## Fast Facts:

**If a release of liability form includes an express assumption of risk statement, the recreational operator's position is greatly strengthened in court.**

**If the injury incurred by the participant is not inherent to the sport, this could result in liability to the operator.**

**A release waiver should include express acknowledgement that the signor knows of, understands, and appreciates the risks that are inherent to the activity.**

***By Daryl Barton***

# Release of Liability

With each passing year, more and more outdoor enthusiasts set out to enjoy the recreational thrills of running rapids, exploring underwater worlds, or canoeing the many rivers in Michigan and other states. A release of liability form is essential to minimize the liability of recreational operators for injuries sustained by participants. While waiver law varies greatly from state to state, in at least 44 states (including Michigan), a well-written waiver, voluntarily signed by an adult, will protect the operator from liability for injuries sustained while engaged in the activity, even if those injuries resulted from the negligence of the operator.[1]

Waivers of liability are known under many names such as exculpatory clauses, hold harmless clauses, and the more generic term, release of liability. A waiver of liability is an agreement that relieves a person or company from liability for injuries incurred because of the person's or company's own negligence. As a general rule, waivers of liability are looked upon with disfavor. The party seeking to avoid liability has to prove that the type of injury sustained by the customer was fully included in the release of liability.[2]

In addition, there is the common-law defense to negligence of *assumption of risk.* People who undertake a hazardous activity with knowledge of the risks and inherent dangers do so at their own peril.

# Forms

## How enforceable are they in outdoor water sports activities?

If a release of liability form includes an express assumption of risk statement, the recreational operator's position is greatly strengthened in court.

Does the failure to read or understand the terms of a waiver of liability establish a basis for setting aside the release? Generally, the answer is no. The accepted rule of law is as follows:

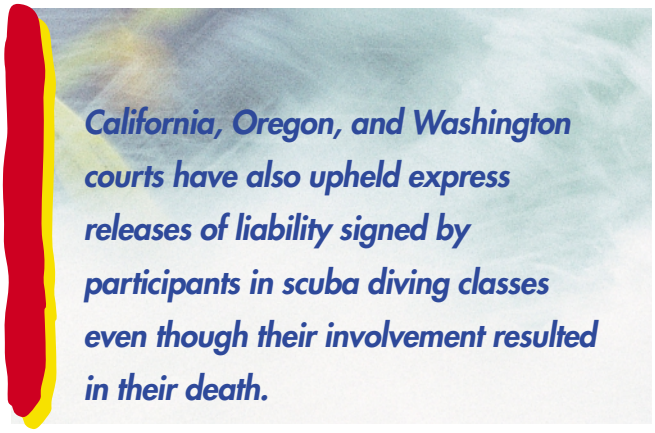
> *"The signer of an instrument is conclusively bound by it and it is immaterial whether he read it or subjectively assented to its terms. There is no allegation of fraud or misrepresentation or that a special relationship existed between the parties which would render this rule inapplicable."*[3]

Although most courts have upheld release of liability forms, a few courts have invalidated them. From the numerous cases involving water sports, two principal issues emerge as the bases for invalidating the signed document. The first issue involves regulatory statutes concerning safety standards and guidelines imposed on the industry by state legislatures. The second issue involves how much actual knowledge the patron had of risks involved at the time of signing the release form and whether the actual injury sustained fell within the range of injuries contemplated by the party at the time of signing. The second issue is the focus of this article.

## Assumption of Risk and Express Release of Liability

A review of recent cases upholding release of liability waivers indicates that the inclusion of an express assumption of risk statement is the primary basis for a court's decision in favor of the rafting company. *Franzek v Niagara Gorge River Trips, Inc*[4] involved an ill-fated attempt to traverse the whitewater of the lower Niagara River. Three people died and a number, including Franzek, were injured. The release forms, signed prior to boarding, included a recitation of the dangerous nature of the trip and a waiver of claims against the sponsors. The release was effective to bar the plaintiff from recovering from the rafting company.

Almost a decade later in 1989, the 4th U.S. Circuit Court of Appeals decided *Krazek v Mountain River Tours, Inc.*[5] Ms. Krazek claimed that the "Raft Trip Release and Assumption of Risk" document she signed did not include specific language barring her from pursuing a negligence action against the company. The court concluded that although the words "negligence" or "negligent acts" were not stated in the form, the intent to release the rafting company from liability for negligence was clear. The court declined to formulate a rule that required the use of specific "magic words" in contracts involving anticipatory releases.




In *Sanders v Laurel Highlands River Tours*[6] the 4th U.S. Circuit Court of Appeals also upheld a waiver and release card signed by a participant. Mr. Sanders was injured while on a guided whitewater tour on the Upper Youghiogheny River in western Maryland. This part of the river is classified as one of the most difficult of river runs. Mr. Sanders had previously rafted the Lower Youghiogheny in the fall of 1987. Both times he signed a release that specifically stated he understood the risks involved in whitewater rafting and agreed to hold harmless the rafting company. The trial court noted that the warnings Laurel gave were adequate as a matter of law and that the general dangers of whitewater rafting are apparent. The court of appeals agreed. They further stated that warnings need only be reasonable, they need not be the best possible warnings in the circumstances. The court concluded that given the obviousness of the risks involved, the warnings of the specific risk from which Sanders was injured, and his previous rafting experience, Sanders assumed the risk of his injury.

California courts have reached similar decisions. In *Saenz v Whitewater Voyages, Inc,*[7] the court denied a surviving minor's wrongful death action, on the basis of the decedent's signature on an express "Release and Assumption of Risk Agreement." The decedent, Edward Saenz, participated in a three-day whitewater rafting trip involving various class III and class IV rapids. At the embarkation point, the decedent completed and signed a release form. On the third day of the trip, Mr. Saenz fell out of a raft guided by defendant's employees and drowned. The court held that the risks of whitewater rafting were apparent. Mr. Saenz' signature on the release form was binding. A wrongful death plaintiff is subject to any defenses that the defendant could assert against the decedent, including the decedent's express agreement to waive the defendant's negligence and assume all risks. The release contained plain language stating that the signor was aware of the risks and dangers that could occur on any river trip with Whitewater Voyages, Inc., including the hazards of personal injury, accident, and illness.

California, Oregon, and Washington courts have also upheld express releases of liability signed by participants in scuba diving classes even though their involvement resulted in their death. In *Hewitt v Miller, et al.,*[8] the issues presented to the court stemmed from the presumed death of Don Franklin Hewitt. Prior to the first dive of an advanced scuba course Mr. Hewitt had enrolled in, he signed a release of liability form. On the second dive of the course, Mr. Hewitt disappeared beneath the surface of Puget Sound. No trace of him or his diving equipment was ever found. The court ruled in favor of the defendants because the release had been signed by Hewitt, the acts involved fell within the language of the release, there was not willful or wanton misconduct on the part of the defendants, the release was part of the overall scuba diving course, and the release was not against public policy. Based on similar fact situations, the court of appeals of California[9] and Oregon[10] reached similar decisions as *Hewitt* for essentially the same reasons.

The reasoning in *Saenz* was applied again in California in the case of *Ferrari v Grand Canyon Dories, et al.*[11] Prior to embarking on a five-day rafting trip, Ms. Ferrari signed a release absolving the defendant of responsibility for injuries she might sustain during the trip. While traversing some rapids, the raft she was in experienced a violent movement. This caused Ms. Ferrari to strike her head against a metal frame in the raft. The court upheld its prior position that negligent conduct of a participant in an active sport is an inherent part of the sport. In her deposition, Ms. Ferrari acknowledged she appreciated the possibility of being thrown out of the raft, but claimed she had not considered the possibility of being thrown about within the raft. The court rejected such a notion as disingenuous. Knowledge of one risk includes knowledge of the other. The court held that striking objects both inside and outside of the raft were included in the risks inherent to the sport. They also pointed out that:

*"It is the thrill of challenging nature and running the rapids without mishap which gives the sport its distinct allure and sets it apart from, for example, a trip down the giant slide at Waterworld."*

Another case where a release of liability waiver was upheld is *Lahey v Covington, dba Twin Lakes Expeditions, et al.*[12] Prior to taking a guided whitewater rafting trip on the Arkansas River in Colorado, Ms. Lahey signed a release form. She admitted she did not read the release before she signed it. The trip involved rafting a stretch of the Arkansas River known as the "Numbers" section (a class IV-plus rated set of rapids). The basis of her claim was not that she did not understand the risks, but that she should not have been allowed to run the river that day because the water was very high. The Arkansas Headwater Recreation Area, a whitewater rafting regulatory group in Colorado, recommends against commercial rafting through the "Numbers" when the water flow measures 4.0 feet high or more on the Scott's Bridge gauge. On the day in question the water flow measured 3.8 feet high. During the trip, the raft Ms. Lahey was in capsized and she was swept thorough the rapids. Ms. Lahey filed suit against the rafting company claiming that the signed agreement should be set aside.

In determining whether an exculpatory agreement is valid, the court considered four factors: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. The court ruled that whitewater rafting is recreational in nature and does not provide a service of great importance to the public; whitewater rafting is not an activity that is an essential service; Ms. Lahey was not coerced or treated unfairly; and the release form she signed was short, written in simple, clear terms, free of legal jargon, and uncomplicated.

## Liability May Be Imposed if the Release is Not Specific Enough

Two other cases in which signed releases were not upheld stem from an accident on the Chilko River in British Columbia, Canada. In *Fasules v DDB Needham Worldwide, Inc*[13] and *Goldstein v DDB Needham Worldwide, Inc,*[14] the widows of two men killed in a whitewater rafting accident on the Chilko River sought compensation for the wrongful death of their husbands. Both U.S. District Courts handling the cases reviewed the facts and decided that the decedents did not fully understand and comprehend the risks involved in their whitewater rafting expedition. The waivers were supposed to have been mailed and signed prior to leaving on the trip. However, they were not given to them until they were at the airport in Vancouver, British Columbia. The language of the release included a clause that the participant should obtain insurance to cover injury or illness. The actual release form was general in nature and nowhere in the agreement was there mention of whitewater rafting, the risks of whitewater rafting, negligence in general, or the negligence of D.D.B. Needham Worldwide, Inc. The document contained serious ambiguities and therefore could not be the basis for dismissing the widows' claims.

## Risks Not Mentioned or Contemplated in the Release Form

The above cases involved injuries that fell within the contemplated risks inherent to the sport of whitewater rafting. If the injury incurred by the participant is not inherent to the sport, this could result in liability to the operator. In *Reuther v Southern Cross Club, Inc*[15] the plaintiff was injured when a huge wave struck the dive boat en route to the scuba dive site. Reuther had signed a form that included a statement that the party was fully aware of the potential dangers incidental to "scuba diving, instruction, or snorkeling." Reuther claimed that he understood the form to concern only the hazards of an actual scuba dive, not injuries sustained while on the boat ride to the dive site. The court agreed that the language of the release only covered injuries that might be incurred while actually scuba diving.

## The Essentials of a Good Waiver of Liability Form

As a general rule, a waiver of liability release form should be clear, concise, and written in understandable language. There should be an express acknowledgment that the signor knows of, understands, and appreciates the risks that are inherent to the activity. The risks and potential injury should be stated including the fact that *death may result.* Including statements about voluntary participation and the assumption of the risks inherent in the activity is essential. Finally, the form should include an indemnification clause. Although some courts might not enforce this provision, including it is important. ✦

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## Footnotes

1. Cotton, Doyice J., "Managing Recreation and Risk," *Athletic Business,* April 1998, p 56.
2. *Krazek v Mountain River Tours, Inc;* 884 F2d 163 (CA 4, 1989).
3. *Franzek v Calspan Corporation, Niagara Gorge River Trips, Inc, et al., and Zodiac, SA;* 78 AD2d 134 (p 138); 434 NYS2d 288 (p 290) (1980).
4. Id. at p 136, p 289.
5. See n 2.
6. *Sanders v Laurel Highlands River Tours, Inc; Laurel Highlands River Tours of Maryland, Inc;* No. 92-1060; 1992 U.S. App. 4th Circuit.
7. *Saenz v Whitewater Voyages, Inc;* 226 Cal App 3d 758; 276 Cal Rptr 672 (1980).
8. *Hewitt v Miller, et al.;* 11 Wash App 72; 521 P2d 244 (1974).
9. *Madison v Superior Court;* 203 Cal App 3d 589; 250 Cal Rptr 299 (1988).
10. *Mann v Wetter and Horizon Water Sports, Inc;* 100 Ore App 184; 785 P2d 1064 (1990).
11. *Ferrari v Grand Canyon Dories, et al.;* 32 Cal App 4th 248; 38 Cal Rptr 2d 65 (1995).
12. *Lahey v Covington d/b/a Twin Lakes Expeditions, Inc,* and *Voisard v Mobilian;* 964 F Supp 1440 (D Col, 1996).
13. *Fasules v DDB Needham Worldwide, Inc;* No. 89 C 1078; 1989 U.S. Dist.
14. *Goldstein, et al. v DDB Needham Worldwide, Inc et al.;* 740 F Supp 461 (SD Ohio, 1990).
15. *Reuther v Southern Cross Club, Inc,* 785 F Supp 1339 (SD Ind, 1992).