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Applicability of Exculpatory Clause Principles to Credit Card Risk-Shifting Clauses

The tripartite credit card transaction[1] is the result of a series of interlocking agreements between three parties: holder, issuer, and merchant. The holder agrees that he will pay for the merchandise upon receipt of a statement. The issuer purchases charge slips evidencing the holder's credit purchases from the merchant by virtue of a prior contract between them. This latter agreement normally provides that the issuer will purchase all of the charge slips from the merchant unless the issuer has notified the merchant that any particular credit card is invalid. After purchasing these credits, the issuer renders a monthly statement to each holder.

From the issuer's standpoint, one risk attending the issuance of credit cards is the possibility of loss due to unauthorized use of the cards. Without more, the credit card contract[2] would bind the holder to pay only for his own purchases, and he would not be liable for purchases without his authorization.[3] Since the issuer is bound to purchase the charge slips that the merchant has accumulated before receiving notice that a card is invalid, the possibility of unauthorized purchases presents a substantial risk of loss to the issuer.[4]

In order to avoid this risk, the card issuer usually inserts a

1. For other discussions of risk-shifting clauses in credit card transactions, see Clafin, *The Credit Card — A New Instrument*, 33 CONN. B.J. 1 (1959); Comment, 48 CALIF. L. REV. 459 (1960); Note, 13 STAN. L. REV. 150 (1960); Annot., 158 A.L.R. 762 (1945).

2. For a discussion of the nature of the credit card contract itself, see Comment, 48 CALIF. L. REV. 459 (1960). It is not within the scope of this Comment to consider the time at which the credit card agreement becomes binding upon the parties. Although many credit cards bear the words "acceptance of this card is conclusive presumption of assent to all of the provisions herein," there is some question whether or not this will be held binding on the card holder in absence of consent, express or implied. For the purposes of this Comment, a binding contract is presumed to be formed upon the holder's receipt of the card. It seems there would be grounds for assuming a valid contract if the holder makes at least one credit purchase, for this might be an act from which a court would infer consent to all of the terms contained in the card.

3. Although the card is usually made out in the name of one individual, it is common knowledge that cards are frequently used by persons other than the holder. Often a card made out in the husband's name will be used exclusively by his wife. Therefore, the question arises as to who will be considered as unauthorized. For the purposes of this Comment it is presumed that an unauthorized purchaser is one who has found or stolen the card, or who is clearly without authorization from the holder.

4. Of course, there is the possibility of recourse against the unauthorized user.

clause on the reverse side to the effect that by "accepting" the card the holder agrees to be responsible for all purchases made with the card, unless and until the issuer is notified of its loss, theft, or cancellation.[5] Due to a paucity of jurisprudence, the legal effects of this risk-shifting clause are not as yet clearly defined. This Comment will attempt to anticipate possible judicial attitudes toward enforcement of credit card risk-shifting clauses by analogy to those factors influencing the decisions involving a kindred contractual device, the exculpatory clause. Although there are dissimilarities,[6] both are contractual devices used in attempting to shift the risks attendant to the performance of executory contracts.

Exculpatory Clauses

Exculpatory clauses are stipulations inserted into contracts which purport to relieve one of the parties of civil liability that may result from a future act of negligence or other improper performance of the contract.[7] They are strictly construed.[8]

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5. The following is written on the back of a credit card issued by a major oil company, in a space 1 1/2″ by 15/16″: "This card, if not canceled or expired, may be used for purchasing merchandise marketed by [issuer], and for lubrication, washing, tire repairs, and accessory installations at service stations displaying this Company's signs; and for similar purchases at stations displaying the signs of other companies shown hereon. Tires, tubes, batteries and mountable accessories must be mounted or installed on the vehicle. Motor fuel and oil deliveries must not exceed tank and crankcase capacities of vehicle taking delivery. This card must be presented when purchases are made and remains the property of [issuer] and may be canceled or repossessed by it at any time. *Customer must notify issuing company in writing if this card is lost or stolen, otherwise customer's approval of all purchases is conclusively presumed. By acceptance of this card, customer named hereon agrees to the above conditions.*" (Emphasis added.)

6. Whereas the exculpatory clause actually shifts or entirely removes the risk from the exculpated party, the credit card clause operates more like an indemnity clause — it does not bar the issuer's liability to the merchant, but operates to force the holder to indemnify the issuer. In exculpatory clauses a party is trying to avoid responsibility for his own negligence or failure to perform the contract, but in credit card transactions the issuer is seeking indemnification for his fulfillment of a contractual liability to the merchant, which liability was originally caused by the carelessness or wrongdoing of another.

7. Sutton, *Contractual Exemptions from Liability*, 34 AUSTL. L.J. 290, 311 (1961); Turpin, *Contract and Imposed Terms*, 73 S.A. L.J. 144 (1956); Comments, 44 CALIF. L. REV. 120 (1956), 8 U. FLA. L. REV. 109 (1955); Annot., 175 A.L.R. 1 (1948).

8. Mohawk Drilling Co. v. McCullough Tool Co., 271 F.2d 627 (10th Cir. 1959); Kummell v. Germania Savings Bank, 28 N.E. 398, 13 L.R.A. 786 (N.Y. 1891); Munro v. Bradstreet, 170 App. Div. 294, 155 N.Y.S. 833 (1915); Bastian v. Keystone Gas Co., 27 App. Div. 584, 50 N.Y. Supp. 537 (1898); Ladd v. Augusta Savings Bank, 96 Me. 510, 52 Atl. 1012, 58 L.R.A. 288 (1902); Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 71 S.E.2d 133 (1952); Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500, 19 Am. St. Rep. 681 (1890); Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231 (1934); 6 CORBIN, CONTRACTS § 1472 (1950); 2 HARPER & JAMES, TORTS § 21.6 (1956); 6 WILLISTON, CONTRACTS

The requirement of consent. In order for one to be bound by an exculpatory clause, there must be consent, express or implied.[9] The clause need not be pointed out to the party to whom the risk is shifted, but only "so laid before him that he may be reasonably . . . believed to have been made aware of [it]."[10] In the absence of actual knowledge of the clause, it has been held that there was no implied consent to it where the clause was printed on the back of a document[11] or perpendicular to the other contract provisions,[12] in cramped type,[13] superimposed over other matter,[14] or on a separate instrument such as a letterhead[15] or ticket.[16]

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§ 1751(B) (rev. ed. 1938); RESTATEMENT, CONTRACTS § 574 (1932).

There is a notion that exculpatory clauses tend to cause one to be less careful in performance of a duty. Sinclair Refining Co. v. Lang, 28 Okla. B.J. 1802 (1957), cited with approval in Mohawk Drilling Co. v. McCullough Tool Co., 271 F.2d 627 (10th Cir. 1959). See Boll v. Sharp & Dohme, Inc., 281 App. Div. 568, 121 N.Y.S.2d 20 (1953). This case involved a blood donor and held an exculpatory clause invalid by strict construction. The basis for the decision was probably the public function served by the blood donee.

9. An offeree cannot consent to an offer of which he is ignorant. 1 CORBIN, CONTRACTS § 59 (1950); RESTATEMENT, CONTRACTS §§ 23, 70 (1932). If the offeror failed adequately to communicate the clause to the offeree, the offeree is not bound by it. French v. Bekins Moving & Storage Co., 118 Colo. App. 424, 195 P.2d 968 (1948); Bodwell v. Bragg & Bros., 29 Iowa 232 (1870); Baldwin v. Collins, 9 Rob. 468 (La. 1845); Dugan v. Central Storage & Transfer Co., 23 So. 2d 634 (La. App. 2d Cir. 1945); Kaiser v. Poche, 194 So. 464 (La. App. Orl. Cir. 1940); Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. Orl. Cir. 1937); Jones v. Great No. Ry., 68 Mont. 231, 217 Pac. 673, 37 A.L.R. 754 (1923); Klar v. H. & M. Parcel Room, Inc., 270 App. Div. 538, 61 N.Y.S.2d 285 (1946); Note, 12 TUL. L. REV. 458 (1938).

10. 1 CORBIN, CONTRACTS 94 (1950).

11. *E.g.*, Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930); Bastian v. Keystone Gas Co., 27 App. Div. 584, 50 N.Y. Supp. 537 (1898); Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A.2d 234 (1953). For a discussion of fine print contracts, see 1 CORBIN, CONTRACTS § 33 (1950); 1 WILLISTON, CONTRACTS § 90D (rev. ed. 1936); Turpin, *Contract and Imposed Terms*, 73 S.A. L.J. 144, 153 (1956); Note, 63 HARV. L. REV. 494 (1950).

12. *E.g.*, New York, N.H. & H. R.R. v. Sayles, 87 Fed. 444 (2d Cir. 1898).

13. *E.g.*, Insurance Co. v. Slaughter, 79 U.S. (12 Wall.) 404 (1870); The Minnetonka, 146 Fed. 509 (2d Cir. 1906), *cert. denied*, 203 U.S. 589 (1906).

14. *E.g.*, New York, N.H. & H.R.R. v. Sayles, 87 Fed. 444 (2d Cir. 1898).

15. *E.g.*, Anaconda Copper Mining Co. v. Houston, 107 Ill. App. 183 (1903).

16. Palas v. Harvey Room Co., 211 Ill. App. 580 (1918) (hotel); Bodwell v. Bragg & Bros., 29 Iowa 232 (1870) (hotel); Kentucky Hotel, Inc. v. Cinotti, 298 Ky. 88, 182 S.W.2d 27 (1944) (hotel); Colgin v. Security Storage & Van Co., 208 La. 173, 23 So. 2d 36 (1945) (warehouse receipt); Vogel v. Saenger Theatres, 207 La. 835, 22 So.2d 189 (1945) (theater); Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930) (wholesale sales contract); Williams v. Gallagher Transfer & Storage Co., 170 La. 461, 128 So. 277 (1930) (warehouse); Gray v. Foundation Co., 151 La. 7, 91 So. 527 (1922) (free pass admission to ship launching); Kember & George v. Southern Express Co., 22 La. Ann. 158, 2 Am. Rep. 719 (1870) (carrier); Fidelity & Deposit Co. v. Rednour, 44 So.2d 215 (La. App. Orl. Cir. 1950) (warehouse receipt); Dugan v. Central Storage & Transfer Co., 23 So.2d 634 (La. App. 2d Cir. 1945) (warehouse receipt); Ford v. Spiro, 5 So.2d 385 (La. App. Orl. Cir. 1942) (lease); Atkinson v. Stern, 175 So. 126 (La. App. 2d Cir. 1937) (lease); Woodward v. Royal Carpet Cleaning Co., 134 So. 443 (La. App. Orl. Cir. 1932) (service contract);

A party to an otherwise oral or implied contract may shift certain risks by a written stipulation. However, as in the written contract, the party attempting to limit his risk must make such efforts to communicate the clause as would have communicated notice of it to a reasonable man.[17] For example, where a parking lot attendant hands a customer a ticket containing an exculpatory clause,[18] or posts a sign to the same effect,[19] the customer is bound only if these are such notices as would have been communicated to a reasonable man.[20] From this notice, consent is inferred.

Policy considerations. Even where all of the elements of a binding contract are present, a court may refuse to enforce an exculpatory clause which it considers contrary to public policy. The clearest case of this is an agreement by which a party seeks to exempt himself from liability for gross negligence,[21] or "wilful and wanton misconduct." More often, however, the exculpatory clause's conformity with public policy will depend largely upon the relationship between the parties at the time of the contract.

Courts have denied the validity of the exculpatory clauses

Klar v. H. & M. Parcel Room, Inc., 270 App. Div. 538, 61 N.Y.S.2d 285 (1946) (bailment); Cohen v. City of New York, 190 Misc. 901, 75 N.Y.S. 846 (1947) (bathhouse); Olley v. Marlborough Court, Ltd., [1949] 1 K.B. 532.

17. O'Brien v. Penn R.R., 184 F. Supp. 305 (S.D. N.Y. 1960); Bodwell v. Bragg & Bros., 29 Iowa 232 (1870); Colgin v. Security Storage & Van Co., 208 La. 173, 23 So.2d 36 (1945); Kaiser v. Poche, 194 So. 464 (La. App. Orl. Cir. 1940); Gulf & S.I. R.R. v. Sutter Co., 12 La. App. 495, 126 So. 458 (La. App. Orl. Cir. 1930); Lawes v. New Orleans Transfer Co., 11 La. App. 170, 123 So. 144 (Orl. Cir. 1929); Williams v. Weil Co., 1 La. App. 188 (1st Cir. 1924); Klar v. H. & M. Parcel Room, Inc., 270 App. Div. 538, 61 N.Y.S.2d 285 (1946). See 1 CORBIN, CONTRACTS § 33 (1950). The offeree is not presumed to assent to a clause merely because he does not object to it. Railroad Company v. Manufacturing Co., 83 U.S. (16 Wall.) 318 (1872); The Minnetonka, 132 Fed. 52 (S.D. N.Y. 1904).

18. Kaiser v. Poche, 194 So. 464 (La. App. Orl. Cir. 1940); Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. Orl. Cir. 1937); Gulf & S.I. R.R. v. Sutter Co., 126 So. 458 (La. App. Orl. Cir. 1930); Sandler v. Commonwealth Station Co., 307 Mass. 470, 30 N.E.2d 389 (1940); Miller's Mutual Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951); Jones, *The Parking Lot Cases*, 27 GEO. L.J. 162 (1938); Notes, 12 TUL. L. REV. 458 (1938), 8 U. CHI. L. REV. 763 (1940); Annot., 43 A.L.R.2d 403 (1955).

19. Munson v. Blaise, 12 So.2d 623 (La. App. Orl. Cir. 1943); Williams v. Weil Co., 1 La. App. 188 (1st Cir. 1924); Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N.W. 300 (1919); Arnold v. Kensington Plaza Garages, 179 Misc. 697, 42 N.Y.S.2d 118 (1943); Lachs v. Fidelity & Cas. Co., 306 N.Y. 357, 118 N.E.2d 555 (1954); Dietrich v. Peters, 28 Ohio App. 427, 162 N.E. 753 (1928).

20. RESTATEMENT, CONTRACTS § 70 (1932).

21. Automobile Underwriters v. Laughlin, 6 La. App. 67 (La. App. Orl. Cir. 1927); Sanger v. Dun, 47 Wis. 615, 3 N.W. 388, 32 Am. Rep. 789 (1879); RESTATEMENT, CONTRACTS § 574 (1932).

by which a party attempts completely to absolve himself of liability either in tort or contract in the performance of a "public function."[22] This seems to be based upon the notion that institutions such as common carriers,[23] telephone and telegraph sys-

22. 6 CORBIN, CONTRACTS § 1472 (1951); PROSSER, TORTS § 55 (2d ed. 1955); Comment, 44 CALIF. L. REV. 120 (1956); 32 NEB. L. REV. 600 (1953); 17 C.J.S. *Contracts* § 262 (1939); RESTATEMENT, CONTRACTS § 575 (1932).

However, in activities outside their public functions, these institutions are allowed to stipulate against their negligence as freely as one without a public function. See cases holding that a public carrier may stipulate against its negligent injury of the lessee of its right of way: Minneapolis-Moline Co. v. Chicago, M. St. P. & P. R.R., 199 F.2d 725 (8th Cir. 1952); Franklin Fire Ins. Co. v. Chesapeake & Ohio Ry., 140 F.2d 898 (6th Cir. 1944); Cacey v. Virginian Ry., 85 F.2d 976 (4th Cir. 1936), *cert. denied*, 300 U.S. 657 (1937); Greenwich Ins. Co. v. Louisville & N.R.R., 112 Ky. 598, 66 S.W. 411 (1902); Direct Transportation Co. v. Baltimore & Ohio R.R., 96 Ohio App. 204, 121 N.E.2d 565 (1953); or against the injury of a gratuitous rider: Charleston & West Car. Ry. v. Thompson, 234 U.S. 576 (1914); Northern Pacific Ry. v. Adams, 192 U.S. 440 (1904); Louisville & N. R.R. v. George, 279 Ky. 24, 129 S.W.2d 986 (1939); Higgins v. New Orleans, M. & C. Ry., 28 La. Ann. 133 (1876); Quimby v. Boston & Me. R.R., 150 Mass. 365, 23 N.E. 205 (1890); Spanable v. New York Cent. R.R., 80 Ohio App. 50, 69 N.E.2d 441 (1946); Atchison, T. & S.F. R.R. v. Smith, 38 Okla. 157, 132 Pac. 494 (1913); Atlantic Greyhound Lines v. Skinner, 172 Va. 428, 2 S.E.2d 441 (1939); PROSSER, TORTS § 55 (2d ed. 1955). A telephone company may stipulate against its liability for negligently mislisting a customer in its directory: McTighe v. New England Tel. & Tel. Co., 216 F.2d 26 (2d Cir. 1954); Georges v. Pacific Tel. & Tel. Co., 184 F. Supp. 571 (D.C. Ore. 1960). *Cf.* Cole v. Pacific Tel. & Tel. Co., 112 Cal. App.2d 416, 246 P.2d 686 (1952); Scheinuk the Florist v. Southern Bell Tel. & Tel. Co., 128 So.2d 683 (La. App. 4th Cir. 1961) (exculpatory clause not pleaded); Correll v. Ohio Bell Tel. Co., 63 Ohio App. 491, 27 N.E.2d 173 (1939). In view of the importance to businesses of proper listings in the telephone directories, and the monopolistic position of the telephone industry, whether such exculpatory clauses are contrary to public policy seems to be a question worthy of further consideration.

23. In Louisiana, a carrier must make a reasonable attempt to communicate notice of the exculpatory clause to the shipper in order for the clause to be binding. Whitehurst v. T. & P. Ry., 131 La. 139, 59 So. 42 (1912); Kember & George v. Southern Express Co., 22 La. Ann. 158, 2 Am. Rep. 719 (1870); Logan v. Pontchartrain R.R., 11 Rob. 24, 43 Am. Dec. 199 (La. 1845); Baldwin v. Collins, 9 Rob. 468 (La. 1845); Kendall v. Teche Lines, 197 So. 810 (La. App. 1st Cir. 1940). *Cf.* Borneman & Co. v. New Orleans M. & C. R.R., 145 La. 150, 81 So. 882 (1919).

In Louisiana carriers may validly exempt themselves from absolute liability from causes other than negligence in the performance of their public duties. American Cotton Co-op Ass'n v. New Orleans & V.P. Co., 180 La. 836, 157 So. 733 (1934); Coustaline v. Louisiana Ry. Nav. Co., 154 La. 667, 98 So. 81 (1923); McHenry Horse Exchange v. Illinois Cent. Ry., 148 La. 49, 86 So. 649 (1920); National Rice Milling Co. v. New Orleans & N.E. Ry., 132 La. 615, 61 So. 708 (1913); J. D. Simms & Sons v. New Orleans & N.E. R.R., 122 La. 268, 47 So. 602 (1908); Maxwell v. Southern Pac. Ry., 48 La. Ann. 385, 19 So. 287 (1896); Darrall v. Southern Pacific Co., 47 La. Ann. 1455, 17 So. 884 (1895); Berje v. Texas & P. Ry., 37 La. Ann. 468 (1885); Edward Newman & Co. v. Smoker, 25 La. Ann. 303 (1873); Levy & Dietor v. Pontchartrain R.R., 23 La. Ann. 477 (1871); Insurance Co. v. Railroad Co., 20 La. Ann. 302 (1868); Brauer v. Barque Almoner, 18 La. Ann. 266 (1866); Roberts v. Riley, 15 La. Ann. 103 (1860); Thomas v. Ship Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509 (1858); Oakey and Hawkins v. Executors of Gordon, 7 La. Ann. 235 (1852); Normann v. Burnham's Van Service, 73 So.2d 640 (La. App. Orl. Cir. 1954); Bowie Lumber Co. v. Yazoo & M.V. R.R., 14 La. App. 454, 131 So. 689 (La. App. Orl. Cir. 1930); Santiago Truxillo v. Texas & Pacific R.R., 7 Orl App. 18 (La.

tems,[24] power,[25] and irrigation companies[26] ought to bear the risks attending performance in return for their public franchise.

Courts appear reluctant to uphold exculpatory agreements where the bargaining power of the party to whom the risk is shifted is relatively small as compared with that of the exculpated party.[27] Accordingly, exculpatory clauses have been held

App. Orl. Cir. 1909). See LA. R.S. 45:903, 45:910 (1950). R.S. 45:903 is identical with § 3 of the Uniform Bill of Lading Act, which prevents a carrier from inserting in a bill of lading covering an intrastate shipment a provision totally exempting it from liability for its own negligence. Straus v. Canadian Pac. R.R., 254 N.Y. 407, 173 N.E. 564 (1930); Comment, 11 TUL. L. REV. 632 (1937).

Other states generally hold that it is against public policy for a common carrier to exempt itself from negligence in the performance of its public duties. Atkinson v. New York Transfer Co., 76 N.J.L. 608, 71 Atl. 278 (1908); Straus & Co. v. Canadian Pac. Ry., 254 N.Y. 407, 173 N.E. 564 (1930); Direct Transportation Co. v. Baltimore & Ohio R.R., 96 Ohio App. 204, 121 N.E.2d 565 (1953); Peterson v. Ogden Union Ry., 110 Utah 573, 175 P.2d 744 (1946). See Comment, 32 NEB. L. REV. 600 (1953). Thus, a common carrier cannot require a paying passenger to exempt the carrier from its negligence liability. Curtiss-Wright Flying Service v. Glose, 66 F.2d 710 (3d Cir. 1933), *cert. denied*, 290 U.S. 696 (1933); Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 194 N.E. 692 (1935).

A carrier exercises "a sort of public office." Railroad Co. v. Manufacturing Co., 83 U.S. (16 Wall.) 318, 328 (1872). Interstate common carriers cannot exonerate themselves from the consequences of their negligence. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953). However, the United States Supreme Court has intimated that a tower might contract against its negligence, dependent upon the surrounding circumstances; and that exculpatory clauses should be individually considered and not automatically struck down. S. W. Sugar & Molasses Co. v. River Term. Corp., 360 U.S. 411 (1959). *Accord*, Compania de Navigacion Cristobal v. The Lisa R., 116 F. Supp. 560 (E.D. La. 1953). *Cf.* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1954); Note, 30 TUL. L. REV. 133 (1955). For federal statutes on transportation, see 46 U.S.C. §§ 190, 191, 192, 303(8) (1958) (ship transporting property), 46 U.S.C. § 183 (1958) (ship transporting passengers); 49 U.S.C. § 20(11) (1958) (railroads); 47 U.S.C. § 201 (1958) (telegrams).

24. See Des Arc Oil Mill v. Western Union Telegraph, 132 Ark. 335, 201 S.W. 273, 6 A.L.R. 1081 (1918); Tujague v. Western Union, 11 Orl. App. 267 (La. App. 1914); Emery v. Rochester Tel. Co., 156 Misc. 562, 282 N.Y. Supp. 280 (1935).

25. Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945); Denver Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39 (1903); Bastian v. Keystone Gas Co., 27 App. Div. 584, 50 N.Y. Supp. 537 (1898); Collins v. Electric Co., 204 N.C. 320, 168 S.E. 500 (1933); Turner v. Power Co., 154 N.C. 131, 69 S.E. 767, 32 L.R.A.(N.S.) 848 (1910); Southwestern Public Service Co v. Artesia Alfalfa Growers Ass'n, 67 N.M. 108, 353 P.2d 62 (1960); Oklahoma Natural Gas Co. v. Appel, 266 P.2d 442 (Okla. 1954).

An electric company may stipulate against its negligence if no public duty is involved. Fire Ass'n of Phila. v. Allis Chalmers Mfg. Co., 129 F. Supp. 335 (N.D. Iowa 1954).

26. See United Irr. Co. v. Bryan, 280 S.W. 196 (Tex. Civ. App. 1926). Compare Granger v. Kishi, 139 S.W. 1002 (Tex. Civ. App. 1911) (private contract).

27. See cases holding that employers cannot exculpate themselves from potential tort liability for injury to their employees: Brant v. Chicago & A. R.R., 294 Ill. 606, 128 N.E. 732 (1920); Haven v. Munson, 169 So. 819 (La. App. 1st Cir. 1936); Lakube v. Cohen, 304 Mass. 156, 23 N.E.2d 144 (1939); Jewell v. Kansas City Bolt & Nut Co., 231 Mo. 176, 132 S.W. 703 (1910); Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388 (1906); Direct Transportation Co. v. Baltimore & Ohio

unenforceable when imposed upon the one who is, in effect, forced into contractual relations with a monopolistic enterprise.[28] Similarly, a stipulation limiting or exempting one from liability has been struck down although the transaction occurs in a highly competitive field where the party sought to be burdened with the risk has little freedom to choose contractual terms because the competitors will not deviate from a standardized contract form.[29] Although disparity in bargaining power appears to be the reason for the results in many cases, the courts have usually

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R.R., 96 Ohio App. 204, 121 N.E.2d 565 (1953). See Bard v. Board of Education, 140 N.Y.S.2d 850 (1955) (where court *very* strictly construed pre-employment exculpatory clause, and held prospective employer in spite of the contract). *Cf.* Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 102 N.Y.S.2d 65 (1951), *aff'd*, 302 N.Y. 545, 99 N.E.2d 882 (1951), *reargument denied*, 303 N.Y. 665, 102 N.E.2d 586 (1951) (contract between employer and employee held void as to employee who agreed to hold third party harmless). *Contra*, Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920).

"[T]he workingman as a matter of fact gets little or nothing for the risk which he assumes and that public policy demands the avoidance of such exculpatory contracts not only for good of the employee but for the safety of society at large." See Beers, *Contracts Exempting Employers from Liability for Negligence*, 7 YALE L.J. 352 (1898).

However, if the court finds that the injured party is in reality an independent contractor, the employer may stipulate against its negligence toward him. Chicago, R.I. & P. Ry. v. Bond, 240 U.S. 449 (1916).

See also 6 CORBIN, CONTRACTS § 1472 (1950) ; RESTATEMENT, CONTRACTS § 575 (1932) ; 17 C.J.S. § 262 (1932).

28. See Railroad Co. v. Manufacturing Co., 83 U.S. (16 Wall.) 318 (1872) ; Collins v. Electric Co., 204 N.C. 320, 168 N.E. 500 (1933) ; 1 CORBIN, CONTRACTS § 107 (1950). In a few instances, however, the courts have upheld a risk-shifting clause in consumer contracts with public utilities if the customer is alternatively offered the opportunity, by paying a higher rate, of having the utility assume full responsibility. See cases involving telegraph company: Tujague v. Western Union, 11 Orl. App. 267 (La. App. 1914). *Cf.* Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 25 So. 232 (1899) ; Des Arc Oil Mill v. Western Union Tel., 132 Ark. 335, 201 S.W. 273, 6 A.L.R. 1081 (1918). Interstate carriers: New York, N.H. R.R. v. Nothnagle, 346 U.S. 128 (1952) ; American Ry. Exp. Co. v. Levee, 263 U.S. 19 (1923) ; Adams Express Co. v. Croninger, 226 U.S. 491 (1913) ; Normann v. Burnham's Van Service, 73 So.2d 640 (La. App. Orl. Cir. 1954). See 1 WILLISTON, CONTRACTS § 90BB (rev. ed. 1936) ; Comment, 25 MICH. L. REV. 1 (1926).

29. In doing business with banks one often has little choice of terms in contracting due to the widespread custom among banks of using standardized contract forms. On stop-payment orders banks will sometimes stipulate that the person wishing to stop payment is not demanding, but is only asking the bank to do it as a courtesy and that the bank will not be liable should it negligently honor the check. When a bank attempts to shift the risk of liability for the negligent honoring of a check against a stop-payment order in this manner, courts have taken divergent positions. The stipulation may fail for "lack of sufficient consideration" (BRITTON, BILLS AND NOTES § 181, n. 3 (1943)), or it may not have been communicated to the offeree (Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (1926) ; BRITTON, BILLS AND NOTES § 181, n. 3 (1943)), or the stipulation may be void as against public policy (Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (1926)). However, some courts have found that the stipulation is reasonable and not against public policy (Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920), 175 A.L.R. 1, 78 (1920)). The redactors of the Uniform Commercial Code feel that the banks should not be allowed to shift this risk and should carry losses due to negligently honoring checks

preferred to articulate their reasons in different language.[30]

In summary, the courts tend to invalidate exculpatory clauses when they are convinced that the party burdened by the clause has not consented to it, or where, because of standardized business practices, he is virtually unable to contract without assenting to the clause. It has been noted also that the courts tend to strike down exculpatory clauses when the favored party is in a monopolistic position, performing a "public function."

Application of Exculpatory Clause Principles to Credit Card Risk-Shifting Clauses

It is suggested initially that the typical issuer of a credit card does not perform a "public function" because there are ordinarily numerous enterprises anxious to sell to the consumer; furthermore, the consumer need not purchase on credit as he may ordinarily use cash.

In some situations the choice of contract provisions is limited. For example, it is doubtful that one could obtain an oil company credit card which would not have a clause designed to shift the risk of loss due to unauthorized purchases to the card holder. To this extent, his bargaining power is inferior to the issuer — if he is to obtain oil products on credit, he must assent to some liability for unauthorized purchases. The question then arises in these situations as to whether or not the holder's bargaining

as a part of their regular business expenses (UCC §§ 4-103(1), 4-403 (1958)).

If the court concludes that the parties are of such unequal bargaining power that one has the other at an *unconscionable* disadvantage, the court *may* declare that the exculpatory clause is void (American Cotton Co-op Ass'n v. New Orleans & V. P. Co., 180 La. 836, 157 So. 733 (1934) (carrier); Haven v. Munson, 169 So. 819 (La. App. 1st Cir. 1936) (employment); Miller's Mutual Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951) (parking lot)).

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (standard automobile manufacturer's warranty). For a discussion of exculpatory clauses in vendor's warranty, see Keeton, *Assumption of Risk in Products Liability Cases*, 22 LOUISIANA LAW REVIEW 122, 133 (1961).

3 CORBIN, CONTRACTS § 559 (1950); Ehrensweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion — Some Thought About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

30. Relative bargaining power is being more frequently discussed by the courts. Tyler v. Dowell, Inc. 274 F.2d 890 (10th Cir. 1960).

See Miller's Mutual Fire Insurance Ass'n v. Parker, 234 N.C. 20, 22, 65 S.E.2d 341, 342 (1951): "A provision in a contract seeking to relieve a party to the contract from liability for his own negligence may or may not be enforceable. It depends upon the nature and the subject matter of the contract, the *relation of the parties, the presence or absence of equality of bargaining power*." (Emphasis added.) Other jurisdictions have held that a hotel, acting as a depositary, cannot shift the risk of losing a guest's valuables, because to do so would be against public policy. Oklahoma City Hotel Co. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941);

Maxwell Operating Co. v. Harper, 138 Tenn. 640, 200 S.W. 515, L.R.A. 1918C 672 (1917).

Generally, the courts will hold that there has been a valid exculpation of negligence if the following factors are present: The parties must be of relatively equal bargaining power. See Shafer v. Reo Motors, 205 F.2d 685 (3d Cir. 1953); Charles Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 (E.D. Pa. 1948). In the following cases, involving what might be termed luxury contracts, the court allowed complete exculpation of negligence when there was a *signed* contract: Weik v. Ace Rents, 249 Iowa 510, 87 N.W.2d 314 (1958) (lawn mower rental); Barrett v. Conragan, 302 Mass. 33, 18 N.E.2d 369 (1938) (beauty salon); Broderson v. Rainier Nat. Park Co., 187 Wash. 399, 60 P.2d 234 (1936) (rented toboggan). *Contra*, Fedor v. Mauwehu Council, Boy Scouts of America, 21 Conn. Supp. 38, 143 A.2d 466 (1958) (summer camp). For general discussion of exculpatory clauses on amusement tickets, see Annot., 97 A.L.R. 582 (1935). There is no public function involved: RESTATEMENT, CONTRACTS § 575(1)(a) (1932). There must be a manifestation of consent to exculpate: Duncan v. Dunn, 8 Fed. Cas. No. 4134 (1879); Nichols v. Hitchcock Motor Co., 22 Cal. App. 151, 70 P.2d 654 (1937); Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671 (1901); Lee v. New Orleans Roosevelt Corp., 106 So.2d 855 (La. App. Orl. Cir. 1958); Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P.2d 460 (1959). See Sutton, *Contractual Exemptions from Liability*, 34 AUSTL. L.J. 290, 293 (1961), 27 AUSTL. L.J. 86 (1953). The wording must be clear and explicit: Mohawk Drilling Co. v. McCullough Tool Co., 271 F.2d 627 (10th Cir. 1959); George Sollitt Const. Co. v. Gateway Erectors, Inc., 260 F.2d 165 (7th Cir. 1958), *cert. denied*, 359 U.S. 925 (1958); Vinnell Co. v. Pacific Electric Ry., 52 Cal.2d 411, 340 P.2d 604 (1959); Bohannon v. Southern Ry., 97 Ga. App. 849, 104 S.E.2d 603 (1958); Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 (1959).

In lessor-lessee contracts the parties are relatively equal in bargaining power. The courts of Louisiana and other states recognize that a landlord may stipulate against his negligence toward the lessee. Jackson v. First National Bank, 415 Ill. 453, 114 N.E.2d 721 (1953), noted in 42 ILL. B.J. 241; Cobb v. Gulf Refining Co., 284 Ky. 523, 145 S.W.2d 96 (1940); Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 So. 852 (1907); Clay v. Parsons, 144 La. 985, 81 So. 597 (1919); Pecararo v. Grover, 5 La. App. 676 (La. App. Orl. Cir. 1927); Griffiths v. Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18, 175 A.L.R. 1 (1947). However, the exculpatory clause may not be hidden or obscured. Ford v. Spiro, 5 So.2d 385 (La. App. Orl. Cir. 1942); Roppolo v. Pick, 4 So.2d 839 (La. App. Orl. Cir. 1941); Santee v. Pick, 199 So. 141 (La. App. Orl. Cir. 1940). Prior to 1932 Louisiana courts would not allow landlords to stipulate against their negligence toward third parties. Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918); Grundmann v. Trocchiano, 125 So. 171 (La. App. Orl. Cir. 1929). Since 1932 the lessor may stipulate against liability to parties on the leased premises through license of the lessee. LA. R.S. 9:3221 (1950). See Green v. Southern Furniture Co., 94 So.2d 508 (La. App. 1st Cir. 1957); Terrenova v. Feldner, 28 So.2d 287 (La. App. Orl. Cir. 1946). For further discussion of exculpatory clauses in lease contracts, see Comments, 7 LOUISIANA LAW REVIEW 406 (1947), 20 LOUISIANA LAW REVIEW 76 (1959), 26 MICH. L. REV. 260 (1928), 84 U. PA. L. REV. 467 (1936), 16 RUTGERS L. REV. 448 (1942); Annot., 17 A.L.R.2d 713 (1951).

A Louisiana innkeeper may lessen the amount of his liability by complying with statutory requirements. Pfenning v. Roosevelt Hotel, 31 So.2d 31 (La. App. Orl. Cir. 1947), 32 TUL. L. REV. 333; LA. CIVIL CODE art. 2971 (1870). *Cf.* Lack v. Anderson, 27 So.2d 653 (La. App. 2d Cir. 1946). Other jurisdictions have held that public policy forbids innkeepers from stipulating against their negligence liability: Oklahoma City Hotel Co. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941); Maxwell Operating Co. v. Harper, 138 Tenn. 640, 200 S.W. 515, L.R.A. 1918C 672 (1917). England allows innkeepers to stipulate against negligence liability. Olley v. Marlborough Court, Ltd., [1949], 1 K.B. 532, 27 AUSTL. L.J. 86 (1953).

A Louisiana warehouseman may not absolve himself of negligence liability. LA. R.S. 54:3 (1950).

On Louisiana deposit contracts see Comment, 25 TUL. L. REV. 268 (1951).

Courts apparently tend to allow business enterprises not engaged in a public function to bind themselves as they see fit. Tyler v. Dowell, Inc., 274 F.2d 890

power is so inferior that the courts may feel constrained to avoid the clause. Because he is not precluded from purchasing petroleum products, but only from purchasing them on credit, it is doubtful that the courts would find such an unfair disparity in bargaining power as to warrant avoidance of the clause.[31]

Thus, if the analogy to exculpatory clauses is apt, consent to the risk-shifting clause on the credit card would make it binding on the holder. It might be said that in the absence of express consent, the holder, by using the card to obtain merchandise on credit, has manifested consent to the condition printed on the card. But this would turn on whether or not notice of the risk-shifting clause had been sufficiently communicated to the holder so that a court might reasonably infer consent from its use. This seems analogous to the situation where the parking lot attendant hands the customer a ticket bearing an exculpatory clause, and the principle applied to test consent should be the same, *i.e.*, whether or not a reasonable man would have realized that the instrument purported to carry the terms of a contract. One

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(10th Cir. 1960) (oil drilling) ; Mohawk Drilling Co. v. McCullough Tool Co., 271 F.2d 627 (10th Cir. 1959) (oil drilling) ; Associated Resources Corp. v. Halliburton Oil Well Co., 238 F.2d 957 (8th Cir. 1956) (oil drilling) ; Aluminum Co. of America v. Hully, 200 F.2d 257 (8th Cir. 1952) (independent contractor) ; Philippine Air Lines v. Texas Engineering & Mfg. Co., 181 F.2d 923 (5th Cir. 1950) (airplane reworking) ; Hall-Scott Motor Co. v. Universal Ins. Co., 122 F.2d 531 (9th Cir. 1941), *cert. denied*, 314 U.S. 690 (1941) (motor installation) ; Maryland Casualty Co. v. Owens-Illinois Glass Co., 116 F. Supp. 122 (S.D. W. Va. 1953) (bottler) ; Charles Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 (E.D. Pa. 1948) (chemicals) ; Duncan v. Dunn, 8 Fed. Cas. 9 (1879) (mercantile agreement) ; Borneman v. New Orleans M. & C. R.R., 145 La. 150, 81 So. 882 (1919) (bill of lading) ; Egan v. Hotel Grunewald, 129 La. 163, 55 So. 750 (1911) (building) ; Xiques v. Bradstreet Co., 70 Hun 334, 24 N.Y. Supp. 48 (1893) (mercantile agreement) ; Mercante v. Hygrade Food Products Corp., 258 App. Div. 641, 17 N.Y.S.2d 625 (1940) (paint building) ; Hall v. Sinclair Refining Co., 242 N.C. 707, 89 S.E.2d 396 (1955) (filling station) ; Hill v. Caroline Freight Carriers Corp., 235 N.C. 705, 71 S.E.2d 133 (1952) (tractor lease) ; Sanger v. Dun, 47 Wis. 615, 3 N.W. 388, 32 Am. Rep. 789 (1879) (mercantile agreement).

There may be a distinction between private and commercial lease treatment. See Jackson v. First National Bank, 415 Ill. 453, 114 N.E.2d 721 (1953), 42 ILL. B.J. 241.

31. Rather than holding that the exculpatory clause is or is not enforceable as making the holder liable for the whole of the unauthorized purchases, the reported cases have apparently weighed the comparative carelessness of the parties. Although no express rule could be found, it appears that the holder must use due care in handling the card and the issuer or the dealer must use due care in honoring the card. Gulf Refining Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945) ; Gulf Refining Co. v. Plotnick, 24 Pa. D. & C. 147 (1934) ; Union Oil Co. v. Lull, 349 P.2d 243 (Ore. 1960). In applying this approach of comparative carelessness, the courts impute the carelessness of the dealer to the issuer. This solution may be recommended in that it tends to make issuers exercise some degree of caution in honoring cards and tends to place the loss upon the more careless party.

court has admitted that most persons carrying credit cards are unaware of the liability sought to be imposed by the conditions on the card.[32]

Conclusions

If credit card transactions are to be encouraged, some means must be afforded the issuer by which he can protect himself from losses due to unauthorized purchases. Otherwise, the risk in issuing credit cards might become too great for the practice to be carried on at a level most consistent with good business. The use of a risk-shifting clause which places the risk of loss due to unauthorized purchases on the card holder seems to be a practically sound plan which would minimize unauthorized purchases because the holder is the first party likely to know when a credit card falls into unauthorized hands. Also, it gives him an incentive immediately to notify the issuer of a lost or stolen card, and then the issuer may in turn promptly notify the merchants to dishonor the card. However, it seems inequitable to shift this risk to the holder without giving him a notice sufficient to enable him to protect himself.

It is suggested that the courts may well apply by analogy to the credit card risk-shifting clause the policy factors considered in determining the enforceability of exculpatory clauses. The crux of the problem seems to be whether consent to the clause should be implied from mere use of the card. If the holder's consent to the clause is to be presumed from use of the card, even though he is unaware of it, perhaps the judiciary or legislatures should require that the issuer take adequate steps to remind the holder of the importance of reporting loss or theft of the card to the issuer.[33]

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32. Union Oil Co. v. Lull, 349 P.2d 243, 247 (Ore. 1960), 13 STAN. L. REV. 150. The same case held that the question of whether or not the risk-shifting clause is a part of the credit card agreement is a question for the jury, if properly raised in trial.

33. There are many things that an issuer could do in an attempt to communicate notice of the exculpatory clause to the holder: the clause might be printed in large letters, or in a bright colored ink; the monthly statements might carry a reminder of the clause; the credit application blank or letter accompanying the card, or both, might explain the clause; the dealers might have signs posted reminding the holders of it.