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WISCONSIN COURT ENFORCES SKI PARK'S WAIVER

By Alexander "Sandie" Pendleton

In a decision issued September 11, 2013, a Wisconsin trial court has enforced a ski park's waiver. The case is significant, in that it appears to be the first written decision where a Wisconsin court has considered a waiver in a context in which a participant was provided a choice between a "with waiver" price and a higher "without waiver" price. Despite the court finding that such did not constitute "bargaining," the court nevertheless found the waiver clear, voluntary, and enforceable.

The plaintiff (Hickey) broke her leg as she was attempting to get off a chairlift at the Navarino Hills Skiing & Snowboarding Park. Prior to the accident, Hickey had signed a form which covered both her rental of ski equipment and her agreement to waive all claims she may have regarding her skiing at Navarino. Both agreements were on the same form, but there were separate signature lines for each agreement. Navarino's policy is that it permits skiers to use the facility without signing the waiver agreement, if the skier pays an additional \$15 per day. Hickey had chosen to sign the waiver agreement. The agreements were set forth on the same page in a small font size, but key provisions were in bold type and capital letters.

After the incident, Hickey sued Navarino, alleging negligence, and after discovery was conducted, Navarino sought summary judgment based on the waiver.

The trial court begins its analysis by noting that in Wisconsin waivers are subjected to close scrutiny, and are generally viewed with disfavor. The court also indicates it would follow a two-step analysis, first applying a contract analysis to determine whether the contract was broad enough to cover the activity that caused the injury, and second, applying a "public policy analysis," to determine whether enforcement of the waiver would violate important public policy standards (as articulated by the Wisconsin Supreme Court in the leading case on waivers in Wisconsin, *Atkins v. Swimwest*).

Under the contract analysis, the court held that the language in the agreement was sufficiently drafted so as to identify that if Hickey signed the agreement, she could not sue Navarino for injuries caused by chairlift loading and unloading operations. "Looking at the release, it is clear that this activity was covered and that the scope of the release was clearly communicated to Hickey." The court further found that the format of the release agreement was sufficient, in that the categories of risk were set forth on separate lines, and key terms were presented in an "easy to read format."

Moving on to the public policy analysis, the court considered whether the release used "exceeds the contemplation of the parties' at the time the release was executed." Hickey had testified at her deposition that she thought she was only waiving her right to sue Navarino for her own negligent actions. The court found significant that, while a legal term like "releasees" is "not necessarily clear to a lay reader," the term was clearly defined (in bold and capital letters), and other key portions of the waiver were also set forth in bold and capital text. The court also found it significant that the waiver was not "presented on a take-it-or-leave-it-basis" (she could have paid the extra \$15 and still skied, without signing the waiver), and that the agreement was not overly broad (as it expressly indicated it did not apply to claims for reckless or intentional acts).

Comments/Conclusion

The release agreement at issue in the *Hickey* case appears to have been drafted by an attorney, and it presents a good example of a waiver agreement which was drafted at least to some extent with prior Wisconsin waiver cases in mind. Hickey appears to be the first written decision in Wisconsin in which a court discusses and comments favorably on a recreational facility's giving a "with waiver" price and a "without waiver" price. (That courts would view favorably giving participants such an option was first

suggested by the author of this article, in a 2005 article he wrote that was published in the *Wisconsin Lawyer Magazine*.) The *Hickey* decision is also significant in that the facility failed to comply with several factors found significant in *Atkins*. For example, in *Atkins* the Wisconsin Supreme Court voided the waiver based on several factors, including the factor that the form at issue served more than one purpose, and the factor that the facility did not provide the participant an opportunity to bargain. Both of these “bad factors” were present in *Hickey*, yet the waiver is enforced.

If your facility, organization or business wants to ensure that it is protected (and importantly its employees, officers and directors are protected) by a real, up-to-date, well-crafted waiver agreement, don’t hesitate to contact us.

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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.