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Will COVID-19 Liability Releases Hold Up?

Examining the Enforceability of Exculpatory Clauses in the Context of an Evolving Pandemic

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COVID-19 liability waivers are an increasingly common feature of life amid the pandemic. But will these waivers hold up in court? Attorneys from Goldberg Segalla's interdisciplinary COVID-19 Task Force examine the typical legal issues surrounding liability waivers, a variety of iterations of COVID-19 liability waivers, and several issues that hint at how courts will treat these documents and the legal claims seeking to challenge them.

Exculpatory Clauses Hit Headlines

Exculpatory clauses are in the news. Yes, exculpatory clauses. In a widely reported development, to register online for the Donald J. Trump for President rally in Tulsa, Oklahoma, you must agree that: "By attending the Rally, you and any guests voluntarily assume all risks related to exposure to COVID-19 and agree not to hold Donald J. Trump for President, Inc.; BOK Center; ASM Global; or any of their affiliates, directors, officers, employees, agents, contractors, or volunteers liable for any illness or injury." In other words, the buck stops with you. Or does it?

While this example of a legal disclaimer is both high-profile and hyped to the point of notoriety, exculpatory clauses with similar language have become an increasingly typical accommodation to the pandemic. Their proliferation may soon make COVID-19 disclaimers ubiquitous and largely overlooked, like so much other fine print that underscores our daily affairs. And yet, even on their face, COVID-19 disclaimers seem to represent a distinct variation on the genre. Certainly this isn't like agreeing to refrain from diving into the Kiddie Pool, or from pumping gas during a lightning storm. In most contexts observed to date, COVID-19 disclaimers represent agreements to accept a little-understood, potentially lethal threat, for the benefit of doing something completely "normal," like listening to a speech, or watching a movie, or eating a burrito in public.

Exculpatory clauses (call them what you will: waivers, disclaimers, releases, acknowledgements) are hallowed, if vigorously debated, legal constructs. When they are enforced by the courts they do indeed stop the buck. When they are disregarded or stricken, though, they allow risk (the heretofore mentioned buck) to be passed.

Do COVID-19 related exculpatory clauses stand apart? Courts are certain to decide the issue, as claims seeking to challenge these waivers across a variety of contexts are inevitable. While the waivers are too new to say for certain, a close examination reveals several issues that do suggest *sui generis* treatment.

Anatomy and Physiology of a Typical Liability Release for Public Attendance at Events

Exculpatory devices for publicly attended events vary by jurisdiction and industry. Although not usually aimed solely at publicly attended events, most states have specific statutory regulations for the use of exculpatory devices. Exculpatory devices are usually an amalgamation of traditional contract principles together with

jurisdictional common law and statutory regulations. These devices generally include varying types of a release of liability and a waiver or covenant not to sue; express assumption of the risk; hold harmless agreements; indemnification or insurance provisions; and informed consent. For events open to the public, exculpatory devices commonly include a combination of waivers (usually in the form of a traditional contract), disclaimers or notice of risk, informed consent, and traditional indemnification/hold harmless agreements. Generally, event exculpatory devices appear on the back of the event ticket (or more commonly today as a "shrink-wrap" or "click-wrap" agreement on the event's ticketing website). They usually refer to the event host's "terms of use," a separate document which includes a more traditional and more comprehensive contract. Event exculpatory devices are generally more effective when narrowly tailored to the risks inherent in the event, such as the danger from foul balls at a baseball game. A well-drafted, and thus more likely enforceable, event exculpatory device will use simple, plain English and avoid legalese as much as possible. A key component of an event exculpatory device is the disclosure of known or potential risks to the event-goer, couched in language that does not limit the device solely to those risks. Today with COVID-19 closures, many remote and virtual events are including exculpatory devices in an effort to mitigate risk.

Legal Issues Commonly Surrounding Releases

Exculpatory devices invite a host of legal issues and each state's common and statutory law varies. Public event exculpatory devices specifically must be catered to the event's target participants and the event's foreseeable risks. Whether or not the event-goer actually reads the exculpatory device or is even aware of it, they can be effective and enforceable. However, such devices are typically contracts of adhesion, not bargained for and solely drafted by the event's host, so courts typically scrutinize these exculpatory devices thoroughly. Courts will generally hold ambiguities against the host/drafter and whether the exculpatory device and the device's language were conspicuous and clear will be a key fact in determining enforceability. The print and font size of the exculpatory device, especially on the back of paper tickets, can be a major obstacle. Most states only allow exculpatory devices for negligent behavior, while risks from wanton, willful, malicious, or criminal acts cannot usually be preemptively released. Over-arching public policy concerns about limiting liability for hosts that open, and profit, from events involving the public make most courts skeptical of broad or overreaching exculpatory devices and invite lawmakers to specifically address certain activities, mainly sporting events. Many states require some specific "magic language" ranging from Indiana's simple "own negligence" requirement to New York's "fullest extent of the law" savings clause. In many states exculpatory devices are affirmative defenses so the burden of proof often lies with the host. Many states will not allow minors, or the parents of minors, to enter into exculpatory agreements and liability for public events, especially those that cater to children or families, often cannot be effectively limited. The logistics in obtaining the exculpatory device are another important factor to be considered, signing, clicking, or otherwise accepting the exculpatory device each time the event is attended is important.

COVID-19 Infection as a Subject of Released Liability

Will COVID-19 strain the viability of an exculpatory device? Almost certainly. Its novelty, including its unclear means of transmission, almost ensure this. Risk, that is to say, a measure of unpredictability, is the essence of exculpatory waivers, releases, and informed consent. But with COVID-19 this measure of unpredictability is pretty much off the scale. Perhaps the closest analogous situations are pre-COVID-19 informed consent forms associated with blood work, invasive procedures, or participation in research studies.

While the language of these familiar exculpatory devices will likely be carried forward to many COVID-19-centric forms, its effect may possibly differ. The ease of COVID-19 transmission through exhaled airborne particles and on frequently touched surfaces, combined with its lethality, make it a truly unique risk. Is the law

willing to conscience multiple fatalities arising from attendance at a meet-the-author gathering at a bookstore that had a sneezing employee but also had exculpatory language at the top of the audience sign-in sheet?

The clarity and specificity of language could be decisive. (See above.) Promoting common sense and situational awareness—like on a ski slope where snow conditions, weather, and visibility constantly change, and where one must keep an eye out for the actions of others—may improve the odds of exculpation. Commercial hosts would do well to blend candor and sincerity (*e.g.*, "despite diligent hygiene measures and compliance with the law we cannot guarantee that infectious transmission will not occur") with tried and true legal verbiage in an effort to craft a COVID-19 exculpatory agreement that a court might find justly enforceable.

While there are likely to be new, untested challenges surrounding any exculpatory device in the COVID-19 context, there is undoubtedly sound reasoning and valid purpose to instituting such measures when hosting public events. At least until there's a vaccine available, that is.

Enforceability Will Hinge on the Language of the Document and the Jurisdiction

As the age-old idiom goes, "the devil is in the details." There is no one-size-fits-all template that can be used equally across all jurisdictions and by all hosts of public events. First, all events are not created equal. By way of example, the types of inherent risks are likely different between an indoor vs. an outdoor event and a gathering of 100 people vs. a gathering of 50,000 people. In order to increase the likelihood of enforceability, any exculpatory agreement should be tailored to the reasonable expected risks of the event. For example, it has long been understood that attendees of a baseball game risk getting hit by a baseball. Indeed, that sort of assumption of the risk is squarely in the nature of the event and a provision protecting the host of the baseball game is likely enforceable. Alternatively, exculpatory language drafted very broadly to include risks that are not inherent on attendance of a baseball game are less likely to be enforceable. Accordingly, it may be prudent to include a severability clause in an exculpatory agreement which will save the remaining provisions of the agreement if part of it is deemed unenforceable. Second, and as referenced above, each state has its own approach to enforceability of exculpatory agreements of this nature. Hosts of public events are well advised to consider any unique approaches of enforceability that may exist in different jurisdictions. Here is a representative clause for a large public event held in New York State:

> **PERSON VOLUNTARILY ASSUMES ALL RISKS, HAZARDS AND DANGERS** incident to the Event and related events, including the risk of personal injury (including death), the risk of exposure to communicable diseases, viruses, bacteria or illnesses, including but not limited to COVID-19, or the causes thereof, sickness, or lost, stolen or damaged property, whether occurring before, during, or after the Event, however caused, and hereby waives all claims and potential claims relating to such risks, hazards and dangers to the fullest extent of the law.

For large entities and promoters that host events in multiple states, tailoring the language to each state would be advisable even for events that are similar in nature.

With all of that said, the wild card in these analyses may be how courts analyze hosting these events in the first place, given what may be a high probability of spreading COVID-19. For example, even assuming the event host follows all federal, state, and local safety and precautionary mandates, a plaintiff could argue that hosting the event in itself is grossly negligent or reckless (a risk from which there is likely no reprieve) despite any precautions taken. Compare a baseball game to a bluegrass festival. While baseball game ticketholders sign off on the assumption of the risk of getting hit by a baseball, the stadium owners still take a precautionary measure

hanging a large net that extends from the backstop down the first and third baselines to cover the areas where the ball is most likely to be hit if it is goes out of play. The effectiveness of the net is obvious and easy to see and evaluate. At a bluegrass festival, though, the effectiveness of a few COVID-19 safety measures (*e.g.*, hand spray, face masks and social distancing), and the venue's ability to compel safe behaviors by attendees, is far less certain. Much like baseball nets with gaping holes, might the bluegrass venue be accused of gross negligence or recklessness once the boogying begins?

Proving Causation Poses a High Hurdle

Even if these exculpatory devices are deemed unenforceable there remains an elephant in the room: causation. How will patrons prove causation? Stated differently, how will individuals establish where they contracted COVID-19? Unless something drastically changes in the field of science they arguably will not be able to meet this burden.

Simply put, given the ease of COVID-19 transmission through exhaled airborne particles and on frequently touched surfaces, as well as roaming asymptomatic carriers, unless the person only attended the targeted event and otherwise lived in a literal bubble (or prison, nursing home, or cloister), there would always be the possibility that COVID-19 was transmitted by a source outside of the event.

Acknowledgement of and the Assumption of Risk Will Affect the Employment Relationship, Too

The topic of exculpatory devices reaches far beyond voluntary attendance at public events. Consider, for example, workplace. As businesses reopen and employees return to the physical location of their employer, employers will undoubtedly want to try to mitigate the risk of an employee contracting COVID-19 and filing suit. Accordingly, some employers may consider requiring employees returning to work to first sign an "acknowledgement of risk" form. These forms may include provisions that describe the various safety measures and protocols implemented by the employer and then expressly certify that the employee understands and accepts that they may still contract COVID-19 despite such precautionary measures. Whether being fired for refusing to sign an "acknowledgement of risk" form would preclude the collection of unemployment benefits is a topic beyond the scope of this article. However, generally speaking, the use of such acknowledgement forms is not prohibited, and, provided that the workplace complies with applicable health and safety laws[1], may have an effect in mitigating liability risk.

Employers also face increased exposure to workers' compensation claims from employees who allege that they became infected in the workplace. Similar to attending a public event, employees will likely have difficulty establishing the element of causation. With that said, a differentiating factor is that the employee will likely have spent significantly more time at work than at an isolated public event. For this reason, COVID-19—waivers, releases and acknowledgements notwithstanding—presents a novel and imposing challenge to workers' compensation programs.

Looking Ahead: Exculpatory Clauses Likely to Play Central Role in COVID-19 Liability Battles

The first claims alleging negligent or reckless transmission of COVID-19 have already been filed, and it would be hard to overstate how many more such claims are expected. To be sure, exculpatory clauses are likely to be found at the center of this legal tempest.

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1 "Compliance" in this context more or less refers to Occupational Safety and Health Administration ("OSHA") and Centers for Disease Control and Prevention ("CDC") guidelines; guidance from the Department of Labor, Department of Health, and State Police; guidance from industry groups and associations; and compliance with the Governor's executive orders.

About the Authors

Jonathan S. Ziss, a partner based in Philadelphia, is chair of the firm's Management and Professional Liability practice, chair of its Aviation Litigation practice, and a member of its Commercial Litigation and Cybersecurity practices. He devotes much of his practice to the representation of professionals in administrative and civil proceedings, and counsels and defends nonprofit entities such as homeowners' associations, faith-based organizations, and others, in management liability litigation as well as non-litigated disputes. Jonathan counsels clients and litigates, arbitrates, and mediates commercial disputes in a wide range of industries, from health care to hospitality, and, as a member of the firm's cyber incident response team, he manages compliance and loss mitigation campaigns in the aftermath of data breaches. Jonathan also serves as a leader in the firm's multidisciplinary COVID-19 Task Force, and has written extensively on issues related to causation, liability, risk-management, and likely claims scenarios in the context of the pandemic.

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For more information on COVID-19 liability waivers or for immediate guidance, contact **COVID19TaskForce@goldbergsegalla.com**