Defeating liability waivers and the primary assumption of risk defense

These roadblocks to liability at summary judgment can often be overcome

By Brian J. Malloy

You have egregious conduct by a defendant leaving your client with serious injuries. The problem is that the bad conduct occurred in a recreational setting. You are inevitably going to face two roadblocks: a liability waiver and the primary assumption of risk affirmative defense. This article will examine ways to overcome both of these defenses and survey the cases where courts have rejected summary judgments on them.

Liability waivers

1. General contract principles apply to waivers

A liability waiver is at its most basic a contract governed by contract law. It is also an affirmative defense, and a defendant asserting a waiver bears the burden of proving its validity. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 780 fn. 58.) In addition, waivers are to be strictly construed against the drafting party. (Cal. Civ. Code § 1654; *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.)

2. Who is included in the waiver?

The first question to answer is who is actually included in the waiver? *See* Cal. Civ. Code § 1558 ("Identification of parties necessary.) It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them."). The most basic question: did your client (or the defendant) even sign the document?

Assuming that the waiver does contain both parties' signatures, the next question is which defendants are included?

In these days of multiple LLCs, corporations, etc., the release may only name one or two actual defendants. If that is the case, an argument can be made based on contract law that third parties to this contract should not be able to enforce it.

3. What is the scope of the waiver?

Once the parties to the waiver are determined, the next question is, what is the waiver's scope, i.e., what is being waived?

To be effective, the release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. In determining a waiver's scope, "California courts require a high degree of clarity and specificity in a Release in order to find that it relieves a party from liability for its own negligence." (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1488.) And, any ambiguity in the scope will be construed against the drafter. (Cal. Civ. Code § 1654.)

What is an ambiguity? Courts have held that "[a]n 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) (citation omitted). Ambiguities can be patent (arising from the face of the writing) or latent (based on extrinsic evidence.). (*Solis,* 94 Cal.App.4th at 360; *Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1357.) Additionally, even where the waiver purports to release a defendant from its own negligent conduct, the "negligence that results in injury . . . must be reasonably related to the object or purpose for which the release is given." (*Sweat v. Big Time Auto Racing, Inc*. (2004) 117 Cal.App.4th 1301, 1305.)

What are some examples of a court finding that certain negligent conduct was outside the scope of release?

In *Leon v. Family Fitness Center* (*# 107*), *Inc.* (1998) 61 Cal.App.4th 1227, the plaintiff was injured in a sauna at a health club. A release waiving liability for the plaintiff to engage in fitness activities at a health club was found not to apply to injuries from a collapsed sauna bench at the same health club. (*Id.* at 1234-35.) The court held that "[t]he objective purpose of the release Leon signed was to allow him to engage in fitness activities within the Family Fitness facilities" but that "it was not this type of activity which led to his injury." (*Id.* at 1235.)

Similarly, in *Sweat v. Big Time Auto Racing, Inc*., 117 Cal.App.4th at 1308, a release that applied to injuries suffered while in a racetrack's restricted area was found not to apply to injuries sustained in bleachers outside of the restricted area.

In *Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467, the scope of a release signed in connection with one-day rental of scuba diving equipment only applied to "boat dives and multiple day rentals."

These are just some examples to highlight that it is very important to carefully read what precisely is included within the four corners of the waiver, as anything not included – including anything that may be ambiguous – may not be covered under the scope of the release.

4. Was defendant's conduct grossly negligent?

If the parties are all signatories to the release and the scope applies to the challenged conduct, another issue concerning waivers is whether the conduct rises to the level of gross negligence, which will invalidate the waiver as relates to grossly negligent conduct. (Cal. Civil Code, § 1668.) The Supreme Court has held that "an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy." (*Santa Barbara,* 41 Cal.4th at 751. While gross negligence does not have to be pled in the complaint, (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467), if the conduct does rise to the level of gross negligence it is a good idea to plead it.[1]

What is gross negligence? It is defined in CACI 425 as "the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or failing to act." The Supreme Court in *Santa Barbara* differentiated between "ordinary" and "gross" negligence this way: "Ordinary negligence — an unintentional tort - consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm" while "gross negligence long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*Santa Barbara*, 41 Cal.4th at 753-54.)

There are a couple of important things to highlight to the Court when contending conduct rises to the level of gross negligence. First, gross negligence does not require an intent to do harm or to act with absolute disregard of the consequences. (*Meek v. Fowler* (1935) 3 Cal.2d 420, 425; *Hawaiian Pineapple Co. v. Ind. Acc. Com.* (1953) 40 Cal.2d 656, 662.) "[M]ost courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358); *Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240.) Second, courts have long recognized that whether conduct rises to the level of gross negligence is generally a question of fact. (*Santa Barbara*, 41 Cal.4th at 767); (*Decker,* 209 Cal.App.3d at 358); (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640).

What are some examples of grossly negligent conduct?

Chavez, 238 Cal.App.4th at 640-42 found a triable issue of material fact on gross negligence, where the evidence could establish that a gym failed to perform regular preventative maintenance and, on that basis, failed to exercise scant

care or demonstrated passivity and indifference toward results.

Jimenez v. 24 Hour Fitness USA, Inc. (2015) 237 Cal.App.4th 546 also found a triable issue of fact as to whether failure to comply with fitness equipment owner's manual constituted an extreme departure from the ordinary standard of conduct.

Jimenez v. 24 Hour Fitness USA, Inc. (2015) 237 Cal.App.4th 546 found a triable issue of fact on gross negligence where standard to provide a caution flagger was not followed.

There are many other cases, but these give you a sense what courts are looking for in determining whether conduct rises above the level of "ordinary" negligence, making the waiver inapplicable to such conduct.

Primary assumption of risk

After you overcome the liability waiver defense, you will next likely have to overcome primary assumption of risk affirmative defense. This affirmative defense absolves a defendant of a duty of care with regard to injury incurred in the course of a sporting or other recreational activity. (*See Knight v. Jewett* (1992) 3 Cal.4th 296, 320.) The object of this defense "in the sports setting is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1011.)

There are two exceptions to the defense, both of which focus on defendant's conduct: (1) where the defendant's conduct was entirely outside the range of ordinary activity involved in the teaching or coaching of the activity, or (2) where the defendant unreasonably increased the risks to plaintiff over and above those inherent in the activity. *Eriksson,* 191 Cal.App.4th at 845.

If you overcame the waiver defense based on gross negligence, many of the same facts and arguments used to establish gross negligence will apply equally to the primary assumption of risk defense.

What are some examples fitting within these two exceptions?

In *Cohen*, 159 Cal.App.4th 1476, a horseback rider was injured after being thrown from a horse during a horseback ride. While the defendant argued that the horse was just "acting like a horse," the court disagreed. It noted that the plaintiff did not "complain about the conduct of the horse assigned her, but about that of the trail guide she was provided." (*Id.* at 1493.) Focusing on the conduct of the defendant, *Cohen* noted that while "[a] spooked horse that throws a rider may be a 'horse acting as a horse,'" in contrast "a trail guide who unexpectedly provokes a horse to bolt and run without warning its rider is not in our opinion a 'trail guide acting as a trail guide.'" (*Id.* at 1493.)

Other examples abound. *Eriksson*, 191 Cal.App.4th at 845-46 (summary judgment was reversed, where the court found that the horse riding coach's conduct "increased the risk inherent in the sport."); *Giardino v. Brown* (2002) 98 Cal.App.4th 820, 831, 834-36) (reversing grant of summary judgment on primary assumption of risk, finding triable issues of material fact involving horseback riding); (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528) (reversing grant of summary judgment involving injury sustained at horse jockey school); (*Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817) (reversing grant of summary judgment involving horse jumping instruction).

The key lesson from all of these cases is to focus on the defendant's conduct to establish that the primary assumption of risk defense should not apply.

Conclusion

An injury in a recreational setting does have additional hurdles, but those can be overcome depending on how the liability waiver has been drafted and how egregious the defendant's conduct is.


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Endnote

[1] This is because the defendant then has the initial burden on summary judgment to establish no triable issues of material fact on the gross negligence allegation. If the defendant fails to make that showing, courts have denied summary judgment on the ground that the burden did not even shift to the plaintiff. *See Eriksson,* 191 Cal.App.4th 856 ("[I]t was incumbent upon [the defendant], as part of her burden of production, to submit undisputed facts negating these material factual allegations, which could well equate to gross negligence. This she did not do."); *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858 ("If, in anticipation of an affirmative defense, the complaint alleges facts to refute it, the pleadings themselves create 'a material issue which defendant[ ] would have . . . to refute in order to obtain summary [judgment].' [Citation.]").