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## Exculpatory Fairy Tales

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## Exculpatory Fairy Tales

Roger Bernhardt

The decision in *Burnett v Chimney Sweep, LLC* (2004) 123 CA4th 1057, 20 CR3d 562, reported at p , presents an uncomfortable dilemma to any attorney who wants to save clients from a fate similar to that which beset the landlord in this case. Given that the exculpatory clause in *Burnett* failed to do its job, should practitioners address the problem by drafting better wording, or by advising their clients that such a clause will never afford them real protection?

The exculpatory clause in *Burnett*, as quoted by the court, said:

Lessor shall not be liable for injury or damage to the person or goods, wares, merchandise, or other property of Lessee, . . . whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or from any other cause, whether said injury or damage results from conditions arising upon the Premises or upon other portions of the Building of which the Premises are a part, from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is accessible or not. . . . Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

Despite its extensive language, the provision did not support a judgment on the pleadings against tenants who sued for personal injuries and property damage to their business inventory (and also, apparently, for having to quit the premises) as a result of toxic mold they discovered inside the store.

### Drafting Broader Language

The strategy to improve the clause for landlords is not difficult to devise. The court's opinion noted that the provision shielding the landlord from liability for property damage or personal injury did not specifically mention negligence. Because it is settled in California that if an exculpatory clause does not include that word it protects a landlord only from liability for passive negligence and not for active negligence, as was involved here, the clause obviously failed to do its job.

Although the second part of the provision—beginning with “Notwithstanding Lessor's negligence”—clearly did contain the magic word, the rest of the language protected the landlord only against liability for lost income and profits, not against liability for the personal injuries and property damage that was alleged.

Because this combination of drafting errors meant that the landlord could be held liable for personal and property damage that resulted from its active negligence, better drafting could easily eliminate that gap. It requires little more than combining the two provisions into one, and not restricting the reference to negligence to only one type of liability.

(I confess that I don't see why the clause distinguished between personal and property damage on the one hand and income and business losses on the other. Nor can I figure out why "negligence" would be mentioned in the income/business loss second sentence but not in the personal/property damage first sentence. I suspect that years ago a careless lawyer copied the two sentences from two different forms and combined them without ever thinking about their asymmetry, and, ever since, other careless lawyers just inserted both sentences blindly into their own clients' leases.)

Indeed, given what the court said about the language in this lease, I can imagine a future landlord contending that its attorney was professionally negligent in continuing to use it as is.

### **Advising the Client Not To Believe in the Protection of the Lease**

On the other hand, how much confidence should an attorney put into the effectiveness of an improved clause? I have serious doubts that a landlord could win a case like this no matter what its lease said. I do not believe our courts will permit a small shopkeeper's business (here, a gift shop of 470 square feet inside a hotel) to be ruined by toxic mold coming from elsewhere in the building merely because of clever drafting in a printed form lease (the "Standard Industrial/Commercial Multi-Tenant Lease-Gross" involved here).

A decade ago, in a pair of companion cases, our supreme court held, in one case, that the tenant was bound to pay the costs of asbestos removal, and, in the other, that the tenant did not have to pay for seismic retrofitting of an unreinforced masonry building, even though both tenants had the same "covenant to comply" clauses in their leases. See *Brown v Green* (1994) 8 C4th 812, 35 CR3d 598, and *Hadian v Schwartz* (1994) 8 C4th 836, 35 CR3d 589. In *Brown*, Justice Arabian found that an earlier case's statement of the previous rule—which had focused on the language of the lease—was "apt to be misinterpreted as one which, in the search for the parties' intent, exalts a text-bound logic over a close consideration not only of the terms of the lease but of the circumstances surrounding its making."

Rather than follow a "text-bound logic" (*i.e.*, look at what the lease said), the court said that it would consider "a handful of judicially developed circumstantial factors as a means of confirming that the allocation of risk suggested by the text of the lease accurately reflect[ed] the probable intent of the parties and [led] to a reasonable construction of the lease terms" (*i.e.*, feel free to ignore what it said). 8 C4th at 845. In these two cases, the differing nature of the tenancies trumped the similar provisions in the lease documents and thus produced different results.

The situation in *Burnett* is a sort of mirror image of the repair issues covered by the supreme court. The question of who must cover the front-end costs of making repairs necessary for remediation is the converse of who must pay for the consequential costs of injuries that result when the repairs are not made. In *Burnett*, it is likely that the hotel's lease form also required the tenants to comply with all laws, and this case could have come up a year earlier in the posture of litigation over who had to pay for the mold remediation. If, under *Hadian v Schwartz*, it is clear that these one-year, \$400-per-month tenants would not have been obliged to perform the necessary repairs in their 470-square-foot store, no matter what the "covenant to comply" clause said, then it is probable that they would not have had to suffer the consequences of nonremediation—again, regardless of what the exculpatory clause said.

(In *Brown v Green*, the supreme court also said that it rejected a "bright line" rule, under which the obligation to remove environmentally hazardous materials always falls on the lessor of

commercial property unless the responsibility for their removal is explicitly allocated to the lessee by the text of the lease agreement. . . . Whether the parties actually intended the allocation of responsibilities suggested by the use of unqualified language in a lease is an inquiry better approached through the application of a handful of relevant factors than by a “four corners” analysis of the text that focuses exclusively on the interlocking provisions of the agreement itself and their legal consequences. Such an inquiry seems all the more appropriate in cases . . . involving the use of a so-called “form” lease, where the logic of preprinted terms may favor the interests of one party over that of the other and, even when interlineated by the parties, produce an unreasonable result.

In *Burnett*, I believe that it was the “unreasonableness” of requiring these small-store merchants to go inside their walls (which were probably not even included in the space rented to them) to remove the mold that led the court of appeal to conclude that the exculpatory clause did not protect their landlord.)

One reason I think the *Burnett* decision is more likely attributable to the desire to avoid an unreasonable outcome than to faulty drafting in the exculpation language is the court’s further reasoning on its version of the issue. Having held that the clause only exculpated against passive negligence (because the clause was not specific enough to do more), the court then held that affirmative negligence had been alleged here. What was the affirmative negligence? “Based on the allegations in [tenants’] complaint, Chimney Sweep was actively negligent in refusing to remediate the problems caused by the excessive moisture and mold infestation on the premises.” 123 CA4th at 1067. That definition seems to me to convert every condition—even those passively generated—into affirmative negligence whenever the tenants demand a repair and the landlord says “no.” I do not believe the court’s explanation is to be taken seriously. I am not a toxic tort lawyer, but I very much doubt that the migration of mold spores into a store space constitutes active negligence by anybody but the original responsible party.

### **Acting on Both Fronts**

I am tempted to conclude that, for those cases where exculpatory clauses probably won’t accomplish their desired purpose, counsel for landlords should operate on a two-front basis: On the one hand, improve their clauses to shift as much responsibility over to the tenants as possible; on the other hand, they should advise their clients to take their own measures to maintain the structural and other common elements of their buildings in good condition (and purchase whatever insurance they can find). However, that strategy may carry its own dangers, since I suppose a clause can be made so exculpatory as to be held void as against public policy. Therefore, I will content myself with not trying to draft one myself, lest I be accused of spreading public immorality by doing so.