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Enforceability of Exculpatory Clauses in Missouri

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University of Missouri-Kansas City School of Law
Advanced Legal Research Pathfinder

Enforceability of Exculpatory Clauses in Missouri
By: Samantha Cusumano

Fall 2023

Disclaimer

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I. INTRODUCTION

a. Overview

Today, a vast majority of contracts signed by consumers contain provisions that release one or both of the parties from liability if personal injury occurs during the course of the contract. These provisions are referred to as liability waivers, exculpatory clauses, limitations of liability, or liability releases, and these terms are often used interchangeably within this pathfinder and in legal research relating to this topic. The effect of these provisions is that the signing party waives their right to file future claims against the other party in the event of injury or loss and relieves the drafting party of any liability for damages sustained while under contract. Enforceability of these types of waivers varies widely from state to state, leading to uncertainty in situations normally resulting in tort liability or potential damage awards. Some jurisdictions uphold these types of agreements as long as they are clear to the contracting parties, some jurisdictions prohibit them entirely, some apply stricter standards in determining validity, and some states prohibit them if the state has a regulatory interest in the safety and non-negligence of the contracting parties.¹ Generally, across many jurisdictions, waivers of liability for future negligence are valid, and a little more than half the states have passed statutes governing exculpatory clause enforceability.² However, it is important to note that exculpatory clauses are not without limitation and can be invalid in situations including minors, offense to public policy, public interest exceptions, and releases that are ambiguous.³ Furthermore, it is well established that liability waivers that are unconscionable or violate public policy are generally unenforceable.⁴ Regardless of legal precedent that refuses to uphold exculpatory clauses that offend public policy or are deemed unconscionable, parties continue to place these waiver provisions in their contracts to deter injured parties from

¹ Barry A. Lindahl, *Modern Tort Law: Liability and Litigation*; § 21:3. Validity—In general, 2 *Modern Tort Law: Liability and Litigation* § 21:3 (2d ed.).

² *Id.*

³ *Id.*

⁴ Edward K. Cheng et. al., *Unenforceable Waivers*, 76 *Vand. L. Rev.* 571, 572 (2023).

litigating, even if the injured party may well prevail in a claim against the tortfeasor.⁵

b. Intended Audience

This pathfinder is intended for attorneys and law students reviewing contractual obligations and liabilities, and for non-attorney consumers entering into contracts. This pathfinder is primarily intended to help researchers determine whether their contracts contain enforceable liability waivers in Missouri and to help predict factors a court might apply in considering the validity of a waiver. This pathfinder will guide research regarding the applicable case law and secondary sources that influence courts' behaviors when considering whether a liability waiver is enforceable.

c. Exculpatory Clause Sample

The following exculpatory clause was drafted to conform to the *Alack* test, addressed below in this pathfinder, and relates specifically to a contract for use of a company's facilities, such as a gym, and their equipment. Understanding the language of exculpatory clauses first may guide research.

By the use of the facilities of Company and the execution of this Agreement the Member expressly agrees that Company shall not be liable for any damages arising from personal injuries sustained by the Member or his or her guest in, on or about the premises of said facilities or as a result of their using the facilities and the equipment therein. Member assumes full responsibility for any such injuries or damages that may occur to Member or guest in, on or about the facilities and further agrees that Company shall not be liable for any loss or theft of personal property. Member also specifically agrees that Company shall not be responsible for such injuries, damages, loss or theft even in the event of negligence by Company, whether such negligence is present at the signing of this Agreement or takes place in the future. This waiver does not, however, apply to gross negligence or intentional torts by Company.⁶

⁵ *Id.*

⁶ § 37:49. Exculpatory clause—In contract for club facilities, 7 Mo. Prac., Legal Forms § 37:49 (3d ed.)

II. QUICK GUIDE TO RESEARCH

The following resources are important research tools for the intended audience looking for a quick, succinct, high-level understanding of the enforceability of exculpatory clauses in Missouri. Each of the sources listed in this quick guide return the most helpful and concise results for research on this topic.

- a. Case Law
 - i. *Alack v. Vic Tanny Intern. of Missouri, Inc.*
 1. Why is this resource helpful?
 - a. *Alack* is Missouri’s lead case in examining the enforceability of exculpatory provisions. It provides a bright-line test frequently used by Missouri courts.
 - ii. *Milligan v. Chesterfield Village GP, LLC*
 1. Why is this resource helpful?
 - a. *Milligan* further clarified *Alack* regarding the way in which the exculpatory clause must be stated to be enforceable.
 - iii. Search Method: (Westlaw Precision & Lexis+): Cases > Missouri > Search advanced “(enforceab! & "exculpatory clause")”.
- b. Law Review and Journal Articles
 - i. Karen A. Read, *Public Policy Violations or Permitted Provisions: The Validity of Exculpatory Provisions in Residential Leases*
 1. Why is this resource helpful?
 - a. Provides analysis into when a provision may be considered against public policy and the history of exculpatory provisions.
 - ii. Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Mo. L. Rev. 493 (2010)
 1. Why is this resource helpful?
 - a. Provides excellent summary of the factors, rules, and other considerations that Missouri courts review when determining the validity of exculpatory clauses.
 - iii. Search Method: (Westlaw Precision): Secondary Sources > Law Reviews & Journals > Filter by Jurisdiction: Missouri > Search “exculpatory provision enforceability & party sophistication”. (Lexis+): Secondary Materials > Law Reviews & Journals > State: Missouri > Search “exculpatory provisions & public & contracts”.
- c. 50 State Survey
 - i. Exculpatory Agreements and Liability Waivers Chart
 1. Why is this resource helpful?
 - a. Although this resource is not primary or secondary, binding or persuasive authority, this chart is an excellent place to quickly review important factors to consider when

researching exculpatory clauses in 50 states, including Missouri.

- ii. Hyperlink: <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILITY-WAIVERS-CHART.pdf>.

III. PRIMARY SOURCES

a. Missouri Statutory Law

Missouri law does not incorporate statutes specifically governing the enforceability of exculpatory clauses or liability waivers; therefore, the primary governing authority is case law.

b. Missouri Case Law

The validity of a liability limitation is a question of law and courts have historically taken different approaches when considering exculpatory clause enforceability.⁷ This section will discuss Missouri courts' approaches in assessing whether to uphold an exculpatory provision.

General Rule: Exculpatory clauses are generally valid, but regularly disfavored by Missouri courts. Missouri courts weigh multiple factors to determine validity and enforceability of these types of provisions. The provision must not be unconscionable or against public policy, the language must be clear, conspicuous, and unambiguous, and the provision may not waive willful or wanton conduct.

Key Case Law:

- i. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996)
 1. This is Missouri's leading case regarding exculpatory clauses. This case determined that exculpatory provisions are not prohibited as against public policy, but to be valid, the language must "effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence" and must also be so clear, unambiguous, unmistakable, and conspicuous as to the shifting of risk. This case also provides the strict standard in which exculpatory language will be construed by the courts. This case succinctly sums up the "rules" for liability limitation clauses in consumer contracts.
 2. Alack Bright-Line Test: "The words 'negligence' or 'fault' or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving."

⁷ Lindahl, *supra* note 1.

- ii. *Milligan v. Chesterfield Village GP, LLC*, 239 S.W.3d 613, 616 (Mo. Ct. App. 2007)

1. This case relies heavily on *Alack* in determining that exculpatory language must explicitly and conspicuously use terms such as “negligence,” “future negligence,” “fault,” or similar but specific language that makes it unmistakably clear that a party is waiving any claims for future negligence against the drafting party. Additionally, this case made clear that Missouri courts do not recognize “gross negligence” separate from regular negligence.

Search Method: (Westlaw Precision & Lexis+): Cases > Cases by State > Missouri > All Missouri State Cases > Search advanced “(enforceab! & "exculpatory clause)"”.

c. Major Factors of Enforceability

1. Unconscionability or Against Public Policy

- a. General Rule: Exculpatory clauses that are considered to be unconscionable or against public policy are generally unenforceable. Liability waivers must be compatible with public policy, and courts will invalidate waivers if injuring parties would have “insufficient incentives” to protect the safety of patrons or counterparties by unequivocally waiving tort liability.⁸ Liability waivers disclaiming recklessness, willful breach of duty, or wanton or intentional conduct are almost always against public policy.⁹ It is important to note that Missouri courts do not recognize degrees of negligence at common law.

b. Case Law:

- i. *Khulusi v. Sw. Bell Yellow Pages, Inc.*, 916 S.W.2d 227 (Mo. Ct. App. 1995)
 1. Limitation of liability provisions are not valid if the injuring party’s conduct is “willful and wanton” or an intentional tort.
- ii. *Warner v. Southwestern Bell Telephone Co.*, 428 S.W.2d 596 (Mo.1968)
 1. Limitation of a defendant’s liability may be effective if conduct is merely negligent, but not if the conduct is willful or wanton.

⁸ Cheng et. al., *supra* note 4.

⁹ *Id.*

- iii. *DeCormier v. Harley-Davidson Motor Company Group, Inc.*, 446 S.W.3d 668, 671 (Mo. 2014)
 - 1. While exculpatory agreements will be strictly construed [against the drafting party], the Court will enforce them to protect a party from their *own* negligence. Missouri courts do not recognize degrees of negligence at common law, and thus, claiming gross negligence by the drafting party to invalidate an exculpatory clause will not be considered (as against public policy).
- iv. Search Method: (Westlaw Precision): State materials > Missouri > Search “exculpatory clauses against public policy”. (Lexis+): State > Missouri > Search “exculpatory clauses & public policy & intent!”.

2. Clear and Conspicuous Language

- a. General Rule: Exculpatory clause language must be clear and conspicuous so that a reasonable person understands they are waiving their rights and shifting the risk away from the drafting party.
- b. Case Law:
 - i. See, *Alack v. Vic Tanny Intern. of Missouri, Inc.*
 - ii. *Fuller v. TLC Prop. Mgmt., LLC*, 402 S.W.3d 101 (Mo.App. S.D., 2013).
 - 1. Clear and explicit language in the contract is required to absolve a person from liability. The provision of an exculpatory clause must be unambiguous, unmistakable, and conspicuous. Exculpatory language must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence.
 - iii. *Easley v. Gray Wolf Investments, LLC*, 340 S.W.3d 269 (Mo.App. E.D. 2011)
 - 1. A well-established rule of contract construction is that a provision exempting one from liability for his or her own negligence will never be implied but must be explicitly stated.
 - iv. *McNearney v. LFT Club Operations Company, Inc.*, 486 S.W.3d 396 (Mo. Ct. App. 2016).
 - 1. Missouri courts have held that an exculpatory clause must clearly and explicitly state the nature and extent of the waiver, and a key factor is the actual presence of the words “negligence” or “fault,” used conspicuously.

2. Note: as of the date of the release of this pathfinder, this case has not been overruled.

- v. Search Method: (Westlaw Precision): Cases > Missouri > Search “exculpatory & clear & reasonable/p”. (Lexis+): Content > Cases > Missouri > Search “exculpatory & clear & reasonable”.

3. Reasonable Person

- a. General Rule: The language in an exculpatory provision must be clear and unmistakable so that a reasonable person understands what they are signing and that there is a shift in risk.
- b. Case Law:
- i. *Lewis v. Snow Creek, Inc.*, 6, S.W.3d 388 (Mo.App. W.D. 1999).
 1. If language and format of an exculpatory clause, or the circumstances surrounding signing (i.e. occurs while in line to receive ski equipment), leave doubt that a reasonable person agreeing to the clause would actually understand what future claims he or she is waiving, then the waiver is unenforceable.
 - ii. Search Method: (Westlaw Precision & Lexis+): Cases > Missouri > Search ““exculpatory" & "reasonable person””.

4. Open and Obvious Danger

- a. General Rule: While the existence of an open and obvious danger is not an explicit factor that Missouri courts consider when examining the enforceability of an exculpatory clause, they have considered liability limitations valid when the party engaging in a dangerous activity signs against their right to sue for future injury. The cases below address exculpatory clause effectiveness when a party is engaged in a known dangerous activity.
- b. Case Law:
- i. See above, *Lewis v. Snow Creek*
 - ii. *Ferbet v. Hidden Valley Golf and Ski, Inc.*, 618 S.W.3d 596, 600 (Mo. Ct. App. 2020)
 1. If a plaintiff assumes the risk, he voluntarily accepts that specified risk and is generally barred from recovering damages resulting from that risk, relieving a defendant from the duty and exculpating them.
 - iii. *Munoz v. Six Flags St. Louis, LLC*,
 2. If a person voluntarily consents to accept the danger of a known and appreciated risk, that person may

generally not sue another party for failing to protect him from it.

- iv. Search Method: (Westlaw Precision): Cases > Missouri > Search “exculpatory & "open and obvious"” (Lexis+): Content > Cases > Missouri > Search “exculpatory clauses for dangerous activit!”

IV. SECONDARY SOURCES

a. Law Review & Law Journals

The law review and journal articles contained in this section provide insightful case law research, court methodologies, party strategies, and unenforceable waivers across almost all courts.

Missouri

- i. Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Mo. L. Rev. 493 (2010)
 - 1. This law review article concisely summarizes the strict standard, factors, rules and other considerations that Missouri courts consider when determining the validity of exculpatory clauses. Additionally, it addresses how the sophistication of the contracting parties plays into the analysis.
- ii. Karen A. Read, *Public Policy Violations or Permitted Provisions: The Validity of Exculpatory Provisions in Residential Leases*
 - 1. Although this resource pertains specifically to residential leases, information provided in this article is useful in researching Missouri courts’ history in considering the validity of exculpatory clauses and better explains when “void against public policy” applies.
- iii. Dale C. Doerhoff, *Adequate Remedy at Law Does Not Always Preempt Equity and Other Recent Developments*, 52 J. Mo. B. 205, 206 (1996)
 - 1. This journal article provides information regarding the bright-line test for exculpatory clauses which Missouri courts look to in determining whether language in the clause is a clear and unmistakable waiver and shifting of risk that a reasonable person can understand.

Search Method: (Westlaw Precision & Lexis+): Secondary Sources > Law Reviews & Journals > Filter by Jurisdiction: Missouri > Search "exculpatory clause" "enforceab!".

National

- i. Anita Cava, Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 Santa Clara L. Rev. 611 (1988)
 1. This article discusses, with specificity, the factors that courts typically examine when reviewing the validity of exculpatory clauses under a strict judicial standard and analyzes each factor.
 2. Search Method: HeinOnline.com > search “enforceability of exculpatory clauses judiciary”.
- ii. Edward K. Cheng, Ehud Guttel, Yuval Procaccia, *Unenforceable Waivers*, 76 Vand. L. Rev. 571, 572 (2023)
 1. This essay is particularly helpful for general liability waiver research because it contains insight as to the strategies that a contracting party may have in including a waiver provision, even if similar provisions have already been deemed unenforceable or void as against public policy (referred to as “flouting”). The essay examines, at a high-level, different types of waivers and courts’ handling of each type.
 2. Search Method: (Westlaw Precision): Secondary Sources > Law Reviews & Journals > Search “unenforceable waivers”.
- iii. Maggie Lu, *Against Public Policy: Enforceability of Exculpatory Clauses*, 60 S. Tex. L. Rev 497 (2019)
 1. This article specifically discusses the confusion today on the enforceability of exculpatory clauses and parses out tests that courts have used in reviewing their validity. Additionally, this article describes how to determine if the provision at issue is an exculpatory clause at all.
 2. Search Method: HeinOnline.com > Search “Enforceability of Exculpatory Clauses”.

- iv. Ryan Martins, Shannon Price, John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 *Cardozo L. Rev.* 1265, 1266 (2020)

1. This article provides historical information regarding contracting and exculpatory provisions, public policy evaluations and the current landscape of waivers.
2. Search Method: (Westlaw Precision): Secondary Sources > Law Reviews & Journals > Search “waivers in tort contracts” > Filter by Publication Type: Law Review & Journals.

b. American Law Reports

American Law Reports is a resource that combines elements of legal encyclopedias with elements of case reporters, annotated to guide research. It can provide summaries, relevant case law, legal rules and principles, and other resources in a concise way.

- i. Patricia C. Kussman, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 *A.L.R.6th* 147 (2011)
 1. This resource examines whether or not exculpatory clauses in contracts for health clubs, fitness clubs, and gyms are against public policy and the factors that courts have considered in their analysis.
 2. Search Method: (Westlaw Precision): Secondary Sources > American Law Reports > Search “(exculpatory & clause & enforceab!)”.
- ii. Linda A. Sharp, *Waiver of Liability for Personal Injury or Death in Cases Involving Facilities of Recreational or Sports Activities*, 88 *A.L.R.7th Art.* 3 (2023)
 1. This resource explains how exculpatory clauses create a tension between parties’ right to contract and the idea that parties should be responsible for their own negligence, and how courts reconcile this tension.
 2. Search Method: (Westlaw Precision): Secondary Sources > American Law Reports > Search “exculpatory clause enforceability”.

iii. George L. Blum, *Release or Compromise or Waiver by Parent of Cause of Action for Injuries to Child as Affecting Right of Child*, 75 A.L.R.6th 1.

1. This resource provides analysis specific to and regarding cases where courts have considered the enforceability of a liability waiver when a parent signs on behalf of their child.
2. Search Method: (Westlaw Precision): Secondary Sources > American Law Reports > Search “enforceability of tort liability waivers” > filter “ALR” and “Missouri”.

c. Legal Encyclopedias

i. American Jurisprudence (AmJur)

1. AmJur summarizes broad principles of law and provides important citations to cases, treatises, statutes, and rules. This resource helpfully synthesized the general view on exculpatory clauses, particularly viewed against public policy and intentional, reckless, willful, or wanton misconduct, or gross negligence. This resource did not provide results specific to Missouri.
2. Search Method: (Westlaw Precision): Secondary Sources > Jurisprudence & Encyclopedias > American Jurisprudence 2d (AMJUR) > Negligence > Basis or Foundation of Legal Liability > §55. Enforceability of contractual exculpatory clauses excusing intentional tort, wanton or willful misconduct, or gross negligence, generally.

ii. Corpus Juris Secundum

1. CJS is a national legal encyclopedia covering state and federal legal topics. This resource returned helpful results regarding the effects of liability waivers, the legality of contracts exempting liability for negligence, public policy violations and other considerations. This resource did not provide results specific to Missouri.
2. Search Method: (Westlaw Precision): Secondary Sources > Jurisprudence & Encyclopedias > Corpus Juris Secundum > Search “(exculpatory & enforceab!)”.

d. Catalogs

Catalogs are global research databases that include resources and materials that individual libraries possess.

i. HeinOnline

1. HeinOnline is particularly helpful in researching exculpatory clauses. A search returned articles on point that address exculpatory clause enforceability in realty leases, hazardous recreational activities, service contracts, and education programs.
2. Search Method: HeinOnline.com > Log-in > Search “Enforceability of Exculpatory Clauses”.

ii. Worldcat.org

1. Worldcat is a global catalog of library materials and provides information on which physical library has the resource the researcher is looking for. This resource returned helpful articles accessible online and some physical book resources regarding contract law.
2. Search Method: Worldcat.org > Search “exculpatory clause enforceability contract”.

iii. UMKC Law Library Catalog Search

1. This resource is helpful because it allows the researcher to read full PDF texts of each article. The UMKC Law Library Catalog returned helpful academic journal articles on searches related to exculpatory clause enforceability. The results from the catalog also returned information relating to unconscionability, which is an important factor Missouri courts consider in ruling on the validity of liability waivers.
2. Search Method: <https://law.umkc.edu/law-library/index.html> > Search “exculpatory clauses tort.” In the event the UMKC Catalog requires school login information, the “Public Access” option will return many of the same results.

iv. ProQuest

1. ProQuest is a catalog resource that contains global content for researching library services, papers, articles, periodicals, historical collections, and databases. This resource returned some helpful results on the enforceability of exculpatory clauses.
2. Search Method: <https://www.proquest.com/> > Search “tort exculpatory clause enforceability”.

e. Books & Treatises

i. Restatements

1. Restatements are a helpful resource as they serve to better articulate the rules and principles for this specific area of tort law liability. Restatements also serve as persuasive authority and synthesize how courts may view exculpatory provisions.
2. Search Method: (Westlaw Precision): Secondary Sources > Restatements & Principles of the Law > Restatements of the Law – Torts > Restatement (Third) of Torts: Liability for Physical and Emotional Harm. (Lexis+): Secondary Materials > Restatements > Torts > Restatement of the Law, Torts 3d Liability for Physical and Emotional Harm – Official Text.

ii. Missouri Practice Series

1. This resource is a compilation of practice materials for attorneys in Missouri which contain summaries of the law and the law's application to legal issues. This resource returned helpful guides on limitations of liability and potential defenses for liability under exculpatory clauses.
2. Search Method: (Westlaw Precision): Secondary Sources > Texts and Treatises > Filter Jurisdiction to "Missouri" > Search "tort liability" > Personal Injury and Torts Handbook > Search "exculpatory claus!".

f. CLE Publications

i. Missouri Tort Law CLE Publication

1. This resource is helpful for searching general topics regarding waivers, limitations on liability, contractual releases, and rights to rely. Sections of the CLE Publication define these terms with better specificity and provide case references to guide research on a broad range of tort law, including medical malpractice, aviation, wrongful death, and products liability.
2. Search Method: (Westlaw Precision): No sources located. (Lexis): Secondary Materials > Missouri > All Missouri Bar CLE > Missouri Tort Law (MoBarCLE).

g. News

i. The American Bar Association

1. The American Bar Association provides free email newsletters through their website for a multitude of personal injury topics, including Dispute Resolution Committee Newsletters, Litigation and Trial Practice Newsletters, and Health and Disability Committee Newsletters. These resources can provide insight to prepare both business clients and personal injury clients for a liability waiver's impact on their claims.


ii. Google News

1. Google News is a search tool that returns relevant articles, sorted by most recent results, based on the subject you are searching for. A search of "Tort Liability Waivers" returned multiple results, including "Liability Waivers; They Might Not Be What You Think" and "Waiver Doesn't Discharge Tort Liability." This search tool should be used for a more general search, rather than specifically Missouri law.

h. Alerts

Legal subscription services, including Westlaw and LexisNexis allow researchers to elect notifications and alerts regarding news and updates on research topics.

- i. Westlaw: Notifications > Alerts > Create Alert > WestClip > [add description] > [add desired content types] > Enter search term: (enforceab! & "exculpatory clause") > [add desired customized delivery] > Schedule Alert

1.  >
History Folders My links Notifications ? [user icon] Sign out
2. Alerts Alerts History · Create Newsletter Manage Alert Groups >

WestClip alert

1 Basics

Name of alert

Client ID: [REDACTED] [Change](#)

Description (optional)

Assign to alert group

[Continue](#)

2 Select content





3 Enter search terms

4 Customize delivery

5 Schedule alert

3.


- ii. LexisNexis: Search “exculpatory clause” “enforceab!” > narrow Jurisdiction to “Missouri” > click the Bell icon

Results for: "exculpatory clause" "enforceab!" Natural Language    

1.



2. Once you have selected the Bell icon, Lexis provides options for alert search terms, content types, delivery types, frequency of alerts, and any additional recipients to receive the alerts.

Search Alert



Title
"exculpatory clause" "enforceab!" 

Search Terms
"exculpatory clause" "enforceab!"



Description 1000 characters remaining

Content Types
Select Content Types 
[Secondary Materials](#) 

Narrowed by
Secondary Materials : Missouri

My Alert Delivery
 On Lexis+ Only 
 On Lexis+ & Email 

Frequency
 As Updates Are Available
 Daily
 Business Daily
 Weekly
 Monthly

Delivery Recipients Select/Add up to 50 email addresses.
Enter Email Address 
[Logged in as: \[REDACTED\]](#) 

Share My Alerts /Select/Add up to 50 email addresses.

V. OTHER FREE RESOURCES

a. Blogs & Blawgs

i. The Waiver Society Project

1. This free website is monitored by a team of Yale students and their professor, dedicated to “collecting, displaying, and marveling...the variety of waivers in American life.” This website analyzes the likelihood of enforcement for almost all fifty states but does not include data on Missouri waivers.
2. Hyperlink: <https://www.waiversociety.org/>

ii. Justia Blawgs

1. Justia is a free, online resource providing access to case law, regulations, statutes, codes, and other information. Utilizing the Justia Law Blogs returned helpful information regarding enforceability of liability waivers, with some results by particular state, and some results providing a general overview of these types of waivers.
2. Search Method: <https://blawgsearch.justia.com/> > Search “liability waiver”.

b. Surveys

i. Exculpatory Agreements and Liability Waivers in All 50 States

1. While this resource is not binding or persuasive authority, and should not be relied on solely for research, it is an excellent resource in the way of a 50 State Survey monitored by Matthiesen, Wickert & Lehrer, S.C. It is a quick guide to exculpatory provision validity, applicable state statutes, requirements for drafting an exculpatory provision, and additional commentary by the drafters.
2. Search Method: (Google): Search “exculpatory agreements and waivers in 50 states” > first result (hyperlink: <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILITY-WAIVERS-CHART.pdf>).

c. Legal Websites

i. Find Law

1. Find Law is a free, online resource which provides articles and answers to legal topics and questions, operated by Thomson Reuters. This resource provided the quickest, most succinct search

relating to the enforceability of liability waivers. The top results provided information regarding enforceability of liability waivers in certain circumstances, such as at daycare, hotel pools, campgrounds, skydiving, and other recreational waivers, making it easy for a researcher to find an article relevant to their specific topic area.

2. Search Method: <https://www.findlaw.com/> > Search Legal Topics > Search “liability waivers enforceable”.

ii. Legal Information Institute

1. Legal Information Institute is a free, online resource which provides access to legal research sources. This resource returned helpful results regarding general requirements, conditions, prohibition of certain types of waivers, and risk management of exculpatory clauses.
2. Search Method: <https://www.law.cornell.edu/> > Search “exculpatory provisions”.


iii. Nolo


1. Nolo is a free, online resource offering an extensive library of free legal articles and a catalog of products and legal services. This resource provided some free articles relating to personal injury liability waivers. This resource is only recommended for a high-level general understanding of the concepts relating to exculpatory clauses.
2. Search will require specific language regarding the issue being researched. This resource did not return helpful results under a general liability waiver search.

d. Artificial Intelligence

- i. Artificial Intelligence can be a useful tool for researching a legal issue and can often provide a good starting point on where and what to base additional research. ChatGPT specifically returned helpful insights and predominantly accurate information regarding the question entered: “What factors do Missouri courts consider when determining if an exculpatory clause in a contract is enforceable?” ChatGPT returned seven factors that it claimed Missouri courts consider when reviewing the validity of waivers, including: (i) clear and ambiguous language; (ii) conspicuousness; (iii) nature of the agreement; (iv) public policy; (v) unfair surprise; (vi) informed consent; and (vii) scope of release. Many of these factors are explicitly addressed in the case law and other resources included in this pathfinder, indicating that ChatGPT did not hallucinate the information contained in its response to the question.

- ii. Disclaimer: It is imperative to remember that information provided by AI should be independently fact checked and researched. AI is susceptible to “hallucinations,” which occur when it creates and provides false information. AI has been known to falsify case law and thus, “hallucinations should give [researchers] pause in accepting generative AI as authoritative.”¹⁰
- iii. The following screenshots are the actual ChatGPT interaction conducted for this pathfinder:

 **You**
 What factors do Missouri courts consider when determining if an exculpatory clause in a contract is enforceable?

 **ChatGPT**
 I am not a lawyer, and legal matters can be complex and depend on specific details and context. It's crucial to consult with a qualified attorney for advice tailored to your situation. However, I can provide some general information.

Exculpatory clauses, also known as liability waivers or release clauses, are provisions in contracts that seek to release one party from liability for certain acts or negligence. The enforceability of such clauses can vary, and Missouri courts consider several factors when determining their validity. Some of the key factors include:

- iv.
- v. ChatGPT also included a disclaimer at the end of its response, advising users to consult a Missouri attorney:
- vi.
 - It's important to note that the specific circumstances of each case can influence how these factors are applied. Legal advice from a qualified attorney who is familiar with Missouri law is essential when dealing with issues related to contract enforceability and liability waivers.

VI. CONCLUSION

The purpose of this pathfinder is to provide a starting point and to guide research for the intended audience conducting research on the enforceability of exculpatory clauses relating to personal injury and tort claims in Missouri. This pathfinder is not comprehensive or exhaustive and should be used only as a resource to conduct further independent research. Legal research requires the use of many sources, including both primary and secondary authority, online databases and catalogs, summaries, articles, and relevant and current news.

¹⁰ Paul D. Callister, *Generative AI and Finding the Law*, <https://umkc.app.box.com/s/pcuebbmhn4ndpi7e880cow87iyp5sw9n> (last visited November 23, 2023).

VII. APPENDIX OF RESOURCES

The chart below contains resources included in this pathfinder and additional resources with links to their respective websites. The resources have been parsed into categories based on whether they require a subscription for access or if they provide free primary and secondary authority.

Subscription Services	Free Primary Authority	Free Secondary Authority
<u>Westlaw Precision</u>	<u>Google Scholar</u>	<u>Nolo on Personal Injury</u>
<u>Lexis Nexis</u>	<u>Missouri State Statutes</u>	<u>Legal Information Institute</u>
<u>HeinOnline</u>	<u>Case Law Access Project</u>	<u>Justia – Research the Law</u>
<u>Bloomberg Law</u>		<u>UMKC Law Library Public Access</u>
<u>ProQuest</u>		