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John B. Thurman Jr.

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## EFFECT OF EXCULPATORY CLAUSES UNDER THE FEDERAL TORT CLAIMS ACT

The effect of an exculpatory clause<sup>1</sup> in a federal contract was the subject of two recent cases brought against the government under the Federal Tort Claims Act.<sup>2</sup> In *United States v. Kelly*<sup>3</sup> the subject of the contract was the sale of "edible garbage," and the contract provided that the garbage was sold "as is"<sup>4</sup> and "without recourse" against the government,<sup>5</sup> and that in any case where the liability of the government was established, the recovery would be limited to the contract price.<sup>6</sup> In *Air Transport Associates v. United States*<sup>7</sup> the subject of the contract was the use by plaintiff's commercial transports of an airfield owned and operated by the government. The contract contained a provision which purported to release the government from all future liability for the negligence of its employees. The plaintiff in

1. Technically, all agreements which exempt a person from future liability for the harmful consequences of his own negligence may be classed as exculpatory clauses. However, the term is used in this discussion to describe a clause of a contract which either exempts or limits the liability of one of the parties for his failure to use due care in the performance of the contract. See note 5 *infra*. The term will also be used to apply to provisions in warranties, similar to the "without recourse" clause in the *Kelly* case (see note 4 *infra*), which may be construed as including negligence within their terms; these are similar to the "pure" exculpatory clause. *Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335, 353-62 (N.D. Iowa 1955) (an excellent analysis of the language necessary to relieve a party from liability for negligence); *Shafer v. Reo Motors*, 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd*, 205 F.2d 685 (3d Cir. 1953) (both opinions discuss the effect of the "Standard Warranty" which relieves defendant from "all other obligations or liabilities").

The distinction between a release, executed by plaintiff after the claim has arisen in favor of one of several joint tortfeasors, and an exculpatory clause, executed prior to the negligence of the defendant, must be kept in mind.

2. 28 U.S.C.A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1950).

3. 236 F.2d 233 (8th Cir. 1956).

4. The provision that the goods are sold "as is" prevents representations made by the seller from constituting express or implied warranties, even though the buyer relied thereon; however, the provision does not affect the seller's obligation to deliver goods which comply with the description of the property—that is, since the government sold "edible garbage," it must deliver "edible garbage." 46 Am. Jur., *Sales* § 319 (1943).

5. The "as is" clause read as follows:

"All property listed herein is offered for sale 'as is' and 'where is', and without recourse against the Government. \*\*\* The description is based on the best available information, but the Government makes no guaranty, warranty, or representation, expressed or implied, as to the quantity, kind, character, quality, weight, size or description of any of the property, or its fitness for any use or purpose, and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected; this is not a sale by sample." Brief for Appellant, p. 2, *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956).

6. The "Limitation on Government's Liability" clause read as follows:

"In any case where liability of the Government to the purchaser has been established, the extreme measure of the Government's liability shall not, in any event, exceed the refund of the purchase price or such portion thereof as the Government may have received." Brief for Appellant, p. 2, *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956).

7. 221 F.2d 467 (9th Cir. 1955).

the *Kelly* case, who used the garbage as feedstuff on his farm, alleged that the government negligently delivered contaminated garbage to him and that as a result several of his cattle died from lead poisoning.<sup>8</sup> The plaintiff in the *Air Transport* case alleged that the government was negligent in instructing the plaintiff's transport to land on a runway on which a government truck was stalled at night without lights, causing the transport to collide with the truck. In both cases the government contended that the contractual provisions operated to bar recovery by plaintiffs;<sup>9</sup> in both cases the appellate court allowed plaintiffs to recover. The contract provisions in the *Kelly* case were held to be inapplicable to a tort action for negligence,<sup>10</sup> but the court did not indicate whether they were applying state or federal law. The exculpatory clause in the *Air Transport* case was held invalid as against public policy under the law of the state where the contract was made *and* where the negligent act occurred.

The Federal Tort Claims Act provides that the United States shall be liable for all claims caused by the negligence of any of its employees while acting within the scope of their employment "in the same manner and to the same extent as a private individual under like circumstances,"<sup>11</sup> and "in accordance with the law of the place where the act or omission occurred."<sup>12</sup> The federal district courts are given jurisdiction over all such claims.<sup>13</sup> While it is now well-settled that the Act adopts local law to determine the liability of the government,<sup>14</sup> the extent to which local law must be applied to other issues presented in the case is not clear,<sup>15</sup> and this is of peculiar significance where re-

8. The plaintiff, believing the substance was plaster and that it might damage the container in which he cooked the garbage before feeding it to his hogs, emptied the contaminated garbage in a pasture, and some of his cattle ate the garbage.

9. In the *Kelly* case the government also contended (1) that plaintiff's contributory negligence in emptying the contaminated garbage in his pasture was an efficient intervening cause, and (2) that plaintiff had assumed the risk by his failure to complain when other foreign matter had been found in the garbage and by his execution of the contract containing the disclaimer of warranties. Brief for Appellant, pp. 8-15, *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956).

10. *But see* *Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335 (N.D. Iowa 1955); *Shafer v. Reo Motors*, 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd*, 205 F.2d 685 (3d Cir. 1953).

11. 28 U.S.C.A. § 2674 (1950).

12. *Id.* § 1346(b) (1950).

13. *Id.* § 1346 (1950).

14. "[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). See also *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), 9 VAND. L. REV. 882 (1956). For a discussion of which state law is to be applied under the Federal Tort Claims Act, see 9 VAND. L. REV. 83 (1955).

15. See Gottlieb, *State Law Versus a Federal Common Law of Torts*, 7 VAND. L. REV. 206 (1954); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 890-91 (1957); 10 VAND. L. REV. 450 (1957).

covery for the tort depends upon the validity of an exculpatory clause in a government contract. The presence of the exculpatory clause presents questions of whether federal or local law is to be applied, and the answers to these questions depend in large part upon the answer to the question of whether the clause is a matter of contract or tort law.

Normally the clause will appear in a contract which has some other purpose as its main object, but which creates and defines a legal relationship between the parties.<sup>16</sup> Obviously the validity of the contract in which the clause is found must be established by the principles of contract law before the exculpatory clause can have any validity itself. Assuming the validity of the contract, the creation of the legal relationship, as distinguished from the purely contractual relationship, gives rise to certain obligations and duties imposed by operation of the law without regard to the intention of the parties and which are independent of the contract.<sup>17</sup> Perhaps the most important of these duties is the duty to use care in the performance of the contract.<sup>18</sup> In general it may be said that the breach of this duty may be the subject of either a tort or contract action;<sup>19</sup> however, a distinction is drawn between misfeasance, for which either action will lie, and nonfeasance, for which the contract action alone is available.<sup>20</sup> The election of remedy by the plaintiff may settle the question of whether contract or tort law will be applied in an action for breach of this duty.<sup>21</sup> On the other hand, if the point at issue is one of substance, the court may look to the "gravamen" of the action to determine which of two inconsistent rules of law is applicable, refusing to allow an election. It would seem that in cases involving personal injuries there is a tendency to look to the misconduct and the injury as the gist of the action and to apply the tort law, but where the damage is to property only, the plaintiff is usually given his election.<sup>22</sup> Further, there is almost unanimous accord to the proposition that the contract of an infant cannot be enforced against him indirectly by suing in tort;<sup>23</sup> and in the case of a private

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16. See Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248 (1937); Comment, *Contracting Against Liability for Negligent Conduct*, 4 MO. L. REV. 55 (1939); Comment, *Exculpatory Clauses: The Historical Impact of Common-Carrier Law and the Modern Relevancy of Insurance*, 24 U. CHI. L. REV. 315 (1957); Annot., 175 A.L.R. 8 (1948). See also note 24 *infra*.

17. See note 16 *supra*.

18. *Kenny v. Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925).

19. PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380, 384-87, 406-07 (1954).

20. See PROSSER, *op. cit. supra* note 19, at 387-422 for a discussion of the confusion which surrounds the distinction between misfeasance and nonfeasance.

21. *Id.* at 429-50, and cases collected therein.

22. *Ibid.*

23. See cases collected in PROSSER, *op. cit. supra* note 19, at 447 n.296.

contract for transportation, tort liability has been found.<sup>24</sup> Prior to the enactment of the Tort Claims Act, the Supreme Court held that the breach of the government's duty to use care was actionable under the Tucker Act,<sup>25</sup> which permitted claims based on contracts not sounding in tort.<sup>26</sup>

The purpose of the exculpatory clause is to exempt one of the parties from liability for his breach of the implied obligation to use due care in the performance of the contract.<sup>27</sup> Assuming the validity of the clause,<sup>28</sup> it is, in effect, a means of distributing the risk of

24. *McClure v. Johnson*, 50 Ariz. 76, 69 P.2d 573 (1937). See discussion in PROSSER, *op. cit. supra* note 19, at 407-11.

25. 28 U.S.C.A. § 1491 (1949).

26. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939). The Court said that although the common-law fiction of waiving the tort and suing in assumpsit could not be used to evade the limitations of the Act, the breach of this implied duty was derived from an undertaking and came within the scope of the Act.

27. See notes 14 and 16 *supra*.

28. An exculpatory agreement exempting a party from liability for an intentional tort, for either wilful and wanton or gross negligence, or for liability imposed by statute is generally held void. RESTATEMENT, CONTRACTS § 575(1) (1932); 6 WILLISTON, CONTRACTS §§ 1751, 1751B (rev. ed. 1938).

Although some courts hold that an exculpatory clause is invalid per se as against public policy [See *Kaylor v. Magill*, 181 F.2d 179 (6th Cir. 1950) (court purports to apply Tennessee law)], the prevailing rule is that an exculpatory clause exempting one from the consequences of his "ordinary negligence" is valid. *Thomas v. Atlantic Coast Line R.R.*, 201 F.2d 167 (5th Cir. 1953); *Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335 (N.D. Iowa 1955); *Maryland Cas. Co. v. Owens-Illinois Glass Co.*, 116 F. Supp. 122 (S.D. W. Va. 1953); *Shafer v. Reo Motors*, 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd*, 205 F.2d 685 (3d Cir. 1953); *Bigelow, Kennard & Co. v. Boston*, 254 Mass. 53, 149 N.E. 540 (1925); RESTATEMENT, CONTRACTS § 574 (1932). Where, however, certain relationships are found to exist, the clause may be invalid either as against public policy or because the law will protect those in need of goods and services from being overreached by others who have power to drive hard bargains. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). These relationships may be classified as follows: (1) Where one of the parties has a greater responsibility than an ordinary person—6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938); (2) Where one party, by virtue of unequal bargaining power inherent in the transaction must accept what is offered or be deprived of the advantages of the relationship—Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248 (1937); Annot., 175 A.L.R. 8, 15-20 (1948) (the annotator advances the argument that this is the most important factor in declaring exculpatory contracts void); (3) Where the exemption from liability would lead to conduct injurious to third parties—6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938); (4) Where one party is charged with a duty of public service and the clause relates to negligence in the performance of any part of its duty to the public—*Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) (common carrier-towage contract); 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1938) refers to relationship which involves a status requiring of one party greater responsibility than that required of the ordinary person); RESTATEMENT, CONTRACTS § 575 (1)(b) (1932); Comment, *Exculpatory Clause: The Historical Impact of Common-Carrier Law and the Modern Relevancy of Insurance*, 24 U. CHI. L. REV. 315 (1957). When the party engaged in a public service is acting in his private capacity, the exculpatory contract will be upheld. *Thomas v. Atlantic Coast Line R.R.*, 201 F.2d 167 (5th Cir. 1953) (common carrier acting in private capacity as lessor).

negligence by contract, and it will bar recovery even in a tort action,<sup>29</sup> apparently on the theory that the action is "founded upon" the contract or that the tort duty itself is modified by the agreement.<sup>30</sup> It would seem, therefore, that an exculpatory clause may be treated either as a matter of contract or tort law.<sup>31</sup>

If the courts look to contract law to determine the validity of the exculpatory clause, the subsequent question of whether federal or state contract law should be applied must be decided. In *United States v. Allegheny County*,<sup>32</sup> the Supreme Court said:

The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.<sup>33</sup>

This was, to a certain extent, a reiteration of its holding in *Clearfield Trust Co. v. United States*,<sup>34</sup> in which the Court held a "federal law merchant" applicable to the commercial paper of the United States. In applying the doctrine that federal law is applicable to government contracts, the courts have not departed to a great extent from the general principles of contract law which govern contracts between private persons.<sup>35</sup> It should be noted that even where the commercial paper of the government is involved, if the litigation is purely between private parties and does not touch the rights and duties of the United States, the Supreme Court will refuse to apply the federal law.<sup>36</sup> On the other hand, one court, relying on the doctrine of *Erie R.R. v. Tompkins*,<sup>37</sup> has held that the validity of an exculpatory clause in favor of a federal agency must be determined by application of the

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29. See *Maryland Cas. Co. v. Owens-Illinois Glass Co.*, 116 F. Supp. 122, 124 (S.D.W. Va. 1953) (indicating that as between buyer and seller, the parties may distribute the risks of negligence as they please).

30. Prosser, *op. cit. supra* note 19, at 445-46. See *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) (action for breach of duty to use care in performance of contract allowed under Tucker Act, 28 U.S.C.A. § 1491 (1949), which permitted suits for claims based upon contracts not sounding in tort); 9 WILLISTON, CONTRACTS §§ 196, 201 (rev. ed. 1945).

31. In *Lindsay v. Chicago, B. & Q.R.R.*, 226 Fed. 23 (7th Cir. 1915), the court applied the tort conflict of laws rule to determine what state law was applicable to an exculpatory clause, and held that its validity as a defense in an action in tort is governed by the law of the place of injury rather than the place of the contracting.

32. 322 U.S. 174 (1944).

33. *Id.* at 183. See *Developments in the Law*,—*op. cit. supra* note 15, at 875-87.

34. 318 U.S. 363 (1943). See *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956).

35. 9 WILLISTON, CONTRACTS § 195 (rev. ed. 1945) (the fact that one of the parties is a sovereign requires some distinctions between the law governing federal contracts and that governing purely private contracts).

36. *Bank of America Nat'l Trust and Sav. Ass'n v. Parnell*, 352 U.S. 29, 35 (1956).

37. 304 U.S. 64, 114 A.L.R. 1487 (1938).

substantive law of the state in which the contract was made.<sup>38</sup> However, the more recent decisions indicate that government contracts are to be interpreted by federal law,<sup>39</sup> apparently on the ground that a uniform law is needed to avoid confusion, uncertainty and indefiniteness which would result if the contracts were to be governed by local law.<sup>40</sup>

Another approach which the courts might take is to treat the exculpatory clause as a matter of tort law, similar to the treatment of the defenses of consent and assumption of risk. Logically, it would seem that this approach would require the application of local law to determine the validity of the exculpatory clause as a defense in a tort action. The clause could be considered as a part of the test of the liability of the government.<sup>41</sup> In *Rayonier Inc. v. United States*<sup>42</sup> the Supreme Court noted that the test established by the Act is "whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred."<sup>43</sup> In other words, if an exculpatory clause could be asserted as a defense by a private person, the United States would be able to plead the clause as a defense. The hesitancy among the federal courts to establish a federal common law of torts would be a factor tending to support this approach.<sup>44</sup>

Finally, it is possible that even if the validity of the exculpatory clause is to be determined by contract law, the Federal Tort Claims Act may be interpreted as adopting the local law of the state in which the act or omission occurred. This approach is, therefore, a matter of statutory interpretation.<sup>45</sup> The liability of the government is identified with that of a private person "under like circumstances,"<sup>46</sup> and this latter phrase may be interpreted broadly to include within its terms all

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38. *Keifer & Keifer v. Reconstruction Finance Corp.*, 97 F.2d 812 (8th Cir. 1938), *rev'd on other grounds*, 306 U.S. 381 (1939) (unfortunately the Court did not reach the question of whether a federal contract law or state law should be applied).

39. *Pofcher, The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 LA. L. REV. 37 (1951).

40. The reasoning behind the application of a federal common law of contracts is summed up in the dissent of Justices Black and Douglas in *Bank of America Nat'l Trust and Sav. Ass'n v. Parnell*, 352 U.S. 29, 35 (1956).

41. See *Lindsay v. Chicago, B. & Q.R.R.*, 226 Fed. 23 (7th Cir. 1915) (indicating that the rules of tort law are applicable to an exculpatory clause where it is pleaded as a matter of defense).

42. 352 U.S. 315 (1957).

43. *Id.* at 319.

44. *Williams v. United States*, 350 U.S. 357 (1955); *United States v. Taylor*, 236 F.2d 649 (6th Cir. 1956), 10 VAND. L. REV. 450 (1957).

45. There is authority which would support strict construction of the FTCA, *Feres v. United States*, 340 U.S. 135 (1950), and authority which would support a liberal interpretation, *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366 (1949). *Rayonier Inc. v. United States*, 352 U.S. 315 (1957) may be an indication that the Court is going to continue to construe the Act liberally.

46. 28 U.S.C.A. § 2674 (1950).

local law applicable to the case. It has been held that under this phrase local law is to be used in determining the effect of a release executed in favor of a joint tortfeasor after the claim has arisen.<sup>47</sup>

In one case brought under the Act the validity of the exculpatory clause was in question. The court held that state law must be applied to determine the validity of the clause contained in a federal housing authority lease and summarily dismissed the plaintiff's contention that the clause was against the public policy of the United States.<sup>48</sup>

Local law was applied in one of the principal cases, the *Air Transport* case, to determine the validity of the exculpatory clause, although the court did not indicate whether it considered the validity of the clause a matter of contract or tort.<sup>49</sup> It was able to get around a troublesome question of conflict of laws by finding that the law of the place where the act occurred and the law of the place where the contract was made were to the same effect.<sup>50</sup> Furthermore, the court relied upon *Rushford v. United States*<sup>51</sup> as authority for its use of local law.<sup>52</sup> That case, however, dealt with a release executed in favor of a joint tortfeasor, and there would seem to be a vital distinction between a release of this type and an exculpatory clause. The *Kelly* case, on the other hand, does not indicate what law it is purporting to apply,<sup>53</sup> although the concurring judge talks in terms of "doubtful questions of local law as to which the trial court reached a permissible conclusion."<sup>54</sup>

Each of these approaches is supported by some authority, and each of them presents a solution to the problem. It is submitted that the court should determine which approach it will take by weighing certain policy arguments. The desirability of adopting local law to determine the rights and obligations of parties to a government contract is questionable; indeed, the benefits to be gained from uniform interpretation of government contracts should be a prime considera-

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47. *Rushford v. United States*, 204 F.2d 831, 832 (2d Cir. 1953) ("it is plain that Congress meant to make the proper state law in all respects the model for the liabilities it consented to accept; and that the 'circumstances' included as much those facts that would release a liability once arisen, as those on which its creation depended.").

48. *Schetter v. United States*, 136 F. Supp. 931 (W.D. Pa. 1956). Apparently the court did not consider the questions raised by the use of an exculpatory clause as a defense in a tort action.

49. 221 F.2d at 471.

50. *Id.* at 472.

51. 204 F.2d 831 (2d Cir. 1953).

52. 221 F.2d at 471. Since the Act specifically adopts the law of the place where an accident occurs as the law with which liability is to be determined, the court reasoned that this adoption applied also to the release from liability.

53. The only indication that the *Kelly* case might be thinking in terms of federal law is the fact that in dealing with the limitation of damages clause, the court referred only to federal court decisions. 236 F.2d at 237.

54. *Id.* at 237.



tion.<sup>55</sup> Much confusion and uncertainty will be avoided by applying a federal rule to exculpatory clauses, particularly in view of the divergence of local law.<sup>56</sup> Furthermore, troublesome and needless questions of conflict of laws will be eliminated. In addition to the argument in favor of uniformity, it must be remembered that exculpatory clauses present serious questions of public policy, and where the clause is contained in a government contract the public policy questions may be stronger than in ordinary contracts. As the court of claims pointed out in *Ozark Dam Constructors v. United States*,<sup>57</sup> the government is buying immunity by requiring bidders on public contracts to increase their bids to cover the contingency of damages caused by the negligence of government employees.<sup>58</sup> Further, it may be argued that Congress, by the enactment of the Federal Tort Claims Act, has established a public policy in favor of governmental liability for claims based upon the negligence of government employees, and the executive department should not be allowed to contract away the very liability for which Congress has consented to be charged. In conclusion it is submitted that the better approach would be to apply a uniform federal rule to determine the validity of exculpatory clauses in government contracts without regard to the form of action.

JOHN B. THURMAN, JR.

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55. On the other hand, it has been said that Congress adopted state law to define governmental liability in order "to achieve within each state a uniformity of rights of plaintiffs whether the defendant be a private person or the Government." *Developments in the Law, supra* note 15, at 890.

56. See note 24 *supra*.

57. 130 Ct. Cl. 354, 127 F. Supp. 187 (1955).

58. *Id.* at 359, 127 F. Supp. at 190. The court refused to find that the "non-liability" provision provided for immunity for liability where the negligence of the government approached wilful and wanton misconduct. It is entirely possible that this case may be relied upon for a federal rule against the validity of exculpatory contracts in favor of the government.