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

Yes, in Tennessee, parties have the ability to limit liability by contract through exculpatory clauses and indemnity agreements, subject to certain exceptions. *Chazen v. Trailmobile Inc.*, 215 Tenn. 87, 384 S.W.2d 1 (1964); *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977), *Crawford v. Buckner*, 839 S.W.2d 754, 759 (Tenn. 1992); *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 893 (Tenn. 2002).


In *Olson*, the Tennessee Supreme Court adopted the following factors to consider when determining whether an exculpatory clause as part of a transaction would be invalid as against public policy:

[a.] It concerns a business of a type generally thought suitable for public regulation.

[b.] 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.

[c.] The party holds himself 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.

[d.] 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 services.

[e.] 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.
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 agents.

It is not necessary that all be present in any given transaction, but generally a transaction that has some of these characteristics would be offensive and void. Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977).

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

Yes - although the preeminent case regarding pre-injury waivers of jury trials relates to bank contract enforceability and does not deal with physical injury, Tennessee law favors arbitration, which, in turn, supports waivers of jury trials in multiple contexts. Poole v. Union Planters Bank, N.A., 337 S.W.3d 771, 778 (Tenn. Ct. App. 2010) (citing State, Dep't of Highways v. Urban Estates, Inc., 225 Tenn. 193, 465 S.W.2d 357, 360-61 (Tenn. 1971) (a pre-dispute contractual waiver of the right to trial by jury will be recognized absent some violation of public policy).

In order to be enforceable, the jury waiver must be “knowing, voluntary, and intelligent.” Regions Bank v. Lost Cove Cabins & Campgrounds, Inc., 2010 Tenn. App. LEXIS 699, *9, 2010 WL 4514957 (Tenn. Ct. App. Nov. 9, 2010) (citing Poole v. Union Planters Bank, N.A., No. W2009-01507-COA-R3-CV, 2010 Tenn. App. LEXIS 259, 2010 WL 1404416, at *7 (Tenn. Ct. App. Apr. 8, 2010)). A non-exhaustive list of factors courts have considered to determine these issues include the following: (1) the conspicuousness of the jury-waiver provision; (2) the parties’ business acumen and experience; (3) the representation, or lack thereof, of counsel; (4) the negotiations had concerning the agreement and the waiver provision; (5) the relative bargaining power of the parties; (6) the nature of the contract; and (7) the existence of fraud, overreaching, or unconscionability.” Poole, 337 S.W.3d at 783.

As discussed above, Tennessee does not allow parents to bind their minor children to pre-injury waivers of liability, releases, or indemnity agreements.” Blackwell ex rel. Blackwell, 2017 Tenn. App. LEXIS 6 at *73, 2017 WL 83182. While this rule does not explicitly identify whether a minor can be bound by a parent’s waiver of a jury trial on his or her behalf, it is likely that such a ruling would follow based on the same rationale.

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

Yes. In general, arbitration agreements regarding any controversy in existence or thereafter arising are enforceable and favored in Tennessee, and there is no mention of their inapplicability to claims for injury or death. Benton v. Vanderbilt Univ., 137 S.W.3d 614, 617, 2004 Tenn. LEXIS 617, *7 (Tenn. 2004) (“In general, arbitration agreements in contracts are favored in Tennessee both by statute and existing case law”); see also, Tenn. Code Ann. §29-5-302(a) (arbitration agreements are “valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.”) If the court finds a valid written agreement to arbitrate, whether to order the parties into arbitration is not a matter of discretion.
for the court, but is statutorily required. See, Tenn. Code Ann. §29-5-303(a). The only specific types of claims that such an agreement appears to not bind are those brought under the Tennessee Human Rights Act for sexual discrimination or sexual harassment. See, Tenn. Code Ann. §29-5-301 (Applicability).

Despite the strong support for arbitration agreements, courts will generally apply ordinary principles that govern contract formation to evaluate any objections to them. Taylor v. Butler, 142 S.W.3d 277, 280, 2004 Tenn. LEXIS 697, *1 (Tenn. 2004). Therefore, if the agreement is found to be part of an “adhesion contract” or an oppressive or unconscionable agreement “beyond the reasonable expectations of an ordinary person”, it is subject to attack. Hill v. NHC Healthcare/Nashville, LLC, 2008 Tenn. App. LEXIS 265, *23-24, 2008 WL 1901198 (Tenn. Ct. App. Apr. 30, 2008). The Tennessee Supreme Court has held that a contract was an adhesion contract where: (1) it was a standardized form contract; (2) the offering party had a superior knowledge of the underlying subject matter; (3) the contract was offered on a take it or leave it basis; (4) failing to sign the agreement would have interrupted the rendition of services; and (5) because of the type of services involved, choosing another provider would have caused delay, resulting in a difficult choice.” Wofford v. M. J. Edwards & Sons Funeral Home Inc., 490 S.W.3d 800, 803, 2015 Tenn. App. LEXIS 926, *1, 2015 WL 7428743 (Tenn. Ct. App. Nov. 23, 2015). The issue of unconscionability is necessarily fact intensive. For example, a contract may be found to be unconscionable where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." Hill v. NHC Healthcare/Nashville, LLC, 2008 Tenn. App. LEXIS 265, *23-24, 2008 WL 1901198 (Tenn. Ct. App. Apr. 30, 2008) (“If the provisions are … so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.”). It is important to note that these agreements are not generally considered to be unconscionable as long as they do not “alter legal duties or limit liabilities [but] simply provide an alternative forum for the resolution of disputes.” Hill, 2008 Tenn. App. LEXIS at *35, 2008 WL 1901198.