



MJ INSURANCE
SORORITY DIVISION

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Sorority Leadership

RE: Liability Waivers

We are often asked about the “worthiness” of using liability waivers by our clients, especially when they are engaging in a more “active” type of event.

We asked our friends at “Fraternal Law” to address this and you will find their legal opinion in the November 2006 edition of their publication. I have taken the liberty of including a copy of the article for your review.

Of particular note is the second recommendation put forth by the author of crafting the waiver to acknowledge the risks inherent to the particular activity by the person signing the waiver. An example would be a football fan using a Sorority parking lot to park his/her automobile during a football game. The risks inherent are a college community with extremely tight quarters to park automobiles as well as the area being exposed to all kinds of car and foot traffic.

We neither encourage nor discourage the use of waivers because the ultimate enforceability is so unknown. We could make an argument that having a waiver is better than not having one and should an injury or property damage occur it may dissuade the individual from filing a claim, as they did in fact sign the waiver.

Should you wish to discuss this further, feel free to give us a call.

MJ Insurance, Inc.

Regards,

Cindy Stellhorn

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ENFORCEABILITY OF LIABILITY WAIVERS

Are liability waivers used by fraternities and sororities in the context of social events, particularly recreational activities, enforceable? The answer is that, like most other things in the law, "it depends." While the enforceability of liability waivers varies by state, and tends to be unpredictable overall, there are some general consistencies in the law that anyone wishing to utilize liability waivers should take into account when drafting one.

First, keep in mind that a waiver cannot release someone from liability for injuries caused by intentional misconduct. It is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy. For example, the Supreme Court of Minnesota has stated that, "If the clause . . . purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn.1982).

Second, avoid using language that attempts to explicitly release the party requesting the waiver from liability for injuries resulting from that party's negligence. While such waivers are not always struck down, they are more likely to be troublesome than waivers releasing a party from liability for injuries resulting from risks inherent in a particular activity, particularly those risks outside of anyone's control. For example, the Supreme Court of Connecticut has stated that, "[The] law does not favor contract provisions which relieve a person from his own negligence." *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*, 829 A.2d 827 (Conn. 2003). And in *Sweeney*, the court commented that, "The law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and such agreements are subject to close judicial scrutiny." *Sweeney v. Hertz Corp.*, 740 N.Y.S.2d 19 (First Dept. 2002).

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Third, be aware that judicial enforcement of liability waivers is unpredictable. Not only are they generally disfavored as encouraging lack of care,¹ courts often strike them down under the generic guise of being "against public policy." Unfortunately, courts have been reluctant to offer meaningful guidance as to what exactly that means. They have chosen instead to utilize a case-by-case, totality of the circumstances approach because, "No definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963).² So no matter how

careful someone is in drafting a waiver, there is always the risk that the court will refuse to enforce it.

Fourth, realize that in construing a liability waiver, courts generally give the benefit of the doubt to the party against whom the contract is to be enforced. This means that if there is any ambiguity, or if the enforceability is a close call, the courts may choose to protect the party who signed the waiver. The Minnesota Supreme Court has echoed this tendency, warning that, "Exculpatory clauses are . . . strictly construed against the benefited party." *Yang v. Voyageaire Houseboats, Inc.*, 701 N.W.2d 783 (Minn. 2005).

Liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.

Fifth, make sure that the language used in a liability waiver is express and comprehensive so that individuals asked to sign such waivers clearly recognize what exactly they are agreeing to. The language "must be clear, unambiguous and explicit in expressing the intent of the parties." *Sweat v. Big Time Auto Racing, Inc.*, 12 Cal.Rptr.3d 678 (Cal.App.5.Dist. 2004). Use commonly understood words, short sentences, and the active voice.

Finally, liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.³ The person against whom it is to operate should notice it.

While adherence to these guidelines will not guarantee that the liability waiver will be upheld if challenged, it increases the probability that the court will choose to do so.

• Elizabeth L. Hutton

¹ "Exculpatory agreements have long been disfavored in the law because they encourage a lack of care." *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006).

² See also *Hanks v. Powder Ridge Restaurant*, 885 A.2d 734 (Conn. 2005) ("The ultimate determination of what constitutes the public interest . . . must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.")

³ See *Leon v. Family Fitness Center (No. 107), Inc.*, 71 Cal.Rptr.2d 923 (Cal.App.4.Dist. 1998); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329 (Tex.App. Houston 2006); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex.App. San Antonio 2004).