THE GREAT ESCAPE
How to Draft Exculpatory Clauses That Limit or Extinguish Liability
by Steven B. Lesser

Exculpatory clauses extinguish or limit liability of a potentially culpable party through the use of disclaimer, assumption of risk and indemnification clauses as well as releases of liability. For decades, Florida courts have wrestled with issues relating to the enforcement of exculpatory clauses where liability arises from personal injury, real estate, construction, and commercial disputes.

These provisions gain significance as parties seek to shift the monetary risk of business transactions to others. Frequently these clauses are showcased in contractual agreements involving common carriers, promoters of sporting events, providers of design/construction services, and among participants to e-commerce transactions. As lawyers, we constantly draft and interpret exculpatory clauses hoping that the product of our efforts will withstand judicial scrutiny. Recognizing that the economic stakes often are high, counsel must be aware of the pitfalls associated with the drafting and interpretation of such clauses. These issues should be of enormous interest to lawyers because when the deal goes sour, disgruntled clients may seek to recoup their losses by challenging the lawyer’s advice through claims for legal malpractice.

This article examines how Florida courts interpret exculpatory language as utilized in releases, waivers of liability, assumption of risk and indemnification agreements as well as other types of contracts. As similar legal principles apply to drafting these various types of clauses, they will collectively be discussed and referred to throughout this article as “exculpatory clauses.” In addition, this article will offer practical suggestions to assist counsel in drafting enforceable exculpatory clauses.

Legislation and Public Policy Considerations
Limit Enforcement of Exculpatory Clauses

Exculpatory clauses will be enforced as long as the language is clear and unequivocal. These same concepts apply to indemnification agreements, which shift liability for damages to another party, and to releases of liability. On the other hand, exculpatory clauses that extinguish liability for intentional torts or reckless harm will generally be declared null and void.

Florida statutes prohibit the use of exculpatory clauses in certain transactions such as residential lease agreements that disclaim or limit a landlord’s liability to a tenant for breach of the implied warranty of habitability; condominium documents that disclaim liability for breach of the statutory implied warranties of fitness and merchantability to a purchaser of a new condominium; agreements that waive the right to assert a construction lien law claim in advance of improving real property; indemnification provisions in construction contracts that encompass claims or damages resulting from gross negligence, willful, wanton, or intentional misconduct, or for statutory violations. Likewise, a clause in a fee agreement that exculpates or limits the liability of an attorney for his own negligence to avoid a claim for legal malpractice is prohibited.

Florida law prohibits common carriers such as an airline or railroad from extinguishing liability for its own negligence when acting as a common carrier, as opposed to when it engages in private enterprise. In interpreting
effort to escape liability for breach of the implied warranty of habitability, the developer asserted that the buyer executed a contractual disclaimer of “all warranties, written or oral.” However, the disclaimer clause failed to specifically mention implied warranties and, consequently, the court declined to rule that these warranties were disclaimed. Other courts have been reluctant to enforce disclaimers of implied warranties. Sellers of residential real estate face greater challenges when attempting to disclaim any duty to disclose the existence of facts that may materially affect the value of the property. The Florida Supreme Court has held that the “as is” sale of residential real estate does not relieve the seller from the duty to disclose latent defects to a buyer.

General Rules for Drafting Exculpatory Clauses

At the heart of every analysis over enforcement of an exculpatory clause lies the issue of conspicuousness of the language employed. In one case, a condominium conversion developer successfully disclaimed all express and implied warranties because the disclaimer was bold and conspicuous. In the sale of goods, under the Florida version of the Uniform Commercial Code, a disclaimer of a warranty must be in writing and conspicuous. On this score, conspicuous means a larger type size, a different type style, e.g., bold or all capitals, or a different color. While this statute is not controlling beyond the sale of goods, the underlying rationale suggests that similar considerations would apply to exculpatory language utilized in other transactions such as those involving real estate.

Intent of the Parties Is of Paramount Importance

Intent of the parties is of paramount importance when determining the enforcement of disclaimers, waivers, releases of liability, and indemnification clauses. Exculpatory clauses although disfavored will be enforced if the intent to relieve a party of its own negligence is clear and unequivocal. In describing exculpatory language that will be enforced, one court stated, “The wording of such an agreement must be so clear and understandable that an ordinary and knowledgeable party to it will know what he is contracting away.”

Drafters of exculpatory clauses must be sufficiently specific to release liability for certain conduct yet be broad enough to encompass other related acts and conduct that may result in liability. The same challenge applies to drafting assumption of the risk clauses. A plethora of cases discussing these various issues arise in the context of summary judgment. For example, in one unreported trial court decision, a participant to a boxing match executed a “Release, Assumption of Risk and Indemnification Agreement” in favor of the owners and operators of the facility hosting the event. The agreement waived and released the owner from all “risks inherent in boxing.” During the boxing match the plaintiff sustained injuries and thereafter initiated a lawsuit against the owner for negligence arising from the owner’s failure to provide emergency post-injury medical treatment. The owner’s motion for summary judgment was denied based upon the fact that the agreement failed to specifically release and hold harmless the owner for his own negligence. Additionally, the agreement was devoid of any language applicable to events that arose following the fight. In that instance the agreement was strictly confined to “risks inherent in boxing” and nothing more.

Similarly, in O’Connell v. Walt Disney World Company, 413 So. 2d 444 (Fla. 5th DCA 1982), a nine-year-old child sustained injuries while horseback riding at Walt Disney World. Prior to participating in this activity, the child’s parents executed a document that released and held harmless Walt Disney World from liability. In addition, the form executed by the parents consented to the minor’s “assumption of the risks inherent in horse-
When confronted with enforcing exclamatory clauses, courts consider whether a releasing party appreciated and knowingly waived the risk. This factor found the spotlight in Parkham v. East Bay Raceway, 442 So. 2d 399 (Fla. 2d DCA 1983). In Parkham, a patron paid $1 for insurance in order to view a car race from a restricted pit area in close proximity to the racetrack. In conjunction with payment of the insurance fee, the patron was asked to sign a “form for insurance.” In fact, the document consisted of a standard form release that contained multiple signatures of other patrons. When the form was presented to the patron for signature, only the signatures of other patrons were displayed. The form was folded over concealing the upper half of the document where the printed exclamatory language appeared. As a result, the critical language was not visible when the patron executed the document. The language released the raceway from “all liability in the event of an injury to a signatory in any restricted area.” Thereafter, the patron was struck by a racecar and initiated a lawsuit against the raceway. In response, the raceway defended based upon the existence of the patron’s signature on the release.

The court denied summary judgment because it was unclear whether the patron was deceived or misled by the raceway employee when instructed to sign a form where the release language was hidden from view. The holding in Parkham emphasizes that the party benefiting from the release must demonstrate that the injured party knowingly waived and released a known risk. This decision highlights the importance of having separate release forms executed by each individual that is waiving and releasing another from liability. Toward that end, the form containing the exclamatory language should be dated and witnessed.

Language That Works
The Fifth District Court of Appeal in Hardage v. Enterprises, Inc. v. Fidesys Corp. N.V., 570 So. 2d 436, 437 (Fla. 5th DCA 1990), held that “There are no words of art required in a release if the intent of the parties is apparent from the language used.” Hardage stands for the proposition that the specific use of the word “negligence” is not required. However, from a practical standpoint, utilization of the word “negligence” should increase the likelihood of enforcement. Most frequently, the enforcement of exclamatory clauses frequently occurs in connection with personal injury lawsuits arising from a participant’s involvement in high risk sporting activities such as car racing, bicycle racing, horseback riding, and boxing. In most instances, courts generally will bar a party from recovering damages when an executed waiver or release of liability acknowledges the risk sought to be limited or extinguished.

In Theis v. J & J Racing Promotions, 571 So. 2d 92 (Fla. 2d DCA 1990), the court granted summary judgment and barred the recovery of damages sustained by a participating driver to a sprint car race known as the “Dash for Cash.” During the Dash for Cash a nonracing vehicle improperly entered the track and struck the driver, resulting in his death. Prior to the race, the deceased driver executed a release and waiver clause that “released the track from liability whether caused by the negligence of the releases or otherwise.” The court found the exclamatory language to be “clear, unambiguous, unequivocal, broad enough and specific enough to protect appellants (race promoters) from their own negligence, even if their actions constituted gross negligence.” In reaching its holding, the court focused specifically on the “own negligence . . . or otherwise” phrase in determining that the exclamatory language was broad enough to “encompass all forms of negligence, simple or gross.”

Courts have a tendency to enforce these clauses when the language reveals a clear intent of the parties to negotiate away a known risk. Illustrating this point is Banfield v.
In a construction setting, owners often seek to exculpate their own monetary liability for delays they may cause to contractors engaged in construction on their behalf. Construction contracts often contain “no damage for delay” clauses. Florida courts generally enforce these clauses subject to certain exceptions such as delays not reasonably contemplated by the parties and active interference by the owner. These clauses will be enforced as long as the contractor is provided with a remedy for delay such as an extension of time to complete the project. This factor evidences an intent that the existing risk was appreciated and negotiated between the parties.

**Miscellaneous Clauses**

Although not technically exculpatory clauses, various language is frequently included in agreements to discourage parties from asserting their rights. Consequently, the impact is the same, namely, a disclaimer of liability. For example, clauses that require a dispute arising from a construction contract to be litigated or arbitrated outside the state of Florida have been declared null and void. Similarly, the Florida Legislature has statutorily invalidated contract provisions that attempt to shorten the applicable statute of limitations. However, parties are permitted to agree to a waiver of jury trial or stipulate that the law of a foreign jurisdiction shall apply to the judicial resolution of a dispute.

A clause in an executory contract or unexpired lease that purports to give a right of termination for insolvency or bankruptcy is void and unenforceable.

**Checklist for Drafting Enforceable Exculpatory Clauses**

The following checklist for drafting exculpatory clauses has been compiled based upon the statutory and case law referenced in this article:

1. The exculpatory language of the clause should be bold and conspicuous through the use of larger type, boldfaced type or a special color, e.g., DO NOT BE RELUCTANT TO DRAW ATTENTION TO EXCULPATORY CLAUSE.

2. Specify in the document that you are seeking to obtain a releasing for your own negligence and specifically use the word “negligence.”

3. Broadly identify the extent of the risks involved, i.e., it is important to make clear whether the exculpatory language is for all risks that might arise. Otherwise the clause may be limited to known risks or risks that are inherent in the activity.

4. Specify whether the disclaimer, indemnity provision, or release is for past wrongful acts or future wrongful acts. Courts are more likely to find an exculpatory clause unenforceable as applied to future acts.

5. Specify whose wrongful conduct is being exculpated, i.e., the indemnitee, the indemnitor, the third party. Courts disfavor these clauses absent clear and unequivocal language expressing the intent of the parties.

6. When feasible, make sure that a person with authority to speak for...
the organization is available to explain the risks to the other party. This supports the proposition that the clause was the result of the bargaining process reflecting the intention of the parties.

7) Draft the document to provide an option to the person accepting the risk to elect to acquire more protection by paying additional fees. Often this risk can be insured especially with professional services.

8) Courts are more inclined to enforce monetary limitations on liability as opposed to extinguishing liability.

9) The document containing the exculpatory language should be properly executed and witnessed. The person executing the document should initial the exculpatory clause.

10) A separate release or waiver form should be executed by each individual party to avoid multiple signatures on the same document.

11) In the event a complete release is being furnished without any limitations or exclusions it should be labeled a “GENERAL RELEASE” or “UNCONDITIONAL AND FULL GENERAL RELEASE” as opposed to “RELEASE.” Releases should include the following elements: a) any and all claims, b) demands; c) damages; d) actions; e) causes of action; f) suits in equity of whatever kind or nature; g) use of the word “negligence” to clarify that the release in an exculpatory clause encompasses negligent conduct.

12) Indemnification agreements should include provisions to deal with an arrangement where one party has the duty to defend and hold harmless the other party in litigation. Under these circumstances, the agreement should include a “cooperation clause” requiring the indemnified party to supply documents and arrange for witnesses to be available for consultation as well as for testimony. Additionally, the indemnification agreement should specifically address the rights of the indemnified party to control the litigation arising from the indemnification obligation. These rights include the manner in which a
litigated claim will be settled. Additionally, should a third party initiating the litigation seek equitable relief such as an injunction, these allegations may impact other business interests of the indemnified party. Under those circumstances, the indemnified party may elect to represent itself in the proceedings. The indemnification agreement should establish a standard of care applicable to the lawyer assigned to defend an indemnified party. On this point, the agreement should obligate counsel to provide for interim litigation progress reports and notification of all hearings. Finally, the agreement should employ procedures for resolving conflicts of interest that may arise during the litigation. A sample provision dealing with these indemnification issues has been furnished for review.  

Conclusion

Exculpatory clauses that extinguish or limit liability enable your clients to limit risk and avoid liability. However, the failure to appreciate the legal requirements that trigger enforcement of these clauses can spell financial disaster. When the financial stakes are high these clauses will likely be attacked. Toward that end, valid clauses must be drafted in a clear and unequivocal manner. Furthermore, the clause must disclose the risk being relinquished by the party that has executed the clause. The drafter should be mindful of statutory prohibitions applicable to exculpatory clauses. Florida courts disfavor exculpatory clauses and will declare them invalid should they fail to satisfy applicable legal standards.

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1 University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1972); Thesis v. J & J Racing Promotions, 571 So.2d 92 (Fla. D.C.A. 1990), rev’d, 581 So. 2d 168 (Fla. 1991); Taut v. Hartford Accident and Indemnity Co., 390 So. 2d 155 (Fla. 3d D.C.A. 1980); Ivey Plants, Inc. v. F.M.C. Corp., 252 So. 2d 205 (Fla. 4th D.C.A. 1973), cert. denied, 269 So. 2d 731 (Fla. 1974). If there is ambiguity in the exculpatory language, the clause is likely to be unenforceable. In Orkin Exterminating Co. v Montagano, 359 So. 2d 512, 514 (Fla. 4th D.C.A. 1978), the court instructed as follows: “We must require draftsmen of all contracts which contain them [exculpatory clauses] to use clear and unequivocal language totally without a hint of deceptive come-on, or inconsistent, clauses.”

2 Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So. 2d 507 (Fla. 1979); Middleton v. Lomaskin, 282 So. 2d 675 (Fla. 3d D.C.A. 1975); Fuentes v. Owen, 310 So. 2d 458 (Fla. 3d D.C.A. 1975); Manokap Enterprises, Inc. v. Wells Fargo Alarm Services, Inc., 427 So. 2d 332 (Fla. 3d D.C.A. 1983).

3 Residential leases containing such exculpatory clauses would effectively render the warranty of habitability meaningless. Exculpatory provisions in residential leases have been declared illegal and unenforceable to the extent that they attempt to relieve the landlord of liability for personal injury. See, e.g., Dade County v. Martin, 513 So. 2d 542, 544 (Fla. 4th D.C.A. 1987); John’s Pass Seafood Co. v. Weber, 369 So. 2d 616, 617 (Fla. D.C.A. 1979). Prior to passage of this statute in 1973, an exculpatory clause in a lease would preclude recovery by a tenant against a landlord. Rubin v. Randwest Corp., 292 So. 2d 60 (Fla. 4th D.C.A. 1974), cert. denied, 305 So. 2d 786 (Fla. 1974); Middleton 266 So. 2d at 678.

4 Fla. Stat. §718.203 (2000) provides for certain implied warranties that flow from the developer to the purchaser of a condominium unit and from a contractor (or subcontractor or supplier) to a developer or purchaser. The question arises concerning whether these warranties may be disclaimed. Fla. Stat. §718.303(2) (2000), resolves the question by providing that “a provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner.” Since a waiver would adversely affect the benefits derived from the §718.203 warranty provisions, the language of §718.303(2) has the effect of making any attempted disclaimer or waiver unenforceable. Condominium documents and purchase agreements often contain provisions that disclaim all warranties except the statutory warranties described in Fla. Stat. §718.203 (2000). A sample disclaimer of warranty clause is as follows: “WARRANTY AND DISCLAIMER. Specimen copies of all manufacturer’s warranties which will be passed through to Buyer at closing and which are not expressly warranted by Seller have been made readily available for Buyer’s review in the Florida Jacksonville sales office and Buyer acknowledges disclosure of such warranties and the location thereof by Seller. Buyer, to the extent permitted by law, is purchasing the Unit and its interest in the recreational facilities and common elements “AS IS” and should undertake whatever inspections of the Unit, common elements and recreational facilities Buyer so desires in order to assure Buyer as to the quality and condition of the buildings and improvements.

EXCEPT FOR THE WARRANTIES CONTAINED IN THE DEED OF CONVEYANCE AND ANY WRITTEN WARRANTIES DELIVERED AT CLOSING, NO WARRANTIES, EXPRESSED OR IMPLIED, REPRESENTATIONS, UNDERSTANDINGS, GUARANTIES OR PROMISES HAVE BEEN MADE TO OR RELIED UPON BY BUYER IN MAKING THE DETERMINATION TO EXECUTE AND CLOSE PURSUANT TO THIS AGREEMENT AND, TO THE MAXIMUM EXTENT PERMITTED BY LAW, ALL WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND HABITABILITY, AND ALL WARRANTIES IMPLIED BY STATUTE (EXCEPT TO THE EXTENT THEY CANNOT BE DISCLAIMED) ARE DISCLAIMED.

“As to any implied warranties which cannot be disclaimer, either in whole or in part, incidental and consequential damages are disclaimed and Seller shall have no responsibility for any incidental or consequential damages, including, but not limited to, any claims for personal injury, property damage or emotional distress. No warranties or guarantees are given as to consumer products as defined in 15 U.S.C., §2301 et seq. (Magnuson-Moss Warranty Act). Seller has not given and Buyer has not relied on or bargained for any such warranties. This paragraph shall survive closing.”


6 Recently, the Florida Legislature revised Fla. Stat. §725.061(1)(2001) dealing with indemnification among parties to a construction contract. The revised statute, effective July 1, 2001, now permits one party to a construction contract to indemnify the other party for its own negligent conduct as long as a stipulated monetary limitation of liability exists. However, this statutory right of indemnification shall not apply to include claims or damages resulting from gross negligence, willful, wanton or intentional misconduct, or for statutory violations. It is also noteworthy that similar provisions declare illegal and unenforceable indemnification provisions that obligate one party to indemnify a public agency for its own negligence. Fla. Stat. §725.063(1) (2001).

7 Rule 1.8(h) Florida Rules of Professional Conduct. See The Florida Bar In Re Herman Cohen, 331 So. 2d 206 (Fla. 1976).

8 Russell v. Martin, 88 So. 2d 315, 317 (Fla. 1956).

9 Banfield v. Louis, 589 So. 2d 441, 446 (Fla. 4th D.C.A. 1991).

10 In evaluating exculpatory language, Florida has adopted a six-part “public interest” test to evaluate whether a public interest factor will invalidate an exculpatory clause when
“(1) it concerns a business of the type generally suitable for public regulations;  
“(2) the party seeking exculpation is engaged in performing a service of great public importance which is often a matter of practical necessity for some members of the public;  
“(3) the party holds himself out as willing to perform this service for any member of the public who seeks it;  
“(4) as a result of the essential nature of the service and the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength;  
“(5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and  
“(6) as a result of the transaction the person or property of the purchaser is placed in a position to bar a bicycle participant’s claim for personal injury against the tour operator because the participant signed a release. See Charles Prew Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co., 374 So. 2d 487 (Fla. 1979).”

By initializing this contract clause, the purchaser(s) acknowledge(s) that this clause has been read and fully understood, and that the purchaser(s) has had the chance to ask questions about its meaning and significance.  

“PURCHASER(S) ________ (initials)”  


“THERE ARE NO IMPLIED WARRANTIES OF ANY KIND APPLIED WARRANTIES OF ANY KIND WORKMANLIKE CONSTRUCTION.”


“...as a result of the transaction the person or property of the purchaser is placed in a position to bar a bicycle participant’s claim for personal injury against the tour operator because the participant signed a release.”

Banfield, 589 So. 2d at 446.


“...as a result of the transaction the person or property of the purchaser is placed in a position to bar a bicycle participant’s claim for personal injury against the tour operator because the participant signed a release.”

Hess, 422 So. 2d at 945.

“...as a result of the transaction the person or property of the purchaser is placed in a position to bar a bicycle participant’s claim for personal injury against the tour operator because the participant signed a release.”

Id.

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Hessel, 258 So. 2d at 11.

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Id.  

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Johnson v. Davis, 480 So. 2d 625 (Fla. 1986), in which the Florida Supreme Court announced as follows: “Accordingly, we hold that where the seller of a home knows of a defect and can reasonably affect the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.”

Johnson v. Davis, 480 So. 2d at 629. Although applicable to residential property the doctrine of “caveat emptor” remains applicable to the sale of commercial real estate. Haskell Co. v Lane Co. Ltd., 612 So. 2d 669 (Fla. 1st D.C.A. 1993).


Hess, 422 So. 2d at 945.

Bert Smith Oldsmobile, Inc. v. Franklin, 400 So. 2d at 1235 (Fla. 2d D.C.A. 1981).

See Hess v. Walmsley Construction Co Inc 422 So. 2d at 943 (Fla. 2d D.C.A. 1989).

Dade County School Bd. v. Radio Station WQBA, 731 So. 2d at 638 (Fla. 1999).

Banfield, 589 So. 2d at 444. Courts strictly construe exculpatory clauses against the party seeking to rely on them. Auto-Owners Insurance Co. v. Anderson, 756 So. 2d 29 (Fla. 2000).

However, the general rule of contract construction is that an ambiguous clause will be construed against the drafter. City of Homestead v. Johnson, 760 So. 2d at 80 (Fla. 2000); Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999). On this score, parties presented with written agreements containing exculpatory clauses prepared solely by the other party should exercise caution. Frequently, these agreements contain a provision that stipulates that the document is the joint product of the parties. Under those circumstances, the party adversely impacted by the clause may lose the ability to have it construed against the drafter.

Fuentes v. Owen, 310 So. 2d at 458–60 (Fla. 3d D.C.A. 1975).

Silva v. Cousins Club Corp et al., Case No. 98-001615 15th Judicial Circuit in and for Palm Beach County, Florida. Following denial of the defendant’s motion for summary judgment a jury trial was conducted in West Palm Beach, Florida. The jury returned a verdict in excess of $12,000,000 in favor of the plaintiff. Post-trial motions are pending before the court. Telephone interview with Gregg I. Shavitz, counsel for the plaintiff in Boca Raton, Florida (August 31, 2001).
Florida recognizes the validity of “no damage for delay” clauses: “If the Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or by any contractor employed by Owner, or by changes ordered in the scope of the Work, or by fire, adverse weather conditions, or by any other cause beyond the control of the Contractor, then the required completion date or duration set forth in the progress schedule shall be extended by the amount of time that the Contractor shall have been delayed thereby. However, to the fullest extent permitted by law, Owner and Marriott Corporation and their agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner or Marriott Corporation, or their agents or by any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time.” 26 F.3d at 1067.

In Luria, the exculpatory language addressed by the court was as follows: “It is agreed that Company is not an insurer and that the payments hereinafter named are based solely upon the value of services herein described and it is not the intention of the parties that Company assume responsibility for any loss occasioned by malfeasance or misfeasance in the performance of the services under this contract or for any loss or damage sustained through burglary, theft, fire or otherwise or any liability on the part of Company by virtue of this Agreement or because of the relation hereby established. If there shall, notwithstanding the above provisions, at any time be or arise any liability on the part of Company by virtue of this Agreement or because of the relation hereby established, whether due to the negligence of Company or otherwise, such liability is and shall be limited to a sum equal to the rental service charge hereunder for a period of service not to exceed six months, which sum shall be paid and received as liquidated damages. Such liability as herein set forth is fixed as liquidated damages and not as a penalty and this liability shall be complete and exclusive. That in the event Subscriber desires Company to assume greater liability for the performance of its services hereunder, a choice is hereby given of obtaining full or limited liability by paying an additional amount under a graduated scale of rates proportioned to the responsibility, and an additional rider shall be attached to this Agreement setting forth the additional liability of Company and additional charges. That the rider and additional obligation shall in no way be interpreted to hold the Company as an insurer.” (Emphasis added.) Luria, 384 So. 2d at 948.

Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 198 (3d Cir. 1995), Florida Power & Light Co. v. Mid-Valley, Inc., 736 F.2d at 1316 (11th Cir. 1985). In Valhal, the exculpatory clause limited the architect’s liability to the fee paid or $50,000 but provided an option to increase insurance liability by the owner paying a surcharge for the increased insurance premiums.

Pepper & Associates v. Hardrives Company, 528 So. 2d 72 ( Fla. 4th D.C.A. 1998). In Marriott Corp. v. Dasta Construction Co., 26 F.3d 1057 (11th Cir. 1994), reh’g denied, 37 F.3d 639 (11th Cir. 1994), the following “no damage for delay” clause: “If the Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or by any contractor employed by Owner, or by changes ordered in the scope of the Work, or by fire, adverse weather conditions, or by any other cause beyond the control of the Contractor, then the required completion date or duration set forth in the progress schedule shall be extended by the amount of time that the Contractor shall have been delayed thereby. However, to the fullest extent permitted by law, Owner and Marriott Corporation and their agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner or Marriott Corporation, or their agents or by any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time.” 26 F.3d at 1067.

Florida recognizes the validity of “no damage for delay” clauses, Triple R Paving, Inc. v. Brookview Construction Co., 774 So. 2d 50 (Fla. 4th D.C.A. 2001); Marriott Corp. v. Dasta, 26 F.3d 1057 (11th Cir. 1994), reh’g denied, 37 F.3d 639 (11th Cir. 1994); Newbury Square Development Corp. v. Southern Landmark Inc, 578 So. 2d 750 (Fla. 1st D.C.A. 1991); Harry Pepper & Associates v. Hardrives Company, 528 So. 2d 72 (Fla. 4th D.C.A. 1998). In Marriott Corp. v. Dasta Construction Co., 26 F.3d 1057 (11th Cir. 1994), reh’g denied, 37 F.3d 639 (11th Cir. 1994), the following “no damage for delay” clause: “If the Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or by any contractor employed by Owner, or by changes ordered in the scope of the Work, or by fire, adverse weather conditions, or by any other cause beyond the control of the Contractor, then the required completion date or duration set forth in the progress schedule shall be extended by the amount of time that the Contractor shall have been delayed thereby. However, to the fullest extent permitted by law, Owner and Marriott Corporation and their agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner or Marriott Corporation, or their agents or by any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time.” 26 F.3d at 1067.

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