

HOW TO DEFEAT AN EXCULPATORY CLAUSE: A STEP BY STEP GUIDE

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Exculpatory or “release from liability” clauses limit or absolve a party from liability for its own negligence. These clauses lock the courtroom doors to injured plaintiffs. As a result, an important incentive for defendants to manage risk and foresee and control hazards is eliminated.

“Accountability breeds responsibility.”¹ However, a corollary is that giving defendants a “Get out of Jail Free” card for their own negligence spawns irresponsibility. As plaintiff lawyers, we must vigorously challenge exculpatory clauses. The good news is that there is plenty of “wiggle room” for creative plaintiffs to argue what the law should be. While uniformity may be the hallmark of admiralty, in the area of exculpatory clauses, disparity is the practice.

Where the claim involves maritime personal injury or wrongful death, a clear rule for exculpatory clauses has not been enunciated by any circuit. In property damage and commercial cases, the circuits are split on the issue of whether a party can fully exonerate itself from all damages from ordinary negligence. The First and Eleventh Circuits allow a party to limit its liability, but not fully exonerate itself from all damages for ordinary negligence. On the contrary, the Eighth and Ninth Circuits allow a party to fully exonerate itself from all damages for ordinary negligence. The courts uniformly agree that where a party has committed gross negligence or willful or wanton misconduct, a party cannot shield itself contractually.

The case law in the area of exculpatory clauses is somewhat confusing. Our office recently successfully voided an exculpatory clause in a case argued before the First Circuit Court of Appeals; while the material is still fresh in our minds, we thought we would chart a course to make it easier for our maritime brothers and sisters to challenge these clauses in the future.

START WITH *BISSO V. INLAND WATERWAYS CORP.*

The last and best word on the validity of exculpatory clauses is the leading Supreme Court case of *Bisso v. Inland Waterways Corp.*, which has not been reversed or overruled.² *Bisso* involved the issue of whether a towboat could contract away liability for its own negligent towage. In holding that it could not, the Supreme Court noted the need to discourage negligence by making wrongdoers pay damages, as well as the desire to protect those in need of goods and services from being overreached by others who have the power to drive hard bargains.³

Although some circuits would like to restrict the language of *Bisso* to towing cases, it cannot be read that narrowly. One of the underlying rationales for the rule was to encourage safety by holding tortfeasors accountable. In *Bisso*, Court observed that the “dangers of modern machines make it all the more necessary that negligence be discouraged.”⁴

The same rationale and policy applies in most cases today. Power boats have become bigger, stronger, and faster. Jet skis were not even around fifty years ago. While negligent repairs or acts in a land-based setting may only lead to minor problems, they could lead to the sinking of a vessel and serious injury in a maritime setting.

ARGUE THAT A PROPERTY OR COMMERCIAL DAMAGE LAW EXCULPATORY CLAUSE ANALYSIS SHOULD NOT BE USED FOR A PERSONAL INJURY CASE

While a body of jurisprudence has developed in the area of maritime commercial contracts and property damage, the same cannot be said for maritime personal injuries. This could be because the issue has been resolved by statute in two major areas of maritime personal injury: Jones Act cases and cases involving certain passengers.

The Jones Act prohibits the use of exculpatory contracts or similar devices to restrict an employee's remedies. FELA, 45 U.S.C. §55 provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Provisions limiting liability for injury or death in passenger ships are also prohibited.⁵ However, limitations relieving a vessel operator and related persons from liability for emotional distress, mental suffering, or psychological injury are allowed under certain circumstances.⁶ A ship owner may not limit its liability for cases alleging sexual harassment, assault, or rape.⁷

Parties to a marine repair or storage contract are often in a position where they can anticipate their loss in the event of property damage or business interruption. A vessel, its engine, and its appurtenances can be easily valued in advance on the open market. Lost profits are able to be calculated, too. This allows sophisticated businessmen to shift the risk of loss of these damages as part of the bargain and to obtain insurance to cover this risk.

On the other hand, damages involved in a personal injury case are not as easy to estimate and insure against. For starters, an injured party would have to purchase health insurance, disability insurance, and business interruption insurance. This insurance would not pay for pain and suffering, loss of enjoyment of life, permanent loss of function, loss of consortium, diminution of earning capacity, hedonic damages, and the full panoply of damages available in most jurisdictions.

The risks involved in a commercial or property damage case are foreseeable by the parties: vessel damage, fire, or downtime. Unfortunately, a party to a contract involving a release from tort claims may not realize the nature of what that entails. For example, he may understand that he cannot sue for risks inherent in the sport of jet-skiing, but not know that he is barred from recovery if, while walking into the marina, the sign that says "Welcome to Lake Lashaway Marina" falls on his head and cracks his skull because the marina failed to secure it.

In addition, the circumstances surrounding the signing of a release from liability contract are often very different in a non-commercial setting. For example, a pre-printed release from liability form is given to a father with kids in tow who want to go jet-skiing. There is no room for negotiation when the ticket or contract is presented to the father under the ticket window; the father either signs the agreement or leaves with a carload of disappointed children.

Maritime counsel faced with an exculpatory clause in a personal injury case would do well to look to the favorable decisions from the various states. In *Hiatt v. Lark Barcroft Community Assn., Inc.*, the Virginia Supreme Court ruled that all exculpatory agreements purporting to release tortfeasors from future liability for personal injuries are unenforceable because "[t]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct ... can never be lawfully done where an enlightened system of jurisprudence prevails."⁸

In the 2005 case *Hanks v. Powder Ridge Restaurant Corp.*, the Connecticut Supreme Court followed suit.⁹ In invalidating an exculpatory clause, the court noted the concern of the tort system with the "admonition of the tortfeasor."¹⁰ In an analogous case, *Rothstein v. Snowbird Corp.*, the Utah Supreme Court limited an exculpatory clause in a ski injury case to the inherent risks of skiing.¹¹ Where the skier collided into a retaining wall of railroad ties, the court held that this was not an inherent risk of skiing and that the ski area should have purchased insurance for the non-inherent risks.

PLEAD GROSS NEGLIGENCE

All of the circuits are in accord that a party cannot shield itself contractually from liability for gross negligence.¹² When faced with an exculpatory clause, look to the definition of “gross negligence” in your own jurisdiction to see whether you can make a colorable claim. Although you may not ultimately prevail, the defendant may not win summary judgment, and your client will have his day in court.

DOES YOUR CIRCUIT ALLOW A PARTY TO COMPLETELY ABSOLVE ITSELF OF ALL LIABILITY FOR ORDINARY NEGLIGENCE

Two Circuit Courts allow a party to limit, but not totally absolve, its liability for negligence.¹³ However, the prospective damages must be enough to deter negligent conduct. This limitation must be clear and unequivocal, and the parties to the contract must have equal bargaining power.¹⁴

If you are in the First or Eleventh Circuit, or any Circuit that has not ruled on this issue, and you are confronted with an exculpatory clause that would allow a tortfeasor to completely walk away from his or her negligence without paying anything, argue that the clause is against public policy and should be stricken. On the other hand, the Eighth and Ninth Circuits allow a party to completely absolve itself of all liability for negligence.¹⁵

WAS THE EXCULPATORY CLAUSE UNCLEAR OR OVERLY BROAD, OR DID THE PARTIES HAVE EQUAL BARGAINING POWER

All of the Circuits are in accord that the intent to exculpate a party from its own negligence must be clearly and unequivocally expressed. Courts have struck many clauses which are seemingly appropriate upon a quick reading, but fail under further scrutiny.

In a recent case that our office argued to the First Circuit Court of Appeals, a clause required the plaintiff to “agree and covenant that he will defend, indemnify and save MARINA harmless from any and all of such claims, demands, causes of action, judgments and executions, and the MARINA shall be entitled to responsible attorneys fees in the event of breach of the OWNER’s covenant hereunder.”¹⁶ In striking this clause as against public policy, the court noted that the quoted language never made a reference to the word “fault” or “negligence,” and was not likely to be an effective warning that conveyed a clear and specific disclaimer of liability for negligence to the plaintiff.¹⁷

In *Randall v. Chevron U.S.A., Inc.*, the Fifth Circuit has also observed the need for specificity in release from negligence and indemnity provisions.¹⁸ In *Randall*, the owner agreed to “indemnify and hold harmless [Chevron] against all claims ... as well as against any and all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel.”¹⁹ The court held that this language did not shield Chevron from liability for the negligence of its employees, observing that this could be done only from the “plainly expressed intentions of the parties, manifested by language couched in unmistakable terms.”²⁰

DOES THE CLAUSE VIOLATES A STATUTE

Under Chapter 7, Section 202 of the Uniform Commercial Code, certain exculpatory clauses in bailment contracts are void.²¹ The storage of a yacht has been deemed to be a storage of “goods” and a marina a “person engaged in the business of storing goods for hire.”²²

As noted above, exculpatory clauses are invalid in Jones Act and certain vessel passenger cases. Whenever your cause of action arises out of the violation of a safety statute, argue that the statute was based upon the intent of the legislature to promote safety, and that this cannot be contracted away.

In a recent Florida slip opinion, *Tassinari v. Key West Water Tours, L.C.*, the Southern District of Florida held that the exculpatory provisions in a jet-ski rental agreement were against public policy.²³ *Tassinari* involved a Florida statute which required jet-ski tour guides to have completed certain water safety courses. In invalidating the exculpatory language, the court reasoned that the safety obligation created by statute was an obligation owed to the public at large, and it was therefore not within the power of a private individual to waive.

CONCLUSION

Exculpatory clauses in maritime tort claims encourage carelessness and breed irresponsibility. Insurers have tried to poison the minds of jurors with their propaganda and pack the benches with their lawyers; do not let them lock the courtroom doors to victims of negligence by the ruse of “freedom of contract.”

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¹ STEVEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (1990).

² 349 U.S. 85 (1955).

³ *Id.* at 91.

⁴ *Id.*

⁵ 46 U.S.C. § 30509.

⁶ 46 U.S.C. § 30509(b).

⁷ 46 U.S.C. § 30509(b)(2).

⁸ 418 S.E.2d 894, 896 (1992) (citations omitted).

⁹ 885 A.2d 734 (Conn. 2005).

¹⁰ *Id.* at 742.

¹¹ 175 P.3d 560 (Utah 2007). *See also Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799-800 (Vt. 1995) (in striking an exculpatory clause, the court reasoned that a ski area was in the best position to foresee and control hazards and maintain and inspect its premises).

¹² *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272 (1st Cir. 2006); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982); *Royal Ins. Co. of America v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999).

¹³ *La Esperanza de P.R., Inc. v. Perez Y. Cia de P. R., Inc.*, 124 F.3d 10, 19 (1st Cir. 1997); *Diesel "Repower", Inc. v. Islander Investments Ltd.*, 271 F.3d 1318, 1324 (11th Cir. 2001).

¹⁴ *Bisso*, 349 U.S. at 90-91.

¹⁵ *Sander v. Alexander Richardson Investments*, 334 F.3d 712 (8th Cir. 2003); *Royal Insurance v. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) (“[E]xcept in towing contracts, exculpatory clauses are enforceable even when they completely absolve parties from liability for negligence.”).

¹⁶ *Broadley*, 471 F.3d at 273.

¹⁷ *Id.* at 275.

¹⁸ *See Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994).

¹⁹ *Id.* at 905.

²⁰ *Id.* (quoting *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580, 583-84 (5th Cir. 1971); *cf. Waggoner v. Nags Head Water Sports, Inc.*, 141 F.3d 1162 (4th Cir. 1998) (exculpatory clause need not specifically state the word “negligence” to bar all claims)).

²¹ U.C.C. § 7-202(b)(3).

²² *Fireman's Fund American Ins. Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917 (1st Cir. 1969) (striking exculpatory clause).

²³ *Tassinari v. Key West Water Tours, L.C.*, 2007 WL 1879172 (S.D. Fla. June 27, 2007).