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Anthony J. Sebok

Benjamin N. Cardozo School of Law, sebok@yu.edu

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Just Kidding? The Problem of Unenforceable Waivers of Liability

Author : Anthony Sebok

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Edward Cheng, Ehud Guttel & Yuval Procaccia, *Unenforceable Waivers*, 76 **Vand. L. Rev.** ___ (forthcoming, 2023), available at [SSRN](#).

In their forthcoming article, *Unenforceable Waivers*, Edward Cheng, Ehud Guttel, and Yuval Procaccia (“CGP”) ask an embarrassing question: Why do businesses require customers to sign waivers that have been struck down by courts in published opinions that are available not only to their lawyers but also to their customers? In this Jot, I praise CGP for their sharp eye—this is torts scholarship at its best—and then evaluate their suggestions for reform.

First, the question: Killington Ski Resort is the defendant in a well-known Vermont Supreme Court case that adopted a pro-plaintiff interpretation of the public policy limitation on express assumption of risk. Why does Killington still ask its customers to sign the waiver struck down in that case ([Dalury v. S-K-I Limited](#))? I teach this case, as do many others, as a clear statement of Vermont law. In classroom discussion, I begin with the assumption that whatever one thinks of *Dalury*'s common law reasoning or policy implications, the Vermont Supreme Court was “wrong clearly even when [it] was clearly wrong” (*pace* H.L.A. Hart).

CGP cite other examples of states including Connecticut, Hawaii, Tennessee, and Minnesota, whose courts have issued clear rulings that are ignored by businesses, and quote from current waivers that are obviously unenforceable. This phenomenon is arguably even more flagrant in states where such waivers are forbidden by statute—such as Louisiana (all waivers) and New York (health clubs).

CGP argue that businesses secure unenforceable waivers because they face a straightforward risk/reward calculation: there is no downside and some potential upside to presenting customers with these unenforceable waivers. It typically costs nothing for the business to ask for the waiver. (Note that this is not always true—in another case I teach, [Jones v. Dressel](#), the business “purchased” the customer’s waiver by offering a \$50 discount.) The benefit, while speculative, is worth something if it is realized. The chief benefit is that some customers who would otherwise bring a lawsuit won’t because they falsely assume that the waiver bars their claim. Let’s call this the “abandonment benefit,” since it assumes that the customer abandons her claim based on her awareness of the putative waiver. Interestingly, CGP offer an additional explanation which is parasitic on the abandonment benefit: based on the same logic, insurers encourage their insureds to incorporate unenforceable waivers in their contracts and may even require them to do so. (P. 52 n.160.)

The cost of unenforceable liability waivers, according to CGP, is that they impair both deterrence and compensation, two central functions of negligence law. (P. 13.) Defendants will be under-incentivized to invest in safety, and victims of unreasonable conduct will not receive fair compensation. Before we accept these arguments, it is worth stopping and asking about the real-world impact of unenforceable waivers. It is possible, for example, that Killington’s investment in safety would be the same regardless of how many waivers they collect, simply because Killington is still unwilling to take the risk of being sued and losing (after all, it knows the waivers cannot hold up in court), and so it may be cost-effective to invest in the safety required by the law *and* view the abandonment benefit as a windfall.

For the abandonment benefit to make a difference to a defendant’s net liability costs *ex post*, a lot rides on the hope that the customer will indeed self-edit after an accident by declining, *because of the waiver*, to ask a lawyer if she has a case. This strikes me as implausible, since it assumes that customers even know about the waivers, much less have read and understood them.

Still, the mere existence of unenforceable waivers is a problem, regardless of whether they actually make a difference in tort law's capacity to deter or compensate. If nothing else, they misstate the law. From my point of view, even if unenforceable waivers did nothing more than marginally increase cynicism about the law among lawyers and business people they are worth eliminating. Therefore, it is worth reviewing CGP's proposals to get rid of them.

The first proposal is to use contract law's doctrine of non-severability to police the waivers, which are, after all, invalid portions of the contract between the consumer and the business. CGP suggest that courts hold the entire contract invalid, thus penalizing the business that might otherwise have hoped that the worst possible outcome would be the severance of the offending waiver from the contract. However, as CGP admit, relieving the consumer of her duty to pay under the contract is not much of a penalty in most waiver cases. This proposal will not have much of an incentive effect *ex ante*, given that the sums at issue in the performance of the contract are usually very small compared to the tort liability the waiver is designed to eliminate.

The second proposal is to legislate civil penalties for businesses that knowingly adopt unenforceable waivers. CGP provide a few examples where this public law solution has already been adopted, such as Massachusetts, which imposes a \$2500 penalty against health clubs that ask customers to waive their right to sue for injuries caused by unsafe conditions. (P. 44.) Consumers thus act as "private attorney generals," seeking statutory damages against businesses with whom they contract who have clearly violated state law in connection with their deal. CGP recognize, however, that civil penalties, like the threat of the non-enforcement of a contract in its entirety, may not be a sufficient incentive, given the bet that the businesses are taking, which is that the waiver will deter a potentially costly tort judgment.

Their third proposal solves the incentive problem: it is to allow courts to impose punitive damages where, in addition to acting negligently, the defendant also asked the plaintiff to waive her right to sue in contract before the accident. Left unclear in this proposal is whether the right to seek punitive damages would be triggered by a defendant *invoking* the waiver in the underlying tort action by the plaintiff, or simply by the fact that the defendant asked the plaintiff to sign the waiver at the outset of the relationship. I suspect that, given the deterrence goals articulated by CGP, they intend the latter.

I have some qualms about this proposal. In the common law of most states in which they are awarded, punitive damages must be causally connected to conduct that contributed to the plaintiff's injury. To be sure, in a typical punitive damages case, the defendant's conscious indifference to the plaintiff's rights may not increase the plaintiff's harm; nevertheless, punitive damages can be imposed because the indifference was expressed in the doing of the harm. But in the examples CGP offer, it is not obvious that the existence of the unenforceable waiver *caused* the defendant's tortious conduct—there is no reason to think that, but for the waiver, the defendants would have exercised the care required by the law.

My qualms do not extend to those procedural doctrines, like the remedy for spoliation or the tolling of statute of limitations, that provide the plaintiff with a benefit that enables the plaintiff to prove the alleged tortious wrongdoing. But the reason the plaintiff receives such a benefit is not solely to punish the defendant. Rather, the benefit corrects a secondary wrong that makes it harder to know whether the defendant committed the primary wrong. By contrast, adding punitive damages after a plaintiff proves negligence even when the defendant's waiver played no role in the plaintiff's case strikes me as unmoored from the legitimate purposes of a tort remedy.

Even if CGP can meet my concerns, I think that there is a fourth option which they should consider. As an aside, they mention that public law regulation might have the beneficial effect of reminding the lawyers who advise the businesses that they should not be recommending unenforceable contract terms to their clients. (P. 45.) But this point can be taken further. The real culprits in the story told by CGP are the lawyers (including the insurance company lawyers) who advise businesses like Killington to require customers to sign unenforceable waivers. There is a good chance that some clients—especially the smaller businesses—are not aware of the precedents that prohibit the waivers in their contracts and rely on their lawyers to inform them of their obligations. Furthermore, laypeople may not appreciate that

common law contract principles impose duties as binding as public law, but their lawyers should certainly understand this.

Furthermore, Model Rule of Professional Responsibility (MRPC) 1.1 requires a lawyer to provide competent legal advice to their clients, and it is hard to understand under what circumstances it is competent legal advice to encourage a client to include clearly unenforceable terms in a contract drafted on the client's behalf. The lawyer's wrongdoing goes beyond their breach of duty to their clients (who may not care unless the contracts are struck down). MRPC 4.1 prohibits a lawyer "knowingly mak[ing] a false statement of material fact or law to a third person [in the course of representing a client a lawyer]." MRPC 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," including, one might assume, the communication to the public that the law is something other than it is.

It may be that the threat of professional discipline is insufficient to prevent businesses from adopting waivers that are clearly inconsistent with existing precedent. Clearly, much turns on how seriously the sorts of lawyers who draft contracts for these businesses take the threat and whether it would be easy for those businesses to hire less scrupulous lawyers if the first group were deterred. But the advantage of focusing on the lawyers is that this places the penalty in exactly the right place. The wrong of including unenforceable waivers is that they constitute a flouting of the rule of law by lawyers who know better. CGP have done us a great service in identifying a problem in our midst, and that problem is lawyers who lack respect for the clear requirements/prohibitions of common law declared by the courts.

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