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How Courts May Interpret COVID-19 Waivers Of Liability

By **Jessica Kelly** (May 21, 2020, 5:05 PM EDT)


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The economic harm to businesses that chose or were forced to close as a result of COVID-19 will be severe and long-lasting. Although businesses across the country are beginning to reopen, the threat of infections will still be high for the foreseeable future. What can businesses do to protect themselves from another economic threat in the form of negligence claims arising from inevitable virus outbreaks?

First and foremost, businesses must proceed with caution in reopening and practice all mandated and recommended practices for keeping patrons and customers safe inside their establishments. As additional protection, however, can businesses seek to limit or release themselves from negligence claims for COVID-19 infections utilizing contractual waivers of liability?

This article examines how courts have traditionally interpreted waivers of liability or other types of disclaimers and releases, and whether everyday businesses, such as retailers and restaurants, may utilize similar waivers to protect themselves from claims arising from future virus outbreaks.

Law on Waivers of Liability

Waivers of liability are controversial, but not uncommon. They are widely used for public events and participation in sports and other recreational activities, among other things. Whether a waiver of liability is enforceable to bar subsequent negligence claims, however, varies significantly by state.

For example, Montana and Louisiana have statutory prohibitions against contracts that attempt to limit future liability for physical injuries.[1] Massachusetts, on the other hand, routinely enforces waivers of liability for ordinary negligence, even if it causes physical injuries.[2] States also differ significantly in the enforcement of parental waivers of liability on behalf of minor children.

In the jurisdictions where waivers of liability are not unenforceable per se, there is consistency in the factors courts will consider when determining enforceability of waivers.

First, courts will likely consider whether the waiver language was clear and unambiguous. Other terms courts use are "unequivocal," "explicit" and "conspicuous." In other words, would a participant or customer reasonably understand that he or she was releasing a business from liability for injury or illness? If not, the waiver is likely unenforceable. Ambiguity in the waiver language will be construed

against the business seeking to enforce it.

Second, courts are unlikely to enforce waivers of liability obtained by fraud or duress. States that do not favor waivers of liability may also consider the disparity of bargaining power between the parties.

Wisconsin, for example, will not enforce "take it or leave it" clauses, which force the individual to waive liability in order to be a guest or participate in an event. The Wisconsin Court of Appeals has stated that the "absence of an opportunity to bargain in regard to an exculpatory clauses' terms is a significant factor suggesting a violation of public policy."[3] Essentially, some states will not enforce waivers of liability if the individual waiving potential claims cannot negotiate the terms of the waiver.

Third, courts will consider the public policy implications of enforcing waivers of liability and generally will not enforce waivers for gross or extreme negligence, wanton and willful misconduct, or conduct that violates a statute.

Courts must balance public safety interests with the freedom to contract and allow businesses to operate without a constant threat of litigation, especially in connection with inherently dangerous but popular activities like skiing and ice hockey. Again, states take a widely different perspective on where the line between allowing lawsuits for injuries sustained by participating in such activities and enforcing contractual waivers lies.[4]

Post-Pandemic Waivers of Liability

In the wake of the first of what may be numerous surges in COVID-19 infections, will there be a corresponding surge in lawsuits asserting claims that businesses were negligent in their duties to protect the public from the virus? Aside from issues of duty and causation, which I examined in an earlier Law360 guest article, everyday businesses, like retailers and restaurants, may start thinking about how they may utilize waivers of liability for virus claims. From a practical standpoint, implementation and enforcement may be difficult.

The first question to consider is how such waivers would be implemented in everyday consumer life. In certain circumstances, written waivers may make sense. A simple google search pulls up examples being used by businesses across the country, from YMCAs to golf courses.

On the one hand, where membership, reservations or check-in procedures are needed before using a facility or attending an event, such as booking a hotel or tee time at a golf course, it will be easier for businesses to obtain a written waiver ahead of such use (assuming the business's jurisdiction would enforce the written waiver).

On the other hand, having patrons sign a waiver upon entry to a store or restaurant is probably not practical for a number of reasons. The process of signing a document involves contact with objects and surfaces, which is not ideal in the COVID-19 era. The process would also likely be distasteful to patrons. Would the store or restaurant ask people to leave if they chose not to sign the waiver? Would a line of people waiting to sign a form cause potential visitors to turn around? The written waiver option for certain businesses is likely not workable.

What about placing signs in windows and entryways notifying customers that they would be waiving liability for any claims arising from a COVID-19 infection by entering the premises? The signage option is practical and would be easy to implement, but raises the second question: Would courts enforce such

disclaimers of liability for COVID-19 infections appearing in signs?

Signs that caution the public against certain dangers are common, but are not the same as contractual waivers of liability. Businesses do have a duty to warn their patrons of a dangerous condition on the property, such as a hole in the ground or a wet floor.

By displaying a clear warning of the condition, a business may satisfy its duty to warn, but that does not necessarily absolve the business of liability for injuries caused by the dangerous condition. Instead, it may allow a business to argue that the injured party contributed to the negligence by not heeding the warning or otherwise assumed the risk of injury.

Accordingly, placing a clear and conspicuous sign in the window or entrance of a store or restaurant warning customers of the danger of COVID-19 may not insulate a business from liability, but may assist in the defense of a negligence claim. The business may decide to include in the sign that it is following all government-ordered precautions to provide a clean and safe environment for its customers, that customers must follow certain protocols, such as social distancing and wearing masks once they enter the establishment, but that there is still an inherent risk of infection in being with other members of the public.

Given the extent to which the pandemic has affected the world and the general knowledge of how easily it spreads, courts will likely assign some level of responsibility for infection on plaintiffs who choose to enter a store or restaurant, whether there is a sign or not.

Conclusion

Businesses should consult counsel about how courts in their jurisdiction treat waivers of liability and whether it would be practical to implement them as they start to reopen. If written waivers will not work, businesses can also consider a conspicuously placed notice or sign warning that the threat of COVID-19 exists regardless of the precautions. At minimum, businesses may be able to defend claims of negligence arising from COVID-19 infections by arguing that the plaintiff had a choice to enter the premises and assumed the risk of injury or illness by doing so.

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[1] See Mont. Code Ann. § 28-2-702; La. Civ. Code Ann. art. 2004.

[2] See Cormier v. Cent. Massachusetts Chapter of Nat. Safety Council, 620 N.E.2d 784, 786 (Mass. 1993) (release signed by participant in motorcycle safety course barred negligence claim).

[3] Brooten v. Hickok Rehab. Servs., LLC, 831 N.W.2d 445, 448 (Wisc. 2013) (holding that waiver of liability in gym membership contract was not enforceable to bar negligence claim brought by injured member).

[4] Compare Gershon v. Regency Diving Center, Inc., 845 A.2d 720, 727-28 (N.J. 2004) (enforcing

deceased diver's waiver of liability to preclude decedent's wrongful death claim would adversely affect the public interest) with Doherty v. Diving Unlimited Int'l, Inc., 140 N.E.3d 394, 397 (Mass. 2020) (public policy considerations did not bar waivers of ordinary negligence and therefore decedent's release of diving company before fatal diving accident was binding on the beneficiaries of his estate).