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Online Waiver Agreements: Not Worth The Paper They're (Not) Written On?

By Alexander "Sandie" Pendleton

Do courts enforce waiver agreements that are entered into between parties electronically, for instance, via an online registration process? Or instead, will courts only find an agreement enforceable if the agreement is printed on a real piece of paper and signed in ink in the traditional manner?

The above questions raise a host of issues, and there is no one definitive answer (this is due partly to the fact that the enforceability of any waiver agreement is dependent on multiple considerations, including which state's laws apply to a given accident or waiver agreement). Online waiver agreements can raise such issues as:

- What constitutes "consent" sufficient to form a binding contract?
- Is it necessary for a party to have actually read the terms of a proposed contract, if the party signed (or otherwise expressed the party's consent to the written terms of) the proposed contract?
- What constitutes a sufficient "signature" for purposes of an online agreement, and how does one prove *a particular person* clicked on "I agree," if the person later claimed it must have been someone else (or his dog)?
- When the terms of the contract and the consent to the contract all exist electronically, how does one prove that after the fact, the terms were not changed, so that a court will find authentic and permit into evidence a particular document?
- If data is lost (due to a crash, for instance, or just normal deletion policies), what proof will courts accept to prove the terms of the purported agreement?

There is a long history of the courts struggling with similar issues as each new means of electronic communication arrives (*e.g.*, the telegraph, the telephone, Twitter, etc.).

While discussions of the above issues fill legal textbooks and law review articles, what can be said in the recreational release context is that courts have enforced online waiver agreements, even in instances where the actual "original" online agreement was later "lost." For example, in a 2009 Minnesota Court of Appeals case, the court allowed enforcement of an online waiver agreement, even though the defendant lost the 2005 version of the "original" agreement, and could only produce the 2007 version (with testimony by an individual that the terms of the 2005 form and the 2007 form were the same).

Online registration forms and procedures provide certain benefits to organizations and businesses that use them, but also carry with them certain risks. There are definitely "bad" online waiver-of-liability forms that are currently being used by organizations to register new members and participants, which forms would not be enforced by courts (especially in such "strict" states as Wisconsin). If you are using (or considering the using) an online registration process, we suggest that you consult with a lawyer who is familiar with the above issues, and has experience with designing online forms and procedures.

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(The information and views discussed in this article are for general information purposes only. An organization that has specific questions as to the effect the above development may have for it should discuss such with its attorney, or with an attorney who is familiar with this area of the law and the organization's specific operations or concerns.)

About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Pendleton Legal, S.C. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues.

About Pendleton Legal, S.C.: At Pendleton Legal, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team (Sports, Fitness & Recreation Team) guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. In addition to our S/F/R services, we provide legal expertise across the numerous areas of law encountered by businesses and organizations in the normal course of their day-to-day operations and growth. If you would like to explore whether we can help your organization achieve its mission, contact us.