

## When Client Turns Claimant: A Travel Agent's Guide to Disclaiming Unwanted Liability

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Regardless of destination, purpose, or price range, every traveler has the same goal for their trip: they want it to be perfect. Oftentimes, however, despite the best effort of a travel agent to plan and prepare the ideal itinerary, something unexpected happens. If the result of this unintended event is personal injury or property damage to the client, he or she will look for someone to blame. Suddenly, the travel agent becomes a convenient target for litigation and the friendly client turns into an angry claimant. Although the law recognizes the responsibility of an agent to a client under the proper circumstances, the law also recognizes the right of the agent to disclaim certain liability.

There are two different theories of liability under which a client may initiate a lawsuit against an agent. The first is a simple negligence theory under which the client asserts that the actions or omissions of the agent were the direct cause of the client's damages. Common claims made under this theory of liability include failure to warn of a potential danger, failure to investigate accommodations or conditions, and negligent selection of a hotel or other service provider. A useful, albeit tragic, example of a case in which the Court ruled that a travel agency could be held directly liable involves a lawsuit brought against a travel agency for the death of a traveler when she fell between two moving train cars. Although the travel agency was aware that three other travelers had died the same way on previous tours, the agency did not warn the traveler.

The second theory of liability is known as vicarious liability. Under this theory, an agent can be held liable for the negligence of a third party, typically a hotel or excursion operator. This theory rests on the notion that the travel agent exercised control over another's conduct. This is often difficult to prove because a travel agent is generally seen as an agent for the client rather than the third party. However, there are circumstances in which such a relationship is inferred. For example, if the third

party is authorized to do business under the name of the travel agency or if an employee of the third party represents to the client that he is an employee of the travel agency, there might be sufficient evidence to infer management or control in order to hold the agency vicariously liable. Whichever theory of liability a lawsuit is brought under, travel agents have a recognized right to avoid certain liability through the use of disclaimers.

Disclaimers allow one party to repudiate a legal right or claim of another. The typical travel agent's disclaimer is written into the client contract or invoice with language that negates the right of a client to sue the travel agent for certain acts of negligence arising during the course of the contract. There are two types of disclaimers that can be used by travel agents. The first and more common type of disclaimer pertains to the acts of third parties. A typical third party disclaimer would read:

*Travel Service, Inc., acts only as agent for the client in acquiring transportation, hotel accommodations, sightseeing and other privileges, or services for the clients' benefit, and on the express condition that Travel Service, Inc. shall not be responsible for any loss, accident, injury, delay, defect, omission or irregularity which may occur or be occasioned, whether by reason of any act, negligence or default of any company or person engaged in or responsible for carrying out any of the arrangements, or otherwise in connection therewith.*

These third party disclaimers are legally valid as long as the intent to disclaim liability is clear, the language used is unambiguous, and the client has notice of the provision (which requires that the provision is conspicuously located in the contract document).

The second type of disclaimer, which disclaims an agent's own negligence, is less common and is looked at less favorably under the law. These disclaimers are subject to additional requirements in order to be valid. First, they cannot be against public policy or detrimental to society as a whole. For example, if the clause attempts to avoid liability for the violation of a law that was enacted for the public safety it will generally be invalid. Second, they cannot arise from contracts in which the bargaining power of the two parties was so unequal that the client had no choice but to accept the disclaimer. Because the client always has the option of booking directly with the third party (airline, hotel or operator), it is unlikely that an exculpatory clause in an agent's contract would fail for this reason. Third, reckless or intentional acts of harm cannot be disclaimed. Finally, any doubt as to the intent of the parties, the ambiguity of the language, or the propriety of notice will be construed against the party seeking to avoid liability, in this case the travel agent.

Nonetheless, these clauses can be upheld and are important to be aware of. A typical exculpatory clause would read:

*Travel Service, Inc. shall not be liable for any injuries or any damage to any client or be subject to any claim, demand, injury, or damages, whatsoever, including without limitation, those damages from acts of passive or active negligence on the part of Travel Service, Inc., its officers, employees, or agents. Client does hereby expressly release and discharge Travel Service, Inc. from all such claims, demands, injuries, damages, actions or causes of action. Client acknowledges that he/she has carefully read this paragraph and fully understands that this is a waiver and release of liability.*

The use of disclaimers can be very beneficial to travel agents. Avoiding liability allows an agent to control the risks associated with marketing and providing travel services. As a result, agents are able to lower the cost of doing business. Defending a lawsuit can be very taxing on a company financially as well as on a person emotionally. Disclaiming liability allows these mental and financial resources to be allocated to other important functions of your business.

If agents desire to make use of disclaimers in their client contracts, they are encouraged to consult a local attorney before doing so. The disclaimers used in this article are only examples and should not be substituted for a well crafted disclaimer by a local professional.

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