …”). In this regard, courts have held that an exculpatory clause contravenes public policy if it were to immunize a party from liability for intentional, reckless or grossly negligent conduct. *Vitale v. Schering-Plough Corp.*, 146 A.3d 162, 170 (N.J. App. Div. 2016); *Steinberg v. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 750 (N.J. 2016). Exculpatory clauses in which parents waive potential liability claims on behalf of their minor children have also been held unenforceable because they contravene the public interest. *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 388 (N.J. 2006).


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

New Jersey courts will enforce pre-injury waivers of the constitutional and statutory right to a jury trial only in situations where such a waiver has been “clearly and unmistakably established.” *Morgan v. Sanford Brown Inst.*, 225 137 A.3d 1168, 1180 (N.J. 2016). The New Jersey Constitution guarantees the right to a trial by jury in civil cases where plaintiff’s claims are legal rather than equitable in nature. *N.J. Const., Art. I, Para. 9; Weinisch v. Sawyer*, 587
A.2d 615, 619 (N.J. 1991). In addition, certain statutes provide for a trial by jury for particular causes of action. See, e.g., Noren v. Heartland Payment Sys., 154 A.3d 178 (N.J. App. Div. 2017) (Conscientious Employment Protection Act provides plaintiffs with right to jury trial). To be enforceable, a waiver clause must be clear and unambiguous that the party has assented to waiving the right to have his or her claim decided by a jury. Atalese v. U.S. Legal Servs. Grp., L.P., 99 A.3d 306, 314 (N.J. 2014). “To be effective, a party must have full knowledge of his legal rights and intent to surrender those rights.” Knorr v. Smeal, 836 A.2d 794, 798 (N.J. 2003). While no “magical language is required,” and the waiver clause “need not identify the specific constitutional or statutory right” being waived, to be enforceable, the waiver clause must explain in clear and plain language (1) what right is being surrendered and (2) the nature of the claims covered by the waiver. Noren, 154 A.3d at 184. Courts tend to decline enforcing jury waiver clauses where they are not negotiated, are inconspicuous and are contained in a standardized adhesion contract executed without the advice of counsel. See, e.g., Fairfield Leasing Corp. v. Techni-Graphics, Inc., 607 A.2d 703 (N.J. Law Div. 1992).

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

New Jersey courts will only enforce a mandatory arbitration clause if it complies with New Jersey contract principles. In Atalese, the New Jersey Supreme Court held that mandatory arbitration clauses have the effect of waiving parties’ constitutional and statutory rights to file their claims in court and have their disputes decided by a jury. 99 A.3d at 312. As a result, a mandatory arbitration clause is only enforceable if it states, in clear and unmistakable terms, that by agreeing to mandatory arbitration, the party is waiving his or her rights to file their claim in a court of law and have their claims decided by a jury. Id.; Dispenziere v. Kushner Cos., 101 A.3d 1136 (N.J. App. Div. 2014) (holding that plaintiffs could not be compelled to arbitrate because the arbitration provision in the contract did not state that plaintiffs were waiving their right to sue). Accordingly, a mandatory arbitration clause will only be enforced if the party was made aware of it at the time the contract is executed. Kleine v. Emeritus at Emerson, 139 A.3d 148, 152 (N.J. App. Div. 2016) (holding that an arbitration clause in a patient’s nursing home contract was unenforceable because the exclusive arbitration forum required under the contract was unavailable at the time the contract was entered). In addition, a mandatory arbitration clause must be conspicuously placed in a contract such that the parties have reasonable notice of its existence. Noble v. Samsung Elecs. Am., Inc., 2017 U.S. App. LEXIS 3841 (3d Cir. Mar. 3, 2017) (mandatory arbitration clause contained in voluminous product manual is unenforceable because consumer had no reasonable notice that the manual contained contractual terms). Moreover, a mandatory arbitration clause will not be enforced if it is ambiguous or contradicts other terms in the parties’ contract. Souza-Bastos v. Federal Auto Brokers, Inc., 2016 N.J. Super. Unpub. LEXIS 1332 (N.J. App. Div. Jun. 10, 2016) (upholding the trial court’s denial of defendant’s motion to compel arbitration because the auto sales contract documents contained contradictory and inconsistent arbitration clauses).