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Waiver Agreements: *Three Little Words* Can Make a Real Difference

By Alexander "Sandie" Pendleton

In the classic 1950 movie *Three Little Words,* Fred Astaire struggles throughout to come up with just the right words to make all the difference in a great song he's written. "Three little words" is also what makes a real difference for a ski resort in a federal court decision out of Colorado addressing whether a wrongful death claim would be barred by the waiver agreement a skier signed prior to making his last run down the mountain.

In *Rowan v. Vail Holdings, Inc.* (U.S. District Court for Colorado, 1998), the plaintiffs were the parents of a deceased "national caliber racer with international experience." On the day of the accident, the skier (Rowan) was employed by a ski manufacturer (Solomon), and was "glide testing" skis in advance of a World Cup Downhill Race. (Glide testing determines which ski waxes and base structures run the fastest at the venue where the testing is being conducted, and in this instance the testing was being performed by Solomon immediately in advance of a World Cup race scheduled to occur at Vail.) During glide testing, Rowan attained speeds in excess of 120 kilometers per hour.

On the morning of the third day of glide testing, Vail employees asked the glide testers to sign a waiver-of-liability agreement, and Rowan and the other testers complied with the request. The agreement stated "I agree to release and hold harmless Vail ... from any and claims I might state as a result of physical injury, including death ...." A separate later paragraph in the agreement stated "[t]his agreement is binding on my estate, heirs, administrators and assigns ...." During testing, Rowan lost control, collided with an outdoor deck, and sustained a fatal injury.

Rowan's parents commenced suit against Vail, claiming negligence. Vail sought to have the suit dismissed based on the waiver agreement Rowan had signed, but the district court denied Vail's motion.

In reaching its decision, the court considered whether the agreement was "clear and unambiguous." The court began its discussion by indicating (as is common in waiver cases) that such agreements "have long been disfavored [by courts] and must be 'closely scrutinized'", and that they are "strictly construed against the drafter."

The court found that the agreement was free from legal jargon and neither inordinately long nor complicated, but the court nevertheless found it ambiguous. The court concluded that the problem was that the agreement first indicates "I agree to release and hold harmless Vail ... from any and all claims **I might state** . . ." and then later indicates it is binding on Rowan's "estate" and "heirs." To the court, the three words "I might state" created an ambiguity as to whether the parties intended the agreement to apply just to claims Rowan himself could state, or whether they intended it to apply to Rowan's claims **and** the independent wrongful death claim that Rowan's estate and heirs might state.[1]

While there are several lessons that can be taken from the *Rowan* decision, the most important one is that **in a waiver agreement every word matters, and will be closely scrutinized by opposing counsel and a court**. It might just be "three little words" in a lengthy waiver agreement, but those words can make all the difference. What may seem like an unimportant choice of words to a participant or business (even a highly-sophisticated business like the Vail Ski Resort), can have a significant impact on whether a court will or will not enforce a waiver. Each choice as to language must be thought through, with a consideration of all terms in the agreement, and with a consideration of potential scenarios, and the law applicable to various potential claims.

Consideration must be given not only to claims that could be brought by the participant, but also to more obscure claims that might be brought by third parties (such as wrongful death claims, survival

[1] The court further found there was ambiguity in the "assumption of risk" language in the agreement, but that is a separate issue from whether the waiver language in the agreement was ambiguous.

claims, loss of consortium claims, loss of society and companion claims, and subrogation claims, some or all of which might be brought by a participant's estate, heirs, spouses, children, parents or insurers).[2] Bottom line, **waiver agreements should only be drafted and updated by individuals who have a thorough knowledge of the statutes and cases in this area of the law, who have experience drafting waiver agreements, and who have a thorough understanding of the risks of the activity, and the circumstances in which the waiver agreement will be deployed.**

At the end of the movie *Three Little Words,* Fred Astaire's character finally realizes that the key three little words he needs for the song he's been trying to write are (not surprisingly) "I love you." If you want to love the results you get with the waiver and indemnification agreements your business or institution uses, ensure they are drafted or updated by an individual who has experience and knows the many "landmines" that can exist in this area of the law.

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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**.**

[2] For an example of a decision in which a court considered virtually identical language to that used in *Rowan*, but came to an opposite conclusion as to its enforceability (at least as to an insurer's subrogation claim), see the Tenth Circuit's 2002 decision in *Mincin v. Vail Holdings, Inc.,* a case also arising out of a fatal ski accident at Vail.