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Exculpatory Agreements--A Dilemma for the Courts and a Problem for Society

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K.R. The paper is well written and well reasoned. I have written a few comments within the body of the paper. Thanks for letting me review it. Elizabeth J. Dibble

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Exculpatory Agreements-A Dilemma For The Courts

& A Problem For Society

Each of us signs away our rights countless times every year. And anyone who thinks they have been cautious enough as to keep their rights, is more than likely mistaken. Anyone who has been to a golf course, a baseball game, a football game, a basketball game, a gym, or an amusement park has more than likely waived his or her rights to recover damages as a result of injury. After one knowingly contracts away his or her rights, a question generally arises--Is the exculpation agreement[1] valid? Unfortunately, there is no clear answer to this question, as the border between admissible and inadmissible exculpatory clauses is ever shifting.

Since there is no clear formula courts follow in determining whether an exculpatory clause is admissible or inadmissible, exculpatory agreements have caused both a dilemma for the courts and a problem for society. Although courts have no clear formula they apply to determine whether or not an exculpatory contract will be upheld; a careful examination of the types of exculpatory contracts that courts have traditionally held to be valid, as well as types of exculpatory contracts that courts have traditionally held to be invalid, will lead to a better understanding of when a court will uphold or refuse to uphold an exculpatory contract.

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[1] An exculpation agreement is an agreement by which a party contracts away liabilty as a result of their negligence.

EXCULPATORY AGREEMENTS UPHELD BY COURTS

The basis on which any exculpatory agreement may be upheld is the basic right of the parties to contract. One Illinois case, Harris v. Walker, sets forth the basis of the freedom to contract: "We start from our often-repeated axiom that '[p]ublic policy strongly favors freedom to contract, as is manifest in both the United States Constitution and our constitution.'"[2] Illinois precedent holds that courts should not interfere with the right of two parties to contract: "The rationale for this rule is that courts should not interfere with the right of two parties to contract with one another if they freely and knowingly enter into the agreement."[3] Thus, the general principle behind a valid exculpatory contract is the freedom of parties to contract in a manner that will provide the parties with the opportunity to meet their needs.[4] However, the right to contract alone is not enough to ensure that an exculpatory agreement will be enforced.

Most courts have held that in order for an exculpatory agreement to be upheld, the agreement must clearly express the intent that one of the parties to the agreement knowingly agreed to release the other party of his or her negligence.[5] It should be noted that courts decide whether or not the releasor knowingly intended to release the maker of the exculpatory agreement by looking at all of the relevant circumstances surrounding the complaint; and the courts decide what the relevant circumstances are case by case. Therefore, a party to an action involving an exculpatory agreement cannot take for

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[2]Harris v. Walker, 119 Ill. 2d 542, 544, 519 N.E.2d 917, 919 (Ill. Sup. Ct. 1988), (quoting McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp., 95 Ill. 2d 68, 72, 447 N.E.2d 400 (Ill. Sup. Ct. 1983)).

[3]Garrison v. Combined Fitness Centre, 201 Ill. App. 3d 581, 584, 559 N.E.2d 187, 190 (1st Dist. 1990).

[4]Note, *The Quality of Mercy: Charitable Torts and their Continuing Immunity*, 100 HARV. L. REV. 1382, 1394 (1987).

[5]Cadek v. Great Lakes Dragaway, Inc., No. 93-C-1402, 843 F. Supp. 420, 422, 1994 U.S. App. LEXIS 1163, at *6 (Northern District of Ill. Feb. 4, 1994).

granted that a court will hold the circumstances in the case at bar relevant, even if the circumstances resemble those of a previous case which the court held to be relevant.

Typically, once an exculpatory clause has been worded with sufficient clarity, courts will not be concerned with a contracting party's awareness of the existence of the exculpatory clause. The only concern of the court will be whether the clause could have been reviewed by the releasor with no unusual difficulty.[6] This means that a party cannot exert as a defense that he or she did not read the exculpatory agreement before signing the agreement. Even if the releasor did not read the exculpatory contract, the court will only consider if the releasor would have been able to ascertain that the agreement indemnified the releasee had the releasor read the exculpatory contract.

In addition, courts frequently uphold exculpatory clauses when the injury is one expressly covered by unmistakable language in the exculpatory clause. A Georgia Appellate court upheld an exculpatory clause in Hall v. Gardens Servs., Inc., 332 S.E. 2d 3, 5 (Ga. Ct. App. 1985) where a bailor relieved himself of liability from his own ordinary negligence, except when the negligence amounted to willful and wanton misconduct.[7] The language of the before mentioned case is important in determining whether or not an exculpatory clause will be upheld by a court. The court in upholding Hall noted that the exculpatory contract expressly relieved the bailor from his own negligence. Exculpatory clauses that contain language expressly releasing the releasee of his or her own negligence effectively preclude the releasor from asserting that he or she was unaware that the contract released the maker of the contract of his or her own negligence.

The language of Hall is also important in determining when a court will uphold an exculpatory agreement because the bailor noted that the exculpatory clause would not be

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[6]James Brook, *Contractual Disclaimer and Limitation of Liability Under The Law of New York*, 49 BROOK. L. REV. 1, 28 (1982).

[7]Krystyna M. Carmel, *The Equine Activity Liability Acts: A-Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 169 (1994).

upheld if the injury resulted from negligence as a result of willful and wanton misconduct. The language contained in Hall that barred the bailor's relief from liability when the injury resulted from willful and wanton misconduct should be contained in all exculpatory clauses, as a court will not uphold an exculpatory contract that relieves a party of willful and wanton misconduct.

Although it is highly recommended that an exculpatory clause expressly contain the phrase "own ordinary negligence" in order to adequately release the defendant of his or her liability, it is not always necessary for the exculpatory clause to contain said phrase, or even to contain the term "negligence:" "Although exculpatory contracts or clauses are subject to the general rule that they are to be construed most strongly against their maker, a specific reference to the maker's "negligence" or its cognates is not required."[8] However, it is important to note that it is very helpful when the exculpatory agreement expressly states that the party is releasing others from negligence.[9] When the term "negligence" is not used, it is important that the exculpatory clause clearly establish the parties' intent preclude such liability.[10]

Courts often refer to words that describe negligence without expressly containing the term as "magic words," and many courts are divided on whether an exculpatory clause is valid only when the term "negligence is included," or if the clause is valid when "magic words" are included. Given the division of courts on whether or not exculpatory clauses should contain the term "negligence" or if "magic words" will be sufficient to describe negligence, it is better to include "negligence" in the exculpatory clause than to risk not having the clause upheld.[11]

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[8]Larsen v. Vic Tanny Intern., 130 Ill. App. 3d 574, 576 , 474 N.E.2d 729, 731 (5th Dist. 1984).

[9]Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities - The Alternative to Nerf (registered) Tiddlywinks*, 53 OHIO ST. L.J. 683, 712 (1992).

[10]Krazek v. Mountain Rivers Tours, Inc., 884 F.2d 163, 166 (4th Cir. 1989).

[11]Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY

Courts have consistently upheld that exculpatory clauses are effective in protecting one from liability of ordinary negligence, yet it is still important for the exculpatory agreement limiting the liability to contain clear language in describing the scope of activities that the exculpatory contract protects: "More specifically, such exculpatory agreements have been upheld in the context of parachuting activities where the language of the agreement sets forth in clear language the range of activities to which it applies."[12] In Falkner v. Hinckley Parachute Center, the Second District court of Illinois held that the exculpatory clause existing between Falkner and the Hinckley Parachute Center effectively precluded the administrator of Falkner's estate from bringing a wrongful death action against the parachute center. Falkner, a student of the Hinckley Parachute Center, fell to his death when the parachute provided for him by the parachute center became entangled and failed to slow his fall.[13] The court held in Falkner, that the accident which caused Falkner's death was well within the range of covered activities in the exculpatory contract: "We conclude that an accident of the type suffered by the decedent was within the scope of the exculpatory clause of the training agreement."[14] The exculpatory clause in Falkner clearly indemnified Hinckley Parachute Center from,

> any and all liability claims, demands or actions or causes of action whatsoever arising out of any damage, loss or injury to the Student or the Student's property while upon the premises or aircraft of the Hinckley Parachute Center, Inc. or while participating in any of the activities contemplated by the agreement, whether such loss, damage, or injury results from negligence of Hinckley Parachute Center, Inc. * * * or some other cause. (Emphasis added.)[15]

L.J. 1, 115 (1993).

[12]Falkner v. Hinckley Parachute Center, 178 Ill. App. 3d 597, 560, 533 N.E.2d 941, 944 (2nd Dist. 1989).

[13]Falkner v. Hinckley Parachute Center, 178 Ill. App. 3d at 599, 533 N.E.2d at 943.

[14]Falkner v. Hinckley Parachute Center, 178 Ill. App. 3d at 561, 533 N.E.2d at 945.

[15]Falkner v. Hinckley Parachute Center, 178 Ill. App. 3d at 601, 533 N.E.2d at 945.

The court further held in Falkner that the parties to an exculpatory contract need not anticipate the precise action which causes injury, when the exculpatory clause, as the exculpatory clause in Falkner, contains broad language describing the covered activities.[16] The court explained that the broad language of the release allowed Falkner to contemplate a wide range of risks that one could expect when jumping out of an airplane, including the risks of, "unsafe equipment, negligent instruction, and death."[17] As Falkner illustrates, the maker of an exculpatory agreement should be sure that the exculpatory agreement contains a range of protected activities from which the release from liability applies.

In addition to the before mentioned exculpatory contracts which courts tend to uphold, courts are also likely to uphold exculpatory clauses relating to non-essential activities and services, especially when the injured party is able to foresee the risk which caused the injury. Examples of non-essential activities and services include activities and services for entertainment. Non-essential activities include baseball, football, golf, tennis, swimming, and skydiving. Examples of non-essential services include the services of sport stadiums, amusement parks, exercise gyms, and country clubs. Courts are likely to uphold exculpatory clauses relating to non-essential activities and services especially when the injured party is able to foresee the risk which caused the injury. In order for the maker of an exculpatory contract to ensure that a court will be able to enforce the contract, the maker should make certain that the releasor is able to foresee a wide range of injuries from the context of the exculpatory contract.

EXCULPATORY CLAUSES THAT COURTS REFUSE TO UPHOLD

The courts are concerned with fairness when a party claims exemption from negligence because the parties have entered into an exculpatory clause. The courts will

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[16]Id.
[17]Id.

closely examine the exculpatory clause to make sure that a number of standads have not been violated. Courts have noted that exculpatory clauses are not favored and will be strictly construed against the contracts maker: "More recently, we observed that exculpatory clauses are not favored and must be strictly construed against the benefiting party, particularly one who drafted the release."[18] The standards that a court applies to an exculpatory agreement in deciding whether or not to uphold the agreement include the standards of: public policy, unfair bargaining power, and lack of intent of a releasor to relive a releasor of his or her liability. Courts will frequently refuse to uphold exculpatory clauses in violation of any of the before mentioned standards.

Courts strictly refuse to uphold any exculpatory contract in violation of public policy: "A contract which shifts the risks of one's own negligence to another contracting party will be enforced unless it would be against settled public policy to do so or there is something in the social relationship of the parties militating against upholding the agreement."[19] And although courts refuse to uphold any exculpatory agreement in violation of public policy, there is no one formula courts apply to determine when an exculpatory contract is in violation of public policy. Courts have labeled certain types of exculpatory clauses as violating public policy. One such type of an exculpatory clause that courts have held violative of public policy, is one that most of us are familiar with. The exculpatory agreement that I am referring to is the type which must be signed as a condition for participation in interscholastic athletic activities. In Washington, the Odessa and Seattle school districts required both the students and their parents to sign "standardized forms" releasing the school districts from any liability as a result of negligence arising out of the districts' athletic programs. Some of the parents unsuccessfully tried to strike the exculpatory clause from the agreement, and as a result

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[18]Harris v. Walker, 119 Ill. 2d 542, 544, 519 N.E.2d 917, 919 (Ill. Sup. Ct. 1988).
[19]Nikolic v. Seidenberg, 242 Ill. app. 3d 96, 98-99, 610 N.E.2d 177, 179-80 (2nd Dist. 1993).

their children were not allowed to participate in the interscholastic athletic activities.[20] This case was heard before the Washington Supreme Court. The Washington Supreme Court considered whether exculpatory clauses should be allowed as a condition for participation in interscholastic athletic activities, which was an issue of first impression in the state of Washington. The court held that exculpation clauses required as a condition for participation in interscholastic athletic activities "violated public policy and were therefore invalid."[21]

In addition to refusing to uphold an exculpatory clause violative of public policy, courts will also refuse to uphold an exculpatory clause in which one party has a superior bargaining power over the other party. For example, if a releasor is forced to sign an exculpatory agreement as a condition for receiving medical treatment, then the releasee has unfair bargaining power. The releasee holds an unfair bargaining power because the releasor must sign the exculpatory agreement in order to receive the medical treatment. Exculpatory agreements that must be signed as a condition for medical services will not be upheld for the reason of unfair bargaining power.

Case law has further established that courts will not uphold exculpatory contracts when the general language of the contract does not accurately reflect the releasor's intent to absolve the releasee of his or her liability: "General language is not sufficient to indicate an intention to absolve a party from liability for negligence."[22] In Calarco v. YMCA of Greater Metropolitan, the Second District court of Illinois held that if the language of an exculpatory contract does not clearly show the intent of the releasor, then no inference shall be made from the contract to show an intent to release: "Other

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[20]Case Comment, *Negligence-Exculpatory Clauses-School Districts Cannot contract Out of Negligence Liability in Interscholastic Athletics-Wagenblast v. Odessa School District, 110 Wash. 2d 845, 758 P.2d 968 1988),* 102 HARV. L. REV. 729, 730 (1989).

[21]id. at 730

[22]Calaraco v. YMCA of Greater Metropolitan, 149 Ill. App. 3d 1037, 1042, 501 N.E.2d 268, 273 (2nd Dist. 1986).

decisions have stated that a limit on liability for negligence will not be inferred unless such intention is clearly expressed and that the language of an agreement must clearly notify the prospective releasor of the effect of signing the agreement."[23]

In addition to courts holding general language insufficient to indicate intent, the courts also hold general language insufficient to indicate the covered activities of the exculpatory contract. For example, in Calarco v. YMCA of Greater Metropolitan, the Second District court of Illinois refused to uphold the exculpatory contract in question as the language contained on the membership form was not explicit enough to relieve YMCA from liability for negligence resulting from the use of exercise equipment:

> The form does not contain a clear and adequate description of covered activities. Such as 'use of the said gymnasium or the facilities and equipment therof,' to clearly indicate that injuries resulting from negligence in maintaining the facilities or equipment would be covered by the release.[24]

Exculpatory contracts releasing a party from claims arising from willful conduct or gross negligence are completely void and will not be enforced.[25] Most courts hold that exculpatory agreements cannot preclude a plaintiff's claims against a defendant for intentional torts, or for the more serious forms of negligence often resulting from willful, wanton, or reckless conduct:

> Generally, a release does not bar plaintiff's maintenance of an action alleging willful and wanton misconduct by the defendants. This rule is based on the determination that, as a matter of public policy, a plaintiff cannot exculpate or indemnify a defendant for the defendant's willful or wanton acts.[26]

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[23]Calaraco v. YMCA of Greater Metropolitan, 149 Ill. App. 3d at 1042, 501 N.E.2d at 273.

[24]Calaraco v. YMCA of Greater Metropolitan, 149 Ill. App. 3d at 1041, 501 N.E.2d at 272.

[25]James Brook, *Contractual Disclaimer and Limitation of Liability Under the Law of New York*, 49 BROOK L. REV. 1, 26 (1982).

[26]Downing v. United Auto Racing Ass'n, 211 Ill. App. 3d 877, 885, 570 N.E.2d 828, 836 (1st Dist. 1991).

One example of a court allowing a cause of action in a willful and wanton negligence case is where a court allowed a plaintiff's estate to bring a claim against a defendant, for the defendant's reckless conduct, where the parties had previously entered into an exculpatory agreement. The defendant was a railroad company, and the plaintiff worked for a quarry which had an exculpatory agreement indemnifying the railroad company for liability to the quarry's employees as a result of the railroad company's own negligence. The quarry employee was killed at the site when a speeding train struck a wheelbarrow which was on the train track. As a result of the train striking the wheelbarrow, the wheelbarrow struck the employee with "enough force to cause fatal injuries."[27] The appellate court held that train's striking of the wheelbarrow on the track to be willful and wanton negligence, as the train was speeding at the work site. The appellate court held that the exculpatory clause did not protect the railroad company from liability as a result of willful and wanton negligence, and remanded the case for a new trial.

Courts are also likely to refuse to uphold exculpatory clauses relating to activities and services necessary to maintain a minimum standard of life. Courts generally will not uphold exculpatory contracts relating to essential services. Essential services include housing services, medical services and utility services. Courts are concerned with fairness when a public service corporation claims an exemption from negligence liability as a part of their contract or schedule. This is because although the relationship between the public service supplier and the customer is contractual; the customer is forced to enter into the exculpatory contract in order to receive the services. Customers are forced to enter into exculpatory contracts with utility providers as there is usually only one provider of each public utility service in a given area. One such example of a court refusing to uphold an exculpatory agreement where the customer was forced to sign an exculpatory contract in

Perhaps your earlier discussion of medical services should be here w/ the discussion of essential service

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[27]Karen M. Espaldon, *Virginia's Rule of Non-Waiver of Liability for Negligent Acts: Hiett V. Lake Barcroft Community Association, Inc.*, 2 GEO. MASON U. L. REV. 27, 37 (1994).

order to receive an essential service is found in the case of Con Ed, 407 N.Y.S.2d 777 (N.Y.C. Civ. Ct.). In Con Ed the court refused to uphold an exculpatory agreement that provided "in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants, or agents the Company will not be liable therefor."[28] The court refused to uphold the exculpatory agreement in the before mentioned case as the customer was forced to sign the exculpatory agreement as a condition to receive an essential service.

CONCLUSION

Traditionally exculpatory agreements that have been upheld by courts expressly relieve the defendant of his or her "own ordinary negligence" by the use of language clearly showing the releasor's intent to release the releasee of his or her liability. Courts have traditionally refused to uphold exculpatory agreements: where the agreement violates of public policy; where one party of the exculpatory contract holds an unfair bargaining power; where the agreement does not contain language clearly establishing the intent of the releasor to relieve the releasee of his or her "own ordinary negligence;" and where the injury is a result of willful or wanton misconduct or negligence. There is no one formula that courts use to apply to exculpatory agreements to decide whether they should be upheld or held to be invalid; and as a result, exculpatory contracts pose a dilemma for our courts and a problem for society. Exculpatory clauses pose a dilemma for the courts and a problem for society, as it is never clear under what circumstances a court will uphold or refuse to uphold an exculpatory contract.

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[28]James Brook, *Contractual Disclaimer and Limitation of Liability Under the Law of New York*, 49 BROOK L. REV. 1, 20-21 (1982).