

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 of the two leading sports insurance companies in the US. After all, they actually settle and litigate hundreds of these cases every year.

A waiver or release is a written agreement where the player and parent sign promising not to sue the league and it's directors, officers, or volunteers should the player be injured.

In the context of a minor (under age 18), the usefulness of a waiver/release agreement is dependent on your particular state's law. Depending on the state, there are three different outcomes that are most likely.

In the minor context (under age 18), only a few states will uphold a waiver/release for the purposes of immediately dismissing a lawsuit on Summary Judgment. This outcome is extremely rare. An Ohio court recently upheld such a waiver and said that under some circumstances a parent's signature could bind a minor to such an agreement. We will have to keep our eye on this case to see if it sets legal precedent in other states. Please note that even if you do win on Summary Judgment, your legal defense costs can still be in the \$10,000 to \$20,000 range.

Other states will immediately throw out such a waiver/release agreement because a minor under the age of 18 is not legally competent to enter into a binding contract. These states reject the notion that a parent can enter into such a contract on behalf of their minor child.

The majority of states will give some weight to a waiver/release (in the minor context) only if the following three conditions are met:

- 1) The intent is crystal clear and written in language that is easily understood.
- 2) The injury is more accidental in nature and not the result obvious negligence.
- 3) The waiver/release is "well drafted" and avoids common pitfalls.

If the above 3 conditions are met, most courts still will not immediately throw out a lawsuit on Summary Judgment. Instead, the legal system will give weight later on in the process, as the injured party's attorney must overcome the defense's presentation of the waiver/release.

Because the benefit occurs later in the legal process, legal defense costs can still be extremely high. This is why a waiver/release absolutely should not be used in lieu of purchasing liability insurance. Nevertheless, the benefit is still very important because it will ultimately limit the amount of damages that are payable. This is why most insurance companies strongly recommend or mandate the use of waiver/releases. Remember, lower claims may mean lower renewal pricing on your insurance.

By the way, waiver/releases are very effective in the adult context in terms of immediately having the lawsuit dismissed on a Summary Judgment. The majority of states uphold this view as long as the waiver is well drafted and the injury is not characterized by gross negligence. But once again, even if you win on Summary Judgment your legal defense costs may range from \$10,000 to \$20,000.

There is one other important reason to use a waiver/release. Did you know that you don't have to be proved negligent to lose a lawsuit when a sports participant is injured? That's right, in many states the injured party must only prove that he was not aware of the risks involved in participation and did not give his informed

consent to be subjected to such risks. This is why a "well drafted" waiver/release should contain a risk warning and informed consent provision.

The bottom line is that a well-drafted waiver/release is worth the paper it's written on. The claims managers from the two leading sports insurance carriers guaranteed me of this fact and cited countless examples of how it gave them a negotiating edge. It is estimated that settlement or adverse jury verdict costs can be reduced by up to 35% in many circumstances.

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 being thrown out. 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 signatures are frowned upon by the courts where all participants sign underneath the waiver/release language. The reason is because if a line forms 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.
- ✓ 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 describe the full range of possible injuries including the key words “permanent disability” and “death”.
- ✓ 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.
- ✓ 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 in tact.
- ✓ A new waiver/release should be signed before each season even if one is on file from a previous season.

If you're interested in receiving a sample waiver/release that was written to avoid these pitfalls, please click on the waiver/release links in this website.

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