Exculpatory Contracts Revisited: Waivers, Releases, and All that Jazz

by Daniel D. Crean



Attempts to limit liability come in an endless variety, ranging from simple one-paragraph waivers to complex agreements, including indemnification and "hold-harmless" clauses. They can be found as stand-alone documents. More commonly (particularly in a local government context), they will appear as clauses in admission tickets to sporting events, permission slips to participate in sponsored activities, facility use agreements, or signs posted at public facilities, such as parks or swimming pools. Liability limits also exist under a variety of state statutes. Liability releases and waivers also may arise in connection with approval of developments or issuance of permits, or in connection with construction of public works. Discussion of these latter forms of liability limits (statutory limits, development approvals, and construction) generally is beyond the scope of this article.

Commonly used documents or clauses often seek to avoid or limit tort liability, specifically that form of liability which arises from a person's negligence. They may also seek to limit contractual liability, though the primary focus, here, is on torts. Law school tort courses routinely examine doctrines such as assumption of risk, indemnification, and waivers of liability which have long been part of the American legal scene. The legal term generically used to describe methods by which a person or entity may seek to avoid tort (or contract) liability in this manner is an "exculpatory clause" or "exculpatory contract." Over the years, courts have acknowledged the validity of exculpatory agreements. As discussed in this article, a number of jurisdictions have viewed the concept of escaping the consequences of one's behavior with increasing disapproval.

After a brief review of basic principles, this article examines selected recent case law involving exculpatory language. It will conclude with some thoughts and suggestions for practices that may assist local governments in effectively seeking to utilize the protections afforded by exculpatory language.

A Capsule Look at the Legal Principles

Exculpatory agreements call into conflict two primary legal tenets: (1) a party should be liable for the consequences of the negligent breach of a duty owed another vs. (2) the principle that, as a matter of efficiency and freedom of choice, parties should be able to contract freely about their affairs.[1] The Restatement of Contracts states, as a general rule: "Absent some statute to the contrary, the generally accepted rule is that contracts against liability for negligence are valid except in cases that involve a public interest."[2] Of course, the true meaning of a rule often lies not in the general language, but in its exceptions and limitations. In addition to state-specific statutes that may allow, prohibit or regulate the use of exculpatory agreements,[3] courts appear to be increasingly vigilant in applying exculpatory language narrowly and by limiting waivers of liability that, in the past, may have been viewed more expansively based on freedom of contract as noted in the general restatement rule cited above.[4]

Judicial approaches to exculpatory agreements naturally will address specific language used in specific instances. In general, though, courts have expressed concerns as to their use in several instances:

- Public policy concerns where the bargaining power of the parties is one-sided and disclaiming liability by one party would be patently unfair;[5]
- Exculpatory language that is "hidden" or couched in terms that a reasonable person could not be expected to read or understand;[6]
- Disclaimer of liability of a type that would not be in the public interest;[7] and
- Releases associated with compelled instead of voluntary activities.[8]

As a general rule, language will be construed narrowly to apply only to particular circumstances envisioned by a limited reading of its terms. Some states, though, differ markedly in their approach to the enforceability and construction of exculpatory agreements.[9] It is in the notion that some exculpatory provisions may be contrary to public policy that the use of exculpatory language has seen considerable alteration in common law.[10]

The Scope of Exculpatory Language

In early 2009, the New Hampshire Supreme Court revisited the issue of the validity, scope, and requirements of exculpatory agreements in *McGrath v. SNH Development, Inc.*[11] The case did not involve a local government entity, but its guidance is important in confirming the limited, but vital, role that agreements to limit liability may play in protecting property owners, including local governments, and in allowing recreation programs, school field trips and other activities to be conducted economically and without fear of unreasonable exposure to liability.

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The lessons to be learned from this case apply, as well, to regulating liability in agreements for the use of municipal and school facilities, as local government and school programs often seek to utilize waivers, indemnification, or "hold-harmless" agreements to supplement governmental immunity when it exists, or to limit liability where immunity may not exist.

In this case, the plaintiff, who had been snowboarding at a privately-owned skiing facility, was involved in a collision with a snowmobile operated by a ski area employee. She sued to recover damages for the injuries she suffered from the ski area owner. The plaintiff was a "season pass" holder, which required that she sign two documents. The first of these documents, an application for a season pass, read in part:

> I understand and accept the fact that alpine skiing... is a hazardous sport and... injuries are a common occurrence. I agree, as a condition of being allowed to use the ski area facility, that I freely accept and voluntarily assume all risks of personal injury... and release [the facility], its owners and its… employees…from any and all liability…which results in any way from negligence, including… grooming, snow-making… .[12]

The second document, formally entitled "Liability Release Agreement," repeated language from the application and again stated that the user would release the ski area owner from "any and all liability for personal injury…which results in any way from negligence."[13]

The trial court granted the ski area's motion for summary judgment based on the assertion that the two documents were valid exculpatory agreements that prevented the ski area from being held liable for negligence. The plaintiff appealed to the Supreme Court, whose decision may be summarized as follows. First, the court restated the judicial branch's "grudging"accep- tance of these attempts to avoid or limit liability. While noting that New Hampshire law generally prohibits exculpatory agreements and views them with disfavor, they can be enforceable if: (1) they do not violate public policy; (2) the plaintiff understands the importance and meaning of the agreement (or a reasonable person in the plaintiff's position would understand the import of the agreement); and (3) the plaintiff's claims are within the contemplation of the parties when they executed the exculpatory contract.[14]

Applying these principles to the case, the court ruled:

- Public policy was not violated, as there was no special relationship between the parties and there was no disparity in their bargaining power; nor did the agreement violate any statute or interfere with public health or safety.[15]
- The release did not mention snowmobiles specifically, but it did release the ski area from any and all liability resulting in any way from negligence. Although the court mentioned the substantial font size and formatting of the release language, which served to enforce its visibility, it did not base its rulings solely on those factors.[16]
- Lastly, the court concluded that the release was not limited to risks inherent in skiing and snowboarding, so it could be extended to reach the circumstances of this case.[17]

The court's decision to not limit the release contrasts markedly with some prior cases, in which the release language more specifically targeted risks associated with the activity involved. For example, by narrowly construing recreation use immunity statutes, the court had limited recreational immunity and held it did not apply when the injured party was not a part of the general public.[18]

Courts may also address issues with regard to compensation and the specific focus of activities covered.

Exculpatory Provisions and Local Governments

Local government sovereign immunity, of course, varies by jurisdiction, but it is not an entirely forsaken concept. Even where liability does exist, municipalities may still retain some protections that private parties do not possess. For example, cities and towns may be protected by the principle that government-issued building permits do not guarantee that a building is safe or habitable (unless, of course, the permit so states); thus, liability may be limited or barred for negligently-issued permits.[19] Such limitations do not extend, of course, to situations where municipal facilities that may be used by a building or occupant are negligently operated or maintained.[20]

Historically, local governments have made ample use of exculpatory language. For example, releases are commonplace in policies, ordinances and regulations, as well as tickets for admission to recreation areas, for participating in or observing sporting events, or for going on field trips. Coupled with judicial and legislative trends toward limiting sovereign immunity in general, attempts to create broad municipal immunity through the use of exculpatory language may be viewed in the same light, even in jurisdictions that have not yet expressly done so.

Critical judicial attitudes toward exculpatory language suggest that municipalities should take a second look at attempts to limit or escape responsibility for their own actions. This is particularly true in those jurisdictions that have limited or abolished sovereign immunity, if exculpatory agreements seek to secure indirect restoration of blanket or even selective immunity.[21]

A Closer Look at Language

Aside from such statutes or cases that limit the effect of exculpatory language, a potential new limit on its effectiveness may be on the horizon. An elevated standard may be imposed where courts require use of language beyond the traditional clarity and public policy standards by, for example, requiring that exculpatory agreements relate solely to the issue of liability and not be

mixed with other terms of use. Another potential standard suggests that parties also should have the ability to negotiate exculpatory provisions. The Wisconsin Supreme Court set a very high target for exculpatory contracts to effectively accomplish the goal of limiting the recourse of persons who may be injured or suffer property damage as the result of another person's negligence.[22] It has been suggested that exculpatory provisions after this case must (1) not serve multiple purposes, and (2) indicate that the signer has the "opportunity to bargain" over its provisions.[23]

The first of these cautions means that exculpatory language should not be included as "boilerplate," and must not be coupled with other general language (e.g., the terms and conditions of using a park). Instead, the language must be clear and focused and, as indicated by cases urging narrow construction, identify the risks and the liability involved. A completely separate exculpatory agreement may not be required, but drafters must ensure that language and its intent are abundantly clear.

The notion of "bargaining" over the terms of exculpatory language, if the Wisconsin decision is given effect elsewhere, may prove to be even more troublesome. Does this mean, for example, that permission to use a public swimming pool should provide persons with the options of (1) using the public swimming pool for free if they agree to waive liability, or (2) paying some sum in the form of legal consideration to support the exculpatory agreement, if they choose not to sign a release?

Guidance for the Future

This article does not propose that municipalities avoid risk transference and avoidance by the use of exculpatory language. Indeed, exculpatory contracts and clauses continue to have their place in the municipal risk management tool-kit. However, to place too great a reliance on this tool risks opening the door to liability as a result of overbroad exclusions, unclear or vague language, or actions that leave disadvantaged parties without any reasonable remedy for wrongdoing. Worse, they may create an illusion of immunity, providing the opportunity for facilities managers to forego proper maintenance and operation procedures.

In any event, legislative and judicial treatment of exculpatory provisions does present distinct concerns that will arise in assessing the use of waivers, releases, and hold-harmless clauses. Municipal lawyers should seek to avoid the traps of:

- overbroad exclusions that seek to avoid any liability, no matter how outrageous the conduct of the local government, and its employees and officials;
- vague or hidden terms, laden with legalese, that defy attempts to understand the disclaimers and assumptions of liability by the mythical "reasonable person";
- violations of proscriptions against waivers that violate the public interest standard; and
- running afoul of legislative limits on liability waivers and disclaimers.

Proper usage also requires that releases and similar documents:

- apply narrowly so that they will not violate public policy by encouraging reckless and dangerous conditions;
- clearly and concisely state their meaning and purpose, so that they do not require a law degree to decipher their intent and consequences; and
- limit the attempt to disclaim liability to specific risks, activities, and conditions that are identified in the document.

Exculpatory clauses and contracts can be valid and effective when they are carefully crafted and targeted to meet the specific needs of situations. Beyond drafting concerns, municipal legal advisors may wish to consider the possibility of creating opportunities to demonstrate that exculpatory provisions have become "part of the deal," and that there exists a fully-disclosed intent to release local governments from liability.

Taking a cue from recent decisions, some risk management pointers for local government attorneys may be summarized as the following:

- be open and clear about the liability being disclaimed. Broad generic language may seem appropriate, but may be viewed as vague, or so broad as to violate the public policy component of limitations on disclaimers.
- when language is too broad to reasonably identify the specific risks and dangers involved, the language will be interpreted narrowly. The use of overly broad and vague language may ultimately provide merely an illusion of immunity from liability.
- be aware of statutory requirements governing the operations of a facility, and do not disclaim liability associated with any required actions and responsibilities.
- understand that the public policy components of case law seek to ensure that property is cared for in a reasonable manner, and that regulations and standards that are imposed to protect the public may not be ignored or disregarded.
- test the wording used to determine if it is readily understandable by "ordinary citizens." The legal standard requires that the wording be understood by a reasonable person in the position of the person who is being asked to agree to waive liability.

To add a layer of protection, individuals might be advised to consider seeking legal guidance if they have questions. In appropriate circumstances (e.g., field trips), sufficient time should be provided to allow for such consultation. Further, the law of particular jurisdictions must be reviewed to determine the ability of minors to release their rights, and for parents or guardians to release rights on behalf of minors.

In conclusion, municipal lawyers might keep in mind the notions that what has worked in the past may no

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longer be adequate, and what works in one situation might not work so handily in others! Truly, in this arena, one size does not fit all circumstances, and an ounce of prevention is worth a pound of cure.

Notes

1. Barnes v. N.H. Karting Ass'n, Inc., 509 A.2d 151 (N.H. 1986). *See also*, ABA Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, § 5-27 (Nov. 1984); Morrow v. Auto Championship Racing Ass'n, Inc., 291 N.E.2d 30, 32 (Ill. App. Ct. 1972).
2. Restatement (Second) of Contracts, § 45 (1981), "courts upholding such agreements often comment that persons should be free to contract as they choose."
3. In New Hampshire, for example, immunity for persons who allow for the recreational use of their property is limited to those who do not charge for such use: N.H. Rev. Stat. Ann. § 504:18 (2009). States may also bar their use to disclaim liability for gross negligence by statute or case law—*see, e.g.*, Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (N.Y. 1983).
4. In New Hampshire, "exculpatory contracts are generally prohibited. A defendant seeking to avoid liability must show that the exculpatory agreement does not contravene public policy; i.e., that no special relationship existed between the parties and that there was no other disparity in bargaining power." *Barnes*, 509 A.2d at 154.
5. *See* cases and comments, *supra* note 1.
6. Sometimes called a "fair notice requirement," exculpatory language should be accessible. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505 (Tex. 1993) discusses notice concepts and the distinctions between indemnification agreements and releases. The court there stated it could "discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same effect." *Id.* at 509. *See also*, Hanks v. Powder Ridge Restaurant Corp., 885 A.2d 734 (Conn. 2005) (applying both the public policy and the clarity tests).
7. Audley v. Melton, 640 A.2d 777 (N.H. 1994) (model bit in the face by a lion; exculpatory contract in this case was not void as against public policy in absence of a "special relationship" between the parties; the case also lacked "any hallmarks of a disparity in bargaining power," and the service offered by the defendant was not a "matter of practical necessity"). *See also* Loewe v. Seagate Homes, Inc., 987 So. 2d 758, 761 (Fl. Dist. Ct. App. 2008) ("Even assuming, arguendo, that the parties here were in an equal bargaining position, a builder should not be free to negligently, recklessly, or intentionally construct a residence in a manner that will unreasonably threaten the life, health or safety of its future occupants.").
8. Sharon v. City of Newton, 769 N.E.2d 738, 745 (Mass. 2002) (student injured while participating in a voluntary cheerleading practice at public school sued city; court held that participation in the activity was neither compelled nor essential, and that public policy was "not offended by requiring a release as a prerequisite to that participation").
9. A release involving horseback riding was alleged to preclude liability by a patron who was injured when her tour guide's horse kicked the patron in the leg. The N.H. Supreme Court said the release did not apply to alleged negligence on the part of the tour guide who, it was claimed, should have responded to indications that the guide's horse was about to "act out." The court ruled that the release did not bar a trial, noting, in particular, that the "agreement easily could have been framed in a manner that would have expressed more clearly its conditions and exclusions." Wright v. Loon Mountain Recreation Corp., 663 A.2d 1340, 1334 (N.H. 1995). Contrast this with the ruling in *Sharon v. City of Newton*, discussed in the previous endnote.
10. Restatement (Second) of Contracts, §§ 60 and 61 (1981), cases noted elsewhere in this article.
11. 969 A. 2d 392 (N.H. 2009).
12. *Id.* at 395.
13. *Id.*
14. *Id.* at 395-96.
15. *Id.* at 397.
16. *Id.* at 398.
17. *Id.* at 398-99.
18. Estate of Gordon-Couture v. Brown, 876 A.2d 196 (N.H. 2005) (in a premises liability action brought against a landowner by the estate of a two-year-old child who drowned in the landowner's pond during a birthday party, the court held that recreational use statutes that immunized, from liability, landowners who opened their property to members of the general public for recreation did not abrogate the landowner's duty of care to private guests or persons invited onto the property for private activities).
19. *See, e.g.*, Howe v. Douglas County, 43 P.3d 1240 (Wash. 2002) (on a claim of alleged negligent permitting, the court held that the plaintiff property owners did not fall within the "special relationship" exception to public duty doctrine and, accordingly, could not maintain a claim against the county for negligently granting the subdivision developer a permit, where the owners did not have direct contact with county officials).
20. 1515-1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp., 43 P.3d 1233 (Wash. 2002). When a landslide damaged three townhouses during heavy rain, the homeowners sued the city for allowing the houses to be built and for failing to properly maintain drainage systems. The city had allowed the houses to be built only on the condition that the builders record exculpatory covenants, relieving the city of liability for anything relating to landslides. The court held that local governments, owners, and developers may negotiate agreements which limit liability and bind successive owners. The court also cited the long-standing principle that governments are not liable for negligently granting permits. The city, though, could be held to account for negligent maintenance of drainage systems.
21. *See, e.g., Howe*, 43 P.3d 1240.
22. Atkins v. Swimwest Family Fitness Ctr., 691 N.W. 2d 334 (Wis. 2005) (in a wrongful death action that alleged the facility's negligence caused a user to drown, the facility's exculpatory waiver

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was held unenforceable as against public policy— the use of the term "fault" in the waiver, which stated that visitors assumed all liability without regard to fault and agreed to hold facility harmless for any injuries incurred, made the waiver unenforceable as overly broad and all-inclusive, and did not specify that visitors were releasing the facility for negligent acts; second, it did not provide the signer with adequate notification of the waiver's nature and significance).

23. *See Enforceable Exculpatory Agreements: Do They Still Exist?* Wisconsin Lawyer, Vol. 78, No. 8 (Aug. 2005). ML

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States Reach Agreement on Buy American (5 Feb. 2010). *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca.

85. Ontario Ministry of Economic Development and Trade (MEDT) News Release, *Canada and the United States Reach Agreement on Buy American: McGuinty Government Supports Important Breakthough. See* MEDT website at http://www.ontariocanada.com/ontcan/1medt/en/news_2010_02_12_en.jsp.

86. *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, Part B, Market Access, Thresholds. *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca for the text of the agreement.

87. *Federal Canadian government announcement Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) *Negotiations. See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca. ML

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transportation, promoting bicycle and pedestrian paths, workforce housing, and other projects that fall under the broad umbrella of "smart growth." The Act appropriates $3.75 billion over three years, starting in 2011, for the program. Areas with population under 200,000 may apply for up to $15 million while large population areas with over 500,000 may be awarded up to $100 million. Some rural states and communities see themselves at a disadvantage with the Act. Senator John Thune (R-SD) has stated that the Act "is a program that's going to overwhelmingly focus on urban areas."[9] Even so, this may very well be a bill that will pass President Obama's desk and it will be worth your local government's time to keep track of S.1619's progress.

Notes

1. Livable Communities Act of 2009, S. 1619, 111th Cong. (2009).
2. Press Release, U.S. Senator Chris Dodd, *Dodd Announces Initiative to Coordinate Housing, Transportation, and Environmental Policies* (Aug. 6, 2009) (on file with author).
3. Livable Communities Act of 2010, H.R. 4690, 111th Cong. (2010).
4. Don Stacom, *Dodd Promises to Promote 'Smart Growth' Housing Plans*, Hartford Courant, March 9, 2010, at http://articles.courant.com/2010-03-09/news/hc-hartford-livable-0309.artmar08_1_smart-growth-plans-housing-authority-directors-sen-christopher-dodd. (last accessed Mar. 15, 2010).
5. Press Release, U.S. Dept. of Housing and Urban Development, HUD *Secretary Donovan Announces New Office of Sustainable Housing and Communities* (Feb. 4, 2010) (on file with author).
6. Press Release, U.S. Dept. of Housing and Urban Development, *HUD and DOT Announce Interagency Partnership to Promote Sustainable Communities* (Mar. 18, 2009) (on file with author).
7. Livable Communities Act of 2009, S. 1619, 111th Cong. § 6 (2009). The Act's Interagency Council would be expanded to include the Administrator of the Environmental Protection Agency and "such representatives from other Federal agencies . . . as the President may prescribe."
8. Livable Communities Act of 2009, S. 1619, 111th Cong. § 7(b) (2009).
9. Elana Schor, *Dodd Vows to Pass Livability Bill Amid Skepticism From Rural Senators*, dc.streetsblog.com, available at http://dc.streetsblog.org/2010/03/09/dodd-vows-to-pass-livability-bill-amid-skepticism-from-rural-senators/. ML

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the Act was concerned with the *consequences* of the unlawful employment practice. Benna Ruth Solomon, Corporation Counsel for the City of Chicago, argued that the time when the injury occurred or impact was felt was when the tiered list or priority pool was first created. That was the only practice that had adverse impact as contemplated by the statute, and "in this case the defining feature, namely disparate impact, in the sense defined by the statute, required by the statute to limit or classify in a way that denies people employment opportunities based on race — that defining feature was absent within the charging period." Regardless of how many hiring rounds occurred, it "always goes back to the test and the list." Ultimately, what the petitioners were asking the Court to do was to validate new "opportunities to challenge exactly the same thing that they…would have challenged if they had filed a charge promptly." Illustrating the City's dilemma further, she added that, "in a case like this, it – it wasn't possible simply to take the list down. The Court's opinion in *Ricci* makes that quite clear."

The Court's decision is expected by this June. ML