

ARE WAIVER/RELEASES WORTH THE PAPER THEY ARE WRITTEN ON?

As a sports insurance specialist and risk manager, I often wondered the answer to this question myself because of all the contradictory information on this topic. To satisfy my curiosity, I interviewed the real authorities, the claims managers from the two leading sports insurance providers in the US. After all, they actually settle and litigate hundreds of these cases every year. In addition, I also interviewed one of the most widely published and respected attorneys in the US on this topic.

A waiver/release agreement has two primary protective purposes: 1) “Contractual Exculpation” which uses contract law principles (waiver/release is a contract) to excuse a sports organization for its simple negligence and 2) provides “real evidence” of the sports organization’s warning of inherent and other risks thereby triggering the common law Assumption Of Risk (AOR) defense under tort law.

Contractual Exculpation

A waiver/release is an exculpatory *contract* that attempts to excuse or relieve a party, (I.E. - the sports organization) for injuries to a participant that arise out of the known and unknown risks in an activity including the inherent risks *or* which arise from the sports organization’s ordinary negligence. Waiver/release documents are interpreted by the courts using contract law principles; this is why it is so important to have a well drafted waiver/release prepared for your sports organization.

A waiver/release will only be upheld if all of the following conditions are satisfied: 1) the injury arises from risks stated in the waiver/release contract (here we will often see language of “known and unknown risks” *and* discussions of the inherent risks of an activity) or from the sports organization’s simple negligence; 2) the waiver/release is properly drafted or worded according to the law in the state of the sports organization; and 3) it does not violate any state laws or public policy. If all of these conditions are met, the use of a waiver/release may result in the lawsuit being dismissed on Summary Judgment. Summary Judgment is important because it concludes litigation early in the process which can drastically reduce legal defense costs.

It is important to note that even if Summary Judgment dismissal is achieved, the legal defense costs will still be too expensive for most sports organizations and related directors, officers, employees, or staff to pay out of pocket. For this reason, a waiver/release is never a substitute for purchasing General Liability insurance.

Contractual Exculpation-- Adult Is Injured Party

The law of adult waiver/releases varies from state to state. As far as adult injuries are concerned, waiver/releases can be very effective and result in lawsuit dismissal in most states as long as the three conditions listed above are satisfied.

States where recreational waivers will not be enforced by the courts: Louisiana, Montana, and Virginia.

States with strict interpretations of contract language (they will be examined carefully and are circumstances where they won't be upheld): Alaska, Arkansas, Arizona, California, Connecticut, Delaware, Hawaii, Indiana, Kentucky, Maine, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Utah, Vermont, and Wisconsin.

States with more moderate interpretations of contract language (the decisions have been generally less strident than the strict interpretations in other states): Colorado, D.C., Florida, Idaho, Illinois, Iowa, Minnesota, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wyoming.

States with fairly lenient interpretations (the decisions show good acceptance of waiver/releases and apply fewer standards to the language used): Alabama, Georgia, Kansas, Maryland, Massachusetts, Michigan, Nebraska, North Dakota, Ohio, and Tennessee.

States where the outcome is not predictable because no case law or statutory authority: Puerto Rico and Rhode Island.

Contractual Exculpation-- Minor Is Injured Party

The law of minor waiver/releases also varies from state to state. However, unlike adults, minors are not legally “competent” (in other words aren’t seen under the law as capable) to enter into a binding contract such as a waiver/release. Therefore, the only way for a minor to be bound for purposes of contractual exculpation would be through a parent’s signature on the waiver/release. Even then, most states will not allow a parent to contractually waive their minor children’s right to sue for a sports related injury. This is very much a developing area of the law that is undergoing constant change. What can be said is as follows:

The same three conditions that apply for upholding adult waiver/releases also apply to parental waiver/releases : 1) the injury arises from stated risks including inherent risks or from the sports organization’s ordinary negligence; 2) the waiver/release is properly drafted; and 3) it does not violate any state laws or public policy. In addition, the language in the waiver/release will be scrutinized under the same degree of strictness as indicated under adult waiver/releases above on a state by state basis.

At the current time, only the following ten states may uphold parental waiver/releases if all of the three conditions listed above are satisfied and subject to the same degree of state contractual scrutiny as listed above : California, Connecticut, Georgia, North Dakota, Wisconsin, Florida, Massachusetts, and Ohio. However, it is believed that the trend for the acceptance of parental signed waiver/releases is gaining ground in other states.

Assumption Of Risk (AOR) As A Defense To Negligence

The second protective purpose of a waiver/release is to trigger the Assumption Of Risk Defense under tort law – in other words – to provide evidence that the sports organization gave adequate warnings of the risks so that an argument can be made that the participant *assumed* those risks.

In order to trigger the AOR defense to a negligence lawsuit, the waiver/release should contain the proper assumption of risk language; though you can also demonstrate assumption of risk by having evidence (usually in the form of other witnesses) of other types of good warnings such as signs, brochures, verbal instructions or safety briefings, etc. With respect to the waiver and release, it should specifically mention the types of risk that are assumed (known and unknown) as well as worst case injury scenarios (permanent disability and death). It is also important to note that often times courts will only apply the AOR defense to *inherent* risks of the activity. Inherent risks are those risks that the organization will simply not be able to control, regardless of their best efforts (ex: in baseball, being hit by a pitched ball).

With minors and the AOR defense, you should note that the minor must be capable of understanding the risks and must sign the assumption of risk portion of the waiver/release. Just like with adults, you can demonstrate assumption of risk by both the language in the waiver/release and by the verbal instructions or safety briefings given. Many courts have ruled that a seven year old child is capable of understanding the inherent risks involved in an activity if adequately explained.

A successful AOR defense may or may not result in having a lawsuit dismissed on Summary Judgment. If not on Summary Judgment, this defense can come into play much later in the legal proceedings when evidence is being introduced before a trier of fact. I am told by claims adjusters that the threat of this defense is probably

worth a 35% reduction in damages or claims paid out in many cases. A 35% reduction is significant on a large case. As a result, waiver/release agreements are definitely worth the paper they are written on even if they don't result in the lawsuit being dismissed as a matter of contract law.

Pitfalls to Avoid

You might be asking yourself what constitutes a "well drafted" waiver/release? Quite simply, it means that virtually every phrase in every sentence was specifically written to counter a court case that found a pitfall that resulted in the waiver/release not being enforced. There are at least ten common pitfalls that must be avoided.

The most common pitfalls to avoid are as follows:

- ✓ The wording must not be unclear or ambiguous. It must be worded in simple terms easily understandable by the common man. Legalese should be avoided.
- ✓ The print or type must be large enough to be easily read – at least 10 point type.
- ✓ Never commingle your waiver/release on the same page with another registration form. Many courts will strike a commingled waiver/release because it is not conspicuous.
- ✓ Gang or group style signatures where all participants sign underneath a single document are frowned upon by the courts. Remember, these waiver/release documents are *contracts* and they need to be treated with the seriousness of a contract. You need to be able to demonstrate that the participants who are signing these contracts understand them and are signing them voluntarily. So, if a line forms at your event where parents/players are waiting to sign, the parents/players in the front of the line may feel rushed and they might not understand the rights that they are giving up. Or, this is the argument they or their clever attorney will later use when they want to avoid or negate the waiver/release contract and sue your organization.
- ✓ The first sentence should state “In consideration of being allowed to participate” A waiver/release is not a valid contract unless all parties receive consideration (“something of value”). The consideration received by the sports organization is the promise not to sue and the consideration received by the player/parent is the right to participate.
- ✓ The waiver/release should warn of the full range of possible injuries including the key words “permanent disability or death”. This is an important part of the Assumption Of Risk defense.
- ✓ All risks should be assumed, both “known and unknown”. The key word here is “unknown”. Some waivers get too specific and limit risks to games and practices and this may lead to the omission of important risks such as transportation and non-sports outings. This is also an important part of the Assumption Of Risk defense.
- ✓ The waiver/release should never attempt to disclaim responsibility for “gross negligence” or other outrageous conduct. It should disclaim responsibility for “negligence”.
- ✓ The waiver/release should have a phrase releasing the organization from negligence to “the fullest extent permitted by law”. This magic phrase may allow a court to strike the phrases that are contrary to state law while leaving the rest of the waiver/release intact.
- ✓ A new waiver/release should be signed before each registration period even if one is on file from a previous registration period.

If you're interested in receiving a sample waiver/release that was written to avoid these pitfalls, please click on the sample Waiver / Release Forms in our online risk management library.

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