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Legal Issues Worth Considering Concerning COVID

Dear Friends and Clients,

We continue to get questions from clients -- it seems with increasing frequency -- as to whether a separate COVID supplemental release is desirable, rather than simply adding a sentence or two about the risks of COVID in the basic release.

Because there is so much uncertainty on this subject, we thought it might be useful to suggest why we think a supplemental release is better than a modified basic release.

Most companies modifying the basic release simply add a sentence to the effect that "Client assumes all risk of COVID-related losses . . ." But, there are two potential problems with this approach.

The first is that in many states, a company cannot require clients to assume all risks unless those risks are detailed with some specificity. Generalized releases such as "I release [XYZ] from all risks associated with my horseback riding trip" generally will not be successful. A specific release which talks to skittishness of horses, uncontrollability, etc., is far more likely to be successful.

With regard to COVID and travel, courts have held that the travel entity (tour operator, travel agent, sponsoring organization, etc.) must advise the client of risks of which it is or should be aware and of which the client may not be aware. As a result, specific risks (for example, the possibility of a negative COVID test being required prior to return to the USA) should be articulated.

The second reason a supplemental release is more desirable is that it is limited to COVID. In contrast, when emphasizing COVID in a basic release, the plaintiffs' bar can argue that the travel entity is diminishing the risks associated with other diseases and epidemics, such as MERS, SARS, hantavirus, etc. Virtually all releases do have a provision about "epidemics". Some have wording such as "epidemics such as but not limited to MERS, SARS, . . ." As a result, courts have, on occasion, stated that by emphasizing one issue but not others, those other issues are deemphasized and travelers

might have more of a right to ignore what they say.

One final word about a COVID supplemental release might be useful. It is a good idea to review it often and add to it as necessary. Changes that have gone into the supplemental releases over the last year have been significant. For example, until recently almost no one pointed out the specific risk that the traveler might have to obtain a negative COVID test, even if fully vaccinated, in order to return to the United States. New issues such as these could arise, and even though a supplemental release is in place, it may not cover everything.

Of course, we would be happy to discuss any of these issues with you at your convenience.

With best regards,

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About Smith Duggan Buell & Rufo LLP

Smith Duggan Buell & Rufo LLP was founded in 1989 as Smith & Duggan. The firm has grown and now has 20 attorneys, with offices in Boston and Lincoln. More information regarding the firm's history, people and services can be found at www.smithduggan.com.

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