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My client executed a release of liability before the accident, now what?

A release of liability does not necessarily bring your claim to a grinding halt, but it can

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Thoughtful evaluation to the application and impact of a release of liability executed by a client should be given by the practitioner when assessing a potential claim or case. Where an individual executed a release prior to engaging in an activity and thereafter sustained injury, the release may act as a complete bar to recovery for an otherwise deserving client. Assuming a release of liability exists, it will almost assuredly be the subject of a motion for summary judgment or adjudication. Careful consideration of this at the outset, along with tailoring a focused discovery plan to defeat summary judgment will serve counsel well in the long run.

Rule of law

An individual may expressly agree to release any claims of negligence against another by contract. Such an agreement, “is valid unless it contravenes public policy.” (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1292, at p. 686; see also *City of Santa Barbara v. Sup. Ct.* (2007) 41 Cal.4th 747, 758 [*“Santa Barbara”*].) Civil Code section 1668 provides that, “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law.”

California courts have nullified releases of liability for ordinary negligence where the, “particular release concerns a service that transcends a purely private agreement and affects the public interest.” (*Santa Barbara* at p. 757.)

Conversely, private agreements made in connection with sporting or recreational activities have consistently been upheld. (*Id.* at p. 759.) “[P]rivate agreements made ‘in the recreational sports context’ releasing liability for future ordinary negligence’ do not implicate the public interest and therefore are not void as against public policy.” (*Ibid.*)

In evaluating the language of a release of liability, the purpose is to effectuate the manifest or objective intent of the



parties. (*Paralift, Inc. v. Sup. Ct.*, (1993) 23 Cal.App.4th 748, 755 [*"Paralift"*].) No specific language is required for a release to be operative. (*Sanchez v. Bally's Total Fitness Corp.* (1988) 68 Cal.App.4th 62, 66-67.) As long as the release reflects the parties' intent to release the defendant from its negligent conduct, it will be upheld. (*Madison v. Sup. Ct.* (1988) 203 Cal.App.3d 589, 597.) Accordingly, the specific act of negligence that injured the plaintiff does not need to be specified in the agreement, but the mechanism of injury must be reasonably related to the object or purpose for which the release is given. (*Paralift* at p. 757; *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1357 [*"Benedek"*].)

A release of liability will only be upheld to exculpate a party from ordinary negligence, but never for gross negligence. (*Santa Barbara* at p. 755.) Gross negligence is the "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (*Id.* at p. 754, internal citations omitted.)

Application

When confronted with a situation implicating the applicability of a release of liability, counsel should, at a minimum, evaluate the following three questions: (1) Does the release violate public policy? (2) Does the scope of the release cover the incident? and (3) Is there evidence of gross negligence?

Public policy consideration

A release of liability that limits a public interest is invalidated by operation of Civil Code section 1668. In *Tunkl v. Regents of University of Cal.*, (1963) 60 Cal.2d 92 (*"Tunkl"*) the California Supreme Court stated that, "[n]o definition of the concept of public interest can be contained within the four corners of a formula." (*Tunkl* at p. 98.) However, there are generally six-characteristics of public interest categories for a court to apply: (1) It must concern businesses generally thought suitable for public regulation; (2) The party seeking to enforce the

release performs a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) The party seeking to enforce the release holds him/herself out as willing to perform the service for any member of the public who seeks it; (4) The party seeking to enforce the release holds a significant bargaining strength against the public who seek his/her services; (5) The exculpatory agreement is a standardized adhesion contract with no provision whereby a purchaser may pay an additional fee to gain protection against negligence; and (6) The transaction results in the purchaser being placed under the control of the seller, subject to the risk and carelessness by the seller or his agents. (*Tunkl* at p. 98-99; *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 717 [*"Gardner"*].)

In *Tunkl*, the high court invalidated a release contained in a hospital-patient contract. Similarly, an automobile-repair garage disclaimer was held void because auto-maintenance implicates a public interest. (*Gardner* at p. 721.) Additionally, a statutory provision may exist which prohibits contractually regulating a service or industry.

Conversely, where a release of liability involves a sporting or recreational activity, courts invariably find the activity does not further a public policy and are thus open to contractual liability limitation. Representative cases include injuries at a gym or fitness center, skydiving, bicycle racing, river rafting, motocross racing, etc. As a practical matter, if the activity at issue is clearly recreational or more likely than not to fall within that category, counsel's efforts are better spent arguing scope of the release language or gross negligence.

Scope considerations

• Ambiguity

As with other contracts, a challenge to a release of liability may be predicated upon ambiguous contractual language. "An ambiguity exists when a party can identify an alternative, semantically

reasonable, candidate of meaning of a writing." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360 [*"Solis"*].) The ambiguity may be patent, latent or based on extrinsic evidence. (*Ibid.*) Where an ambiguity exists as to the scope of the release, it should be construed against the drafter. (*Id.*; Civ. Code, § 1654.)

In *Solis*, an individual purchased a season ski pass that contained a comprehensive release of liability provision, but only permitted him to utilize the ski resort Monday through Friday. (*Solis* at p. 362.) He thereafter purchased a day pass to ski on a Sunday which did not contain a release, following which he sustained injury on the slopes. (*Ibid.*) The trial court granted defendant's summary judgment motion based upon the release contained in the season pass. (*Id.* at p. 359.) On appeal, the respondent (plaintiff) argued that the season pass release only applied Monday through Friday and that the terms of the Sunday day pass (with no release provision) controlled on the day of his injury. (*Id.* at p. 362.) The court evaluated the contractual ambiguity and determined that although the plaintiff's argument may not ultimately carry the day, it was at least a plausible interpretation, adequate to create a triable issue of material fact. (*Ibid.*)

• Reasonably related to object or purpose

Probably the ripest area for argument to oppose the application of a release of liability is the requirement that the act of negligence which results in injury be reasonably related to the object or purpose for which the release is given. (*Benedek* 104 Cal.App.4th at p. 1357.) While the express terms of the release must be applicable to the negligent act, not every possible specific act of negligence of a defendant needs to be spelled out. (*Ibid.*) The particular risk of injury inherent in the activity is not at issue, rather the scope of the language in the release. (*Ibid.*)

In *Leon v. Family Fitness Ctr. (#107)* 61 Cal.App.4th 1227 (*"Leon"*), the Fourth District Court of Appeal reversed summary judgment related to an injury sustained at a fitness center when a bench in



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the sauna room a patron was sitting on collapsed. (*Leon* at p. 1230.) The membership agreement executed by Leon contained an exculpatory agreement releasing the fitness center from liability surrounding Leon's participation in exercise or sports. (*Id.* at p. 1235.) The appeals court found that the object and purpose of the release was to allow Leon to engage in physical fitness activities. (*Ibid.*) However, Leon was injured while he was lying on a fixed, permanent bench in the sauna room. (*Ibid.*) Thus, the Fourth District determined, the scope of the release did not extend to Leon's use of the stationary sauna bench.

In practice, the greater a distinction that can be drawn between the specific language contained in the release and the negligent conduct, the more likely a court is to reject a dispositive motion and find the existence of a triable issue.

Gross negligence

In 2007, the California Supreme Court established that a release of liability cannot be utilized to exculpate a party from conduct arising to "gross negligence." (*Santa Barbara* at p. 755.) Gross negligence is defined as the "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (*Id.* at p. 754, internal citations omitted.) "[T]he distinction between ordinary and gross negligence reflects a rule of policy that harsher legal consequences should flow when negligence is aggravated instead of merely ordinary." (*Id.* at p. 776, internal citations omitted.) The gross negligence standard adheres to the public policy of discouraging and not facilitating aggravated wrongs. (*Ibid.*) Gross negligence is generally a question of fact, but in some situations may be determined as

a matter of law. (*Frittelli, Inc., v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 52.)

In one of the most recently published decisions evaluating a defendant's alleged gross negligence, the Second District Court of Appeal in *Grebing v. 24 Hour Fitness USA, Inc.*, (2015) 234 Cal.App.4th 631 determined that a fitness center did not act with gross negligence in maintaining its fitness equipment. A patron was injured while utilizing a low row machine that was affixed with a clip connecting the handlebar to a cable attached to weights. (*Id.* at p. 634.) The clip was the incorrect size and strength, and as a result broke while in use. (*Ibid.*) The evidence established that a "heavy-duty clip" was required for this equipment; it was the fitness center's practice to use heavier clips for that machine, and a patron had complained to staff about the incorrect clip 15 minutes before the incident but it had not been replaced. (*Id.* at p. 638-639.) Despite this, the court concluded that although the "evidence may raise conflicting inferences regarding the measures' effectiveness, these conflicts did not preclude summary judgment of claims of gross negligence." (*Id.* at p. 639.)

Conversely, the Fourth District Court of Appeal found that a triable issue regarding gross negligence existed where a motocross rider was injured on a racetrack during a practice run. (*Rosencrans v. Dover Images, Ltd.*, (2011) 192 Cal.App.4th 1072.) The rider fell off his bike but was initially uninjured. (*Ibid.*) However, he was struck by another rider 30 seconds later and again 20 seconds after that. (*Ibid.*)

The track did not provide caution flags for the practice run despite it being the industry standard for tracks to do so,

which the track's owner acknowledged. (*Id.* at p. 1086-1087.) The court found this was adequate evidence of gross negligence to defeat summary judgment. (*Ibid.*)

To successfully argue the existence of gross negligence, there must be something substantial to hang your hat upon, and not merely ordinary misconduct. Published decisions do not provide much help in determining exactly what will suffice. However, if there is a potential gross negligence claim on a given case, the theory should be fully fleshed out in discovery at the earliest opportunity.

Conclusion

The impact that a release of liability may have on a client's potential for recovery should not be discounted. Releases serve an important function in the fabric of modern society and courts are inclined to uphold their validity where the legal and factual pieces align. Representing a client who executed a release before being injured will likely be an uphill battle fought on many fronts. Counsel should be prepared to drive the case from the outset to establish that the injury to their client falls outside the umbrella of the release.



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