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Liability Waivers Are they worth the paper they're printed on?

Most pilots and aircraft owners are in the upper percentiles in income and net worth. Naturally, we are averse to risk and want to minimize the likelihood that our personal assets will be subject to our aviation liabilities. While a solid insurance policy is always on the front lines, many pilots ask: “*Should I also have my passengers sign a liability waiver?*” As with any legal question, the answer is usually “maybe”.

Which Law Governs?

Although federal governments have exclusive jurisdiction to regulate aviation, issues of liability and damages are determined by local courts. So, notwithstanding any FARs of the United States (or other nation’s counterparts), the question of whether a pilot was negligent on a particular flight will be adjudicated under the laws of the jurisdiction where the accident (or alleged negligence) is alleged to have occurred. So, it doesn’t matter that the pilot was from Florida, the aircraft was owned by a Delaware LLC, or that the dead passengers used to live in New York. If the aircraft crashed while on an instrument approach in Georgia, Georgia law will apply and that is usually where the lawsuit will take place. If the pilot (or their estate) seeks the protections of a liability waiver, the enforceability of that waiver will usually be governed by where it was signed by the passenger (which might be different the location of the accident). If there is a forum selection clause in the waiver (most have one), that forum’s laws will govern.

Can a passenger waive their rights to sue?

Fundamentally, our society does recognize the validity of liability waivers for most activities. In theory, all waivers are presumed to be valid unless a court declares its terms to be “unconscionable”. In sum, the burden is on the person who signed the waiver (or their estate) to prove the latter. In general, the more voluntary the activity, the more likely a waiver will be upheld. In aviation, waiving claims against a pilot for a sightseeing flight has a greater likelihood of being upheld than someone being airlifted for an emergency medical treatment.

What Other Factors Apply?

Courts typically look at the following other factors to determine whether a waiver is “unconscionable”:

- The length of time the person waiving their rights had time to review the waiver and seek independent legal counsel. If you intend to present a waiver to a passenger, suggest you email it a week in advance rather than showing it to them for the first time at the aircraft hangar.
- The substance of the rights being waived. For example, a total waiver of all claims and all recovery (\$0.00) would be more likely to be found unconscionable than a waiver that limits a passenger’s recovery to the limits of the aircraft’s \$1,000,000 insurance policy.
- Financial incentive. A friend who gets a free ride will have greater difficulty alleging unconscionability than someone who pays a pilot for their services (even under Part 91). If you are providing both pilot services and the aircraft for money that exceeds the pro-rata share of expenses, you are now a Part 135 operation (let’s not go there).

What Can’t Be Waived?

Again, local laws will govern here, but in general:

- Gross negligence cannot be waived. If you fly while intoxicated, nothing will protect you.
- Minor children can’t sign waivers, and in most jurisdictions, only the parent or legal guardian can sign for them. So, don’t rely on the Auntie Emma’s signature for her niece.
- If the passenger is taking the flight within the course and scope of their employment, that activity will be governed by labor codes and workers’ compensation law. Rarely will those waivers be upheld. If a passenger is injured, their recovery would be against the employer’s workers’ compensation insurance carrier, who will not hesitate to subrogate against the pilot or aircraft owner. Remember, carrier didn’t sign the waiver, and the passenger can’t waive the carrier’s rights.

So, after all that, should most GA pilots ask their passengers for a waiver? Certainly, there is no penalty for doing so. At the very least, the existence of a solid waiver will cause some personal injury attorneys to think twice about taking the case. However, any possible benefit must be balanced with the negative turn-off factor. Will your friend feel good about flying with you if asked to sign a waiver? Maybe, maybe not.

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