

Just what is "Gross Negligence"?



Tom Kearns, Olshan Frome Wolosky

held a home inspector liable for missing a hazardous condition. *Johnson v. Smith* (Jefferson Co. 2006). However, other New York decisions define gross negligence as a "reckless indifference to the rights of others." In *Kalisch-Jarcho v. City of New York* (1983), the city continuously delayed a contractor from performing a contract with a "no-damage-for-delay" clause. The court held that the plaintiff was entitled to a trial to determine whether the city acted so recklessly as to be grossly negligent, thereby vitiating the no-damages clause on policy grounds.

The New York opinions described involved defendants trying to avoid jury trials. In 1993, the court held that an alarm company was not liable for gross negligence granting summary judgment, i.e. the defendant avoided a jury trial. In *Colnaghi, U.S.A. v. Jewelers Protection Services*, the alarm company forgot to alarm a skylight in a gallery. Burglars entered through the vulnerable skylight and stole 23 paintings. The court held that failing to wire the skylight was not for a jury to decide - it was clear that it was not so grossly negligent as to overcome the contractual exculpation on negligence.

As a practical matter, should you let your lawyer fight for a gross negligence standard in your contract? Yes. It does make a difference but it may not help you avoid a jury trial. Alternatively, just get the best insurance you can and hope a jury sees it your way.

Tom Kearns is a partner at Olshan Frome Wolosky, New York, N.Y.

Management and service contracts and LLC Agreements all have indemnification and waiver-of-liability clauses to protect the parties, depending on custom and the market. The classic example is a property management agreement under which the property owner indemnifies for claims arising under the manager's duties. Invariably, there are carve-outs from the owner's duty to indemnify, e.g., the owner typically does not indemnify a manager's intentional wrongdoing. Managers' lawyers usually ask that any carve-out for negligence of the manager be limited to his "gross negligence."

In New York and Delaware, the use of the term "gross negligence" makes a difference. However, the standard may not help the accused avoid a jury since the determination of whether an act or omission was negligent or grossly negligent is one for a jury. Courts in both states often describe it as closer to willful conduct than mere heightened negligence and acts of aggravated character rather than a failure to exercise ordinary care.

First, Delaware has a consistent view of the "gross negligence" standard:

"a higher level of negligence representing an extreme departure from the ordinary standard of care. . . . [and] involves a devil-may-care attitude or indifference to duty amounting to recklessness. . . . [A] plaintiff must plead and prove that the defendant was recklessly uninformed or acted outside the bounds of reason."

Metropolitan Life Ins. Co. v. Tremont Gp. Holdings, Inc. [Del Ch 2012]. Delaware law is important because most LLCs in New York transactions are organized under Delaware law and LLC agreements often have indemnification provisions favoring the managing member.

New York decisions vary based on the equities of the situation. For example, a court held a home inspector liable for missing a hazardous condition. *Johnson v. Smith* (Jefferson Co. 2006). However, other New York decisions define gross negligence as a "reckless indifference to the rights of others." In *Kalisch-Jarcho v. City of New York* (1983), the city continuously delayed a contractor from performing a contract with a "no-damage-for-delay" clause. The court held that the plaintiff was entitled to a trial to determine whether the city acted so recklessly as to be grossly negligent, thereby vitiating the no-damages clause on policy grounds.

The New York opinions described involved defendants trying to avoid jury trials. In 1993, the court held that an alarm company was not liable for gross negligence granting summary judgment, i.e. the defendant avoided a jury trial. In *Colnaghi, U.S.A. v. Jewelers Protection Services*, the alarm company forgot to alarm a skylight in a gallery. Burglars entered through the vulnerable skylight and stole 23 paintings. The court held that failing to wire the skylight was not for a jury to decide - it was clear that it was not so grossly negligent as to overcome the contractual exculpation on negligence.

As a practical matter, should you let your lawyer fight for a gross negligence standard in your contract? Yes. It does make a difference but it may not help you avoid a jury trial. Alternatively, just get the best insurance you can and hope a jury sees it your way.

Tom Kearns is a partner at Olshan Frome Wolosky, New York, N.Y.