

TRAVEL LAW: ADVENTURE TRAVEL: SOFT, HARD AND EXTREME: DISCLAIMERS AND RELEASES

REVISION #3

July 16, 2014

By Thomas A. Dickerson

Adventure travel includes some level of physical exertion and some degree of risk or danger, perceived or real, which takes you out of your comfort zone. Adventure travel runs the spectrum from the (1) *soft* such as camping, easy day hiking and casual horseback excursions, (2) *hard* such as trekking, bungee jumping, sand boarding, mountain biking, white water rafting, zip-lining, paddle boarding, paragliding, rock climbing and arctic ice climbing and (3) *extreme* such as Tough Mudder featuring physical challenges in "hostile environments that might include extreme heat or cold, snow, fire, mud, extreme changes in elevation and water...activities include runs, military style obstacles, going through pipes, traversing cargo nets, climbing walls, encountering electric voltage, swimming in cold water...hazardous activity that presents the ultimate physical and mental challenge to participants" [*Tough Mudder Pty. Ltd. Assumption Of Risk, Waiver Of Liability And Indemnity Agreement at*

<https://toughmudder.com>].

Questions To Ask

Having decided to participate in adventure travel [see e.g., Adventure Travel Trade Association at www.adventuretravel.biz] you need to carefully evaluate the risks and ask the following questions. (1) Is the travel adventure provider insured, licensed and trained? (2) Has a third party such as a tour operator, resort/hotel or cruise line providing shore excursions, evaluated the reliability and responsibility of the travel adventure provider? (3) Has that third party disclaimed all liability and responsibility for the negligence and/or misconduct of the recommended travel adventure provider? (4) Must you sign the travel adventure providers' liability and/or damages limitation waiver and, if so, is it enforceable and/or have you assumed the risk of whatever may happen to you? And (5) is there travel insurance available to cover travel adventure accidents?

Accidents & Disclaimers

In our recent article on Adventure Tours [ETN June 12, 2014] we discussed various types of accidents sustained by adventure travelers. What about the releases, waivers and disclaimers that

adventure travelers are invariably required to sign before their great adventure begins. Are they enforceable and should they be?

Enforceability Issues

It is, perhaps, the element of danger that motivates some travelers to participate in adventure tours seeking ambiguity and risk instead of safety and certainty. Under these circumstances it may be argued that adventure travelers should be willing to sign or be bound by disclaimers and waivers absolving the travel adventure provider or third party from some or all liability, at least, for simple negligence. Certainly, there is a difference between soft, hard and extreme adventure travel which the court may consider when determining the enforceability of a specific disclaimer.

Unequal Bargaining Power

Some courts have refused to enforce a time limitation clause based on unequal bargaining power [see *Long v. Holland America Line Westours, Inc.* (cruise passenger on shore excursion falls at museum; time limitation for filing lawsuit clause in passenger ticket not enforced; "Holland America imposed the disputed clause in an unusually one-sided manner...there are indications of

contractual overreaching... Holland America and its agents made no efforts to inform [traveler] of the contractual limitation until the company sent...her tour itinerary"); but see *Beehner v. Outback Trail Rides, Inc.* (horse riding accident; release enforceable for ordinary negligence..."We can find no Minnesota case holding that a liability release in a contract for recreational activity was unenforceable due to a disparity of bargaining power")].

Unconscionability

Some courts have refused to enforce a disclaimer limiting the amount of recoverable damages based on oppression and unequal bargaining power [see *Lhotka v. Geographic Expeditions, Inc.*, (37 year old decedent "died of an altitude-related illness while on a GeoEx expedition up Mount Kilimanjaro"; mandatory arbitration clause and limitation of liability and damages providing that "the maximum amount of recovery to which I will be entitled under any and all circumstances will be the sum of the land and air cost of my trip with GeoEx" and release unenforceable as unconscionable as being one-sided and reflecting unequal bargaining power)].

Deceptive Trade Practices

Some courts have refused to enforce disclaimers based on deceptive trade practices [see *Courbat v. Dahano Ranch, Inc.* (travelers purchased tour through "Island Incentives, Inc., an internet-based tour organizer" and suffered injuries from horse riding accident at the ranch; "If on remand the trier of fact determines that the nondisclosure of the waiver was a deceptive trade practice rendering the waiver void, then the Courbat's negligence claims proceed free of the waiver defense"); *Peters v. Norwegian Cruiseline Limited* ("Due to an untreatable genetic condition, Peters required a wheelchair for mobility. In 1998 Peters decided to take a cruise...after he saw a poster for a 'Texaribbean Cruise' in the window of a travel agent. On at least 15 different occasions, Peters spoke with a travel agent... regarding the accessibility of the (cruise ship) for physically disabled people"; many assurances were given but in reality many of the services and facilities aboard the ship were not accessible as promised; numerous causes of actions alleging negligent misrepresentation, violation of Deceptive Trade Practices Act and fraudulent inducement sustained)].

Illegality

Some courts have refused to enforce disclaimers based on illegality [see *McDermott v. Carie, LLC* (patron loses distal

portion of right index finger in horse riding accident at dude ranch; prior to riding patron signed a Waiver and Release Agreement...We reiterate that the pre-tort release that [patron] signed was illegal...The Agreement...stated that he acknowledges the unpredictable nature of horses as an inherent risk of the activities of which he would partake and indicated that he knew that inherent risks involved...(defendant) has [not] attempted to enforce the Agreement").

Against Public Policy

And some courts have refused to enforce disclaimers as against public policy [see *Munn v. Hotchkiss School* ("In the spring of 2007, Cara Munn signed-up for a six week summer enrichment program to be principally in Tianjin, China. The trip was organized by Cara's boarding school, The Hotchkiss School. Three months prior to her departure, the school sent Cara and her parents a four-page 'Agreement, Waiver and Release of Liability (which disclaimed, inter alia, any) responsibility for any accident, illness...resulting directly or indirectly from the Student's participation in the Program'...Cara fell ill four weeks into her time in China (having contracted) tick-borne encephalitis...that causes swelling in the brain...permanently lost her ability to speak, control her drooling, many of her fine

motor skills and some of her cognitive capacity. Cara and her parents allege that Cara's illness resulted from Hotchkiss's negligent planning and supervision of the China trip"; release not enforced as against public policy; jury verdict for \$41.75 million)].

Most Disclaimers Enforced

Generally, and in the absence of the reasons discussed above, most Courts have enforced liability disclaimers releasing the adventure travel provider from the consequences of simple negligence [see *Brozyna v. Niagara Gorge Jetboating, Ltd.* (passenger injured during white water excursion through rapids of Niagara River; maritime law applies; release enforced); *Lavine v. General Mills, Inc.* (slip and fall on rock; disclaimer enforced); *Sova v. Apple Vacations* (scuba diving accident; disclaimer enforced); *Schoeps v. Whitewater Adventures* (minor participant dies during whitewater rafting; liability release enforced and not unconscionable)] and releasing a third party tour operator, resort/hotel or cruiseline for misconduct of independent contractor adventure travel providers [see *Hofer v. The Gap, Inc.* (slip and fall into turtle pool; no liability for negligence of independent contractors); *Yurchak v. Atkinson & Mullen Travel, Inc.* (no liability for jet ski accident); *Fisher v. Olde Towne*

Tours, LLC (fall in boat during excursion in St. Thomas; release and assumption of the risk agreement enforced)].

Conclusion

Adventure Travel is gaining in popularity and travelers are well advised to carefully select responsible Adventure Travel providers and purchase appropriate insurance. In addition and as discussed in our earlier article on Adventure Tours [ETN (June 12, 2014)] there are several liability theories available which may assist the injured traveler in circumventing disclaimers and releases [see *Chaparro v. Carnival Corporation* [duty to warn of dangers at Coki Beach]; *Zapata v. Royal Caribbean Cruises, Ltd.* (negligent selection of shore excursion adventure travel provider); *Reming v. Holland America Line, Inc.* (negligent selection); *Perry v. Hal Antillen NV* (third party beneficiary theory); *Haese v. Celebrity Cruises, Inc.* (third party beneficiary theory)].

Justice Dickerson been writing about *Travel Law* for 38 years including his annually updated law books, *Travel Law*, Law Journal Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles many

of which are available at

www.nycourts.gov/courts/9jd/taxcertatd.shtml.