

Producers Beware: When Waivers And Releases Don't Work

Law360, New York (December 09, 2014, 10:12 AM ET) --

We live in a litigious country. Everyone knows that, especially producers in the entertainment industry. One way that producers — especially ones for unscripted TV — try to mitigate their risks is to require all on-screen participants to sign very broad waivers and releases. More often than not, these agreements amount to an insurance policy or a safety blanket just in case someone sues. But what happens when someone actually sues and challenges the enforceability of the document? Will the waiver and release survive judicial scrutiny? In a recent California appeal, it did not, and the case should serve as a warning to producers everywhere.



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The Case

The case, *Rossi v. Photoglou*, stemmed from a 2012 trial in which Gretchen Rossi, a cast member on "The Real Housewives of Orange County" (RHOC), accused her former friend Jay Photoglou of harassment and stalking. At trial, Rossi was awarded over \$500,000 in compensatory and punitive damages against Photoglou. The trial court dismissed Photoglou's claims against Rossi for libel, slander and invasion of privacy, holding that the release he signed to appear on the show shielded not only the producers, but also other cast members, from liability.

On appeal, the court reversed this finding and instead held that because all three of Photoglou's claims involved intentional torts, California Civil Code Section 1668 (Section 1668) precluded enforcement of the release.

Section 1668 states, in its entirety:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another or violation of law, whether willful or negligent, are against the policy of the law.

The release presented to Photoglou sought to exonerate the producers and their employees, officers and agents "from any and all claims, demands, controversies, causes of action, damages, rights, liabilities, and obligations whatsoever (including, without limitation, any defamation claim and/or claim that such use invades any right of privacy and/or publicity)." According to the appeals court, however,

this release could not, as a matter of law, cover Photoglou's claims for libel, slander and invasion of privacy, because of Section 1668.

What Does This Mean for Producers?

For producers — especially unscripted producers like those of "RHOC" — perhaps the most important language in the statute is "his own." Although Section 1668 does not permit individuals or companies to shield themselves from liability arising from their own purposeful wrongdoing, it does not necessarily preclude producers from guarding against liability arising from the intentional torts committed by their cast members or others.

In light of this, waivers and releases governed by California law should be modified to address this issue. Specifically, producers should consider adding these provisions into their standard release forms:

- **Waiver of Vicarious Liability:** Producers should continue to employ broad releases for all forms of liability. However, if it's not already in their forms, producers should add protections to addresses the constraints of Section 1668. For example, in connection with any instances of intentional wrongdoing or violation of the law, the release should seek to exculpate from "vicarious" or "principal liability" any person or entity who does not actually commit the tort. The release should make clear that the plaintiff's sole recourse in such a situation is to sue the person who actually committed the tort. In contrast to the waiver at issue in *Rossi v. Photoglou*, this language should not run afoul of Section 1668.
- **Representations and Indemnification:** Similarly, in all cast, crew and other agreements involving the production, the producers should require that the individual represent, warrant, and covenant that he or she will not commit any intentional torts or violate the law in any way and that such actions would be outside the scope of the employment or agency arrangement. The agreement should further stipulate that in the event the person breaches any of these representations, warranties, or covenants and a lawsuit is filed, the person will defend, indemnify, and hold harmless the production company and its employees, officers, directors, agents, distributors and licensees. Although many wrongdoers will not have the financial ability to stand behind these types of indemnification obligations, it is nonetheless advisable to include such provisions in the agreement in the off chance that they are able to or eventually become able to do so.

California is not the only state that invalidates waivers and releases that attempt to shield wrongdoers from their own intentional torts. So, producers from everywhere, not just California, need to understand the laws in their respective jurisdictions and craft releases that afford themselves the greatest degree of protection.

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