

The Redwoods Group Insurance Program for JCCs

LESSONS IN THE NEWS

TOPIC: Court to review waiver forms

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Wisconsin Supreme Court to decide if broad liability releases are binding

A wrongful death lawsuit involving a Madison doctor's drowning three years ago has prompted the Wisconsin Supreme Court to take a closer look at liability waiver forms filled out by users of facilities such as swimming pools.

The high court said Tuesday that it will consider a lawsuit involving the May 4, 2001, drowning death of Dr. Charis Wilson, an urgent care physician for Dean Medical Center who drowned while swimming at Swimwest Family Fitness Center, a private swimming pool on Madison's West Side.

Wilson, 47, was using the pool on May 3, 2001, to rehabilitate and strengthen a knee she had fractured before she was found at the bottom of the pool. She died the next day.

Wilson's only child, Benjamin Atkins, alleged in the lawsuit that the negligence of a lifeguard at Swimwest caused his mother's death. But Dane County Circuit Judge Michael Nowakowski dismissed the suit because Wilson had filled out a guest registration form that immunized Swimwest against liability for injuries at the pool.

Atkins appealed. On March 25, the 4th District Court of Appeals said that it could not make a decision on the appeal because Wisconsin courts have yet to formulate a clear, uniform test for the enforceability of broadly worded liability waiver forms.

The high court on Tuesday said it would use the case to answer two questions:

Are the words on a standard guest membership form enough to immunize against a wrongful death claim?

And if not, does the waiver release statement prevent the victim's child from pursuing a wrongful death action? (*emphasis ours*)

The issue

Last year a California court determined that a well written, routinely honored waiver was no longer viable in a childcare setting. It reasoned that childcare has become a necessary service and that a broad restrictive waiver was contrary to the public interest. As seen above, the Wisconsin Supreme Court is now questioning the enforceability of broadly worded liability waiver forms. Two questions must be considered: is your waiver strong enough to do any good, and will it pass the new scrutiny of the courts?

Well-drafted release forms are never a substitute for thorough planning and careful execution. JCC facilities and programming encompass many risks. While those risks may be reasonable, they still contain the potential for injury. Because of our country's present legal climate the injured party often turns to litigation as a means of establishing liability. Avoiding unnecessary risk is not enough. JCCs have to manage carefully the risk that is inherent in their programming and operations. Besides using common sense, educating attendees, providing

warnings, and getting insurance, there are several other tools that can be used to transfer risk. The more common of these are obtaining indemnification from others, avoiding the indemnification of others, issuing disclaimers, and obtaining releases.

Be specific

To be effective, releases must be very narrowly drawn. For example a release that states, "I release you from everything" probably will not be enforceable. It has to be quite specific about who is providing the release, to whom it is given, for what purpose and activity, for what period of time, and exactly what is being released – namely the negligence of the JCC.

A release is most effective when it includes specific waiver of claim language. Its potential effectiveness is further bolstered by an acknowledgement that the person providing the release is physically able to participate in the event and does so at his or her own risk.

Timing Is Everything

Another critical aspect of crafting an effective release is timing. Requesting a release months in advance of an isolated activity is probably too far removed from the event to be considered timely. Obtaining a release at the time of the event is also untimely. If the release form is presented to everyone at the starting line of the obstacle course it may be deemed that there was too much coercion and too little time to carefully assess the impact of signing and thus the release would be unenforceable. Some middle ground must be found. Having a clear notice in the advertising and pre-registration material that a release will be required for participation and providing the release language should be effectual. The participants (or their parents) then can sign the release at the time of the event.

If the release is not signed at the site or in the presence of your staff, the signature should be notarized.

Clarity is crucial

The release must be clearly communicated. That means that the language should be clear, concise, and unambiguous with important points clearly emphasized. The legendary "fine print" has no place in a release that you want to withstand the scrutiny of the courts

Make It Mandatory

Consistency is very important. All participants must be informed that there will be no participation without a signed release. That rule must be strictly enforced; no exceptions should ever be made.

Keep it enforceable

Activities for which you require a release should have some measure of risk. This can be the normal risk associated with physical exercise or the increased risk found in programs like challenge courses, archery, or off-site travel. Clearly identify and

draw attention to any activity that has increased risk and specifically address it.

A release will likely be ineffectual for any activity that is construed to be required membership in a JCC or participation in a program is almost always elective but the use of childcare may not be. Finally, the use of even a very well crafted release can never substitute for the use of utmost care in planning, preparation, and supervision.

Without expressed acknowledgement of value given and value received the agreement technically is not a contract and may be overturned. Generally the value received by the signer of the release consists of being allowed to participate in the activity for which the release is provided; the value given to the JCC is the release.

Include an attestation of legal competency by the signatory. If the release is for a minor participant, the signatory should also attest that they are legally responsible for the child or children indicated on the form.

Protect your organization

Construct your release so that it provides the most protection possible. In addition to a simple waiver of rights include a hold-harmless agreement, a covenant not-to-sue, and most importantly, an indemnification agreement.

For example

Putting it all together, an example of good release language and format is:

*In consideration of my being allowed to participate in the Master's Swim Team and intending to be legally bound, **I hereby waive, release, hold harmless, covenant not-to-sue, and forever discharge any and all rights, actions, and claims of negligence* that I or my heirs, executors, or assigns may have against the [Name of JCC] as well as their respective officers, directors, trustees, agents, employees, representatives, successors, assigns, and affiliates for death, injury, loss, and any and all damages that I may sustain and/or suffer in connection with my participation in the Master's Swim Team. I also agree to indemnify the [Name of JCC] for any defense, cost, or expense arising out of any claim of damages, injury, or death arising from my participation in this program. I am physically fit, legally competent, and freely participate in this activity at my own risk.**

In summary:

- Make it specific
- Make it timely
 - not so far in advance that it can be forgotten or put off
 - not so immediate that there is inadequate time for adequate consideration
- Make it clear
 - Use comprehensible language
 - Visually identify important points
 - Use adequate font size

- Make it mandatory
- Make it enforceable
 - Use a release where it makes sense don't dilute its effectiveness by trying to apply it in every situation
 - Identify and explain unusual or "high-risk" potentialities i.e., allow the participant/parent to give informed consent
 - Do not use a release for required activities the courts will probably find it unreasonable or unconscionable
 - Indicate value received and given
 - Affirm legal competency and responsibility
- Make it worthwhile
 - Include an agreement to waive normal rights
 - Include an agreement to hold harmless
 - Include an agreement to not sue
 - Include an agreement to indemnify

Please call us at 800-463-8546 to discuss this or any other risk management safety tip, or visit our web site at www.redwoodsgroup.com to learn more about JCC risk management issues.