

Release of Liability



A Tool for Managing the Risk of a Volunteer or Participant in an Activity Suing the Activity's Organizer or Host

A properly designed release agreement signed by a volunteer or participant in an activity can substantially reduce the liability risks of the organizing or hosting organization.

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Risk-Shifting Tools

Purpose Generally

Accidents happen and, when they do, claims for personal injury or property damage sometimes follow. Defending lawsuits is expensive and time-consuming. The defense may be ultimately successful and covered by insurance, but the costs are ultimately passed on to the insured through higher premiums.

The risk of being held responsible for injuries or property damage associated with organizing volunteer, educational, recreational and other events and activities (or opening up property for the same)

may be avoided or minimized by having those who wish to participate sign a release agreement.¹ This risk reduction tool, one of many risk management strategies, is the subject of this guide.

Guides to Reducing and Managing Risk

The Pennsylvania Land Trust Association has published several guides to assist organizations in reducing and managing risks:

- [Reducing Liability Associated With Public Access](#) discusses standards of care legally required of landowners and suggests ways to minimize and insure against these risks.
- [Pennsylvania's Recreational Use of Land and Water Act](#) discusses the immunity from liability afforded by Pennsylvania's Recreational Use of Land and Water Act ("RULWA").
- [Indemnity Agreements and Liability Insurance](#) explains how an indemnity agreement operates to allocate, between the parties to the agreement, the risks of defending and paying claims asserted by others.
- This guide looks at contract arrangements designed to shield one party from the risks of liability to the other.

Model Release Agreement

The Pennsylvania Land Trust Association has published a [model release agreement](#) that *Sponsors* may use to reduce the risks of being sued by *Activity Participants*. As used in the model and this guide:

- A Sponsor may be the organizer or sponsor of the activity or the owner of the land or manager of the facility on which the activity will take place.
- Activity Participants are those who avail themselves of the opportunity to engage in volunteer efforts, field trips, events or other educational or recreation activities (“Activities”) made possible by the Sponsors.

The [Model Release Agreement](#) is commented on extensively in this guide and may be viewed or downloaded at [ConservationTools.org](#).

Three Approaches to Creating a Shield from Liability

The [Model Release Agreement](#) incorporates three techniques for dealing with the risks of being sued for personal injury or property damage; each technique shifts the risk of being burdened with the cost of potential injuries and damages from the Sponsor to the Activity Participant. The model seeks from Activity Participants:

1. a covenant not to sue,
2. a release,
3. an assumption of risk.

1. Covenant Not to Sue

The first risk-shifting technique is to obtain the agreement of the Activity Participant not to sue the Sponsor for anything that happens while engaging in the activity. The covenant not to sue is the first line of defense against a claim asserted by the Activity Participant because, if successful, the litigation ends there. There is no need to determine who caused the accident or, if the Sponsor was at fault, whether the Sponsor is shielded from liability by the release agreement or under RULWA.

The [Model Release Agreement](#) includes a covenant not to sue; however, its effectiveness as a bar to claims for injuries that have not yet occurred is uncertain under Pennsylvania law. Covenants not to sue entered into

post-injury are recognized to be effective for that purpose.²

2. Release

The purpose of a release is to absolve one party to the contract from liability for the consequences of their negligent acts. The Sponsor may have failed to meet ordinary standards of reasonable care but, absent a finding that the Sponsor’s conduct was more blameworthy than ordinary negligence, the release absolves the Sponsor from responsibility for any harm resulting from its conduct.

The release differs from a covenant not to sue. The releasing party, from the moment the release is agreed to, permanently relinquishes their legal rights or, in some cases, turns them over to another.³ Parties promising not to sue retain their legal rights but promise not to use them in the future.

Release Effective in Pennsylvania

As a general rule, releases of liability for negligence in a recreational setting are valid and enforceable in Pennsylvania.⁴ The “Legal Considerations” section of this guide discusses exceptions and limitations from this general rule but the good news for Sponsors is that it is well worth their effort to obtain releases from Activity Participants.

Scope of Release; Activity Description

Clarity is the key to an effective release agreement. The release only applies to the Activity as defined in the release agreement; thus, that definition must be worded with care so as to be both clear and inclusive of all elements of the Activity. Reference to an Activity as named on the Sponsor’s website or announced in a publication of Sponsor may serve as a brief, but clear, identification. A Sponsor may take this further, providing in the release agreement a reference to a specific description contained at a website or in a brochure that provides greater detail about the Activity, including features, such as transportation provided by Sponsor, which may not otherwise be clearly included in the Activity.

Examples

- Fall tree planting work party at Woodlands Preserve
- Horseshoe Trail hiking opportunities described at www._____.org
- Field Trip B (Birding Adventure) as in Sponsor’s 2014 Conference brochure

The [Model Release Agreement](#) provides a space where users insert a description of their Activity.

3. Assumption of Risk

A release agreement is strengthened when the Activity Participants admit that they knowingly and voluntarily chose to sign the release⁵ and accept the risks of participation in the Activity. The [Model Release Agreement](#) includes several provisions evidencing the Activity Participant’s assumption of risk.

Voluntary Participation

Activity Participants may seek to defeat a release agreement by claiming that it was not voluntary—the contract terms were forced upon them (a contract of adhesion). That strategy does not work in Pennsylvania even if the release agreement is non-negotiable. The Sponsor may insist that its terms must be accepted as a condition to participation in the Activity. The Activity Participants can then decide whether to participate or not but, if they do, they have accepted the release agreement as-is and cannot void it by claiming it is a [contract of adhesion](#).

Knowing Election to Assume Risks

Release agreements may not be effective if it is found that the Activity Participants did not knowingly waive their legal rights, either because they did not appreciate the inherent dangers of the activity or they did not understand the contract terms of the release.

The plain language of the model is intended to be clear and easily understood by a person of ordinary intelligence and education. It includes several provisions highlighting the inherently dangerous nature of the activity and the need for Activity Participants to take responsibility for their own safety. The model may, if desired, be customized to reflect

the dangers of a specific activity; for example, a snowmobiling club may add examples of dangers inherent in that activity.

Other Contract Terms

Brevity is an important feature for a release agreement. A court is not likely to find credible an assertion that the Activity Participant lacked sufficient opportunity to read and understand a one-page document. Nevertheless, Sponsors may want to consider additional contract terms, including some of the following items, depending on the circumstances.

Choice of Forum

Some Sponsors may want assurance that any litigation will take place in a certain court or the county in which the Sponsor is located for convenience, cost saving and, perhaps, strategic purposes.⁶ The following provision may be added to the [Model Release Agreement](#) for that purpose:

Sample Provision: I agree that the only courts to decide any matter covered by this agreement are the Court of Common Pleas of ___ County, or the United States District Court for the ___ District of Pennsylvania.

Unlimited Duration

A release agreement is limited in time to the duration of the described Activity. As to a one-day field trip or a two-week hike, the duration is clear. As to an Activity that the Activity Participant may engage in any number of times over an unspecified period of time, a clarification of the unlimited duration of the release may be a desirable addition.

Example: A hiking club requests its members to sign release agreements, which describe the Activity as “all hikes, trail maintenance and other activities organized or sponsored by the club”.

Sample Provision: I understand that this release agreement is unlimited in duration and covers all Activities that I participate in at any time in the future.

Medical Care

The [Model Release Agreement](#) can be expanded to shield the Sponsor from liability for rendering first aid or other medical assistance if the Activity Participant is unable to do so.

Sample Provision: If I am injured while participating in the Activity, and unable to act on my own behalf, I authorize Sponsor to provide emergency first aid and further authorize any attending medical/first aid personnel to provide such medical care as they consider necessary or appropriate and to execute on my behalf such permission forms, consents or other documents as are needed to obtain hospital or other medical care.

Photography; Publicity

Sponsors often take photographs and other images of Activities and post them on their website or publish them in other media. To assure that Activity Participants have no objection to Sponsor's use of their images, the [Model Release Agreement](#) may be expanded to include the following:

Sample Provision: I release to Sponsor, and authorize Sponsor to produce, reproduce, broadcast and otherwise use, photographs, films, videotapes, recordings, digital images and other depictions, likenesses or images of me, in any media form in connection with my attendance at or participation in the Activity, without compensation, for an unlimited duration.

Legal Considerations⁷

Enforceability of Risk Shifting Contract Provisions

Risk shifting contract provisions are legally valid in Pennsylvania if three conditions are met.⁸

- The clause must not contravene public policy.
- The contract must be between persons⁹ concerning their private affairs¹⁰.
- Each party must be a free bargaining agent so the contract is not one of adhesion.

Even if the clause meets the three requirements for validity, it may still be unenforceable unless the language of the parties is clear that a person is being relieved of liability for his or her own acts of negligence.¹¹

Public Policy Exception

As a matter of public policy, Pennsylvania courts will uphold a pre-injury release of liability applicable to negligent conduct¹² but will not enforce such an agreement as applied to reckless or intentional conduct.¹³ It is unclear whether a properly worded release is effective for claims of gross negligence.¹⁴

Neither this guide nor the [Model Release Agreement](#) attempts to untangle the myriad of fact patterns and court decisions to explain what acts do or do not constitute gross negligence and whether those acts ought to be excluded on public policy grounds from a pre-injury release. By its terms, the model applies to conduct which, under Pennsylvania law, may be the subject of a pre-injury release. That may or may not include gross negligence depending upon future court decisions on the issue.¹⁵

Free Bargaining Agent

As discussed above, the contract terms of a release document may be non-negotiable. Activity Participants are, nevertheless, free bargaining agents if, having the opportunity to read and understand the release agreement, they choose to participate in the Activity.¹⁶

Clear Language

The language of the risk-shifting agreement must be clear to be effective. In particular, drafters must pay particular attention to the following:

- The fact that the signer is entering into a contract; for example, the heading on the model: "This is a Contract. Read it!"
- The kinds of conduct included in the release; for example: "negligence or any other conduct for which it is not against public policy to obtain a release."¹⁷

- Those entitled to the benefit of the release; for example, “ABC Corp., its owners, operators, officers, agents and employees”. The model also includes the landowners if not otherwise included as a named Sponsor.

Releases Signed By Or On Behalf of Minors

Release by Minor Ineffective

In Pennsylvania, a minor is a person under the age of eighteen. A contract made by a minor is voidable at the minor’s discretion, meaning that the contract is valid and enforceable until the minor takes some affirmative act to disavow the contract. Courts that have addressed the issue of whether or not a release is effective for the claim of a minor have held that it is not.¹⁸ Thus, there is little benefit to obtaining a release from a minor. However, a release signed by the minor’s parent or guardian may be worthwhile.

Release by a Parent or Guardian for a Minor May Be Worthwhile

A parent or guardian does not have the legal capacity to waive the rights of the child by signing a release agreement. If a child participating in an Activity is injured, the parents or guardians have the right to sue on the child’s behalf and, even if they do not timely exercise that right, when the child turns 18, the child can still sue on account of the injury even if the suit would otherwise have been time barred.¹⁹

Nevertheless, it is worthwhile to obtain a release from parents or guardians because, if they pay the child’s medical expenses, they can assert a claim for reimbursement from the Sponsor. This claim is separate from the child’s and may be waived by a release.²⁰

Releases and RULWA

RULWA provides immunity to those who make their lands available for recreational use as explained in the [Pennsylvania’s Recreational Use of Land and Water Act](#) guide. Releases can furnish protection from liability beyond the scope of RULWA.

Who Is Protected?

RULWA protects landowners and others having an interest in or control over the property. The term *Sponsor* (as defined in the [Model Release Agreement](#)) covers a wider range of persons involved in arranging and supporting the Activity who may have no interest at all in the land or control over its condition.

Free of Charge

RULWA protection does not apply if a fee is charged for access; however, it is not always clear how that rule applies to particular situations. For example, are the owners of land made available for a field trip protected if Activity Participants make a payment to Sponsor to reimburse travel and other expenses of a field trip? Does RULWA continue to apply if an annual membership fee is collected by a hiking or snowmobiling club to fund trail maintenance? The [Model Release Agreement](#) will apply whether or not a payment of any kind is received by landowners or other Sponsor.²¹

Improved or Not

Some courts have interpreted RULWA as not applicable to injuries resulting from unsafe conditions *within improvements or on or near improved areas*, for example, within a building or on a basketball court.²² The [Model Release Agreement](#) affords protection whether or not the Activity includes the use of improvements or occurs on or about improved land.

Scope of Protection

The Activity described in the release agreement may include off-site travel included in the Activity; for example, an Activity described as “bus trip to Hawk Mountain”. RULWA only provides protection for claims associated with entry onto the property.

Different Standards of Protection

RULWA protection applies unless the landowners *willfully or maliciously* fail to warn of dangerous conditions. A release agreement will not protect persons who engaged in *reckless or intentional* conduct; and, as discussed earlier, may or may not apply to grossly negligent conduct.

Release of Liability

RULWA's *willful or malicious* language is not synonymous with the terms *reckless, intentional* or *grossly negligent* but an explanation of the differences is beyond the scope of this guide. The important point here is that, if the incident is at least arguably covered by RULWA, the protection of that statute should be raised as a defense in addition to the protections offered by the release agreement. Conduct (perhaps gross negligence), if excluded by law from the protections of a release agreement, may be covered under RULWA.

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Conclusion

Releases are useful tools to protect organizations sponsoring or hosting recreational and other activities from the potential costs of litigation when accidents occur.

Related Resources at ConservationTools.org

Library Categories

[Liability Associated with Recreational Use](#)

Featured Library Items

[Model Release Agreement](#)

Related Guides

[Indemnity Agreements and Liability Insurance: Protection from Claims Brought by Third Parties](#)

[Pennsylvania's Recreational Use of Land and Water Act: Statutory Protection for Property Owners Who Open Their Land to the Public](#)

[Reducing Liability Associated With Public Access](#)

Experts

[Patricia L. Pregmon, Esq.](#) Pregmon authored this guide and has helped scores of clients achieve their goals.

Disclaimer

Submit Comments and Suggestions

The Pennsylvania Land Trust Association would like to know your thoughts about this guide: Do any subjects need clarification or expansion? Other concerns? Please contact Andy Loza at 717-230-8560 or aloza@conserveland.org with your thoughts. Thank you.

Acknowledgements

[Patricia L. Pregmon](#), attorney at law, is the primary author, and [Andrew M. Loza](#), the contributing author and editor.

The Pennsylvania Land Trust Association published this guide with support from the William Penn Foundation, the Colcom Foundation and the Growing Greener Program of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.



Colcom Foundation

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¹ Sometimes this document is entitled *Release* or *Waiver*. For clarity, this guide uses the term *release* to identify one of the operative provisions (one party relinquishing or handing over its rights to another) included in a document referred to as the *release agreement*. The release agreement is a contract evidencing the meeting of the minds between the parties regarding potential liability that may arise in the course of an activity or event that has not yet occurred.

The word *waiver*, while similar and, in some respects, overlapping with the word *release*, usually applies to claims that already exist and which one party agrees not to assert against the other at least for a period of time. For example, the [Model Grant of Conservation Easement and Commentary](#)

discusses circumstances in which the Holder may consider a temporary Waiver of its enforcement rights due to exigent circumstances. Holder is not giving up its rights, it is only agreeing not to invoke them for a period of time. Thus, the word *waiver* rather than *release* is appropriate for that purpose.

² A post-injury covenant not to sue is sometimes used as an alternative to a release in cases where a release of one person partly responsible for an accident may unintentionally release another.

Example: The bus carrying Activity Participants to a field trip destination is involved in an accident and injuries are sustained. Activity Participant is not interested in pursuing recovery against the Sponsor, only the bus company, but counsel raises a concern that if Activity Participant signs a release applicable to the Sponsor, the bus company may argue that the release operates to its benefit as well. Instead, counsel suggests a covenant not to sue as a preferred alternative when a release may have undesirable consequences.

³ A release may operate to transfer the rights of one party to the other to use. *See*, for example, the provision for use of images in the “Other Contract Terms” section of this guide.

⁴ *Chepkevich v. Hidden Valley Resort L.P.*, 607 Pa. 1, 2 A.3rd 1174 (Pa. 2010) (referred to as “Chepkevich”); *Tayar v. Camelback Ski Corporation*, 47 A.3rd 1190 (Pa 2012) (referred to as “Tayar”).

⁵⁵ While a signed release agreement is *highly* desirable, it is not strictly necessary if a contract may be implied from the facts; for example, a sign at the entry to a trail stating that

THIS IS A NATURAL AREA AND IS NOT INSPECTED OR MAINTAINED FOR PUBLIC SAFETY. IF YOU CHOOSE TO ENTER, YOU ASSUME ALL RISK OF INJURY AND RELEASE ANYONE HOLDING AN INTEREST IN THE AREA FROM ALL LIABILITY FOR YOUR INJURY.

A court may find that the sign constituted an offer to allow entry on certain terms (assumption of risk and release of liability); the offer stipulated that entry constituted acceptance of those terms; thus, the offer was accepted and a binding contract formed by the *act* of entry regardless of whether a document was signed.

⁶ For example, a Sponsor located in a rural, undeveloped county may believe that local residents are more likely to appreciate the inherent dangers of accessing wild lands. By choosing its own county as the forum for litigation, the

Sponsor eliminates other more urbanized and developed counties as potential sites for the court case.

⁷ The issues raised in this section are germane to validity and enforceability of release agreements generally. The legal rules developed to determine the issue will differ from state to state; thus, users of this guide or the [Model Release Agreement](#) outside of Pennsylvania must consult with counsel in their own state.

⁸ Tayar.

⁹ A *person* may be an individual or a legal entity such as a corporation.

¹⁰ The term *private affairs* presumably excludes governmental action as the subject of a release governed by the rules developed by Pennsylvania courts. As explained in the guide [Reducing Liability Associated With Public Access](#), municipalities and other governmental entities are afforded statutory protections under Pennsylvania law.

¹¹ Green, Nancy, "Drafting Exculpatory Releases after Chepkevich and Tayar", *The Legal Intelligencer*, July 26, 2013. As discussed in the "Legal Considerations" section, clarity of language is a key element to craft a legal, binding and enforceable release agreement.

¹² Tayar.

¹³ Tayar.

¹⁴ Emory, Hugh, "[Releases of Liability are Better Than You May Think](#)", *Cipriani & Werner, P.C. Journal*, (referred to as "Emory"). The author comments that "[t]he language of the majority opinion [in Tayar] arguably supports the position that gross negligence, as being a type of negligence, would be covered, whereas recklessness, which is more akin to intentional conduct, is not covered."

¹⁵ A Sponsor may narrow the coverage provided by the default provision in the [Model Release Agreement](#) to exclude gross negligence but, before doing so, the Sponsor should consult with counsel and consider whether it may be more prudent to defer, until the facts surrounding a specific occurrence of alleged gross negligence are known, the decision of whether to offer compensation to the claimant.

¹⁶ In Chepkevich, a release included in a non-negotiable Season Pass Agreement for access to a ski area was held to be effective and barred all of the injured skiers claims against the ski area.

¹⁷ Emory.

¹⁸ Emory.

¹⁹ In 1996 in Michigan a 10-year-old girl was injured when another child jumped into a swimming pool on top of her.

The mother agreed not to sue in exchange for a \$3,275 settlement with the YMCA where the injury occurred. However, when the girl turned 18, she filed a lawsuit against the YMCA. The court ruled that the parent "had no authority, merely by virtue of being a parent, to waive, release or compromise claims by or against the parent's child." In other words, the mother did not have the legal authority to sign away the child's rights, and the YMCA was still liable for the negligent act. Eric Eilerman and Dr. Peter Titlebaum, "[Understanding Liability Waivers](#)", Recreation Management, viewed at http://www.recmanagement.com/feature_print.php?fid=200908gc01 on 11/18/2013.

²⁰ Parents or guardians can waive their own rights to reimbursement but, if expenses were paid by Medicaid, the Commonwealth of Pennsylvania Department of Public Welfare has its own right to reimbursement unaffected by the parents' or guardians' waiver.

²¹ The [Model Release Agreement](#) includes the statement "I WILL NOT claim that I paid any consideration for participating in the Activity or entering the Property for recreational purposes." That statement is included as the default on the assumption that nonprofit organizations will use the model for Activities that they sponsor free of charge in furtherance of their mission. The statement must, of course, be deleted or corrected to reflect actual circumstances.

²² See the guide [Pennsylvania's Recreational Use of Land and Water Act](#) for a discussion of this complex subject.