Liability Waivers

I. Nature of the Tool

Often private landowners are unwilling to open their land for public access because of liability issues: landowners fear that they might be held liable to those injured while using the owner's property for recreational purposes. However, all states have some sort of legislations protecting landowners who hold their property open for free public recreational uses. The underlying policy of these "Recreational Use" laws is that the public's desire for access to recreational land has exceeded the ability of local, state, and federal governments to provide such areas. These laws are intended to encourage landowners to help meet the public access need. The basic mechanism of recreational use laws is the waiver of liability. Although the laws vary among the states, they generally relieve the landowner of any duty to keep his land safe, so long as the owner does not charge a user fee.

II. Relationship to Waterfronts

While liability waiver laws apply generally to privately owned lands, they hold special importance for waterfront communities. Because access to waterfront property is being limited at a faster rate than public access to other areas, recreational use waivers are a critical means to provide the much needed access. Liability waiver laws can apply to river, lake and ocean-front properties, as well as the waters themselves.[1]

III. Pros and Cons

Legislation that alters the duty of care owed by property owners to visitors need only be a reasonable exercise of the police powers to be constitutional.[2] Access to the water has been upheld as constitutional as supporting public health and welfare. Thus, recreational use and liability waiver laws are constitutional.

Liability waiver laws do not remove all duties owed by property owners. Some claims remain actionable despite the waiver laws. A number of state statutes do not apply to negligent supervision[3] or attractive nuisance.[4] Most statutes specifically state that willful or malicious actions are not immune from liability.[5]

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[1] Lonergan v. May, No. W.D. 58498 (Mo. App. W.D. 2001) (the waterway where the boating accident occurred was entitled to the immunity protection of the Recreational Use Act because the primary purpose of the land was recreational).

[2] *See* Abdin v. Fischer, 374 So. 2d 1379 (Fla. 1979) (finding that Fl. Stat. §375.251 did not violate Fla. Const. art. 1, §21).

[3] *See* Dickinson v. Clark, 767 A.2d 303, 306 (Me. 2001) (finding that a negligent supervision claim was not precluded by the states recreational use statute).

[4] *See* N.C. Gen. Stat. §38A-4 (1999); City of Indianapolis v. Johnson, 736 N.E. 2d 295, 299 (Ind. Ct. App. 2000). *But c.f.* WIS. Stat. Ann. §895.52 (specifically stating the attractive nuisance doctrine is not available against property owners who qualify under the recreational use statute).

[5] *See* FL Stat. 375.251; N.J. Stat. §2A-42A-4.

Determining which entities are entitled to protection under the liability waiver law is often an issue. In Florida, the liability waiver statute has been interpreted to apply only to individuals and to municipalities but not to counties.[6]

V. Best Policy Practices

Florida statute 375.251 is an excellent example of standard recreational use and liability waiver statute. The purpose of the statute is to encourage private landowners to make their land, including water areas, available to the public. Limiting the landowners' liability to visitors and third persons who are injured by the action of other persons on the property or the property itself is the incentive. The statute limits liability by providing that an owner owes no duty of care to keep the land safe or to give warning to those entering the property. However, the statute does not provide limited liability when there is any charge or if any part of the land is used for commercial purposes. Further, limited liability is not available for people who deliberately, willfully or maliciously injure visitors or property. The statute neither creates nor increases the liability of these people.

[6] Cox v. Community Services Dep't, 543 So. 2d 297 (Fla. 5th DCA 1989); McPhee v. Dade County, 362 So. 2d 74 (Fla. 3d DCA 1978).