

## The New, New Fad In Risk Transfer Why Should We Be Liable To The Full Extent Of Our Negligence?

While we all can appreciate a new or evolving business model, business leaders need to be aware of how the changes can affect their organization's well-being, as well as their own.

Contractual risk transfer is a risk mitigation technique that has been used successfully for decades. It is usually employed on an industry-wide basis or when the exclusivity of one party's product or service affords them the ability to dictate the terms of the transaction. The following is a recent situation where a seller was overly confident in the uniqueness of their offering and approached the customer with a "take it or leave it" ultimatum that did not work out as planned.

As we have every year for the past several years, we did our research and picked a quality steakhouse for our annual Board dinner. Making our reservation was not only easy, but enjoyable too. The reservation staff was pleasant and very attentive.

As the weeks before our reservation passed, the steakhouse was in constant touch, offering limousine service and even tickets to a nearby show. "This is great," I said to myself; "We sure picked the right steakhouse".

The day of our reservation, the steakhouse concierge unexpectedly gave us a large amount of paperwork, asked us to bring it with us to the restaurant, and informed us it was another valued added service the steakhouse provided. We were a bit confused by this, but decided to carry on and take a closer look at the paperwork once we arrived.

The day of the dinner, upon exiting the steakhouse-provided limo, we were greeted by the manager and a large team -- many of whose roles I didn't understand as they related to our dining experience. Nonetheless, we proceeded to our table in the center of a colossal room. Once seated, the wait staff presented us with an exquisite menu and proceeded to read us the "house recommendations". Within seconds of presenting the recommendations, the waitperson asked for our selections. My dining guest inquired how the evening's special would be prepared and what side courses it would include. Without skipping a beat, the waitperson replied, "We're a popular steakhouse with locations throughout the world; all of our customers love this special and you should not bother the chef and just accept it as presented".

Remembering our surprise experience from the previous year, I asked if the gratuity was included in the prices listed on the menu. The response this year was different, but similar. "This year, sir," the waitperson said, "We're forgoing Variable Incremental Gratuity (VIG) in favor of an Enhanced Guaranteed Gratuity Supplement (EGGS)". Even though the steakhouse VIG was palatable last year, I asked how much the EGGS would be this year and was told that they wouldn't know until the order was confirmed by the kitchen. I thought it was odd that the waitperson who takes these orders every day would not know the gratuity amount, but we placed our order anyway.

After a short while the waitperson returned with what I assumed was the dessert menu, but quickly learned was a contract that needed to be signed before the dinner order could be placed. The waitperson said it had been included in the advance paperwork we had received and asked if we had any questions before signing it. I responded that I did not have questions, and furthermore, not having ever been asked to sign a contract to place a dinner order at this steakhouse or any other steakhouse, I refused to sign. Next, an aspiring assistant manager came forth explaining that other industries make their customers sign agreements, and furthermore, 99 and 44/100% of their customers sign, so we should too. Starting to sense that tonight's meal was more about the steakhouse and less about their diners, I glanced over the dining contract as the assistant manager spoke in circular anecdotes and here's what caught my eye:

*The steakhouse, affiliates, subsidiaries, and their respective directors, officers, employees and agents (steakhouse/we/us) are not acting as a gastronomical fiduciary (unless forced by jurisdictional law) for the diner and further limit their liability to the diner and guests in total, for any and all damages, costs, and expenses (including but not limited to attorneys' fees), whether based on contract, tort (including negligence or gross negligence), or otherwise, in connection with or related to the dinner and associated dining services (including a failure to fulfill your order, resulting bodily injury, economic injury or even death however caused by us) or any other services that we provide shall be limited to an aggregate amount.*

If that wasn't enough, the steakhouse further required of the diner and their guests:

*If you or any of your dinner party guests asserts any claims or makes any demands against us for a total amount in excess of the aforementioned aggregate amount, then diner agrees to indemnify us for any and all liabilities, costs, damages and expenses, including attorneys' fees, incurred by us that exceed this liability limitation. In addition diner voluntarily waives its right to a trial by jury and any future dining at this establishment.*

*This Agreement shall constitute the entire understanding between us and diner, and supersedes all other agreements or understandings, including but not limited to steakhouse advertising, marketing materials, website content, e-mail transmissions, and concierge promises, whether written or oral.*

Even with our growing concerns about the food and service we were about to consume, we still just asked that our order be placed. Within moments a steakhouse legal representative approached and gave the same explanation regarding why signing an agreement outlining the order and the services to be rendered would be beneficial for the steakhouse and its diners, but there was no credible explanation why a diner should limit the steakhouse's liability at all, never mind to an amount significantly less than the value of our dinner. Enough was enough and we turned the table on our host, telling them that we would leave the establishment, guests and all, if they wouldn't place our order as they had for years, without any written dining contract.

**Post Mortem:** If you find, as a diner or a guest, that your favorite steakhouse needs to limit its liability arising from what they're supposedly world-renowned in providing, you should be concerned. Coincidentally, if your insurance broker asks the same of you and your organization,

you should have a frank conversation as to why that's not going to happen. If they don't agree, contact ARI and we'll show you how to avoid limiting your insurance broker's liability to a fraction of your insurance limits. In other words, we'll show you how to have your "steak" and not limit your "steakhouse's" liability too – be one of the so-called 0.56/100%. Remember, you're buying insurance to protect your organization from risk. Don't let the risk be amplified from the outset by an intermediary limiting its liability for the products and services it's recommending, placing and maintaining for you. So just because a diner almost died after getting sick on the omelette à la norvégienne ("Baked Alaska"), there's no reason to allow steakhouses to unilaterally limit their liability. In fact, it's the reason any prudent organization should not allow it!

Even though the steakhouse finally acquiesced on the Limitation of Liability (LOL), we decided to walk across the street (interestingly, "quality" steakhouses are usually walking distance from one another) and try another establishment. What we found was that the beef came from the same farm, was similarly prepared on an open flame to our desired temperature, was served with the same sides and was more competitively priced. Granted, we didn't get show tickets or a limousine ride to the steakhouse, but the *total* gratuity was disclosed up front and we didn't need to sign off on the steakhouse's LOL.

At the end of the day, if you do choose to accept your insurance broker's LOL, make sure you've let your stakeholders know (some of your Additional Insureds, for example, may be affected by your decision), as many key constituencies won't be LOL (Laughing Out Loud) when they learn of the LOL (Limitation of Liability).

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