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Michigan Supreme Court Holds Waivers Signed by Parents Are Unenforceable

By Alexander "Sandie" Pendleton

The Michigan Supreme Court on June 18, 2010 issued its long-awaited decision in *Woodman v. Kera*, holding therein that under Michigan law waiver-of-liability forms signed by parents on behalf of minors are **unenforceable**.

Key to the Court's decision was the majority's holding that under the common law in Michigan a minor lacks the capacity to enter into a pre-injury waiver, and that the minor's parents also lack the legal capacity to bind their child to such contract.

The decision affirms a 2008 decision of the Michigan Court of Appeals, that held that virtually all waiver-of-liability agreements signed by parents on behalf of their children are unenforceable (the very narrow exception being if the parent had first obtained a court's permission to sign the waiver of liability).

The seven justice Michigan Supreme Court issued an unusually splintered decision in the case, with five of the seven justices writing separately. The lead opinion (the holding of which was joined in by four other justices) was written by Justice Robert Young, Jr., a justice who is normally characterized as a member of the court's conservative wing. Key to Justice Young's decision is his view that while there may be good reasons why the common law should be changed so as to permit parents (and guardians) to enter into waiver agreements on behalf of their minor children (or wards), such arguments are better presented to and resolved by the legislature, rather than the courts.

Because of the decision of the Court, it is likely that the Michigan legislature will proceed to consider a bill that was introduced earlier this year, which bill was introduced in an attempt to obtain an at least partial reversal of the effects of the court of appeals' decision in *Woodman.* House Bill 4970, if passed, would allow the parent or guardian of a minor child to provide a written release from liability before the child participated in a recreational sport run by a *non-profit organization.* **Note**, the proposed bill if passed in its current form would **not provide protection to for-profit businesses that want to rely on parental waivers**, but that of course could change, as the bill winds its way through the legislative process.

The reasoning of the majority of the justices, was vigorously opposed by two of the justices, who pointed out that no prior Michigan court decision had invalidated parental waivers. To these two justices, the field was therefore an open one, and to them there were many good reasons why the Michigan Supreme Court (rather than the legislature) should take up the issue, and clarify Michigan common law, so as to make it clear that the law in Michigan allows parents to enter into valid pre-injury waivers on behalf of their children. In blunt judicial language, Justices Corrigan and Markman criticized the majority's reasoning, and predicted dire consequences regarding youth sports and recreational opportunities in Michigan (increased litigation against recreational providers, increased costs, fewer volunteers, fewer civic organizations willing to become involved, and sharply diminished recreational opportunities for minors).

With five justices writing separately in the case, the decision is a lengthy one, and it is clear that there are several points in this area of the law about which the justices in the majority continue to disagree amongst themselves. For example, one disagreement that is potentially important to businesses and organizations in Michigan that provide recreation opportunities to minors, is Justice Young's comment in a footnote that even if a parent cannot bind his minor child to a contract, the parent can contract on the parent's own behalf to indemnify the defendant for any losses arising from injuries the parent's child suffers while participating in a recreational activity offered by the defendant. (In this context "to indemnify" means that the parent would be required to reimburse a negligent recreational provider, for any damages that the defendant was held to be obligated to pay to an injured minor). Other justices, however, disagreed with Justice Young's comment.

Based on the ultimate holding in *Woodsman,* the implications for business, organizations and individuals in Michigan that want to rely on parental waiver agreements are challenging, if not stark. Under the Court's holding in *Woodman,* those agreements are currently void and non-effective. However, because

the Michigan legislature is currently considering passing a bill that would reverse the holding of *Woodman,* business and organizations may want to consider (after conferring with counsel), at least for the time being, continue to ask parents to sign such agreements, in the event the bill ultimately passed by the legislature contains some retroactive provision to it.

The Michigan Supreme Court decision in *Woodman* also emphasizes the importance of having well drafted agreements relating to recreational activities, as one of the issues discussed was that the business in this case—an established business that did nothing but provide recreational opportunities to kids—was using a waiver form agreement that, on close inspection, was drafted in a sloppy and ambiguous way. As such, one lesson of *Woodman* is that carefully crafted and deployed agreement terms are essential, if a business, organization or individual wants to have any hope of convincing a court to enforce the terms of an agreement containing waiver-of-liability, indemnification or assumption of risk terms.

All organizations in Michigan that use releases (especially if the release relates to minors) should ensure that their release forms have been reviewed by an attorney familiar with the law in this area. That same advice applies to organizations operating in other states as well, especially in states that take a very strict approach to releases (such as, for example, Wisconsin).

The outcome in the *Woodman* case is contrary to the outcomes in cases in numerous other Midwest states in which courts have enforced parental release agreements (such as Wisconsin, Minnesota and North Dakota).

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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**.**