

A tree-cutter who was an expert in removing branches that threaten tall buildings contracted, in a signed writing, to lift and trim branches near a building where a major conference was scheduled to occur. An exculpatory clause in the contract provided that the tree-cutter would not be liable for any physical damage to the building occurring during removal of the branches. There was also a clause providing for per diem damages if the tree-cutter did not complete performance by a specified date and a clause providing that "time is of the essence." Another clause provided that any subsequent agreement for extra work under the contract must be in writing and signed by both parties.

With ample time remaining under the contract for commencement and completion of his performance, the tree-cutter notified the building owner that he was selling his business to a landscaper, who was equally an expert in removing branches that threaten tall buildings, and that the landscaper had agreed to "take over the contract."

If the building owner refuses to accept the landscaper's services, which of the following clauses in the contract will best support the owner's contention that the tree-cutter's duties under the contract were not delegable without the owner's consent?

- A. The exculpatory clause.
- B. The extra-work clause.
- C. The liquidated-damage clause.
- D. The "time is of the essence" clause.

Explanation:

Assignment v. Delegation

Assignment Transfer of contractual *rights* to another (ie, assignee)

Delegation Transfer of contractual *duties* to another (ie, delegatee)

An **exculpatory clause** releases a party (eg, the tree-cutter) from liability for damages caused during the execution of the contract. Such a clause would effectively release that party from liability for damages caused by a delegatee (eg, the landscaper) as well.

This goes against the controlling principle that a **delegating party** is **not released from liability** for damages caused by a delegatee **unless the other party** to the contract (eg, the building owner) **expressly agrees** to a release. As a result, the exculpatory clause best supports the building owner's contention that the tree-cutter's duties were not delegable without the owner's consent.

(Choice B) The extra-work clause limits the scope of work to be done, but it says nothing about who is permitted to perform that work.

(Choice C) The liquidated-damage clause sets forth a fixed measure of damages for breach; it has no bearing on whether the tree-cutter can delegate his duties without the building owner's consent.

(Choice D) The "time is of the essence" clause indicates that performance by the time specified in the contract is crucial for the building owner to receive the benefit of the bargain. But this clause does not determine whether the tree-cutter can delegate his duties without the building owner's consent.

Educational objective:

An exculpatory clause releases a party from liability for damages caused during the execution of the contract. This would include damages caused by a delegatee, so the party to be released cannot delegate his/her duties without the other party's consent.

References

- Restatement (Second) of Contracts § 318 (Am. Law Inst. 1981) (delegation of duties).

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