

# An Update on Timely Issues Relevant to the Validity of Waivers

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Laws governing the validity of waivers are in a constant state of change. Each new case within a state carries with it the potential of making significant changes in the waiver law of that state. For this reason, it is important to remain aware of the latest cases and their potential impact on waiver law. The purpose of this paper is to provide an update on some of the latest waiver cases involving new issues or changes regarding old issues. Eight timely issues will be addressed here.

## Need to Warn of Risks

The general rule has been that waivers might include information warning the signer of risks in the activity, but that the waiver is valid without this information. The primary purpose for inclusion would be for the establishment of an assumption of risk defense. Some recent cases seem to suggest that, in certain instances, this delineation of risks might be necessary for the waiver to be held valid.

A young man signed a waiver prior to going spelunking which stated that ". . . in recognition that speleology is an inherently dangerous recreational activity, we voluntarily assume all risks and shall indemnify and hold the owners . . . harmless from all claims . . . arising out of . . . negligence." (*Coughlin v. T.M.H. International Attractions, Inc.*, 1995, p. 1-2) The court, however, ruled that the waiver was not valid because the decedent was an inexperienced caver who knew little about the activity of spelunking. While he voluntarily signed the release, the court emphasized that he "did not know of the dangers inside the cave — the release read more as an enticement than as a warning of specific risks that the tour members would confront."

In *Maurer v. Cerkenick-Anderson Travel, Inc.*

(1994), a young lady taking a tour in Mexico died when she fell from the moving train. Her parents sued alleging that the decedent was the fourth victim to die on these tours and that the travel agency had a duty to disclose material facts affecting safety in promoting and selling its tours. The defendant contended that the victim had waived all claims against the tour company when she signed a waiver which stated:

. . . The purchaser releases and absolves College Tours from all liability for . . . death or personal injury, . . . sustained on account of, . . . whether due to its own negligence or otherwise. (p. 12)

The itinerary also contained a paragraph expressly entitled "waiver of liability." This statement was set apart from the other paragraphs of the itinerary and stated:

The students and the students [sic] relatives hereby waive any [sic] or liability for property damage, or personal injury, or death (Including the loss of services), which maybe sustained by any student on account of . . . said trip . . . unless claimant establishes the person or entity, . . . violated the law or was guilty of a willful injury . . . (p. 12-13)

The court did not find the waiver to be a valid defense because it was too general and did not alert the victim to the specific risks that she was supposedly waiving. The court distinguished between the obvious dangers covered in an auto racing waiver and the dangers involved in the tour stating that ". . . the danger is too defuse [sic] and unspecific for a valid waiver to apply." (p. 14) The court also cited Restatement (Second) of Agency @ 419 (1957) which states that an agency has a duty to deal fairly with the principal and to disclose to him all facts

which the agent knows or should know would reasonably affect the principal's judgment. Consequently, the court remanded the case for trial to determine if College Tours has met its duties to decedent.

In *Swierkosz v. Starved Rock Stables* (1993), a horseback rider was thrown from a horse after signing a waiver releasing the stables from liability. The court said that her inexperience was less of a factor because the "release specifically enumerated the risks of horseback riding." The waiver stated that there are inherent elements of risk always present regardless of safety precautions taken. It went on to list some examples of risk such as inability to predict horse behavior when frightened or angry, possibly resulting in jumps in unpredictable directions and the fact that any fall will be from up to five feet high with a possibly injurious impact.

In another 1994 case (*McBride v. Minstar, Inc.*), the waiver included language that skiing was a hazardous activity, that equipment could not prevent or reduce injury, and that there was a risk of injury to any and all parts of the body. The signer further expressly assumed all risks of injury or death to the user of the equipment. The court, in determining the clarity of the waiver, stated "The thrust of the contract was then, and is now, unmistakable. It contains McBride's acknowledgment of the dangers of the sport and . . ." (p. 493)

In sharp contrast to these cases, *McGuire v. Sunday River Skyway Corp.* (1994) involved a Maine case in which the signer was concerned about the risks of the activity and received verbal assurance that she had "nothing to worry about," that she would have "a good time," that "nothing was going to happen," and that no one had even gotten hurt in the instructor's class. The court ruled that there was no misrepresentation or fraud involved and that the Maine ski liability statute makes it clear that a ski operator has no duty to warn skiers of inherent risks regardless of their level of expertise. The waiver was upheld.

### **Limitations on Breadth of Protection**

A new interpretation regarding the scope of an Oregon waiver in a 1995 case requires more care be taken by the waiver user. A skier who was injured while skiing sued the ski resort

alleging that the waiver was against public policy because it attempted to protect the business against gross negligence and willful and wanton misconduct. The actual language in question was "This release and indemnity agreement shall apply to claims based upon negligence and for any other theory of recovery." (*Farina v. Mt Bachelor, Inc.*, p. 6) The court ruled that waivers may effectively protect against liability for ordinary negligence, but that the waiver attempted to relieve the business from liability for gross negligence and willful and wanton misconduct, and was, therefore, against public policy. The court stated that:

Because Mt. Bachelor made an unenforceable bargain in trying to escape liability for gross negligence and willful misconduct, the entire release provision in the season pass application, including the limitation of liability for ordinary negligence, is unenforceable. . . It is not our rule to enforce only part of the release clause where it is not obvious from the language of the clause that the parties intended the clause to be severable. (p. 8)

The clause in the waiver which created the problem was ". . . based on negligence and for any other theory of recovery." (p. 3) From the opinion, it was not clear whether the court interpreted the word "negligence" to include ordinary negligence, gross negligence, and willful and wanton misconduct or whether it was interpreting "any other theory of recovery" to include gross negligence and willful and wanton misconduct.

In *Wolfgang v. Mid-American Motorsports, Inc.* (1995), the court's view was diametrically opposite. The plaintiff argued that the language ". . . whether caused by the negligence of [defendants] or otherwise" (p. 11) attempted to exculpate defendants for reckless and wanton conduct in addition to negligence, thereby making the entire waiver void as against public policy. The court held that while relief for reckless and wanton conduct is unenforceable, that does not make the entire waiver void. A 1991 West Virginia court cited the Restatement (Second) of Torts @ 4968 comment d (1963, 1964) which stated that ". . . a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any fu-

ture negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances." (*Murphy v. North American River Runners, Inc.*, p. 510) The court concluded that language attempting to relieve liability for gross negligence or wanton conduct is unenforceable, but has no effect upon the remainder of the document.

### **Need for a Severability Clause**

A severability clause is a statement within the waiver which says, in effect, that if any part of the document is held void, this will have no effect upon the validity of the remainder of the waiver. In *Farina v. Mt. Bachelor, Inc.* (1995), the waiver contained no severability clause. The court stated that the waiver "does not manifest an intention by Mt. Bachelor or by Farina that the provision be severable." (p. 8) It further explains that whether a contract is divisible depends upon the intention of the parties.

The waivers in each of the other two cases (*Wolfgang v. Mid-American Motorsports, Inc.*, 1995 and *Murphy v. North American River Runners, Inc.*, 1991) included severability clauses. Severability clauses are not uncommon in waivers used in motorsports (*Groves v. Firebird Raceway, Inc.*, 1994; *Bertotti v. Charlotte Motor Speedway, Inc.*, 1995). The following language is representative of that commonly used in waivers:

. . . waiver is intended to be as broad and inclusive as permitted by laws of the State of Missouri and that is [sic] held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect. (*Vergano v. Facility Mgmt. of Missouri*, 1995, p. 2)

### **Used of the Word "Negligence"**

The general rule is that the use of the word "negligence" is not mandated in order for a waiver to be held valid. A few states, Alaska, Florida, New Jersey, New York, and Texas have long held that the specific word "negligence" is necessary. Other states, including Arizona, Arkansas, California, Delaware, Maine, and Wisconsin, have not required use of the specific word, but have leaned strongly in that direction. Recent cases in New Hampshire and Missouri have reemphasized the importance of using the word "negligence" in those states. In

the new Hampshire case (*Wright v. Loon Mountain Recreation Corp.*, 1995), the court does not specifically say the word "negligence" must be used, however it does state that "the contract must clearly state that the defendant is not responsible for the consequences of his negligence." (p. 5) The court emphasized that clarity should be such that a reasonable person would understand that the intent of the document was to release the defendant from liability for personal injury caused by the defendant's negligence. The Loon Mountain waiver failed because it lacks "a straightforward statement of the defendant's intent to avoid for its failure to use reasonable care in any way." (p. 11)

Two Missouri cases addressed the issue of the use of the word "negligence" in the exculpatory language. In the first case (*Hornbeck v. All American Indoor Sports, Inc.*, 1995) the waiver stated ". . . the undersigned person(s) hereby release A.A.I.S. . . . from any and all claims, liability, loss of services and causes of action . . ." (p. 2) The question was whether the waiver properly notified the signer that he was releasing the defendant from all claims arising from the defendant's negligence. The court ruled that the "any and all claims" language did not clearly and unambiguously exonerate the defendant from liability for negligence. "The language is too general to meet the standards necessary to . . ." (p. 9) release All American Indoor Sports from liability for its negligence. The court concluded that waiver language must be clear and unambiguous and the general language will not suffice.

The second Missouri case (*Alack v. Vic Tanny International of Missouri, Inc.*, 1995) served to settle the issue. The court reiterated the need for clear, explicit and unequivocal language and that the act must be within the reasonable contemplation of the parties. The court noted that while the use of the word "negligence" is mandated in indemnity agreements in commercial leases, the issue was whether that mandate applied to waivers. The court felt that the exculpatory clause was written in simple and clear terms, was free of legal jargon, was not long or complicated, and ". . . specifically addressed a risk that adequately described the circumstances of plaintiff's injury." (p. 16) Thus the court ruled that the clause was explicit enough to absolve

the defendant of liability and concluded by stating

. . . the standard for evaluating the enforceability clause . . . is whether the intention of the parties is expressed in understandable language, such that an exculpatory clause insulates a party from liability for its own negligent acts. The standard requires . . . the agreement clearly and unambiguously exonerate the exculpated party from liability and that its terms apply to the particular conduct which caused the harm. **Although the better practice may be to include an explicit reference to the "negligence" of the exculpated party in the exculpatory agreement** (emphasis added), . . . the validity . . . of an exculpatory clause does not hinge on the use of the . . . work "negligence." (p. 21-22)

From these three cases, it is apparent that the use of the word "negligence" is not mandated in New Hampshire or Missouri. However, as the Alack court stated, the better practice may be to include an explicit reference to the "negligence" of the exculpated party in the waiver.

### **Waivers and Third Parties**

Three very different cases involving the effect of waivers regarding third parties have occurred recently. In the first, *Universal Gym Equip., Inc. v. Vic Tanny Intl.*, (1994), a Vic Tanny health club member, Catherine Ostroski, was injured while using a piece of Universal equipment. The plaintiff's claim against Vic Tanny was barred by a waiver in the membership agreement, however, she sued and reached a settlement with Universal, the equipment manufacturer, for \$225,000. Universal then filed a claim against Vic Tanny alleging Tanny failed to safely maintain the premises and had an obligation to indemnify Universal or to contribute toward the settlement. Contribution distributes the loss among tortfeasors by requiring each to pay a proportionate share, while indemnification generally involves the shift of the entire loss from one organization to another. In order to gain contribution, one tortfeasor must sue the other in a separate action as Universal did in this case. (van der Smissen)

At issue in the case was whether Vic Tanny may invoke the waiver signed by Ostroski ex-

culpating Vic Tanny, Int'l., from liability for their own negligence as a defense against Universal's contribution claim. The court stated that is seemed unfair to abrogate Universal's right to contribution based on an exculpatory clause to which they were not a party. The court, however, agreed with the plaintiff's argument that the situation was covered in the language of the contribution statute which states that "In an action to recover contribution commenced by a tort-feasor who has entered into a settlement, the defendant may assert the defenses set forth in subsection (3) and **any other defense** (emphasis added) he may have to his alleged liability for such injury or wrongful death." (p. 371) The court ruled that the waiver qualifies as "any other defense" and under Michigan law protects Vic Tanny from liability to Universal. Whether the same would be true in other states was not clear.

In regard to the indemnification claim, the court ruled that an action for indemnification can be maintained only when there is an express contract or when there is a common-law or implied contractual indemnification, involving a party who is free of negligence. Further, where the complaint in the underlying action does not contain allegations of derivative or vicarious liability, the claim is precluded. In the instant case, there was no express contract and there was no allegation of vicarious liability.

In an Ohio case, a ring was stolen from a health club member while the ring was locked in a locker at the Scandinavian Health Spa. (*State Farm Fire and Casualty Co. v. Scandinavian Health Spa, Inc.*, 1995) State Farm Fire and Casualty Co., insurer of the ring, paid the claim to the health club member and filed a suit against Scandinavian arguing that Scandinavian was negligent in failing to keep its premises in a reasonably safe condition for its business invitees. Scandinavian claimed protection based upon a waiver signed by the health club member. The waiver stated that ". . . Scandinavian Health Spa shall not be liable for any bodily injury and or **property damage** (emphasis added) resulting from the use of the facilities." (p. 5) The court ruled that the waiver did not clearly cover theft of property and thus, did not serve to protect Scandinavian from liability.

In Georgia post-injury release involving a

boating accident, the plaintiff settled with the owners of the boat and their insurers in exchange for a liability release. (*Davis v. Brunswick Corporation*, 1993) The release including language releasing them “. . . and other persons, firms and corporation, . . . from any and all actions . . . resulting or to result from a certain incident . . .” (p. 1576) The engine manufacturer and seller sought to sue the release as an affirmative defense on their behalf. The court found that “a general release given to one joint tortfeasor does not release all joint tortfeasors unless it is agreed that the language releases them.” (p. 1577) The court ruled that this was boilerplate and not intended to target any specific joint tortfeasor, therefore, it offered no protection for the manufacturer and seller of the engine.

### **Equal Protection as a Cause of Action**

Generally the cause of action in a waiver case is negligence on the part of the defendant. In *Kyriazis v. University of West Virginia* (1994), violation of equal protection rights was for the first time seen as the cause of action. A student was injured playing rugby with the University rugby club. Having signed a waiver prior to participation, the university claimed the waiver served as an absolute bar to the claim. The plaintiff claimed that the University allowed students to participate in both intramural sports and club sports, but that only participants on club sports teams that were members of the Sports Club Federation were required to sign a waiver. As such, the plaintiff claimed “. . . the Release is an unconstitutional deprivation of his right to equal protection guaranteed by the West Virginia and the United States Constitutions, and unconstitutionally deprives him of his right to a certain remedy as guaranteed by the West Virginia Constitution; . . .” (p. 8) The court found that there was no rational relationship between the policy of treating intramural and club sports participants differently (requiring club sport participants to sign a waiver) and a legitimate state purpose. Subsequently, the court ruled that the waiver was in violation of the equal protection guarantee.

### **Physical Loss of the Waiver**

The issue in a 1995 California case (*Daddaria v. Snow Valley, Inc.*) concerned the

validity of a waiver when the actual waiver had been destroyed by fire. Prior to filing suit, the plaintiff had called an attorney associated with Snow Valley to ask if she had signed a release and requested a copy of what she may have signed. After being informed that all business records had been destroyed in a fire, plaintiff filed suit denying having signed a release. The court interpreted the evidence to indicate that a waiver had been signed and cited the Evidence Code that “establishing the existence of the signed agreement was ‘deemed in lieu of the original and [had] the same effect as if the original had not been . . . destroyed . . .’” (p. 1338)

### **Interpretation of Waivers**

One final issue is not a new one, but one of which the reader should always be aware. Courts in different states tend to vary in the interpretation of similar language and are sometimes very “picky” in interpreting waiver language.

An excellent example is the interpretation of an otherwise good waiver used in *Wright v. Loon Mountain Recreation Corporation* in 1995. The first part of the waiver stated that the signer held harmless and indemnified Loon Mountain for loss including injury due to use of the animal in question. It further acknowledged that riding is a “HAZARDOUS ACTIVITY.” that the signer assumed any and all injury or death resulting from the use of the animal while participating in the activity, and that it is impossible to predict every situation or the reaction of the horse to the situations. The waiver then stated

I therefore release Loon Mountain . . . FROM ANY AND ALL LIABILITY FOR DAMAGES AND PERSONAL INJURY . . . RESULTING FROM THE NEGLIGENCE OF LOON MOUNTAIN . . . TO INCLUDE NEGLIGENCE IN SELECTION, ADJUSTMENT OR ANY MAINTENANCE OF ANY HORSE, accepting myself the full responsibility for any and all damages or injury of any kind which may result. (p. 3)

The court stated that a waiver must be sufficiently clear that “a reasonable person in [her] position would have known of the exculpatory provision.” (p. 5) The court felt that the word “therefore” refers to the preceding discussion regarding inherent risks, thus creating doubt as to whether the signer meant to waive responsi-

bility for negligence. The court felt the meaning was further clouded by the words "TO INCLUDE" which a reasonable person might interpret to mean only the enumerated types of risk. The court also questions the meaning of "NEGLIGENT MAINTENANCE OF ANY HORSE" as well as whether the waiver included horses not ridden by the plaintiff.

In a similar case (*Tanker v. N. Crest Equestrian Ctr.*, 1993), the signer agreed in the first paragraph "... to assume full responsibility and liability for any and all . . . personal injury . . . associated with riding . . . of any horses at North Crest Equestrian Center . . ." (p. 524) The second and third paragraphs consisted of indemnification language by which the signer agreed to indemnify the center for loss as a result of riding, training, or boarding horses at the center and to indemnify the center for all claims for personal injury caused by negligence of other riders. The court ruled that the agreement was not clear and unequivocal — that paragraph two was not a release and that paragraph two was not a release and that paragraph three applied to other students, riders, or trainers and does not necessarily even apply to North Crest's own trainers. The court stated that paragraph one, without even using the term "release" attempted to shift all responsibility to the signer. The court further stated that the agreement purported "... to provide such comfort for everyone in the world" (p. 525) and was so general as to be meaningless.

Another inconsistency in interpretation involves the use of terms such as "any and all." In the *Stotak* case (*Stotak v. Vic Tanny International, Inc.*, 1993), the phrase "any and all claims" was interpreted to include negligence and the court said it left no room for exceptions. In contrast, the *Holmes* court (*Holmes v. Health and Tennis Corporation of America*, 1995) ruled that the phrase "any injury or damages resulting" did not include injuries caused by negligence and found for plaintiff. As mentioned earlier, the *Farina v. Mt. Bachelor, Inc.* court took a third stance regarding the phrase "negligence and any other theory of recovery" in interpreting it to include not only negligence, but gross negligence and wanton and willful misconduct as well.

## Summary

While many topics and issues are addressed in this article, most seem, either directly or indirectly, to reemphasize the importance of a major concept—the importance of taking care in the choice of waiver language. Use of a severability clause, specifying the risks involved, use of the word negligence, and careful grammatical construction are a few ways of reducing ambiguity and increasing the likelihood that the waiver will be upheld in court.

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