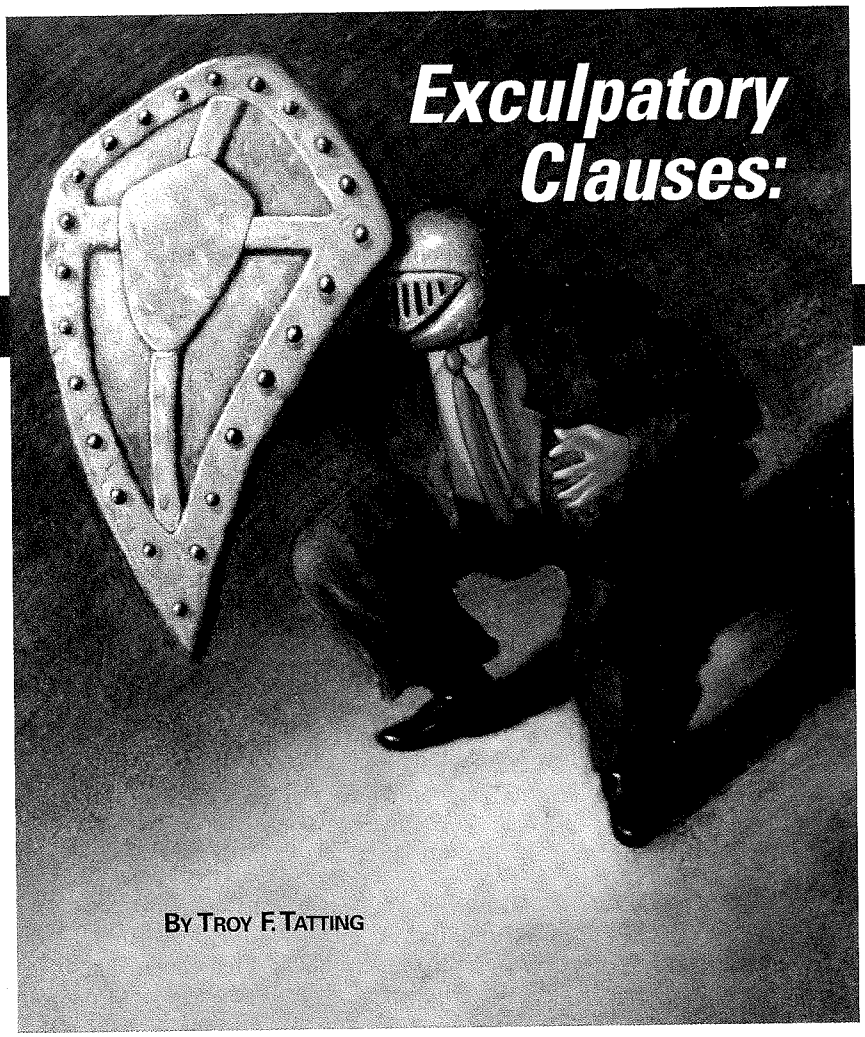

Exculpatory Clauses:

Uncertain Shields Against Liability

Exculpatory clauses garner mixed reviews from courts, juries, and consumers but can be useful tools in the armory of companies that provide services involving significant risk. Litigators and transactional attorneys alike will benefit from knowing the strengths and limitations of these devices.

BY TROY F. TATTING

Companies routinely include exculpatory clauses in their contracts with their clients. Exculpatory clauses are especially important to companies that provide services involving a significant risk of physical injury, such as health clubs, ski resorts, skydiving companies, horse stables, and paintball facilities. These clauses purport to relieve a company from liability resulting from a negligent or wrongful act.[1] The idea behind such provisions is that once a patron signs a contract containing an exculpatory clause, the patron's ability to bring a negligence claim will magically disappear.

In practice, however, an exculpatory clause does not necessarily abrogate litigation. Minnesota courts disfavor exculpatory clauses and juries may loathe them even more. Minnesota case law has not explicitly approved of certain "magic words" that would make an exculpatory clause airtight. Under these circumstances, the course of litigating a matter involving an exculpatory clause may change dramatically depending upon a court's interpretation of the clause in a ruling on a motion to dismiss or for summary judgment.

So how should plaintiff, defense, and transactional attorneys best serve their respective clients when confronted with an exculpatory clause?

Exculpatory Basics

Minnesota case law on exculpatory clauses is still developing, but courts have adopted some basic rules. The rules are conflicted, providing hope for both plaintiff and defense attorneys. On one hand, an exculpatory clause is valid as long as (1) it is not ambiguous in scope; and (2) it does not exonerate the benefited party from liability for intentional, willful or wanton acts.[2] On the other hand, exculpatory clauses are disfavored and strictly construed against the benefited party.[3] They are also void if they violate public policy considerations.[4]

Tactics for Plaintiffs

Plaintiffs' attorneys should be wary but willing in taking on an exculpatory clause. An exculpatory clause does not necessarily terminate your client's claims. It may intimidate you because it adds increased risk and litigation costs, even if successful. To reduce monetary risk, consider charging a flat fee to contest the validity of the clause and, if successful, a contingent fee thereafter.

Tip the scales in your favor. Remember, defendants and their attorneys see an exculpatory provision as a complete bar to liability and convenient tool to avoid protracted litigation. Your case's value should inflate significantly if you survive a motion to dismiss or summary judgment. That is why it is essential to have a good handle on the facts before you place your case in suit. You need to be able to create a record for negligence, ambiguity, overly broad contractual language, and an offense to public policy.

First, tell the court about the strengths of the underlying case. You represent an injured party, who needs compensation. You have a good argument that the defendant was, at the very least, negligent. The defendant should have cleaned up that wet floor, fixed its treadmill, tightened that saddle, etc. Show the court that your client would win if not for the exculpatory provision.

Then, attack the contract. Focus on any ambiguity, however small or questionable it may be. This is a disfavored contract and it should be avoided for even the smallest of ambiguities.

Look into the exculpatory language itself to see if it is overly broad. Minnesota courts are unclear about whether an attempt to exculpate intentional misconduct results in the voiding of an entire exculpatory clause or the voiding of only the portion of the clause attempting to exculpate intentional misconduct.[5] Nevertheless, the contract may ask for too much, and you may hope to convince the court that your

client should be relieved from its oppressive terminology because of it.

Tactics for the Defense

Keep the case about the contract. Plaintiff signed it voluntarily, gave consideration, and could have contracted with other companies if she so desired. Focus on the contractual language that unambiguously blankets the factual scenario which brought about plaintiff's alleged injury. If a clause is unambiguous, construction by the court is unnecessary and summary judgment is appropriate.[6] Plaintiff's alleged injury can be said to be contemplated by the express terms of the contract if it states, for example, that the defendant shall not be held liable for the negligence of its employees or injuries resulting from use of its facilities. If the language suggests that the contract might apply to exonerate willful acts, argue that it does not do so in the underlying case.

Remind the court that exculpatory clauses are routinely upheld and why that is so. Although Minnesota courts disfavor exculpatory clauses, historically they have upheld such clauses in the business and commercial context.[7] Where these clauses have been upheld, the cases rely on principles of freedom of contract and provide that parties may protect themselves against liability resulting from their own negligence so long as the agreement does not contravene public policy or public welfare.[8]

You may also want to argue that exculpatory clauses allocate risk between contracting parties. Without exculpatory clauses, your client's membership fees will increase, its inspection costs will skyrocket, or its recreational activities will be unaffordable. In other words, your client will suffer hardship that will be passed on to its clients and consumers.

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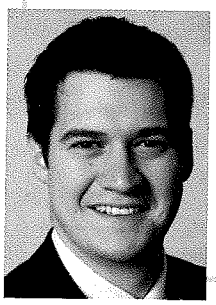

It's not over until it's over. Remind plaintiff's attorney that you will appeal an unfavorable judgment relating to the validity of the exculpatory clause. Even if the court denies your motion to dismiss or for summary judgment, any recovery at trial might still be completely wiped out with a post-trial reversal.

Drafting Exculpatory Clauses

In drafting exculpatory clauses, adopt language from already scrutinized contracts. While the courts may not have explicitly approved of certain magic words that would make an exculpatory clause fool-proof, they have upheld contracts containing specific exculpatory language. Find a case, such as *Breehner v. Cragun Corp.*, 636 N.W.2d 821, 825-26 (Minn. App. 2001), where a clause has been upheld and set forth in the opinion. Adapt it to apply to your clients' businesses and make a generic annotated copy for your records so you can later explain why you selected certain words and phrases.

Advise your clients about the public policy test. The test examines (1) whether, at the time of contracting, there was a disparity of bargaining power between the parties, and (2) if the type of service being offered is a public or essential service.[9] A disparity of bargaining power exists where an adhesion contract is drafted by a business and forced on an unwilling or unknowing public "for services that cannot readily be obtained elsewhere."[10] To establish a disparity in bargaining power, a party must show that there was no opportunity for negotiation *and* that the services could not be obtained elsewhere.[11]

If your client is one that provides a public or essential service, such as a common carrier, hospital, public utility or innkeeper, among others, courts will not enforce its exculpatory clause.[12] A public or essential service includes a service generally thought suitable for public regulation.[13] Recreational activities generally do not fall into the categories of public or essential services.[14]

Update your work. A good exculpatory clause today may be an overly broad clause tomorrow. Compare new case law with your annotated copy and adjust it accordingly. Each adjustment gives you a great reason to keep in contact your clients.

Be an Expert

A thorough understanding of how exculpatory clauses are enforced, avoided, and drafted should provide you with an excellent opportunity to market to current clients, generate new business, and impress your partners and associates. Your expertise in this area should make you the go-to-attorney when your firm is dealing with exculpatory clauses. ▲

Notes

[1] *Black's Law Dictionary* 258 (2d pocket ed. 2001).
[2] *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005).
[3] *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).
[4] *Id. See also Zerby v. Warren*, 210 N.W.2d 58, 64 (Minn. 1973).
[5] *Schlobohm*, 326 N.W.2d at 923 (providing that an exculpatory clause is unenforceable if it "purports" to release intentional conduct but citing to cases from other jurisdictions suggesting that an overbroad clause including a release of intentional conduct would be narrowed to a negligence release); *Nimis v. St. Paul Turners*, 521 N.W.2d 54, 57 (Minn. App. 1994) (court voided entire clause where it released all claims caused by negligence "or otherwise"); *Ball v. Waldoch Sports, Inc.*, 2003 WL 22039946, at *3 (Minn. App. 2003) (an attempt to release intentional misconduct would result in voiding only that portion of the clause) (unpublished opinion).
[6] *See Schlobohm*, 326 N.W.2d at 923.
[7] *See Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 189 N.W.2d 404, 407 (Minn. 1971).
[8] *Arrowhead Elec. Co-op. Inc. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 878 (Minn. App. 1997).
[9] *Schlobohm*, 326 N.W.2d at 923.
[10] *Id.* at 924.
[11] *Id.* at 924-25; *see also Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 730 (Minn. App. 1986) (fact that party had no opportunity to negotiate terms of exculpatory agreement by itself not enough to show a disparity in bargaining power).
[12] *Schlobohm*, 326 N.W.2d at 923.
[13] *Id.* at 925.
[14] *Id.* at 925-26.