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# Contagion waivers as a COVID-19 pandemic risk management tool

CONTRACT LAW

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As public institutions and private businesses across the country transition through various states of physical and virtual operations, the use of contagion waivers during the COVID-19 pandemic has emerged as a particularly hot topic within the legal community.

From school districts to small businesses, and from golf camps to hair salons, questions abound: Can a waiver and release agreement effectively protect against the risk of a lawsuit by someone who contracts COVID-19 while in the establishment? What type of conduct can be covered by such a contagion waiver? What types of public and private entities can utilize a contagion waiver, and when?

While the COVID-19 pandemic has opened the door to a wide variety of litigation that has already started generating reported appellate decisions, it will be many months and years before these legal questions are well-settled. In the meantime, those of us advising risk managers can draw upon a rich array of legal precedent to guide our path.

In general, exculpatory contracts are enforceable and effective against negligence claims under a core legal principal: the freedom of contract. However, exculpatory clauses must be carefully constructed, as they are judicially disfavored and thus strictly construed. *Harris v. Walker,* 119 Ill.2d 542, 548, 519 N.E.2d 917, 919 (1988). An exculpatory clause may be broadly worded, but it must contain clear language referencing the types of activities, circumstances, or situations that are encompassed by the release. *Hussein v. L.A. Fitness International, LLC,* 2013 IL App (1st) 121426, ¶ 13 (2013).

While an exculpatory agreement need not contemplate the precise occurrence which resulted in the plaintiff's injury, the danger which caused the injury must be one which ordinarily accompanies the activity covered by the release. *Johnson v. Salvation Army,* 2011 IL App (1st) 103323, Para. 36 (2011). Thus, the exculpatory clause must give the plaintiff notice of the range of dangers of which she assumes the risk, and the scope of a release is often defined by the foreseeability of a particular danger. *Oelze v. Score Sports Venture, LLC*, 401 Ill.App.3d 110, 120 (2010). If there is a dispute, the legal effect of an exculpatory contract is to be decided by the court as a matter of law. *Johnson v. Salvation Army,* 2011 IL App (1st) 103323, Para. 19 (2011).

With these parameters in mind, we turn to the question of whether and when an exculpatory agreement, specifically a contagion waiver, may be invalidated on public policy grounds. Generally, an agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy, or unless it is manifestly injurious to the public welfare. Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case. *Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.,* 215 Ill. 2d 121, 129–30, 828 N.E.2d 1175, 1180 (2005), as modified on denial of rehearing (June 9, 2005).

This presents an interesting standard that hinges largely on who seeks to enforce the contagion waiver, and under what circumstances enforcement is sought. While a private gym owner will more likely than not prevail on a public policy challenge to enforcement of a contagion waiver against a client who contracts COVID-19 during a one-on-one training session, a public school district required by Article X of the Illinois Constitution to provide a free public education may find it more difficult to enforce a contagion waiver against a student who contacts COVID-19 during the course of the school day. While the gym owner is free to condition access to its private facilities on each member's execution of a contagion waiver, a public school district likely does not have the same latitude to condition access to its facilities or programs, due to its constitutional mandate to provide a free public education.

Although a public body such as a public school district may not be able to enforce a contagion waiver to the same extent as a private entity, many pubic bodies, such as public school districts, can avail themselves to certain protections under the Local Governmental and Governmental Employees Tort Immunity Act.

For example, Section 6-104 of the Tort Immunity Act provides a local public entity and its employees with immunity "for an injury resulting from the policy decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if such decision was the result of the exercise of discretion vested in the local public entity or the public employee, whether or not such discretion was abused." 745 ILCS 10/6-104. As COVID-contraction negligence claims arise, we can expect an entirely new line of cases forthcoming, interpreting and applying this and other public-sector statutory immunities.

And, in considering statutory protections such as Section 6-104, it would be remiss to not consider whether state or federal legislation may provide a better vehicle than contagion waivers for broad, comprehensive management of all the multitude of risks arising from the COVID-19 pandemic. While there has been some action on this front within several states, a coordinated federal response has yet to be seen. In any event, with or without a contagion waiver, a negligence claim based on COVID-19 contraction faces many challenges. To even see the inside of a jury room, a plaintiff will bear the significant burden of proving causation, specifically that the act or omission of the defendant caused the plaintiff to contract COVID-19. In this regard, COVID-19 infection cases will be more difficult to prosecute than the average injury case.