

# CURTIS THAXTER

ATTORNEYS AT LAW

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## MEMORANDUM

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TO: MYCA Members  
COPY: Ron Hall  
FROM: Jack Erler, Nancy Savage Marcus and Tyler Costello  
DATE: March 1, 2021  
RE: Waivers and indemnification agreements

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**IMPORTANT REMINDER: This information is being provided for your general educational purposes only. You must consult your attorney or other advisors for advice on how laws apply to specifics at your camp.**

### **What is a “waiver”?**

A waiver is an agreement proposed by a camp (a Seller), to be signed by the parents of a camper (a Buyer), in which the parents agree to waive (in other words, relinquish) their, and their child’s rights to make a claim against the camp for any damages, or personal injuries to their child while at camp.

### **Does it work?**

Not well enough that a camp should rely on it alone as protection from liability.

### **Two reasons. First:**

The validity of a waiver is determined by the law of the state where it used. In Maine, courts have consistently disfavored waivers and have scrutinized them carefully when interpreting language which exempts a Seller from liability for its own negligence<sup>1</sup>.

### **What does this mean?**

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<sup>1</sup> In Doyle v. Bowdoin College, 403 A.2d 1206, 1207-08 (Me. 1979), the Maine Supreme Court (the Law Court), stated that: “contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law . . . such contracts 'must spell out the intention of the parties with the greatest of particularity' . . . and show the intent to release from liability 'beyond doubt by express stipulation' and '[n]o inference from words of general import can establish it' . . . such contracts must be construed with every intendment against the party who seeks the immunity from liability . . . the burden to establish immunity from liability is upon the party who asserts such immunity.” Id. at 1207-08 (quoting Employers Liability Assurance Corp. v. Greenville Bus. Men's Ass’n, 423 Pa. 288, 224 A.2d 620, 623 (1966)).

It is the camp that wants a waiver. Thus, it is the camp that has the burden to draft a waiver that spells out the intention of the parties with the greatest of particularity and the camp that carries the burden of demonstrating to a court that the language of the waiver does so.

### **Are there cases where Maine courts have upheld the waiver?**

Yes, the court held in Lloyd v. Sugarloaf Mountain Corp., 2003 ME 117, 833 A.2d 1 that Sugarloaf, the drafter of the waiver, succeeded in clearly spelling out its intention that Lloyd, the one who signed Sugarloaf's waiver, waived his claims against Sugarloaf.<sup>2</sup> So, a waiver can be drafted with sufficient particularity to overcome the fact that courts "traditionally disfavored contractual exclusions of negligence liability."

### **But are the "right" words enough?**

No. The facts of the Sugarloaf case are different than a camp case. In analyzing whether to uphold Sugarloaf's waiver, the court said: "Generally speaking, courts holding that similar releases for recreational activities are void as against public policy do so because they find that the activity is a public service or open to the public; the facility invites persons of every skill level to participate; the facility has the expertise and opportunity to control hazards and guard against negligence; the facility is in a better position to ensure against risks; and broad releases of liability would remove incentives for the facility to manage risks, thereby requiring the public generally to bear the costs." *These are all elements of camps.*

In the Sugarloaf case, the court then distinguished between activities with the attributes described above, and the activity in that case. The court pointed out that the activity in the Sugarloaf case, which was called "Widowmaker Challenge" was a bike race on the mountain's ski trails. Such an activity would have risks recognized by persons who wanted to participate. Thus, unlike activities generally open to the public, such as camps, persons participating in a "Widowmaker Challenge" would readily expect substantial risks of participation and understand that is why the waiver they were asked to sign relieved Sugarloaf of liability for their injuries.

### **Second reason to doubt the validity of waivers in Maine:**

We know that Maine law holds that a minor (a person under the age of 18) cannot bind her/himself to a contract. Thus, a waiver signed by a minor cannot be enforced against the minor.

In addition, it appears that Maine law denies parents the right to waive their children's claims against a third party (a camp). Although there is no Maine Law Court case directly on point,

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<sup>2</sup> There the waiver stated: "with specificity that Lloyd releases and discharges Sugarloaf, as well as any sponsors and promoters, from all liability that arises directly or indirectly from the negligence of anyone connected with the sponsorship, organization, or execution of any bicycle race." *Lloyd*, 2003 ME 117, ¶ 8, 833 A.2d 1.

there is every indication that if faced with this issue, the court would hold that parents cannot waive their children's right to make a claim for an injury caused by negligence.<sup>3</sup>

This is shown in a recent Maine Superior Court case, *Rice v. American Skiing Co.*, No. CV 99-06, 2000 WL 33677027 (Me. Super. Ct. May 8, 2000), in which the court held against the validity of a waiver signed by a parent waiving their child's claim.<sup>4</sup>

The bottom line here is that a waiver signed by the parents of a camper most likely will NOT waive the camper's claim against the camp for damage or injuries suffered by the camper as the result of negligence of the camp.

### **What about an indemnification agreement?**

In addition to the waiver, your camp can also have parents sign an "indemnification agreement" whereby the parents agree to reimburse the camp for any loss or damage the camp incurs as a result of their child's claim against the camp. What this means is that if the waiver is unenforceable (and the child can bring a claim against the camp), the camp may be able to recover its costs by enforcing the parent's agreement to indemnify the camp for claims made by the child.

### **Will an indemnification agreement work?**

Maybe. An indemnification agreement faces the same test as a waiver. It must also "clearly and unambiguously" reflect the camp's intent to avoid responsibility for its negligence. *Doyle*, 403 A.2d at 1208-09. In addition, an indemnity is only as valuable as the assets of the parents when the camp seeks to enforce it.

### **So, should my camp use these agreements anyway?**

Yes, because we don't know for sure how the Maine Law Court will rule in a camp waiver or indemnification case. However, it is important to have your agreement drafted and/or reviewed by your camp attorney so the pit-falls are avoided to the maximum extent possible.

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<sup>3</sup> There are two Maine cases with similar but not the same facts reaching similar conclusions. In *Therriault v. Breton*, 114 Me. 137, 95 A. 699 (Me. 1915) the Law Court said: "The parents of the minors, as natural guardians, had no authority or legal right to discharge, waive, or release any property right of their wards." *Id.* at 138. In *Stockman v. City of South Portland*, 147 Me. 376, 87 A.2d 679 (Me. 1952) the Law Court said: "It is the prevailing view that a guardian may not waive legal rights in behalf of his ward, or surrender or impair rights vested in the ward, or impose any legal burden thereon." *Id.* at 382 (citation omitted). In addition, there is a Maine statute, 14 M.R.S. §1605, that states: "No settlement of any action brought in behalf of an infant by next friend or defended on the infant's behalf by guardian or guardian ad litem is valid unless approved by the court in which the action is pending, or affirmed by an entry of judgment."

<sup>4</sup> In its holding the court said: "The [Maine] Law Court in *Doyle* was unequivocal in its declaration, [in a foot note], that '[t]his Court has held that a parent, or guardian, cannot release the child's or ward's, cause of action . . . This language is too unequivocal to ignore'. In fact, other [out of state] courts have cited *Doyle* as support for this proposition." *Id.* (quoting *Doyle*, 403 A.2d at 1208 n. 3).

There is also an argument that even if not a legal barrier, these agreements can be a psychological impediment to a lawsuit. But you need understand, that the more serious the injury is to the child, the more likely there will be a legal action, even if there are waiver and indemnification agreements.

**What else should I do to protect my camp?**

Waiver and indemnification agreements are just tools in your risk management kit. There are a lot more and better tools for the job, and, of course, appropriate insurance coverage, in case . .

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