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Drafting Waiver Agreements for Use in Wisconsin: It's Not Getting Any Easier

By Alexander "Sandie" Pendleton

The Wisconsin Court of Appeals has issued a decision that has implications for all businesses and organizations that use waiver agreements in Wisconsin. In *Brooten v. Hickok Rehabilation Services* (issued April 30, 2013, recommended for publication), the court of appeals held void a waiver agreement that had been signed by an individual who joined a health club, who subsequently was injured when a weight bench he was using collapsed under him.

Relying primarily on the Wisconsin Supreme Court's seminal 2005 decision in *Atkins v. Swimwest,* the court held that the health club's agreement form was contrary to public policy and therefore void based on three factors: (1) the form used provided no opportunity to bargain; (2) the agreement was overbroad; and (3) the agreement "exceeded the contemplation of the parties." While generally following the decision in *Atkins,* parts of the decision in *Brooten* go beyond *Atkins,* and may establish an even higher standard for those businesses and organizations that want to use waiver agreements.

No Bargaining Opportunity

As to the "no opportunity to bargain" factor, the agreement form was completely silent as to the issue of bargaining. As in *Atkins*, the court indicated this was a "significant factor" suggesting a violation of public policy. Again as in *Atkins,* the court offers no guidance as to exactly how "the form itself must provide an opportunity to bargain." That lack of guidance continues to provide significant challenges to drafters and users of waiver agreements. Users of waiver agreements—many of whom continue to ignore the issue of bargaining in their waiver agreements—should take note of this element of the court's decision, and ensure that their agreements address this factor.

Overbroad

As to the "overbroad" factor, here the health club clearly made a fatal mistake, when it failed to include a carve-out for claims based on reckless or intentional conduct. The law in Wisconsin has been clear for decades that a waiver that attempts to cover reckless or intentional conduct claims is void.

One of the comments of the court in *Brooten,* however, suggests that *any* attempt to extend a waiver beyond *ordinary negligence claims* will result in the agreement being held overbroad: "Moreover, despite the release being overly broad by extending beyond negligence claims . . . ." Although perhaps *dicta*, the comment is a new one under Wisconsin waiver law, and places drafters and users of waiver agreements in a difficult situation. Drafting a waiver agreement to cover only negligence claims potentially leaves the recreational-provider exposed to creative pleading by plaintiff's counsel (so as to include such claims as breach of contract, misrepresentation, or safe place liability); on the other hand, drafting a waiver agreement to cover all claims, except for those for harm caused intentionally or recklessly, potentially leaves the recreational-provider exposed to an argument that under *Brooten,* the entire agreement must be held void as overbroad. Users of waiver agreements—many of whom continue to seek to have their waiver cover "all claims"—should take note of this element of the court's decision, and consider revising their forms to address this factor.

Failure to Alert the Signer to the Nature and Significance of the Agreement

As to the third factor, this was based on the court's concluding that the "defend-and-indemnify" clause included in the agreement was not sufficiently brought to the gym member's attention. The court found significant the facts that (i) the title of the document did not refer to such a clause (the title was "Waiver and Release of Liability"), (ii) the capitalized language set forth immediately above the signature line did not refer to such a clause, and (iii) the clause itself in the body of the agreement was not conspicuous.

"We are satisfied that an ordinary consumer would not contemplate that 'defend and indemnify' language buried in the middle of the form's text would require him or her to provide a legal defense for Chetek Fitness and to pay Chetek Fitness's share of damages in the event a third party sued Chetek Fitness." Reading between the lines, one gets the impression that the court was offended by the health club's inclusion of the clause in the agreement form. Users of waiver agreements—many of whom make no attempt to make conspicuous to users an indemnification provision, or explain the meaning of such a clause—should take note of this element of the court's decision, and ensure that their agreements are drafted in such a way so as not to make the same mistakes the court identifies in *Brooten.*

Conclusion

While Wisconsin courts have never said that all waiver agreements are *per se* void, the *Brooten* decision is another example of a Wisconsin case holding that such agreements are disfavored, and must withstand incredibly close scrutiny before they will be upheld.

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(The information and views discussed in this article are for general information purposes only. An organization that has specific questions as to the effect the above development may have for it should discuss such with its attorney, or with an attorney who is familiar with this area of the law and the organization's specific operations or concerns.)

About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Pendleton Legal, S.C. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues.

About Pendleton Legal, S.C.: At Pendleton Legal, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team (Sports, Fitness & Recreation Team) guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. In addition to our S/F/R services, we provide legal expertise across the numerous areas of law encountered by businesses and organizations in the normal course of their day-to-day operations and growth. If you would like to explore whether we can help your organization achieve its mission, contact us**.**