COVID-19 WAIVERS OF LIABILITY

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As businesses, both public and private, are attempting to reopen or remain open during the pandemic while also protecting the public and customers they serve, many are turning to the use of Pandemic Waivers of Liability. By having the public or customers, sign these waivers the entities hope to reduce their liability exposure should someone contract COVID-19 while at the entities' location.

At minimum, pandemic liability waivers offload the responsibility of deciding when it is responsible to open. Unfortunately, the social and ethical purposes of liability waivers may not be applicable to a pandemic. They may make sense for many inherently dangerous activities such as sporting events or recreational events, but the full risks of COVID-19 are not fully disclosable to the person signing the waiver.

Let's first start with what a pandemic liability waiver is: an exculpatory agreement. In most exculpatory agreements, one of two things is stipulated: (1) one party is relieved of any blame or liability arising from the other party's wrongdoing with regard to a particular activity, and/or (2) one party (usually the one that drafted the agreement) is freed of all liability arising out of performance of that contract.

An exculpatory agreement is usually a provision contained in a contract between a service provider and a participant, relieving the service provider from any liability resulting from loss or damage sustained by the participant. The terms "waiver" and "release of liability" are usually used interchangeably. An example of an exculpatory clause is a dry cleaner's receipt that includes a disclaimer purportedly relieving the dry cleaner from any liability for damage to the clothing during the dry-cleaning process. Disclaimers can appear as warning signs posted on playgrounds, sports arenas, constructions sites or other areas involving risk of physical injury ("enter at your own risk" or "use at your own risk").

A typical waiver of liability form may read as follows:

I expressly, willing, and voluntarily assume full responsibility for all risks of any and every kind involved with or arising from my participation in parachuting activities with Company whether during flight preparation, take-off, flight, landing, travel to or from the take-off or landing areas, or otherwise. Without limiting the generality of the foregoing, I hereby irrevocably release Company, its employees, agents, representatives, contractors, subcontractors, successors, heirs, assigns, affiliates, and legal representatives (the "Released Parties") from, and hold them harmless for, all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the parachuting activities....

They include liability waivers, releases of liability, assumption of risk agreements, pre-injury releases, disclaimers of liability, sign postings, etc. Most people are unaware of what rights, if any, they are giving up or waiving, when they sign such exculpatory agreements. For many years, many professionals held the misconception that waivers are not worth the paper they are written on. Over time, this erroneous notion was replaced by the equally erroneous belief that waivers can offer total liability protection for all facility and service providers under all circumstances. Neither belief is correct.

The enforceability of pandemic liability waivers will be determined when the family of someone who signed, got COVID-19, and died tries to sue the entity where they think the virus was contracted. Judges will have to make these decisions. And they cannot easily use previous cases to decide because pandemic liability is unprecedented. The consequences of allowing people to give up their right to sue would be disastrous. But not recognizing waivers (which means allowing suits) does not mean suits will prevail. In many cases, it will be difficult to prove that one got sick at the event in part because of COVID-19's incubation period. A blanket expectation that businesses shoulder the financial burden of continued infection would be just as damaging. So, should waivers really stop lawsuits? No. Will those who sue win? Depends.

A waiver might dissuade someone from suing, but what if you went to an event and came home only to infect your neighbor or grandma? The person who didn't sign the release could sue. But even so, a release may nonetheless be of no force

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and effect if it's contrary to public policy, the business was grossly negligent (e.g., failed to take reasonable precautions), or there is law or other remedy prohibiting them.

Over the last century, each state has developed its own case decisions and legislation about the enforcement of exculpatory provisions in contracts.

California courts have identified six criteria established to identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy:

(1) It concerns a business of a type generally thought suitable for public regulation;

(2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some member of the public;

(3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards;

(4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks her services;

(5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract or exculpation, and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence; and

(6) As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. Tunkl v. Regents of the University of California, 60 Cal.2d 92 (Cal. 1963).

To be enforceable, many states require waivers to be narrowly and clearly drafted to fully notify the parties of the significance of the document and inform them as to the specific nature of what is being waived. In some jurisdictions, the waiver must be a separate document with its own signature line, should not use excessive legal jargon, and should discuss only the risks associated with the activity, and the release from liability due to negligence.

Generally, even if the waiver is held valid, it will apply only to ordinary negligence. California courts have held that such agreements waiving all negligence generally are void on the ground that public policy precludes enforcement of a release that would shelter aggravated misconduct or gross negligence. City of Santa Barbara v. Superior Court, 41 Cal.4th 747 (Cal. 2007)

While Pandemic waivers of liability can potentially have benefit in holding an entity harmless to the person who signed the waiver contracting COVID-19, it remains to be seen whether that waiver of liability will extend to family members or others who contract COVID-19 from the person who signed. In California, it is also important to follow the six requirements outlined in Tunkl v. Regents of the University of California, 60 Cal.2d 92 (Cal. 1963). Negligent acts can never be waived by a waiver of liability so public entities need to ensure they are following the CDC guidelines as well as those guidelines by their local county health agency.