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## WAIVERS: ARE THEY WORTH THE PAPER THEY'RE WRITTEN ON?

Private and public recreational facilities often have facility users or recreational-activity participants sign a waiver or release. This paper is designed to protect the recreational provider from liability for any claims or lawsuits resulting from that activity. Over the years, many people have questioned whether these waivers are “worth the paper that they are written on”. This memo will help to define what a waiver is, how it is used, its enforceability, Minnesota cases, and its relationship to the parks and recreation immunity and other defenses such as assumption of the risk and no negligence.

### What is a waiver?

A waiver is an agreement signed by a person that states that he or she will release the party providing the recreational activity from liability for any negligent claim or lawsuit. Other names for waivers are **exculpatory clauses, releases, or hold harmless clauses**.

The key factors that courts look at to determine whether to enforce waivers are:

- Can only release negligent activity (not willful, wanton or intentional behavior)
- Must be clear and unambiguous
- Signed voluntarily and with knowledge of the effect of the waiver
- No disparity in bargaining power
- Does not involve an essential service that would make it a matter of public policy

### How is a waiver used?

There are risks associated with every recreational facility and activity. The waiver is used to try to limit the liability of the recreational provider. By limiting the liability, the recreational provider is more likely to afford to provide that activity and other recreational opportunities.

Cities generally have used it for the following types of activities:

- Use of public buildings or fields
- Recreation teams
- Recreation classes
- Special events
- Field trips

- Races (bicycle, running, in-line skating etc.)
- Fun runs
- Hazardous activities (climbing walls, demolition derbies etc.)

The waiver may be a separate document or part of an application or registration form.

### **Is a waiver enforceable?**

Yes, a waiver can be enforceable if it is drafted correctly and used properly. The general legal rule is that a court does not want to enforce a waiver where someone has given up legal rights. It will therefore look at the waiver very carefully and interpret it against the party who wrote it and benefits from its enforcement. So if it is a clear waiver signed voluntarily and applied to a negligent claim, there is a good chance that a court will use it to dismiss a lawsuit against the recreational provider.

### **Minnesota Cases**

Minnesota courts have enforced waivers in the following activities:

- **Paintball – *Kaltenbach v. Splatball, Inc.*, Minnesota Court of Appeals, September 7, 1999**  
Paintball player signed a release prior to playing. When the Plaintiff was in the safe area, another player shot him in the eye. The court found that the release was unambiguous in releasing the company from only negligence claims. There was no disparity in bargaining power and enforcement of the release was not counter to public policy.
- **Aerobics class – *Saude v. Red River Racquet Club*, Minnesota Court of Appeals, Unpublished opinion, September 12, 1989**  
Student signed Medical Release prior to aerobics class. It said, “I agree that the Red River Racquet Club, Ltd. and or Instructor are exempt from liability for any injury or disability that might be incurred during or as a result of dance/ movement/exercise instruction.” The court found this release to be “simple, straightforward, and written in plain, easy to understand language.” It was signed voluntarily and was not a matter of public policy and there was no disparity in bargaining power.
- **Skydiving – *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W. 2d 727 (Minn. Ct. App. 1986)**  
A skydiving student signed a waiver of liability form prior to the class. He was injured when his parachute did not open properly. Though the court thought that the waiver was “unnecessarily wordy”, it found that it was not ambiguous. It also found that the waiver only released the club from acts of negligence. There was no difference in bargaining power and the club’s services were not public or essential so there was no violation of public policy.
- **Use of Exercise Machine – *Schlobohm v. Spa Petite, Inc.*, 326 N.W. 2d 920 (Minn. 1982)**  
The waiver provision was located in a membership contract. The court said that it was entered into voluntarily and there was no unequal bargaining power. It applied to a

negligence claim (as compared to willful or intentional) and furnishing of this type of services was not of great public importance so as to make the waiver a violation of public policy.

Minnesota courts have not enforced waivers in the following activities:

- Newspaper carrier / Independent contractor – **Bunia v. Knight Ridder, 544 N.W.2d 60 (Minn. App. 1996)** Exculpatory clause was unenforceable as against public policy. There was a disparity in bargaining power similar to an employment relationship and the position was essential for the carrier.
- Exercise class – **Nimis v. St. Paul Turners, 54 N.W. 2d 521 (Minn. App. 1994)** When demonstrating an exercise, a woman injured her leg. The waiver provision was in a prior membership contract. The waiver said that the person would “waive...demands, losses or damages . . . caused in whole or part by the negligence of the releasee or otherwise.” The court held that the “or otherwise” language made the waiver ambiguous and unenforceable. Also the waiver was not in effect in the membership contract when the accident occurred.
- Horseback riding – **Cooper v. Diamond T. Ranch, (Minn. App. 1993, unpublished)** The waiver or exculpatory agreement was held to be unenforceable because it was ambiguous. The waiver focused on the rider’s responsibilities but did not specifically release the Ranch’s liability for its own acts.
- Travel tour – **Walton v. Fujita Tourist Enterprises, 380 N.W. 2d 198 (Minn. App. 1986)** A travel agent on a “familiarization tour” was hurt. The court held that the exculpatory clause unenforceable because of the disparity in bargaining power between Northwest Airlines and the agent and that the agent would not have been able to obtain this service elsewhere. It also held that it was ambiguous as to its scope.

### **Who should sign the waivers?**

The person doing the activity should sign the waiver. A team captain cannot sign on behalf of the entire team. A parent should sign in addition to the minor child. In one Minnesota case, the court held that if a minor signs a waiver, the minor must “disaffirm” it within a reasonable time after becoming an adult or it will be enforceable. (**Scoles v. Franzen, (Minn. App. 1991)**).

### **Relationship to the Parks and Recreation Statutory Immunity**

Under the Minnesota Municipal Tort Liability Act, Minn. Stat. 466.03 subd.6e, cities are not liable for any claim based upon an injury that occurred on city property that was intended to be used for recreational purposes. This immunity does not apply to hidden hazards that are likely to cause a serious injury.

A waiver applies no matter what is the condition that caused the injury. A waiver would provide much broader protection to a city than this immunity. The waiver would apply even when there were hidden hazards. So even though cities have been dismissed from many cases using this

immunity, they still could benefit from having waivers signed in recreational activities.

### **Relationship to the defenses of Assumption of the Risk and No Negligence**

Even when the waiver is not enforced, it can still be used positively as a basis for other defenses. It can be used to establish that the person was aware of the risk of the activity and assumed that risk. The assumption of the risk defense has been used successfully for hazardous activities such as skiing and rollerskating.

It can also be used to show that the city was not negligent. To support this defense the city must prove that it exercised reasonable care. A waiver can show that the city met that burden by warning participants about the dangers of the activity.

### **Recommendations**

A waiver that is more likely to be enforced should:

- Be in large print and prominent
- Clear language
- Apply only to negligent actions
- Be signed voluntarily and with knowledge of the effect of the waiver
- The person was given time to review the waiver
- Should not involve an activity that is an essential service that cannot be obtained elsewhere

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