

When a Contractual Limitation of Liability May Not Apply: Court Rules That Violation of a Health and Safety Code Statute Will Not Be Subject to Contractual Limitation of Liability

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As many are aware in California, California Courts have embraced contractual limits of liability and have recognized that a Limitation of Liability Clause can protect even a wrongdoer from liability. *See, Food Safety Net Services v. Eco Safe Systems, USA, Inc.* (2012) 209 Cal.App.4th 1118 and *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705. Consistent with that, very often in commercial lease agreements, the parties to the commercial lease will agree to limit liability arising from breaches of covenants in the lease. *See, Kelly Frittelli, Inc. v. 350 N. Cannon Drive, LP* (2011) 202 Cal.App.4th 35.

One issue that has arisen is whether an exculpatory provision which attempts to shield an at-fault party from tort liability can still apply where the at-fault party's conduct violates California Public Policy. In that regard, California *Civil Code* § 1668 provides that, "All contracts which have for their object, directly or indirectly, to exempt anyone 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."

The intermix of the Scope of Limitations of Liability in Commercial Lease Agreements was recently addressed in the case of *Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC* (Westlaw 278179) ("Epochal case"). In that case, a dispute arose between lessee, Epochal Enterprises, Inc., and property owner LF Encinitas Properties, LLC. In summary, the commercial property owner purchased real property containing dilapidated commercial greenhouses in 2012. The greenhouses were built in the 1960s, and had asbestos. The lessee ended up leasing what was known as Range 9, part of the subject property, in 2014. The lease agreement contained an indemnification provision shielding the owner from personal injury or property damage liability for property connected with the lessee's use of the premises, absent gross negligence or intentional misconduct by the owner. There was also a limitation of liability which provided that neither the owner nor any affiliate of the owner shall have any personal liability with respect to the breach of any of the provisions of the lease of the premises.

Beginning sometimes in early 2016, a storm damaged Range 9. It later became known that there was asbestos, which had not been identified by the owner, and should have been, prior to the commencement of the lease. The lessee defaulted on the lease. The owner obtained a Default Judgment in an Unlawful Detainer Action. In 2018, the now former lessee filed a lawsuit against the owner based upon the failure to disclose asbestos

and lead paint in Range 9. At trial, the owner asserted that there could not be any claim for lost profits or other economic loss, based upon the limitations of liability in the commercial lease.

The Trial Court after the jury awarded \$144,300 in lost profits, and \$77,700 in other past economic losses, entered judgment for the former lessee/Plaintiff, but then granted the owner/Defendant's Motion for Judgment Notwithstanding the Verdict as the Trial Court concluded the Limitation of Liability Clause barred Plaintiff's recovery.

On appeal, the Court of Appeal reversed as to the Limitation of Liability. In its Opinion, the Court of Appeal acknowledged that a limitation of liability in a contract is generally enforceable, citing the case law set forth above. However, the Court of Appeal construed Civil Code § 1668 to invalidate the contractual limitations of liability in the commercial lease, based on the owner's failure to disclose the existence of the asbestos. The Court of Appeal distinguished a number of cases involving limitations of liability, including CAZA Drilling (California), Inc. v. TEG Oil & Gas USA, Inc. (2006) 142 Cal.App.4th 453, on the basis that the lessee/Plaintiff had proved a violation of the Health and Safety Code based upon the asbestos claim. On that basis, the Court of Appeal ruled that, to the extent the Limitation of Liability Clause would exculpate the owner/Defendant for its violations of the Health and Safety Code, the limitation of liability would not apply.

The Epochal case is important because, while it recognizes limitations of liability under contract, in the event that the Plaintiff can prove a violation of at least a Health and Safety Code provision, the Limitation of Liability may be found to be against public policy and not enforceable.

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