INSURANCE JOURNAL

West News

Signed Liability Waiver May Not Protect Against Gross Negligence

By Patricia-Anne Tom
April 26, 2007

Is a signed liability waiver useless in protecting a government entity from gross negligence and only good in protecting against ordinary negligence? That issue is expected to be decided by the California Supreme Court in 60 to 90 days.

At issue in *City of Santa Barbara v. Superior Court* is whether a liability waiver can be effective as to ordinary negligence under Civil Code section 1668, as interpreted by *Tunkl v. University of California (1963) 60 Cal.2d 92*, but not as to gross negligence.

In the case, a disabled 14-year-old girl drowned in a city-owned swimming pool in Santa Barbara, Calif., while participating in a recreational activities program for developmentally disabled children. Prior to the girl's participation in the program, her parents signed a waiver and release and express assumption of the risk agreement. By signing the agreement, the parents waived and released all liability related to the program, including potential negligence of the facility and its workers.

Nevertheless, after the girl drowned, the parents filed a lawsuit, alleging that the city of Santa Barbara and its counselor acted negligently.

The trial court ruled that the agreement signed by the parents was valid and enforceable, but concluded that the agreement could not protect the defendants from liability for "gross negligence." Consequently, the case was allowed to go to trial, where a jury would decide whether the plaintiffs could prove "gross negligence."

In making that ruling, the trial court permitted a non-statutory cause of action for "gross negligence" and it found that such liability could not be waived or released. While a release can be effective in defeating ordinary negligence, the factual issue as to whether conduct would arise to the level of gross negligence would be left to a jury.

The defendants appealed, and the Court of Appeal affirmed the ruling, which found that the waiver and release signed by the parents could protect the organizing government entity from ordinary negligence, but not gross negligence.

Following that decision, the defendants petitioned the California Supreme Court for review. The Supreme Court ordered that briefs be filed in Jan. 2007, and the Court heard oral arguments on April 3, 2006 in Los Angeles.

According to Agajanian, McFall, Weiss, Tetreault & Crist LLP, the court's ruling could mark a new era in the sports and recreation industries in California, with growing liability exposures, increased litigation and rising insurance costs.

"Summary judgments are obviously very important to defendants in the sports and recreation fields, and their ability to obtain insurance. Even if a case is ultimately won at trial, the case is already lost to a significant degree if the defendant is forced to defend itself at trial due to the immense costs and fees expended, in addition to the potential liability exposures," said Bill D. Anthony, an

associate at the law firm. "All attorneys know that the vast majority of cases in this context do not go to trial. A plaintiff's attorney knows that his or her chance of obtaining a monetary settlement is greatly increased if he or she can force the case to trial."

As such, several amicus curiae (friend of the court) briefs were filed for the hearing. Anthony and Paul L. Tetreault of Agajanian, McFall, Weiss, Tetreault and Crist LLP filed briefs on behalf of the California Speedway in Fontana and NASCAR, "both of whom rely heavily upon waiver and release agreements signed by race participants and spectators entering the pit areas," Anthony explained.

Further briefing was scheduled for April 25, 2007, with a decision expected in 60 to 90 days.

More details on this case will be published in Insurance Journal's May 7, 2007, West region edition.

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