



Pain-Free Mistakes

How and when you can avoid liability for your own negligence

By RONALD V. MILLER, Jr.

for SmartCEO

It is no secret that the ability of businesses to limit liability is critical for the long-term survival and growth of any size company. For many businesspeople who are looking to reduce exposure to liability, the exculpatory clause - the exoneration of a party's responsibility for its wrongful acts - may be just what they have been looking for.

An infrequently used, but powerful tool in the prevention of legal responsibility, the exculpatory clause places the axiom that parties should be free to contract as they please in tension with the principle that actors should bear responsibility for the consequence of their own

negligence. Yet because these clauses (which are often found in the small print of contracts) provide for absolute accountability relief from parties at fault, they are closely scrutinized and narrowly interpreted by the courts.

Maryland law

Maryland courts have shown, however, a recent willingness to give full effect to exculpatory clauses that are unambiguous. For example, in the 2000 case, *Seigneur v. National Fitness Institute Inc.*, the Maryland Court of Special Appeals found that a health club was immune from liability to an injured

club member because the contract that the client signed contained an exculpatory clause that stated:

Important Information: I, the undersigned applicant, agree and understand that I must report any and all injuries immediately to NFI, Inc. staff. It is further agreed that all exercises shall be undertaken by me at my sole risk and that NFI, Inc. shall not be liable to me for any claims, demands, injuries, damages, actions, or courses of action whatsoever, to my person or property arising out of or connecting with the use of the services and facilities of NFI, Inc., by me, or to the premises of NFI, Inc. Further, I do expressly hereby forever release and discharge NFI, Inc. from all claims, demands, injuries, damages, actions, or courses of action, and from all acts of active or passive negligence on the part of NFI, Inc., its servants, agents or employees.

when the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other's negligence; and (3) when the transaction involves the public interest.

How to fortify an exculpatory clause

In spite of the Maryland courts' apparent tolerance for reasonable exculpatory clauses, few (exculpatory clauses) are risk-free from judicial scrutiny due to the exception that enforcing an exculpatory clause can be somewhat amorphous and subject to interpretation. In order to best fortify an exculpatory clause, using the key elements, utilizing simple and consistent language, stating the obvious and fighting fair, will insulate an agreement and provide the best protection.

Make your clause clear and obvious

An exculpatory clause must clearly state in readily understandable terms that the released party will be free of all liability and using simple language offers that explicit protection. While Maryland law does not require such language, using language that has received approval from Maryland's appellate courts like the word "negligence", gives an obvious advantage in defeating arguments that contractual language is not clear and fully exculpatory and in turn, offers the greatest protection. (At a health club I own in Anne Arundel County, we utilize the identical language used in our exculpatory clause that was found clear and unambiguous by the court in *Seigneur v. National Fitness Institute, Inc.*)

In July 2001, a New York appeals court heard a case regarding a dry cleaner sued by a customer to recover the cost of a torn shirt. The dry cleaner contended that damages must be limited to \$20 pursuant to a limitation of liability exculpatory clause printed on the claim ticket. The ticket stated that the dry cleaner "cannot assume responsibility for inherent weaknesses of or defects in

The court determined, after finding that the contractual agreement between the plaintiff and the club contained the clear intention of the parties to insulate the fitness center from liability for all acts of negligence and because the fitness center had not provided "essential services" of great public importance or practical necessity, that the exculpatory clause of the contract was enforceable.

Still, notwithstanding this decision, there are cases in which Maryland courts will refuse to enforce an exculpatory clause. Accordingly, even the most carefully crafted exculpatory clauses will not prevent the recovery of damages in every instance.

For example, exculpatory clauses used by landlords and certain construction contracts are forbidden by Maryland statute. Three exceptions have also been identified where the public interest will render an exculpatory clause unenforceable. They are: (1) when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton, or gross negligence; (2)

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materials that are not readily apparent prior to processing" and could not "guarantee against color loss, and shrinkage; or against damage to weak and tender fabrics. "

In this case, the court found that the contract did not limit liability for negligent conduct because there was not any inherent weakness in the material; the shirt was simply negligently torn. Had the dry cleaner used simple language that sought indemnification for its own mistakes, as opposed to the limiting phrase providing coverage for "inherently defective material," it would have likely been able to limit the claim to \$20.

Consistent contractual language

In a Florida case reported earlier this year, a Miami Dolphins club-level season ticket holder brought an action against the owner of the Dolphins' stadium as a result of injuries suffered when intoxicated fans assaulted him. While his contract to purchase season tickets contained an exculpatory clause, elsewhere in the contract it stated that a club level season ticket holder did not have "any greater or lesser rights and privileges with respect to admission to the Stadium" than those given to other regular season ticket holders. Contracts of regular season ticket holders, however, did not contain exculpatory clauses, as did his contract for "club-level"

season tickets. Accordingly, the Florida appellate court overturned the trial court's enforcement of the exculpatory clause.

The take home message: If you are using exculpatory language, particularly if you are adding such language into your current agreement, make certain that no other provision of that contract can be read inconsistently with your exculpatory clause.

Contracts outside of Maryland

In business-to-business contracts between companies located in different states, complicated issues arise regarding the appropriate venue for a dispute and which state law is controlling. Accordingly, it is important to know how exculpatory clauses are viewed in any jurisdiction in which there is a possibility that your exculpatory clause might be reviewed under the laws in another jurisdiction.

Looking for a shortcut? Because Maryland law is relatively favorable to exculpatory clauses, include a clause in your contract that Maryland law is controlling. Not only will such a clause likely improve probability that your exculpatory clause will be enforced, it will decrease the invariable legal costs if your Maryland lawyer is required to battle over what law is controlling (and researching the law in other jurisdictions).

Make it a fair fight

One articulated exception to the enforcement of exculpatory clauses is when the bargaining power of one party to the contract is so "grossly unequal so as to put that party at the mercy of the other's negligence", yet courts typically disfavor contracts of adhesion.

These are usually found in the "small print", contracts drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to a weaker party that has no real opportunity to bargain about its terms. Although the exculpatory clause in *Seigneur* was a "small print" term that was not highlighted in any way, additional protection can be found by having the releasing party initial the exculpatory clause. As a result, courts look for any signs that a term was noticed or better yet, approved by the releasing party, yet the down side is that there is a possibility of creating a dispute over a term where none may have existed. An alternative means of providing additional protection is highlighting the exculpatory clause either by using all capital letters or underlining or putting the text in bold.

Play fair

One of the reasons exculpatory clauses are held in disfavor by some courts is because they provide no ramifications, and therefore no consequences, to negligence. Unlike in an insurance situation where negligent parties often

risk deductibles and the possibility of increased insurance rates, exculpatory clauses offer little incentive for safety and due care from the released parties.

Still, Maryland courts will strike down the clause if the protected party intentionally causes harm or engages in acts of reckless, wanton, or gross negligence.

So, the question is: How do you protect yourself from such a finding?

Stating the obvious, use due care in avoiding the negligence covered by the clause but also make sure that you have objective evidence that demonstrates your effort, via systems, practices and procedures, to avoid negligent acts.

For example, in *Seigneur*, if the health club had developed safety procedures and made reasonable efforts to create a safe environment, its exculpatory clause would be more immune from attack. Conversely, if the club knowingly allowed unsafe practices to continue while making no efforts to create a safer environment, the club's clause would be more vulnerable to attack.

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