

WAIVER & INDEMNIFICATION IN COLORADO RESIDENTIAL LEASE AGREEMENTS – WHEN ARE THEY ENFORCEABLE?

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As we enter another snowy March in Colorado, businesses and homes throughout the state will continue to experience heavy snow, ice, and rain. Although the snow may be beneficial to those who prefer to hit the slopes in the last few weeks of the season, the heavy snow and ice may pose a liability to landlords. Recently, some landlords have even begun to include an explicit exculpatory agreement in residential lease agreements, in which the tenant explicitly gives up the right to sue the landlord for any personal injuries caused by snow or ice on the premises. However, such indemnification agreements and waivers may not be enforceable under Colorado law, and may not ultimately provide any protection from liability for slips, trips, and falls caused by snow and ice on the property.

Indemnification

Under Colorado law, courts treat indemnification clauses in residential lease agreements more stringently than commercial lease agreements. Courts typically enforce indemnification clauses in commercial lease agreements as written. [1] However, indemnifications in standard form residential lease agreements are very rarely enforceable. [2]

Colorado has a long history of regulating the landlord-tenant relationship. Tenants do not have the ability to correct hazardous conditions in common areas, and tenants typically do not have the power, knowledge, or ability to negotiate the terms of the lease agreement. As such, exculpatory clauses indemnifying a residential landlord's negligence in maintaining common areas are void due to public policy reasons. [3]

The above analysis is particularly relevant in cases involving an injury in a "common area" outside the direct control of the lessee, and in cases where plaintiff seeks relief under a theory of premises liability. [4] Courts have additionally upheld this analysis broadly, holding some residential indemnification agreements void even where the resident had experience with property contracts and sought a lease with limited intervention from the landowner. [5] Colorado courts have applied this analysis to all residential lease agreements involving an indemnification clause regardless of the exact language. Colorado courts have strictly refused to apply indemnification agreements found in residential leases. Landlords will likely not be able to escape snow and ice liability, even if the tenant explicitly indemnified the landlord against the same.



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Waiver

In dealing with a waiver found in a residential lease agreement, Colorado courts apply a standard similar to the standard discussed above regarding the enforceability of indemnification agreements in residential leases. The Court in *Jones v. Dressel* provided four factors to determine the enforceability of an exculpatory agreement: (1) “the existence or nonexistence of a duty to the public;” (2) “the nature of the service performed;” (3) “whether the contract was fairly entered into;” and (4) “whether the intention of the parties is expressed in clear and unambiguous language.” [6] Courts construe an exculpatory agreement narrowly to ensure it was “fairly entered into and that the intention of the parties is expressed in clear and unambiguous language.” [7] Generally, courts uphold waivers if they are narrowly tailored and clearly written.

However, Colorado courts have found businesses providing “essential public services” may not protect themselves from claims of negligence. [8] Such services include but are not limited to water, electricity, or sanitary services. [9] The Colorado Court of Appeals has held residential housing is an “essential service,” and as such, waivers and exculpatory clauses in residential leases are unenforceable for policy reasons. [10] Colorado courts have traditionally applied the same analysis to waivers found in residential leases as they have to indemnification clauses in residential leases; due to the unequal bargaining power of the parties, no form of waiver, indemnification, or exculpatory agreement is generally enforceable in a residential lease. This means snow and ice waivers and indemnification agreements alike are unlikely to be enforced when part of a residential lease agreement.

Takeaway

Whether an exculpatory agreement in a residential lease is phrased as an indemnification agreement or a waiver, it will be difficult to enforce under Colorado law. Prior to drafting a residential lease agreement containing an exculpatory clause, speak with a lawyer who may be able to assist in crafting the language delicately in accordance with Colorado law. Do not rely solely on indemnification or waiver provisions in a residential lease to protect your business from potential liability.

[1] *Constable v. Northglenn, LLC*, 248 P.3d 714 (Colo. 2011).

[2] See *Stanley v. Creighton Co.*, 911 P.2d 705 (Colo. App. 1996).

[3] *Sanders v. Terrace Park, LLLP*, No. 2017CV031616, 2018 WL 3674028, at *1 (Colo.Dist.Ct. June 04, 2018).

[4] *Michael CRAPSEY, Plaintiff, v. Rick NEWMAN dba G.A.T.E. LLC., Defendant.*, No. 2002CV02, 2003 WL 25429803 (Colo.Dist.Ct. Dec. 31, 2003).

[5] *Djukic v. Murphy*, No. 2018CV030204, 2018 WL 8300145, at *5 (Colo.Dist.Ct. Dec. 04, 2018).

[6] *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981).

[7] *Raup v. Vail Summit Resorts, Inc.*, 233 F.Supp.3d 934, 942 (D. Colo. 2017) (quoting *Jones*, 623 P.2d at 376).

[8] *Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150, 1152-53 (10th Cir. 2016).

[9] *Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150, 1152-53 (10th Cir. 2016).

[10] *Stanley v. Creighton Co.*, 911 P.2d 705 (Colo. App. 1996).

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