

Chapter X

RISK MANAGEMENT: RELEASES AND PARTICIPATION AGREEMENTS

Overview

Risk management takes many forms including assessment of risks and preventive legal planning; review and obtaining of adequate insurance whether purchased or through self-insurance and the development and execution of adequate agreements concerning responsibilities and liability of program participants. The chapter focuses on these agreements.

A release or an exculpatory agreement (contract) is a statement signed by an individual participating in an event or activity that indicates to the sponsoring agency and its agents that they are released from liability in case of injury or some other type of harm. A classic situation occurs when a scuba diver signs a release releasing the scuba operator from any and all liability from any diving injury.

Application

TYPES OF RELEASES

Most colleges sponsoring an overseas program require their students to sign an agreement relating to the program and institutional

responsibility. The agreement can take the form of a release, an assumption of risk statement, or waiver or it can be coupled with a more generalized and probably a preferred document, a participation agreement. These documents should be carefully drafted and easily understood.

These agreements are developed for several reasons. First, colleges are increasingly looking at ways to minimize or eliminate exposure in overseas programs. Obtaining an appropriate release or participation agreement is one way to accomplish that objective. Second, most colleges believe it is appropriate to inform students of the dangers that an activity may create. Third, in the event a college is sued, the college officials involved in the activity may feel more comfortable having obtained a release from a student who knowingly assumes the risk of the activity. Fourth, many courts will generally, under defined conditions, enforce releases of liability. Fifth, an assumption of risk agreement may protect the institution even if a general release is questionable.

State law is critical. Whether releases are valid and the specific content of a release agreement is determined solely by state law. Accordingly, the law of each state must be examined to determine if a college can enforce a release and how the release should be prepared.

Courts have interpreted releases in several different ways. In the case of adults, some courts have sustained releases if there was adequate consideration, if the parties understood what was being released, and if there was no evidence of fraud or duress. Courts taking this approach view the release as a contract and hold that adult parties can contract away their right to sue for the negligence of another (i.e., the college or its employees).

A second view, promulgated by some state courts, is that a release of liability for the future negligent acts of another is against public policy of the state, and therefore, is invalid and will not protect a college from future negligent acts and liability. A third

view is that certain types of releases that attempt to release a party from statutory duties of responsibility are against public policy, but other types of releases may be valid if they meet the requirements of a binding contract.

As a matter of public policy, an individual cannot contract away claims for gross negligence on the theory that such actions are so against public policy that persons must be accountable for such negligence. Gross negligence can be defined as a “negligent act done with utter unconcern for the safety of others, or one done with such reckless disregard to the rights of others that a conscious indifference to consequences is implied in law.”

Some courts have recognized a “public service” exception that, as a matter of public policy, prohibits an agency from obtaining a release for liability. There are several elements of the public service determination, some of which have led courts to determine that athletic programs provided by state universities come under the public service exception and therefore releases are not enforceable. (*Kyriazis v. University of West Virginia*, 1994).

Courts generally take a strict approach to releases for several reasons. First, a minor cannot contract, and therefore, such contracts are void. Second, an agreement exonerating an individual from liability could cause the individual to exercise a lack of care and courts do not want to foster such possibilities. Third, as a general proposition, individuals may not contract away their own negligence.

General Releases

There are several elements to a release. First, the release should be clear as to what the student or person is releasing. Second, if the college decides to attempt to release itself from negligence of its own agents, then that should be specifically covered in the release. A California court in rejecting the validity

of a release reaffirmed its requirements that the language of a release must be clear and unambiguous. Further, applying general rules of contract, the court applied the principle that the terms of such agreements will ordinarily be construed strictly against the drafter. The court stated if a party who might be negligent is to be released from that liability, “the language used must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.” (*Leon v. Family Fitness Center, Inc.*, 1998).

Third, if a college desires to protect itself from lawsuits, there should be a specific provision regarding the student’s agreement to hold the college harmless and in some cases to indemnify it for costs incurred in any claims against the college arising out of the specific incident. Fourth, the release should be voluntarily given and a recital of this fact should be made on the release.

Releases are used in several situations. The most likely situation is where there is some real potential of injury that could occur to participants. For example, colleges obtain releases for field trips, interscholastic or intramural athletics, or an assumption of risk agreements for potentially dangerous activities such as scuba, rappelling, mountain climbing, cheerleading, and for sponsored overseas study programs.

Assumption of Risk

Even in cases where a release may not be used such as in states that prohibit them or states where immunity statutes prevent state institutions from seeking such broad releases or when minors are involved, persons may sign assumption of risk or participation agreements. These agreements must clearly detail the risk of the activity with specificity so that it be demonstrated that any harm incurred was the result of a consequence detailed in the agreement.

An example of such an assumption of risk agreement coupled with an indemnification provision might include:

I acknowledge that there are certain risks inherent in foreign studies programs; foreign political, legal, social, and economic conditions; different standards of design, safety and maintenance of buildings, public places and conveyances; and local medical and weather conditions. There are other risks due to _____. I acknowledge that all risks cannot be prevented and I assume those beyond the control of the university staff. I represent that I am physically able, with or without accommodation, to participate in this program.

Knowing the risks described above, and in consideration of being permitted to participate in the program, I agree, on behalf of my family, heirs, and personal representative(s), to assume all the risks and responsibilities surrounding my participation in the program. To the maximum extent permitted by law, I agree to indemnify the university and their officers, employees and agents, from and against any present or future claim, loss or liability for injury to person or property which I may suffer, or for which I may be liable to any other person, during my participation in the program including periods in transit to or from any country where the program is being conducted.

Recreational activity assumption of risk agreements are often the subject of litigation. As a matter of public policy they are frequently enforced. Lawrence Clanton, upon entering a roller skating rink, signed a release. He skated at this rink over a period of time. During one visit when he had signed a release, Clanton was injured by another skater who was apparently going too fast.

Clanton sued the owner of the skate rink. (*Clanton v. United Skates of America*, 1997) The skate rink moved for dismissal of the case due to the fact that Clanton had signed a full release which stated in part:

That roller skating is a participation sport and I am fully aware of the risk and hazards involved in or arising from my use of or presence upon the facilities. I hereby assume any and all risk involved in or arising from my use or presence upon the facilities, including without limitation, the risk of bodily injury resulting from collision between myself and another person or stationary object of the negligent or deliberate act of another person.

Under Indiana law, such exculpatory agreements are enforced unless they are successfully challenged because the signer: (1) did not know the contents of the release; or (2) was placed under duress in the signing of the release.

In this case, the court ruled that Clanton chose to skate at this rink, had acknowledged reading the release, he had no other interests other than enjoyment and therefore the release was valid. Clanton's argument that the release violated public policy when it released the owner from its negligence was rejected by the court because if accepted, "would dramatically raise the cost of participation in these activities and severely limit the public's recreational opportunities."

Indemnification Agreements

Minors cannot sign a release. Minors are not able to sign a release because they are "not legally competent." The best way to handle the release for a minor is to have the parents sign the release and agree to indemnify the college. In the event the minor sues the college, the parents would have to indemnify the college

for any expenses or damages that the minor obtains. Obviously, such an indemnification agreement poses a major barrier to such litigation on behalf of minors by their parents.

The validity of these indemnification agreements depends on state law, but obtaining such agreement is the best way to protect the college from claims of minors. The following language might address this issue:

I further hereby agree to indemnify and hold harmless the university from any loss, liability, damage or cost, including court costs and attorneys' fees, that it might incur due to my son's or daughter's participation in said activity, whether caused by negligence of my son or daughter or otherwise.

ELEMENTS OF A RELEASE

Most releases for overseas study programs address various components of the program: (1) the foreign experience; (2) general liability; (3) health and safety; (4) delivery of the program; and (5) choice of forums clauses.

Risks of Study Abroad

A release addressing the inherent dangers in overseas study program provides:

I understand that participation in the study abroad program (the "Program") involves risk not found in study at the university. These include risks involved in traveling to and within, and returning from, one or more foreign countries; foreign political, legal, social, and economic conditions; different standards of design, safety and maintenance of buildings, public places and conveyances; local medical and weather conditions, and the possibility of emergency

evacuation as a result of these various conditions. I have made my own investigation and am willing to accept these risks.

Assumption of Risk and Release of Claims

Regarding general liability, releases set forth exculpatory clauses and assumption of risk provisions:

Knowing the risks described, and in consideration of being permitted to participate in the program, I agree, on behalf of my family, heirs, and personal representative(s), to assume all the risks and responsibilities surrounding my participation in the program. To the maximum extent permitted by law, I release and indemnify the university, and its officers, employees and agents, from and against any present or future claim, loss or liability for injury to person or property which I may suffer, or for which I may be liable to any other person, during my participation in the program (including periods in transit to or from any country where the program is being conducted).

Health and Safety

On health, safety, and insurance issues, a release can also cover financial responsibility for medical treatment:

I have consulted with a medical doctor with regard to my personal medical needs. There are no health-related reasons or problems which preclude or restrict my participation in this program.

I am aware of all applicable personal medical needs. I have arranged, through insurance or otherwise, to meet any and all needs for payment of medical costs while I participate in the program. I recognize that the university is not obligated to attend to any of my medical or medication

needs, and I assume all risk and responsibility therefor, including medical evacuation. If I require medical treatment or hospital care, in a foreign country or in the United States, during the program, the university is not responsible for the cost or quality of such treatment or care.

The university may (but is not obligated to) take any actions it considers warranted under the circumstances regarding my health and safety. I agree to pay all those expenses and release the university from any liability for any actions.

Program Changes

A release addresses program issues including cancellation and program changes and refunds:

The university has the right to make cancellations, substitutions or changes in case of emergency or changed conditions or in the interest of the program. I understand that the university's fees and program charges are based on current airfares, lodging rates and travel costs, which are subject to change. If I leave or am expelled from the program for any reason, there will be no refund of fees already paid. I accept all responsibility for loss or additional expenses due to delays or other changes in the means of transportation, other services, or sickness, weather, strikes, or other unforeseen causes. If I become detached from the program group, fail to meet a departure of a bus, airplane, or train, or become sick or injured, I will at my own expense seek out, contact, and reach the program group at its next available destination.

Choice of Forum

Releases also address the applicable law and the forum for any challenges or conflicts based on the document:

This agreement shall be governed by the laws of the state of _____, which shall be the forum for any lawsuits filed under or incident to this agreement or to the program.

For additional release forms, see Appendix A.

PARTICIPATION AGREEMENTS

Participation agreements are often broader than a release and address health and safety issues, program issues, and the behavioral requirements of students who participate in overseas programs. These agreements provide the institution a moment of truth to inform students of their responsibility and the inherent risks and challenges of overseas study. When carefully drafted in a communicable manner, they are effective in informing students of the general principles by which the institution undertakes foreign study, they can provide institutional protection and documents its integrity in dealing with students.

An agreement can also address student conduct. It can explain how different cultures establish norms that may differ from those of the student.

ELEMENTS OF PARTICIPATION AGREEMENTS

Standards of Conduct

Assessments of the overseas environment and the behavior of participants are addressed:

I understand (foreign country) has its own laws and standards of acceptable conduct, including dress, manners, morals,

politics, drug use and behavior. I recognize that behavior which violates those laws or standards could harm the university's relations with those countries and the institutions therein, as well as my own health and safety. I will become informed of, and will abide by, all such laws and standards for each country to or through which I will travel during the program.

Student Discipline

The agreement can also address disciplinary standards and the applicability of the sponsoring institution's code of conduct and the procedures which may apply in the case of student misconduct:

I will comply with the university's rules, standards and any instructions for student behavior. I waive and release all claims against the university that arise at a time when I am not under the direct supervision of the university or that are caused by my failure to remain under such supervision or to comply with such rules, standards, and instructions.

I agree that the university has the right to enforce the standards of conduct described above, in its sole judgment, and that it will impose sanctions, up to and including expulsion from the program, for violating these standards or for any behavior detrimental to or incompatible with the interest, harmony, and welfare of the university, the program, or other participants. I recognize that due to the circumstances of foreign study programs, procedures for notice, hearing and appeal applicable to student disciplinary proceedings at the university do not apply. If I am expelled, I consent to being sent home at my own expense with no refund of fees.