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Wisconsin Court Rules Waiver Signed by Race Participants Enforceable

By Alexander "Sandie" Pendleton

On February 10, 2011, the Wisconsin Court of Appeals held enforceable a waiver signed by two subsequently-injured participants at an auto race.

The case, *Beer v. La Crosse County Agricultural Society*, arose out of a race held at the La Crosse County fairgrounds. Both plaintiffs signed a waiver form upon their arrival at the track, so as to be able to participate in a race and/or to be in the restricted in-field area. Both of the plaintiffs were seriously injured when a car in a race went over a barricade and struck them while they were in the in-field area.

As is customary in Wisconsin waiver cases, the court of appeals began its decision by stating that, while Wisconsin case law does not favor exculpatory contracts, such contracts are not *per se* invalid. The court addressed the issue of enforceability by applying a two-prong test consisting of first an analysis of contractual validity (*i.e.,* whether the contract is broad enough to cover the activity at issue), and second an analysis of public policy considerations.

Because plaintiffs did not dispute the contractual validity of the waiver, the court focused its inquiry only on public policy considerations. The court observed at the outset that the waiver in question was essentially identical to that in the 1999 Wisconsin Court of Appeals case *Werdehoff v. General Star Indemnity Company* (a case arising out of injuries sustained by two participants in a motorcycle race). There, the court held that the waiver did not violate public policy and was therefore valid. In *Werdehoff* the court addressed such public policy factors as whether the waiver was "clear as to its application," whether it "clearly communicate[d] the terms of the agreement to the signer," and whether it "serve[d] two purposes" (such as event registration and releasing a company from liability).

In *Beer*, the court held that the release was clear in its application, and it unambiguously communicated the terms of the agreement to the plaintiffs. The release, which was broken down into six paragraphs and had certain terms capitalized, drew attention to the releases, waivers, discharges and covenants not to sue. Moreover, the court found the agreement was clearly titled and served a sole purpose of securing a release, waiver of liability, and assumption of risk.

Plaintiffs argued that the court should still render the waiver unenforceable as against public policy based on the Wisconsin Supreme Court's 2005 decision in *Atkins v. Swimwest Family Fitness Center* (the leading case in Wisconsin on waiver law), where the court among other public policy factors, considered whether the injured party had had an "opportunity to negotiate or bargain over the contract." The Court of Appeals in *Beer* noted that it had considered that "bargaining" factor previously in *Werdehoff*, and was bound by its holding in *Werdehoff* that the waiver form did not violate public policy.

The court's decision in *Beer* is not recommended for publication, but it is possible that the plaintiffs in *Beer* will ask the Wisconsin Supreme Court (which has yet to find an exculpatory agreement it has considered in a recreational-liability case enforceable) to review the court of appeals decision.

Overall, the decision in *Beer* is good news for Wisconsin businesses, organizations and individuals who want to rely on and use waivers. The decision, however, emphasizes that to be enforceable in Wisconsin waivers must be carefully-drafted, unambiguous, clear in their application, and serve only one purpose. If your business or organization is unsure whether the waivers you have been using are optimized so as to meet the demanding Wisconsin standard, 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**.**