Waivers – Are They Worth It?

by Ellen Longfellow

Private and public recreational facilities often have facility users or recreational-activity participants sign a waiver or release. This paper is designed to protect the recreational provider from liability for any claims or lawsuits resulting from the activity. Over the years, many people have questioned whether these waivers are "worth the paper they are written on."

What is a waiver?

A waiver is an agreement signed by a person that states that he or she will release the party providing the recreational activity from liability for any negligent claim or lawsuit. Other names for waivers are exculpatory clauses, releases, or hold harmless clauses.

The key factors that courts look at to determine whether to enforce waivers are:

• Can only release negligent activity (not willful, wanton or intentional behavior)

• Must be clear and unambiguous

• Signed voluntarily and with knowledge of the effect of the waiver

• No disparity in bargaining power

• Does not involve an essential service that would make it a matter of public policy.

How is a waiver used?

There are risks associated with every recreational facility and activity. The waiver is used to try to limit the liability of the recreational provider. By limiting the liability, the recreational provider is more likely to afford to provide that activity and other recreational opportunities. The waiver may be a separate document or part of an application or registration form.

Is a waiver enforceable?

Yes, a waiver can be enforceable if it is drafted correctly and used properly. The general legal rule is that a court does not want to enforce a waiver where someone has given up legal rights. It will therefore look at the waiver very carefully and interpret it against the party who wrote it and benefits from its enforcement. So if it is a clear waiver signed voluntarily and applied to a negligent claim, there is a good chance that a court will use it to dismiss a lawsuit against the recreational provider.

Who should sign the waiver?

The person doing the activity should sign the waiver. A team captain cannot sign on behalf of the entire team. A parent should sign in addition to the minor child. In one Minnesota case, the court held that if a minor child signs a waiver, the minor must "disaffirm" it within a reasonable time after becoming an adult or it will be enforceable.

Relationship to the defenses of Assumption of Risk and No Negligence

Even when the waiver is not enforced, it can still be used positively as a basis for other defenses. It can be used to establish that the person was aware of the risk of the activity and assumed that risk.

The assumption of the risk defense has been used successfully for hazardous activities such as skiing and roller skating.

It can also be used to show that a facility was not negligent. To support this defense, the facility must prove that it exercised reasonable care. A waiver can show that the facility met the burden by warning participants about the dangers of the activity.

Recommendations

A waiver that is more likely to be enforced should:

• Be in large print and prominent

• Clear language

• Apply only to negligent actions

• Be signed voluntarily and with knowledge of the effect of the waiver

• The person was given time to review the waiver

• Should not involve an activity that is an essential service that cannot be obtained elsewhere.

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