

"SO SUE ME . . ." (JUST HOPE MY LIABILITY WAIVER IS WORKING)

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I can't tell you how many times I've heard a stable owner tell me "They won't sue me. They signed a liability waiver". This statement reflects a misconception prevalent in the horse industry – that a liability waiver will prevent lawsuits from being filed. Nothing could be further from the truth. In fact, many stable owners are currently using standard form liability waivers drafted in such broad, generic terms as to be virtually unenforceable in the event a lawsuit gets filed. How can this be?

Most stables require participants to sign "liability waivers" before they participate in riding activities. The waiver form, signed by the participant, typically "holds the stable harmless" for any accidents or injuries suffered by the participant while on the premises. Often, a stable owner or instructor obtained the form from a friend or from a generic form book, and started using it without first requesting review by a licensed attorney. The stable owner believes the waiver prevents the participant from later suing the stable. However, the enforceability of the waiver depends largely on the specific wording of the waiver, as well as the particular legal requirements which differ from state to state. In other words, **that waiver is meaningless without proper wording and compliance with applicable state law.**

Consider the following example. A young boy and his father arrive at the lesson stable, ready to begin lessons. The stable owner gives the boy and his father a lesson contract to review and sign. The short-form contract contains information identifying the stable, the participant, the dates of lessons and the riding level of the child. The agreement also contains the following clause:

"I agree to take full responsibility for myself and the animal I am riding. I will hold the stable blameless for any accident, injury or loss that might occur due to my participation in these lessons, and free from all liability for accidents, injuries or losses."

The father and boy both sign. The boy later falls off his horse during the lesson and breaks his collarbone. The boy's parents sue the stable on behalf of their minor son. The stable's attorney files a Motion to Dismiss Petition based upon the signed liability waiver. Will the case be dismissed by the court? Will the waiver work?

Start off with the proposition that liability waivers are not typically favored in the law. This is because the liability waiver is an extraordinary method of shifting the risk of negligent conduct away from the negligent party. It is a contractual agreement to waive common law duties that otherwise exist between two parties. For example, at common law, the stable owner and lesson instructor owe the boy a duty to exercise reasonable care to protect him before, during and immediately after his lesson or while he is otherwise on the premises. The waiver attempts to make the boy solely responsible for his injuries, even if the injuries were potentially caused by the stable or lesson instructor's negligence.

Because of this unusual shift of responsibility, some states do not enforce liability waivers at all, holding them "void as a matter of public policy". Other states enforce them cautiously, asking the following questions:

1. Is the waiver clear and unambiguous?
2. Does the waiver contain clear, explicit language waiving a person or entity's liability?
3. Is the waiver language conspicuous within the document or hidden in fine print?
4. Is the parties' intent to "waive negligence" clearly and expressly stated in the agreement?
5. Were the parties sufficiently informed about the potential risks in order to permit a "knowing" waiver of those risks and attendant liabilities?

If any of these questions are answered "No", the waiver may be unenforceable.

Applying these rules to the above waiver, a court would most likely analyze the waiver's enforceability as follows. On its face, the waiver language appears conspicuous given its presence in a short form contract. The waiver appears to express the participant's acceptance of full responsibility for any accidents or injuries which might occur.

On the other hand, the waiver does not mention the possible risks of injuries related specifically to horseback riding. Accordingly, the father and son can argue they were not aware of the inherent risks when they signed, and were therefore unable to "knowingly waive" the liability of the stable where the risks were an unknown factor. In many states, this absence of risk identification is sufficient to void the waiver. In addition, many states which have enacted some form of the Equine Limited Liability Act require all equine contracts and waivers to contain express wording about the "inherent risks" of equine activities as a prerequisite to invoking the protections of the Act.

The waiver clause in our example additionally lacks clear language which unambiguously waives the stable's liability for its own negligence. Many states, prior to holding a waiver enforceable, require that waiver to expressly state that the participant has waived any claims of liability against the stable from acts occurring from the "neglect" or "fault" of the stable. These terms must be specifically set forth in the clause in order to be enforceable. These states include, but are not limited to, Missouri, North Dakota, Delaware, and New York. In those states, the above waiver would probably be unenforceable.

In other states, including but not limited to Wyoming, Florida, New Hampshire and Illinois, the clause does not require an express waiver of negligence phrase to be enforceable. The clause need merely contain evidence of the participant's clear intent to release the stable. For example, consider the following clause: "Participant shall hold harmless and release Stable from any and all claims and damages which may occur from participating in any and all activities sanctioned by Stable". A similar clause was enforced by a Wyoming court, which found the clause to be a clear and unambiguous release of liability even though it did not specifically mention the release or waiver of the stable's "negligence".

A waiver can be a strong defense tool for a stable owner or lesson instructor, and its use should be considered in all instances involving equine activities. However, do not automatically assume your current waiver is enforceable under your particular state's laws. If you currently use a waiver in your equine business, take another look at it. Is it conspicuous? Does it inform the participant of the inherent risks of the activity? Does it comply with your state's Equine Limited Liability Act? Does it include an express waiver of negligence clause? Can the participant understand what he or she is reading, and its legal significance? If so, your waiver is probably positioned to enjoy enforcement under the law. However, as in all instances involving legal matters, you should have your waiver carefully scrutinized by a local attorney to ensure its compliance with your particular state's laws before you rest securely on its perceived protections.

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