WALKER WILCOX
WALKER WILCOX MATOUSEK LLP

HOW TO LIMIT YOUR EXPOSURE WITH A WAIVER OF LIABILITY THAT COMPLIES WITH ILLINOIS LAW

A waiver of liability is an excellent tool to protect your company from litigation. However, not all waivers are enforceable and a drafter must be aware of the legal requirements in order to be successful in preventing a lawsuit. We recently obtain a dismissal on behalf of a client, who had obtained a waiver of liability from the plaintiff. The plaintiff had serious injuries and our client was exposed to a potentially significant judgment in the event a lawsuit was allowed to proceed. By preparing a proper waiver, our client was able to limit its exposure and put an end to the claims brought against it.

Thus, we now turn to what is required in order for an exculpatory clause to be valid. Under Illinois law, an exculpatory clauses in contracts, though disfavored, and construed against the drafter, are enforceable if: (1) the agreement clearly spells out the intention of the parties; (2) there is nothing in the social relationship between the parties militating against enforcement; and (3) it is not against public policy. *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill.App.3d 407 (1st Dist. 2007).

To better understand the implications of the above principles, we must look to Illinois case law that has analyzed whether a waiver of liability is enforceable:

- In *Owen v. Vic Tanny's Enterprises*, plaintiff was a member of defendant's gymnasium when she slipped and fell as she left the swimming pool. 48 Ill.App.2d 344 (1st Dist. 1964). Prior to joining the gym, she entered into a membership agreement, which contained an exculpatory clause relieving the defendant from liability for any injuries resulting from the plaintiff's use of the gymnasium or related facilities. *Id.* at 345-346. The court found that the defendant was a private corporation and under no duty to accept plaintiff as a member. *Id.* Having consented to do so, the defendant has the right to insist upon such terms as it deemed appropriate for the agreement between the parties. *Id. at* 347-348. Thus, the court found for the defendant and concluded that the exculpatory clause was valid.
- In *Hellweg v. Special Events Management*, plaintiff brought an action in against a race organizer after he was injured in a collision with a non-participating bicyclist while warming up for the race. 2011 IL App (1st) 103604 (2011). The trial court granted the defendant's motion to dismiss based on an exculpatory clause and the plaintiff appealed. *Id.* ¶ 1. The appellate court held that in order for an exculpatory clause to be valid, the precise occurrence which results in injury need not have been contemplated by the parties at the time the contract was entered into. *Id.* ¶ 3; citing *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill.App.3d 581, 584 (1st Dist. 1990) (upholding an exculpatory clause relieving a club from liability from alleged negligence in purchasing and making available an allegedly defective bench press). It should only appear that the injury falls within the scope of possible dangers. *Id.* The appellate court affirmed, finding that it is sufficient if the language used in the exculpatory clause is broad enough to reasonably demonstrate the parties contemplated the risk at issue. *Id.* ¶ 7.

The take away from the cases is that the waiver must clearly spell out the intention of the parties and the injury must have been a foreseeable consequence of participating in the activity that required the waiver. If done properly, a waiver can limit your exposure to a lawsuit.