

## Tennessee Supreme Court Announces New Approach to Exculpatory Contracts

By J. Matthew Kroplin and Nicole Keefe

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Last week, the Tennessee Supreme Court revised the factors for determining the enforceability of releases signed before participation in an activity or obtaining a service. These releases, often called exculpatory agreements, were the subject of an opinion issued on December 20, 2018, in *Frederick Copeland v. HealthSouth/Methodist Rehabilitation Hospital, L.P.*

An exculpatory agreement is one that makes a party not liable to the other party for certain actions, usually negligence. For many years, lawyers in Tennessee have generally perceived that exculpatory agreements were generally enforceable. In other words, a court in Tennessee would normally find that a party who signed an exculpatory agreement could not sue the other party for negligence.

Under an exculpatory agreement, a party agrees not to pursue a negligence claim for potential injuries against another party. The Tennessee Supreme Court previously identified six factors for courts to consider in deciding whether to enforce exculpatory agreements. However, these factors resulted in confusion, inconsistent application, and failed to consider the totality of circumstances; as a result, the Tennessee Supreme Court concluded that this 6-factor test was overly rigid and arbitrary.

After reviewing the precedent of the state of Tennessee and across the United States, the Tennessee Supreme Court concluded that the enforceability of exculpatory provisions exempting one party from liability for negligence should be evaluated by the following non-exclusive factors: (i) relative bargaining power of the parties, (ii) clarity of the exculpatory language, and (iii) public policy and public interest implications. This approach is meant to better encapsulate the totality of the circumstances while still respecting the freedom of contract.

Two key criteria in determining the disparity in bargaining power between parties are the importance of the service at issue and the amount of free choice that party has in seeking alternative services. Further, the language of an exculpatory agreement must clearly and unequivocally state a party's intent to be relieved from liability in a way that is so clear and understandable that an ordinary and knowledgeable person will know what that person is contracting away. When considering whether enforcement of an exculpatory provision would be against public policy or public interest, significant weight will be given to the importance and practical necessity of the services.

In light of the *Copeland* decision, parties using releases that contain an exculpatory agreement should reevaluate the language used to ensure any such agreements follow the new standards set forth by the Tennessee Supreme Court. Although those releases may still be enforceable, the legal precedent has changed and the releases should be re-examined by an attorney knowledgeable of the *Copeland* decision.

To read the full opinion, please click [here](#).

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