# Drafting a Limited Liability Clause that Will Pass the Scrutiny of the Utah Courts*

## I. INTRODUCTION

Limited liability clauses contractually limit a party's liability. This comment will address four types of limited liability clauses: releases, exculpatory clauses, indemnity clauses, and limitation of damages clauses.

A release is a clause liberating one party from any liability to the other party in a contract. This type of clause is often found in standard form contracts, such as rental agreements between a ski-renter and a skier. An exculpatory clause is similar to a release, except that it is often created between two parties that have entered into a uniquely drafted contract bargained for at arms length. These are common in construction or service contracts. The third type of clause, an indemnity clause, is used when a party promises to protect another from third party liability. Finally, a limitation of damages clause fixes a maximum amount an injured party may recover, regardless of the amount of damages the party can prove.[1]

Traditionally, limited liability clauses have not been favored by Utah courts.[2] This comment will first discuss the common-law rule regarding the validity of these clauses. Second, it will discuss the history underlying the use of limited liability clauses in Utah, focusing on the standards set forth by the courts over the past half-century. Finally, it will explore how a legal practitioner can draft a clause that will pass the scrutiny of Utah courts.

## II. THE COMMON-LAW RULE

Under the common-law majority rule, limited liability clauses are valid unless they go against public policy in the narrow circumstances of

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 These concepts were originally compiled in a memo on how to defeat limited liability clauses in Utah and Wyoming written by Trey Dayes and edited by Shawn Gunnerson for the law firm of Walstad & Babcock, Provo, Utah. They are used with the firm's consent.

1. 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1068 (1964).
2. Union Pacific R.R. v. El Paso Natural Gas Co., 408 P.2d 910, 913 (Utah 1965).

an employer-employee relationship or where one is "charged with a duty of public service . . . ."[3] This rule applies to releases, exculpatory, indemnity, and limitation of damages clauses equally.[4]

## III. Judicial Treatment of Limited Liability Clauses in Utah

Utah courts have interpreted limited liability clauses inconsistently, occasionally applying different standards to clauses containing nearly identical language. This section will review Utah case law addressing indemnity clauses, exculpatory clauses, and limitation of damage clauses. Additionally it will explore how limited liability clauses are treated in the federal courts, and the special exceptions that apply.

### *A.* El Paso *and* Freund

#### *1.* El Paso*: The Clear Expression Standard*

The Utah Supreme Court outlined Utah's original rule for indemnity clauses in a 1965 case called *Union Pacific Railroad v. El Paso Natural Gas Company*.[5] In this case, Union Pacific paid damages to one of El Paso's employees who was struck by Union Pacific's train.[6] Union Pacific later sought payment from El Paso under an indemnity provision between the two. The provision stated that El Paso "would indemnify and hold the Union Pacific harmless . . . from and against *any and all liability*, loss, damage, claims, . . . of *whatsoever nature*."[7] The court held the clause invalid, stating that "[t]he majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld."[8] Thus, while the court followed the common-law majority rule,[9] it added a new requirement that the clause be "clearly understood and expressed."

Twelve years later, in a 1977 case called *Union Pacific Railroad v. Intermountain Farmers*,[10] the court followed *El Paso* clear-expression standard to invalidate a clause which stated that the "[l]essee shall at all times protect the Lessor and the leased premises from all injury, damage

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3. *Id.*
4. *Id.*
5. 408 P.2d 910 (Utah 1965).
6. *Id.* at 911.
7. *Id.* at 912 (alterations in original).
8. *Id.* at 914.
9. *See supra* Part II.
10. 568 P.2d 724 (Utah 1977).

or loss."[11] The court cited *El Paso* and stated that clear intention "is not achieved by inference from general language."[12]

In the 1983 case of *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*,[13] the court again cited the *El Paso* standard when it upheld an indemnity clause that was similar to the clause invalidated in *El Paso*. The clause at issue stated that "Contractor [Brinkerhoff] agrees to protect, indemnify and save Operator [Shell], its employees, and agents harmless from and against all claims, demands, and causes of action of every kind and character."[14] In its holding, the court looked to the *El Paso* clear expression standard, stating that "[t]he indemnity provision challenged here meets [the *El Paso*] requirement, and is upheld under those authorities."[15]

### 2. Freund*: The Negligence Standard*

In 1991 the Utah Supreme Court introduced a modified *El Paso* standard when it decided *Freund v. Utah Power & Light Co.*[16] In *Freund*, the court upheld an indemnity clause which said that "Licensee [Jones] shall indemnify, protect, and save harmless Licensor [UP & L] from and against *any and all claims demands, causes of action, costs or other liabilities*,"[17] stating that "[i]n a long line of cases spanning more than fifty years, we have repeatedly held that an indemnity agreement

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11. *Id.* at 724-25.
12. *Id.* at 726.
13. 658 P.2d 1187, 1189 n.1 (Utah 1983).
14. *Id.* at 1189 n.1.
15. *Id.* at 1189. In spite of the court's holding, however, an argument can be made that *Shell Oil* actually clouded the *El Paso* standard in two ways. First, the *Shell Oil* court claimed to use the same rule as *El Paso*, but arrived at the opposite result. Though the words of the two clauses were not identical, their effect was similar. The clause in *El Paso* said that defendant would indemnify and hold the Union Pacific harmless "from and against *any and all liability*, loss, damage, claims, . . . of *whatsoever nature*." Union Pacific R.R. v. El Paso Natural Gas Co., 408 P.2d 910, 912 (Utah 1965)(alteration in original). Similarly, the clause in *Shell Oil* says, "[c]ontractor [Brinkerhoff] agrees to protect, indemnify and save Operator [Shell], its employees, and agents harmless from and against all claims, demands and causes of action of every kind and character." *Shell Oil*, 658 P.2d at 1198 n.1.

Second, the court's dicta in *Shell Oil* stated that "[i]ndeed, the contention that contracts of indemnity violate public policy by inducing negligence has been rejected by more that one court as 'fanciful' or 'untenable' in view of the many automobile liability insurance policies in existence." *Id.* at 1189. The court left unanswered the question of whether Utah still "does not look with favor" upon these clauses. *See El Paso*, 408 P.2d at 913.

16. 793 P.2d 362 (Utah 1990).
17. *Id.* at 371. This clause was similar to the *El Paso* clause which said "that the defendant would indemnify and hold the Union Pacific harmless . . . from and against *any and all liability*, loss, damage, claims, . . . of *whatsoever nature*." *El Paso*, 408 P.2d at 912 (alterations in original).

which purports to make a party respond for the negligence of another should be strictly construed."[18]

The court noted that "there is a growing trend to relax some of the strictness of the rule of construction when the indemnity arises in a commercial context."[19] Additionally, the court continued, "it is not necessary that the exculpatory language refers expressly to the negligence of the indemnitee, so long as the intention to indemnify can be 'clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances.'"[20] This new twist on *El Paso* implies that word 'negligence' effectively shows clear intent.[21]

### 3. *Cases After* Freund

The *El Paso* rule requires that the clause be very specific; indeed, intent must be "clearly and unequivocally expressed."[22] *Freund* relaxes that rule in commercial settings. In *Freund*, intent or the word negligence can be implied "from the language and purposes of the entire agreement, and the surrounding facts and circumstances."[23]

Though *Freund* arguably set forth a new standard regarding indemnification clauses in commercial settings, few courts followed it. For example, in *Gordon v. CRS Consulting Engineers, Inc.*[24] the Utah Court of Appeals found that a clause indemnifying the State by a construction company did not cover the engineering company hired by the

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18. *Freund*, 793 P.2d at 370 (citing Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983)); *See also* Union Pacific R.R. v. Intermountain Farmers Ass'n, 568 P.2d 724, 725-26 (Utah 1977); Howe Rents Corp. v. Worthen, 420 P.2d 848, 849 (Utah 1966); Union Pacific R.R. v. El Paso Natural Gas Co., 408 P.2d 910, 913-14 (Utah 1965); Barrus v. Wilkinson, 398 P.2d 207, 208 (Utah 1965); Walker Bank & Trust Co. v. First Security Corp., 341 P.2d 944, 947 (Utah (1959); Jankele v. Texas Co., 54 P.2d 425 (Utah 1936).

19. *Freund*, 793 P.2d at 370.

20. *Id.*

21. Two things can be inferred from *Freund*. First, a new rule exists for indemnity clauses in commercial transactions bargained for at arm's length; namely, that intent "can be 'clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances.'" Second, for a clause to meet the clear and unequivocal expression test of *El Paso*, the word 'negligence' should appear in the clause.

Reviewing *El Paso* and *Intermountain Farmers*, the word negligence is not in their clauses. *See El Paso,* 408 P.2d 910; Union Pacific R.R. v. Intermountain Farmers Ass'n, 568 P.2d 724 (Utah 1977). Perhaps this was why they were found invalid. Conversely, in *Shell Oil* the clause does say "except where such injury, death or damage has resulted from the sole *negligence* of Operator." *Shell Oil*, 658 P.2d at 1189. Thus, inclusion of negligence is more clear in the *Shell Oil* case than in the *El Paso* and *Intermountain Farmers*, allowing this clause to pass the *El Paso* rule.

22. Union Pacific R.R. v. El Paso Natural Gas Co., 408 P.2d 910, 914. (Utah 1965).

23. Freund v. Utah Power and Light Co., 793 P.2d 362, 370 (Utah 1990).

24. 820 P.2d 492 (Utah App. 1991).

State as an independent contractor. In construing the clause, the Court of Appeals cited *El Paso*[25] but made no reference to *Freund*, even though *Freund* could easily have been applied.[26]

Two years later the court of appeals again ignored *Freund* in favor of *El Paso*. In *Scudder v. Kennecott Copper Corporation*[27] two commercial entities entered into a contract where Weyher-Livsey, the contractor, was to indemnify Kennecott, the owner. Although *Freund* was cited as the controlling authority of the case, the court looked to *El Paso* to hold that the clause was valid. Following the *El Paso* holding, the court declared that:

> The law is clear that indemnification agreements should be strictly construed against the drafter. The reason an indemnification agreement is strictly construed "seems to have arisen primarily to appease the concern that one who is not financially responsible for the consequences of his or her own negligence will be less careful in his or her behavior toward others." "A party is contractually obligated to assume ultimate financial responsibility for the negligence of another only when that intention is 'clearly and unequivocally expressed.'" The presumption is against assuming financial responsibility for the negligence of another and "it is not achieved by inference or implication from the general language."[28]

The court ignored the language in the *Freund* case stating that this standard has been relaxed in commercial situations and a court can imply the negligence language "from the purpose of the entire agreement, and the surrounding facts and circumstances."[29] However, the proper result was still achieved because the clause passes the stricter *El Paso* rule. The court stated:

> This indemnification agreement, while somewhat convoluted, is less equivocal than the indemnification agreement in *Freund* because it specifically requires Weyher-Livsey to indemnify Stearns for losses and expenses incurred by reason "of negligence or any other grounds of legal liability . . . on the part of [Weyher-Livsey, Kennecott, or

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25. *Id.* at 494.

26. Under *Freund*, the clause would still have been invalidated because the "surrounding facts and circumstances" indicated that the clause did not extend to the engineer. *Freund*, 793 P.2d at 370. Thus the court reached the proper result without applying the proper rule. However, the court's analysis leaves some question as to when *El Paso* applies and when *Freund* applies.

27. 858 P.2d 1005 (Utah App. 1993), *rev'd*, 886 P.2d 49 (Utah 1994)(reversing on grounds unrelated to the indemnification agreement).

28. *Id.* at 1008 (citations omitted).

29. Freund v. Utah Power and Light Co., 793 P.2d 362, 370 (Utah 1990).

> Stearns]." We conclude therefore that this agreement expresses a *clear and unequivocal* intent.[30]

This is clearly the *El Paso* standard instead of the *Freund* standard.

The recent case of *Ericksen v. Salt Lake City Corp.*,[31] did little to resolve the question concerning which standard should apply. In fact, the Utah Supreme Court only added to the confusion with this case. In *Ericksen*, a contractor agreed to indemnify the City of Salt Lake. The Court invalidated the indemnity clause, but failed to mention whether *Freund* or *El Paso* should apply. The court compared the *Ericksen* indemnity clause to the clause found valid in *Freund*, stating that in *Freund,* "the contract of indemnity was much broader in its sweep than what we find in the instant case."[32]

This "broader in sweep" language is confusing because there has never been a requirement that the language be "broader in its sweep"[33] as the court in *Ericksen* suggests. That certainly was not in the analysis of the *Freund* decision. Thus, it is unclear whether the court was misapplying *Freund* or if it was introducing a new rule for indemnity clauses.[34]

### *B. Exculpatory Clauses*

Under the common-law majority rule, all clauses limiting liability should be treated in the same way. In Utah, however, this may not be so, considering that early Utah cases invalidated exculpatory clauses. The invalidation rule was first laid down in *Jankele v. Texas Co.*[35] In *Jankele*, the defendant's agent improperly installed a leaky gas tank on the plaintiff's land causing him to lose money. The defendant claimed that the exculpatory clause protected him from liability. The court held the clause invalid, stating:

> It is very doubtful that defendant could relieve itself by contract from its own negligence. Ordinarily such contracts are contrary to public policy. "Undoubtedly contracts exempting persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from

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30. *Scudder*, 858 P.2d at 1009 (emphasis added).

31. 858 P.2d 995 (Utah 1993).

32. *Id.* at 998.

33. *Ericksen*, 858 P.2d at 998.

34. It is important to note that reference to negligence is not explicitly stated in the clause. *Id.* Thus, the clause would also have be invalidated under the *El Paso* rule, but maybe not under the *Freund* rule.

35. 54 P.2d 425 (Utah 1936).

> the cause. It has therefore been declared to be good doctrine that no person may contract against his own negligence."[36]

Thus, exculpatory clauses were void under Utah law because they were against public policy.[37]

Twenty-three years after *Jankle*, the Utah Supreme Court handed down a decision in *Walker Bank & Trust v. First Security Corp.*[38] that reversed *Jankle* and permitted companies to use exculpatory clauses. In *Walker Bank*, the guardian of beneficiaries of a lapsed life insurance policy brought suit "because of [the] bank's failure to pay premiums"[39] as it had a duty to do. The contract between the bank and the trustor had a "hold harmless" provision where the bank assumed "no liability whatsoever in the premises, and [the trustor] further agree[d] to hold [the bank] harmless of and from any and all claims arising [t]hereunder."[40] The court invalidated the clause using a rule very similar to the *El Paso* rule, stating:

> [O]ne may contract to protect himself against liability for loss caused by his negligence, it is nevertheless well settled that contracts in which a party attempts to do so are subject to *strict construction* against him; and further, that he will be afforded no protection unless the preclusion against the negligence is *clearly and unequivocally stated*.[41]

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36. *Id.* at 427 (citing 6 R.C.L § 132, p. 727).

37. This differs from the original indemnity rule (*El Paso*) which generally allowed indemnity clauses if they were clearly and unequivocally expressed.

The American Law Reports recognized Utah as one of the minority states that in dicta has "unqualifiedly laid down" the rule that "one cannot avoid liability for negligence by contract." K.A. Drechsler, Annotation, *Limiting Liability for Own Negligence*, 175 A.L.R. 8, 14 (1927). The language is arguably not dicta because the court did invalidate the clause as void as against public policy. Even so, the American Law Report makes it clear that this was the rule in Utah.

Later cases, such as *Allen v. Southern Pac. Co.*, 213 P.2d 667 (Utah 1950), also support the proposition that exculpatory clauses are void as against public policy. In *Allen*, the plaintiff "brought [an] action against the Southern Pacific Company to recover $2,190 for [a] traveling bag and contents which were lost from defendant's checkroom in [the] railroad station." *Id.* The court held that "[t]he great weight of authority is that a bailee cannot entirely exempt himself by contract from liability due to his negligence and contracts limiting his liability for negligence during the course of a general business with the public are usually regarded as being against public policy." *Id.* at 668 (*See*, 6 AM. JUR. *Bailments* § 176). The court did not cite *Jankele*, so this case can be read two ways. First, it could be read as following *Jankele*, that exculpatory clauses are void as against public policy. Second, in could be read very narrowly to say that exculpatory clauses are only void in the bailee/bailor situation. Given these two readings of the case, it really does not help a practitioner understand whether exculpatory clauses are void as against public policy in Utah.

38. 341 P.2d 944 (Utah 1959).

39. *Id.*

40. *Id.* at 947.

41. *Id.* at 947 (emphasis added).

Thus, exculpatory clauses, like indemnity clauses,[42] must be clearly stated.[43]

Nineteen years after *Walker*, the Utah Supreme Court reaffirmed that the *El Paso* clear-expression standard applies to exculpatory clauses. In *DuBois v. Nye*,[44] vendors brought an action against the purchasers to recover for fire damage caused by the purchasers the day before the house was conveyed. The purchasers claimed that a clause in the sales contract exculpated them from their own negligence. The court cited *El Paso*, stating "[t]he broad language as to the 'risk of loss' cannot be construed as a clear, unequivocal expression that is intended to include loss due to the negligent or intentional wrongful conduct of either party."[45] Thus, it appears that *El Paso* is the rule for exculpatory clause cases.[46]

### *C. Limitation of Damages Clauses*

Limitation of damages clauses limit the amount of damages an injured party may receive. The standard for this type of clause is outlined in a 1983 case *DCR Inc. v. Peak Alarm Co.*[47] In *DCR*, a burglar alarm company claimed that the damages it must pay for a faulty alarm system were limited.[48] The clause in question read as follows: "[L]iability *hereunder* shall be limited to a fixed sum of $50.00, as liquidated damages, and not as a penalty, and this liability shall be exclu-

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42. *See supra* note 11 and accompanying text.

43. In *Howe Rents Corp. v Worthen*, 420 P.2d 848 (Utah 1966), the Utah Supreme Court added confusion to exculpatory clause law. The case is similar to *Walker Bank* but it is between a bailor and bailee. *Id.* No reference is made to *Allen* which is also factually similar. Instead the court cites *El Paso* and the indemnity line of case as the rule. After *Howe Rents* and *Walker Bank*, one could infer that the indemnity's clear and unequivocal rule from *El Paso* applies to exculpatory clauses.

In *Boise Cascade Corp. v. Stephens*, 572 P.2d 1380 (Utah 1977), which came after *Howe Rents*, the court adding dicta in a concurring opinion. This case addressed waiver of a materialman's lien and did not directly address exculpatory clauses. The concurring opinion makes the point that a subcontractor cannot waive his lien "the same as the court would ordinarily refuse to enforce a covenant to waive a right for redress for future negligence." *Id.* at 1382 (concurring opinion). No citation for this statement exists but it sounds similar to the *Jankele* rule. This case has no precedential value with regard to exculpatory clauses, but it illustrates the potential confusion surrounding exculpatory clauses.

44. 584 P.2d 823 (Utah 1978).

45. *Id.* at 826-827.

46. The problem with this assumption, however, is that the decision is pre-*Freund* and *Ericksen*. No subsequent case exists either validating or invalidating exculpatory clauses in Utah after *Freund* and *Ericksen*. Therefore, the law concerning exculpatory clauses is more in question than that of indemnity clauses because it is unclear whether these rules apply.

47. 663 P.2d 433 (Utah 1983).

48. *Id.* at 433-434.

sive."[49] Although this clause was originally drafted as a liquidated damages clause,[50] under the facts of the case the clause operated as a limitation of damages clause because it does not fix liability between parties for breach of contract, but for negligence. The court cited *El Paso* as the rule for limitation of damages clauses,[51] stating that in *El Paso* "this court refused to enforce a very detailed and thorough exculpatory clause."[52] The court proceeds to invalidate the clause under the *El Paso* rule claiming that "[i]n the present case, the language employed by the parties does not 'clearly and unequivocally' express an intent to limit defendant's tort liability."[53]

### *D. Application of Utah Case Law in the Federal Courts*

The federal court cases provide an interesting twist on this analysis as the district and circuit courts have attempted to apply Utah law. Federal courts have addressed two types of clauses: releases and indemnity clauses.

#### *1. Release Clauses*

Only two federal district court cases address Utah law regarding release clauses. Both post-*Freund* and *Ericksen,* but the cases do not apply the standards from either case.

The first federal case is *Zollman v. Myers*.[54] In *Zollman*, a snowmobile driver injured in an accident brought a negligence action against the recreational park and the driver of the other snowmobile with which she collided.[55] The rental agreement contained a clause that released the park from any liability "even if they or any of them negligently caused the bodily injury or property damage."[56] The plaintiff advanced two arguments to invalidate the release: First, she

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49. *Id.* at 437.

50. Liquidated damages clauses are invalidated or validated under different rules and will not be discussed in this comment.

51. *Id.*

52. *Id.* This incorrect characterization of *El Paso* as an exculpatory clause, added to the fact that the court never recognized the *DCR* clause as a limitation of damages clause, puts the court's analysis and the applicability of the rule in question.

53. *Id.* at 438. Because this case is pre-*Freund* and *Ericksen*, the question of whether those rules apply to limitation of damages clauses is unanswered. This case is the only limitation of damages case in Utah analyzed under limited liability clause rules.

54. 797 F. Supp. 923 (D. Utah 1992).

55. *Id.*

56. *Id.* at 925 n.1.

argued that this type of release is against public policy;[57] second, she asserted that "release agreements are not favored in Utah law."[58]

The *Zollman* court did not accept the first argument which the plaintiff based on a public policy statute regarding off-road vehicles.[59] However, the court accepted the second argument and found the clause invalid. At the beginning of its analysis, the court cited *El Paso*[60] but made no further reference to it. Instead, the court rested its decision on an ambiguity analysis based upon a clause in the contract that stated "I hereby agree to stop my snowmobile and wait for proper instructions. Otherwise, I expressly agree to assume the risk presented by the situation or problem."[61] The court declared that "if Zollman stops and awaits instructions when encountering a hazardous situation, she does not assume the risk of an accident."[62] Thus, the court holds, this clause conflicts with the "even if they or any of them negligently caused the bodily injury or property damage"[63] statement. The court finds the clause "ambiguous" under normal contract principles, not under the *El Paso* rule.[64] Thus, it appears that courts will require that release clauses be more than merely "clearly expressed" in order to avoid ambiguity.

Under the *El Paso* rule the clause may have been held unambiguous because the clause contained reference to release the renter from his own

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57. *Id.* at 926.

58. *Id.*

59. The plaintiff's public policy argument was that the Utah Code implicitly disallowed release agreements for rental and training on off-road vehicles. The statute reads as follows:

> It is the policy of this state to promote safety and protection for persons, property, and the environment connected with the use, operation, and equipment of off-highway vehicles, to promote uniformity of law, to adopt and pursue a safety education program, and to develop trails and other facilities for the use of these vehicles.

UTAH CODE ANN. § 41-22-1 (1991).

The court held that "the Act deals almost exclusively with the registration of and the restrictions on the operation of off-highway vehicles, such as snowmobiles. . . . and in no place suggests that parties providing such training cannot seek to limit their liability." *Zollman*, 797 F. Supp. at 926-927.

60. *Zollman*, 797 F. Supp. at 926 n.4.

61. *Id.* at 926 n.6.

62. *Id.* at 928.

63. *Id.* at 925 n.1.

64. *See, Id.* at 927-928. This opens the question of whether limited liability analysis applies to release clauses in Utah. The opinion can be read many ways. First, the court might not have followed the *Freund* rule because this was not a commercial contract with two parties at arm's length. Normally, as in this case, the release language is found in a standard rental form contract where the renter has no bargaining power, and usually does not even fully read the contract. So, arguably, the *Freund* rule does not apply.

negligence.[65] However, by citing *El Paso's* "not favored language,"[66] and using normal ambiguity principles, the federal district court came up with a standard that is more strict than that which the Utah Supreme Court applies. Under the federal court's holding, any ambiguity or conflict with the release clause, even from other sections of the contract, will invalidate the clause. This standard would invalidate many limited liability clauses.

In the second case, *Ghionis v. Deer Valley Resort Co.*,[67] a "[s]ki equipment lessee brought [an] action against [the] lessor/operator of [a] ski resort, alleging negligence . . . in connection with a ski accident in which she injured her knee."[68] The court held that the release was ambiguous and cited the *El Paso* standard in holding that: "[E]xculpatory agreements are binding so long as they are clear and unequivocal in expressing the parties' agreement to absolve a defendant of liability. General language of release, however, without specificity as to the shifting of responsibility is not enough to relieve a party at fault from liability."[69] However, the court continued, asserting that "[t]he Release document is also ambiguous."[70] Citing *Zollman*, the court held that "like the release in *Zollman* the court finds the Deer Valley Release is

65. *See, e.g.*, Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990) (implying that specific reference to exculpating one's negligence would pass the *El Paso* test); Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983)(upholding an indemnity clause that contained reference to indemnitee's negligence).

66. *Zollman*, 797 F. Supp. at 926.

67. 839 F. Supp. 789 (D. Utah 1993).

68. *Id.*

69. *Id.* at 793 (citations omitted). *Walker Bank & Trust Co. v. First Security Corp.*, 341 P.2d 944 (Utah 1959), cited in *Ghionis*, is an exculpatory clause case decided before *El Paso*, but it clearly uses a rule similar to the *El Paso* standard.

70. *Ghionis*, 839 F. Supp. at 793.

ambiguous."[71] Thus, it appears that, at the federal level at least, *Zollman* can be considered a separate rule and will apply.[72]

### 2. *Indemnity and Exculpatory Clauses*

The federal courts have done a better job interpreting indemnity and exculpatory clauses than release cases.[73] In three cases from 1966 to 1971, the Tenth Circuit correctly applied the *El Paso* standard to validate two clauses and to invalidate one.[74]

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71. *Id.* The ambiguity is created by conflict between paragraphs seven and ten. Paragraph seven reads:

> I hereby release the ski shop, and its owners, agents and employees from any and all liability for damages and injury to myself or to any person or property resulting from negligence, installation, maintenance, the selection, adjustment and use of this equipment, accepting myself the full responsibility for any and all such damage or injury which may result.

*Id.* at 792-93 n.2.

The court claims that this conflicts with paragraph ten, which reads: "All instructions on the use of my rental equipment have been made clear to me, and I understand the function of my equipment." *Id.* The court held that statement was untrue "[w]here those instructions are lacking or deceptive, as is claimed by Ghionis on the compatibility of her boots and the ski binding, the release clause of paragraph 7 does not apply." *Id.* at 794. This is quite a stretch to find ambiguity. On their face the two paragraphs do not conflict; the only conflict was that factually paragraph ten was not a true statement. The court implies the invalidation of paragraph seven by way of paragraph ten.

72. In essence, the *Zollman* standard is that any ambiguity, or stretch of ambiguity will invalidate the clause.

73. This may be because the indemnity and exculpatory clause cases were in the Tenth Circuit Court of Appeals.

74. The federal district court also passed several decisions dealing with indemnity and exculpatory clauses. For example, the federal district court followed the *El Paso* rule in a case called *Wollam v. Kennecott Corp.* 663 F. Supp. 268 (D. Utah 1987). In *Wollam*, the court invalidated a clause that had no reference to negligence. It stated that the "contract suffers from the same lack of specificity found deficient in *El Paso*. The general language . . . fails expressly to state that Stockmar will indemnify Kennecott for Kennecott's negligence." *Id.* at 272.

After the 1990 *Freund* decision, the district court ignored *Freund* in *CIG Exploration Inc. v. Hill.* 824 F. Supp. 1532 (D. Utah 1993). In that case, a "[g]as pipeline operator brought [an] action seeking reimbursement from royalty interest owners of that portion of royalties attributable to overcharges reimbursed to customers." *Id.* at 1532-33. Citing the *El Paso* rule and several of its progeny, including the district court opinion of *Freund*, the court held that the indemnity clause was invalid. *Id.* at 1541-42.

Under the *El Paso* rule, this decision properly held the clause invalid because it did not contain specific language indemnify CIG from its own negligence. The problem with the holding is that this is a commercial contract so the *Freund* rule should have applied. Under the *Freund* rule, this clause would pass because it could "be 'clearly implied from the language,'" Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990), that CIG is to be saved "harmless from and against any and all loss, cost, expense or damage it may suffer." *CIG Exploration*, 824 F. Supp. at 1541. Thus, *CIG* can be read to imply that the *Freund* rule is not valid, or that it is valid but this was not a commercial context with parties bargaining at arm's length. The court made no statement one way or the other.

In the first case, *Titan Steel Corporation v. Walton*,[75] a general contractor and owner sued for indemnity from a subcontractor whose employee fell through a roof and died.[76] The clause contained the language, "except when caused by the sole negligence of the Contractor or Owner."[77]In addition to examining Utah law, the court recognizes a federal view: "The federal view is that they [indemnity clauses] are contrary to public policy, especially contracts affected with a public interest and involving a public duty."[78] The court then went on to apply the *El Paso* clear-expression standard to validate the clause.[79]

In the next case, *United States Steel v. Warner*,[80] a similar analysis invalidated an exculpatory clause. In *Warner*, the plaintiff, an independent contractor, brought and action against the defendant for injuries sustained from falling through a roof. The clause between the parties, stated that the "safety of all persons . . . shall be the sole responsibility of the Contractor."[81] The court correctly cited *El Paso* as the governing rule and held that the provision was invalid. The court stated that "the intent to relieve the defendant from its own negligence is not clearly and unequivocally expressed."

Finally, in *Southern Pacific Trans. Co. v. Nielsen*,[82] the same court again validated a indemnity clause. In *Nielson*, the railroad brought suit against the purchaser of a railroad bridge for indemnification when one of the purchaser's employees was killed.[83] The clause said that the buyer would indemnify the railroad from all liability, "regardless of any negligence or alleged negligence on the part of any Railroad employee or agent."[84] The Tenth Circuit, in three decisions, cited *El Paso* and carefully maneuvered its way through Utah law to validate the clause because it specifically included the railroad's negligence.

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75. 365 F.2d 542 (10th Cir. 1966).
76. *Id.*
77. *Id.* at 548.
78. *Id.* This rule is similar to the *Jankele* rule found in the old exculpatory clause cases.
79. *Id.* at 548-49.
80. 378 F.2d 995 (10th Cir. 1967).
81. *Id.* at 999 (alterations in original).
82. 448 F.2d 121 (10th Cir. 1971).
83. *Id.* at 121-122.
84. *Id.* at 122.

### *E. The Special Exception: Indemnity Clauses in Construction Contracts and Design Professionals*

#### *1. Construction Contracts*

A construction contract commonly includes indemnity clauses. The Utah legislature has decided that in these contracts indemnity provisions are void as against public policy. The Utah Code states:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against public policy and is void and unenforceable.
>
> This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective.[85]

This is a special exception to the rules outlined above and the clause only qualifies if the contract is for construction. The indemnity clause limits damages for physical injury or property damage and the limits liability for indemnitee's sole negligence. If these conditions exist, the clause is void.[86] Many contracts get around this obstacle with an "except for the sole negligence of indemnity" clause.[87] With this clause the contract and its indemnity provision will be upheld.[88]

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85. UTAH CODE ANN. § 13-8-1 (1991).

86. *See, e.g.*, Jacobsen Constr. Co. v. Blaine Constr., 863 P.2d 1329 (Utah Ct. App. 1993), *appeal dismissed*, 878 P.2d 1151 (Utah 1994); Wollam v. Kennecott Corp. 663 F.Supp 268 (D. Utah 1987).

87. *See, e.g.*, Scudder v. Kennecott Copper Corp., 858 P.2d 1005 (Utah App. 1993)("excluding any liability caused by sole negligence or willful misconduct of Owner or Manager."), *rev'd* 886 P.2d 49 (Utah 1994)(reversing on grounds unrelated to the indemnification agreement); Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 n.1 (Utah 1983)("except where such injury, death or damage has resulted from the sole negligence of Operator."); Titan Steel Corp. v. Walton, 365 F.2d 542, 548 (10th Cir. 1966)("except when caused by the sole negligence of the Contractor or Owner."); *cf.* Southern Pacific Trans. Co. v. Nielsen, 448 F.2d 121, 122 (10th Cir. 1971)("regardless of any negligence or alleged negligence on the part of any Railroad employee or agent.").

88. *See, e.g.*, Scudder v. Kennecott Copper Corp., 858 P.2d 1005 (Utah App. 1993)("excluding any liability caused by sole negligence or willful misconduct of Owner or Manager."), *rev'd* 886 P.2d 49 (Utah 1994)(reversing on grounds unrelated to the indemnification agreement); Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 n.1 (Utah 1983)("except where such injury, death or damage has resulted from the sole negligence

### 2. *Design Professionals*

A design professional is defined as "an architect, engineer, or land surveyor. It includes any other person who, for a fee or other compensation, performs services similar to the services of an architect, engineer, or land surveyor in connection with the development of land."[89]

A contract for services performed by design professionals may not limit the design professional's or landowner's liability to either the contractor or subcontractor.[90] This rule does not apply if the design professional is also hired to construct the project[91] and no exception exists for clauses that exempt sole negligence.[92] Thus, this restriction is more rigid that the construction industry rule.

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of Operator."); Titan Steel Corp. v. Walton, 365 F.2d 542, 548 (10th Cir. 1966)("except when caused by the sole negligence of the Contractor or Owner."); *cf.* Southern Pacific Trans. Co. v. Nielsen, 448 F.2d 121, 122 (10th Cir. 1971)("regardless of any negligence or alleged negligence on the part of any Railroad employee or agent.").

89. UTAH CODE ANN. § 13-8-2(1)(c) (1991).

90. The relevant statute states:

> (2) An agreement between an owner and a contractor may not limit the owner's or a design professional's liability to the contractor for any claim arising from services performed by the design professional in connection with the development of land. This subsection does not apply if the owner and the contractor are the same person or entity or ar controlled by the same person or entity.
>
> (3) An agreement between a contractor and a subcontractor may not limit the owner's or a design professional's liability to the subcontractor for any claim arising from services performed by the design professional in connection with the development of land.

UTAH CODE ANN. § 13-8-2(2)-(3) (1991).

91. UTAH CODE ANN. § 13-8-2(4) (1991) states: "This section does not apply if the design professional is retained under a single contract to perform both the design and the construction of the project, such as in a design-build or turn-key project."

92. The statute gives no exceptions:

> (2) An agreement between an owner and a contractor may not limit the owner's or a design professional's liability to the contractor for any claim arising from services performed by the design professional in connection with the development of land. This subsection does not apply if the owner and the contractor are the same person or entity or ar controlled by the same person or entity.
>
> (3) An agreement between a contractor and a subcontractor may not limit the owner's or a design professional's liability to the subcontractor for any claim arising from services performed by the design professional in connection with the development of land.

UTAH CODE ANN. § 13-8-2(2)-(3) (1991).

### *F. Limiting Liability Clause in Fraud Cases*

The majority rule for limiting liability clauses in fraud cases is that "[a] term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy."[93]

The Utah Supreme Court applied this majority rule to a limitation of damages clause in a case called *Lamb v. Bangart*.[94] In *Lamb*, a purchaser brought an action for breach of warranty and fraud against the sellers of a livestock breading contract. The issues were whether a clause limiting the purchaser's damages to "[e]xoneration of the final payment . . . and tender of one half of the [bull's] semen"[95] was valid in a fraud action. The court held that "a contract clause limiting liability will not be applied in a fraud action" and further "[a] contract limitation on damages or remedies is valid only in the absence of allegation or proof of fraud."[96] An old New York case, *Bridger v. Goldsmith*,[97] gives an especially clear explanation of the rationale behind this rule:

> [T]here is no authority we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such case as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing.[98]

Therefore, if a clause at issue in a fraud action bars liability completely or limits damages, it is invalid.

The rule in *Lamb* was cited and upheld in a 1993 case, *Ong International (U.S.A.) Inc. v. 11th Avenue Corporation*.[99] There, a release between the partners "forever discharge[d] SLMM [defendant], its agents, officers and employees from any and all claims, demands,

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93. *See* RESTATEMENT (SECOND) OF CONTRACTS § 196 (1965).
94. 525 P.2d 602 (Utah 1974).
95. *Id.* at 608.
96. *Id.*
97. 38 N.E. 458 (N.Y. 1894).
98. *Id.* at 459.
99. 850 P.2d 447 (Utah 1993).

rights of action or causes of action."[100] The court cited *Lamb* and held that "[t]he law does not permit a covenant of immunity which will protect a person against his own fraud on the ground of public policy. A contract limitation on damages *or remedies* is valid only in the absence of allegations or proof of fraud."[101] No confusion exists in this area of limited liability clauses. They are simply not valid in the face of fraud.

### *G. Summary*

As outlined above, the case law in Utah raises creates several standards for limited liability clauses. Below are the possible rules and their relationship to each other:

*Ericksen* rule: Clause is sufficiently broad[102]

<---Strict----------|----------Lenient--->

| | | | | |
|---|---|---|---|---|
| *Jankele*-Federal rule: void, against public policy, exculpatory clauses.[103] | *Zollman* rule: any conflict or ambiguity, releases?[104] | *El Paso* rule: clear & equivocal expression, specific, covers negligence, indemnity, exculpatory? limitation of damages.[105] | *Freund* rule: implied from language, purpose of agreement, surrounding facts, for commercial, arms length transactions, indemnity? exculpatory? limitation of damages?[106] | Majority rule: valid unless employer or charged with public service (all types)[107] |

100. *Id.* at 451 (citing Lamb v. Bangart, 525 P.2d 602 (Utah 1974)).

101. *Id.* at 452.

102. Ericksen v. Salt Lake City Corp., 858 P.2d 995 (Utah 1993).

103. *See* Allen v. Southern Pac. Co., 213 P.2d 667 (Utah 1950); Jankele v. Texas Co., 54 P.2d 425, 427 (Utah 1936); Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966). *See also* Boise Cascade Corp. v Stephens, 572 P.2d 1380, 1382 (Utah 1977); K.A. Drechsler, Annotation, *Limiting Liability for Own Negligence*, 175 A.L.R. 8, 14 (1927).

104. *See* Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789 (D. Utah 1993); Zollman v. Myers, 797 F. Supp. 923 (D. Utah 1992).

105. *See* DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983)(limitation of damages clause); Howe Rent Corp. v. Worthen, 420 P.2d 848 (Utah 1966)(exculpatory clause); Union Pacific R.R. Co. v. El Paso Natural Gas Co., 408 P.2d 910 (Utah 1965)(indemnity clause).

106. Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990).

107. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1965).

## III. CONCLUSION: HOW TO DRAFT A LIMITED LIABILITY CLAUSE THAT WILL PASS THE SCRUTINY OF THE COURT

Understanding the intricacies involved in Utah limited liability clause cases is essential to properly drafting a valid clause. Each holding must be taken into consideration when drafting the clause, especially in light of the fact that a clause could end up being used for a different purpose depending on how the controversy arises.[108] In spite of this potential, however, it is possible to draft a limited liability clause that will pass the scrutiny of the court.

The best rule to drafting a valid clause would be to draft it so that it would pass the most strict rule that courts have used, even if the rule does not directly apply to the type of clause being drafted. The *Jankele* rule is the strictest and voids any clause limiting liability, making it impossible to draft a clause that would pass this standard.[109] The next standard is the *Zollman* rule.[110] Under *Zollman*, any potential conflict or ambiguity between the clause and other parts of the contract will invalidate the clause. Drafting a clause without these conflicts can be difficult with a large contract where many provisions could potentially conflict with the clause in question. The drafter must review the whole contract for conflicts or ambiguities using *Zollman* and *Ghionis* as examples.[111]

The next standard is the *El Paso* rule. This standard requires that the parties clearly and unequivocally state their intentions to exculpate one party's negligence. The rule specifically requires that the clause clearly state that one party is exculpating the other party from its own negligence. The clause in *Nielsen* is an excellent example of one that will pass the scrutiny of the court. This clause states that "regardless of any negligence or alleged negligence on the part of any . . . employee or agent."[112]

While the *Nielson* clause passes the *El Paso* text, it would be found invalid under the Utah statute if it appeared in a construction con-

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108. For example, a clause drafted to indemnify one party could end up being used as an exculpatory clause if a conflict arises between the contracting parties.

109. *See* Allen v. Southern Pac. Co., 213 P.2d 667 (Utah 1950); Jankele v. Texas Co., 54 P.2d 425, 427 (Utah 1936); Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966). *See also* Boise Cascade Corp. v. Stephens, 572 P.2d 1380, 1382 (Utah 1977); K.A. Drechsler, Annotation, *Limiting Liability for Own Negligence*, 175 A.L.R. 8, 12 (1927).

110. *See* Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789 (D. Utah 1993); Zollman v. Myers, 797 F. Supp. 923 (D. Utah 1992).

111. *See Ghionis*, 839 F. Supp. 789; *Zollman*, 797 F. Supp. 923.

112. Southern Pacific Trans. Co. v. Nielsen, 448 F.2d 121, 122 (10th Cir. 1971).

tract.[113] For construction contracts, an appropriate clause is one similar to the clause in *Shell Oil*. A construction clause should include language to the effect that liability will not exist "except where such injury, death or damage has resulted from the sole negligence of Operator."[114] These clauses will pass the *El Paso* standard.

The final standard is the *Ericksen* rule. Under *Ericksen*, the clause must be sufficiently broad to cover any situation that may arise. Because the situation is not known to the parties at the time they draft the clause, the *Ericksen* standard is difficult to meet. A clause that limits *any and all liability* from *any and all possible parties* should generally meet this standard.[115]

In conclusion, a clause that meets the *Zollman*, *El Paso*, and *Ericksen* standards will meet the more lenient *Freund* or majority rules. Drafting a clause to meet the requirements of these rules will allow the clause to pass the scrutiny of Utah courts.

*Trey Dayes*

113. UTAH CODE ANN. 13-8-1 (1991).

114. Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 n.1. (Utah 1983).

115. The clause in *Ericksen* fell short because it missed any employees of the city. Ericksen v. Salt Lake City Corp., 858 P.2d 995, 998 (Utah 1993).