

Risky Business: Waivers & Assumption of the Risk of COVID-19 Exposure

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Businesses are navigating an uncertain transition as stay-at-home orders expire and states begin a gradual shift out of lockdown. One challenge to reopening is the risk that third parties will sue, alleging that they contracted COVID-19 due to the business's negligent failure to implement reasonable precautions to prevent its spread on business premises. Because it is not possible to eliminate the possibility that third parties may fall ill after visiting a business (regardless of the actual source of their infection), businesses need a strategy for mitigating this potential liability.²

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Certain industries that expose customers to unavoidable risk, such as recreational sports, have historically used waivers to manage liability. In light of the unavoidable risks posed by the COVID-19 pandemic, other businesses may now be wondering whether COVID-19-specific waivers in which patrons assume the risk of contracting the disease can provide them with protection. While certain considerations and limitations outlined below may constrain the benefits of such waivers, and there is no clear precedent relating to communicable disease waivers during a pandemic, meaning that the enforceability of these waivers will likely be a matter of first impression for courts to grapple with in the coming months, there is a real possibility that in some jurisdictions, such liability waivers can provide greater certainty and stability during the difficult process of reopening.

¹ Thanks to Timothy Leech and Savannah Haynes for their contributions.

² This post does not address employee liability waivers for COVID-19 exposure. However, we note that employee waivers are historically disfavored by courts given the disparity in bargaining power between employer and employee, as well as the public interest in requiring employers to protect their employees, and are therefore unlikely to be enforceable.



Liability Waivers – Express Assumption of Risk

While state law on the enforceability of liability waivers in which patrons expressly assume certain risk varies by jurisdiction,³ where waivers can be enforced, courts generally consider the following factors in determining whether a waiver will be upheld:⁴

(1) Clearly Defined Risks. It must be clear from the terms of the agreement that the parties intended to cover the particular conduct of the business that caused the harm in order for the business to be protected from liability. If the language of the waiver is overbroad (so that it attempts to insulate the business from every form of potential liability), it may be deemed unenforceable.⁵

Businesses should be careful to avoid ambiguous language, including in particular provisions purporting to cover liability for “inherent risks” associated with the business. Where the business drafts the waiver, its terms (and therefore any ambiguities) will usually be strictly construed against the business. Therefore, if it is arguable that the harm suffered by a patron would not reasonably be considered as resulting from an inherent risk associated with the business—for instance, where the harm results from COVID-19 exposure—a waiver using this “inherent risk” terminology will likely not insulate the business from liability.⁶

Businesses should therefore, at a minimum, ensure that their COVID-19 waivers define the risks being assumed as those specifically related to COVID-19 exposure on business premises. Given the prominent coverage of the COVID-19 pandemic, it will likely be difficult for a customer to argue that she did not understand what risks (namely, illness) were contemplated by a waiver addressing “exposure to COVID-19.” The harder question for businesses is whether to further specify the COVID-19 risks associated with particular choices made by the business. In a suit over COVID-19 exposure, a plaintiff will have to allege specific acts or omissions by the business that caused the plaintiff’s exposure. Drafting waivers to relieve liability for those specific acts or omissions may therefore be more effective than including general exculpatory language purporting to cover all COVID-19 exposure risks.

³ In fact, in some states, such as Virginia and Louisiana, liability waivers of any kind may not be enforceable.

⁴ See, e.g., *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260 (Tenn. 2018); *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306 (1979); *Barnes v. New Hampshire Karting Ass'n, Inc.*, 128 N.H. 102, 509 A.2d 151 (1986); *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441 (1963).

⁵ See, e.g., *Copeland*, 565 S.W.3d at 277 (finding the following waiver provision overbroad, ambiguous and unenforceable: “Client does hereby release and forever discharge [defendant] ... from any and all claims, suits, rights, interests, demands, actions, causes of action, liabilities, accident, injury (including death), costs, fees, expenses and any and all other damages or losses of any kind whatsoever, whether to person or property ... arising out of, incidental to, associated with, or in any way related to any transportation services provided to Client by [defendant]”).

⁶ See, e.g., *Stone v. Live Time Fitness, Inc.*, 411 P.3d 225, 230-31 (Colo. Ct. App., 2016) (finding that, due to the a gym’s use of “inherent risk” language and focus on injuries resulting from the use of exercise equipment in its liability waiver, “one could reasonably conclude that by signing the [waiver] he or she was waiving claims based only on the inherent risks of injury related to fitness activities” and not those based on tripping over an unsecured electric cord in the facility’s restroom).

(2) Clear Acceptance. It must be clear that the third party not only agreed to (i.e. signed) the waiver, but also that she was in fact aware of and understood what she was agreeing to in order for the court to find that she expressly assumed the risk contemplated in the waiver. Exculpatory language included in fine print that is unlikely to be read (e.g., on the back of a ticket), on documents that are not typically considered binding contracts (e.g., receipts), or on documents that patrons are not required to sign (e.g., pamphlets distributed to customers as they enter the premises) are less likely to relieve a business of liability based on the risks described in the waiver.

(3) Disparity in Bargaining Power. An express assumption of risk will not be enforceable where there is such disparity in bargaining power between the parties that the agreement does not represent a free choice on the part of the signatory. While there is no precise rule for when a patron's bargaining power is sufficient, two important criteria are (1) the importance of the service at issue for the physical or economic well-being of the party signing the agreement and (2) the amount of free choice the signing party has in seeking alternate services.

This inquiry is highly fact-specific and the outcome will vary significantly depending on the nature of the business in question. Businesses should consider whether a decrease in available alternatives due to COVID-19 (e.g., competitors going out of business, reduced hours or capacity at alternative businesses) will arguably increase their bargaining power relative to customers, and whether there are available strategies for counterbalancing this disparity (e.g., providing advance notice of waiver requirements before customers arrive at business premises, providing alternatives to on-site service such as deliveries, virtual programs, etc.).

Certain jurisdictions, however, heavily disfavor the use of "take-it or leave-it" exculpatory provisions where the party signing the agreement has no opportunity to bargain.⁷

(4) Public Policy. Courts are unlikely to give effect to a waiver where the assumption of risk is contrary to public policy. This inquiry generally turns on how important the business's services are to the public and how many alternatives are available.

- *Gross Negligence or Reckless Conduct:* As a matter of public policy, a party may not exempt itself from tort liability for harm caused by that party's gross negligence or reckless conduct. Demonstrating that a business treated its customers or third-party visitors recklessly or with gross negligence is typically a high bar to clear, but the evolving guidance on COVID-19 may make reasonableness (i.e., non-negligent conduct) a moving target.
- *Duty of Public Service:* A business charged with a duty of public service will likely not be able to escape liability through express assumption of risk.

⁷ See, e.g., *Atkins v. Swimwest Family Fitness Center*, 691 N.W.2d 334 (Wis. 2005) (exculpatory provision found unenforceable in wrongful death suit against instructional swimming facility where the waver did not provide for an opportunity to bargain).

- *Public Regulation*: For businesses in industries that are suitable for public regulation,⁸ or where a waiver would work to undermine duties imposed by federal, state or common law, an express assumption of risk by customers will likely be void as contrary to public policy. In particular, waivers that try to eliminate liability for failure to comply with federal, state or municipal COVID-19 laws (e.g., requirements to wear masks, social distancing requirements) seem unlikely to be enforceable.
- *Matters of Public Necessity*: Waivers that impact matters of practical necessity or services of great importance to the public will likely be found unenforceable.

While it can be difficult to predict a court's analysis of the public policy factor, the following types of businesses have been discussed as implicating public policy concerns and thus unlikely to be able to rely on waivers: (1) hospitals; (2) hotels; (3) childcare providers; (4) common carriers; and (5) public utility companies.⁹ In contrast, certain types of non-essential businesses have been found to *not* implicate public policy concerns and thus waivers have been upheld: (1) investment firms and (2) recreational sporting facilities (e.g., ski resorts, races, scuba diving, drag race facilities).¹⁰

The nature of the business is more important to this factor than the specific acts or omissions of the business. Businesses that provide a necessary service for which no reasonable alternatives exist should expect that enforcing liability waivers will be an uphill battle.

The Special Case of COVID-19

In the unprecedented era of COVID-19, predictions based on past litigation trends are challenging. The United States has never seen a pandemic of this sort in modern times and thus case law in the context of such a disease is limited. In particular, express assumption of risk has not been applied in the communicable disease context, making previous judicial guidance on the enforceability of waivers of

⁸ While the phrase "suitable for public regulation" is somewhat ambiguous, the core of this inquiry is whether the presence of public regulations demonstrates a public interest in this industry which would be adversely affected by the exculpatory language in question. *In re Mountain W. Indus., LLC*, 592 B.R. 871, 888 (Bankr. D. Utah 2018). Thus, where the industry in question is heavily regulated (e.g., airline industry), but the public interest supporting those regulations is not implicated by the exculpatory language (e.g., waiver in contract for sale of commercial airplane), the waiver may be deemed enforceable despite the fact that the business is subject to regulation. *See Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 104, 47 Cal. Rptr. 518, 524 (Ct. App. 1965) ("The fact that [the airline] is a regulated enterprise and carries passengers has no relevance to the present decision. The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised.").

⁹ *See, e.g., Tunkl*, 60 Cal. 2d at 98-99, n.10 (holding that hospitals are a "practical and crucial necessity" and noting that retail stores, restaurants, innkeepers and common carriers implicate similar public policy concerns); *Gavin W. v. YMCA of Metro. Los Angeles*, 106 Cal. App. 4th 662, 131 Cal. Rptr. 2d 168 (2003) (childcare provider); *Air Transp. Assocs. v. United States*, 221 F.2d 467 (9th Cir. 1955) (airport). While cases such as *Tunkl* indicate in dicta that businesses such as restaurants and retail stores implicate similar public policy concerns as hospital and common carriers, we are not aware of cases in which courts have conducted a detailed public policy analysis based on exculpatory language used by restaurants or retail stores.

¹⁰ *See, e.g., Wolf v. Ford*, 335 Md. 525, 644 A.2d 522 (1994) (investment firm); *McGrath v. SNH Dev., Inc.*, 158 N.H. 540, 969 A.2d 392 (2009) (ski resort); *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821 (1972) (drag race facility).

limited predictive value. Moreover, the assumption of risk doctrine requires a court to consider the totality of the circumstances in reaching its decision, meaning that no single factor is determinative and that the particularities of the pandemic may lead to unprecedented outcomes.

The primary question a court will likely consider is whether COVID-19 exposure is the kind of risk that can be waived. There is typically no requirement that the risks a customer waives be specifically related to the nature of the business drafting the waiver. Rather, waivers are limited by the common law requirements noted above, namely that the type of risk assumed be specifically enumerated and the presumption against the use of general waivers of all potential liability. It therefore seems that COVID-19 waivers could be enforceable, provided that they are sufficiently concrete. Whether these waivers would be seen as contrary to public policy, however, is a separate issue that courts will have to confront, and may well result in inconsistent outcomes as courts attempt to balance the public's interests in preventing the spread of COVID-19, maintaining safe public spaces, and providing legal remedies for individuals exposed to COVID-19, against mitigating the chilling effect of legal risk on a reopening economy.

Practical Considerations for Implementing COVID-19 Waivers

Given the significant uncertainties inherent to the COVID-19 pandemic, businesses should seriously consider liability waivers. This will be a highly fact-specific decision that each business should make by considering the totality of its present circumstances, including the nature of its business, how it interacts with its customers, and whether peer businesses are taking similar steps. Businesses should also consider whether relying on liability waivers in this environment could result in reputational harm.

In the event that businesses decide to use COVID-19 liability waivers, they should consider the following to increase the likely effectiveness of their waivers:

- Require that customers sign these waivers before entering business premises, or when signing up for/renewing memberships, rather than including the relevant language on signs, in optional reading materials, or as part of commonly disregarded documents such as receipts.
 - For businesses that rely on recurring memberships, clearly communicate with existing members regarding waivers and provide opportunities for members to agree to these terms before they return to business premises.
 - Provide a designated area near the entrance of the business where customers who have not signed waivers in advance have an opportunity to review and sign waivers before entering business premises. Ensure that the designated area complies with best practices for mitigating the spread of COVID-19, and consider the following:
 - Allow for social distancing by customers reviewing waivers or waiting in line to do so.

- Where possible, provide safer methods for reviewing and signing waivers, such as offering single-use writing implements, or sterilize between uses.
 - Follow federal, state and local guidance regarding the safety of employees who manage the designated area.
- Use large, obvious print for the relevant exculpatory language.
 - Identify certain reliable sources of information (e.g., CDC, WHO, state-level public health agencies) and comply with the current guidance from those sources. Then describe the regulatory guidance reviewed and factored into the business's response to COVID-19 in the waiver. If possible, provide links to company websites with more detailed discussion of specific preventative measures.
 - For all such regulatory guidance mentioned in the waiver form and on the company website, regularly monitor for updates to such guidance and update the company's response and website accordingly.
 - Clearly identify the COVID-19-related risks being assumed by the party signing the waiver. Do not use general exculpatory language relating to any potential liability resulting from the business's conduct.
 - Include language that covers harm resulting from negligence in connection with the business's efforts to prevent the spread of COVID-19. Do not include language attempting to insulate the business from liability for harm caused by the business's gross negligence, willful misconduct or reckless conduct, and consider carving these bases out of the exculpatory language explicitly.
 - E.g., "I hereby exonerate [the business] from any and all liability for harm which may occur due to my exposure to COVID-19 on business premises, including harm resulting from [the business's] negligence, except for such harm as may result from [the business's] gross negligence, recklessness or willful misconduct."
 - In the event that a customer chooses not to sign the waiver, do not permit the customer to enter business premises.
 - In the event that a customer would like to discuss the waiver provisions prior to signing, prepare on-site management to walk customers through the agreement and answer any questions.

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Cleary Gottlieb has established a [COVID-19 Resource Center](#), providing information and thought leadership on developing events. In addition, we have a [COVID-19 Task Force](#) that is acting as a repository for practical solutions, best practice and issue-spotting to help our clients by sharing market experience, insight and advice from across our global presence.

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