

FHMS COVID-19 Resource Center:

ENFORCEABILITY OF COVID-19 LIABILITY WAIVERS UNDER PENNSYLVANIA LAW

As states and counties lift COVID-19 restrictions, we anticipate that businesses will use liability waivers to limit the ability of customers, patrons, or others to sue if they contract COVID-19. Before this pandemic, liability waivers were used as a contractual mechanism to limit or avoid liability from lawsuits arising from injury. In Pennsylvania, such liability waivers, or exculpatory agreements, are generally enforceable, except in cases of intentional, reckless, or grossly negligent conduct. *Feleccia v. Lackawanna Coll.*, 215 A.3d 3, 20-21 (Pa. 2019). Pennsylvania courts have yet to address COVID-19 liability waivers. However, existing legal precedent provides a framework on how courts might evaluate those waivers, which is discussed herein.

This article focuses on enforceability of the waiver language under Pennsylvania law. It does not address other factors related to contract enforceability, such as whether a valid contract exists, or whether a contracting party may enforce forum selection or choice-of-law provisions.

Validity of Liability Waivers

Under Pennsylvania law, exculpatory clauses, are valid if: (1) the clause does not contravene public policy; (2) the contract is between persons relating entirely to their own private affairs; and (3) each is a free bargaining agent to the agreement so that the contract is not one of adhesion. *Chepkovich v. Hidden Valley Resort, LP*, 2 A.3d 1174, 1189 (Pa. 2010) (citing *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98 (Pa. 1993), and *Emprls.' Liab. Assur. Corp. v. Greenville Businessmen's Ass'n*, 224 A.2d 620 (Pa. 1966)). A party invoking a waiver must prove these three conditions. *Id.* Pennsylvania courts refer to this three-part test as the "*Topp Copy/Employers' Liability* standard." Courts will likely apply this standard to COVID-19 waivers.

(1) Public Policy

In determining if public policy invalidates a liability waiver, Pennsylvania courts examine legal precedent, government practice, or obvious moral or ethical standards. *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1199 (Pa. 2012). As an example, liability waivers that try to release a business for its recklessness violate public policy, because recklessness entails conscious action or inaction akin to intentional conduct. *Id.* at 1201. Similarly, one cannot require a liability waiver for gross negligence, because gross negligence entails an "extreme departure" from the standard of care. *Feleccia*, 215 A.3d at 20-21.

For COVID-19 claims, plaintiffs may allege that businesses operating in knowing violation of government shutdown orders are acting recklessly or are grossly negligent. Similarly, businesses that do not follow CDC guidelines or state or local COVID-19 guidelines may be accused of gross negligence. In other words, businesses that do not adhere to government mandates or guidelines do so at the risk of voiding any contractual liability waivers. A business operating in violation of health and safety mandates will likely be unable to enforce a liability waiver. For example, in *Schultz ex rel. Schultz v. Devaux*, 715 A.2d 479 481 (Pa. Super. 1998), the court refused to enforce a liability waiver in a lease, because there was evidence that the landlord did not comply with the building code.

Conversely, businesses that operate in compliance with the law are more likely to meet the public-policy part of the *Topp Copy/Employers' Liability* standard. For example, if a restaurant entering Pennsylvania's "yellow phase" of reopening were to limit its outdoor seating to 25 or less people and take additional preventative measures related to the spread of the COVID-19 as required, a court may be more likely to find that a liability waiver does not violate public policy.

(2) *Private Affairs*

The second part of the *Topp Copy/Employers' Liability* standard requires that liability waivers relate to the parties' "private affairs." This generally means that the waiver must be between private parties and must not relate to matters of interest to the public or the state. *Hinkal v. Pardoe*, 133 A.3d 738, 742 (Pa. Super. 2016) (en banc). Matters of interest to the public or the state include the employer-employee relationship, public service, public utilities, common carrier, and hospitals. *Id.*

Generally speaking, athletic or recreational activities will satisfy the "private affairs" part of the test. *See, e.g., Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1147 (Pa. 2010) (skiing); *Valentino v. Phila. Triathlon, LLC*, 150 A.3d 483 (Pa. Super. 2016) (en banc) (sprint triathlon), *aff'd by an equally divided Court*, 209 A.3d 941 (Pa. 2019); *Hinkal*, 133 A.3d 738 (gym membership); *McDonald v. Whitewater Challengers, Inc.*, 116 A.3d 99 (Pa. Super. 2015) (whitewater rafting).

It is possible that a court may not permit a hospital to require all non-patient visitors to sign a liability waiver. Similarly, a court would likely not permit an employer to require its employees to sign COVID-19 liability waivers as a condition of employment. Conversely, waivers for voluntary athletic activities will likely be upheld. Liability waivers for children's athletic activity present special considerations that are addressed below.

(3) *Contract of Adhesion*

The third part of the *Topp Copy/Employer's Liability* standard requires that a liability waiver not be a contract of adhesion. Adhesive contracts are usually standard-form contracts prepared by one party and signed by another who lacks bargaining power and who has little choice regarding the terms of the contract. *Chepkevich*, 2 A.3d at 1190. Many times, the party with little or no bargaining power is a consumer. *See id.*

When an individual, even though in a position with less bargaining power, voluntarily assumes a risk in entering a contract, the contract may not be found a contract of adhesion. For example, a standard form skier's release is not a contract of adhesion. *Id.* 1190-91. Neither is a release contained in a gym membership. *See Hinkal*, 133 A.3d at 742. People who voluntarily participate in recreational activities are under no compulsion to do so, so liability waivers related to those activities are generally not contracts of adhesion. *See Toro v. Fitness Int'l, LLC*, 150 A.3d 968, 975 (Pa. Super. 2016).

Liability Waiver Language

A liability waiver that satisfies the *Topp Copy/ Employers' Liability* standard must have language that applies to the particular situation at issue. A court may not enforce an otherwise valid liability waiver if its language is unclear. Specifically, a liability waiver must clearly identify that it releases from liability the person or business seeking protection. *See Brown v. Racquetball Centers, Inc.*, 534 A.2d 842, 843 (Pa. Super. 1987). In interpreting the language necessary for enforceability of liability waivers, Pennsylvania courts look to the following standards:

- 1) the contract language must be construed strictly, since the exculpatory language is not favored by the law;
- 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties;
- 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and
- 4) the burden of establishing the immunity is upon the party invoking protection under the clause or contract language.

Topp Copy, 626 A.2d at 99.

The language in a liability waiver controls whether it applies to a particular claim and will be enforceable. For example, in *Toro*, the plaintiff fell in an L.A. Fitness locker room. *Toro*, 150 A.3d at 970. The court enforced the liability waiver in the plaintiff's gym membership, which applied "to any claims . . . on account of injury to Member's person or property" "while Member or Member's minor children are in, upon, or about L.A. Fitness[]" premises or using any L.A. Fitness facilities, services or equipment." *Id.* In contrast, the liability waiver in *Brown* 534 released the health club from liability as follows: "I hereby and do assume all risks of injury to my person and property that may be sustained in connection with the stated and associated activities in and about those premises." *Brown* 534 A.2d at 843. Because the clause did not clearly apply to all activities at the health club, the court did not enforce the liability waiver against the plaintiff, who fell in a shower. *Id.*

In light of the varying factors and factual scenarios that impact the enforceability of a liability waiver, it is not possible to identify specific or form language that can be used by every business in a waiver. For COVID-19, businesses likely need clear and unambiguous language stating the risks associated with COVID-19. Medical and epidemiological evidence shows that transmission is possible even when carefully performing preventive measures. Ideally, any liability waiver would remind or inform persons of this risk and that they voluntarily agree to undertake the subject activity notwithstanding. Moreover, to be enforceable, the language of any exculpatory clause must clearly cover the conduct that gave rise to the injured person's claim. Finally, the waiver must provide that it releases the person or business from liability even for their own negligence.

Special Considerations

- ***Children***: Pennsylvania law does not prevent parents from entering into liability waivers on behalf of their children. Any liability waiver involving a minor will involve the minor's adult guardian(s).
- ***Failure to Read***: A person cannot avoid a liability waiver by claiming that he or she did not read a document that he or she signed. *Vinson v. Fitness Int'l, LLC*, 187 A.3d 253, 259 n.4 (Pa. Super. 2018).
- ***Conspicuity***: Generally, Pennsylvania does not require liability waivers to be in a certain size font or typeface to be enforceable. *Hinkal*, 133 A.3d at 744-45. However, the lack of conspicuity may be evidence that the parties to an exculpatory clause did not enter into a legally enforceable agreement. *Id.*

Conclusion

As businesses throughout Pennsylvania re-open, we anticipate a rise in the use of COVID-19 liability waivers and exculpatory clauses. As discussed above, liability waivers will likely not permit businesses to avoid or ignore federal, state, and local health and safety guidelines. And whether courts will enforce liability waivers for COVID-19 exposure remains to be seen, although a good roadmap already exists. We are available to discuss your questions or concerns. Please do not hesitate to contact us about liability waivers for COVID-19 exposure.

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