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With the passage of Wyoming's Recreation Safety Act and its subsequent amendments, recreation providers might believe that they are protected from suit if one of their clients is injured while participating in a recreation activity. However, as the Wyoming Supreme Court has recognized, the Recreation Safety Act has limited reach. In order to better manage the risks associated with providing recreational opportunities, providers should consider having their clients execute releases and/or indemnity agreements. Crafted properly, these documents can be effective in minimizing the liability associated withphysically challenging, and sometimes dangerous, recreational activities.

Releases and Waivers

The seminal case addressing the use of releases in the recreational activity context is *Massengill v. S.M.A.R.T. Sports Medicine Clinic, P.C.,* 996 P.2d 1132 (Wyo. 2000). In *Massengill*, plaintiff was using a weight lifting machine at S.M.A.R.T. when the pin used to secure the weights fell out and he injured his wrist. Before plaintiff was allowed to use the S.M.A.R.T. facility, he signed an Agreement and Release which stated that S.M.A.R.T. was not liable for any injuries or damages to any member, including those caused by the negligence of S.M.A.R.T. Plaintiff argued that the release was not enforceable as a matter of public policy.

In Wyoming, a contract limiting liability for negligence may be enforced only if it does not contravene public policy. *Schutkowski v. Carey*, 725 P.2d 1057, 1059-60 (Wyo. 1986). In analyzing the *Massengill* release, the Court applied a four-part test: 1) whether a duty to the public exists, 2) the nature of the service performed, 3) whether the contract was fairly entered into, and 4) whether the intention of the parties is expressed in clear and unambiguous language. The Court concluded that the services of a private recreational business did not qualify as suitable for public regulation because they did not affect the public interest nor could they be considered as necessary or essential. The Court found that plaintiff's use of the S.M.A.R.T. facility was purely optional and that plaintiff had been given three days to consider the Agreement and Release at home before he came back to use the facilities. As a result, the Court concluded that the release had been fairly entered into. Finally, the Court found that the intent of the parties was expressed in clear and unambiguous language. Thus, the Court rejected plaintiff's argument that the release was void as against public policy.

The *Massengill* plaintiff also argued that the Recreation Safety Act

prevented S.M.A.R.T. from using the Agreement and Release because the Act created a statutory duty which preserved actions based on negligence. The Court rejected this argument, instead noting that the use of releases remains a prudent option for providers:

> . . .we are satisfied that the Recreation Safety Act does not foreclose the invocation of a contractual release or waiver for negligent conduct that is not released by the assignment of the inherent risk to the person participating in the sport or recreational opportunity under the statute. **Indeed, the limited reach of the statute would suggest that a contractual release in addition to the statute would be prudent.**

Id. at 1137 (emphasis added).

Indemnity Agreements

Judge Brimmer considered the issue of indemnity agreements in the recreation activity context in *Madsen v. Wyoming River Trips, Inc.*, 31 F. Supp.2d 1321 (D. Wyo., 1999). In Madsen, plaintiff sued a white water river-rafting company for injuries she sustained during a rafting trip. Prior to the trip, her husband had signed a "Reservation and Liability Release." In that document, plaintiff's husband agreed to release and to hold harmless Wyoming River Trips from any claims by him or his minor children from any and all legal claims of any kind, including claims based on negligence. Plaintiff brought the lawsuit against Wyoming River Trips, arguing that the company's negligence had caused her injuries. In its defense, the company sought to invoke the indemnity provision of the "Reservation and Liability Release."

At the outset, the Court noted that the defendant was trying to assert a type of indemnity agreement that is disfavored in the courts – when the indemnitee seeks to hold the indemnitor liable for its own negligence. The Court also noted that it was unable to uncover another case like this one, where an attempt is made to hold a private consumer responsible for claims made by his own family that were brought due to a business's alleged negligence. In interpreting the release and indemnity agreement, the Court construed it against Wyoming River Trips, the drafter, and noted that the indemnity provision was "buried at the end of a run-on sentence (in very small print) in which the entire focus of the sentence was that Mr. Madsen was only signing on behalf of he and his minor children." *Id*. at 1324. The Court noted that the document had repeatedly referred only to "me and my minor children" with the only reference to "my family" being at the end of the document. *Id*. The Court concluded that the plain language of the document did not convey an intent to prevent a suit by Mrs. Madsen.

The Court went on the hold that even if the indemnification clause could be read broadly enough to reach Mrs. Madsen's claims, the clause was nonetheless void as a matter of public policy. The Court explained that Mr. Madsen had purchased the services of a specialized nature from a member of the business community in whom he had placed his trust. The Court further explained that the document did not disclose to Mr. Madsen the specific risks inherent in river rafting, and concluded that "an

indemnitor should know these things before he agrees to indemnify the service provider." *Id*. at 1325. In sum, the Court concluded "Defendant's unprecedented attempt to hold a private citizen to an indemnity contract for a service that he himself purchased will not stand." *Id*.

Drafting Releases and Indemnity Agreements

The trend in releases appears to be that while courts may review releases closely, they are still willing to enforce them when they are clear, fairly entered into, and not against public policy. The fate of indemnity agreements is less clear. While Judge Brimmer in the *Madsen* case indicated that an indemnity in the commercial/private context "will not stand," the Wyoming Supreme Court may not follow suit. It remains to be seen whether an indemnity that is clear and accompanied by a detailed listing of risks inherent to the activity might be upheld by the Wyoming Supreme Court. This seems a possibility, especially in light of the Court's holding in *Massengill*, which specifically permits contracts limiting liability for negligence in just such a commercial/private context.

Until a clear rule is in place, it continues to be advisable to include in any release and indemnity agreement, language listing the risks involved in a recreational activity: it will always be to a recreational provider's advantage to put its guests on notice as to what types of risks to expect when participating in recreational activities. Such language strengthens arguments that any release, waiver or indemnity agreement was fairly entered into. Putting guests on notice as to the dangers associated with recreational activities will further be helpful in the determination of whether a risk is inherent. This seems especially important in light of the Tenth Circuit's recent decision in *Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1104 (10th Cir. 2002), holding that whether a risk is inherent is a question of fact. *See also, Addakai v. Witt,* 31 P.3d 70, 75 (Wyo. 2001), where the Wyoming Supreme Court permitted jurors to decide under the Recreation Safety Act what is or is not a risk inherent to a particular recreational activity.

A Special Word About Minors

Very often, recreational activities involve entire families and, very often, a parent is asked to sign a release and waiver on behalf of his minor child. While there are no cases on this issue in Wyoming, both the Colorado and Utah Supreme Courts have held that a parent may not release his child's causes of action against a third party before or after an injury. *See Hawkins v. Peart*, 37 P.3d 1062 (Utah 2002) and *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo. 2002). Thus, while it is still advisable to have a parent execute a release and waiver on behalf of each of his children, and an indemnity in the event a claim is made on behalf of the children, it is quite possible that the Wyoming Supreme Court might refuse to enforce such a document.