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Drafting Exculpatory Clauses in a Landlord-Tenant Relationship

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COMMENTS

DRAFTING EXCULPATORY CLAUSES IN A LANDLORD-TENANT RELATIONSHIP*

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I. INTRODUCTION

In recent years, lessors, motivated primarily by a desire to find an alternative to costly insurance, have sought a solution through the device of exculpatory clauses.[1] To date no Florida court has ruled upon the validity of these clauses. Non-liability provisions have, however, been subjected to both judicial and legislative scrutiny in other jurisdictions.[2]

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1. Georgalas, *Exculpatory Clauses in Leases of Realty in Pennsylvania*, 15 U. PITT. L. REV. 493 (1954); Jones, *An Exculpatory Provision that will Protect the Lessor*, INS. L.J. 79 (1946); 2 POWELL, REAL PROPERTY, § 234(4) (1966); Rehberg, *Exculpatory Clauses in Leases*, GA. B.J. 389 (1953); Note, 15 ALA. L. REV. 266 (1963); Note, 2 BROOKLYN L. REV. 122 (1932); Note, 8 CLEV.-MAR. L. REV. 538 (1959); Note, 7 FORDHAM L. REV. 126 (1938); Note, 5 HOW. L.J. 251 (1959); Comment, 54 NW. U.L. REV. 61 (1959); Note, 10 N.Y.U.L. REV. 89 (1932); Note, 15 TEMP. L.Q. 427 (1941); Note, 17 WASH. & LEE L. REV. 89 (1960); Note, 42 YALE L.J. 139 (1932).

2. *E.g.*, Deen v. Holderfield, 155 So.2d 314 (Ala. 1963); Barkett v. Brucato, 122 Cal. App. 2d 264, 264 P.2d 978 (1st Dist. 1953); Miller-Du Pont, Inc. v. Service, 208 P.2d 87 (Colo. 1949); Plaza Hotel Co. v. Fine Products Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953); Jackson v. First Nat'l Bank, 415 Ill. 453, 114 N.E.2d 721 (1953); Cobb v. Gulf Ref. Co., 284 Ky. 523, 145 S.W.2d 96 (1940); Thiel v. Kern, 34 So.2d 296 (La. Ct. App. 1948); Levins v. Theopold, 95 N.E.2d 554 (Mass. 1950); Eastern Ave. Corp. v. Hughes, 228 Md. 477, 180 A.2d 486 (1962); Tucker v. Gvoic, 344 Mich. 319, 74 N.W.2d 29 (1955); MacKenzie v. Ryan, 230 Minn. 378, 41 N.W.2d 878 (1950); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); Kuzmiak v. Brookchester, Inc., 33 N.J.Super. 575, 111 A.2d 425 (1955); McCreech v. Howard R. Ware Corp., 53 N.Y.S.2d 192 (1945); Godfrey v. Western Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925); Clifton v. Bainbridge Co., 297 P.2d 398 (Okla. 1956); Auferheide v. Thal, 77 Ohio App. 96, 63 N.E.2d 329 (1945); Jacob Seigel Co. v. Philadelphia Record Co., 348 Pa. 245, 35 A.2d 408 (1944); Hester v. Hubbuch, 26 Tenn. App. 246, 170 S.W.2d 922 (1942); Feigenbaum v. Brink, 401 P.2d 642 (Wash. 1965).

For an enumeration of state legislation affecting the use of exculpatory clauses in landlord-tenant relationships, see text accompanying notes 59 through 67 *infra*.

The purpose of this paper is to examine case law in order to help the practitioner draft an adequate clause for his client.

Exculpatory clauses entered into by a landlord with a tenant have been upheld by a majority of jurisdictions either on the rationale that they are within the proper scope of the "freedom of contract" or as a reasonable substitute for the lessor's carrying of insurance.[3] They have been held valid when affecting multiple dwelling apartments,[4] residential[5] and commercial properties,[6] railroads acting as bailees,[7] and Public Housing Authority lessors.[8]

In the main, exculpatory clauses have taken the form of covenants inserted in the lease or as collateral agreements wherein the lessor is either exonerated from all liability or from liability in certain enumerated instances.[9] Whether the clause is a part of the lease itself, is embodied in a collateral agreement, or is in the form of a general or specific exclusionary clause, it is generally subject to the rule of strict construction.

The major contentions asserted against validity of exculpatory clauses used in landlord-tenant relationships are public policy arguments and a finding of a disparity of bargaining power between the lessor and the lessee. During World War II and other periods of acute housing shortage the inequality of bargaining power between the lessor and the prospective tenants was asserted as a ground for invalidating exculpatory clauses. But even during these times few courts accepted this argument.[10] In order to constitute a disparity of bargaining power that would render exculpatory clauses invalid, a housing shortage must affect a wide geographical area

3. Cannon v. Bresch, 307 Pa. 31, 160 Atl. 595 (1932); Inglis v. Garland, 19 Cal. App. 2d 767, 64 P.2d 501 (1936). Cases decided by Pennsylvania courts rely heavily upon the freedom of contract guaranteed by federal and state constitutions. See Georgalas, *supra* note 1.

4. Wade v. Park View, Inc., 25 N.J.Super. 433, 96 A.2d 450 (1953). The court noted that the number of units in the apartment house would not make a difference.

5. O'Callaghan v. Waller & Beckwith Realty, 15 Ill. 2d 436, 155 N.E.2d 545 (1958). *But see* Rishty v. R. & S. Properties, Inc., *infra* note 6, which distinguished between residential and commercial properties and intimated that they would be valid in the latter but not in the former instance.

6. Rishty v. R. & S. Properties, Inc., 101 A.2d 254 (D.C. Munic. Ct. 1953).

7. Pettit Grain & Potato Co. v. Northern Pac. Ry., 227 Minn. 225, 35 N.W.2d 127 (1948), stating that the strict liability rule as applied to common carriers does not affect the validity of an exculpatory clause when the carrier is functioning in the role of a lessor and not a carrier for hire. See also Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry., 175 U.S. 91 (1899).

8. Manius v. Housing Authority, 350 Pa. 512, 39 A.2d 614 (1944) (the very fact that the authority was created to serve the public was a factor upholding the clause). Georgalas, *supra* note 1.

9. In Lerner v. Hecklen, 89 Pa. Super. 234, 236 (1926), a general clause provided: "nor shall the lessor(s) be held responsible for loss of property however occurring." See Cannon v. Bresch, *supra* note 3 (damages resulting from leaking and bursting pipes excluded); Rose v. Finance Co., 40 Pa. County Ct. 17 (C.P. No. 1, Phila. 1910) (lessor exonerated from roof leakage); and Jacob Siegel Co. v. Philadelphia Record Co., *supra* note 2 (damage from water, rain, and snow specifically excluded).

10. O'Callaghan v. Waller & Beckwith Realty, *supra* note 5.

and contain the added feature of permanency.[11] In *Simmons v. Columbus Venetian Stevens Bldgs.*,[12] the threat of severe hardship to a tenant if he refused to accept the conditions of an exculpatory clause as an incident to the renewal of his lease was not sufficient reason to invalidate the exclusionary clause.

II. LESSONS IN JUDICIAL CONSTRUCTION

Judicial disfavor for exculpatory clauses has manifested itself in a rule of strict construction. Expertness in draftsmanship is therefore essential. To avoid pitfalls in drafting, the conscientious attorney must endeavor to ascertain what construction courts have placed on specific language found in these clauses.

In *Walker & Dunlop, Inc. v. Gladden*,[13] an exculpatory clause attempted to exonerate the landlord from liability from any accident or damage to the tenant caused by the handling of electric wires or lights. The court, strictly interpreting this clause, held it not to include an injury resulting from a defective light switch. Similarly, in *Cunningham v. Mutual Reserve Life Ins. Co.*,[14] a clause providing that ". . . said lessor shall not be liable for damage to either person or property occasioned by the elevators, boilers, machinery . . . ." did not, according to the New York court, cover a tenant's injuries caused by the negligence of an employee in the operation of an elevator.

The draftsman must carefully ascertain and specify exactly the areas of the demised premises that are to be included in the coverage afforded by the exculpatory clause. Exclusion of defects on or in front of the premises has been held not to cover a walkway located in the rear of the premises.[15] The Supreme Court of California has construed the phrase "in or about or connected with this tenancy or the occupancy of said demised premises" not to include coverage for injuries sustained in an elevator, the use of which was essential in order for the lessee to reach the leased premises.[16] Where the agreement by its terms includes only property damage there is a general tendency to refuse to extend protection to the lessor from suits based on personal injuries.[17]

In *Koehler v. Southmoor Bank & Trust Co.*,[18] an Illinois court was confronted with a clause providing that "Lessor and Lessor's agents and servants shall not be liable. . . ." Beneficiaries of a land trust, who accord-

11. *Ibid.*
12. 20 Ill. App. 2d 1, 155 N.E.2d 372 (1958).
13. 47 A.2d 510 (D.C. Munic. Ct. 1946).
14. 125 App. Div. 688, 689, 109 N.Y.S. 1070, 1071-72 (1908).
15. Feigenbaum v. Brink, *supra* note 2; Hollander v. Wilson Estate Co., 7 P.2d 177 (Cal. 1932).
16. Hollander v. Wilson Estate Co., *supra* note 15.
17. See Miller-Du Pont, Inc. v. Service, *supra* note 2.
18. 40 Ill. App. 2d 195, 196, 189 N.E.2d 22, 23 (1963).

ing to the terms of the trust merely had possession and control of the property leased as distinguished from a legal or equitable interest, asserted that the above quoted language inured to their benefit. The court, however, held that the exculpatory clause did not afford protection.

Loss of profits has been held not within the scope of exoneration afforded by the phrase "damages to any goods, property or effects . . . ."[19] Nor does the exclusionary phrase "arising from the failure of the lessee to keep the premises in good condition" protect the lessor from suit by the injured party sustained on a sidewalk which became icy subsequent to the execution of the lease. "To keep the premises in good condition" has been equated with the obligation to maintain conditions that exist as distinguished from conditions that arise subsequent to the execution of the agreement.[20] The latter construction is not atypical. In *Strothman v. Houggy*[21] the use of the phrase "from any cause whatever which may arise from the use or condition of said premises" prevented a landlord from gaining protection from injuries caused by defects existing prior to the demise.

III. Exclusion of Liability for Negligence and Other Tortious Conduct

Although a majority of jurisdictions recognize the validity of exculpatory clauses, there is a lack of general agreement whether a landlord may exclude liability for his negligence. Two jurisdictions have, by statute, declared such agreements void and unenforceable.[22] The reluctance of most courts to do so has resulted in a general trend to refuse coverage for active negligence but to permit coverage for passive negligence.[23] Coverage for negligence is also limited by applying a general rule

19. Butt v. Bertola, 242 P.2d 32 (Cal. Dist. Ct. App. 1952).

20. American Trust Co. v. Truck Ins. Exch., 305 P.2d 73 (Cal. Dist. Ct. App. 1957).

21. 186 Pa. Super. 638, 142 A.2d 769 (1958).

22. N.Y. Real Property Law § 234, which is similar to Ill. Rev. Stat. ch. 80, § 15(a) (1959) provides:

> Agreements exempting lessors from liability for negligence void and unenforceable. Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy or wholly unenforceable.

The Illinois statute, besides containing provisions similar to those contained in the New York statute, recognizes as exempt from coverage "business leases in which any municipal corporation, governmental unit, or corporation regulated by a State or Federal Commission or agency is lessor or lessee."

The constitutionality of the New York statute under the due process and equal protection clauses of the federal and state constitutions was upheld in Billie Knitwear v. New York Life Ins. Co., 174 Misc. 978, 22 N.Y.S.2d 324 (1940), *aff'd*, 262 App. Div. 714, 27 N.Y.S.2d 328 (1941).

23. New York courts, prior to the promulgation of § 234 of the Real Property Law, held that exculpatory clauses were effective to relieve the lessor of liability for passive negligence, but could not constitute a defense to affirmative negligence. Drescher Rothberg

of construction refusing to exonerate the landlord from liability arising from his negligence no matter how all encompassing the language of the clause, unless such coverage is expressed in unequivocal terms.[24] Thus, the use of such phrases as "any cause," "however occurring," or "any injury or damage" when specifying the risk of losses excluded have generally been held insufficient to include the negligence of the lessor. The Pennsylvania Supreme Court, in *Perry v. Payne*,[25] held that a contract of indemnity against personal injuries could not afford protection against the negligence of the indemnitee. Notwithstanding this general reluctance to permit a landlord to exonerate himself from liability for his negligence, most jurisdictions recognizing the validity of exculpatory clauses in general,[26] also recognize that the landlord's negligence may be included within the agreement.[27]

> No distinction has been made between agreements relieving the landlord from liability for negligent injury to the tenant's property and those which relieve from liability for injuries to the person.[28]

The liberalism that courts have taken toward the idea that liability for negligence may be expressly contracted against has not been extended to willful or fraudulent conduct, or where the landlord's negligence also violates legislation promulgated for the protection of the general public. *Robinson v. Tate*,[29] a Tennessee case, best illustrates this type of thinking. The landlord sought immunity from liability for injuries caused by his failure to disclose defects in the demised premises. The court felt obli-

Co. v. Landeker, 140 N.Y.S. 1025 (1913); Note, 7 FORDHAM L. REV. 126, 128 (1938). See also Wheeler, Lacey & Brown, Inc. v. Baker, 269 Ala. 293, 112 So.2d 461 (1959); Barkett v. Brucatto, *supra* note 2; Armi v. Huckabee, 266 Ala. 91, 94 So.2d 380 (1957).

24. Fields v. City of Oakland, 291 P.2d 145 (Cal. Dist. Ct. App. 1955); Butt v. Bertola, *supra* note 19; Inglis v. Garland, *supra* note 3; Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J.Super. 110, 125 A.2d 884 (1956); Samuel v. Princeton Constr. Co., 157 N.Y.S. 135 (1916); Perry v. Payne, 217 Pa. 252, 66 Atl. 553 (1907); Clarke v. Ames, 165 N.E. 696 (Mass. 1929); Lerner v. Heicklen, *supra* note 9. In the latter case, a clause providing "from all losses of property however occurring" was held broad enough to include loss of property or injuries arising from the negligence of the landlord or that of his agents.

25. 217 Pa. 252, 66 Atl. 553 (1907).

26. The one notable exception is the jurisdiction of New Hampshire. In Papakalos v. Shaka, *supra* note 2, any attempt to contract against liability for negligence was held contrary to public policy.

27. Exculpatory clauses exonerating a landlord from liability for his negligence have been sustained in the following cases: King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933); Plaza Hotel Co. v. Fine Products Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953); Cobb v. Gulf Ref. Co., 284 Ky. 523, 145 S.W.2d 96 (1940); Manaster v. Gopin, 330 Mass. 569, 116 N.E.2d 134 (1953); MacKenzie v. Ryan, 230 Minn. 378, 41 N.W.2d 878 (1950); Weirwick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Kansas City Stock Yards Co. v. A. Reich & Sons, Inc., 250 S.W.2d 692 (Mo. 1952); Wade v. Park View, Inc., 25 N.J.Super. 433, 96 A.2d 450 (1953); Wright v. Sterling Land Co., 157 Pa. Super. 625, 43 A.2d 614 (1945); Robinson v. Tate, 236 S.W.2d 445 (Tenn. Ct. App. 1950).

28. Jackson v. First Nat'l Bank, 415 Ill. 453, 462, 114 N.E.2d 721, 726 (1953).

29. 236 S.W.2d 445 (Tenn. Ct. App. 1950).

gated to determine whether the failure to disclose constituted fraud, for if such were the case, the exculpatory clause would not afford immunity.

California, New York and Pennsylvania have refused to grant lessors protection from liability where their conduct violated legislation promulgated for the protection of the body politic. *Hanna v. Lederman*,[30] the California decision, required the court to rule upon the validity of an exculpatory clause in light of a municipal code:

> All contracts which have for their object directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, [are] against the policy of the law.[31]

If the violation of the code is the proximate cause of the tenant's injuries, the exculpatory clause cannot be used as a defense.[32] Opposite to *Hanna*, however, is *Clifton v. Bainbridge*[33] which was decided under a similar provision of the Oklahoma Constitution.[34] In New York, by virtue of 3175 *Holding Corp. v. Schmidt*,[35] the lessor cannot contractually release himself from duties set forth in the Tenement House Laws. The principle of *Hanna* and *Holding Corp.* was observed in Pennsylvania in *Boyd v. Smith*,[36] where the court refused to hold valid an exculpatory clause exonerating the landlord from liability for his negligence when the tenant's injuries resulted from the landlord's failure to equip the demised premises with a satisfactory fire escape as required by statute.

Godfrey v. Western Carolina Power Co.[37] is a fascinating case when viewed in light of the court's unwillingness to extend coverage for tortious conduct other than negligence. The defendant lessor caused a flooded area to develop attracting Anopheles mosquitoes. Although the presence of a limiting clause prevented the flooding of the area from serving as a predicate for a tort action, the court held that a public nuisance had been created and accordingly awarded damages to the plaintiff-tenant.

IV. Effect of Exculpatory Clauses on the Rights of Third Parties

The effect of exculpatory clauses entered into between a landlord with his tenant upon the rights of persons not parties to the agreement has been litigated in many jurisdictions. Cases have considered the rights

30. 36 Cal. Rptr. 150 (2d Dist. 1963).
31. *Id.* at 154.
32. Hanna v. Lederman, *supra* note 30.
33. 297 P.2d 398 (Okla. 1956).
34. Okla. Const. art. 23, § 8 (1951).
35. 150 Misc. 853, 270 N.Y.S. 663 (1934).
36. 372 Pa. 306, 94 A.2d 44 (1953).
37. 190 N.C. 24, 128 S.E. 485 (1925).

of licensees and invitees of the tenant, members of the contracting tenant's family, non-contracting tenants, persons injured off the demised premises, and assignees of both the lessor and the lessee.

Initially, it should be noted that a court's decision exonerating a lessor from liability not only with the contracting lessee but also with persons not parties to the contract presents a question of violation of due process under the fifth and fourteenth amendments of the Constitution.[38] This issue was presented to a Louisiana court[39] under a statute which validated agreements between landlord and tenant relieving the landlord from liability for defects in the premises to the tenants and licensees of the tenant. In holding the statute valid the court reasoned that in order for there to be a deprivation of due process, a "right" must be involved, and ". . . there is no vested or property right in a potential and not yet existent claim for damages."[40] Illinois is another jurisdiction which has spoken on the issue of whether rights created in exculpatory clauses are within the ambit of the due process clause. In *Booth v. Cebula*,[41] an Illinois court of appeals declared void the retroactive application of a statute invalidating agreements which contained exculpatory clauses. The rationale was that the clauses involved vested property rights and were therefore protected by the due process clause. Until a pronouncement is made by the United States Supreme Court, this conflict will remain unresolved.

There is a split of authority whether an exculpatory clause will bar a licensee's or invitee's action against a landlord. The question has been considered by the Illinois and Massachusetts courts. In *B. Shoninger Co. v. Mann*,[42] the Illinois court held that employees of the lessee could not be denied recovery because of an exculpatory clause agreed to by the lessee. The same result, however, did not obtain in Massachusetts. In *Telless v. Gardiner*,[43] a truck driver was injured when making a pick-up of the lessee's laundry. In denying recovery, the court reasoned that because of the exculpatory clause the lessee could have no claim and hence, neither could the driver. Although the rule of *Telless* has been re-affirmed by Massachusetts courts in subsequent decisions,[44] an important qualification of this rule should be noted. If the invitee is injured by the negligence of the lessor on premises under the lessor's control, the invitee will be per-

38. The fifth amendment due process clause as incorporated into the fourteenth amendment would be applicable, assuming a "property right" is involved, since enforcement would be sought in a state court.

39. Paul v. Nolen, 166 So. 509 (La. Ct. App. 1936).

40. *Id.* at 511.

41. 25 Ill. App. 2d 411, 166 N.E.2d 618 (1960).

42. 219 Ill. 242, 76 N.E. 354 (1905).

43. 266 Mass. 90, 164 N.E. 914 (1929).

44. Levins v. Theopold, 95 N.E.2d 554 (Mass. 1950); McCarthy v. Isenberg Bros., 72 N.E.2d 422 (Mass. 1947).

mitted to proceed against the lessor without regard to the lessee's rights against the lessor.[45]

In *Deen v. Holderfield*,[46] the wife of a contracting tenant was held bound by the terms of an exculpatory clause executed by her tenant-husband. The Alabama court in *Deen* distinguished the facts presented from those in an Illinois case[47] where the wife recovered from the lessor because she was injured on premises under the control of the landlord. Tacit recognition has also been given by an Ohio court[48] to the notion that members of a contracting tenant's family are bound by the terms of an exculpatory clause executed by the head of the family with the lessor.

Schetter v. United States[49] considered the effect of a parent's agreement not to hold the lessor liable for injuries to members of the household upon rights of action under wrongful death and survival statutes. Since a suit under a wrongful death statute is for the benefit of the parent alone, the release clause was effective to bar recovery. On the other hand, a survival statute creates a remedy inuring to the benefit of the decedent's estate, and not necessarily to the parents. Accordingly, the court was confronted with the issue whether the exculpatory clause executed by the parent was binding upon their children. In construing the clause, the court reasoned that "the tenants have agreed to release the landlord from liability *to themselves* for their own losses arising from injuries sustained by members of their household, but . . . they have not agreed to release the claims of any one other than themselves."[50]

In *Sun Copper & Wire Co. v. White Lamps*,[51] the effect of an exculpatory clause entered into by one tenant upon the rights of a non-contracting tenant as against the lessor was considered by a New Jersey appellate court. The rule announced was to be expected: an exculpatory clause between a lessor and one lessee would not affect the rights of a second lessee.

No case has expressly considered the effect of exculpatory clauses upon the rights of persons sustaining injuries off the demised premises. *Cussen v. Weeks*[52] and *Shoninger Co. v. Mann*[53] refused to construe exculpatory clauses as a bar to an invitee's action against a lessor.[54]

45. Cussen v. Weeks, 232 Mass. 563, 122 N.E. 757 (1919).
46. 155 So.2d 314 (Ala. 1963).
47. Valentin v. Swanson, 25 Ill. App. 2d 285, 167 N.E.2d 14 (1960).
48. Zurich Gen. Acc. & Liab. Ins. Co. v. Mutual Mort. & Inv. Co., 113 N.E.2d 134 (Ohio Ct. App. 1953).
49. 136 F. Supp. 931 (W.D. Penn. 1956).
50. *Id.* at 935.
51. 12 N.J.Super. 87, 79 A.2d 93 (1951).
52. *Supra* note 45.
53. *Supra* note 42.
54. See text accompanying notes 1 through 5.

Neither court was willing to hold that exemption of a landlord by a tenant diminished the lessor's duties to third parties lawfully on the premises. It follows, of course, that an exculpatory clause will not diminish a lessor's duties to third parties who are not on the demised premises.

All courts agree that upon an assignment of the leasehold estate the provisions of an exculpatory clause inure to the benefit of the lessor's assignee.[55] It is of no importance that the assignment of the lease is made without notice to the lessees.[56] Whether a sub-lessee will be held bound by the provisions of a clause executed by his lessor with the landlord, has been held to depend upon whether the sub-lessee took possession of the premises with knowledge of the existence of the clause. In *Rodier v. Kline's, Inc.*,[57] knowledge of the exculpatory clause bound the sub-lessee by its provisions.

Although most courts will not give effect to provisions exonerating the lessor from liability for his negligence to third persons, the presence of such a provision will not affect the validity of other provisions valid in themselves.[58]

V. LEGISLATIVE DISFAVOR

Six jurisdictions, to date, have legislated on the use of exculpatory clauses in landlord-tenant relationships: Illinois,[59] Massachusetts,[60] New Jersey,[61] New York,[62] and Pennsylvania.[63] The statutes of Illinois and New York both declare that any attempts to exonerate a lessor from liability arising from his negligence are void as against public policy. The legislatures of the four other states have been more liberal in their attempts to control the use of exculpatory clauses for the statutes in these states prohibit their use only in leases of tenements or multiple dwellings.[64]

55. Plastone Plastic Co. v. Whitman-Webb Realty Co., 176 So.2d 27 (Ala. 1965); Wade v. Six Park View Corp., 27 N.J.Super. 469, 99 A.2d 589 (1953).

56. Hyman v. 230 So. Franklin Corp., 7 Ill. App. 2d 15, 128 N.E.2d 629 (1955).

57. 226 Mo. App. 474, 46 S.W.2d 230 (1932). Reference was previously made in the text to a Louisiana statute recognizing the binding effect of a landlord's agreement with his tenant upon licensees of the tenant. Decisions under that statute are not in harmony. *Compare* Grundmann v. Trocchiano, 125 So. 171 (La. Ct. App. 1929) wherein a sublessee was held bound by the exculpatory clause entered into by his lessor with the landlord, *with* Gardiner v. De Salles, 126 So. 739 (La. Ct. App. 1930) wherein the landlord was held liable to one who had rented a room from the lessee notwithstanding the fact that the landlord executed an exculpatory clause with the lessee. See also, Harlow v. Kulik, 169 Ill. App. 624 (1912); Henry H. Tuttle Co. v. Phipps, 219 Mass. 474, 107 N.E. 354 (1914).

58. Sinclair Refg. Co. v. Reid, 60 Ga. 119, 3 S.E.2d 121 (Ga. Ct. App. 1939).

59. ILL. REV. STAT. ch. 80, § 15(a) (1959). See note 22 *supra* for a comparison of the Illinois statute with that of New York.

60. MASS. ANN. LAWS ch. 144, §§ 80-82 (1942).

61. N.J. STAT. ANN. tit. 55, § 7-1 (1940).

62. N.Y. REAL PROPERTY LAW § 234.

63. PA. STAT. ANN. tit. 53, § 25025 (1948).

64. Typical of these statutes is that of New Jersey which provides:

Every tenement house and all parts thereof shall be placed and maintained in good

Both Illinois and New York were faced with the problem whether statutes declaring exculpatory clauses void can be given retroactive application. In *Booth v. Cebula*,[65] the Illinois court held that exculpatory clauses are vested property rights protected by the due process clause, and accordingly, statutes declaring their invalidity can only be given a prospective application. The same result was achieved by the New York court in *Weiler v. Dry Dock Sav. Institute*.[66]

VI. General Requisites and Specific Problems

Since an exculpatory clause constitutes a binding contract between the lessor and lessee, general contract principles control the formalities of execution. Thus, the contract elements of offer, acceptance, and consideration must be present.

If the provision excluding liability is contained in the lease contract, the consideration giving enforceability to the lease will suffice to give enforceability to the exculpatory clause. However, where the agreement to exonerate the landlord from liability is contained in an instrument collateral to the contract of lease, the exculpatory clause must stand on its own consideration.

Not yet considered by any court is whether Statute of Frauds requirements are applicable to these clauses. The problem can arise in any one of several instances. Consider the following:

> 1) A (lessor) and B (lessee) contemporaneous with a written contract of lease orally agree that B will hold A harmless, or
> 2) A (lessor) and B (lessee) after the written lease has been delivered agree that A will be liable for injuries arising out of defects in the premises.

In the first situation, it can be argued that since the "hold harmless" agreement was an integral part of the lease, it is part and parcel of a contract for the sale of realty. In the second situation, the Statute of Frauds prohibition against enforceability of oral agreements where one party undertakes to answer for the debt, default or miscarriage of another, would seem relevant.

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repair and the roofs shall be kept so as not to leak; and all rain water shall be so drained and conveyed therefrom as to prevent its dripping to the ground or causing dampness in the walls, ceilings, yards or areas.

N.J. Stat. Ann. tit. 55, § 7-1 (1940).

65. *Supra* note 41.

66. 258 App. Div. 581, 17 N.Y.S.2d 192 (1940). "Application retroactively of § 234 would operate to deprive the defendant of a contract right in violation of the due process clause of the Constitution." *Accord*, Keg-O Prod., Inc. v. J. Swedlin, Inc., 258 App. Div. 916, 917, 16 N.Y.S.2d 375, 376 (1939). See also Canrock Realty Corp. v. Vinn Elec. Co., 258 App. Div. 968, 16 N.Y.S.2d 867 (1940); Bernard Katz, Inc. v. East Thirtieth St. Corp., 172 Misc. 873, 16 N.Y.S.2d 640 (1939).

VII. CONCLUSION

Exculpatory clauses can achieve their purpose, provided that great care is exercised in drafting. The draftsman should first ascertain exactly what coverage is to be included within the non-liability provisions of the agreement. Each and every circumstance which is desired to afford the lessor exemption from liability should be fully spelled out. If negligence of the lessor is to be included within the terms of the agreement, care should be exercised to avoid expressions such as "however may occur" or "from any cause whatever." If liability from defects in the demised premises is to be exempted, ascertain whether the intent of the parties is to include defects arising after the leasehold estate takes effect, or before, or both. Focus attention on the problem of ascertaining what area of the premises is to be included within the protection of agreement. The terminology, of course, must be clear and specific.[67]

It should be determined whether the contracting parties desire the exculpatory clause to be binding upon members of the lessee's household or his employees. As previously noted,[68] most jurisdictions are unwilling to hold persons not parties to the contract bound by the terms thereof. To be assured that such coverage is afforded the lessor the attorney should make certain that all who are desired to be bound become parties to the contract by so stipulating in the exculpatory agreement and having them sign the instrument itself.

Unnecessary litigation on points involving the Statute of Frauds and the parole evidence rule can be easily avoided by embodying the terms of the agreement in a complete, self-sufficient written document.

Although it is not within the scope of this paper, an alternative solution to affording the lessor protection should be considered. An agreement between the lessor and lessee whereby the lessee is obliged to carry insurance protection will achieve the same financial result for the lessor.

67. Feigenbaum v. Brink, 401 P.2d 642 (Wash. 1965); Hollander v. Wilson Estate Co., 7 P.2d 177 (Cal. 1932).

68. See text accompanying notes 38-53, *supra*.