

MARKS & WEINBERG, P.C.

Jordan v. Diamond Equip. & Supp. Co. 2005 WL 984513 (Ark., Apr. 28, 2005)

Lessee leased a Bobcat loader from Lessor in order to further his landscaping business. Among the provisions included in the lease by the Lessor was an exculpatory clause attempting to relieve Lessor from "injuries or damages sustained in the use of these items whether the damages are due to neglect, mechanical failure, or any other cause whatsoever, regardless of who happens to be operating the equipment." Lessee subsequently severely injured himself while using the leased equipment and brought a negligence action against Lessor in an Arkansas court. The trial court granted summary judgment in favor of Lessor. Lessee appealed.

On appeal the Court evaluated whether the exculpatory clause should be void for public policy reasons by examining the clause under a "total transaction" test and the three-factor *Finagin* test. The total transaction test looks to the circumstances surrounding the execution of the document, including factors such as, but not limited to, the previous execution of similar documents, whether a party was forced to sign, and whether the parties had equal bargaining power. The three-factor *Finagin* test proposes that an exculpatory clause may be enforceable if: (1) the party agreeing to the exculpatory clause knows of the potential liability is released; (2) the party agreeing to the exculpatory clause benefits from the activity which may lead to the potential liability that is released; and (3) the contract that contains the exculpatory clause is fairly entered into.



The Court concluded that the exculpatory clause passed the total transaction test as Lessee was not forced to sign the contract, but sought out Lessor to engage in the transaction. The Court also concluded that the exculpatory clause passed the *Finagin* test. The Court found, in satisfaction of the first *Finagin* factor, that the Lessee knew of the potential liability that was released by initialing statements that he had received safety training and had read the damage waiver. The Court found, in satisfaction of the second *Finagin* factor, that Lessee benefited from the lease of the bobcat loader as it assisted him in his occupation. Finally, in satisfaction of the third *Finagin* factor, the Court found that since there was no evidence of fraud, undue influence, lack of capacity, mutual mistake, or inequitable conduct sufficient to void the contract, that the contract was fairly entered into, and as such, the exculpatory clause was enforceable and was not against public policy.

The Court also held the exculpatory clause was not void for lack of mutuality of obligation as the clause was part of the valid lease agreement and the exculpatory clause was not excluded from the contract because it lacked conspicuity as Lessee initialed the provision. Moreover, the Court held the exculpatory provision was not so vague that it did not expressly describe the liability to be avoided as the lease provided that the Lessor was released from liability from any injuries due to "neglect, mechanical failure, or any cause whatsoever." Finally, the Court held the exculpatory clause was not unconscionable as there was no gross inequality of bargaining power and the Lessee was aware of the exculpatory clause when he entered into the agreements.

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