Liability Waivers Are Far From Bulletproof

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PROFESSIONALS

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Over the last three months, we have been asked to prepare many liability waivers ("exculpatory clauses") to be signed by their customers in order to insulate the clients from damage claims relating to potential exposure to the COVID-19 virus. That assignment may seem simple enough, but, in fact, there are a whole host of barriers to the enforcement of liability waivers that can render the waiver no better than the paper they are written on. Simply put, particularly in cases in which a business is dealing with consumer customers, courts hate exculpatory clauses and will generally do whatever they can not to enforce them. To appreciate how to prepare enforceable waivers, certain general rules must be followed.

First, the customer must have the opportunity to freely bargain the terms of the waiver. Of course, in the real world, few, if any, people actually bargain the terms of a waiver that is presented to them, but, if the waiver document is clearly and accurately described and the waiver language is not buried among other terms, this first requirement may be satisfied. Describing a document as an "application," but having it contain an exculpatory clause, is not going to enhance the chances the clause will be enforced. So, the first rule is make sure the document tells the customer in clear and unambiguous terms the general nature of what the client is signing.

Second, make sure the risks involved are well defined. The broader the description of risks, the less likely the clause will hold up. Do not be afraid to alarm the customer with descriptions of the harm that may ensue from the activity the customer will be engaged in. Particularity is crucial, as the courts will search out the specific risks the parties contemplated when the waiver was signed. Otherwise, the door will be open for the court to throw out the clause. For instance, in one Wisconsin case, a race driver whose car crashed into a wall and burst into flames was caused serious brain damage when rescue personnel sprayed toxic flame retardant chemicals in the car before removing him. The court held the exculpatory clause dealing with the risks of car racing did not necessarily contemplate risks of rescue operations. Likewise, where a participant in a water ski show failed to execute a trick, fell in the water and was struck and killed by a trailing ski boat, the court questioned that the waiver relating to risks of water ski shows applied to that type of accident. If you are concerned about a particular risk, describe it. It's not a bad idea to have a general catchall phrase, but do not count on it being enforced.

Third, don't be greedy. Many people, including a number of lawyers, think they need to cover all eventualities and make waivers as broad as possible. Numerous court cases on exculpatory clauses demonstrate that just the opposite is the truth — the narrower and more limited the waiver is, the greater the chance a court will uphold it. In Wisconsin, an exculpatory clause that waives damages because of a person's reckless, intentional or willful behavior is ipso factor unenforceable. Make sure the waiver is limited to negligent acts.

Fourth, don't be greedy. Do not push the customer's obligations too far. Obtaining a waiver is one thing. Requiring the customer to indemnify and defend you is another. Such language was highly criticized in a case involving an exculpatory clause. If there is a good chance the customer will have no clue what they are being asked to do, it is best not to ask them to do it. Keep it simple and, to the extent possible, avoid confusing and highly legalistic language.

In summary, courts will look to fairness, e.g., reasonable disclosures and limitations, and clarity in reviewing exculpatory clauses. Do not assume that, because a customer signed your broad liability waiver the customer is stuck "because they signed it." The analysis is far more complicated than that and will depend largely on public policy considerations.