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Should esports tournaments and other live events have participants and fans sign COVID-19 waivers when in-person entertainment gatherings resume?

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Prior to COVID-19, the attendance at esports and other live events continued to grow. With the spread of the virus, that growth was placed on hold. Many esports companies, publishers, and other like companies were forced to cancel or indefinitely delay their events. While some regions are now in the process of reopening, businesses reliant on in-person activities, including the gaming and esports industry, are assessing their risks and strategies to minimize those risks. Businesses should consider whether, in spite of taking all reasonable steps to adopt best practices and comply with applicable regulations, they might still face claims based on customer or participant infection. Claims would likely be based on concepts of premises liability, alleging negligence, gross negligence, and recklessness. Risk management strategies for businesses must, therefore, include consideration of exculpatory clauses as an element of a reopening plan. This article discusses the legal and business considerations of COVID-19 exculpatory clauses—waivers, releases, assumptions of risk, and indemnity clauses—for such live events. Similar considerations can also be applied to businesses generally open to or interacting personally with customers, including retailers and those providing in-home services, and for other infectious diseases.[1]

A brief description of the different types of exculpatory clauses may be helpful: (i) a waiver is a voluntary relinquishment of a known right, such as the waiver of the right to sue; (ii) a release, as its name implies, releases one party from claims, including future claims, from another party (here, the attendees would release the host); (iii) indemnity clauses provide that one of the parties (in this context the attendee) defend and pay costs and expenses for another party (here, the event host) for certain claims that may be brought by third parties; and (iv) assumption of risk refers to the affirmative acknowledgment and agreement to accept the risks of a known danger (here, the risk of contracting COVID-19 at a public gathering). A comprehensive risk management program should consider whether and under what circumstances one or more of these clauses should be incorporated into the contracts for attendance at events.

[1] Please note that this article does not cover exculpatory clauses and their effects in the employment context.

But wait, is there really a risk of liability?

Attendees who may seek to bring claims against event hosts may have a difficult time proving their case. To sustain a claim of negligence, the plaintiff must prove causation. In this context, the plaintiff would have to prove that they contracted COVID-19 during or at the event. Given the inherent difficulties of contact tracing, the extended incubation period, the disputes that presently exist over how the virus is transmitted, and the increasingly pervasive transmission, it will be no easy feat to identify a particular point of infection, even if the person was perfectly isolating before and after the event. In defending against such claims, the event host will likely gather information about all of the places where the attendee had been during the extended incubation period, all of the known and unknown persons who could have been a source of infection (including asymptomatic persons), and all of the methods of potential transmission, including airborne and surface transmission.

Still, however, it is not difficult to imagine circumstances under which a plaintiff would try to make a showing of a particular infection source. Further, avoiding the publicity and reputational impact of claims taken to trial may be a sufficient reason to incorporate exculpatory provisions into a contract.

Enforceability

Assuming viable claims could be brought, all four exculpatory clauses can be a useful tool for deterring or managing litigation risk. However, given the novel nature of the COVID-19 pandemic, it is uncertain to what extent such agreements will be enforced by courts. Presently, enforceability is largely an issue of state law. Currently, the law of most states invalidates or nullifies a waiver to the extent that it attempts to protect or release a party from liability for gross negligence, or reckless or intentional conduct. Gross negligence is characterized in California by "want of even scant care or an extreme departure from the ordinary standard of conduct."[2]

Legislative initiatives are underway in states and at the federal level, with some broadening and some narrowing the enforceability of exculpatory clauses in the pandemic. Some bills would provide some measure of protection for certain businesses or industries from claims by customers. Senate Republicans recently introduced legislation that would federalize claims for personal injury from exposure to COVID-19, impose heighted pleading requirements, require proof of gross negligence or willful misconduct, and provide extensive protections and favorable presumptions for businesses. For instance, Iowa passed a law that premises owners shall not be held civilly liable for COVID-19 exposures or infections absent reckless disregard or actual malice. On the other side, there are also consumer efforts to limit the use of exculpatory clauses in some settings.

Courts have not yet had the opportunity to examine and adjudicate the public policy considerations of exculpatory clauses and COVID-19. A "kitchen sink" approach could be costly to a business, as some exculpatory clauses have been judged to be so overbroad that they violate various unfair competition state laws.

Lessons from the traditional sports context

In the traditional sports context, courts have consistently found in favor of venues, leagues, and teams in cases brought for injuries sustained by attendees of live events that were caused by the

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[2] *Chavez v. 24 Hour Fitness USA, Inc.*, 238 Cal. App. 4th 632, 189 Cal. Rptr. 3d 449 (2015).

sporting activity (e.g., being struck by a "foul ball" at a baseball game).[3] It is only when the venue, league, or team "deviated in some relevant respect from established custom will it be proper for an 'inherent-risk' case to go to the jury."[4] However, this analysis relies on the event (the foul ball) being an "inherent-risk" to attendance; in that case, the risk of the event will be deemed to have been assumed by any spectator, and that allocation of risk will protect the venue, by disclaimer or operation of law. It should be noted that states such as Illinois have looked unfavorably at the "fine print" agreements found on the back of tickets that attempt to have attendees assume such a risk at the outset.[5]

Does COVID-19 fit into the "foul ball" analogy? On the one hand, the virus is unrelated to any particular sport. Rather, the risk of contracting the virus follows from the crowds assembled at the event rather than the sport itself. So while the sporting event may be a but-for cause to the entire scene—more of which is addressed below—the most likely cause of infection is not from the sport, but rather from fellow spectators.

In *Lee v. National League Baseball Club*, a spectator was trampled by other fans in a rush to catch a … foul ball.[6] Citing the California Supreme Court, the court in *Lee* found that the injured spectator did *not* assume the risk of being injured by fellow spectators as a matter of law because:

> "…one who invites the public to a public amusement place operated by him is liable for injury sustained by an invitee as a result of acts of third persons, if such operator has not taken reasonable and appropriate measures to restrict the conduct of such third parties…"[7]

The types of reasonable precautions and restrictions on crowds during COVID-19 have become very familiar to most of the country. The fact that the virus will likely be communicated by another attendee despite precautions and restrictions emphasizes the value of exculpatory clauses, including those that identify the potentially heightened risk of transmission in a public gathering and require acknowledgment and acceptance of that risk. Nonetheless, while compliance with local guidelines and ordinances, and the application of best practices should provide a measure of protection under the standard articulated by the California Supreme Court, the pandemic may yet produce unpredictable results.

Are COVID-19 exculpatory clauses against public policy?

Another consideration is whether such agreements will be deemed by the courts to be unenforceable as against public policy. The very nature of a live event undercuts efforts to contain an infectious disease spread. Simply by bringing people together in a large gathering, the risk of infection increases. Accordingly, the more exculpatory agreements that are signed for an event, the more people, and the more people, the greater the risk of a spread. This begs the question of

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[3] *Loughran v. Phillies*, 888 A.2d 872, 2005 LEXIS 4093.

[4] Id.

[5] See, e.g., *Yates v. Chi. Nat'l League Ball Club, Inc.*, 595 N.E.2d 570, 581 (Ill. App. Ct. 1992) ("[T]he disclaimer on the back of plaintiff 's ticket could not form the basis of defense because the print was so small that it was not legibly reproduced on the photocopy submitted to the trial court. Plaintiff 's acceptance of a ticket containing a disclaimer in fine print on the back is not binding for the purposes of asserting express assumption of the risk.")

[6] *Lee v. National League Baseball Club*, 4 Wis. 2d 168, 89 N.W.2d 811, 1958 Wisc. LEXIS 366.

[7] Id., citing *Edwards v. Hollywood Canteen*, 27 Cal. 2d 802, 1946 Cal. LEXIS 358.

whether the mere existence of the gathering itself creates an inherent public health risk such that the exculpatory agreement will be considered to be against a state's public policy.

Arguably, if the state and local governments allow the resumption of live events, their judgment and assessment of risks should preempt a public policy argument. There is a persuasive argument that it is improper for courts to displace the role of government by creating their own views of public policy, for fear that the courts distract from or conflict with legislative and executive power over the pandemic response. However, to the extent that governments do not speak directly to the event, or a host resumed activities without strict compliance with all applicable restrictions, a court might well find the exculpatory efforts to be against public policy and unenforceable.

States may have higher standards: California spotlight

Certain states, like California, which may enforce waivers of liability for ordinary negligence and allow parents to execute waivers on behalf of their minor children, hold waivers to a higher standard of clarity in the agreement's language.[8] This is to ensure that the contracting parties truly intend to be bound by the terms of the contract. California's standard is that the waiver must:

> "clearly, explicitly and comprehensibly set forth to an ordinary person untrained in the law that the intent and effect of the document is to release his claims for his own personal injuries and to indemnify the defendants from and against liability to others which might occur in the future as a proximate result of the negligence of [the] defendants…"[9]

This heightened standard of clarity emphasizes the need for careful drafting. Language that does not meet this standard will be construed against the drafter.[10]

Practical considerations for drafting COVID-19 exculpatory agreements

Given these general consideration, the drafter of the exculpatory agreements should consider the following:

- Whether to update the language of existing exculpatory agreements or provisions to address the specific risks and consequences presented by COVID-19
- Obtaining a written acknowledgment of the risks of COVID-19 transmission tailored for the particular business and circumstances[11]
- Obtaining representations by attendees/guests about their COVID-19 status and preparedness, including that they are following local guidelines for social distancing, have not traveled to high-risk areas recently, and have not shown any COVID-19 symptoms
- Requiring written indemnification by attendees/guests in favor of the venue/host for claims resulting from false representations or a broader indemnification provision, if desired
- Developing a written waiver/release of liability "to the fullest extent permitted by law"
- Whether to include a narrow waiver and release specific to COVID-19 or draft a broad waiver and release of claims for all possible injury types, on a fact-specific basis depending on the

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[8] *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1488.

[9] *Id.*, quoting *Ferrell v. S. Nev. Off-Road Enthusiasts*, 147 Cal. App. 3d 309, 315, 1983 Cal. App. LEXIS 2192.

[10] Cal. Civ. Code § 1654.

[11] *Sweat v. Big Time Auto Racing, Inc.*, 117 Cal. App. 4th 1301 (2004).

industry, jurisdiction, and public relations facts surrounding the business

- Expected contractual formalities

To improve enforceability, companies should have a written program in place to administer the exculpatory agreements. Elements of an effective program to protect and limit liability should include a process to provide customers with:

- Instructions and/or directions for conduct at the event that comports with state guidelines and requirements and industry best practices
- Prominent and consistent notice of the exculpatory provisions
- A process for access to the full agreement to be reviewed and signed or acknowledged in advance by the attendee

Any exculpatory provisions should be provided to the attendees and participants in advance of any in-person interaction and should appear on the event's website and in any direct communication for registration or purchasing goods or services. Consistent signage with these materials should be presented in clear view at the physical venue as well.

This article merely introduces the issues surrounding exculpatory and COVID-19 and does not replace consultation with your attorney. If you have any questions about the content of this article or any related legal issues, please contact anyone in Nixon Peabody's interdisciplinary Esports and Gaming Industry group or:

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