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Outside Counsel

Enforceability of Liability Waivers In the Age of COVID

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In an effort to flatten New York State's infection and hospitalization rate due to the COVID-19 pandemic, Governor Andrew Cuomo signed an executive order in March 2020, mandating statewide lockdown measures. Those measures appear to have been largely effective, allowing New York to begin a phased re-opening. But as many businesses resume activities, their operations in the "new normal" bear little semblance to pre-COVID-19 existence.

With COVID-19 continuing to linger in the northeast, and the possibility of a resurgence this winter, businesses seeking to reopen find themselves in unchartered territory, facing uncertain risk and potential liability. To minimize that risk—specifically, liability relating to COVID-19 exposure—many businesses, especially those that provide services requiring physical interaction with customers or clients, have begun insisting that patrons sign waivers as a condition to either entering the business establishment and/or availing themselves of the business' services.

Requiring waivers is not a new concept. Most individuals are familiar with and have executed waivers in connection with some recreational activity. Do you have a gym membership? You likely signed a waiver. Have your children gone to summer camp? You likely signed a waiver. Have you ever been skiing? You likely signed a waiver. In the COVID-19 environment, however, such waivers are becoming more and more prevalent for even the most mundane of activities that normally would not require any waiver—such as a haircut or a manicure. The obvious question then arises: to what extent will these waivers be enforceable to safeguard companies and business against liability? As with many questions related to operating a business in the COVID environment, answer is: it depends.

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Enforceability

Under New York law, a liability waiver is enforceable if: (i) it does not violate the public interest, (ii) the intention of the parties is expressed in unmistakable language, and (iii) the provisions are clear and coherent. See, e.g., *Gross v. Sweet,* 400 N.E.2d 306, 309 (N.Y. 1979). See also Williston on Contracts §19:21 (4th ed.) ("Courts have increasingly examined exculpatory provisions and releases to ensure free and knowing assent to the terms they contain, and exculpatory provisions must clearly, unambiguously, and unmistakably inform the party relinquishing its rights of exactly what is being waived.").

Waivers must be clear and intelligible and waive the specific risk that was intended. Frequently, the key waiver language appears in bolded capital letters. Therefore, if a business uses a general waiver with language limiting liability for "physical injury, illness, or bodily harm" the waiver might not be deemed enforceable against a future claim based on exposure to COVID-19. This is because a court may deem the language insufficiently specific to alert the individual executing the waiver that

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he or she is relinquishing rights to pursue claims relating to exposure to COVID-19 at the business establishment.

Additionally, the scope of the wavier and a business' own conduct impact enforceability. A waiver of any and all liability is not necessarily enforceable in all instances. Under New York law, a party can waive ordinary negligence, but not gross negligence, reckless conduct, willful/wanton conduct, or intentional acts. See *Kalisch-Jarcho v. City of New York*, 58 N.Y.2d 377 (1983); See also Restatement (Second) of Contracts §195 (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."). Gross negligence is defined as conduct which "differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services,* Ltd., 81 N.Y.2d 821 (1983).

Thus, even if a client or customer executes a waiver, which is clear, intelligible and specifies that the risk being waived is COVID-19 exposure, a business may still be susceptible to a future claim if it fails to make any effort to protect patrons against exposure to the virus in accordance with federal and state guidelines. For example, if a business fails to ensure that its premises are disinfected on a regular basis, or does not establish a policy for sick employees to stay home, or fails to mandate distancing between patrons, the waiver could be deemed unenforceable. A court could conceivably determine that the failure to take these actions, which are rapidly becoming the norm, constitutes "grossly negligent" or "reckless" conduct.

Claimants are likely to prevail against motions to dismiss premised upon an executed wavier where the claimant's complaint has adequately alleged that the defendant's failure to adopt basic safety measures was grossly negligent or reckless.

New York has also determined that certain waivers run afoul of both public policy and statutory regimes. An example is a parent's waiver of liability on behalf of a child. A minor will not be bound by a release executed by his/her parent, and a minor may not sign a waiver on behalf of his or herself. See *Santangelo v. City of New York,* 66 A.D.2d 88 (2d Dep't 1978).

Another example is a waiver that employees execute for the benefit of their employers. Such employee waivers are unlikely to have much, if any, utility because worker's compensation schemes and statutory employment claims are rights that typically cannot be waived. See e.g. *Mack v. Ford Motor Co.,* 245 A.D.2d 1055, 1055 (2d Dept. 1997) (rejecting Defendant's argument that "plaintiff's execution of a waiver absolved defendant of liability" and stating the "waiver is contrary to public policy because it effectively eliminates the purpose of Labor Law §240(1)."); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 51 (1974) (stating "we think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

Lastly, waivers executed by tenants purporting to exculpate landlords from liability arising from their own negligent actions are likely to violate statutory authority and be found unenforceable. See, e.g., *Ben Lee Distributors, Inc. v. Halstead Harrison P'ship*, 72 A.D.3d 715, 716 (2d Dept. 2010).

In sum, New York imposes a number of limits on the enforceability of liability waivers. Therefore, simply because a business has obtained an executed waiver from a patron does not guarantee that the waiver is enforceable against that patron. In light of the unique challenges that COVID-19 poses, lawmakers may (i) determine that COVID-19 waivers are enforceable, and if so, under what conditions; (ii) declare these waivers unenforceable as a matter of public policy; or (iii) take no action at all, and let the courts decide.

Further, it is unclear how courts will apply the present legal standard to interpret and enforce adequately worded COVID-related liability waivers in the face of specific types of failures by businesses to implement certain safety protocols: Will a business' decision not to adopt a mask policy constitute the type of grossly negligence that would vitiate an otherwise legally sufficient waiver of COVID-related liabilities? Will the decision not to conduct temperature checks of patrons or employees be considered grossly negligent? These are but a few of the type of factual questions that courts will face during the coming months. This blog will provide updates of key decisions as courts grapple with these issues and provide further guidance as these issues develop.

Choice of Law

Examining whether a waiver is enforceable may be further complicated by the need for a choice of law analysis. What happens when a New York resident signs a waiver out of state and the waiver contains no governing law provision? To illustrate, a New York resident attends a business conference in Pennsylvania and is required to sign a waiver of liability relinquishing the attendee's right to sue the conference organizers if she contracts COVID-19 while attending the conference. Is the waiver governed by Pennsylvania law or New York law if the waiver contains no governing law provision? This threshold question is

critical because the law of the relevant states may be different. For example, three states—Louisiana, Montana and Virginia—have declared that all liability waivers of any kind are unenforceable. Other states' laws vary in their requirements for enforceability, ranging from lenient to strict.

New York courts apply an "interest analysis" test with respect to conflict of laws issues, such that "[T]he law of the jurisdiction having the greatest interest in the litigation will be applied." *Miller v. Miller*, 22 N.Y.2d 12 (1968). In contract cases, New York applies the "center of gravity" or "grouping of contacts" theories, which places emphasis on the law of the place with the most significant contacts with the matter in dispute. *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954). In tort cases, New York will look to lex loci delicti, or the "place of the wrong," although that is not determinative. Further, when the defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred. ***Poplar v. Bourjois***, 298 N.Y. 62 (1948).

Under either analysis, in our business conference example, the venue with the most significant contacts with the dispute and the location of the wrong, at first glance, would appear to be Pennsylvania—the situs of the business conference. Yet, an argument could certainly be made that the venue with the most significant contacts with the dispute is New York, as that is where the individual attendee resides, and New York certainly has an interest in protecting all of its citizens from contracting the highly contagious coronavirus.

In fact, there are several cases that have held that, even if the subject wrong occurred outside of New York, if a "loss allocating" rule applies to the enforceability question rather than a "conduct regulating rule," New York law should still apply because New York has an interest in protecting its citizens from other states' laws which are less favorable than the laws of New York. Compare *O'Connor v. United States Fencing Assoc.,* 260 F.Supp.2d 545 (E.D.N.Y. 2003) (holding that New York law governed enforceability of waiver signed by New York plaintiff in lawsuit against Colorado organization regarding accident that occurred in California), with *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189 (1985) (holding that despite the fact that injury incurred in New York, New Jersey law should apply to question whether plaintiff could bring wrongful death claims against a charitable organization because both plaintiff and defendant were New Jersey citizens).

While the law of waivers may be well-developed, courts will have to grapple with these questions anew in the context of the post-COVID-19 era.

In our business conference example, the enforceability of the waiver would be governed by the "loss allocation rule," as the waiver attempts to establish that the loss of a COVID-19 injury should be allocated to the individual attending the conference rather than the organization that held the conference. There is a strong argument that a New York citizen attending the business conference should be able to avail herself of New York's law on waivers—even though the injury arguably occurred in Pennsylvania.

At bottom, choice of law is complicated, and it is clear that, without an express choice of law provision, the issue of what law governs liability waivers is likely to be a hotly contested issue that will largely depend on the particular facts of each case. Choice of law is not only complex, but of unquestioned importance, as what law applies will often determine the outcome of whether an individual has a cause of action or has waived their right to such a cause of action by virtue of executing a liability waiver.

Key Takeaways

The COVID-19 pandemic and the incentive for businesses to limit their exposure are leading to widespread use of COVID-specific liability waivers. But in New York State, the enforceability of these waivers—even those not related to COVID-19—are far from bullet proof and depend on a wide array of factors, including the business' own negligent conduct and whether the type of waiver in question violates public policy or a statutory scheme. The often fact-intensive analysis required to determine whether a waiver is enforceable may be further complicated by the need for a thorny choice of law analysis.

And while the law of waivers may be well-developed, courts will have to grapple with these questions anew in the context of the post-COVID-19 era. Until lawmakers and/or courts decide how COVID-19 waivers should be treated, it is important for businesses utilizing waivers to consider the pitfalls discussed above and ensure that they employ waivers that utilize language sufficiently specific to protect against liability for COVID-19-related harm. At Moritt Hock & Hamroff, we can assist in both crafting COVID-19 specific liability waivers and developing best practices to maximize the enforceability of such waivers for your company or business.