

Rule 81 – Discussion of Waiver or Release of Liability vs. “Indemnification” or “Hold Harmless” Agreements

Introduction

By their very nature, sporting activities like sailing involve an increased risk of personal injury and property damage. Therefore, an organizer of a sporting event such as a sailing regatta could be assuming a significant potential liability when putting on an event. To keep from creating an undue burden on the organizer, entrants in such events are typically asked to waive their right to sue the organizer or to release the organizer or to indemnify and hold the organizer harmless from its responsibility for liabilities that the law might impose on the organizer by virtue of the entrant’s participation in the event.

While waivers and releases are specifically contemplated by *The Racing Rules of Sailing*, US Sailing has prescribed against hold harmless and indemnification agreements in RRS 81 because of the onerous effect such agreements can have on a competitor. The following discussion explains the concepts of indemnification and hold harmless agreements in relation to the US Sailing prescription and describes the issues that relate to waivers and releases.

What is an "Indemnification" or "Hold Harmless Agreement"?

An indemnification or hold harmless agreement is an agreement by one person (or entity) to be financially responsible for amounts another person (or entity) is legally obligated to pay. The two types of provisions are essentially equivalent. For example, in connection with a school field trip, a parent might be asked to sign the following indemnification clause:

I agree to indemnify the ABC School, and its teachers and administrators, for any costs or liabilities which they may incur as a result of my child's participation in a field trip to the XYZ Art Museum.

Or, a similar hold harmless clause might be worded:

I agree to hold harmless the ABC School, and its teachers and administrators, from any costs or liabilities which they may incur as a result of ... [same as indemnification clause].

Such a clause differs from a waiver or release because it may require the person who agrees to it to be responsible for damages or injuries suffered by someone else. For example, suppose the school bus on which the children ride to the museum is struck by lightning. Under a waiver or release, the parent would have no right to sue the school for any injuries to his or her child and would have no legal obligation to the school for damage to the bus.

However, under an indemnity or hold harmless clause, the parent might have some responsibility for the costs to fix the bus (since the bus would not have suffered damage were it not for the field trip). Obviously, the costs of fixing the bus should be borne by the school and not the parents unless the parents have specifically agreed to be responsible for damages to the bus.

Indemnification or Hold Harmless Agreements at Sailing Events

If a sailor signs an indemnification or hold harmless clause as part of an Entry Form for a regatta, he or she could be assuming responsibility for significant liabilities of the organizer of the regatta, depending on how the indemnification or hold harmless clause is worded. For example, with a broadly worded clause, an entrant might be liable for the costs of a replacement RC boat if the RC boat were to sink while running an event. Although most courts would find that such an agreement is against public policy and unenforceable when applied in that kind of situation, there is a chance that a court would rule that a competitor must pay in such a situation. The competitor may or may not have the financial ability, either personally or by way of insurance, to meet this obligation.

Obviously, those costs should be the sole responsibility of the organizer (unless the entrant actually caused the RC boat to sink by hitting it!). For these reasons, the US Sailing Board of Directors has determined that an indemnification or hold harmless clause constitutes an unreasonable restraint on a competitor's right to compete and is inappropriate as a condition to entering a sailing event. While it is acceptable for the organizer of an event to include a waiver or release in its Entry Form, it is not acceptable to include an indemnification or hold harmless clause.

US Sailing Rule 81

To implement its policy against the use of indemnification and hold harmless clauses in entry documents for sailing events, US Sailing has the following prescription, rule 81, to the RRS:

81 INDEMNIFICATION OR HOLD HARMLESS AGREEMENTS

US Sailing prescribes that the organizing authority shall not require a competitor to assume any liabilities of the organizing authority, race committee, protest committee, host club, sponsors, or any other organization or official involved with the event. (This is commonly referred to as an 'indemnification' or 'hold harmless' agreement.) Go to rules.ussailing.org and click the "Indemnification (Rule 81)" link for more information.

Any language in entry documents which includes the word "indemnify" or the phrase "hold harmless" (or similar concepts) is prohibited by rule 81. A competitor may not be denied entry for refusing to sign an Entry Form that includes such language since, under rule 81, the organizing authority is prohibited from requiring the signing of such a clause as a condition of entry to the event.

Exceptions to the Policy Underlying Rule 81

Note that there are at least two circumstances where indemnity or hold harmless language may be appropriate or necessary in connection with a regatta. First, indemnity and hold harmless language is common as part of a boat charter. So, when an entrant to a regatta is also chartering a boat, indemnity or hold harmless language may be appropriate in connection with the boat charter but not the race entry.

Second, the organizing authority may be required to include indemnity or hold harmless language in the entry documents because of a contract, such as a lease, or local statute. For example, a community sailing center might be obligated to include indemnity or hold harmless language in its Entry Form under its lease from a city or other governmental entity. Or a club might be obligated to include indemnity or hold harmless language in its Entry Form as a condition of being allowed to use a city beach for launching boats. In such a case, the use of an indemnification or hold harmless clause may be required in order to hold the event.

To accommodate such circumstances, rule 81 may be changed by the notice of race and sailing instructions (i.e., it is not listed in the US Sailing prescription to rule 88.2 as a prescription that cannot be changed or deleted). To effect such a change, a simple statement ("Rule 81 is changed by adding 'This rule does not apply to boat charters.'" or "Rule 81 shall not apply to this event.") needs to be included in the notice of race and sailing instructions. However, it is recommended that organizing authorities not change or delete rule 81 unless absolutely necessary.

What is a "Waiver or Release of Liability"?

A "waiver or release of liability" is an agreement by one person (or entity) not to enforce his or her legal rights against another person (or entity). More specifically, a "waiver" is an agreement by a person not to sue another while a "release" is an agreement by a person that he or she no longer has a right to sue another. The two types of provisions are essentially equivalent. For example, in connection with a school field trip, a parent might be asked to sign a waiver as follows:

I waive any liabilities that the ABC School, and its teachers and administrators, may have to me or my child as a result of any injury to my child because of my child's participation in a field trip to the XYZ Art Museum.

Or, a similar release might be worded:

I release the ABC School, and its teachers and administrators, from any liabilities that they may have to me or my child because of my child's ... [same as waiver].

If the child is injured on the field trip and the law would (or might) hold the ABC School (or its agents) liable to the parent for such injuries, the waiver or release means that such liabilities will be ignored (i.e., the parent has given up any legal right to sue over such injuries and therefore may not do so). The effect of the waiver or release is to shift some of the risk of injury (i.e., legal exposure) associated with the field trip from the ABC School to the parents. In effect, each parent agrees to assume any risks inherent with his or her child's participation in the field trip. This is true regardless of whether the parent has the financial ability personally, or by way of insurance, to assume such risk. By reducing its legal exposure, the ABC School hopes to reduce the costs associated with conducting field trips (if the ABC School chooses to buy insurance to cover its legal exposure, the cost of such insurance should be somewhat lower as a result of the reduced liability). Note that if a teacher were to intentionally harm the child, the ABC School would still be liable to the parent for that injury – some liabilities may not legally be shifted by a waiver or release.

Waivers and Releases at Sailing Events

The RRS recognize the inherent risk involved in sailing and provide the following language (Appendix KG 22.1 and LG 30.1) to go in the Notice of Race and Sailing Instructions for an event:

RRS 3 states: 'The responsibility for a boat's decision to participate in a race or to continue to race is hers alone.' By participating in this event each competitor agrees and acknowledges that sailing is a potentially dangerous activity with inherent risks. These risks include strong winds and rough seas, sudden changes in weather, failure of equipment, boat handling errors, poor seamanship by other boats, loss of balance on an unstable platform and fatigue resulting in increased risk of injury. **Inherent in the sport of sailing is the risk of permanent, catastrophic injury or death by drowning, trauma, hypothermia or other causes.**

However, in the United States such a statement in the NOR or SIs may not be enough to be effective as a binding waiver or release under the state law where an event is held. So, most organizing authorities include additional waiver or release language in the Entry Form that must be signed by the skipper of each entering boat. A boat owner often has an insurance policy that covers the risks inherent in sailing in a regatta so he or she need make no special arrangements. By making clear that the risk of a competitor's participation in a regatta is to be borne by the competitor, the yacht club or other organization attempts to reduce its legal exposure and potential costs.

US Sailing Recommendations to Organizing Authorities

The recommendations below may not be appropriate for use by all clubs or organizations.

You MUST consult with your own legal advisor before using any of the recommendations. US Sailing is not responsible for any damages or liabilities that result from the use of these recommendations.

In order to help yacht clubs and other organizations comply with rule 81, US Sailing has some suggestions on how to handle the waiver or release issue:

A. Consider using the following language in your Notice of Race and Sailing Instructions:

Sailing is an activity that has an inherent risk of damage and injury. Competitors in this event are participating entirely at their own risk. See RRS 3, Decision to Race.

The race organizers (organizing authority, race committee, protest committee, host club, sponsors, or any other organization or official) will not be responsible for damage to any boat or other property or injury to any competitor, including death, sustained as a result of participation in this event. By participating in this event, each competitor agrees to release the race organizers from any and all liability associated with such competitor's participation in this event to the fullest extent permitted by law.

B. Include in your Entry Form some kind of simple waiver and release language. For example, an Entry Form might include a paragraph along the lines of the following:

To the fullest extent permitted by law, I hereby waive any rights I may have to sue the race organizers (organizing authority, race committee, protest committee, host club, sponsors, or any other organization or official) involved with the event with respect to personal injury or property damage suffered by myself or my crew as a result of our participation in this event and hereby release the race organizers from any liability for such injury or damage.

C. As an alternative to B above, you might include in your Entry Form a series of more specific paragraphs such as the following:

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES. YOU SHOULD GET APPROPRIATE LEGAL OR OTHER ADVICE BEFORE SIGNING IT.

1. My crew and I recognize that sailing is an activity that has an inherent risk of damage and injury associated with it. We have read RRS 3, Decision to Race and hereby acknowledge and agree that we are participating in this event entirely at our own risk.

2. I acknowledge and agree that neither the organizing authority nor the race committee, nor their members, will be responsible for:

(a) any damage to the entered boat or my other property, or

(b) any injury to myself or my crew, including death, sustained as a result of the participation of myself, my crew and the boat in this event.

3. I hereby waive any rights I may have to sue the race organizers (organizing authority, race committee, protest committee, host club, sponsors, or any other organization or official) with respect to personal injury or property damage suffered by myself or my crew as a result of our participation in this event and hereby release the race organizers from any liability for such injury or damage to the fullest extent permitted by law.

4. I have taken all necessary steps to ensure that myself, my crew and the entered boat are adequately prepared for all possible contingencies, including appropriate safety equipment as may be required by law or that a prudent seaman would consider advisable.

5. I understand this document has important legal consequences and have consulted such legal and other advisors as I deem appropriate before signing.

Please be advised: You MUST consult with your own legal advisor before using any of these recommendations. US Sailing is not responsible for any damages or liabilities that result from the use of these recommendations.