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Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments, 41 Vand. L. Rev. 129 (1988)

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NOTE

Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments

I. INTRODUCTION

Although people enter into bailment agreements every day, the diversity and significance of bailments generally are unknown to lay persons and ignored by lawyers. This neglect stems in part from the antiquity of bailment and from its overlap with other branches of the

law.[1] One commentator has stated that "bailment stands at the point at which contract, tort, and property law converge," representing a contractual conveyance of personal property that is enforceable in tort.[2] Although bailment draws from other areas of the law, it retains a separate legal personality whose independent character has yet to be fully explored.

The term "bailment," commonly defined as "the rightful possession of goods by one who is not the owner,"[3] is derived from the French verb *bailler*, which means "to deliver."[4] The elements required to create most bailments include the intent to establish a bailment relationship, the bailor's delivery of the property to the bailee, and the bailee's acceptance of the item.[5] In order for a valid bailment to arise, the bailee must obtain possession of the bailed property. If the bailee fails to take possession, no bailment exists, and none of the rights and obligations incident to a bailment are established.[6] Possession in the bailment context consists of two elements: the bailee's exercise of physical control over the bailed property and the bailee's intent to exercise physical control.[7] Many items may be bailed—some ordinary, such as cars,[8] film,[9] and laundry,[10] and others rather unusual, such as prunes[11] and dead

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1. N. PALMER, BAILMENT 1 (1979).

2. *Id.*

3. 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1030, at 875 (3d ed. 1967). For a case adopting Professor Williston's definition, see Zuppa v. Hertz Corp., 111 N.J. Super. 419, 423, 268 A.2d 364, 366 (1970). *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY § 10.1 (3d ed. 1975).

4. *See* M. Bruenger & Co. v. Dodge City Truck Stop, Inc., 234 Kan. 682, 685, 675 P.2d 864, 868 (1984); *see also* J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 2 (7th ed. 1863).

5. *See, e.g.*, Wright v. Autohaus Fortense, Inc., 129 Ill. App. 3d 422, 424-25, 472 N.E.2d 593, 595 (1984); Allright Auto Parks, Inc. v. Moore, 560 S.W.2d 129, 130 (Tex. Civ. App. 1977). *But see infra* notes 33-35. *See generally* R. BROWN, *supra* note 3, §§ 10.2-10.3.

6. R. BROWN, *supra* note 3, § 10.2.

7. *Id.; see also* Farmer v. Machine Craft, Inc., 406 So. 2d 981, 982-83 (Ala. Civ. App. 1981); Morris v. Hamilton, 225 Va. 372, 374-75, 302 S.E.2d 51, 52-53 (1983).

8. *See, e.g.*, Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245 (1974); Chambers v. Morgan, 671 P.2d 89 (Okla. Ct. App. 1983); Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967); Allright, Inc. v. Schroeder, 551 S.W.2d 745 (Tex. Civ. App. 1977). *But see* Garlock v. Multiple Parking Servs., Inc., 103 Misc. 2d 943, 427 N.Y.S.2d 670 (Buffalo City Ct. 1980) (holding that the "bailment theory" as a basis for recovery in parking lot cases is no longer appropriate). *See generally* Annotation, *Liability for Loss of Automobile Left at Parking Lot or Garage*, 13 A.L.R.4th 362 (1982); Annotation, *Liability of Owner or Operator of Parking Lot or Garage for Loss of or Damage to Contents of Parked Motor Vehicle*, 78 A.L.R.3d 1057 (1977).

9. *See, e.g.*, Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind. 1982); Bowes v. Fox-Stanley Photo Prods., 379 So. 2d 844 (La. Ct. App. 1984); Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1970). *See generally* Annotation, *Liability of One Undertaking to Develop or to Otherwise Process Already Developed Photographic Film for Its Loss or Destruction*, 6 A.L.R.4th 934 (1981).

10. *See, e.g.*, Holder v. Lockwood, 92 So. 2d 768 (La. Ct. App. 1957); Brooks v. Angelo's Cleaners, 103 A.D.2d 923, 477 N.Y.S.2d 922 (1984). *See generally* Annotation, *Liability of Laun-*

bodies.[12] The bailment concept, however, is limited to tangible personal property[13] and generally does not extend to either real or intangible property.[14]

Before finalizing a bailment contract, a bailee often insists that a stipulation relieving it of liability for negligent loss of or damage to property under the bailee's control be included in the agreement. In England, an ordinary bailee normally is permitted to limit contractually its liability for negligence.[15] English courts uphold these exculpatory provisions both as valid exercises of the freedom to contract without interference and as devices for shifting the burden of obtaining insurance.[16] In the United States, however, the issue of whether a bailee may limit its liability for negligence has not developed uniformly.[17] Although a bailee may incorporate an exculpatory clause into the bailment contract, the limitation of liability may not be enforced in every jurisdiction.[18]

In 1907 Professor Willis, while studying the ability of bailees to limit hy contract their liability for negligence, found that American law on this topic had not yet crystallized. Nonetheless, he predicted that

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dry, Clothes Presser, Dyer, or Dry Cleaner or Third Person by Whom the Work Is Actually Done, for Loss of or Damage to Customer's Goods, 130 A.L.R. 1359 (1941).

11. *See* Dalk v. Lachmund, 157 Or. 152, 70 P.2d 558 (1937) (holding prune dryer to he bailee-for-hire).

12. *See* Edwards v. State, 162 Tex. Crim. 390, 286 S.W.2d 157 (1956). For a discussion of bailments of corpses and human tissue, see generally N. PALMER, *supra* note 1, at 7-10.

13. *See* National Ben Franklin Ins. Co. v. Bakhaus Contractors, Inc., 124 Mich. App. 510, 335 N.W.2d 70 (1983) (noting that only personal property can be the subject of a bailment). *See generally* N. PALMER, *supra* note 1, at 6.

14. *See* N. PALMER, *supra* note 1, at 6. *But see* People v. Smith, 155 Cal. App. 3d 1103, 203 Cal. Rptr. 196 (1984) (bailment of stock), *cert. denied*, 469 U.S. 1160 (1985); Robinson v. St. Clair County, 144 Ill. App. 3d 118, 493 N.E.2d 1154 (1986) (bailment of intangible); *In re* Crabtree, 48 Bankr. 528 (Bankr. E.D. Tenn. 1985) (bailment of debenture and stock certificate). It may be possible to reconcile the cases permitting the bailment of stocks with those prohibiting the bailment of stocks by distinguishing between the intangible interest (ownership interest in company) and the physical object (stock certificate) representing that interest.

15. As early as 1815 Lord Ellenborough, in Maving v. Todd, 4 Campb. 225, 171 Eng. Rep. 72 (K.B. 1815), held that a provision in a bailment contract limiting liability for loss by fire was valid and relieved the bailee from responsibility for any fire damage regardless of the cause. The receipt that the defendants gave the plaintiff stated, "Not accountable for loss by fire." Lord Ellenborough declared, "I am . . . of [the] opinion that a [bailee] by such a notice may *entirely* get rid of his liability for loss by fire." *Id.* (emphasis added).

16. *See* Note, *Validity of an Ordinary Bailment Contract Limiting Liability of Bailee for Negligence*, 86 U. PA. L. REV. 772, 773 (1938). For a discussion of insurance in the bailment context, see Part V of this Note.

17. *See infra* note 22. *But see* R. BROWN, *supra* note 3, § 11.5 (stating that "it is well settled that the parties may agree among themselves, by any contract which is not contrary to public policy, as to the extent of the bailee's liability. Such contracts may impose either a lesser or a greater responsibility on the [bailee] than the law ordinarily implies").

18. *See infra* note 22.

the trend in American courts would be to uphold, on the basis of freedom of contract, any exculpation not contrary to public policy.[19] Not all scholars agreed with Willis' conclusion. At least one commentator challenged this prognosis[20] by revealing a wide split of authority among and, in a few instances, within, jurisdictions.[21] This lack of consensus still exists.[22]

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19. Willis, *The Right of Bailees to Contract Against Liability for Negligence*, 20 HARV. L. REV. 297, 299-304 (1907). Willis stated:

> I maintain that . . . parties should be allowed freedom of contract . . . and thus contract for exemption from liability for negligence if they desire. Of course, if there is any rule of public policy that would be violated, this should not be allowed. . . . It is true that [some contracts] might be . . . bad . . . for one of the parties, but . . . [p]ublic policy does not yet forbid bad bargains.

Id. at 301.

20. *See, e.g.*, Note, *supra* note 16.

21. *See id.* at 773-75.

22. Courts in the following states either have enforced a clause limiting a bailee's liability for negligence or have inferred that they would enforce such a clause if presented witb the issue:
ALABAMA: *See* Birmingham Television Corp. v. Water Works, 292 Ala. 147, 290 So. 2d 635 (1974).
CONNECTICUT: *See* Carter v. Reichlin Furriers, 34 Conn. Supp. 661, 386 A.2d 647 (1977) (holding that a bailee may not limit liability entirely).
DISTRICT OF COLUMBIA: *See* Bernstein v. Noble, 487 A.2d 231, 234 (D.C. 1985) (stating that an exculpatory clause will "serve to limit liability to only those acts of gross negligence, willful acts, or fraud"); Houston v. Security Storage Co., 474 A.2d 143 (D.C. 1984) (upholding a valuation clause when the bailor had actual notice).
FLORIDA: *See* FDIC v. Carre, 436 So. 2d 227, 230 (Fla. Dist. Ct. App. 1983) (stating that exculpatory clauses are disfavored but are upheld when "clear and unequivocal"); *cf.* Harbor One, Inc. v. Preston, 172 So. 2d 478 (Fla. Dist. Ct. App. 1965) (disallowing a limitation of liability because ambiguity resolved against the drafter-bailee).
ILLINOIS: *See* Blume v. Evans Fur Co., 126 Ill. App. 3d 52, 466 N.E.2d 1366 (1984).
LOUISIANA: *See* Grabert v. James C. Noel Flying Serv., Inc., 360 So. 2d 1363 (La. Ct. App. 1978) (holding that the bailor must have actual knowledge of the limitation); *cf.* Bowes v. Fox-Stanley Photo Prods., Inc., 379 So. 2d 844 (La. Ct. App. 1984) (indicating that a disclaimer limiting liability is not binding absent a showing that it was explained or brought to the bailor's attention). For a discussion of *Bowes*, see *infra* notes 157-62 and accompanying text.
MICHIGAN: *See* Klann v. Hess Cartage Co., 50 Mich. App. 703, 214 N.W.2d 63 (1973) (allowing a bailee to limit liability for ordinary negligence but not gross negligence).
MISSISSIPPI: *See* Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921).
MISSOURI: *See* Wells v. Thomas W. Garland, Inc., 39 S.W.2d 409 (Mo. Ct. App. 1931); *cf.* Nuell v. Forty-North Corp., 358 S.W.2d 70 (Mo. Ct. App. 1962) (refusing to enforce limitation of liability because the bailor did not have actual notice of the posted signs or the disclaimer on receipt).
MONTANA: *See* Jones v. Great N. Ry., 68 Mont. 231, 217 P. 673 (1923).
NEW JERSEY: *See* Lebkeucher v. Pennsylvania Ry., 97 N.J.L. 112, 116 A. 323 (1922), *aff'd*, 98 N.J.L. 271, 118 A. 926 (1922).
NEW MEXICO: *See* Omni Aviation Managers, Inc. v. Buckley, 97 N.M. 477, 641 P.2d 508 (1982).
NORTH CAROLINA: *See* Miller's Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951) (allowing limitation of liability when no disparity of bargaining power exists).
SOUTH CAROLINA: *See* Marlow v. Conway Iron Works, 130 S.C. 256, 125 S.E. 569 (1924).
TENNESSEE: *See* Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967).
TEXAS: *See* Fowler v. One Seguin Art Center, 617 S.W.2d 763 (Tex. Civ. App. 1981) (permitting a bailee to limit liability for ordinary but not gross negligence); Allright, Inc. v. Schroeder, 551

The arguments for and against limitations of a bailee's liability for

S.W.2d 745 (Tex. Civ. App. 1977). For a discussion of *Fowler*, see *infra* notes 92-96 and accompanying text.

VERMONT: *See* Goslant v. Town of Calais, 90 Vt. 114, 96 A. 751 (1916).

VIRGINIA: *See* Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 64 S.E.2d 671 (1951).

WYOMING: *See* Fuchs v. Goe, 62 Wyo. 134, 163 P.2d 783 (1945) (requiring that exculpatory clause be specific and clearly expressed).

Eight jurisdictions have held that limitations of liability for negligence are invalid or have indicated that exculpatory clauses are strongly disfavored.

ARIZONA: *Cf.* Lerner v. Brettschneider, 123 Ariz. 152, 598 P.2d 515 (Ariz. Ct. App. 1979) (striking down limitation of liability because it was inconspicuous).

ARKANSAS: *See* Missouri P. Ry. v. Fugua, 150 Ark. 145, 233 S.W. 926 (1921).

COLORADO: *See* Parris v. Jaquith, 70 Colo. 63, 197 P. 750 (1920).

KENTUCKY: *See* Parkrite Auto Park, Inc. v. Badgett, 242 S.W.2d 630 (Ky. 1951) (indicating that disclaimer on a parking receipt was not sufficient to limit liability).

MINNESOTA: *See* Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N.W. 300 (1919).

NEBRASKA: *See* Peck v. Masonic Manor Apartment Hotel, 203 Neb. 308, 278 N.W.2d 589 (1979) (holding that a bailee's right to limit his liability by contract does not extend to an exemption from the consequences of his own negligence). For a discussion of *Peck*, see *infra* notes 97-101 and accompanying text.

OKLAHOMA: *See* Fisk v. Bullard, 205 Okla. 502, 239 P.2d 424 (1951) (stating that contracts limiting a bailee's liability for negligence during his course of dealing with the public usually are void as against public policy).

OREGON: *See* Real Good Food Store, Inc. v. First Nat'l Bank, 276 Or. 1057, 557 P.2d 654 (1976); Pilson v. Tip-Top Auto Co., 67 Or. 528, 136 P. 642 (1913).

Conflict exists within the following jurisdictions:

CALIFORNIA: *Compare* Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934 (1921) (allowing limitation) *with* Dieterle v. Bekin, 143 Cal. 683, 77 P. 664 (1904) (prohibiting limitation).

GEORGIA: *Compare* Hall v. Gardens Servs., Inc., 174 Ga. App. 856, 332 S.E.2d 3 (1985) (allowing limitation) *with* Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245 (1974) (holding that a disclaimer on a parking garage ticket ineffective to limit liability for negligence). This split of authority may exist only between disclaimers printed on the backs of receipts and all other types of limitations.

INDIANA: *Compare* Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind. 1982) (allowing limitation) *with* System Auto Parks & Garages, Inc. v. American Economy Ins. Co., 411 N.E.2d 163 (Ind. Ct. App. 1980) (prohibiting limitation). For a discussion of *Carr*, see *infra* notes 144-56 and accompanying text.

MASSACHUSETTS: *Compare* D'Alosio v. Morton's, Inc., 342 Mass. 231, 172 N.E.2d 819 (1961) (allowing exculpatory clause even though the bailor did not understand the text of the disclaimer because she spoke and read little English) *with* Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc., 343 F. Supp. 347 (D. Mass. 1971) (prohibiting limitation on public policy grounds).

NEW YORK: *Compare* Brooks v. Angelo's Cleaners, 103 A.D.2d 923, 477 N.Y.S.2d 922 (1984) (holding that the limitation was ineffective as against the bailor) *with* Goldbaum v. Bank Leumi Trust Co., 543 F. Supp. 434 (S.D.N.Y. 1982) (stating that the parties are free to limit expressly the bailee's common law liability).

OHIO: *Compare* Kayanda v. Kamenir, 16 Ohio Misc. 2d 1, 475 N.E.2d 519 (Akron Mun. Ct. 1984) *and* Edwards v. Crestmont Cadillac Corp., 64 Ohio Misc. 1, 410 N.E.2d 815 (1979) (indicating that public policy generally will not permit bailee to exempt himself from liability for his own negligence or that of his agents) *with* Lumberman's Mut. Ins. Co. v. F.Z. Cikra, Inc., 58 Ohio L. Abs. 66, 95 N.E.2d 230 (1950) (allowing limitation of liability if not against public policy), *rev'd in part*, 155 Ohio St. 421, 99 N.E.2d 81 (1951).

PENNSYLVANIA: *Compare* Zimmer v. Mitchell & Ness, 235 Pa. Super. 474, 385 A.2d 437 (1978)

negligence are simple and straightforward. Critics argue that exculpatory clauses violate public policy[23] and encourage negligence.[24] Supporters of these limitations respond that the pressures of competitive business will discourage most negligent tendencies[25] and also indicate that the potential harm caused by exculpatory clauses must be balanced with the equally important notion of freedom to contract.[26] The methods bailees use to limit or exempt liability for negligence, which also are elemental, include express clauses in contracts,[27] statutory provisions,[28] printed disclaimers on receipts,[29] and posted warning signs.[30]

This Note examines the use and ramifications of exculpatory clauses for negligence in bailment agreements. Part II of this Note outlines the history and current status of the commercial bailee's duty of care. Part III discusses several techniques that bailees use to limit their liability for negligence. Part IV discusses the feasibility of applying certain sections of Article 2 of the Uniform Commercial Code (UCC or Code) to bailment transactions. Finally, Part V suggests that the procurement of insurance may protect bailors from the financial loss that

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(allowing limitation), *aff'd*, 490 Pa. 428, 416 A.2d 1010 (1980) *with* Atkins v. Racquet Garage Corp., 177 Pa. Super. 94, 110 A.2d 767 (1955) (asserting that a bailee cannot stipulate against liability for his own negligence).

WASHINGTON: *Compare* S.S. Kresge Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977) (prohibiting limitation) *with* Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) (allowing limitation). For a discussion of *Mieske*, see *infra* notes 194-215 and accompanying text.

Courts in Alaska, Delaware, Hawaii, Idaho, Iowa, Kansas, Nevada, New Hampshire, North Dakota, South Dakota, Utah, West Virginia, and Wisconsin have not addressed the question of whether a commercial bailee may limit its liability for negligence.

The preceding categorization is complicated by the fact that some courts (1) will enforce exculpatory clauses generally but will refuse to do so under certain circumstances, *see supra* cases for Florida, Louisiana, Missouri, and North Carolina; (2) have allowed bailees to limit liability for one degree of negligence but not another, *see supra* cases for District of Columbia, Michigan, and Texas; or (3) have not addressed the issue in several decades and conceivably would switch positions if presented with the opportunity, *see, e.g.*, *supra* cases for Arkansas, Colorado, Minnesota, Mississippi, Montana, New Jersey, North Carolina, South Carolina, Vermont, Virginia, and Wyoming.

23. *See, e.g., supra* note 20 (Massachusetts, Ohio, and Oklahoma cases).

24. *See, e.g.*, Note, *supra* note 16, at 776 n.46

One commentator has suggested that limitations of liability for negligence should be invalidated because the party receiving the release might become lazy as a result of its secure position. This laxity enhances the likelihood that negligent loss of or damage to the bailed property will occur. The possibility of pecuniary loss encourages a party to exercise greater care in its dealings with others. *See* Comment, *Contracting Against Liability for Negligent Conduct*, 4 MO. L. REV. 55, 56 (1939).

25. *Id.* at 777.

26. *Id.*

27. *See infra* notes 58-101 and accompanying text.

28. *See infra* notes 106-39 and accompanying text.

29. *See infra* notes 140-67 and accompanying text.

30. *See infra* notes 167-86 and accompanying text.

can result from a bailee's negligence.

II. The Bailee's Duty of Care

A. Historical Development

For centuries, scholars and judges have struggled to develop a framework within which to analyze bailment agreements. Modern bailment law originated in the 1703 English case of *Coggs v. Bernard*,[31] in which Chief Justice Holt, borrowing from Roman law, established a six-part bailment classification governed by the purpose for which the goods were bailed and a determination of whether the benefit derived from the agreement was mutual or unilateral.[32] Although Lord Holt's analysis laid the foundation for many subsequent classification attempts, this framework is obsolete because it fails to accommodate many of the complex bailment variations that subsequently developed. Today, courts routinely hold that bailments may be created absent actual delivery,[33] an express contract,[34] or the bailor's consent.[35] Moreover, bailments may be complicated arrangements involving a series of

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31. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).

32. *Id.* at 912-13, 92 Eng. Rep. at 110.

Holt borrowed heavily from Roman law which also recognized six bailment categories: (1) *depositum* (deposit)—a bailment in which the bailee keeps the property without compensation; (2) *mandatum* (mandate)—bailment of goods for the purpose of having active services performed on them without compensation; (3) *commodatum* (gratuitous loan)—gratuitous bailment in which the hailee may use the goods for its own benefit; (4) *pignus* (pawn or pledge)—bailment in which goods are delivered to the creditor-bailee and are held as security for a debt; (5) *mutuum* (loan of chattels or consumption)—bailment in which the goods delivered are not returned but are exchanged for other similar goods; and (6) *locatio-conductio* (hiring)—bailment for compensation. *See generally* W. Elliott, A Treatise on the Law of Bailments and Other Carriers § 4 (W. Hemingway 2d ed. 1929).

In addition, Roman law acknowledged four varieties of "hiring" bailments: (1) *locatio rei*, "[t]he hiring of a thing for use;" (2) *locatio operi faciendi*, "[t]he hiring of work and labor;" (3) *locatio custodies*, "[t]he hiring or care and services to be performed on the thing delivered;" and (4) *locatio operis mercium vehendarum*, "[t]he hiring of the carriage of goods . . . from one place to another." *Id.; see also* J. Story, *supra* note 4, §§ 8-9.

For American cases discussing the Roman classification, see Slack v. Bryan, 299 Ky. 132, 184 S.W.2d 873 (1945), and Hanes v. Shapiro & Smith, 168 N.C. 24, 84 S.E. 33 (1915).

33. *See, e.g.*, Waugh v. University of Haw., 63 Haw. 117, 621 P.2d 957 (1980) (implying existence of bailment in absence of delivery of possession and acceptance of the goods); Merritt v. Nationwide Warehouse Co., 605 S.W.2d 250 (Tenn. Ct. App. 1980) (holding constructive delivery sufficient to create bailment).

34. *See, e.g.*, Kirby v. Chicago City Bank & Trust Co., 82 Ill. App. 3d 1113, 403 N.E.2d 720 (1980) (recognizing an "implied-in-fact" bailment).

35. *See, e.g.*, Hertz Corp. v. Paloni, 95 N.M. 212, 214, 619 P.2d 1256, 1258 (N.M. Ct. App. 1980) (stating that "[a] person who, in the absence of a mutual contract of bailment, lawfully acquires possession of another's personal property is considered to be a constructive bailee"); *see also* Armored Car Serv., Inc. v. First Nat'l Bank, 114 So. 2d 431 (Fla. Dist. Ct. App. 1959); Capezzaro v. Winfrey, 153 N.J. Super. 267, 379 A.2d 493 (1977); Kayanda v. Kamenir, 16 Ohio Misc. 2d 1, 475 N.E.2d 519 (Akron Mun. Ct. 1985).

bailees and sub-bailees.[36]

A more modern system of classification, which was adopted by Professor Williston, recognizes the presence or absence of compensation as the distinguishing feature among varieties of bailments.[37] This scheme consists of four categories: (1) bailments for the bailor's sole benefit; (2) gratuitous bailments for the bailee's sole benefit; (3) bailments for mutual benefit; and (4) bailments to which the law attaches exceptional obligations for public policy reasons.[38] Another scheme classifies bailments according to their manner of creation. Under this approach, bailments may be express, implied, or constructive.[39] Express bailments arise when the parties explicitly agree to assume the roles of bailor and bailee.[40] Implied bailments are established when the parties, by their conduct, reach a mutual understanding that a bailor-bailee relationship will exist.[41] Constructive bailments arise by operation of law and normally lack one or more of the elements required to create a conventional bailment.[42] In addition to these two standard classification systems, several other categorizations, such as professional-ordinary and gratuitous-lucrative, have emerged in American case law.[43] This Note focuses primarily on commercial bailments, most of which fall into the "*locatio-conducto*," "mutual benefit," or "conventional" (*i.e.*, "express" and "implied") bailment categories.[44]

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36. For cases involving sub-bailees, see Siverson v. Martori, 119 Ariz. 440, 581 P.2d 285 (Ariz. Ct. App. 1978); Governor House v. Schmidt, 284 A.2d 660 (D.C. 1971); Revillon Freres v. Cassell Trucking Co., 24 A.D.2d 846, 264 N.Y.S.2d 24 (1965).

37. 9 S. WILLISTON, *supra* note 3, § 1033, at 883; *see also* J. SCHOULER, THE LAW OF BAILMENTS § 6 (4th ed. 1905). For cases applying the Williston classification, see Pettinelli Motors, Inc. v. Morreale, 39 Misc. 2d 813, 242 N.Y.S.2d 78 (Oneida County Ct. 1963), and Miller v. Hand Ford Sales, Inc., 216 Or. 567, 340 P.2d 181 (1959).

38. Bailees in the fourth category include common carriers and innkeepers, both of which were strictly liable for bailed property under the common law. N. PALMER, *supra* note 1, at 91 n.9; *see also* Ingersoll-Rand Fin. Corp. v. Nunley, 671 F.2d 842 (4th Cir. 1982) (holding that an arrangement in which the debtor left its mining equipment with another company constituted a bailment under West Virginia law even though the bailee's acceptance was constructive rather than actual).

39. *See* N. PALMER, *supra* note 1, at 91; *see, e.g.*, Kern v. Harris, 30 Or. App. 723, 726, 567 P.2d 1069, 1071 (1977).

40. *See* N. PALMER, *supra* note 1, at 91.

41. *See* Rich v. Touche Ross & Co., 415 F. Supp. 95, 99 n.2 (S.D.N.Y. 1976); Robinson v. St. Clair County, 144 Ill. App. 3d 118, 120-21, 493 N.E.2d 1154, 1155-56 (1986); Mack v. Davidson, 55 A.D.2d 1027, 1028, 391 N.Y.S.2d 497, 499 (1977).

42. *See, e.g.*, Kessman v. City & County of Denver, 709 P.2d 975 (Colo. Ct. App. 1985); *see also* 9 S. WILLISTON, *supra* note 3, § 1033, at 884 (discussing the confusion arising from use of the term "constructive bailment").

43. *See, e.g.*, General Grain, Inc. v. International Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616 (1968) (distinguishing between "professional" and "ordinary" bailees); White v. Burke, 31 Wash. 2d 573, 197 P.2d 1008 (1948) (classifying bailments as either "gratuitous" or "lucrative").

44. This Note will not consider commercial hailees whose functions are quasi-public because those bailees are regulated heavily by statute. An example of a quasi-public bailee is a common

B. Current Status

The bailee's duty of care varies according to the type of bailment created.[45] Generally, commercial bailees must exercise ordinary diligence to protect the bailed property from damage or loss.[46] Ordinary diligence is that degree of care that a reasonably prudent person would exercise when handling his own goods under similar circumstances.[47] A bailee who would have been reckless with his own property, however, is not excused from failing to exercise proper diligence when caring for the property of another.[48] Exactly what constitutes ordinary care is a question for the trier of fact that normally hinges on the nature of the bailed property, the business of the bailee, and the standards of the bailee's particular trade.[49] A bailee is expected to exercise a higher degree of care if the bailed goods are of great value than if they are of slight value. In *Kelton v. Taylor*,[50] for example, the defendant stored the plaintiff's cotton under a shed. A thief stole the cotton, and the plaintiff sued the bailee for negligence. Finding that the bailee's method of storing the cotton was not negligent, the court remarked that "what would be ordinary diligence . . . in respect to a bag of oats or a bale of cotton, might be gross negligence as to a bag of gold or a box of diamonds."[51] Trade customs also may influence a court's decision. In *Thackray v. Johnstown Airways, Inc.*[52] a state appellate court overturned a jury verdict and held that the bailee was not negligent merely for failing to employ a night watchman when several airplanes were destroyed in a hangar fire. The court's holding was predicated on the fact

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carrier. Warehousemen, because they are regulated by Article 7 of the UCC, are also outside the scope of this study. *See also supra* note 38.

45. *See* R. BROWN, *supra* note 3, §§ 11.1-11.4.

46. *See, e.g.*, Continental Nat'l Am. Group v. Valley Line Co., 420 F. Supp. 568, 570 (E.D. Mo. 1976); Rhodes v. Duarte, 142 Ga. App. 885, 237 S.E.2d 212 (1977); M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc., 234 Kan. 682, 685, 675 P.2d 864, 868 (1984); Edwards v. Crestmont Cadillac Corp., 64 Ohio Misc. 1, 6, 410 N.E.2d 815, 819-20 (1979); Chambers v. Morgan, 671 P.2d 89, 90 (Okla. Ct. App. 1983). *See generally* R. BROWN, *supra* note 3, § 11.2.

47. *See, e.g.*, Preston v. Prather, 137 U.S. 604 (1891); Dresser Indus., Inc. v. Foss Launch & Tug Co., 560 P.2d 393, 395 (Alaska 1977).

48. *See* Wright v. Autohaus Fortense, Inc., 129 Ill. App. 3d 422, 426, 472 N.E.2d 593, 596 (1984).

49. *See, e.g.*, Edwards v. Crestmont Cadillac Corp., 64 Ohio Misc. 1, 6, 410 N.E.2d 815, 819 (1979); Moon v. First Nat'l Bank, 287 Pa. 398, 402, 135 A. 114, 115 (1926).

50. 79 Tenn. 264 (1883).

51. *Id.* at 266; *see also* Klotz v. El Morocco Int'l, Ltd., 56 Misc. 2d 319, 326, 288 N.Y.S.2d 684, 692 (N.Y. City Civ. Ct. 1967) (stating that the defendant, a night club owner, was negligent for failing to exercise that degree of care required of a reasonably prudent night club operator when guarding moter vehicles of the type (Cadillac) owned by plaintiff), *rev'd on other grounds*, 63 Misc. 2d 489, 312 N.Y.S.2d 60 (N.Y. App. Term. 1968).

52. 18 Camb. Co. L.J. 73 (Pa. C. 1950).

that providing night watchmen was not a trade custom.[53]

Despite a bailee's duty to exercise ordinary care absent a special contract to the contrary, a bailee is not an insurer of the bailed goods[54] and is not liable for the preservation of the bailed property.[55] Nevertheless, most courts agree that bailees may enlarge their common law duties by contract.[56] The precise extent to which bailees may limit their common law duties, however, is the topic of a continuing debate and the primary focus of this Note.[57]

III. BAILEES' METHODS OF LIMITING OR EXCLUDING LIABILITY

A. Express Agreements

Some bailees expressly contract to limit their liability for negligence by inserting into the bailment agreement exculpatory clauses declaring that the property is bailed at the bailor's risk, that the bailee is exonerated from responsibility for loss of or damage to the property in certain situations, or that the damages for which the bailee might be held liable is limited to a specific amount. Courts assess the validity of express exculpatory agreements by determining whether these general clauses cover instances of bailee negligence or whether the clauses must specifically mention negligence in order to insulate the bailee from liability. Although exculpatory clauses are not judicially favored, courts ordinarily will honor the parties' freedom to contract, absent legislation to the contrary.[58] When faced with the dilemma of ascertaining the validity of an exculpatory clause, courts frequently balance the freedom to limit liability by contract against the forum jurisdiction's public policy.

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53. *Id.* at 75.

54. *See, e.g.*, City of Clearwater v. Thomas, 446 So. 2d 1160, 1161 (Fla. Dist. Ct. App. 1984); Torix v. Allred, 100 Idaho 905, 910, 606 P.2d 1334, 1339 (1980); Nimet Indus., Inc. v. Joy Mfg. Co., 419 N.E.2d 779, 781 (Ind. Ct. App. 1981); Mannis v. Pine Hills Taxi Co., 87 Misc. 2d 680, 681, 386 N.Y.S.2d 301, 302 (Albany City Ct. 1976).

55. *See, e.g.*, Chambers v. Morgan, 671 P.2d 89, 90 (Okla. Ct. App. 1983).

56. *See, e.g.*, Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143 (5th Cir. 1983); Elliott v. Sheridan, Inc., 385 So. 2d 1074 (Fla. Dist. Ct. App. 1980); Stubbs v. Hook, 467 N.E.2d 29, 31 n.1 (Ind. Ct. App. 1984); International Feed Prods., Inc. v. Alfalfa Prods., Inc., 337 N.W.2d 154, 157 (N.D. 1983); Annotation, *Bailee's Express Agreement to Return Property, or to Return It in a Specified Condition, as Enlarging His Common-Law Liability*, 150 A.L.R. 269 (1944); *cf.* Texas W. Fin. Corp. v. Ideal Builders Hardware Co., 481 S.W.2d 919, 923 (Tex. Civ. App. 1972) (prohibiting a bailee's liability from being enlarged by words of doubtful meaning).

57. *See supra* note 22 and accompanying text. Some courts simply state that bailees may "modify" their obligations, thus leaving room for bailees to restrict their liability. *See, e.g.*, Davis v. M.L.G. Corp., 712 P.2d 985, 988 (Colo. 1986); On Site Energy Corp. v. Sperry Rand Corp., 5 Conn. App. 326, 498 A.2d 121 (1985).

58. *See, e.g.*, Key Biscayne Divers, Inc. v. Marine Stadium Enters., Inc., 490 So. 2d 137 (Fla. Dist. Ct. App. 1986); W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 482 (5th ed. 1984) [hereinafter PROSSER].

The exculpatory provision will fail if it violates public policy, but otherwise will stand.[59] Thus, an agreement that excuses one of the parties for the consequences of its own negligent conduct may be enforced.[60]

There are several exceptions to the general rule that permits parties to employ exculpatory clauses. The *Restatement of Contracts*, for example, suggests that an agreement extinguishing one party's liability for negligence is illegal to the extent that it attempts to absolve that party of liability for gross negligence.[61] The *Restatement* also forbids exemptions that excuse willful breaches of duty and exemptions covering persons "charged with a duty of public service."[62]

Professor Prosser also recoguizes exceptions to the general rule.[63] Although Prosser insists that parties should be free to contract,[64] he also asserts that when a large discrepancy in bargaining power places one party at the mercy of the other party's negligence, the contract is void as a matter of public policy.[65] On the other hand, when the parties possess roughly equal bargaining power, exculpatory clauses normally are allowed.[66] Prosser also advocates a prohibition against exculpatory clauses limiting liability for negligence in transactions that affect the

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59. Annotation, *Validity of Contractual Provision by One Other than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, 14-15 (1948).

Public policy is an amorphous concept. Several cases have indicated that public policy imports a standard that is uncertain and varies with changes in economic needs, social customs,and usages of trade. *See, e.g.*, Franklin Fire Ins. Co. v. Noll, 115 Ind. App. 289, 295-96, 58 N.E.2d 947, 950 (1945); Barwin v. Reidy, 62 N.M. 183, 192-93, 307 P.2d 175, 181 (1957); Pendleton v. Greever, 80 Okla. 35, 37, 193 P. 885, 887 (1920) (observing that "public policy" "has never been defined by the courts, but has been let loose and free from definition"). According to *Black's Law Dictionary*, the term "public policy" embodies "[t]he principles under which the freedom of contract or private dealings is restricted by law for the good of the community." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Public policy often is enunciated by the legislature in the form of statutes. Even when a statute exists, however, courts have broad interpretive powers. In the absence of a valid statute, courts have even broader powers. Thus, public policy is at best a vague concept that can be molded by a court to serve almost any purpose.

60. *See* PROSSER, *supra* note 58, at 482.

61. RESTATEMENT OF CONTRACTS § 574 (1932). Gross negligence is conduct that falls greatly below "the standard established by law for the protection of others against unreasonable risk of harm." *Id.* at comment.

62. *Id.* § 575.

63. PROSSER, *supra* note 58, at 482-84.

64. *Id.* at 482.

65. *Id.*; *see also* Annotation, *supra* note 59, at 16-17.

66. PROSSER, *supra* note 58, at 483. *See generally* Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372 (1958).

Although no definite rules exist to guide courts in measuring the relative bargaining power of contracting parties, two factors are paramount: the importance of the contract to the physical or economic well-being of the party agreeing to the release of liability and the existence and extent of competition among the group to which the exempting party belongs. *See* Annotation, *supra* note 59, at 16-17.

public interest, such as agreements involving common carriers, public utilities, and innkeepers.[67] This exception, which overlaps with the unequal bargaining power exception, has been extended to commercial bailees who are under no duty to protect the public interest but who deal with the public on a regular basis, such as owners of parking garages and operators of parcel checkrooms. The rationale for preventing these quasi-public bailees from limiting their liability for negligence is based on the public's need for their services and individual customers' lack of actual bargaining power.[68]

In *Allright v. Elledge*,[69] for example, the bailor's car was stolen from the bailee's parking garage and the bailor sued the bailee for the value of the car. The parties had executed a contract under which the bailor paid fifty dollars a month to park in the bailee's lot.[70] The contract included a provision limiting the bailee's liability for loss of or damage to the bailor's car to 100 dollars unless the bailor wished to negotiate for additional coverage at a higher fee.[71] The court held that the contract violated public policy and therefore was void because customers of a public parking garage possess little actual bargaining power and consequently have no choice but to accept the garage's limitations of liability.[72]

Banks are another type of bailee that fall within the scope of Professor Prosser's public interest exception. Several courts have voided exculpatory clauses in contracts concerning safe deposit box rentals and night depository facilities[73] because banking is an essential service that

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67. PROSSER, *supra* note 58, at 482-83; *see also* Comment, *supra* note 24, at 56.

68. PROSSER, *supra* note 58, at 483.

69. 508 S.W.2d 864 (Tex. Civ. App. 1974).

70. *Id.* at 865.

71. *Id.* at 867-68. The first paragraph of the "Contract Parking Agreement" read:

> Contract parking is on a month to month basis. In consideration of the low rates charged for parking, operator will not be responsible for loss by fire, misdelivery or theft, except such loss occasioned by negligence of operator, and then only up to a maximum of $100.00. Proportionately greater rates must be paid in advance if customer sets larger limits of liability.

Id.

72. *See id.* at 869. On certification of a question, however, the Texas Supreme Court stated that it did not feel "the occupation [of parking lot owner] to command so dominant a position." Allright, Inc. v. Elledge, 515 S.W.2d 266, 268 (Tex. 1974).

73. *See, e.g.*, Sniffen v. Century Nat'l Bank, 375 So. 2d 892 (Fla. Dist. Ct. App. 1979) (insisting that the bank could not rely on an exculpatory clause contained in the safety deposit box contract to defeat the claim that the bank had breached the contract by negligently permitting an unauthorized person to gain access to the customer's box); Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112, 350 A.2d 279 (1975); Employer's Ins. of Wausau v. Chemical Bank, 117 Misc. 2d 601, 459 N.Y.S.2d 238 (N.Y. City Civ. Ct. 1983); Real Good Food Store, Inc. v. First Nat'l Bank, 276 Or. 1057, 557 P.2d 654 (1976). *But see* Valley Nat'l Bank v. Tang, 18 Ariz. App. 40, 42, 499 P.2d 991, 993 (1972) (stating that "there is no reason in terms of . . . social policy, why a bank cannot make the facility available under terms and conditions which place the risk of loss on the customer"); FDIC v. Carré, 436 So. 2d 227 (Fla. Dist. Ct. App. 1983). *See generally* Annotation,

the public relies on and because night depository and safe deposit services are integral parts of the banking business.[74]

In *Hy-grade Oil Co. v. New Jersey Bank*[75] the Superior Court of New Jersey held that a bank could not contractually exculpate itself from responsibility for negligently performing night depository services. The contract between the plaintiff oil company and the bank was printed on a standardized form and provided that the bank was not responsible for the loss or destruction of the deposit bag or the bag's contents.[76] The contract also stated that because the bank offered night depository facilities for its customers' convenience, customers used the night depository at their own risk.[77] The manager of the oil company failed to read this section of the contract before signing the agreement.[78] Two days after the manager placed a substantial sum of money into the night depository, he learned that the funds had not been credited to the oil company's account.[79] Upon further inquiry, the manager discovered that the deposit pouch, which was in the bank's possession, had been torn in two and was empty. When the money could not be located, the oil company sued the bank for negligence.[80] The court held that a party under a public duty to exercise special care could not escape liability for its own negligence by means of a contractual provision.[81] More specifically, the court stated that banks perform "an important and necessary public service" and should not be allowed to avoid liability for negligence in providing night depository services.[82]

In contrast, marina owners are bailees whose use of exculpatory clauses is not invalid under Professor Prosser's public interest exception. In *Key Biscayne Divers, Inc. v. Marina Stadium Enterprises, Inc.*[83] the plaintiff stored his boat at the defendant's marina.[84] The boat, which the plaintiff used for commercial diving, was destroyed when its storage rack collapsed. Although the plaintiff's insurance com-

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Liability of Bank in Connection with Night Depository Service, 77 A.L.R.3d 597 (1977).

74. Gramore Stores, Inc. v. Banker's Trust Co., 93 Misc. 2d 112, 402 N.Y.S.2d 326 (N.Y. Sup. Ct. 1978).

75. 138 N.J. Super. 112, 350 A.2d 279 (1975).

76. *Id.* at 114, 350 A.2d at 280.

77. *Id.* at 115, 350 A.2d at 280.

78. *Id.*

79. *Id.*

80. *Id.* at 115, 350 A.2d at 281.

81. *Id.* at 116-17, 350 A.2d at 281.

82. *Id.* at 118, 350 A.2d at 282. UCC § 4-103 prevents a bank from disclaiming or limiting its liability for lack of good faith or failure to exercise ordinary care in connection with bank deposits and collections. The *Hy-Grade Oil* court relied in part on this UCC provision to void the bank's exculpatory clause. *Id.* at 117, 350 A.2d at 282.

83. 490 So. 2d 137 (Fla. Dist. Ct. App. 1986).

84. *Id.* at 138.

pany reimbursed him for the full value of the boat, he sued the marina owner for consequential damages.[85] The storage agreement in question provided that the marina was immune from all liability for loss of life and property damage resulting from ordinary negligence or from fire, theft, windstorm, or other casualty loss.[86] The plaintiff contended that the exculpatory clause did not relieve the bailee-marina owner of responsibility for his own negligence and that the clause was void as a matter of public policy.[87] While expressing a general disfavor of clauses exculpating a party's negligence, the court nevertheless enforced the clause because the parties possessed equal bargaining power and because no public policy factors precluded enforcement of the exculpatory provisions.[88]

When upholding an exculpatory clause courts generally will strictly construe the clause against the drafting party.[89] Therefore, if a bailee intends to incorporate into the contract an exculpatory provision legally voiding the consequences of its own negligence, the clause must be clear and unambiguous and must include the word "negligence."[90] By construing general exculpatory clauses that do not explicitly mention negligence as not covering negligent acts, many courts have developed a convenient and practical means for invalidating stipulations that might have limited a bailee's liability for negligence.[91]

Strict construction in contract interpretation may disadvantage de-

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85. *Id.*

86. The storage agreement stated:

> The owner for himself, . . . hereby releases and agrees to indemnify and hold harmless the company . . . for any and all . . . loss of life and property damage: (1) arising out of the ordinary negligence of the company or its employees and agents in connection with the Company's premises or the use of storage spaces . . . (3) for loss or damage to the Owner's boat . . . or contents there—due to fire, theft, vandalism, collision, marina equipment failure, windstorm, rain, hurricane or other casualty loss.

Id.

87. *Id.* at 137-38.

88. *Id.* at 138; *see also* Fahey v. Gledhill, 33 Cal. App. 3d 884, 663 P.2d 197, 191 Cal. Rptr. 639 (1983) (holding that under admiralty law an exculpatory clause freeing a ship repairer from liability for negligence is not contrary to public policy). *See generally* Annotation, *Liability of Operator of Marina or Boatyard for Loss of or Injury to Pleasure Boat Left for Storage or Repair*, 44 A.L.R.3d 1332 (1972).

89. *See, e.g.*, Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143, 146-47 (5th Cir. 1983) (stating that "[a] provision purporting to exonerate the bailee from his negligence will be strictly construed"); Goldbaum v. Bank Leumi Trust Co., 543 F. Supp. 434, 436 (S.D.N.Y. 1982); Harbor One, Inc. v. Preston, 172 So. 2d 478, 479 (Fla. Dist. Ct. App. 1965); Peck v. Masonic Manor Apartment Hotel, 203 Neb. 308, 313, 278 N.W.2d 589, 593 (1979); Fowler v. One Sequin Art Center, 617 S.W.2d 763, 765 (Tex. Civ. App. 1981).

90. *See, e.g.*, Fowler v. One Seguin Art Center, 617 S.W.2d 763, 765 (Tex. Civ. App. 1981); *see also* Peck v. Masonic Manor Apartment Hotel, 203 Neb. 308, 313, 278 N.W.2d 589, 593 (1979).

91. Annotation, *supra* note 59, at 18. *But see* Fahey v. Gledhill, 33 Cal. App. 3d 884, 893-94, 663 P.2d 197, 204, 191 Cal. Rptr. 639, 646 (1983) (indicating that a direct reference to "negligence" is not required in an exculpatory clause).

fendant-bailees who claim that their liability for negligence was limited or excluded by virtue of a contractual provision. In *Fowler v. One Seguin Art Center*,[92] for example, the owner of a sculpture agreed to display the work at the defendant's art center. During the exhibition, the piece was damaged by an art center employee.[93] When the plaintiff demanded reimbursement for the damaged sculpture, the gallery replied that a disclaimer in the exhibition agreement absolved the gallery from any liability for damage.[94] The plaintiff claimed that the exculpatory clause was invalid because it did not expressly cover negligent acts.[95] The court agreed with the plaintiff's argument and refused to absolve the art center of liability by strictly construing the exculpatory clause. The court also noted that the clause in question failed partly because it did not inform the bailor that the bailee intended to limit liability for the bailee's own negligence.[96]

A Nebraska court addressed a similar issue in *Peck v. Masonic Manor Apartment Hotel*,[97] which arose out of a boat storage agreement between the bailor and the bailee. The contract provided that the bailee "shall not be held liable for any damage to these boats and equipment while on the premises."[98] The bailor returned to check on his boat three months later and discovered that the boat was missing.[99] The bailee failed to locate the boat, and the bailor sued for 5000 dollars, the market value of the boat at the time it disappeared. The bailee responded that the contractual disclaimer exempted it from liability for negligent loss of the boat.[100] The court disagreed, holding that the term "loss" was not synonymous with the narrower term "damage."[101]

When evaluating the validity of express agreements to limit a bailee's liability for negligence, courts generally enforce exculpatory clauses that are clear, specific, and not contrary to public policy.[102] On the other hand, if the terms of the exculpatory clause are doubtful or ambiguous and the bailee possesses greater bargaining power than the bailor, or if the bailee has been entrusted with a public duty, courts usually will invalidate the limitation provisions.[103] Courts, however,

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92. 617 S.W.2d 763 (Tex. Civ. App. 1981).
93. *Id.* at 764.
94. The clause read: "The One Seguin Art Center . . . assumes no responsibility for loss or damage of paintings and sculpture." *Id.*
95. *Id.* at 765.
96. *Id.*
97. 203 Neb. 308, 278 N.W.2d 589 (1979).
98. *Id.* at 309, 278 N.W.2d at 591.
99. *Id.* at 311, 278 N.W.2d at 592.
100. *Id.* at 313, 278 N.W.2d at 593.
101. *Id.*
102. *See supra* notes 59, 66, 83-91 and accompanying text.
103. *See supra* notes 59, 61-62, 65, 67-83, 92-101 and accompanying text.

have tremendous leeway to balance many factors and to interpret freely the meaning of the terms "clear," "specific," and "public policy."[104] Determining what constitutes a "disparity in bargaining power" or "public duty" is also within the discretion of the court.[105] Because courts do not always strike the same balance given a particular set of facts, the outcomes of cases examining the validity of exculpatory clauses are not as consistent as this analysis might suggest.

B. State Statutes

Four western states—California, Montana, Oklahoma, and South Dakota—have enacted statutes that limit a bailee's liability for negligence.[106] These identically worded statutes read: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."[107] An Oklahoma court interpreted its statute to mean that depositories cannot completely limit their liability for negligence.[108]

In *Hoffman v. Eastman Kodak Co.*,[109] the seminal interpretation of the California statute, the plaintiff delivered film containing moving pictures of his Grand Canyon vacation to the defendant for development. The plaintiff testified that the primary motivation for his trip was to experiment with the film in question. The defendant lost the film, and the plaintiff sued to recover 302 dollars, the total cost of his vacation.[110] Because the plaintiff neglected to inform the defendant of the special value of the film, the defendant, relying on the statute, argued that it had reasonably assumed that the bailed property was not extraordinarily valuable.[111] The court agreed with the defendant's reading of the statute and limited the defendant's liability to the retail cost of the lost film.[112] Thus, as interpreted by the courts, the four state bailment statutes provide that the amount of damages recoverable by a bailor for a bailee's negligent loss of goods is limited to the value of those goods as disclosed by the bailor unless the bailee had reason to know or suspect that the goods were more valuable than the bailor has represented.

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104. *See supra* note 59 and accompanying text.

105. *Id.*

106. CAL. CIV. CODE § 1840 (West 1985); MONT. CODE ANN. § 70-6-204 (1987); OKLA. STAT. ANN. tit. 15, § 460 (West 1966); S.D. CODIFIED LAWS ANN. § 43-39-17 (1983).

107. *See supra* note 106.

108. Chamhers v. Morgan, 671 P.2d 89, 90 (Okla. Ct. App. 1983).

109. 99 Cal. App. 436, 278 P. 891 (1929). Plaintiff had purchased a new type of film from Kodak.

110. *Id.* at 437, 278 P. at 891.

111. *Id.*

112. *Id.* at 438, 278 P. at 891.

A more common type of bailment statute limits innkeepers' liability for lost, damaged, or destroyed property to a specified amount.[113] Statutes limiting innkeepers' liability for loss of or injury to a guest's property generally reflect a legislative intent to alleviate the harsh rule of absolute liability imposed on innkeepers at common law.[114] While most state innkeeper statutes resemble each other in certain respects, there are important differences. One type of innkeeper statute establishes a recovery limit for lost or damaged property, but eliminates the ceiling when the loss or damage results from the innkeeper's negligence.[115] Thus, if the guest can prove that the innkeeper acted negligently, the guest may recover the full value of the lost or damaged property, not merely the statutory sum.

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113. All 50 states and the District of Columbia have statutes permitting innkeepers and hotel owners to limit their liability for their guests' baggage and/or other valuables. *See* ALA. CODE §§ 34-15-12 to -15 (1985); ALASKA STAT. §§ 08.56.050 to .060 (1986); ARIZ. REV. STAT. ANN. § 33-302 (1974); ARK. STAT. ANN. §§ 71-1107 to -1110 (1979); CAL. CIV. CODE §§ 1859-1860 (West 1985); COLO. REV. STAT. §§ 12-44-109 to -112 (1985); CONN. GEN. STAT. ANN. §§ 44-1 to -2 (West 1981); FLA. STAT. ANN. § 509.111 (West Supp. 1987); GA. CODE ANN. §§ 43-21-8 to -12 (1984); HAW. REV. STAT. §§ 486K-4 to -9 (Supp. 1985); IDAHO CODE §§ 39-1823 to -1824 (1985); ILL. ANN. STAT. ch. 71, paras. 1 to 4 (Smith-Hurd Supp. 1987); IND. CODE ANN. §§ 32-8-28-1 to -5 (Burns 1980); IOWA CODE ANN. § 105.1 to .9 (West 1984); KAN. STAT. ANN. §§ 36-402 to -403 (1986); KY. REV. STAT. ANN. §§ 306.020 to .030 (Michie/Bobbs-Merrill 1981); LA. CIV. CODE ANN. §§ 2965-2971 (West 1952 & Supp. 1987); ME. REV. STAT. ANN. tit. 30, §§ 2901-2904 (1964); MD. ANN. CODE art. 71, § 3 (1983 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 140, §§ 10-13 (West 1974); MICH. COMP. LAWS ANN. §§ 427.101 to .102 (West 1978 & Supp. 1987); MINN. STAT. ANN. § 327.71 (West Supp. 1987); MISS. CODE ANN. §§ 75-73-1, -5, -7 (1972); MO. ANN. STAT. §§ 419.010 to .030 (Vernon 1979); MONT. CODE ANN. §§ 70-6-501 to -505 (1987); NEB. REV. STAT. §§ 41-208 to -214 (1984); NEV. REV. STAT. ANN. § 651.010 (Michie 1986); N.H. REV. STAT. ANN. § 353:1 (1984); N.J. STAT. ANN. §§ 29:2-2 to :2-4 (1981); N.M. STAT. ANN. § 57-6-1 (1987); N.Y. GEN. BUS. LAW §§ 200-202 (McKinney Supp. 1987); N.C. GEN. STAT. §§ 72-3 to -6 (1985); N.D. CENT. CODE §§ 60-01-29 to -33 (1985); OHIO REV. CODE ANN. §§ 4721.01 to .03 (Anderson 1977); OKLA. STAT. ANN. tit. 15, §§ 501-503(b) (West 1966); ORE. REV. STAT. §§ 699.010-.040 (1985); PA. STAT. ANN. tit. 37, §§ 61-65 (Purdon 1954); R.I. GEN. LAWS §§ 5-14-1 to -2 (1976); S.C. CODE ANN. § 45-1-40 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 43-40-1 to -6 (1983); TENN. CODE ANN. §§ 62-7-103, -106 (1986); TEX. REV. CIV. STAT. ANN. art. 4592 (Vernon 1976); UTAH CODE ANN. § 29-1-1 to -3 (1984); VT. STAT. ANN. tit. 9, §§ 3141-3143 (1984); VA. CODE ANN. § 35.1-28 (1984); WASH REV. CODE ANN. §§ 19.48.030, .070 (1978); W. VA. CODE § 16-6-22 (1985); WIS. STAT. ANN. §§ 50.80 to .82 (West 1987); WYO. STAT. §§ 33-17-101 to -102 (1986).

114. *See generally* O. HOLMES, THE COMMON LAW AND OTHER WRITINGS 175 (1881); J. SHERRY, THE LAWS OF INNKEEPERS § 18.3 (1972); Arterburn, *The Early Liability of a Bailee*, 25 MICH. L. REV. 479 (1927). Because these exculpatory statutes are in derogation of the common law, they generally are construed strictly. *See* Kalpakian v. Oklahoma Sheraton Corp., 398 F.2d 243 (10th Cir. 1968). One reason for absolute liability "was to protect travelers against the dishonest practices of innkeepers and their servants." Phoenix Assurance Co. of N.Y. v. Royale Inv. Co., 393 S.W.2d 43, 47 (Mo. Ct. App. 1965); J. SHERRY, *supra*, § 18.1.

115. *See, e.g.*, ALASKA STAT. § 08.56.050(b) (1986); MISS. CODE ANN. § 75-73-7 (1972); NEB. REV. STAT. § 41-208 (1984); N.H. REV. STAT. § 353:1 (1984); TEX. REV. CIV. STAT. ANN. art. § 4592 (Vernon 1976); WYO. STAT. § 33-17-101 (1986). *See generally* Annotation, *Statutory Limitations upon Innkeeper's Liability as Applicable Where Guest's Property is Lost or Damaged Through Innkeeper's Negligence*, 37 A.L.R.3d 1276, 1283-85 (1971).

In *Shamrock Hilton Hotel v. Caranas*[116] a Texas court applied this type of statute to a case involving a patron of the Shamrock Hilton who left her purse in the hotel restaurant. A busboy delivered the purse to a cashier who subsequently misdelivered it.[117] The purse allegedly contained five dollars in cash, several credit cards, and ten pieces of jewelry worth over thirteen thousand dollars.[118] The owner discovered her loss the next morning and promptly notified the hotel authorities. When the purse could not be relocated, the owner filed suit against the hotel alleging that the hotel was negligent in delivering the purse to an unknown person. The Texas Court of Civil Appeals affirmed a jury finding that the hotel cashier acted negligently by delivering the purse to someone other than the actual owner,[119] and held that the hotel was liable for all of the contents of the purse, as well as for the purse itself.[120] The court added that the state statute limiting the hotel's liability to 500 dollars did not control because the statute is inapplicable when the guest's loss results from the hotel's own negligence.[121]

A second type of innkeeper statute permits hotels to limit their liability regardless of negligence.[122] In *Associated Mills, Inc. v. Drake Hotel, Inc.*[123] the bailor left the only working prototype of a massage machine, which he manufactured, in the bailee-hotel where it had been displayed at a conference. In order to protect the machine, the bailor requested that the hotel seal the exhibit room overnight. The next morning the bailor discovered that the room had not been locked and that the prototype was missing. The bailor sued for a total of 87,123 dollars, which included the cost of developing and manufacturing the

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116. 488 S.W.2d 151 (Tex. Civ. App. 1972). The bailment was a constructive bailment. *Id.; see also supra* note 42 and accompanying text.

117. *Shamrock*, 488 S.W.2d at 152-53. There was no testimony on the question of whether the cashier requested to see identification before relinquishing possession of the purse. *Id.*

118. *Id.* at 153.

119. *Id.*

120. *Id.* at 155-56. The hotel argued that a bailment "existed only as to 'the purse and the usual petty cash or credit cards found therein' and not to the jewelry of which the hotel had no actual notice." *Id.* at 155. The court held, however, that the hotel was liable for the value of the jewelry because it was reasonably foreseeable that a hotel guest "might have her jewelry in her purse either awaiting a present occasion to wear it or following reclaiming it from the hotel safe in anticipation of leaving the hotel." *Id.*

121. *Id.* at 153; *see also* TEX. REV. CIV. STAT. ANN. art. § 4592 (Vernon 1973) (providing, in pertinent part, that "[a]ny hotel . . . who constantly has . . . a metal safe or vault . . . for the custody [of patrons' valuables] . . . shall not be liable for the loss or injury suffered by any guest . . . in excess . . . of fifty dollars . . . *provided, such loss or injury does not occur through the negligence . . . of said hotel*" (emphasis added)).

122. *See, e.g.*, ILL. STAT. ANN. ch. 71, para. 1 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 32-8-28-1 (Burns 1980); N.M. STAT. ANN. § 57-6-1 (1978); N.D. CENT. CODE § 60-01-30 (1985). *See generally* Annotation, *supra* note 115, at 1285-86.

123. 31 Ill. App. 3d 304, 334 N.E.2d 746 (1975).

machine, loss of sales, and consequential damages resulting from the increased costs associated with manufacturing the product without the prototype.[124] The hotel moved to strike all damage requests that exceeded 250 dollars, the statutory ceiling for an innkeeper's liability to a guest for lost or damaged property.[125] The Appellate Court of Illinois granted the hotel's motion because the Illinois Innkeepers' Act limits a hotel's liability regardless of whether the loss or damage resulted from the hotel's own negligence.[126]

A third type of innkeeper statute either does not specifically mention negligence or fails to indicate whether an innkeeper's negligence affects the limitation of liability.[127] Statutes falling into this category have been interpreted in one of two ways, depending on the jurisdiction. Some courts have enforced the statutory limitation in spite of the hotel's negligence;[128] others have refused to allow hotelkeepers to limit liability for their own negligence.[129]

Many of the innkeeper statutes that restrict patrons' recovery for property loss or damage declare that the limitations will not be enforced if the innkeeper fails to post copies of the exculpatory statute in conspicuous places throughout the hotel.[130] In *Terry v. Lincscott Hotel*

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124. *Id.* at 305, 334 N.E.2d at 747.

125. The Illinois statute reads in pertinent part: "Whenever . . . any hotel provides a safe or vault . . . for the safekeeping [of guests' valuables] . . . such hotel . . . [shall not be] liable for loss or damage in an amount exceeding $250, regardless of whether such loss or damage is occasioned by . . . the . . . negligence of such [hotel] . . . ." ILL. ANN. STAT. ch. 71, para. 1 (Smith-Hurd 1957 & Supp. 1987).

126. *Associated Mills*, 31 Ill. App. 3d at 308-09, 334 N.E.2d at 749-50; *see also supra* note 125. The court noted that the only way an innkeeper can incur liability larger than that allowed in the statute is by signing a written agreement to do so. 31 Ill. App. 3d at 310, 334 N.E.2d at 750.

127. *See, e.g.*, CAL. CIV. CODE §§ 1859-1860 (West 1985); FLA. STAT. ANN. § 509.111 (West Supp. 1987); MO. ANN. STAT. §§ 419.010 to .030 (Vernon 1979 & Supp. 1987); TENN. CODE ANN. § 62-7-103 (1986). *See generally* Annotation, *supra* note 115, at 1286-91.

128. For cases holding that a general exculpatory statute governs the loss of or damage to property caused by an innkeeper's negligence and that the guest can recover damages only up to the statutory ceiling, see, e.g., Ricketts v. Morehead Co., 122 Cal. App. 2d 948, 265 P.2d 963 (1954), and Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967).

129. For cases holding that the statutory limitation does not apply and that guests may recover the full and actual value of their losses, see, e.g., Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); Schiffman v. Narragansett Hotel, Inc., 86 R.I. 258, 134 A.2d 153 (1957).

130. *See, e.g.*, ALASKA STAT. § 08.56.050 (1982) (stating that the hotel must display the notice in "three or more conspicuous places"); ARIZ. REV. STAT. ANN. § 33-302 (1974 & Supp. 1986); ARK. STAT. ANN. § 71-1107 (1979) (indicating that the hotel must keep a copy of this section "constantly and conspicuously posted in not less than ten [10] conspicuous places in said hotel"); CAL. CIV. CODE § 1860 (1985); CONN. GEN. STAT. ANN. § 44-1 (1981) (declaring that the hotel must post complete copies of the statute in every guest room of the hotel); ME. REV. STAT. ANN. tit. 30, § 2901 (1978) (asserting that notices must be posted "conspicuously . . . in not less than 10 conspicuous places in all in said hotel"); N.M. STAT. ANN. § 57-6-1 (1987); WYO. STAT. § 33-17-102 (1987). These provisions present the general problems associated with disclaimers posted on sigus. *See infra* notes 168-86 and accompanying text.

Corp.[131] four guests sued the hotel to recover damages for the loss of jewelry and other items that were stolen from their rooms. Relying on the state statute restricting the liability of innkeepers, the hotel owner moved for partial summary judgment for the loss attributable to the stolen jewelry.[132] The court granted the hotel's motion, but proceeded to discuss the ramifications of an innkeeper's failure to post properly notices concerning the availability of a vault for guests' valuables. The court declared that an innkeeper must comply strictly with the terms of the statute in order to relieve itself of the harsh common law liability.[133] The court also held that an innkeeper may fail to direct the guests' attention to the availability of a safe for their valuables and still comply with the technical terms of the statute.[134] The court found that the hotel complied with the statutory requirements because the notices were "readily understandable."[135] The guests, however, asserted that because the posted notices were not conspicuous, the adequacy of the notices' content was immaterial. The guests admitted that copies of the notice were placed on the dressers in their rooms, but argued that "placing" the notice did not fulfill the requirement of "posting" the notice.[136] The court rejected this argument and stated that "post," as used in the stat-

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131. 126 Ariz. 548, 617 P.2d 56 (Ariz. Ct. App. 1980). Interestingly, this decision was written by now United States Supreme Court Justice Sandra Day O'Connor.

For other cases discussing the posting of notices, see, e.g., Skyways Motor Lodge, Corp. v. General Foods Corp., 403 A.2d 722 (Del. 1979) (holding that the motel was not entitled to statutory protection against an innkeeper's absolute liability at common law when the notice of limitation of liability on the guest's motel door did not advise him of the existence of a secure safe and when the notice appeared only on a guest registration card and the motel room door and not "in every lodging room and other conspicuous places" as required by state statute); Zurich Ins. Co. v. Fairmont Roosevelt Hotel, Inc., 250 So. 2d 94 (La. Ct. App. 1971) (holding that if the hotel posted notices quoting the statutory language limiting the innkeeper's liability in a conspicuous place in the room of a fur salesman, then the hotel complied with the terms of the statute and its liability was limited to $100 for stolen furs, regardless of whether the hotel was negligent); Brewer v. Roosevelt Motor Lodge, 295 A.2d 647 (Me. 1972) (observing that under the state statute no innkeeper who keeps a suitahle safe and who posts copies of the statute will be held liable for loss of or injury to a guest's property unless the guest offers property for safekeeping and that the innkeeper's liability is limited to $300 regardless of whether he has complied with conditions of the statute).

132. 126 Ariz. at 550, 617 P.2d at 58. The statute provides that:

> An innkeeper who maintains a fireproof safe and gives notice by posting in a conspicuous place in the office or in the room of each guest that money, jewelry, documents and other articles of small size and unusual value may be deposited in the safe, is not liable for loss of or injury to any such article not deposited in the safe, *which is not the result of his own act.*

ARIZ. REV. STAT. § 33-302(A) (1974) (emphasis added).

133. *Terry*, 126 Ariz. at 552, 617 P.2d at 61; *see also supra* note 10. The guests alleged that the notice placed in their rooms was inadequate because it failed to advise them that the hotel's safe was fireproof. 126 Ariz. at 553, 617 P.2d at 61.

134. *Id.* at 554, 617 P.2d at 62.

135. *Id.*

136. *Id.*

ute, includes either physical attachment or placement of the notice in a room.[137]

Statutory provisions lend certainty and predictability to the law of bailment only when the statutes are clear, unambiguous, and consistently applied. Even the best of these statutes, however, do not address the problems, particularly important in diversity cases, of lack of uniformity among the states.[138] Moreover, these exculpatory statutes apply to hotels but not to similar facilities like restaurants. Promulgating different rules for different commercial bailees may be necessary on occasion, but this practice could present additional problems. Individualized statutes may lead to definitional problems; for example, courts may have difficulty in determining whether a party is an "innkeeper" or some other type of bailee.[139] One solution to the problems caused by variations among state statutes lies in the development of a uniform method of analyzing bailees' disclaimers of liability for negligence.

C. *Disclaimers on Receipts and Tickets*

Many bailees print exculpatory clauses on customer receipts or tickets. These limitations of liability frequently appear in small print and often are placed on the back of the receipt. Courts disagree on whether these disclaimers are effective. Bailors attacking such disclaimers in court generally assert lack of assent to any agreement containing the limitation of liability. Courts have employed two methods when analyzing mutual assent problems. Some courts have held that a customer receipt is a manifestation of the bailment agreement. The bailor, by accepting the receipt, assents to all of the contract terms printed thereon if a reasonable person in the same position would have realized that a contract was being proposed.[140] Under this method, there generally is

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137. *Id.* The court quoted the definition of "post" found in *Webster's Third New International Dictionary. Id.*

138. For a diversity case involving statutes limiting innkeepers' liability, see, e.g., Owens v. Summa Corp., 625 F.2d 600 (5th Cir. 1980) (applying Nevada substantive law to a case filed in Louisiana federal court); see also Pacific Diamond Co. v. San Francisco Superior Court, 85 Cal. App. 3d 871, 149 Cal. Rptr. 813 (1978) (applying Colorado substantive law).

139. *Cf.* McFarland v. C.A.R. Corp., 58 N.J. Super. 449, 156 A.2d 488 (1959) (holding that a restauranteur was not an "innkeeper," and that liability could not be imposed upon a restauranteur as an innkeeper for damage to patron's automobile while in restaurant's parking lot); Ambassador Athletic Club v. State Tax Comm'n, 27 Utah 2d 377, 496 P.2d 883 (1972) (stating that an athletic club was not a "hotel"); Armwood v. Francis, 9 Utah 2d 147, 340 P.2d 88 (1959) (concluding that a restaurant, in and of itself, is not an "inn" either in the common law or modern sense).

140. *See, e.g.*, Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind. 1982); Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967) (holding that exculpatory language printed on automohile claim check was valid). This result may not occur in cases in which a ticket containing a disclaimer is issued by an automatic machine. *See* Thornton v. Shoe Lane Parking

no inquiry into whether the bailor read and understood the disclaimer.[141] Other courts refuse to honor the exculpatory clause unless the bailor had actual notice of its contents. This method usually is employed when the bailor contends that the ticket or receipt was merely a token for identification, not a statement of contractual provisions.[142] This second method is a corollary of the rule that if a person assents to a document believing it to be something other than what it actually is, the instrument is void.[143]

In *Carr v. Hoosier Photo Supplies, Inc.*[144] the Supreme Court of Indiana enforced an exculpatory clause printed on the back of a customer's receipt.[145] The plaintiff, an attorney and amateur photographer,[146] purchased ten rolls of Kodak film for his trip to Spain and France.[147] Upon returning from Europe, the plaintiff took nine exposed

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Ltd., 2 W.L.R. 585 (C.A. 1971) (holding that "the [parking] ticket comes too late" for a disclaimer printed thereon to become part of the contract).

141. This rule flows from Section 70 of the *Restatement of Contracts*:

> One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

RESTATEMENT OF CONTRACTS § 70 (1932); *see also id.* at illustrations 3 & 4 (implying that the offeree would be bound when a reasonable man would have understood both that a contract had been formed and that the disclaimer was part of the contract). *See generally* Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950).

142. *See, e.g.*, Bowes v. Fox-Stanley Photo Prods., 379 So. 2d 844 (La. Ct. App. 1980); Brooks v. Angelo's Cleaners, 103 A.D.2d 923, 477 N.Y.S.2d 922 (1984).

In one well known case, the plaintiff delivered a bag to the parcel room of a railroad station and received a check which, on the reverse side, stated the following condition: "The depositor in accepting this duplicate coupon expressly agrees that the company shall not be liable to him or her for any loss or damage of any piece to an amount exceeding $10." This condition was in fine print. The plaintiff did not read the ticket and the defendant failed to call the disclaimer to the plaintiff's attention. When the plaintiff attempted to reclaim his bag he discovered that it had been misdelivered. The defendant conceded liability but claimed that its obligation did not exceed $10. The court struck down the exculpatory clause and rendered judgment in favor of the plaintiff for the full amount of his loss. The court explained that "[i]n the mind of the bailor the little piece of cardboard . . . did not arise to the dignity of a contract." Healy v. New York Cent. & Hudson River R.R. Co., 153 A.D. 516, 519-20, 138 N.Y.S. 287, 290 (1912), *aff'd mem.*, 210 N.Y. 646, 105 N.E. 1086 (1914).

143. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 344-45 (1974).

144. 441 N.E.2d 450 (Ind. 1982). For the opinion of the Indiana Court of Appeals, which was reversed by the Indiana Supreme Court, see 422 N.E.2d 1272 (Ind. Ct. App. 1981). *See generally* Krieger, *Survey—Property*, 16 IND. L. REV. 283, 288-90 (1983).

145. 441 N.E.2d at 456.

146. *Id.* at 452. Carr was a graduate of Harvard Law School, was a named partner in an Indianapolis law firm, and was a former secretary of the Indiana State Bar Association. At the time of the case, Carr had been an amateur photographer for twelve years. Agreed Statement of Facts, Carr v. Hoosier Photo Supplies, Inc., No. M172-1342 at 1, 4 (Marion County Mun. Ct. 1975) [hereinafter Agreed Statement].

147. *Carr*, 441 N.E.2d at 452. According to Carr, the lost photographs could not be duplicated. "They were the only such exposed film in existence. They represented the documentation of a meticulously planned trip and the record of a once in a lifetime experience." Carr studied the

rolls of film to the defendant photo store for processing. The photo store accepted delivery of the film,[148] gave the plaintiff a numbered receipt for each roll, and sent the film to the defendant film developer.[149] The back of each receipt contained a notice stating that the developer's liability was limited to the replacement of damaged or lost film with an equivalent amount of unexposed film or film processing services, even if the developer was found to have acted negligently.[150] Although the plaintiff failed to read the notice and the photo store neglected to call it to his attention, the plaintiff knew from his practical and legal experience that most film processors placed similar exculpatory clauses on receipts.[151] When only five of the nine rolls of film were returned to the plaintiff, he filed suit against both bailees, requesting a total of 10,000 dollars in damages.[152] The parties stipulated that at least one of the defendants breached the bailment contract by negligently losing the film.[153] Yet both defendants argued that the exculpatory clause was valid and that they were liable only for the replacement cost of four

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history of the region of Spain he intended to visit and planned a detailed itinerary following the route of the early pilgrims traveling to see the remains of St. James. Agreed Statement, *supra* note 146, at 5-6, 10-11.

148. *Carr*, 441 N.E.2d at 452. "A typical customer . . . receipt issued by Hoosier . . . is a printed form approximately one inch by two inches. . . ." Agreed Statement, *supra* note 146, at 3, 6.

149. In the court of appeals, Kodak and Hoosier argued that while they accepted delivery of the film, they did not accept delivery of the photographic images on the film. *Carr*, 422 N.E.2d at 1275.

150. The receipt stated:

> READ THIS NOTICE
>
> Although film price does not include processing . . . the return of any film or print to us for processing . . . will constitute an agreement by you that if any such film or print is damaged by us or any subsidiary company, *even though by negligence* or other fault, it will be replaced with an equivalent amount of unexposed . . . film and processing and, except for such replacement, the handling of such film or prints by us for any purpose is without other warranty or liability.

Carr, 441 N.E.2d at 452 (emphasis added). The boxes of film Carr purchased also displayed a limitation of liability. *Id.*

151. *Id.* Some people feel that Carr lost the case because he was an attorney and "should have known better." If true, one wonders whether an attorney has an absolute obligation to read. If so, this "duty" could be carried to ridiculous extremes.

In a recent San Francisco jury trial, an attorney who worked part time as a free-lance professional photographer was awarded $5000 because Kodak lost some of his photographs. Kodak unsuccessfully argued that its responsibility was limited to supplying the plaintiff with one new roll of film. Hughey, *Photographer's Legal Challenge Takes Aim At Photofinishers that Lose, Damage Film*, Wall St. J., Mar. 17, 1983, at 29, col. 1.

152. *Carr*, 441 N.E.2d at 451. The requested damages reflected the amount necessary to reshoot a set of similar photographs, including round-trip transportation to Spain, expenses while in Spain, and an allowance for the reasonable value of a photographer's services. Agreed Statement, *supra* note 146, at 11-13.

153. *Carr*, 441 N.E.2d at 452.

rolls of unexposed film.[154] The plaintiff asserted that the disclaimer was unconscionable and that his lack of actual notice of the disclaimer prevented his assent to the exculpatory provision.[155] The court enforced the clause, stating that the disclaimer was not unconscionable because the parties possessed equal bargaining power and because the plaintiff knew of the disclaimer but failed to object to its inclusion in the agreement.[156]

Presented with a similar fact pattern, the Louisiana Court of Appeals reached a different result in *Bowes v. Fox-Stanley Photo Products*.[157] The plaintiffs delivered film containing images of their vacation in Bordeaux, France to the defendant for processing.[158] The defendant accepted the film but subsequently lost it. The plaintiffs sued, demanding reimbursement for the cost of their vacation and for "deprivation[] of gratification of intellectual enjoyment in seeing the photographs and in showing them to friends."[159] The defendant claimed that a disclaimer printed on the customer receipt limited liability to replacement of the lost film with an equal amount of unexposed film.[160] The plaintiffs, however, believed that the receipt was merely a token of identification, not a contractual disclaimer of liability.[161] Finding the plaintiffs' belief justified, the court held that the exculpatory term was not binding absent a showing that its contents were explained or brought to the plaintiffs' attention.[162]

Because no single standard exists to determine when a person has a duty to read the provisions of a contract and when that party may be excused on the basis of "mistake," the law concerning exculpatory bailment receipts is replete with uncertainty. For example, it is difficult to test which terms of a contract the bailor assented to and which terms are outside the scope of the bailment agreement. In "bailment receipt" cases, one solution to the dilemma is to apply Professor Karl Llewellyn's theory of mutual assent in standardized form contracts.[163] Llewel-

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154. *Carr*, 422 N.E.2d at 1278.
155. *Carr*, 441 N.E.2d at 455.
156. *Id.*
157. 379 So. 2d 844 (La. Ct. App. 1980).
158. *Id.* at 845 n.4. The customer's receipt included the following language:

> The sending of exposed film to us for any purpose will constitute an agreement that if the film is damaged or lost by us, or any subsidiary company, we may replace it with an equivalent amount of unexposed film and that, except for such replacement the handling of exposed film by us for any purpose is without warranty or other liability of any kind.

Id.
159. *Id.* at 845.
160. *Id.*
161. *Id.* at 846.
162. *Id.*
163. Llewellyn stated:

lyn stated that a form contract consists of two separable contracts.[164] One contract consists of the "dickered" terms, which are those terms actually bargained for and specifically assented to by the non-drafting party. The other contract is the "supplementary boiler-plate" contract that encompasses the unnegotiated and probably unread terms on the form. The non-drafting party—the bailor in most bailment cases—does not manifest specific assent to the boiler-plate terms but assents only to the overall agreement and to any reasonable supplementary terms that an ordinarily prudent person might expect to find in such a transaction.[165] Thus, in a bailment agreement, provisions concerning the description, quantity, delivery and redelivery dates, price, and duration are terms that usually are open for actual bargaining. All other provisions, such as warranties and disclaimers of liability, generally are relegated to the fine print for the bailor to take or leave, commonly without knowledge of their existence.[166] Under Professor Llewellyn's analysis, a bailor would be held only to the bargained-for provisions of the agreement and to a few boiler-plate terms that are fair and consistent with the general tenor of the transaction.[167]

D. Posting Signs

A final exculpatory method employed by commercial bailees is the posting of signs containing disclaimers of liability for the loss of or damage to bailed property. Under the common law rule regarding posted disclaimers, the mere presence of signs will not in itself relieve a defendant of liability for negligence.[168] In order for the limitation to be effective, the bailor must have actual notice of the limitation, or the sign must be conspicuously displayed.[169]

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller [or bailee] may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

K. LLEWELLYN, THE COMMON LAW TRADITION 370-71 (1960).

164. *Id.* at 371.

165. *Id.* at 370-71. *See generally* Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 933-46 (1969).

166. *See* Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939); *see also Booby-Trapped by the Fine Print*, 20 UCC L. LETTER, Feb. 1987, at 1 (outlining both the "healthy purposes" and the "less savory aspects" of boiler plate language).

167. Questions remaining include whether a clause limiting the bailee's common law liability is the type of term a reasonable person expects to find in a commercial bailment agreement and whether such a clause is consistent with the "dickered" terms of that agreement.

168. Chalet Ford, Inc. v. Red Top Parking, Inc., 62 Ill. App. 3d 270, 275, 379 N.E.2d 88, 91 (1978).

169. *See, e.g.*, Parking Management, Inc. v. Jacobson, 257 A.2d 479, 480 (D.C. 1969) (holding

In *Conboy v. Studio 54, Inc.*[170] the plaintiff delivered his one month old, 1350 dollar leather jacket to the discotheque's coatroom attendant.[171] The plaintiff paid seventy-five cents for this service and received a claim ticket that did not contain any disclaimers. At the end of the evening, the plaintiff attempted to reclaim his jacket, but it was missing.[172] The plaintiff subsequently sued the discotheque for negligence, claiming damages of 1350 dollars.[173] The discotheque asserted that its liability was limited by a sign posted in the coatroom and stating that liability for lost property would be limited to 100 dollars per lost item.[174] Because the plaintiff did not notice the sign and the defendant failed to prove that the sign was conspicuously posted, the court held that the plaintiff-bailor was not bound by the disclaimer of liability.[175]

A Texas court reached a similar result in *Ford v. McWilliams*.[176] In *Ford* the plaintiff's car was towed to the defendant's garage for repair. After repairing the car, one of the defendant's employees parked the car in an adjacent vacant lot with the keys left either in the ignition switch or above the sun visor.[177] When the plaintiff returned to retrieve his car, he discovered that it had been stolen.[178] The defendant argued that two posted signs warning that the garage was "not responsible for fire or theft" effectively absolved it of liability for negligent loss of the bailed car.[179] The court held that unless the disclaimer is brought to the bailor's attention, the mere posting of a sign generally does not limit a bailee's liability for theft, fire, or negligence.[180]

Nevertheless, posting signs containing disclaimers is one of the most successful methods used by bailees to limit their liability for negligence. Many courts employ a disjunctive test under which the bailor will be denied recovery if the bailor had actual knowledge of the limita-

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limitation ineffective because the bailor was unaware of the posted disclaimer); Conboy v. Studio 54, Inc., 113 Misc. 2d 403, 406, 449 N.Y.S.2d 391, 394 (N.Y. Civ. Ct. 1982); Ford v. McWilliams, 278 S.W.2d 338, 339 (Tex. Civ. App. 1955).

170. 113 Misc. 2d 403, 449 N.Y.S.2d 391 (N.Y. Civ. Ct. 1982).

171. *Id.* at 404, 449 N.Y.S.2d at 393.

172. *Id.*

173. *Id.*

174. *Id.* at 406, 449 N.Y.S.2d at 394.

175. *Id.*

176. 278 S.W.2d 338 (Tex. Civ. App. 1955).

177. *Id.* at 338. "It was the usual and customary practice of the [bailee] to . . . leave [cars] parked on such lot with the keys either in the ignition switch or on the sun visor. . . . This was the customary practice of persons in the same or similar business in Pampa." *Id.*

178. *Id.*

179. *Id.* at 339 (capitalizations omitted).

180. *See id.*

tion or if the sign was conspicuous.[181] If the bailor fails to notice the sign, the bailee still may prevail if the sign was prominently displayed. A few courts, however, refuse to consider the sign itself and, instead, concentrate solely on the bailor's knowledge.[182] Because this latter group of courts tends to promulgate the more controversial decisions, some observers, such as Professor Farnsworth, oppose judicial adoption of an "actual notice" standard for recovery.[183] Farnsworth recognizes the inequity of denying recovery to a party who attempts to understand the terms of a contract while allowing a party who remains blissfully ignorant of the contract terms to recover.[184] The *Restatement (Second) of Contracts* addresses the problem of permitting parties who are ignorant of the disclaimer to recover while denying recovery to those who are aware of the disclaimer. The *Restatement (Second)* maintains that a standardized agreement should treat those similarly situated in the same manner and should disregard their knowledge or lack of knowledge of the contract terms.[185] An arguably better approach would be for courts to apply Professor Llewellyn's rule on standardized contracts[186] under which an uninformed bailor would be held to have assented only to those terms that were reasonable and consistent with the overall pattern of the transaction. A final and more desirable solution, however, would be for the courts to analyze bailment cases within the framework of the Uniform Commercial Code.

IV. Application of Article 2 of the UCC to Bailment Agreements

Certain sections of Article 2 of the Uniform Commercial Code have been applied to transactions not satisfying the UCC's narrow definition of "sale."[187] This application is supported by UCC section 2-102, which

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181. *See, e.g.*, Chalet Ford, Inc. v. Red Top Parking, Inc., 62 Ill. App. 3d 270, 275, 379 N.E.2d 88, 91 (1978).

182. *See supra* notes 176-81 and accompanying text.

183. E. Farnsworth, Contracts § 4.26, at 299 (1982). Farnsworth calls those that have actual knowledge of the limitation of liability "unfortunate parties." *Id.*

184. *See id.*

185. Restatement (Second) of Contracts § 211 (1981).

186. *See supra* notes 163-67 and accompanying text.

187. *See, e.g.*, Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968) (applying implied warranty section to equipment lease); Pacific Am. Leasing Corp. v. S.P.E. Bldg. Sys., Inc., 730 P.2d 273 (Ariz. Ct. App. 1986) (holding that UCC Article 2 applies to computer leases); Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184 (1975); Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977); Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) (applying UCC to bailment transaction). *But see* Morgenstern v. Eastman Kodak Co., 569 F. Supp. 474, 476 (N.D. Ohio 1983) (holding that the transaction of processing film by use of a prepaid mailer is a bailment for services and therefore governed by the law of bailment, not the UCC); Favors v. Firestone Tire &

provides that "[u]nless the context otherwise requires," Article 2 shall apply to "transactions in goods."[188] The term "transactions" is not defined in the UCC; nevertheless, section 1-102(1)[189] suggests that the UCC should be liberally construed.[190] In addition, UCC drafters have advocated extending the UCC to other areas of the law, namely nonsale transactions, by analogy.[191] Thus, it is reasonable to conclude that the scope of Article 2[192] is not restricted to sales. If Article 2 were applied to nonsale transactions by analogy only, courts would be free to apply or ignore Article 2 arbitrarily. The result would be to decrease predictability and certainty in commercial dealings, contradicting the UCC goal of achieving uniformity among the states in the area of commercial transactions.[193] The solution, therefore, is to apply Article 2 to bailment

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Rubber Co., 309 So. 2d 69, 72 (Fla. Dist. Ct. App. 1975) (stating that "[t]be bailment involved in the case . . . was not similar to a sale and we see no reason to extend Uniform Commercial Code warranties to this type [delivery of truck to store to have tires changed] of bailment"). *See generally* Dusenberg & King, *Sales and Bulk Transfers under the U.C.C.*, in 3 BENDER'S UCC SERVICES § 1.03[4] (1980).

188. UCC § 2-102 (1978).

189. UCC § 1-102(1) (1978). This section reads: "This Act sball be liberally construed and applied to promote its underlying purposes and policies." *Id.*

190. *See also* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (indicating that the underlying purpose of the UCC is to permit commercial usage to be liberally interpreted); Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088 (N.D. Ga. 1975) (stating that the purpose of tbe UCC is to make commercial law uniform and predictable); A.M. Knitwear Corp. v. All Am. Export-Import Corp., 41 N.Y.2d 14, 359 N.E.2d 342, 390 N.Y.S.2d 832 (1976) (holding that the primary purpose of the UCC is to simplify, modernize, and clarify commercial law); Pacific Prods., Inc. v. Great W. Plywood, Ltd., 528 S.W.2d 286 (Tex. Civ. App. 1975) (asserting that tbe objective of the UCC is to provide a comprehensive set of rules governing commercial transactions in place of different rules established by the legislative and decisional law of different states).

191. *See* Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880, 887 (1965); *see also* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936). Chief Justice Stone encouraged courts to look to statutes for analogies in order to achieve a more complete unification of judge-made and statutory law. *Id.* The draftsmen of the Code state in their comment to the title and enacting preamble that "[t]he concept of the present Act is that 'commercial transactions' is a single subject of the law, notwithstanding its many facets. . . . This Act purports to deal with all phases which may ordinarily arise in the handling of a commercial transaction, from start to finish." General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute, UCC, 1 U.L.A. xvi-xvii. (1976). Professors Hart and Willier advance the notion that this statement "clearly indicates that the Code is intended to be a comprehensive embodiment of commercial law." Hart & Willier, *Forms and Procedures Under the Uniform Commercial Code*, in 5 BENDER'S UCC SERVICE ¶ 12.02 (1986).

192. *See* Skelton v. Druid City Hosp. Bd., 459 So. 2d 818 (Ala. 1984) (noting that Article 2 applies to a "transaction" in goods, which is a broader category than the "sale" of goods). *But cf.* Note, *The Extension of Article 2 of the Uniform Commercial Code to Leases of Goods*, 12 TULSA L.J. 556 (1977). Although the commentator argues that Article 2 should be extended to leases, the commentator believes the wording "transaction in goods" in § 1-102 was an inadvertent error and draftsmen intended to use "sale" in place of "transactions." *Id.* at 564-65.

193. UCC § 1-102(2)(c) states that one of the underlying policies of the UCC is "to make uniform the law among the various jurisdictions." In addition, the General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute states tbat

transactions by its own force.

A. Mieske v. Bartell Drug Co.

In *Mieske v. Bartell Drug Co.*[194] the Supreme Court of Washington considered whether Article 2 could be applied to determine the effect of a disclaimer printed on a film receipt.[195] The *Mieske* court, relying both on section 2-102's use of the term "transaction" rather than "sale" and its underlying bias against disclaimers, held that the UCC did apply to the bailment transaction. Thus, the court applied Article 2 to an area not expressly covered by the UCC.[196]

In *Mieske* the plaintiff's wife delivered thirty-two reels of home

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"uniformity throughout American jurisdictions is one of the main objectives of this code." UCC, 1 U.L.A. xv (1976). *But see* Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337 (1978) (discussing the fact that total uniformity has not been realized).

194. 92 Wash. 2d 40, 593 P.2d 1308 (1979)

195. For a discussion of this aspect of the *Mieske* case, see Judicial Highlight, *§ 2-102, 2-719(3)—Extended Application of Article 2 to Bailments—Unconscionable Limitation of Consequential Damages*, 12 U.C.C. L.J. 267 (1980).

196. *Mieske*, 92 Wash. 2d at 40, 593 P.2d at 1312 (stating that "[h]ad the drafters of the code intended to limit article 2 to the sales they could have easily so stated").

One author concluded that the "basic question of whether article 2 extends to non-sale transactions depends, in part, on whether the U.C.C. is viewed as a statute or as a code." Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 EMORY L.J. 853, 889 (1986). Rodau continued that "if viewed as a statute, non-sale transactions generally would be excluded from article 2 coverage while transactions might be covered by article 2 if the courts treated the U.C.C. as a code." *Id.*

Professor Grant Gilmore provided the following explanation of the difference between a code and a statute:

> A "statute," . . . is a legislative enactment which goes as far as it goes and no further. . . . [W]hen a case arises which is not within the precise statutory language . . . then the court should put the statute out of mind and reason its way to decision according to the basic principles of the common law. A "code," . . . is a legislative enactment which entirely preempts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.

Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961).

Rodau believes that the UCC is a code because "[a]n examination of the historical considerations leading to the creation of the U.C.C. indicates that it was intended to produce a single uniform body of law to which commercial lawyers and businessmen could look to answer all commercial questions and solve all commercial problems." Rodau, *supra*, at 890-91 (footnote omitted). *But see, e.g.*, Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981) (asserting that Article 2 is a group of statutes, not a true code). Rodau also notes that "[e]xpress U.C.C. language supports the view that the U.C.C. is intended to be a true code." *Id., referring to* UCC § 1-104 & official comment (stating that UCC is "intended as a uniform codification of permanent character covering an entire 'field' of law"); *see also* Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 299-300 (1962) (arguing that the UCC is a true code because it exhibits a systematic organization of provisions with consistent terminology that provides a means to handle confiicting rules, fill gaps, and mitigate harsh rules when appropriate).

movies to the defendant's camera department for splicing.[197] The film was irreplaceable,[198] and the plaintiff's wife warned defendant's manager, "Don't lose these. They are my life."[199] The manager accepted the film and gave the plaintiff's wife a receipt, which she neither read nor discussed with the manager.[200] The receipt contained a disclaimer that provided, "[W]e assume no responsibility beyond retail cost of film unless otherwise agreed to in writing."[201] The camera shop sent the movies to a film processing lab. While in the lab's custody, the reels of film were negligently lost or destroyed. The plaintiff filed suit against the camera shop, the lab, and a janitorial service employed by the lab. The jury returned a verdict of 7500 dollars against the camera shop and the lab.[202] The verdict was affirmed by the state supreme court.

Defendants lab and camera shop argued that the Washington version of UCC section 2-719(3)[203] authorized a limitation of consequential damages unless the exclusionary clause on the film receipt was unconscionable.[204] The plaintiff, however, argued that the UCC did not apply to bailments. The court settled this debate by holding that the scope of

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197. *Mieske*, 92 Wash. 2d at 42, 593 P.2d at 1309-10.

198. *Id.* at 42, 593 P.2d at 1309. The films started with the plaintiff's wedding and honeymoon, chronicled family vacations and gatherings, and contained pictures of various family members, including some who had passed away. *Id.*

199. *Id.* at 42, 593 P.2d at 1310.

200. *Id.* at 42-49, 593 P.2d at 1310, 1313 (stating, "Mrs. Mieske . . . viewed the numbered slip as merely a receipt").

201. *Id.* at 46, 593 P.2d at 1310.

202. *Id.* The award was based on the "intrinsic value" of the film to the customer hut not on "any unusual sentimental value of the film." *Id.* at 42-46, 593 P.2d at 1308-11.

203. Washington's amended version of § 2-719(3) provides:

> Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or non-conforming goods is invalid in sales of goods primarily for personal, family, or household use unless the manufacturer or seller maintains or provides within the state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.
>
> Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

WASH. REV. CODE § 62A-2-719(3) (1974).

UCC § 2-719(3) states: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." UCC § 2-719(3) (1978).

The differences between the two Code versions are that: (1) the Washington version refers to sales and purchases while the UCC does not, and (2) the Washington statute, unlike the UCC, places the burden of proving unconscionability on the seller when the goods are for personal use and the injury is personal. *See* Special Project, *Recent Developments in Commercial Law*, 11 RUTGERS L.J. 527, 681 & n.34 (1980).

204. *Mieske*, 92 Wash. 2d at 46, 593 P.2d at 1311.

Article 2 encompasses transactions other than sales.[205] Having construed the scope of Article 2 to include bailments, the court next considered whether the disclaimer had been incorporated into the bailment contract.

The defendants asserted that the UCC's recognition of "usage of trade"[206] and "course of dealing"[207] validated the exculpatory clause because the uniform trade practice of film processors imposed on customers exculpatory clauses identical or similar to the one found on the plaintiff's receipt.[208] The existence of a trade usage, however, is a question of fact.[209] Although the *Mieske* defendants established that utilization of printed exculpatory clauses was a trade usage among film processors, the defendants could not prove that the same usage was recognized between commercial film processors and their retail customers.[210] The court held that even though other commercial film processors printed exculpatory clauses on customer receipts, this practice was not proof that all of the defendant camera shop's customers understood the disclaimer.[211] The court also stated that the defendants failed to prove that the plaintiff's wife knew or should have known of the camera shop's "trade usage" of limiting liability for negligence.[212] Thus, the defendants' reliance on the concept of trade usage did not validate the exculpatory clause.[213]

Regarding the course of dealing, the court held that the defendants' proof fell short of the express language of section 1-205(3).[214] The record revealed that the plaintiff's wife and the defendant camera shop's manager never discussed the exculpatory clause; that the plain-

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205. *Id.* at 47, 593 P.2d 1312.

206. Section 1-205(2) of the UCC defines usages of trade as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." UCC § 1-205(2) (1978).

207. Section 1-205(1) of the UCC defines course of dealing as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." UCC § 1-205(1) (1978).

208. *Mieske*, 92 Wash. 2d at 49, 593 P.2d at 1313.

209. *Id.; see also* Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc., 288 N.C. 213, 217 S.E.2d 566 (1975) (providing that, ordinarily, the existence and scope of a usage of trade are questions of fact); Colley v. Bi-State, Inc., 21 Wash. App. 769, 586 P.2d 908 (1978) (holding that whether a party has produced sufficient evidence to establish a trade usage as part of a contract is a question of fact).

210. *Mieske*, 92 Wash. 2d at 49, 593 P.2d at 1313.

211. *Id.*

212. *Id.*

213. *Id.*

214. Section 1-205(3) of the UCC reads: "A course of dealing between parties and any usage of trade in the . . . trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." UCC § 1-205(3) (1978).

tiff's wife never read the clause because she viewed the slip only as a receipt; that the camera shop manager himself did not seem to understand fully the exculpation; and that the defendants failed to show that similar language was printed on any other receipts given in prior dealings between the parties.[215] Thus, the limitation of liability was not part of the bailment contract because, based on standards enunciated in Article 2, a reasonable person in the plaintiff's position would not have expected that a limitation of liability for the bailee's negligence would be part of the commercial agreement.

B. Applicable UCC Provisions

Having established that Article 2 covers bailment transactions, the next step is to determine which sections of Article 2 should be applied. One technique of selection is to disregard all Article 2 provisions whose language ostensibly limits their application to sales.[216] This method is undesirable because it detracts from the flexibility of the Code and virtually limits the UCC to sales transactions.[217] An alternative method is to apply Article 2 provisions to bailments only when "the context requires."[218] In other words, courts would apply UCC provisions only when the case involves the same considerations that gave rise to that provision. The official comments to the UCC offer a readily available source for the premises and assumptions underlying each rule. UCC sections that may readily be applied to commercial bailments include section 2-302 ("Unconscionable Contract or Clause"), sections 2-313 through 2-316 (express and implied warranty provisions), and section 2-719 ("Contractual Modification or Limitation of Remedy").[219]

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215. *Mieske*, 92 Wash. 2d at 49, 593 P.2d at 1313.

216. *See* Special Project, *supra* note 203, at 677. On the other hand, Professors Dusenherg and King advise that lawyers always should consider applying Article 2 principles, including those sections that specifically refer to "sale," "seller," or "buyer," to bailments. Dusenberg & King, *supra* note 187, § 1.03[4], at 1-37.

217. According to Professor Rodau,

> A careful reading on the entire text of article 2 indicates that only ten sections fail, at least in part, to explicitly mention "sale," "buyer," or "seller." However, seven of these sections refer either directly or indirectly to "contracts" or "agreements" which are defined by section 2-106 to refer to contracts or agreements for the present or future sale of goods. Consequently only three sections in article 2 are not explicitly limited to the sale of goods. . . .

Rodau, *supra* note 196, at 893.

218. *See* UCC § 2-102 (1978). One commentator warned that application of the UCC to situations beyond its express terms must be tempered with caution in order to avoid inappropriate application of the UCC. Note, *supra* note 191, at 888.

219. These sections do not compose an exclusive list of the UCC provisions that may be applied to bailment transactions; they simply are a sampling of sections that may most *commonly* be applied to bailment transactions.

1. Section 2-302: Unconscionability

Section 2-302, which deals with the concept of unconscionability, is not expressly limited to sales. This section speaks of "contract" and "clause of contract," and provides that a court may strike an unconscionable clause from an agreement or void as unconscionable the contract as a whole.[220] The word "sale," however, does not appear in section 2-302, nor do any of its derivatives such as "seller."[221] Near the end of the *Mieske* opinion, the Supreme Court of Washington addressed the issue of unconscionability, noting that section 2-302 neither defines nor sets forth specific examples of unconscionable conduct. An unconscionability defense is, however, an important remedy whenever an unsophisticated buyer signs a contract. This remedy allows a buyer, after discovering a seller's unfair practice, to request the court to invalidate the exculpatory clause if the buyer (or bailor) can prove that the clause was grossly unfair or oppressive and that the buyer (or bailor) was surprised by the legal effect of the clause.[222] In *Mieske* the appellate court agreed with the trial court's finding that the disclaimer was unconscionable. Although the court failed to elaborate on the subject, the court did suggest that section 2-302 may be applied to bailment transactions.[223]

Even though the adoption of UCC section 2-302 in the bailment context would not necessarily provide courts with a single definition of "unconscionability,"[224] application of the section would provide courts with a body of interpretive case law to guide their decisionmaking process.[225] The value of this UCC provision is illustrated in *Fotomat Corp.*

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220. *See* UCC § 2-302 (1978); *see also* Rodau, *supra* note 196, at 393 & n.165.

221. *See* UCC § 2-302 (1978).

222. G. WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 5.06 (1981). A detailed discussion of § 2-302 is outside the scope of this Note. For in depth discussions of unconscionability, see Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Spanogle, *supra* note 165.

223. *See Mieske*, 92 Wash. 2d at 49, 593 P.2d at 1313-14. For a detailed discussion of *Mieske*, see *supra* text accompanying notes 194-215.

224. *See* Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976) (stating that the UCC does not define unconscionability).

225. *Id.* While the UCC neither defines the concept of unconscionability nor provides the elements or parameters of the doctrine, courts have identified a number of factors that aid them in determining the applicability of the doctrine of unconscionability to a given fact situation. These factors include:

(1) the use of printed forms or boilerplate contracts drawn by the party in the stronger economic position which establish industry-wide standards on a "take it or leave it" basis to the party in a weaker economic position;

(2) a significant cost-price disparity or excessive price;

(3) a denial of basic rights and remedies to a buyer of consumer goods;

(4) the inclusion of penalty clauses;

(5) the circumstances surrounding the execution of the contract, including its commercial set-

v. Chanda.[226] In *Chanda* a Florida district court reversed a 9500 dollar award for loss of home movies that the plaintiff had entrusted to the defendant film processor.[227] The defendant's order form contained a clause disclaiming liability for any damages beyond the actual cost of the unexposed film.[228] The plaintiff was a medical doctor and was experienced in business transactions. He read the limitation clause, questioned the clerk about it, and then signed the receipt, approving the transaction.[229] After considering Florida's version of UCC section 2-302,[230] and cases decided under UCC section 2-302,[231] the court held that the limitation of liability provision was not unconscionable.[232] The court adopted the view that two elements—substantive unconscionabil-

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ting, its purpose and its actual effect;
(6) the hiding of disadvantageous clauses in a mass of fine print or in places that are inconspicuous to the party signing the contract;
(7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or by the rights given up through them;
(8) an overall imbalance in the obligations and rights imposed by the bargain;
(9) exploitation of the underprivileged, unsophisticated, uneducated and illiterate; and
(10) inequality of bargaining or economic power.

Id.; see also Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co., 113 Wis. 2d 258, 334 N.W.2d 922 (Wis. Ct. App. 1983) (stating that while UCC § 2-302 deals primarily with contracts for the sale of goods, the draftsmens' comments provide insight into the appropriate use of the unconscionability doctrine in other contexts), *rev'd on other grounds*, 117 Wis. 2d 587, 345 N.W.2d 417 (1984); UCC § 2-302 official comment (1978).

226. 464 So. 2d 626 (Fla. Dist. Ct. App. 1985).

227. *Id.* at 627. The plaintiff delivered 28 rolls of movie film to defendant after reading a magazine article indicating that the deterioration of the film could be avoided by transferring the images on the film to videotape and a fiyer distributed by the defendant that advertised the availability of this service. *Id.* The films were of great sentimental value to the plaintiff because they contained depictions of his honeymoon, graduation from medical school, son's birth, and various other family activities. *Id.* at 627-28.

228. *Id.* at 627. The disclaimer read:

IMPORTANT
THE WARRANTY BELOW GIVES YOU SPECIFIC LEGAL RIGHTS AND LIMITATIONS. PLEASE READ IT CAREFULLY. By depositing film or other material with Fotomat, customer acknowledges and agrees that Fotomat's liability for any loss, damage, or delay to film during the processing service will be limited to the replacement cost of a non-exposed roll of film and/or blank cassette of similar size. Except for sucb replacement, Fotomat shall not be liable for any other loss or damage direct, consequential, or incidental, arising out of customer's use of Fotomat's service.

Customer Signature

Id.

229. *Id.*

230. *See* FLA. STAT. ANN. § 672.302 (West 1980). "This is section 2-302 of tbe 1962 Official Text without change." *Id.* at Florida Code Comments.

231. Cases cited in *Chanda* include (in the order cited): Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Kohl v. Bay Colony Club Condominium, Inc., 398 So. 2d 865 (Fla. Dist. Ct. App. 1981); Johnson v. Mobile Oil Corp., 415 F. Supp. 264 (E.D. Micb. 1967).

232. *Chanda*, 464 So. 2d at 631. The case was remanded to the trial court with directions to enter judgment in favor of plaintiff for the "cost of 28 rolls of unexposed Super-8 movie film." *Id.*

ity[233] and procedural unconscionability[234]—must coalesce before a disclaimer will be invalidated. The *Chanda* court held that the plaintiff did not prove either prong of the UCC unconscionability test.

The limitation clause in *Chanda* was not substantively unconscionable because it was reasonable under the circumstances. The defendant presented unrebutted testimony that similar exculpatory clauses were standard in the industry. Although loss or destruction of film is relatively infrequent in view of the tremendous amount of film handled, film processors are unwilling to expose themselves to unlimited liability for the unknown value of the film's contents without greatly increasing the price of their services.[235] If the customer is aware of the exculpatory clause and if there is a commercial need for the clause, courts hesitate to label the clause as substantively unconscionable.[236]

The plaintiff did not satisfy the procedural prong of the unconscionability test because he read and understood the exculpatory clause but proceeded with the transaction anyway.[237] Although the plaintiff was not given an opportunity to negotiate the terms of the agreement, he never attempted to ascertain whether any other processors would provide the same service without disclaiming liability.[238] The official comment to UCC section 2-302 states that one principle embodied in the provision is "the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."[239] In *Chanda* there were no traces of oppression or undue surprise.[240]

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233. "A case is made out for substantive unconscionability by alleging and proving that the terms of the contract are unreasonable and unfair." *Id.* at 629 (citing *Kohl*, 398 So. 2d at 868).

234. "Procedural unconscionability . . . speaks to the individualized circumstances surrounding each contracting party at the time the contract was entered into." *Chanda*, 464 So. 2d at 629 (citing *Kohl*, 398 So. 2d at 868). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 118-30 (2d ed. 1980).

235. *Chanda*, 464 So. 2d at 630.

236. *Id.* at 631. The court noted that the reasonableness of the clause was demonstrated by the huge loss claimed by the plaintiff, compared to the cost of the service. The charge for the processing service was $31.00. The videocassette cost $18.95. The plaintiff claimed $9500 in damages. *Id.* at 630-31.

237. *Id.* at 631.

238. *Id.*

239. UCC § 2-302 official comment (1978).

240. *Chanda*, 464 So. 2d at 631. The court discussed and distinguished the *Mieske* case:

> Although the [*Mieske*] scenario . . . is much like the one here, there is one very salient and important distinction. In *Mieske*, the plaintiff's wife, who brought the already developed film to the drug store for splicing . . ., was given a receipt for the film which contained a brief limitation of liability clause. It was not called to her attention nor discussed, she was not aware of it, and she had no prior experience with or knowledge of any custom of the trade. . . .

Id. In *Chanda* the plaintiff "saw and read the clause in question, asked a question ahout it and was apparently satisfied with the answer because he sigued it. He had previously suffered the loss of

2. Sections 2-313 Through 2-316: The Warranty Provisions

The Article 2 warranty sections contain language referring to sales,[241] but courts have not been willing to apply these provisions to nonsale transactions.[242] One factor supporting this application is the UCC drafters' proposal that the policies underlying express sales warranties be adopted as guidance to courts dealing with bailments-for-hire.[243] A bailment differs from a sale in that a sale transfers ownership of an item in exchange for a given price, while a bailment merely transfers possession and contemplates the eventual return of the item to the bailor. Bailments, however, do resemble sales in several respects: both involve transactions in property, both require a transfer of possession, and both require some form of consideration. Moreover, lay persons often fail to distinguish between commercial bailees and sellers. This confusion is due partially to the fact that some businessmen act as both bailee and seller. A jeweler, for example, sells merchandise as a seller and accepts items for repair as a bailee. Additionally, warranty problems in both types of transactions tend to arise under similar circumstances; for example, both sellers and bailees insert warranties or general disclaimer provisions into standardized form contracts.[244] These similarities indicate that the application of Article 2 warranty provisions is appropriate in the bailment context. If application of the warranty provisions were extended to bailments, bailees would be able to limit their liability for negligence, but this exculpation would have to

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film at a different place of business, and it had been replaced by new film." *Id.*

241. *See* UCC §§ 2-313 (stating that "[e]xpress warranties by the *seller* are created as follows" (emphasis added)), 2-314 (stating that "[u]nless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their *sale* if the *seller* is a merchant" (emphasis added)), 2-315 (indicating that "[w]here the *seller* at the time of contracting has reason to know any particular purpose for whicb the goods are required and that *buyer* is relying on the *seller's* skill . . . there is . . . an implied warranty that the goods shall be fit for such purpose" (emphasis added)), and 2-316 (observing that "when the *buyer* before entering into the contract" (emphasis added)).

242. *See, e.g.*, United States Welding v. Burroughs Corp., 587 F. Supp. 49 (D. Colo. 1984) (assuming, without discussion, that Article 2 warranty provisions were applicable to a transaction involving the lease of computer hardware and operating software); Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 954, 428 S.W.2d 46, 54 (1968) (holding that the state version of § 2-316(2) "is applicable to leases *where the provisions of the lease are analogous to a sale*" (emphasis in original)); Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184 (1975) (holding that UCC §§ 2-313, 2-314, 2-315, and 2-316 should be extended to the lease transaction in question); Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977) (applying the state version of § 2-316(2) to an equipment lease by analogy).

243. UCC § 2-313 comment 2 (1978).

244. For a detailed discussion of warranty law, see Sullivan, *Innovation in the Law of Warranty: The Burden of Reform*, 32 HASTINGS L.J. 341 (1980). See *id.* at 381-82 for a discussion of disclaimers and standardized contracts.

(1) be presented to the bailor in writing, (2) be conspicuous, and (3) specifically mention negligence.[245] A disclaimer in fine print on an inconspicuous sign or on the back of a receipt probably will not fulfill the UCC "conspicuousness" requirement.[246]

Few courts have addressed the precise question of wbether Article 2 sales warranties are applicable to bailments; rather, most cases on the subject have applied sales warranties to bailments by analogy.[247] One court, for example, held that section 2-316(2), pertaining to disclaimer of warranties, could be applied to a bailment transaction because the section reflected state public policy regarding disclaimers of warranty liability in commercial transactions.[248] On the other hand, some courts have indicated that nonsale transactions, such as bailments and chattel leases, are not within the purview of Article 2, and at least one court expressly refused to apply sales warranties to bailments even by analogy.[249] In *Bona v. Graefe*[250] the court stated that warranties in nonsale

245. UCC § 2-316 (1978); *see also supra* text accompanying notes 80-96 (discussing whether an exculpatory clause must contain the term "negligence"). *But cf. The Fine Art of Disclaiming Liability*, 14 U.C.C. L. LETTER, Jan. 1981, at 1, 2 (noting that Code sections such as 2-316 have not prevented the use of deceptive exculpatory techniques hut merely "cause the game to be played on a different level"; the new effort "is to come up with language of limitation that conforms to the technical requirements of the ground rules but . . . does not present itself too clearly as a limitation").

246. For "conspicuousness" cases decided under the UCC, see, e.g., Holcomb v. Cessna Aircraft Co., 439 F.2d 1150 (5th Cir.) (holding that the purported disclaimer of warranties was not "conspicuous" where it was printed in the same type as the rest of the warranty form), *cert. denied*, 404 U.S. 827 (1971); Kennedy Elec. Co. v. Moore-Handley, Inc., 437 So. 2d 76 (Ala. 1983) (holding that conditions printed in red on the back of a sales quotation were conspicuous and thus effective to limit the seller's liability); De Lamar Motor Co. v. White, 249 Ark. 708, 460 S.W.2d 802 (1970) (asserting that a disclaimer of warranties in a conditional sales contract was ineffective because it was in smaller and lighter type than the rest of the printed form, although in italics, and hence was not "conspicuous"); A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982) (holding that a disclaimer printed in boldface type twice as large as the other terms of the agreement was "conspicuous"); Willis v. West Ky. Feeder Pig Co., 132 Ill. App. 2d 266, 265 N.E.2d 899 (1971) (ruling that the seller's disclaimer of warranties printed in bold type on the invoice under a heading in capitals and heavier type was sufficiently prominent on the instrument to effectively exclude implied warranties); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 302 N.W.2d 655 (1981) (noting that a disclaimer of warranties printed in contrasting red print on a purchase order was sufficiently "conspicuous" to satisfy § 2-316(2)); Commercial Credit Corp. v. CYC Realty, Inc., 102 A.D.2d 970, 477 N.Y.S.2d 842 (1984) (holding that the test of conspicuousness under § 2-316(2) is whether a reasonable person would notice the disclaimer when its type is juxtaposed against the rest of the agreement); Frazier v. Consolidated Equip. Sales, Inc., 64 Or. App. 833, 670 P.2d 153 (1983) (indicating that a warranty disclaimer on the back of a sales contract was not in larger type than the rest of the print on the page and was thus inconspicuous).

247. *See generally* Annotation, *Application of Warranty Provisions of Uniform Commercial Code to Bailments*, 48 A.L.R.3d 668 (1973).

248. Baker v. Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971).

249. *See* Annotation, *supra* note 247, at 674-75, and cases cited therein.

250. 264 Md. 69, 285 A.2d 607 (1972).

transactions are governed by case law, not by the UCC.[251] The court clarified its position by stating (1) that if the UCC drafters had intended the warranty provisions to apply to bailments in addition to sales, they would have so provided and (2) that a court's extension of the scope of the UCC amounts to judicial legislation.[252]

In contrast to *Bona*, the court in *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*[253] held that section 2-316(2) was directly applicable to a chattel lease.[254] The *Hertz* court denied summary judgment to a lessor who sued a lessee when the lessee defaulted on equipment lease rental payments. The lessee argued that it ceased payments when the leased machine broke and the lessor failed to repair it. The lessee also claimed that the lessor breached express and implied warranties of merchantability and of fitness for the particular use of the machine intended by lessee.[255] The lease agreement, printed on a standard pre-printed form, provided in part that the lessor made no representation, express or implied, regarding the equipment's suitability.[256] The court held that the validity of a disclaimer of warranties must be tested in light of section 2-316.[257] Announcing that the warranty did not satisfy the conspicuousness requirement of UCC section 2-316, the court noted that under section 2-102, Article 2 applies to "transactions in goods," a category that encompasses a far wider area of commercial activity than a "sale."[258]

The primary advantage of applying UCC provisions to bailment contracts is that under Article 2 an effective disclaimer of implied or

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251. *Accord* Mays v. Citizens & S. Nat'l Bank, 132 Ga. App. 602, 208 S.E.2d 614 (1974) (holding that the UCC warranty provisions were not applicable to a lease of an automobile because the lease was not sufficiently analogous to a sale), *overruled by* Mock v. Canterbury Realty Co., 152 Ga. App. 879, 264 S.E.2d 494 (1980); W. R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76 (Tex. Civ. App. 1979) (holding that Article 2 was applicable to a sale of software but inapplicable to a lease of hardware).

Professor Rodau insists that the reason the *Bona* court refused to apply the Article 2 warranty sections to the golf cart lease is that the court treated Article 2 as a statute rather than a code. Rodau, *supra* note 196, at 896; *see also supra* note 196 (discussing the difference between "code" and "statute").

252. 264 Md. at 73, 285 A.2d at 609.

253. 59 Misc. 2d 226, 298 N.Y.S.2d 392 (N.Y. Civ. Ct. 1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (N.Y. App. Term. 1970).

254. *Id.* at 228, 298 N.Y.S. 2d at 394.

According to Professor Rodau, *Hertz* "recognized that the failure to expressly include leases in article 2 was a gap in article 2. The court looked to the underlying policy of article 2 to bridge the gap rather than simply dismissing the code as inapplicable." Rodau, *supra* note 196, at 897. In other words, the *Hertz* court treated the UCC as a "code" rather than a "statute." *See supra* notes 196 and 251.

255. 59 Misc. 2d at 227, 298 N.Y.S.2d at 394.

256. *Id.* at 228, 298 N.Y.S.2d at 394.

257. *Id.*

258. *Id.* at 230, 298 N.Y.S.2d at 396.

express warranties must comply with fixed requirements directed at consistency of language and protection from surprise. The warranty provisions of Article 2 attempt to equalize the standing of the contracting parties by enforcing the warranty liability of "sellers" and by allowing "sellers" to disclaim that liability only after complying with the specific Code requirements.[259] The development of warranty law in nonsale transactions has not been as extensive as in sales transactions. Because the warranty law applicable to bailment and chattel lease transactions has not yet attained statutory form, it presently lacks many of the advances found in the warranty law of sales under the UCC.[260] Instead of waiting for the promulgation of a "Uniform Bailment Code"—which does not appear to be a likely development in the near future—courts should look to the UCC for guidance in bailment warranty cases, especially because the Code itself invites them to do so.[261]

3. Section 2-719: Conspicuousness

Section 2-719(3), like section 2-302, is not expressly limited to sales. Section 2-719(3) has been applied in various nonsale cases[262] and permits the parties to agree on an exclusion of consequential damages unless the limitation is unconscionable.[263] In *Office Supply Co., Inc. v. Basic/Four Corp.*[264] a federal district court analyzed section 2-719(3) in the context of a computer software lease.[265] The plaintiff purchased

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259. *See supra* notes 188-92 and accompanying text.

260. One important advancement concerns the treatment of implied warranty of fitness disclaimers. Under the common law a written disclaimer of the implied warranty of fitness did not have to be prominently displayed to be effective, *see* General Talking Pictures Corp. v. Shea, 187 Ark. 568, 575-76, 61 S.W.2d 430, 433-34 (1933), but under the UCC these disclaimers must be conspicuous. *See* UCC § 2-316 (1978).

In 1987 the final draft of Article 2A of the UCC was published by the American Law Institute. The new article, entitled "Uniform Commercial Code—Leases," applies to chattle and equipment leases. *See* UCC, 1A U.L.A. (Supp. 1987). To date, no state legislature has adopted Article 2A.

261. *See supra* notes 188-92 and accompanying text.

262. *See, e.g.*, Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) (section 2-719(3) applied in bailment context); *see also* Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971) (section 2-719(3) applied to disclaimer of liability in golf cart lease).

263. For a good comparison of § 2-719(3) and § 2-316, see Dusenberg & King, *supra* note 187, § 7.03[2].

One interesting point about § 2-719(3) is that by permitting any limitation of consequential damages, a conscionability standard is imposed. Thus, the application of § 2-719(3) hinges on the application of § 2-302, the UCC's unconscionability provision. *See supra* notes 220-22.

264. 538 F. Supp. 776 (E.D. Wis. 1982).

265. For a general debate concerning whether UCC Article 2 applies to computer software leases, compare Rodau, *supra* note 196 (advocating application of the UCC to software leases) with Note, *The Warranty of Merchantibility and Computer Software Contracts: A Square Peg Won't Fit in a Round Hole*, 59 WASH. L. REV. 511 (1984) (rejecting application of the UCC to software leases).

hardware and leased software from the defendant computer manufacturer to handle order processing, inventory control, sales analysis, and accounts receivable data. The plaintiff later sued the defendant for damages because the system allegedly was defective and caused the plaintiff to suffer "substantial losses."[266] The contract stipulated that the defendant's liability was limited to making repairs and excluded liability for consequential and incidental damages.[267] The court held that the disclaimers were not unconscionable,[268] primarily because the plaintiff failed to meet its burden of proof.[269] The court, however, did indicate that the result might have been different had the plaintiff shown a gross disparity in bargaining power between the parties or if the defendant had exerted undue influence to compel the plaintiff to enter into the contract.[270] Thus, section 2-719(3) would provide courts addressing the validity of disclaimers of liability in bailment cases with a ready source of law on which to base their decisions. This section, along with the other UCC provisions discussed elsewhere in this Note, would give the courts clear standards and numerous examples the application of which would result in more consistent rulings in cases involving exculpatory clauses.

V. INSURANCE: THE BAILOR'S REMEDY

One way for a bailor to protect itself against loss of or damage to its property by a negligent bailee is to obtain insurance. Because both the bailor and the bailee have an insurable interest in the bailed property,[271] they may agree expressly that one party is responsible for procuring full insurance for the benefit of both.[272] They may require, for

266. *Office Supply*, 538 F. Supp. at 778. The plaintiff sought damages for "lost customers, income, good will and executive time and incurred additional hardware and software expenses, office form expense, personnel expense and maintenance expense, all to its damage . . . of $186,000 plus reasonable interest." *Id.* (quoting plaintiff's complaint).

267. For the content of the disclaimers, see *id.* at 779-80.

268. *Id.* at 788. "The exclusion is presumed valid in a commercial setting." *Id.*

269. *Id.* The plaintiff bore the burden of proving that the exclusion of incidental and consequential damages was unconscionable. *Id.*

The court also based its finding on the fact that the plaintiff's president was accustomed to engaging in contract negotiation, that the plaintiff instituted negotiations with the defendant and engaged in a two-month period of "comparative shopping," that the defendant was not the only source of the product in question, and that the plaintiff took its time in deciding to purchase and was not prevented by the defendant from thoroughly investigating the computer system and the contract provisions. *Id.* at 789.

270. *Id.*

271. For cases holding that a bailee has an insurable interest in bailed property in his possession, see, e.g., Aetna Casualty & Sur. Co. v. Brunswick Corp., 437 F.2d 838 (10th Cir. 1971); Keystone Fabric Laminates, Inc. v. Federal Ins. Co., 407 F.2d 1353 (3d Cir. 1969); Cumis Ins. Soc'y, Inc. v. Republic Nat'l Bank, 480 S.W.2d 762 (Tex. Civ. App. 1972).

272. *See, e.g.*, Dresser Indus., Inc. v. Foss Launch & Tug Co., 560 P.2d 393 (Alaska 1977)

example, that the bailor insure the bailed property in order to eliminate duplicate coverage and to reduce bailment costs. Courts have affirmed the validity of a condition obligating the bailor to purchase insurance, holding that because the bailee could have contracted directly with an insurance company for coverage, the bailee could contract with the bailor for the bailor's procurement of insurance.[273] A condition requiring the bailor to obtain insurance relieves the bailee from liability for its own negligence only to the extent that the bailor's loss is covered by the insurance.[274]

Although bailors may want to consider procuring insurance even when not required by the contract, the cost is often prohibitive. For example, photographers may obtain "reshoot insurance" on a very limited basis for a very high price.[275] Some insurance companies charge between 1000 and 6000 dollars a year to insure the film of professional advertising photographers whose expenses can be determined easily and whose work can be duplicated.[276] A better solution from the bailor's point of view is to require the bailee to procure insurance covering the bailed property.

Generally, a bailee has no obligation to insure the bailed property for the benefit of the bailor.[277] In certain circumstances, however, a number of specific factors may have the effect of imposing on a bailee the duty to insure the bailed property.[278] These factors include a gov-

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(holding that storage agreement made bailor responsible for insurance for benefit of bailor and bailee).

273. *See id.* at 396. *See generally* Annotation, *Bailee's Liability as Affected by Bailment Condition That Bailor Procure Insurance*, 83 A.L.R.3d 519, 522 (1978).

274. *See* Buckey v. Indianhead Truck Line, Inc., 234 Minn. 379, 48 N.W.2d 534 (1951).

The court stated:

> [I]t does not follow that an agreement by a bailor to give a bailee the benefit of the bailor's insurance is equivalent to a contract freeing the bailee from responsibility for his own negligence. In such cases, the bailee is still held fully responsible for the consequences of his negligence, the only difference being that his liability is limited to the extent that the bailor is compensated by insurance carried in accordance with the agreement between the parties.

Id. at 384, 48 N.W.2d at 537.

275. Hughey, *supra* note 151.

On the other hand, the bailor's loss may be covered by a standard homeowner's insurance policy. Thus, the bailor would not have to pay an additional premium. The bailor should, however, contract to have the bailee pay the deductible in case of any loss.

276. *Id.* The price of such policies is usually based on the photographer's billable expenses. *Id.*

277. *See generally* Annotation, *Bailee's Duty to Insure Property*, 28 A.L.R.3d 513 (1969).

278. *See* Bank of Monango v. Ellendale Nat'l Bank, 52 N.D. 8, 201 N.W. 839 (1924) (holding that the general obligation of a bailee to exercise ordinary diligence and reasonable care may, independent of any specific factor requiring him to do so, impose upon him a duty to insure the bailed property). *See generally* J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4509 (W. Berdal ed. 1979); Booth, *Bailee Losses*, 23 INS. COUNSEL J. 304 (1956); Annotation, *supra* note 277.

erning statute,[279] the bailor's instructions,[280] a course of dealing between the parties,[281] and custom in the trade or industry.[282] When a bailee is under a duty to insure the bailed property for any of these reasons, the bailee must insure the goods for their full value.[283] Regardless of who insures the property, this policy coverage will compensate the bailor for at least actual property loss, if not for the bailor's time and attorney's fees.

VI. CONCLUSION

Because the laws vary among and even within jurisdictions, no single answer exists to the question of whether a commercial bailee may limit its liability for negligence. The best advice for bailors is to exercise special care when entering into a bailment agreement. The bailor should read signs, receipts, and, of course, any contract the bailor signs. The bailor also should question the bailee about the bailee's policies concerning loss of or damage to the bailed property. If the bailee insists on limiting its liability for negligence, the bailor should search for bailees who provide similar services without limiting their liability. If a bailee places a ceiling on the amount that the bailor can be compensated for loss of or damage to the bailed property, the bailor either should demand that the bailee agree in writing to increase the bailee's responsibility or should insure the item for the remaining amount

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279. *See, e.g.*, Brass v. North Dakota, 153 U.S. 391 (1894) (upholding a state statute regulating grain warehousemen to insure the grain of bailors); Ayres v. Crowley, 205 S.C. 51, 30 S.E.2d 785 (1944) (imposing duty to insure upon warehousemen storing cotton waste products).

280. *See, e.g.*, Bell v. Fitz, 84 Ga. App. 220, 66 S.E.2d 108 (1951) (holding that the bailee had a duty to insure household goods when bailor had instructed him to do so and bad paid six dollars in insurance charges).

281. *See, e.g.*, Rice Oil Co. v. Atlas Assurance Co., 102 F.2d 561 (9th Cir. 1939) (holding that a course of dealing between the parties established the bailee's duty to insure). *But see* Insurance Co. of N. Am. v. Krieck Furriers, Inc., 36 Wis. 2d 563, 153 N.W.2d 532 (1967) (holding that a course of dealing between the parties established that the bailee had no duty to insure).

282. *See, e.g.*, Coffeen v. Doster, 161 Ga. App. 529, 288 S.E.2d 327 (1982) (holding that, in a suit for alleged negligence in safeguarding bailed jewelry, ample evidence existed to support a jury charge explaining that a custom in the jewelry trade required a bailee to maintain insurance coverage on all bailed property).

One other reason the bailee should be required to obtain insurance is that the bailee is in the best position to explain its operating procedure to the insurance company and therefore may more easily describe the risk and negotiate the premium.

283. *See, e.g.*, Rice Oil Co. v. Atlas Assurance Co., 102 F.2d 561 (9th Cir. 1939).

There is a split of authority on the issue of whether a bailor has a right to maintain a direct action against his bailee's insurer. Generally, a stranger to a contract may not enforce it. The concept of a third party beneficiary, however, is an exception to the general rule and permits a person to enforce, in his own name, a contract made by another for his benefit. The words of the particular policy play a significant role in answering this question. *See* Booth, *supra* note 278, at 304; Annotation, *Bailor's Right of Direct Action Against Bailee's Theft Insurer for Loss of Bailed Property*, 64 A.L.R.3d 1207 (1975).

before delivering the item to the bailee. Of course, people frequently enter bailment agreements in a hurry—for example, dropping off laundry at the dry cleaner when already late for work—without thinking of questioning a bailee about disclaimers of liability. Even when a bailor signs a written agreement, the bailor often fails to read and understand the contractual provisions. Thus, bailees continue to attempt to limit or exclude their liability for negligence, bailors continue to sue for lost or damaged goods, and the courts continue to issue inconsistent and conflicting opinions.

One step toward clarifying bailment law is to apply directly certain sections of UCC Article 2 to commercial bailment transactions. Although the UCC is not a cure-all and may not resolve all bailment controversies, it will help bailment law to adapt to a rapidly changing commercial world. When used in the bailment context, Article 2 provisions should be applied in accordance with the purposes underlying the adoption of the UCC.[284] One such purpose was to simplify, clarify, and modernize the law governing commercial transactions.[285] Another was to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.[286] Finally, the UCC was adopted to provide a degree of uniformity in the law among the various states.[287] Although these purposes are stated in general terms, their impact can be quite specific. For example, Article 2 warranty provisions and the case law interpreting them detail when warranty exemptions are allowed and prohibited. Thus, judges who must determine the validity of a particular provision may look to UCC precedent to aid the court's decisionmaking. The UCC recognizes that a true system of uniformity cannot be attained if decisions are based on literalism and formality;[288] a truly uniform system may be established and maintained only by examining and understanding the Code's underlying policies.

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284. UCC § 1-102 (1978).

285. UCC § 1-102(2)(a) (1978). Professors Hart and Willier note that "[t]his purpose and policy of the Code means simply that courts are to construe its provisions in a way which facilitates rather than complicates commercial transactions." Hart & Willier, *supra* note 191, ¶ 12.03[2][a].

286. UCC § 1-102(2)(b) (1978).

287. UCC § 1-102(2)(c) (1978). According to Hart and Willier:

> The moral for courts and counsel is that they should take heed of the voluminous legislative history and analyses and, perhaps more importantly, of the decisions from other states construing and applying provisions of the Code. Before reaching an opposite or different conclusion from that of a court in another jurisdiction, a court should be convinced of its own position and should he careful to explain the reasons for the variance. . . . Uncertain guidelines for future commercial conduct breed litigation.

Hart & Willier, *supra* note 191, ¶ 12.03[2][c].

288. *See* UCC § 1-102 (1) (1978) (stating that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies"); *see also id.* comment 1.

Based on the number of states that have adopted the UCC,[289] the Code has succeeded in outlining acceptable policies concerning the conduct of commercial transactions.

Applying "sales" law to bailments does not contradict the notion that bailment is a distinct legal concept that should be examined and studied in its own right. On the contrary, applying portions of the UCC to bailment agreements could help to strengthen the concept by ridding bailment of some of its "obsolete formalities"[290] and by facilitating the use of interstate bailment transactions through greater predictability in the law. The need for uniformity in bailment law is especially important today because many businesses operate in national markets. Moreover, busy lawyers need a relatively simple and quickly available source of law for those bailment cases in which the amount in controversy cannot justify hours of research and analysis of conflicting case law. In addition, the application of particular UCC sections may prompt judges to decide cases forthrightly rather than twisting the law to reach the desired result or refusing to rule because of a lack of clear authority to support a position. In short, Article 2 of the UCC would fill a large gap and should be interpreted to cover certain nonsale transactions, specifically commercial bailments.

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289. The UCC has heen adopted in all 50 states, the District of Columbia, and the Virgin Islands. UCC Table 1 (1978).

290. Note, *supra* note 191, at 887. "[M]any of the principles developed in the article on sales of goods may be utilized in renovating other areas such as . . . bailments for hire . . . which are still encumbered with ohsolete formalities." *Id.*