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OUTSIDE COUNSEL

Expert Analysis

Battle Lines Drawn on Enforceability Of Sporting Event-Related Releases

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Participants in sporting events usually sign, as a precondition of participation, a form that in some way or another purports to release the event organizer from liability—even from the organizer's own negligence.

Often, however, little thought is given to such releases, which could amount to a forfeiture of the right of recovery, particularly since the release language is often contained in a registration form, and generally not even presented to the participant, reviewed and/or signed until the day of the event.

Nevertheless, contrary to the belief of many sporting event participants (as well as many event executives and organizers, many in the insurance industry and many members of the bar), such exculpatory language is often enforceable.

What is most surprising is that in New York, whether a release signed in connection with participation in a sporting event is enforceable often rests on in which court the personal injury action is commenced, since a split in authority has developed between the Second and Third departments of the Appellate Division.

Recently, in *Brookner v. New York Road Runners Club Inc.*, 11 N.Y.3d 704, 864 N.Y.S.2d 807 (2008), the New York Court of Appeals, reviewing an application for leave to appeal, was presented with an opportunity to resolve this dispute. In denying the motion, the Court left standing a Second Department decision upholding the enforceability of a release signed in connection with the plaintiff's participation in the ING New York City Marathon 2004.

Indemnification language exculpating a party from the consequences of his own negligence, although subject to close judicial scrutiny, will be enforced where (1) it evinces the "unmistakable intent of the parties" and (2) is not otherwise proscribed by statute. *Gross v. Sweet*, 49 N.Y. 2d 102, 424 N.Y.S. 2d 365 (1979).

Courts will look at the relationship between the parties to the agreement, the evenness of the bargaining positions and for concise and unambiguous language. See *Williams v. Mobil Oil Corp.*, 83 A.D. 2d 434, 445 N.Y.S. 2d 172 (2d Dep't 1981) ("The indemnity provisions… were a part of the business relationship between the parties and…represented an allocation of the risk of liability between the parties.").

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It is well-settled law that a release and waiver of liability is enforceable "[w]here the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence." *Blog v. Battery Park City Authority*, 234 A.D.2d 99, 100, 650 N.Y.S.2d 713, 714 (1st Dep't 1996).

The release upheld in *Blog* was signed by a participant in a go-kart race who contended she did not know what form she signed before the start of the race. See also *Castellanos v. Nassau/Suffolk Dek Hockey Inc.*, 232 A.D.2d 354, 648 N.Y.S.2d 143 (2d Dep't 1996) (dismissing the plaintiff's action where the plaintiff had signed an injury waiver form prior to participation in a dek hockey game); *Chieco v. Paramarketing Inc.*, 228 A.D.2d 462, 643 N.Y.S.2d 668 (2d Dep't 1996) (upholding a release and waiver agreement and dismissing the plaintiff's action where although the plaintiff was injured while attempting a take-off while wearing a paragliding unit he purchased from the defendant, he agreed to release the defendant from all liability for personal injuries); and *Bufano v. National Inline Roller Hockey Association*, 272 A.D.2d 359, 707 N.Y.S.2d 223 (2d Dep't 2000) (holding that the plaintiff's execution of a release barred his claim against inline roller hockey league in which he participated).

In *Lago v. Krollage*, 78 N.Y.2d 95, 571 N.Y.2d 689 (1991), the plaintiff's decedent died as a result of a stock car racing event. While working in the pit area on the infield of the track, the decedent was struck by a car owned by one of the defendants. Just prior to entering the speedway, the decedent signed a document whereby he assumed every risk for loss, damage or injury. The Court of Appeals affirmed the dismissal of the plaintiff's action, stating:

> In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced.

General Obligations Law §5-326 renders unenforceable certain exculpatory language agreed to in connection with the use of a place of public amusement, when the owner or operator thereof receives a fee in connection

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with the use. It provides that:

> Every…membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation…pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities… shall be deemed to be void as against public policy and wholly unenforceable.

The legislative history of §5-326 establishes that the statute was designed as "a consumer protection measure based upon an assessment that members of the general public patronizing proprietary recreational and amusement facilities are commonly either entirely unaware of the existence of exculpatory clauses in admission tickets or membership applications or are unappreciative of the legal consequences thereof." *Owen v. R.J.S. Safety Equipment Inc.*, 169 A.D.2d 150, 156, 572 N.Y.S.2d 390 (3d Dep't 1991) citing Governor's Bill Jacket L 1976, ch 414, § 1.

While both the Second and Third departments have looked to the legislative history for guidance, the Second Department has interpreted the statute restrictively, while the Third has adopted a more expansive view. The result has been irreconcilable holdings —a fact that has been recognized by the Third Department.

Second Department

The Second Department has on multiple occasions, in a narrow and strict interpretation of the statute, found that General Obligations Law §5-326 did not render unenforceable general releases executed by plaintiffs each of whom participated in a sporting event or activity. See *Stuhlweissenburg v. Town of Orangeburg*, 223 A.D.2d 633, 636 N.Y.S.2d 853 (2d Dep't 1995); *Tedesco v. Triborough Bridge and Tunnel Authority Inc.*, 250 A.D.2d 758; 673 N.Y.S.2d 181 (2d Dep't 1998); *Fazzinga v. Westchester Track Club*, 48 A.D.3d 410, 851 N.Y.S.2d 278 (2d Dep't 2008); *Brookner v. New York Roadrunners Club Inc.*, 51 A.D.3d 841; 858 N.Y.S.2d 348 (2d Dep't 2008), lv. denied and appeal dismissed, 11 N.Y.3d 704, 864 N.Y.S.2d 807 (2008).

In *Stuhlweissenburg*, the plaintiff was injured when she slid into third base while playing softball at the Veterans Field in Orangeburg. The town moved for dismissal based on plaintiff's execution of a release.

The Second Department, in affirming the lower court's decision, held that the plaintiff failed to submit evidence she paid a fee to the town "for the admission to, or use of, [its] softball field." See *Bufano* (General Obligations Law §5-326 does not avoid the release signed by plaintiff, since the fee paid for registration in a hockey league was not paid to the owner or operator of a recreational facility).

In *Tedesco*, the court again found that §5-326 was not applicable to a release signed in connection with participation in a sporting event. Therein, the plaintiff signed a general release as part of his application to participate in a five-borough bicycle tour. The plaintiff, while participating in the tour, was injured and commenced an action.

The Second Department, in considering the applicability of §5-326, found that the Verrazano Narrows Bridge, where the plaintiff was injured while riding, was not a place of amusement or recreation as required by the statute and enforced the release.

In *Fazzinga*, the court affirmed the decision of the lower court, which had granted defendant's motion for summary judgment, finding that the plaintiff's decedent had signed a valid waiver and release prior to a race in which he had participated and that §5-326 was not applicable since he was not a member of the general public patronizing a proprietary recreational or amusement facility who was unaware or could not appreciate the consequences of the exculpatory clause.

Finally, in *Brookner*, the court affirmed the dismissal of all claims (on a pre-answer motion to dismiss) against the defendants based on a release signed by the plaintiff, who claimed that he was injured while running in the ING New York City Marathon 2004. The court rejected the plaintiff's attempt to rely on §5-326, noting it was inapplicable because the entry fee paid by the plaintiff was for his participation in the marathon and was not an admission fee allowing him to use a city-owned public roadway. The court also held that the public roadway where plaintiff alleges he was injured is not a place of amusement or recreation.

The plaintiff had also argued that he should at least be permitted to conduct discovery as to his gross negligence claim (since the release would not have applied to gross negligence). Plaintiff contended that the increase of runners by 1,800 (5 percent over the previous year) with no contingency plan in place to allow for the disbursement of the runners amounted to gross negligence. Although the court did not address this argument specifically, it ended the opinion by stating that the plaintiff's remaining contentions (presumably this one) were without merit.

Third Department

The Third Department reads General Obligations Law § 5-326 far less restrictively than the Second. See *Williams v. City of Albany*, 271 A.D.2d 855, 706 N.Y.S.2d 240 (3d Dep't 2000). In *Williams*, the plaintiff was injured when he fell on a piece of glass while participating in a regional sports recreation league.

Before participating in the event, the plaintiff paid a $550 fee to Capital District Flag Football Inc. (CDFF) to compete in the league and signed a release. He subsequently commenced an action against the City of Albany and CDFF. The city owned the field where the event was held and CDFF operated the event.

As did the defendant in *Stuhlweissenburg*, CDFF argued that because the plaintiff did not pay a fee directly to CDFF, §5-326 was not applicable. The Third Department, however, disagreed and refused to narrowly interpret the statute, finding it applies to any owner or operator of a recreational facility who receives a fee, regardless of the source.

Since the evidence showed that CDFF had received a fee, albeit not directly from the plaintiff, for the use of its facilities, the court found the release executed by plaintiff to be void as against public policy.

Recognizing that its holding was irreconcilable with that of the Second Department in *Stuhlweissenburg*, the court noted that "[t]o the extent that *Stuhlweissenburg*…holds to the contrary, we expressly decline to follow it."

In *Tuttle v. TRC Enterprises Inc.*, 38 A.D.3d 992, 830 N.Y.S.2d 854 (3d Dep't 2007), the plaintiff was injured while participating in a "fun day" at a park operated by the defendants. While on his bicycle, the plaintiff collided with a utility vehicle operated by the defendants' employee.

Before participating in the event, the plaintiff paid a fee to the defendants and signed a waiver to participate. The defendants argued that §5-326 did not apply since the park was not a place of public amusement within the meaning of the statute.

The Third Department, however, disagreed and found that the park was a place of public amusement and because the plaintiff had paid a fee, §5-326 did apply and the release was void as against public policy.

Conclusion

It is difficult to read into the Court of Appeals' refusal to hear the *Brookner* appeal. Nevertheless, it is impossible to ignore the irreconcilably of the positions taken by the Second and Third departments.

As such, until such time as one court is convinced of the position taken by the other or the Court of Appeals decides the issue is ripe for its review, geography will continue to be one of the deciding factors in the application of General Obligations Law §5-326.

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