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Waiver of Liability Alert

Connecticut Court Invalidates Waiver of Liability

A waiver releasing recreational operators from liability for personal injuries caused by their negligent conduct violates Connecticut public policy and cannot be enforced.

In a 4-to-3 decision released on Nov. 29, 2005, the Connecticut Supreme Court determined that a waiver of liability signed by a patron of a facility for skiing, snowboarding, and snow tubing violated public policy and could not be enforced. With this decision, *Hanks v. Powder Ridge Restaurant Corp. et al.* (SC 17327), Connecticut rejects the majority interpretation of exculpatory agreements, aligning itself with the few states that examine such agreements by considering the totality of the surrounding circumstances.

The defendants in this case operate a facility in Middlefield, Conn., known as Powder Ridge, at which the public, in exchange for a fee, can ski, snowboard, and snow tube. The plaintiff brought his three children and another child to Powder Ridge to snow tube. Neither the plaintiff nor the four children had ever done snow tubing before, but the snow tubing run was open to the general public, regardless of experience, with the restriction that only persons at least 6 years old or 44 inches tall could participate. Powder Ridge also required its patrons to sign a “Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability” (agreement) in order to snow tube. The plaintiff read and signed the agreement on behalf of himself and the four children. While snow tubing, the plaintiff’s right foot got caught between his snow tube and the man-made bank of the snow tubing run, resulting in serious injuries that required multiple surgeries to repair.

The plaintiff brought a negligence action against the defendants. The defendants claimed that the agreement relieved them of liability. The trial court agreed, granting summary judgment in favor of the defendants. The Supreme Court reversed the trial court, finding that the agreement violated public policy. The court left this question unanswered in an earlier decision also involving Powder Ridge. See *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*, 265 Conn. 636, 829 A.2d 827 (2003).

Before this case, the Connecticut Supreme Court had not addressed the enforceability of a release of liability for future negligence, so the court examined the approaches taken by other jurisdictions. The court, acknowledging that no definition of the concept of public interest can be contained within the four corners of a formula, rejected any mechanical approach involving the application of various factors to these agreements and chose rather to determine what constitutes the public interest by considering the totality of the circumstances of any given case against the backdrop of current societal expectations. Quoting liberally from *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 670 A.2d 795 (1995), a case invalidating a release on public policy grounds in the context of skiing, the court listed seven factors leading to its decision: (1) the defendants invite the public generally to snow tube at their facility, regardless of snow tubing ability; (2) snow tubers are under the care and control of the defendants as a result of an economic transaction; (3) the defendants, not recreational snow tubers, have the knowledge, experience and authority to maintain the snow tubing runs in reasonably safe condition, to determine whether the snow tubing equipment is adequate and reasonably safe, and to guard against the negligence of its employees and agents; (4) the defendants are in a better position to insure against the risk of their negligence and to spread the costs of insurance to their patrons; (5) if the court were to uphold the agreement under the facts of the case, the defendants would be permitted to obtain broad waivers of their liability, and the incentive for them to maintain a reasonably safe snow tubing environment would be removed, with the public bearing the cost; (6) the agreement is a standardized adhesion contract, offered to snow tubers on a take-it-or-leave-it basis, and without the opportunity to purchase protection against negligence at an additional, reasonable fee; and (7) the defendants had superior bargaining authority.

The court acknowledged that most states uphold adhesion contracts releasing recreational operators from prospective liability for personal injuries caused by their own simple negligence, but refuse to enforce such agreements in the context of gross negligence. Connecticut, however, does not recognize degrees of negligence or the tort of gross negligence as a basis for liability. The court could not adopt the majority view and enforce the agreement because recreational operators would then be

able to release their liability for their conduct unless it rose to the level of recklessness. Recreational operators would lack the incentive to exercise even slight care, and the public would bear the costs of the resulting injuries, a result inconsistent with the public policy of Connecticut.

Since the court only recently released this decision, the breadth of this newly minted law has yet to be tested. For the moment, however, similarly situated operators of recreational facilities may no longer be able to claim the protection of exculpatory agreements.

For further information, please contact Brian Del Gatto, brian.delgatto@wilsonelser.com, or Stephen Brown, stephen.brown@wilsonelser.com, of our Connecticut office. For a full copy of the majority opinion, go to http://www.wilsonelser.com/fcwsite/uploadimages/attachments/Hanks_majority_opinion.pdf, and for the dissent, go to http://www.wilsonelser.com/fcwsite/uploadimages/attachments/Hanks_dissent.pdf.

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