COVID-19: DON'T FORGET THE FINE PRINT: LIABILITY CONSIDERATIONS AS FANS RETURN TO LIVE SPORTS AFTER COVID-19

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By: Elizabeth H. White, John S. Wilson

Sports leagues around the world are taking the first steps to emerge from the pause in play caused by COVID-19 that delayed, truncated, or threw into question the entirety of their seasons. Teams and leagues are already considering when and how they will be able to welcome back fans, and it is not as simple as encouraging social distancing and the use of masks or reducing attendance to 25 or 50 percent of in-venue capacity.

Bringing fans back to live sporting event means bringing in their germs, too. So league leaders and front offices must consider the potential for claims and litigation that might arise if fans can reasonably allege that they were infected with COVID-19 while attending a game. Requiring infected fans to stay home is an essential step, but with experts warning that many carriers are asymptomatic, it is far from a failsafe.

One way to limit a team or league's potential liability is with waivers or disclaimers of liability. Many fans often don't realize it, but they agree to terms and conditions every time they attend a game. These are usually printed on the ticket itself, and often include things like the right to eject fans who are disorderly or deemed a threat, consent to searches, and licenses for the use of images from the event, including images of fans. The printed terms may also include an assumption of risks from attending the event such as personal injury or other potential hazards.

In light of COVID-19, leagues and teams should revisit what they want their waiver to cover, how it can be presented to fans, and problems that may arise and how to avoid them. The following are three important considerations when evaluating risk mitigation through a back-of-ticket waiver:

THE SCOPE OF THE LIABILITY WAIVER

First, the scope of any waiver should include a notification to fans that they are assuming a risk of becoming ill if they attend the game and that the league has not screened fans for illness via virus or antibody testing. Teams should consider, though, whether to expand the waiver language to include a representation from attendees that they have not had recent symptoms of COVID-19, have not received a recent diagnosis of COVID-19, and do not suspect recent exposure to the virus.

Such COVID-19 certifications have been used in other contexts, such as real estate showings, where those entering a home for sale in some locations must represent that they do not believe they have COVID-19, have not knowingly been in contact with someone with COVID-19 recently, and are not experiencing COVID-19 systems.[1]

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While teams will want to be careful to state that they are not vouching for any attendee's representation of good health, providing flexibility on refunds and replacement tickets could be a commonsense step that will encourage those who are ill or may have been exposed to stay home.

PRESENTING THE LIABILITY WAIVER TO FANS

Second, including liability waiver language on the tickets themselves is helpful because it assures the people who attend can actually review the terms. Sending terms by email to season ticket holders or even single-game buyers does not account for ticket transfers on mass resale sites or to friends and family. However, it's also the case that many fans never read or ignore the language on physical tickets, and the seriousness of COVID-19 may merit having teams highlight any waivers and representations related to the virus, even if they also include the relevant wording on the tickets (whether e-tickets or old-fashioned paper). There is a variety of ways to accomplish this, including perhaps most simply posting signs or placards at all stadium and arena entryways. Including banners, notices on websites, and on the websites of ticket resale partners, may be effective too, but is not guaranteed to reach all fans. No matter how teams and leagues decide to present liability waivers to fans, the language should be clear, unambiguous, and avoid legalese.

EVEN THE BEST WAIVER ISN'T A GUARANTEE AGAINST POTENTIAL CLAIMS

Third and finally, leagues should keep in mind that waivers are not a guarantee against potential claims. Many jurisdictions limit waivers to protecting against claims of negligent behavior (and some may prohibit the use of liability waivers altogether). Waivers typically will not protect against claims for gross negligence, recklessness, or willful behavior. So implementing cleaning and distancing protocols, encouraging or requiring the use of masks, and, if possible, considering how to accomplish contact tracing in the unfortunate event that the illness spreads among fans are still essential steps to show that teams and leagues take the duty of care seriously.

The law surrounding COVID-19 is still rapidly evolving. How courts will treat COVID-19 liability waivers or requirements that individuals represent that they do not suspect COVID-19 infection is largely unknown. Looking to legal principles and similar events from the past is helpful in guiding present and future conduct, but is not a guarantee of immunity to liability. Therefore, exercising commonsense when working to protect players and fans will continue to be paramount in successfully navigating the pandemic.

FOOTNOTES

[1] National Association of Realtors.

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KEY CONTACTS



ELIZABETH H. WHITE
PARTNER

PORTLAND
+1.503.226.5729
ELIZABETH.WHITE@KLGATES.COM



JOHN S. WILSON
PARTNER

SEATTLE
+1.206.370.6658
JOHN.WILSON@KLGATES.COM

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