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

New Mexico courts have not distinguished specific types of claims for which releases are enforceable but consider the enforceability of these releases on a case by case basis. Berlangieri v. Running Elk Corp., 134 N.M. 341, 76 P.3d 1098, 1106 (2003). New Mexico has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals. Fleemma v. Halliburton Energy Services, Inc., 2013-NMSC-022, ¶ 18, 303 P. 3d 814, 820 (2013) (citing Berlangieri). While the New Mexico legislature has not enacted any broad limitations on the enforceability of liability releases, certain activities, such as skiing and horseback riding, have been tightly regulated by statute. See Equine Liability Act, NMSA 1978, §§ 42-13-1 to 4 (1993 as amended through 1995); see also Ski Safety Act, NMSA 1978, §§ 24-15-1 to 14 (1979 as amended through 1997). Thus, if a liability release agreement is clear and unambiguous even when strictly construed, is not the product of a superior bargaining position, and is not contrary to public policy, it may be enforceable under New Mexico law if it survives case specific scrutiny by the Court.

The New Mexico Supreme Court has set forth a two-part analysis to determine whether a pre-injury release is valid and enforceable. The first analysis considers the clarity and context of the language used, while strictly construing exculpatory clauses against the drafter. Berlangieri, 76 P.3d. at 1106-07. The Court made clear that the language be so clear that “a person without legal training can understand the agreement” to waive these claims. Id. at 1108.

The second part of the analysis considers whether enforcement of a release would be contrary to public policy. The Berlingieri Court adopted six, nonexclusive factors (previously adopted by California courts) for guidance in the public policy inquiry: (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 members of the public; (3) The party holds himself [or herself] out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his [or her] 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 additional reasonable fees and obtain protection against negligence; (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his [or her] agents. Id. at 1109 (citation and quotation omitted). Because it is highly unlikely all six factors are satisfied in any one clause, the six factors are considered as helpful indicators in determining whether enforcement of the release violates public policy. Id. at 1110. It is notable that if the activity at issue has been regulated by statute, the enacted legislation will weigh heavily in the court’s public policy analysis.

II. Are pre-injury waivers of jury trials enforceable in New Mexico?
New Mexico has not specifically addressed whether waivers of the right to a jury trial would be an exception to the general rule that pre-injury releases are enforceable under limited circumstances. Again, as noted, New Mexico courts consider the enforceability of pre-injury waivers and releases on a case by case basis.

III. Are agreements restricting claims for injury or death to arbitration enforceable in New Mexico?

New Mexico has not specifically addressed whether agreements restricting claims for injury or death to arbitration are enforceable. However, New Mexico has a strong policy in favor of arbitration. *Fiser v. Dell Computer Corporation*, 2007-NMCA-087, ¶ 13, 142 N.M. 331, 165 P.3d. 128 (reversed on other grounds by *Fiser v. Dell Computer Corporation*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d. 1215). The courts consider arbitration agreements to be contracts enforceable by the rules of contract law. *Castillo v. Arrieta*, 2016-NMCA-040, ¶ 15, 368 P. 3d 1249, 1254 (certiorari denied). Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case, considering both statutory and judicial expressions of public policy. *Id*. Despite these policy concerns, a court may, consistent with the Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA), invalidate an arbitration agreement through the application of an existing common law contract defense such as unconscionability, which New Mexico courts often do. *Strausberg v. Laurel Healthcare Providers, LLC*, 304 P.3d 409 (2013) (on remand at 2013 WL 5741413)