

## MCLE ARTICLE AND SELF-ASSESSMENT TEST

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by Robert Odson and Staci Tomita

# Boilerplate Breakdown

Common provisions in commercial real property contracts may be unenforceable, partially enforceable, or not enforceable according to their literal meaning

VIRTUALLY EVERY commercial real property contract contains pages of boilerplate provisions with language that seeks to narrow the scope of any subsequent dispute, limit liability, and dictate the manner in which disputes are adjudicated. The virtual ubiquity of these provisions indicates that they are relied upon, but do they work? Stated differently, are the provisions enforced in accordance with their literal meaning? In some cases, common boilerplate provisions in commercial real property contracts are absolutely unenforceable, enforced in certain contexts, or not enforced in accordance with their literal meaning.

For example, commercial real estate contracts often contain provisions in which the parties agree that the purchaser or tenant is taking the property “as-is” and disclaim any representations made outside of the written language in the contract. Boilerplate integration provisions typically state that the contract contains the complete agreement between the parties. Although as-is and integration provisions literally preclude claims based upon alleged promises outside the contract, their enforcement falls short of their literal meaning.

In an as-is sale of property, the use of the term “as-is” relieves a seller of real property from liability for observable defects in the prop-

erty’s existing condition. In an as-is sale, no warranties of quality or condition are implied in the sale of the property. However, an as-is provision will not shield the seller from all claims concerning the condition of the property. When a seller intentionally conceals, through fraud or misrepresentation, material defects not otherwise visible or observable to the buyer, the as-is provision will not shield a seller from a buyer’s claims.<sup>1</sup>

Nor is an integration clause always effective in accordance with its literal meaning. The clause seeks to bar introduction of parol evidence, which is evidence of prior or contemporaneous oral communications introduced to alter the meaning of written contracts. An integration clause is governed by Section 1856 of the Code of Civil Procedure, which states: “Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.”

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**Robert Odson is a founding partner and Staci Tomita is an associate of Shumener, Odson & Oh LLP, a boutique law firm in Los Angeles litigating commercial disputes with a focus on real estate and finance.**

Integration clauses are generally enforceable and can be effective to bar introduction of evidence of alleged promises that are contrary to the clear and express terms of the contract. However, parol evidence may be introduced to interpret the contract when it is ambiguous. Thus, even in the face of an integration clause, a court can, and likely will, hear evidence of prior or contemporaneous oral communications in adjudicating a dispute concerning a real estate contract.<sup>2</sup>

Moreover, integration clauses have, at most, a limited application to fraud claims. It has been the law for years that a “party may not contract away liability for fraudulent or intentional acts or for negligent violations of statutory law.”<sup>3</sup> Section 1668 of the Civil Code states: “All contracts which have for their object, directly or indirectly, to exempt any one 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.” In general, an integration provision will not bar claims of fraud in the inducement of a real property contract. As explained in *Manderville v. PCG & S Group, Inc.*, a “party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision.”<sup>4</sup>

While prior law essentially allowed parties to contract around fraud committed prior to the execution of an integrated contract by refusing to admit parol evidence contrary to the contract,<sup>5</sup> the California Supreme Court in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* held that the parol evidence rule does not bar evidence of fraudulent promises that contradict the terms of an integrated writing.<sup>6</sup> The *Riverisland* court relied upon Section 1856(f) of the Code of Civil Procedure to rule that “it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.”<sup>7</sup>

*Riverisland* has been applied to real estate contracts, such as the commercial leases at issue in *Julius Castle Restaurant, Inc. v. Payne* and *Thrifty Payless, Inc. v. Americana at Brand, LLC*.<sup>8</sup> In *Julius*, commercial tenants sued their landlord for fraud related to purported oral representations that the restaurant equipment was in working order and that the landlord would fix any broken equipment. Over the landlord’s objections, the court concluded that “parol evidence is admissible as

to fraud claims involving sophisticated parties,” reasoning that said admissibility “does not create any injustice” because parties “claiming fraud in the inducement [are] still required to prove they relied on the parol evidence and that their reliance was reasonable.”<sup>9</sup> In *Julius*, the tenants met their burden “to prove that, notwithstanding both the Lease’s integration clause and the ‘as is’ language with respect to the restaurant equipment, they reasonably relied on [the landlord’s] prior oral assurances in entering into the agreements.”<sup>10</sup> The *Julius* court also disagreed with the landlord’s argument that *Riverisland* should only apply to contracts of adhesion.<sup>11</sup>

Likewise, *Thrifty* cited to *Riverisland* to find extrinsic evidence “admissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause.”<sup>12</sup> In *Thrifty*, the plaintiff tenant of commercial space alleged fraud against the landlord for purported false representations about estimated tax, insurance, and common area expenses made in a letter of intent before the parties executed the final lease. The landlord demurred, arguing that tenant agreed in the lease that “it was entering into the lease based on its own investigation,” that “implied terms of the contract could not contradict the express terms,” and that “the lease contained an integration clause...such that prior negotiations and discussions, which were no more than ‘estimates,’ were merged into the lease.”<sup>13</sup> The trial court granted the landlord’s demurrer, but the court of appeal reversed in light of *Riverisland*, stating that “extrinsic evidence is admissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause.”<sup>14</sup>

While as-is clauses and other provisions disclaiming any representations or warranties outside of the contract may not be enough to win demurrers or motions for summary judgment, the clauses may be considered as factors tending to disprove the justifiable reliance element of fraud.<sup>15</sup> Indeed, it will be difficult for a party to show that it justifiably relied on a precontract statement contrary to the terms of a final written contract when the contract contains an integration clause in which the party affirms that it cannot rely on any precontract statements contrary to the terms of the final written contract.

In sum, although as-is clauses, integration clauses, and other provisions disclaiming any representations or warranties outside of the contract may have some efficiency in narrowing future contractual disputes, these provisions will not likely be enforced in accordance with their literal meaning with respect to fraud claims, particularly claims of fraud in the inducement.

It is also customary for commercial real

estate contracts to contain exculpatory clauses. For example, commercial leases commonly include provisions stating that the landlord shall not be liable for negligence. In general, California law regards exculpatory clauses with disfavor. Civil Code Section 1668 provides that certain exculpatory clauses “are against the policy of the law.”<sup>16</sup> Nevertheless, parties may agree to certain exculpatory clauses when the contract does not affect the public interest.<sup>17</sup> When the supreme court reviewed the “troubled” history of Civil Code Section 1668, it found the decisions uniform in one respect: “The cases have consistently held that the exculpatory provision may stand only if it does not involve ‘the public interest.’”<sup>18</sup>

### Public Interest Test

In *Tunkl v. Regents of University of California*, the supreme court set forth a “rough outline” of factors to determine whether an exculpatory clause involves the “public interest” and thus may be invalid. First, the contract “concerns a business of a type generally thought suitable for public regulation.” Second, “The party seeking exculpation is engaged in performing a service of great importance to the public...which is often a matter of practical necessity for some members of the public.” Third, “The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.” Fourth, “As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public...[seeking those] services.” Fifth, “In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation...and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Sixth, “as a result of the transaction, the person or property of the purchaser is placed under the control of the seller...subject to the risk of carelessness by the seller” or the seller’s agents.<sup>19</sup>

Although the exculpatory clause in *Tunkl*, which purported to relieve a charitable research hospital of negligence as a condition of admission, was considered invalid as affecting the public interest, courts have routinely found contracts involving real estate to fall outside of the *Tunkl* factors. For example, in *Burnett v. Chimney Sweep*, the court found commercial leases to be “a matter of private contract between the lessor and the lessee with which the general public is not concerned.”<sup>20</sup> Indeed, “no public policy opposes private, voluntary transactions in which one

# MCLE Test No. 242

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The term "as-is" may relieve a seller of real property from liability for observable defects in the property's existing condition.  
True.  
False.
2. In an as-is sale, no warranties of quality or condition are implied in the sale of the property.  
True.  
False.
3. When a seller intentionally conceals material defects not otherwise visible or observable to the buyer, an as-is provision will shield the seller from the buyer's claims.  
True.  
False.
4. An integration clause always defeats claims of fraud in the inception of a contract.  
True.  
False.
5. *Thrifty Payless, Inc. v. Americana at Brand, LLC*, found extrinsic evidence inadmissible to establish fraud or negligent misrepresentation in the face of the lease's integration clause.  
True.  
False.
6. With respect to fraud claims, as-is clauses and integration clauses will always be enforced in accordance with their literal meaning.  
True.  
False.
7. One factor that the U.S. Supreme Court has set forth to help determine whether an exculpatory clause involves the public interest is whether it concerns a business of a type generally thought suitable for public regulation.  
True.  
False.
8. Contracts that have for their object to exempt any one from his or her own fraud are against public policy.  
True.  
False.
9. Exculpatory clauses that shield against liability for passive negligence always shield against liability for active negligence as well.  
True.  
False.
10. Exculpatory clauses that shield against liability for gross negligence are generally enforceable.  
True.  
False.
11. Parties can sometimes limit who is liable for certain wrongs, notwithstanding Section 1668 of the Civil Code.  
True.  
False.
12. In a commercial transaction, a provision liquidating damages is presumptively valid unless the party seeking to invalidate it shows that it is unreasonable.  
True.  
False.
13. In a commercial transaction, there is no bright-line rule to determine whether a provision liquidating damages is reasonable.  
True.  
False.
14. The amount of damages actually suffered, as determined after a contract is made, is important in determining the validity of the liquidated damages provision.  
True.  
False.
15. All provisions attempting to limit the parties' recovery are construed as liquidated damages.  
True.  
False.
16. Pre-dispute waivers of the right to a jury trial are generally unenforceable.  
True.  
False.
17. To validly agree to a general judicial reference, a party must expressly waive his or her right to a jury.  
True.  
False.
18. A general judicial reference can only be entered into after a dispute arises.  
True.  
False.
19. Since an agreement to submit future disputes to judicial reference acts as a pre-dispute jury trial waiver, it is necessarily unenforceable.  
True.  
False.
20. Judicial reference provisions are subject to standard rules of contract interpretation and contract defenses, such as fraud or unconscionability.  
True.  
False.

## MCLE Answer Sheet #242



### BOILERPLATE BREAKDOWN

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2.  True  False
3.  True  False
4.  True  False
5.  True  False
6.  True  False
7.  True  False
8.  True  False
9.  True  False
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  True  False
15.  True  False
16.  True  False
17.  True  False
18.  True  False
19.  True  False
20.  True  False

party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.”<sup>21</sup>

In the context of commercial real estate transactions, California courts have repeatedly found general exculpatory clauses enforceable notwithstanding Civil Code Section 1668. Courts have found such provisions to shield against liability for “passive” negligence, but parties should include more explicit references to negligence if they wish to shield against liability for “active” negligence as well.<sup>22</sup> In *Inglis v. Garland*,<sup>23</sup> a general exculpatory clause shielded a landlord from its passive failure to discover the actual source of a leak sooner because the landlord made bona fide efforts to repair the leak. On the other hand, the court in *Butt v. Bertola*<sup>24</sup> did not consider a general exculpatory clause sufficiently explicit and specific to shield a landlord from its active negligence in repeatedly failing to repair leaks that it knew about, which led to massive flooding that destroyed the tenant’s store.<sup>25</sup>

Similarly, in *Burnett*, the court of appeal reversed the trial court’s judgment on the pleadings because questions of fact remained as to whether the exculpatory clause protected the landlord from liability for its active negligence in refusing to remediate a known mold infestation.<sup>26</sup> There, the general excul-

patory clause did not specifically mention negligence, but a provision purporting to shield the landlord from liability for any of the tenant’s loss of profits did. As the court stated, an agreement that “seeks to limit generally without mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.”<sup>27</sup> Had the exculpatory clause in *Burnett* specifically mentioned negligence as a claim released, it likely would have released the active negligence at issue.<sup>28</sup>

This is because exculpatory clauses that specifically mention negligence typically release parties from both passive and active negligence.<sup>29</sup> The parties, however, probably cannot contract around gross negligence.<sup>30</sup> In *Frittelli, Inc. v. 350 N. Canon Drive, LP*, the exculpatory clause that specifically mentioned negligence shielded the landlord from liability for active negligence.<sup>31</sup> The court further noted that the lease set forth the landlord’s “sole recourse” to file an insurance claim.<sup>32</sup> Interestingly, parties can sometimes limit who is liable for certain wrongs as well, notwithstanding Section 1668.<sup>33</sup> In short, in commercial real estate transactions, parties may exculpate themselves from liability for negligence (but probably not fraud or gross negligence), and they should specifically mention negligence in an exculpation clause to

reflect the parties’ intent to disclaim liability for active as well as passive negligence.<sup>34</sup>

### Provisions Limiting Damages

Commercial real estate contracts, particularly contracts for purchase and sale of real property, commonly include liquidated damages provisions. In a commercial transaction, a provision liquidating damages is presumptively valid unless the party seeking to invalidate it shows that it is unreasonable.<sup>35</sup> However, in commercial contracts, a provision liquidating the damages to the seller if the buyer fails to purchase the property must also be 1) “separately signed or initialed by each party to the contract,” and 2) “set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type” if the provision is included in a printed contract.<sup>36</sup> With respect to commercial property, the validity of a liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered or the fact that damages could become readily ascertainable at some point after the contract was made have no bearing on the validity of the liquidated damages provision.<sup>37</sup>

In commercial transactions, there is no bright-line rule to determine whether a liquidated damages provision is reasonable, but “the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract...the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract.”<sup>38</sup> Most important in determining the reasonableness of liquidated damages is whether the amount is proportional to the damages that may actually flow from the anticipated breach—whether the amount represents the parties’ reasonable effort to estimate a “fair average compensation for any loss that may be sustained.”<sup>39</sup> In the absence of this relationship, a liquidated damage clause is deemed void as a penalty.<sup>40</sup>

In *Harbor Island*, the liquidated damages provision was considered a penalty because it allowed the landlord to collect double rent if the tenant breached the lease. The court determined that the amount was not reasonably related to any actual damages that the landlord could have anticipated resulting from the tenant’s failure to properly maintain the premises. Likewise, in *Fox Chicago Realty*

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*Corporation v. Zukor's Dresses*,<sup>41</sup> a liquidated damages clause was considered a penalty when it required the tenant to pay \$159,450 for breaching the lease by removing portions of the store. The parties initially agreed to monthly rent of \$4,100 but repeatedly modified their lease to reduce the rent. The liquidated damages provision required the tenant to pay the cumulative difference between the initial \$4,100 rent and the reduced rent actually paid each month in the event of any breach. Not only did the landlord fail to show that the damages suffered were difficult to ascertain, which was required at the time,<sup>42</sup> but he also failed to show how payment of \$159,450 for removal of portions of the store was proportional to any damages anticipated from the unauthorized removal.<sup>43</sup> In *Smith v. Royal Manufacturing Company*, the court considered a liquidated damages provision a penalty based on the proposition that when "a fixed sum is agreed upon as liquidated damages for one of several breaches of varying degree, it is to be inferred that a penalty was intended."<sup>44</sup>

On the other hand, the provision in *Hong v. Somerset Associates*<sup>45</sup> was not a penalty because it only provided for liquidated damages in the amount of 2 percent of the purchase price in the event of the buyer's failure to complete the purchase. In addition, the par-

ties were sophisticated and understood that, pending the close of escrow, the seller would take the property off the market, make repairs, and continue to make mortgage and insurance payments.

Similarly, the provision in *El Centro Mall, LLC v. Payless ShoeSource, Inc.*,<sup>46</sup> was not a penalty, even though it provided for liquidated damages of 10 cents per square foot of leased space per day in the event of a breach. Although the lease already provided for payments of percentage rental in the event of the tenant's default, the liquidated damages clause was held reasonable in part because it accounted for more than percentage rental, such as anticipated loss of synergy, goodwill, and patronage.

Interestingly, not all provisions attempting to limit recovery are necessarily construed as liquidated damages. To the extent that a provision is considered a mere limitation on liability, as opposed to a liquidated damages clause, it may be enforced according to its literal meaning. In *Wheeler v. Oppenheimer*,<sup>47</sup> the agreement stated: "If Seller does not complete sale it is agreed that she will pay all accrued [sic] Costs and expenses, Seller only to be liable for such costs and expenses." Despite the buyer's claim that the clause constituted a void liquidated damages clause, the court disagreed, stating: "We think the provision was

not intended to prescribe a definite liability, i.e., liquidated damages, but is a limitation on the maximum possible recovery for actual loss or damage alleged and shown by evidence. It imposes a limitation within which damages might be proved. The validity of the condition is not open to doubt."<sup>48</sup> Thus, clauses imposing mere limitations on liability, subject to proof, as opposed to definite liability, are not considered liquidated damages.<sup>49</sup>

The lesson is that a party seeking to limit its damages ahead of time may do so in a liquidated damages clause, as long as the amount constitutes a reasonable estimate given the circumstances at the time of contracting. However, if the liquidated damages provision constitutes a penalty, the provision will not be enforced, despite the literal meaning of the agreement. Parties may also consider limiting their damages in a more open-ended limitation-on-liability clause, subject to proof.

### Waiver of Right to Trial by Jury

Many commercial real estate contracts still include predispute jury trial waivers, but these provisions are unenforceable. The exclusive methods for this type of waiver are set forth by Section 631(f) of the Code of Civil Procedure.<sup>50</sup> Although one method is waiver by express consent,<sup>51</sup> Section 631 "presupposes a pending action."<sup>52</sup> In other words,

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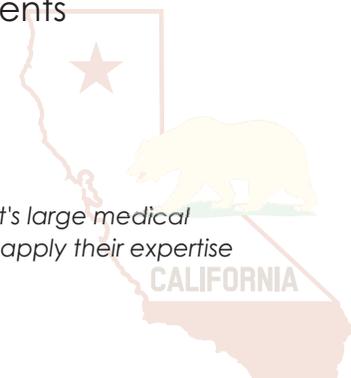
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only persons who are already parties to a pending action may enter into a waiver of jury trial as provided by statute.<sup>53</sup> As such, parties are generally prohibited from using a contract to prevent future disputes from being adjudicated by jury trial.

Parties, however, may effectively contract around a jury trial, while maintaining the procedural and substantive protections of a bench trial, by agreeing to resolve future disputes through general judicial reference. General judicial reference is a procedure by which the parties agree to submit their dispute to an appointed neutral third party who renders a binding decision. While parties can agree on modified procedural and evidentiary rules, judicial reference proceedings are conducted much like bench trials and are subject to appellate review. Referees are bound to follow applicable substantive law rather than more abstract notions of equity or fairness that may be applicable to arbitration.

A general judicial reference is initiated by agreement between the parties,<sup>54</sup> can be entered into either pre- or postdispute, and results in a decision that is binding between the parties. Courts have repeatedly held that an agreement to submit future disputes to judicial reference is enforceable, even though it acts as a predispute waiver to the right to jury trial.<sup>55</sup> Moreover, the agreement need not

expressly negate jury trial, nor need it be filed with the court.<sup>56</sup>

Judicial reference provisions, however, are subject to standard rules of contract interpretation and contract defenses, such as fraud or unconscionability.<sup>57</sup> This requires the clause to be conspicuous, plain and clear, so that it does not defeat the parties' reasonable expectations. Although the waiver of a jury trial need not be expressly stated, an agreement to submit to judicial reference must "clearly and unambiguously show that the party has agreed to resolve disputes in a forum other than the judicial one, which is the only forum in which disputes are resolved by juries."<sup>58</sup>

Common boilerplate provisions in real estate contracts are frequently not enforced in accordance with their literal meaning. In some cases, such provisions are absolutely unenforceable or may only be enforced in certain contexts. As a result, real estate lawyers and professionals should recognize the limitations of such boilerplate provisions as they negotiate and memorialize their agreements and consider alternative means to meet their objectives. ■

<sup>1</sup> Shapiro v. Hu, 188 Cal. App. 3d 324 (1986).

<sup>2</sup> See, e.g., Ryan J. Barncastle & Kenneth E. Moore, *The Fraud Exception to the Parol Evidence Rule after Riverisland*, LOS ANGELES LAWYER, Nov. 2013, at 10.

<sup>3</sup> Blankenheim v. E. F. Hutton & Co., 217 Cal. App. 3d 1463, 1471-72 (1990).

<sup>4</sup> Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486, 1500-01 (2007); see also Smith v. Rickards, 149 Cal. App. 2d 648, 653-54 (1957).

<sup>5</sup> Bank of Am. Nat. Trust & Sav. Ass'n v. Pendergrass, 4 Cal. 2d 258, 263 (1935); Julius Castle Rest. Inc. v. Payne, 216 Cal. App. 4th 1423, 1440 (2013).

<sup>6</sup> Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n, 55 Cal. 4th 1169 (2013).

<sup>7</sup> *Id.* at 1180-81.

<sup>8</sup> Julius, 216 Cal. App. 4th 1423; Thrifty Payless, Inc. v. Americana at Brand, LLC, 218 Cal. App. 4th 1230 (2013).

<sup>9</sup> Julius, 216 Cal. App. 4th at 1442.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Thrifty, 218 Cal. App. 4th at 1241.

<sup>13</sup> *Id.* at 1237.

<sup>14</sup> *Id.* at 1241-42 ("Thrifty can allege both intentional and negligent misrepresentations based upon Americana's grossly inaccurate estimates.")

<sup>15</sup> See Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486, 1489 (2007).

<sup>16</sup> CIV. CODE §1668; Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066 (2004) ("[T]he law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them.") (quoting Basin Oil Co. of Cal. v. Baash-Ross Tool Co., 125 Cal. App. 2d 578, 594 (1954); Frittelli, Inc. v. 350 N. Canon Drive, LP, 202 Cal. App. 4th 35, 43 (2011) (Any exemption from liability for negligence "is subject to the public policy disfavoring attempts by contract to limit liability for future torts."))

<sup>17</sup> Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 95-96 (1963).

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 98-100.

<sup>20</sup> Burnett, 123 Cal. App. 4th at 1066; *see also* Rooz v. Kimmel, 55 Cal. App. 4th 573 (1997); *cf.* Akin v. Business Title Corp., 264 Cal. App. 2d 153 (1968).

<sup>21</sup> Tunkl, 60 Cal. 2d at 101.

<sup>22</sup> *See* Burnett, 123 Cal. App. 4th at 1067; Frittelli, Inc. v. 350 N. Canon Drive, LP, 202 Cal. App. 4th 35, 48 (2011).

<sup>23</sup> Inglis v. Garland, 19 Cal. App. 2d Supp. 767, 769, 774 (1936).

<sup>24</sup> Butt v. Bertola, 110 Cal. App. 2d 128, 138-40 (1952).

<sup>25</sup> The exculpatory clause in *Butt* provided: "It is agreed by the parties hereto, that said Lessor shall not be liable for damages to any goods, property, or effects in or upon said demised premises, caused by gas, water, or other fluid from any source whatsoever." *Id.* at 138.

<sup>26</sup> Burnett, 123 Cal. App. 4th at 1061-62, 1065-66.

<sup>27</sup> *Id.* at 1066; Butt, 110 Cal. App. 2d at 140.

<sup>28</sup> Burnett, 123 Cal. App. 4th at 1066.

<sup>29</sup> *See, e.g.*, Frittelli, Inc. v. 350 N. Canon Drive, LP, 202 Cal. App. 4th 35, 48 (2011); Rooz v. Kimmel, 55 Cal. App. 4th 573, 587 n.7. (1997).

<sup>30</sup> Frittelli, 202 Cal. App. 4th at 43.

<sup>31</sup> *See id.* at 45.

<sup>32</sup> *Id.* at 39-40.

<sup>33</sup> Farnham v. Superior Court, 60 Cal. App. 4th 69, 72, 77 (1997).

<sup>34</sup> Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1065-66 (2004); *see also* Frittelli, 202 Cal. App. 4th at 48-49.

<sup>35</sup> CIV. CODE §§1671, 1679.

<sup>36</sup> CIV. CODE §§1670, 1671, 1676, 1677; Hong v. Somerset Assocs., 161 Cal. App. 3d 111, 115 (1984); *see also* El Centro Mall, LLC v. Payless ShoeSource, Inc., 174 Cal. App. 4th 58 (2009).

<sup>37</sup> El Centro Mall, 174 Cal. App. 4th at 63; Smith v. Royal Mfg. Co., 185 Cal. App. 2d 315, 323-24 (1960).

<sup>38</sup> CIV. CODE §1671 cmts.

<sup>39</sup> Harbor Island Holdings v. Kim, 107 Cal. App. 4th 790, 796 (2003).

<sup>40</sup> *Id.*; *see also* Fox Chicago Realty Corp. v. Zukor's Dresses, 50 Cal. App. 2d 129, 134 (1942) ("Any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty and is therefore void.").

<sup>41</sup> Fox, 50 Cal. App. 2d at 129.

<sup>42</sup> *See* Hong v. Somerset Assocs., 161 Cal. App. 3d 111, 114-15 (1984).

<sup>43</sup> Fox, 50 Cal. App. 2d at 134.

<sup>44</sup> Smith v. Royal Mfg. Co., 185 Cal. App. 2d 315, 324 (1960).

<sup>45</sup> Hong, 161 Cal. App. 3d at 115-16.

<sup>46</sup> El Centro Mall, LLC v. Payless ShoeSource, Inc., 174 Cal. App. 4th 58 (2009).

<sup>47</sup> Wheeler v. Oppenheimer, 140 Cal. App. 2d 497, 499 (1956).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Grafton Partners, L.P. v. Superior Court, 36 Cal. 4th 944, 952-56 (2005).

<sup>51</sup> *See* CODE CIV. PROC. §631(f).

<sup>52</sup> Grafton Partners, 36 Cal. 4th at 957-58.

<sup>53</sup> *Id.*

<sup>54</sup> CODE CIV. PROC. §638.

<sup>55</sup> Woodside Homes of Cal., Inc. v. Superior Court, 142 Cal. App. 4th 99, 103-04 (2006).

<sup>56</sup> *Id.* at 104 ("A statute permitting agreement for a reference unambiguously results in a waiver of 'jury trial' without the need to use those words."); O'Donoghue v. Superior Court, 219 Cal. App. 4th 245, 256 (2013).

<sup>57</sup> *See* Badie v. Bank of Am., 67 Cal. App. 4th 779, 787-90 (1998); O'Donoghue, 219 Cal. App. 4th at 258-61.

<sup>58</sup> O'Donoghue, 219 Cal. App. 4th at 257-58.

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