Liability Waiver Found to Be a Violation of Public Policy and Therefore Unenforceable

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Practice Area: School Law

Enforceability of liability waivers has been a hot topic in courts across the country for the past several years. With an influx of litigation lodged against school districts for various activities, districts have become increasingly reliant upon liability waivers as a means to limit legal exposure. However, are liability waivers really that effective in reducing liability? Can they protect a school district from harm? What must a waiver contain in order to be effective and valid under the law?

These questions were squarely before the Wisconsin Supreme Court in the case of *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20 (Mar. 30, 2016). Although not in the context of school activities, the Court's decision is nonetheless instructive for districts seeking to limit claims through the use of liability waivers.

In *Roberts*, the plaintiff was injured while waiting in line for a hot air balloon ride. The plaintiff was struck by the balloon's basket when one of the balloon's tether lines snapped, causing the balloon to move toward the spectators waiting in line. The plaintiff had signed a liability waiver that provided as follows:

> I expressly, willingly, and voluntarily assume full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities with Company whether during flight preparation, take-off, flight, landing, travel to or from the take-off or landing areas, or otherwise.
>
> Without limiting the generality of the foregoing, I hereby irrevocably release Company, its employees, agents, representatives, contractors, subcontractors, successors, heirs, assigns, affiliates, and legal representatives (the "Released Parties") from, and hold them harmless for, all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the ballooning activities...

As an initial matter, the Supreme Court recognized that case law does not favor liability waivers. *See Atkins v. Swimwest Family Fitness Center*, 2005 WI 4, ¶12, 277 Wis.2d 303, 691 N.W.2d 334. Although waivers are not automatically invalid, the Court has held that such provisions are strictly construed against the party seeking to rely upon it. In order to be considered valid under a public policy analysis, the Court considers: (1) whether the waiver is overly broad and all-inclusive as to the activity covered and the injury caused; (2) whether the waiver is conspicuous and provides the signer with adequate notification of the waiver's nature and significance; and (3) whether the signer was presented with an opportunity to bargain or negotiate the terms.

The Court found the waiver unenforceable as a matter of law because it failed to satisfy the factors set forth above. The waiver was overly broad and all-inclusive. It absolved the operator from any injury, from any activity, and for any reason, known or unknown. Additionally, it was not clear to the court whether waiting in line for the ride is something the plaintiff would have contemplated as being covered by the waiver. Further, the waiver was a standard form agreement of the company, and did not offer the plaintiff any opportunity to bargain or negotiate in regard to the language. In order to participate in the hot air balloon ride, the plaintiff was told she would need to sign "this document." The content of the waiver and the risks associated with the activity were never discussed with her. She was not asked whether she had any complaints or concerns with the waiver and she did not have an opportunity to negotiate the terms. Thus, the waiver was found to violate public policy and was found to be void as a matter of law.

Districts should take this opportunity to review any standard liability forms that are utilized for extra-curricular activities, field trips, competitions, events, etc. In light of *Roberts*, school districts should take into account the following factors in utilizing waivers:

1. The waiver should expressly state that the signer is releasing negligence claims against the district.
2. The waiver should set forth the specific type(s) of conduct or activities that causes injury and in which activities a student will be participating, as well as a broad description of the types of injuries that may result. You may also consider including a provision that indicates serious injuries may have lasting consequences, as appropriate.
3. The waiver should be conspicuous, meaning it is a separate document. Liability waivers should be separate from permission to participate forms, registration forms, or other documentation.
4. The signer should possess the opportunity to bargain over the terms. This means that the signer may choose not to sign the agreement and has the option to discuss the terms of the waiver with a district designee.

The *Roberts* case should be a cautionary tale to school districts seeking to recycle liability waiver forms for a variety of activities. School districts must be vigilant in drafting waivers that will surpass a legal challenge and pass muster under a public policy analysis.
