

# Book Review: Legal Aspects of Waivers in Sport, Recreation and Fitness Activities

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*LEGAL ASPECTS OF WAIVERS IN SPORT, RECREATION AND FITNESS ACTIVITIES*

Doyice J. Cotten and Mary B. Cotten

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In recent decades, Americans have increased their participation in sport, recreation, exercise and fitness activities. From country clubs to sky diving, Americans are becoming much more familiar with the worlds of sport and recreation. Corresponding to that increase is the growth in sport-related businesses, and unfortunately, sport-related lawsuits. It has become increasingly necessary for sport-related businesses and organizations to protect themselves from legal liability resulting from injuries individuals may receive while participating in or watching sports activities. The book, *Legal Aspects of Waivers in Sport, Recreation and Fitness Activities*, analyzes the use of waivers by sport-related organizations in an attempt to avoid legal liability.

There has been much debate over the validity of waivers, mostly because the law varies from state to state. The authors, however, guide the reader through the issues which surround the use of waivers in an attempt to familiarize the reader with every aspect of waiver usage.

To begin, the authors note that it is important to understand why waivers are used. Waivers protect the service provider from legal liability for injuries caused by the negligence of the provider or its employees. In most cases, a well written waiver can protect the service provider against liability, even when the injury is a direct result of negligence. However, because a waiver is a contract between two parties, its validity can be effected by issues often present in contract law. Therefore, such an agreement to be valid, it must meet the requirements of a valid contract. In chapter three, the authors provide an informative and detailed explanation of four of the primary contractual requirements a waiver must meet to be considered valid.

First, an effective waiver must contain clear and unambiguous language. The authors cite several cases which support this principle. One court has stated that language which would release a party from liability for its own negligence "must be clear, explicit and comprehensible in each of its essential details." (pg. 318). Included in the discussion of clear language is the authors analysis of waiver format. It is noted that the title of the document, the font size and the conspicuousness of excul-

patory language are all important factors which courts may consider when evaluating the validity of a waiver.

Secondly, a waiver must not violate public policy. Although factors constituting public policy violations vary from state to state, it is generally held that waivers intended to protect the service provider from liability for conduct such as gross negligence or recklessness are invalid. Sport-related waivers are generally not against public policy, however, if the waiver pertains to a service that is important to the public, or the parties are not of equal bargaining power, a waiver attached to a sports or recreation activity could be unenforceable.

The third contractual requirement that the authors discuss is consideration. For a waiver to be enforced, there must be evidence of a mutual exchange of consideration between the parties. "When one signs a waiver agreeing to relieve the service provider of liability for injury due to negligence in exchange for the right to participate, the contractual requirement of consideration is met." (pg. 40).

The final contractual requirement for a valid waiver is the capacity to contract. A sport-related business or organization relying on a waiver must be certain that the signing party has the necessary capacity to contract. Generally, issues that arise under questions of capacity concern the signing parties age; however, mental incompetence and intoxication may also be considered and impact a court's determination of validity.

In most states, a well-written waiver that meets the previous requirements, and is voluntarily signed by an adult, will effectively protect a service provider from liability. The authors, however, do point out several instances in which the effectiveness of a waiver can be limited.

Chapter four begins by stating that an examination of the effectiveness of waivers would be incomplete without analyzing the use of waivers with minors. The rule in contract law which states that minors are not bound by contracts is applicable to waivers as well. Minors may disaffirm contracts; therefore, minors may disaffirm waivers. Knowing this, many service providers require that a parent sign the waiver on behalf of the minor; however, the authors advise against reliance on waivers by service providers because waivers are likely to be disavowed, whether signed by the minor, the parent, or both the minor and the parent.

In addition to waivers by minors, Chapter 4 discusses waiver for non-signing spouses and heirs, waivers for fitness trainers and instructors, waivers in medical research settings and waivers in the school setting. Waivers involving non-signing spouses are generally upheld based on the logic that a spouses' cause of action is a derivative of the injured party's cause of action and therefore, the service provider will be protected.

Similarly, sport professionals may effectively utilize waivers if they are involved in prescribing exercise regimens. Waivers in the school setting may be used effectively if they are for elective courses or activities. The authors note, however, that schools who mandate waivers for required courses or activities are generally held to be in violation of public policy.

The remainder of chapter four informs the reader that disclaimers found on the back of tickets are not likely to provide protection against liability to the service provider. Such disclaimers may be useful as evidence that the participant was warned of risks inherent to the activity, but it is stressed by the authors that this form of waiver provides little or no protection and should not be relied upon by the service provider.

As mentioned previously, the laws concerning waivers vary from state to state. In chapters five and six, the authors give a detailed analysis of how each state treats waiver use as a protection from liability. By categorizing every state as either lenient, moderate or rigorous, the authors give the reader a basic idea of how different states analyze the issues attached to waiver usage. The authors do note, however, that the classifications are based upon personal interpretation and that the law reported is always subject to change by subsequent court decisions or a new legislative enactment.

The final chapters of the book provide the reader with helpful guidelines and suggestions for formatting and administering waivers. In addition, chapter nine discusses other protective documents such as the agreement to participate and the informed consent form. By concluding the book with this information, the authors give the reader the opportunity to actually utilize the information provided.

*Legal Aspects of Waivers in Sport, Recreation and Fitness Activities* is a book which should be read by any sport-related business. Unfortunately, all such organizations have an inherent risk of being held responsible for a negligent act. By gaining an understanding of relevant case law and applying the principles the authors set forth, an organization can successfully obtain the desired protection against liability.

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