

## January 2005 Property Law Column

### Exculpatory Provisions in Commercial Leases Not an Absolute Defense

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In *Burnett v. Chimney Sweep*, 2004 WL 2445249, the Second District Court of Appeal considered whether exculpatory clauses in a commercial lease preclude a lessor's liability for toxic mold on the leased premises under a negligence theory.

#### Background

George and Marie Burnett (the "Burnetts") agreed to lease a commercial space (hereinafter "Premises") from Chimney Sweep, LLC ("Chimney Sweep") in a hotel in Solvang, California. The commercial lease term commenced on September 1, 1998. The lease expressly permitted the Burnetts to use the Premises as a "gift shop and hotel convenience shop". Shortly thereafter, the Burnetts began doing business on the Premises under the name Beau Monde Perfumes.

Upon moving into the Premises in 1998, the Burnetts had observed water stains on the back wall and ceiling. Later, between April and September of 2001, the Burnetts discovered excessive moisture, mildew growth, and mold on the Premises. Although the Burnetts immediately notified Chimney Sweep of this "dangerous condition", Chimney Sweep refused to repair it.

The Burnetts sought to recover substantial damages to their business inventory and belongings which had been affected and contaminated by toxic mold. The moisture, mildew and mold ultimately prevented the Burnetts from conducting their business at the Premises. Additionally, the Burnetts alleged that they had sustained severe physical discomfort as a result of the toxic airborne spores and severe emotional and mental distress.

On April 5, 2002, the Burnetts sued Chimney Sweep, alleging seven causes of action: premises liability, general negligence, breach of contract, negligent maintenance of premises, negligence maintenance of nuisance, intentional infliction of emotional distress, and conversion.

#### Trial Court Ruling

The trial court granted Chimney Sweep's motion for judgment on the pleadings, relying on paragraphs 8.4 and 8.8 of the commercial lease. The commercial lease's exculpatory provision, paragraph 8.8, was entitled "Exemption of Lessor from Liability," and provided in

pertinent part:

**Lessor shall not be liable for injury or damage to the person or goods, wares, merchandise, or other property of Lessee, ...whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, air-conditioning or lighting fixtures, or from any other cause, whether said injury or damage results from conditions arising upon the Premises or upon other portions of the building of which the Premises are a part, from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is accessible or not: notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.**

Paragraph 8.4 of the lease required the Burnetts to maintain "full replacement cost" insurance coverage on their personal property.

### **Appellate Decision**

The Burnetts appealed, contending, *inter alia*, judgment on the pleadings was erroneously granted. The appellate court began its analysis by addressing the Burnetts' contention that the exculpatory language of paragraph 8.8 of the commercial lease affects "the public interest" because, the Burnett's argued, the remediation of toxic mold "is unquestionably a matter of current and intense public interest." *Burnett, supra*, at \*4. The appellate court disagreed. Although the Burnetts were correct that an exculpatory clause "may stand only if it does not involve 'the public interest'" (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 96), the appellate court was unpersuaded that such a dynamic was present here, as "a [commercial] lease is a matter of private contract between the lessor and the lessee with which the general public is not concerned." *Burnett, supra*, at \*4, citing *Inglis v. Garland* (1936) 19 Cal.App.2d Supp. 767, 773.

However, the appellate court determined that Chimney Sweep's liability could not be resolved in this matter solely because the exculpatory clause had no impact upon the public interest, as "the 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 persons relying upon them. [Citations.]" *Burnett, supra*, at \*4, quoting from *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 594. The court explained that "[f]or an agreement to be construed as precluding liability for 'active' or 'affirmative' negligence, there must be express and unequivocal language in the agreement which precludes such liability. [Citations.] An agreement which seeks to limit generally without mentioning negligence is construed to shield a party only for passive negligence, not for active negligence. [Citations.]" *Burnett, supra*, at \*4, citing *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 933.

The determination of whether the commercial lease's exculpatory clause covered the alleged negligence by Chimney Sweep turned primarily on contractual interpretation, *i.e.*,

whether or not the intent of the parties as expressed in the agreement affords the protection for negligence Chimney Sweep contends the Burnetts agreed to. *Burnett, supra*, at \*4 citing *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 632.

Here the first portion of exculpatory clause of paragraph 8.8 that shielded Chimney Sweep from liability for property damage or personal injury did not specifically mention negligence. Therefore, under *Salton Bay Marina, supra*, this provision was construed as shielding Chimney Sweep from liability "only for passive negligence, not for active negligence." *Burnett, supra*, at \*5 citing *Salton Bay Marina, supra*, 172 Cal.App.3d at 933. Only the second portion of paragraph 8.8, that purported to shield Chimney Sweep from liability for lost profits, specifically mentioned negligence. In any event, the court concluded: "Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact." *Burnett, supra*, at \*5, quoting *Rossmoor Sanitation, supra*, 13 Cal.3d at 629.

Based on the allegations in Burnetts' complaint, the court of appeal determined "Chimney Sweep was actively negligent in refusing to remediate the problems caused by the excessive moisture and mold infestation on the premises."

Chimney Sweep contended it had no duty to take remedial action because the commercial lease imposed the duty to "keep the premises and every part thereof in good order, condition and repair..." on the Burnetts. The appellate court was careful to acknowledge that the excessive moisture may have been due to a leak from an area of the hotel solely *under* Chimney Sweep's control, *i.e.*, the roof, a hotel room, or a common area – whereupon the mold may have migrated onto the Premises. *Burnett, supra*, at \*5. Accordingly, the court of appeal held these are factual issues that cannot be resolved on a motion for judgment on the pleadings: "In these circumstances, it cannot be said as a matter of law that the exculpatory clause shields Chimney Sweep from liability." *Burnett, supra*, at \*5, citing *Butt v. Bertola* (1952) 110 Cal.App.2d 128, 138-140.

The court additionally held that the scope of the exculpatory clause was unaffected by paragraph 8.4 of the lease which required the Burnetts to maintain insurance coverage on their personal property on the Premises. The court recognized that "[n]othing in the lease suggests that, if Chimney Sweep's active negligence caused damage to appellant's personal property, their sole recourse would be to file a claim with their insurance company." *Burnett, supra*, at \*6.

## CONCLUSION

The *Burnett v. Chimney Sweep* decision illustrates the importance that parties fully and specifically articulate the respective risks distributed among them in commercial leases and, once a dispute arises, carefully analyze the lease's express provisions. Here, the appellate court identified a valuable tool for plaintiffs' attorneys seeking to defeat exculpatory clauses. Moreover, *Burnett* illustrates that commercial lessors who refuse to take appropriate steps to maintain and repair their premises, with knowledge of foreseeable injuries to a tenant's property, do so at their peril.