Insulation from liability? Maybe

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Can you use an exculpatory agreement to insulate yourself from liability? That was the question addressed in Copeland vs HealthSound/Methodist Rehabilitation Hospital, LP, number W2016-02499-SC-R11-CV (Tennessee Supreme Court, December 20, 2018). In Copeland, a medical transport company was engaged to transport an elderly patient to his doctor's appointment. When the driver arrived to pick up the patient, he presented him with a form to sign insulating the company from any liability arising out of using their services. After the appointment, while getting into the van for the return home, the patient fell and suffered significant injuries. The patient now became the plaintiff and sued the transportation company. They attempted to use the exculpatory agreement as a defense. The trial court ruled for the transport company, finding that the contract was not one of adhesion (the patient had no choice but to sign it). The Court of Appeals also ruled the agreement to be enforceable, finding that the transportation services provided were not medical in nature, which would make exculpatory agreements unenforceable but were rather nonprofessional services that did not involve a public interest consideration. The Tennessee Supreme Court then reviewed the case.

Before this case, the law in Tennessee held that exculpatory agreements—contracts absolving the negligence of one party to the other—could not apply to a "...professional person operating in an area of public interest and pursuing a profession licensed by the state." Courts at that time had noted that "...because certain relationships require of one party [a duty to exercise] greater responsibility than that required of the ordinary person, an exculpatory agreement between such parties is peculiarly obnoxious."

In determining under what circumstances a transaction affects the public interest, Tennessee looked to California's decision in Tunkl vs Regents of the University of California, 383 P.2d 441 (California, 1963) and adopted the following considerations:

(a) It concerns a business of a type generally thought suitable for public regulation.
(b) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
(c) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
(d) As a result of the essential nature of the services, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
(e) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence.
(f) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

The court went through a lengthy analysis of numerous cases in attempting to distinguish under what precise circumstances exculpatory contracts would and would not be allowed using the factors previously stated. The court did, however, note some common principles associated with these considerations. The first was that "...a party may not, for public policy reasons, exempt itself from liability for gross negligence, reckless conduct, or intentional wrongdoing." The second was that these provisions are unenforceable "...in contracts involving common carriers . . .inns and airports . . .on the grounds of public policy and disparity of bargaining power," mainly because the public is compelled to use their services. Next, the court noted that while many states allow for such provisions, they are generally disfavored under the law. Fourth, "[a]n exculpatory clause must *clearly, unequivocally, specifically, and unmistakably* state the intention to exempt one of the parties from

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liability for its own negligence." Fifth, these clauses will not be enforced or upheld if they are against public policy. Whether something is determined to be against public policy is determined by:

> . . .all of the facts and circumstances surrounding the making of the agreement; society's expectations; the identity and nature of the parties involved, including their relative education, experience, sophistication, and economic status; and the nature of the transaction itself, including the subject matter, the existence or absence of competition, the relative bargaining strength and negotiating ability of the economically weaker party, and the terms of the agreement itself, including whether it was arrived at through arm's length negotiation or on terms dictated by the stronger party and on an adhesive, take-it-or-leave-it basis.

After a lengthy analysis of decades of law pertaining to this issue, the Supreme Court decided that the lower courts should evaluate exculpatory clauses using a balancing test of 3 factors. The factors do not need to be weighed equally, but rather each should be given due consideration based on a totality of the circumstances. These factors were the relative bargaining power of the individual parties, the clarity of the language insofar as the signing party being aware of precisely the rights being waived, and whether there are any public policy or public interest implications. The court also noted that there would be no exemption relating to professional services, therefore the test could be applied in situations involving health-care providers. The court then examined each factor in detail.

Regarding relative bargaining power, the court looked at 2 factors. The first was the importance of the service to the physical or economic well-being of the person being asked to sign the exculpatory agreement. The second was how much of a free choice exists for the signing party to seek alternative services. As to the clarity of the language in the agreement, the court noted that for someone to be relieved of or exempted from liability, the language providing that exemption must be "so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away." The signing party must also be made aware of the fact that they are giving up their legal right of redress. In addition, the language cannot be so overly broad such that it encompasses "any and all liability" relating to participating in the event in question.

Addressing the public policy and public interest considerations, the court noted that public policy, insofar as this issue is concerned, is defined as "that principle of law under which freedom of contract or private dealings is restricted by law for the good of the community." In addition, public policy is offended if the contract "conflicts with the constitution, statutes, or judicial decisions of this state or tends to be harmful to the public good, public interest, or public welfare." Finally, the court paid homage to the fact that "public policy is also determined by societal expectations that are flexible and change over time." An example would be any service that has an intended purpose of providing an essential public service obligation such as a utility company, a common carrier, a hospital, or a hostelry.

Applying the test to the facts of the case, the court noted that the hospital arranged for the plaintiff's transportation. He required medically-needed, follow-up care that was scheduled for that day. The plaintiff was presented with the contract when he was picked up with no chance to review it or make timely alternative arrangements. In short, it was a take-it-or-leave-it proposition, legally known as a contract of adhesion, and thus, the unequal bargaining position.

Regarding the clarity of language consideration, the court quoted the following 2 offending paragraphs in the agreement.

> Client does hereby release and forever discharge MedicOne . . . from any and all claims, suits, rights, interests, demands, actions, causes of action, liabilities, accident, injury (including death), costs, fees, expenses, and any and all other damages or losses of any kind whatsoever, whether to person or property . . . arising out of, incidental to, associated with, or in any way related to any transportation services provided to Client by MedicOne.

> CLIENT WILL INDEMNIFY, DEFEND AND HOLD HARMLESS MEDICONE RELATED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS ASSERTED BY CLIENT, ANY PERSON OR ENTITY RELATED TO CLIENT OR ASSERTING A CLAIM BY OR THROUGH CLIENT, OR ANY OTHER THIRD PARTIES OR ENTITIES WHICH, IN ANY WAY, ARISE OUT OF, ARE INCIDENTAL TO, ASSOCIATED WITH, OR IN ANY WAY RELATED TO ANY TRANSPORTATION SERVICES PROVIDED TO CLIENT BY MEDICONE. [Caps in original.]

The court decided that such language was so vague, overbroad, and ambiguous that the plaintiff did not know, nor could he decipher, precisely what rights he was giving up.

Finally, the court took on the public policy or public interest consideration. It noted that the ability to secure appropriate and timely-delivered health care is exactly

the type of service that is encompassed under the phrase "contemporary societal expectations." However, the court, without stating it, noted the temporal component to the fact pattern by noting the impracticality of being able to secure alternative transportation and yet keep his appointment at the hospital at his appointed time. The court vacated and reversed the lower court holdings in favor of the plaintiff and remanded the case for a new trial.

COMMENTARY

Over the years, many health-care practitioners have attempted to limit their exposure to liability through the use of various exculpatory strategies. Some involve requiring patients to commit to arbitration regarding doctor-patient disputes. Some involve attempting to use a variety of exculpatory agreements. Most of the time, these agreements are not upheld. Courts don't like them. Think about it. You are a doctor who is attempting to absolve yourself because you committed professional negligence. Honestly, do you think that's fair?

On the other hand, we often have no control over such things as adverse or latent dentofacial growth and development, poor cooperation by the patient regarding any number of breaches regarding their responsibilities under the doctor-patient contract, plain old poor response, and so on; none of these involve any degree of negligence on your part. Given that reality, why shouldn't you be able to use an exculpatory agreement, except for any conduct on your part, which is deemed wanton, willful, or grossly negligent? You might be able to, but you have to frame it properly. Let's look at this the way the court did.

The court started with whether there is an unequal bargaining power between you and the patient. I'm going to lump that and the public policy considerations together because for orthodontics; I think it makes more sense. To find an exculpatory clause legal, we would first have to grant that no one needs your services. Orthodontics is essentially elective. Sure, there are a few instances, such as patients with craniofacial anomalies who need orthodontics, but for the most part, humans can live very well with crooked teeth. When you come right down to it, we can live pretty well without any teeth. We are not animals in the wild who need our fangs for self-preservation. Straight teeth are nice. In my humble opinion, an orthodontically-massaged dentition can often enhance one's social presence and self-esteem, and may, in select cases, provide a minimal dental health benefit. But, is orthodontics necessary from a contemporary societal expectation perspective? Whereas undergoing orthodontics has been called "a rite of passage," correcting a malocclusion is not a medically necessary treatment such that it rises to the level of creating an unequal bargaining position between the doctor and patient. To hold otherwise, could place one on a very slippery slope, which professionally would relegate even the slightest imperfection of necessitating treatment. Once that cat got out of the bag, the cost of providing orthodontics to everyone with a diastema would necessitate using screenings and indexes. No, we don't want to go there.

Our services are also never an emergency. Nobody, except possibly babies born with a cleft of some type, need "immediate" orthodontic care. Appointments are scheduled in advance and save for a very few specific types of appointments, it is not critical to be seen on a precise day at precise time.

To make the exculpatory clause more palatable, pardon the pun, you could also provide a quid pro quo for having a patient sign the agreement by offering a reduction in your fee for agreeing to do so, legally referred to as contractual consideration.

Finally, there is the geographic concern. It's one thing if you are one of a respectable number of practitioners in town who are accessible to the population of the area seeking your orthodontic services. In other words, the public has choices regarding who to go to for orthodontic intervention. But, suppose you are the only orthodontist within a 2-hour driving radius. This is now a horse of a different color. Lack of access creates an environment for unequal bargaining positions to prosper. Fortunately, for most of us, this is not the case . . . unless it is.

The last consideration concerns the clarity of the language. I believe that this can be overcome. Just be specific and tell it like it is. You will be providing orthodontic treatment. During the provision of this treatment, simple acts of negligence can and do occur. It is these acts and omissions from which you seek absolution. Spell them out. You already do it to some degree in your informed consent forms. You only need to add a few more rare untoward occurrences and massage the language. Be specific about all of the negative sequellae that can happen. Discuss how to frame this with your colleagues and study club members, come up with the verbiage and voila, you have an exculpatory clause. Any good health-care attorney can help you do this. Just make sure it's not an "anything and everything" collection of exclusions.

Having given you all of this insight and information, I would like all of you to send me an e-mail absolving me from any liability you incur for having taken to heart anything I have written here today or for that matter anything I have ever written. See how it feels?