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Exculpatory Agreements: Mitigating COVID-19 Related Risks as the Economy Reopens

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Stores, restaurants, bars, and other customer-facing business owners are in various stages of reopening around the country and facing a patchwork of regulations and recommendations for dealing with the ongoing pandemic. Many are rightly concerned about liability to customers based on exposure to COVID-19. It is not difficult to imagine the possible scenarios: Bob shops at his favorite clothing store and later gets sick – he sues, claiming the store did not enforce sufficient social distancing and let too many shoppers inside. Nancy ate at her local restaurant but claims the tables are too close together – when it's later discovered that a fellow customer was infected and she gets sick, she sues. Putting aside the difficulty of proving that Bob or Nancy actually contracted the virus at the store or restaurant, those business owners rightly want to guard against such claims, if possible. We previously suggested several measures that businesses should implement to mitigate their risk. One of our recommendations involved communicating warnings to preserve the defense of "assumption of risk." Obtaining written exculpatory agreements – i.e. waivers or releases – from your customers are a related but more narrowly focused tool.

Exculpatory agreements are contracts whereby one party waives their right to sue the other party on certain grounds, negligence for example. While every business should ensure that they are taking the responsible and appropriate steps necessary to protect their patrons, under the right circumstances the use of these agreements could provide some much needed protection. Exculpatory agreements may not be appropriate for every business, but for businesses that can and wish to use them, they can help minimize risk in a time of high risk and great uncertainty. Pairing these agreements with an arbitration clause or class action waiver could further fortify a business against expensive litigation as they navigate rebuilding.

Although the prospect of customers signing waivers before shopping or eating dinner may have seemed like a foreign concept just several months ago, it may not be any more. Customers may understand that stores and restaurants need these protections to justify reopening in the current environment. In Hong Kong for example, where restaurants have been operating for months during the pandemic, restaurant patrons must make advance reservations, sign health certifications, provide contact information, and get a temperature check before entering. It is not unreasonable to anticipate that at least in some regions of the United States some or all of these measures may become commonplace and customers may expect such heightened levels of inquiry. Inserting clear and conspicuous waivers into, for example, a restaurant reservation system may be an easy way to obtain customer agreement. Presenting patrons who appear in person with forms disclosing the inherent risk of shopping or dining during the pandemic may also be possible.

However, the law surrounding exculpatory provisions varies greatly by state, making a nuanced understanding of each states' law on this issue crucial to their effective use. Below, we explore the law surrounding exculpatory provisions and arbitration agreements in some of the hardest hit jurisdictions.

New York

In New York, the enforceability of an exculpatory agreement between a business and its customers will to some extent depend on the nature of the business and its relationship with its customers. All such agreements are subject to "close judicial scrutiny." Despite this, a nonessential business that is not covered by a specific statute can likely enforce an exculpatory agreement that is clear and unambiguous, explicitly states that claims for negligence are waived, and does not seek to exempt gross negligence or any other behavior in excess of negligence.

Exculpatory agreements will generally be "upheld in a purely commercial setting, or where voluntary nonessential social activities are freely engaged in by consenting parties." But New York courts will refuse to enforce an exculpatory agreement if it is against public policy due to the relationship between the parties, such as a passenger and common carrier, a customer and a telephone utility, an employer-employee, or a home health aide and patient. The extent of this exception is not well-defined, however, so specific legal advice should be sought. Of particular relevance here is that some courts refuse to enforce a waiver where the relationship between the parties implicates the "State's interest in the health and welfare of its citizens" – although this rationale has not been applied in the context of the current pandemic.

New York statutes render waivers void in a variety of business contexts, such as landlords, caterers, building service or maintenance contractors, those who maintain garages or parking garages, or pools, gymnasiums or places of public amusement or recreation. N.Y. CLS Gen. Oblig. Law § 5-321 et. seq. While most of these are relatively straightforward in application, there is some ambiguity in General Obligation Law § 5-326, which states that exculpatory agreements are unenforceable between the operator of a "pool, gymnasium, place of amusement or recreation, or similar establishment" and their patrons. N.Y. CLS Gen. Oblig. Law § 5-326 (emphasis added). A retail establishment is unlikely to be included, but service establishments are less certain. All of this uncertainty could be capitalized by an enterprising plaintiff.

Still, businesses in New York that cater to or have minors for patrons must be cautious. First, a minor can usually void any contract they enter into. Second, some courts will not enforce waivers signed by a parent on behalf of their child. A business should likely assume that any exculpatory agreement involving a minor may be unenforceable.

Finally, it is unlikely that an exculpatory agreement would be invalided as a contract of adhesion. A nonessential business that simply refuses service to those who do not sign the agreement is unlikely to be characterized as an adhesion contract. Consequently, a clause requiring arbitration is likely to be enforceable, even if the exculpatory provision is not.

California

In California, an exculpatory agreement between a nonessential business and its customers waiving liability for conduct that does not rise above negligence is likely to be enforceable as long as it is clear, explicit, and comprehensible and does not violate public policy. When analyzing whether an exculpatory agreement violates public policy, California looks to whether the transaction exhibits

certain characteristics, such as whether the business is suitable for public regulation, the services offered are of high importance or necessity, and whether the party seeking exculpation has a strong bargaining advantage. As a practical matter, a business providing nonessential services, or services provided by sufficient competitors in its immediate vicinity, is unlikely to have these characteristics. However this may not prevent plaintiffs from asserting that a particular business does have these characteristics.

Businesses in California should also be wary of entering an agreement directly with a minor, as these contracts are likely voidable. However, a parent is permitted to enter binding contracts on behalf of their children in California, and a California court is more likely to uphold a release if it was signed by the parent on behalf of the minor.

Finally, it is unlikely that an exculpatory agreement between a nonessential business and its customers would be an unenforceable contract of adhesion. In California, contracts of adhesion are unenforceable when they (1) do "not fall within the reasonable expectations of the weaker or 'adhering' party" and/or (2) "when the contract is, considered in its context unduly oppressive or unconscionable." An exculpatory agreement that clearly explains the risks of socializing during a pandemic is likely adequate to clear the first hurdle. The second requires the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." The nonessential nature of a business alone is likely to mitigate against any such finding. An arbitration clause is likely to be enforceable so long as it passes this test and is not against public policy.

Washington, D.C.

In Washington, D.C. ("D.C.") an exculpatory agreement between a nonessential business and its customers waiving liability for negligence is likely to be enforceable as long as it is clear and unambiguous and not against public policy. As in most jurisdictions, a business cannot exempt itself "from liability for gross negligence or wanton conduct." Consequently, a contract that is clear and unambiguous, attempts to waive only negligence, and is not otherwise against public policy is likely to be enforceable under D.C. law.

A D.C. court may find that an exculpatory agreement violates public policy if it seeks to avoid a public service obligation inherent to the public good, such as a landlord's obligation to provide habitable residential premises. There is not yet case law indicating whether waiving liability for negligent conduct related to COVID-19 prevention avoids a public service obligation inherent to the public good. However, D.C. courts have permitted parties to waive liability for claims arising from statutorily imposed duties of care, such as compliance with OSHA. This may suggest that a D.C. business can enforce an exculpatory agreement even if the agreement waives liability related to failed compliance with government requirements or guidance related to COVID-19.

As is the general rule, in D.C. a minor has the right to void a contract, which makes entering into an exculpatory provision with them risky and unlikely to be enforceable if voided. It is not clear whether a parent can waive a minor's right to sue on their behalf in D.C.

Finally, D.C. also precludes the enforcement of certain contracts of adhesion as against public policy. Such a contract will be unenforceable if there is "a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere" and the good or service was essential. Assuming that the business is nonessential, or that there are other providers of similar goods or services in the vicinity, the

exculpatory agreement should not be invalid on these grounds. An arbitration provision should be subject to the same analysis.