# Proving Gross Negligence to Overcome Limitations of Liability

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## PROVING GROSS NEGLIGENCE TO OVERCOME LIMITATIONS OF LIABILITY

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In today's business climate, limitation of liability clauses abound. In making purchases or ordering services, the chances are good that you have agreed to limit someone's liability in a transaction. Of course, when something goes wrong these seemingly innocuous -- or camouflaged -- clauses can come back to haunt us. This is especially true in the subrogation and recovery field. Many of us have encountered claims with waivers of subrogation or other limitation of liability clauses which can enable the responsible party to evade liability.

### Common Limitation of Liability Clauses

Limitation of liability clauses are common in transactions involving the sale of goods. The fine print at the bottom (or back) of the invoice/receipt often contains language limiting the injured buyer's remedy to the cost of the goods.

Service contracts also may contain limitation of liability clauses. Alarm monitoring contracts, for example, typically contain language limiting the monitoring company's liability to a nominal sum.

Many leases or contracts between sophisticated entities contain waiver of subrogation clauses. The construction industry, for example, frequently uses standard AIA forms containing these waivers.

In addition, many jurisdictions have statutes, or tariffs, limiting the liability of public utilities for a service interruption or power surges/spikes. Although your insureds do not negotiate these tariffs, they may nevertheless limit the liability of potentially responsible parties.

### Gross Negligence Exception

Many jurisdictions will enforce these limitations of liability clauses unless the party at fault is grossly negligent. In these cases, protecting the public from egregious misconduct is deemed more important than protecting the parties' right to contract freely.

The problem is that many jurisdictions define gross negligence differently. Thus, when attempting to prove gross negligence to avoid limitations of liability, you must know the legal standard. These standards are occasionally set forth in statutes, but most are created by case law.

### Defining Gross Negligence

Along the spectrum of bad acts, gross negligence falls somewhere between ordinary negligence and intentional torts. Where ordinary negligence is generally defined as the failure to use ordinary care, intentional torts (such as trespass or assault) require proof of a subjective intent to do harm.

Between failing to use ordinary care and actually intending to do harm is the person who *knows* that an act is substantially certain to cause harm, yet proceeds to act anyway. In most jurisdictions, this is gross negligence. It requires an objective inquiry into the degree of risk and a subjective inquiry into the actor's real or supposed state of mind.

Many jurisdictions lump "gross negligence" together with "willful," "wanton," and "reckless" conduct. These jurisdictions do not distinguish between the level of the actor's knowledge and treat each as an aggravated form of negligence, differing in quality -- rather than degree -- from ordinary negligence. This approach can create proof and coverage issues for the subrogating attorney or adjuster.

### Proof Issues

How does one prove grossly negligent conduct? Because the subjective element is rarely admitted, it must usually be proven by circumstantial evidence. Violating a code, ordinance or statute is generally not sufficient evidence of culpability to distinguish it from ordinary negligence. Neither is simply proving a defective design or failure to maintain equipment. Most courts distinguish gross negligence from mere thoughtlessness, inadvertence or errors in judgment. Inattention will not prove grossly negligent conduct, nor will mistakes due to inexperience, excitement or confusion.

Objectively, the tortfeasor's conduct must involve an extreme degree of risk. This is essentially a visceral value judgment, and may be shown using relevant guidelines, codes or other standards of care. The objective prong is generally easier to prove than the tortfeasor's mental state.

The plaintiff must prove *actual* knowledge of the likelihood of harm from the defendant's conduct. In practice, this is very difficult and one's success often depends upon the quality of the objective proof. The actor's knowledge must relate both to the seriousness of the risk created, as well as the relative ease with which the risk could be reduced or eliminated.

### Coverage Issues

One final concern is that successfully pleading and proving gross negligence may effectively remove part of the claim from liability insurance coverage. Most Comprehensive General Liability policies provide coverage for bodily injury or property damage caused by an "occurrence." An occurrence is generally defined as:

> an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

COUCH ON INSURANCE 3d, §201:18 (West 1999). Under these policies, coverage may be excluded for the insured's intentional acts.

The problem for the subrogating insurer or recovery representative is that proof of gross negligence often requires proof of the defendant's subjective mental state. In jurisdictions without a nuanced definition of gross negligence, any negligence so gross as to amount to a willful, deliberate and intentional wrong could trigger a denial of coverage.

### Conclusion

The subrogation professional may be able to plead and prove gross negligence to overcome contractual limitations of liability. Care must be taken, however, to ensure that the evidence presented does not eclipse the liability policy providing indemnification to the target defendant. Knowing the jurisdiction's definition and interpretation of gross negligence will help in addressing these issues.