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CONTRACTUAL DISCLAIMER AND LIMITATION OF LIABILITY UNDER THE LAW OF NEW YORK

*James Brook**

Our fundamental faith in freedom of contract is constantly being put to the test. Its most severe challenge may be that presented by contract provisions purporting to exclude or limit the liability of one party to an agreement. We recognize in principle that the parties should be free to bargain over the instances and extent of their contractual liability; yet, when actually confronted with an exculpatory clause our conviction falters. We are understandably concerned that the party who allowed an exculpatory clause to deprive him of much or all of the rights that seem to flow from other, often more prominent, provisions may have been "hoodwinked." He may have fallen victim to practices creating the kind of "unfair surprise" that we do not believe the law should countenance. Even in those instances where one party was or should have been aware of the limits placed on the other party's obligations, there is the concern that such a provision would not have been inserted into the agreement if the integrity and "fairness" of the bargaining process had not been in some way compromised. Those concepts that have evolved as countervailing forces to the unfettered freedom of contract — whether expressed as control over adhesion contracts, unconscionability, or simply general notions of public policy — all may come into play when we are faced with such a contract provision.

The question of the enforceability of contract provisions excluding or limiting liability is clearly quite broad. This Article

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will not directly address the philosophical questions that are involved; rather, it will provide an overview of the topic by examining the diverse ways in which the law of one jurisdiction, New York, approaches the enforceability of such provisions. The theme that emerges is one of variety and specialization. The balancing of the tension between the principle of freedom of contract and our basic protective instinct toward contracting parties works itself out in varying ways. There is no single answer, certainly not in practice nor apparently in basic policy, to the question of how far a party may go in limiting his liability by contract under New York law. The result ranges from broad validation to the outright prohibition of such attempts. The question may be approached in one context by an intricate code,¹ in another by a narrowly drawn statute,² and in yet another by a specialized common law doctrine.³ The answer is a set of answers, each with its own measures of clarity and confusion. We are reminded by this compendium of what our law governing contractual relationships has become. The traditional common law of contract still exists, but now as the centerpiece of a much grander and intricate montage. Indeed, by the end of this review, we will have reason to wonder whether this fundamental center has not been overwhelmed, in this area at least, by the more particular schemes that have grown up about it.

I. SALE OF GOODS

Undoubtedly, the most comprehensive and detailed treatment of exculpatory provisions is that governing their inclusion in contracts for the sale of goods found in Article 2 of the Uniform Commercial Code (the Code).⁴ The Code offers a complex

¹ See notes 4-54 and accompanying text *infra*.

² See notes 84-104 and accompanying text *infra*.

³ See notes 55-80 and accompanying text *infra*.

⁴ N.Y.U.C.C. art. 2 (McKinney 1964 & Supp. 1981-1982). Because of judicial extension of the Code's provisions to contracts not literally covered by its terms, the Code's treatment of exculpatory provisions is of even more importance. See generally Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). In New York, the Code's treatment of clauses purporting to disclaim or limit liability has been extended to a variety of leasing transactions. See, e.g., *Laudisio v. Amoco Oil Co.*, 108 Misc. 2d 245, 437 N.Y.S.2d 502 (Sup. Ct. N.Y. County 1981); *Fairfield Lease Corp. v. U-Vend, Inc.*, 14 U.C.C. REP. SERV. (Callaghan) 1244 (Sup. Ct. N.Y. County 1974); *Hertz Comm. Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (N.Y.C. Civ. Ct. 1969), *rev'd on other grounds*,

blend of prohibition and permission, focusing in some instances on the substantive effect of exculpatory clauses⁵ and in others on the manner of their presentation in an agreement.⁶ This is so primarily because the Code contains separate rules for what are considered to be two types of clauses — warranty disclaimers and limitations of remedies. Although contractual language often blurs the distinction between these clauses, and while they can effect nearly identical results, they are nonetheless analytically distinct and must be considered separately.⁷ An effective warranty disclaimer restricts the substantive rights of a buyer as to the nature or quality of the goods that he can expect under the contract; it limits those occasions on which a seller will be held liable for breach.⁸ A limitation of remedy clause narrows the remedy available for breach of contract to ones other than those provided by Article 2 itself in the absence of such a clause.⁹

When the clause in question is phrased in terms of a warranty disclaimer, its effect, as governed by section 2-316 of the Code,¹⁰ is largely determined by the type of warranty on which the buyer seeks to rely. If the buyer hopes to take advantage of an express warranty — one created by the seller's representa-

64 Misc. 2d 910, 316 N.Y.S.2d 585 (App. Term 1st Dep't 1970). However, the analogy to the Code when examining transactions outside of its purview has its limits. See *Arnold v. New City Condominiums Corp.*, 78 A.D.2d 882, 882, 433 N.Y.S.2d 196, 193 (2d Dep't 1980) (U.C.C. § 2-316 "conspicuousness" requirement not applicable to sale of condominium); *Perlmutter v. Don's Ford, Inc.*, 96 Misc. 2d 719, 721, 409 N.Y.S.2d 628, 630 (Utica City Ct. 1978) (U.C.C. § 2-719 not applicable to service contract for rustproofing).

⁵ See, e.g., N.Y.U.C.C. § 2-719(2) (McKinney 1964) (invalidating limitation of remedy clauses that "fail of their essential purpose").

⁶ See, e.g., *id.* § 2-316 (warranty disclaimers must be "conspicuous").

⁷ See *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 402, 244 N.E.2d 685, 687, 297 N.Y.S.2d 108, 111 (1968); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 471-72* (1980); *Special Project: Article Two Warranties In Commercial Transactions*, 64 CORNELL L. REV. 30, 212-15 & 224-25 (1978). Unfortunately, the courts do not always recognize this distinction. For example, in *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 304 N.Y.S.2d 918 (4th Dep't 1969), the court imposed the requirement, applicable only to warranty disclaimers, see note 20 and accompanying text *infra*, that the term "merchantability" be used in a clause drafted as a remedy limitation. 33 A.D.2d at 23, 304 N.Y.S.2d at 925. This result has been severely criticized. See WHITE & SUMMERS, *supra*, at 472 n.181; *Special Project, supra*, at 212-15.

⁸ See WHITE & SUMMERS, *supra* note 7, at 429-57.

⁹ See *id.* at 462-85. Unlike a warranty disclaimer, a limitation of remedy clause could theoretically be used to protect either the buyer or the seller. In practice, however, such provisions are invariably drafted to protect the seller in the event of his breach.

¹⁰ N.Y.U.C.C. § 2-316 (McKinney 1964).

tions during the contracting process¹¹ — then the disclaimer is likely to have little effect.¹² While section 2-316 does not automatically invalidate disclaimers of express warranties, it renders ineffective attempted disclaimers to the extent they are inconsistent with the words or conduct creating the express warranty.¹³ Thus, while an attempted disclaimer may encourage a narrow interpretation of ambiguous representations claimed by the buyer to create an express warranty, it cannot override express warranties that are unambiguous.¹⁴ However, the operation of the parol evidence rule¹⁵ may substantially reduce the buyer's protection. If the representations upon which the buyer relies took place before a final writing was prepared, then a clause purporting not only to disclaim warranties but to act as a merger clause may effectively bar proof of prior representations.¹⁶

In contrast to the considerable difficulty of disclaiming an express warranty, disclaimer of implied warranties of merchantability¹⁷ or of fitness for a particular purpose¹⁸ may be relatively simple under section 2-316. The Code provides the seller with a precise set of requirements governing the presentation of such a disclaimer in the agreement.¹⁹ To be effective

¹¹ See *id.* § 2-313 (defining conduct necessary to create an express warranty); WHITE & SUMMERS, *supra* note 7, at 325-43.

¹² See notes 13-15 and accompanying text *infra*.

¹³ See N.Y.U.C.C. § 2-316(1) (McKinney 1964) (disclaimers construed as consistent with language creating express warranty unless such a construction is unreasonable); *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 405, 244 N.E.2d 685, 689, 297 N.Y.S.2d 108, 113-14 (1968); WHITE & SUMMERS, *supra* note 7, at 429-433. The adoption of § 2-316 reversed an earlier line of cases that allowed a disclaimer to prevail over an express warranty. See *Railroad Waterproofing Corp. v. Memphis Supply, Inc.*, 303 N.Y. 849, 104 N.E.2d 486 (1952); *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931).

¹⁴ See WHITE & SUMMERS, *supra* note 7, at 430.

¹⁵ N.Y.U.C.C. § 2-202 (McKinney 1964).

¹⁶ See *FMC Corp. v. Seal Tape Ltd., Inc.*, 90 Misc. 2d 1043, 396 N.Y.S.2d 993 (Sup. Ct. Queens County 1977); *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 343 N.Y.S.2d 541 (Sup. Ct. Schenectady County 1972); *Pennsylvania Gas Co. v. Secord Bros., Inc.*, 73 Misc. 2d 1031, 343 N.Y.S.2d 256 (Sup. Ct. Chautaugua County 1973); *Special Project*, *supra* note 7, at 176-80.

¹⁷ See N.Y.U.C.C. § 2-314 (McKinney 1964). See generally WHITE & SUMMERS, *supra* note 7, at 343-57.

¹⁸ See N.Y.U.C.C. § 2-315 (McKinney 1964). See generally WHITE & SUMMERS, *supra* note 7, at 357-60.

¹⁹ See N.Y.U.C.C. § 2-316 (McKinney 1964); notes 20-23 and accompanying text *infra*. The policy underlying this section is not to prohibit or discourage disclaimers but simply to "protect the buyer from surprise." N.Y.U.C.C. § 2-316 comment 1.

against an implied warranty of merchantability, a disclaimer must "mention merchantability and in case of a writing must be conspicuous."²⁰ To exclude an implied warranty of fitness, the disclaimer must be both in writing and conspicuous.²¹ Either warranty also may be disclaimed by language that in common commercial understanding indicates that the buyer is taking the goods with no implied warranties.²² A disclaimer meeting these requirements will be effective notwithstanding the buyer's lack of knowledge of the disclaimer.²³

The meaning of "conspicuousness" is often a central issue in cases challenging a disclaimer's validity.²⁴ The Code defines the term to mean language "so written that a reasonable person against whom it is to operate ought to have noticed it,"²⁵ and provides examples of ways in which a clause can be made sufficiently conspicuous, such as printing it entirely in capitals or in larger or contrasting type.²⁶ It should be emphasized that these examples are not exhaustive, and the conspicuousness of the disclaimer is always a question of fact for the court.²⁷ It should also

²⁰ N.Y.U.C.C. § 2-316(2) (McKinney 1964). With respect to the requirement that the disclaimer use the word "merchantability," see *Dennin v. General Motors Corp.*, 78 Misc. 2d 451, 357 N.Y.S.2d 668 (Sup. Ct. Spec. Term Essex County 1974); *Stream v. Sportcar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1977).

²¹ See N.Y.U.C.C. § 2-316(2) (McKinney 1964).

²² The drafters indicated that language such as "as is" and "with all faults" would be sufficient to meet this requirement. See *id.* § 2-316(3)(a) & comment 7. While not specifically required by the Code, New York courts have assumed that such language must also be conspicuous to be effective. See *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (Utica City Ct. 1978); *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (N.Y.C. Civ. Ct. 1972).

²³ See *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 498, 333 N.Y.S.2d 818, 822 (Sup. Ct. N.Y. County 1972).

²⁴ See *WHITE & SUMMERS*, *supra* note 7, at 440-44.

²⁵ N.Y.U.C.C. § 1-201(10) (McKinney 1964).

²⁶ See *id.* For a case addressing the "conspicuousness" requirement in the context of an oral disclaimer, see *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (N.Y.C. Civ. Ct. 1972) (oral statement by auctioneer that goods are sold "as is," that was neither repeated nor amplified, did not meet "conspicuousness" requirement).

²⁷ See N.Y.U.C.C. § 1-201(10). Conspicuousness may be achieved by the use of "larger or other contrasting type or color," *id.*, but other methods may be equally successful. See, e.g., *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 499, 333 N.Y.S.2d 818, 823 (Sup. Ct. N.Y. County 1972) (language separately set forth, framed with a heavy black line, and surrounded by one inch blank margin). For examples of language not meeting the test, see *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982, 983, 403 N.Y.S.2d 322, 325 (2d Dep't 1978) (clause in print no larger than any other print on entire page and smaller than some),

be noted that what is required is that the *limitation* of warranties be made conspicuous; the negative or limiting aspect of the provision must be reasonably certain to gain the buyer's attention. Thus, a disclaimer might be ineffective if only the comforting term "WARRANTY" is made prominent, though the provision as a whole would restrict the buyer's warranty protection.²⁸

The seller's power to disclaim implied warranties is limited only by his willingness to comply with the formal requirements of section 2-316.²⁹ In contrast, the Code's provision on modification and limitation of remedies, section 2-719,³⁰ sets forth no guidelines on what a clause must say or how it must appear other than to require that the clause expressly state that a remedy is exclusive if it is to function as the sole remedy.³¹ The Code's approach is to state general approval of provisions creating remedies "in addition to or in substitution for" those already provided by Article 2,³² but then to introduce a pair of rules

General Elec. Credit Corp. v. Hoey, 7 U.C.C. REP. SERV. (Callaghan) 156, 160 (Sup. Ct. Kings County 1970) (disclaimer on back of form), and Natale v. Martin Volkswagen, Inc., 92 Misc. 2d 1046, 1048, 402 N.Y.S.2d 156, 158 (Utica City Ct. 1978) (disclaimer hand-stamped on printed material making it difficult to read). While language that is not in some way distinguished from other language in a form contract will usually not be deemed conspicuous, it may pass the test where the agreement is not a standard form but is drafted by sophisticated commercial parties. American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 451 n.22 (S.D.N.Y. 1976).

²⁸ Compare Victor v. Mammana, 101 Misc. 2d 954, 956, 422 N.Y.S.2d 350, 351 (Sup. Ct. Nassau County 1979) (disclaimer not conspicuous where only "WARRANTY" appeared in large print and disclaimer was in small print and borderless) with Basic Adhesives, Inc. v. Robert Matzkin Co., 101 Misc. 2d 283, 290, 420 N.Y.S.2d 983, 987 (N.Y.C. Civ. Ct. 1979) (disclaimer conspicuous where first word was "NON-WARRANTY" printed in capitals). It should be emphasized that a disclaimer meeting the requirements of § 2-316 will still be ineffective if it is not included as part of the original agreement, as where it appears on an invoice or owner's manual provided at the time of delivery. See WHITE & SUMMERS, *supra* note 7, at 445-46.

²⁹ At least this is what appears from a reading of § 2-316 itself. The doctrine of unconscionability may come into play and limit the power to disclaim implied warranties. See notes 45-54 and accompanying text *infra*. It should also be noted that warranties may be effectively excluded or modified under the Code by the buyer's taking the goods following his examination of them or following his opportunity to examine them prior to contracting, see N.Y.U.C.C. § 2-316(3)(b) (McKinney 1964), or by trade usage or custom, see *id.* § 2-316(2)(c). However, limitations not part of a formal contract are beyond the scope of this Article.

³⁰ *Id.* § 2-719.

³¹ *Id.* § 2-719(1)(b). See Stream v. Sportscar Salon, Ltd., 91 Misc. 2d 99, 106, 397 N.Y.S.2d 677, 682-83 (N.Y.C. Civ. Ct. 1977).

³² See N.Y.U.C.C. § 2-719(1) (McKinney 1964). The Code specifically gives as examples of such allowable modifications "limiting the buyer's remedies to return of the goods

each of which may limit the substantive effect of any such provision, the overriding purpose being to assure "that at least minimum adequate remedies be available."³³

The first such limitation comes into play only at the time a breach occurs. Section 2-719(2) provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."³⁴ Section 2-719(2) is concerned with remedies that fail to achieve their intended purposes because of unforeseen circumstances arising at the time of the breach; it is intended to deal with those cases where at the time of contracting the limiting provision appeared reasonably well suited to fairly and adequately handle problems that might arise but where the actual difficulty that does arise is one the clause was not designed to cope with effectively. This doctrine does not depend on any finding that the substituted or limited remedy could have been judged to be

and repayment of the price or to repair and replacement of non-conforming goods or parts." *Id.*

³³ *Id.* comment 1.

³⁴ *Id.* § 2-719(2). A comment explains that "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of . . . Article [2]." *Id.* comment 1. The meaning of this doctrine has been much debated, see, e.g., Anderson, *Failure of Essential Purpose And Essential Failure On Purpose: A Look At Section 2-719 of the Uniform Commercial Code*, 31 Sw. L.J. 759 (1977); Eddy, *On The "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719 (2)*, 65 CALIF. L. REV. 28 (1977). By its very nature, dealing as it does with changing and unforeseen circumstances, it is probably not subject to precise definition. An example, however, may be helpful. The classic example of a situation governed by the "failure of essential purpose" doctrine is found in automobile sales agreements. Such agreements typically supplement the express warranty with a provision limiting the buyer's remedy for defects to replacement of the defective parts. The "essential purpose" of this remedy could be said to be the assurance that the buyer will, with only a minimum of personal inconvenience and delay, have a car free from defect as he would reasonably expect when buying a new car. It assumes that such cars may require some minor repair or adjustment before they are truly "as good as new" and that such work can be expected and should be accepted in the circumstances. If the car is defective in such a way, or if the seller's attempts to repair are so faulty and unsuccessful that it is still not in good condition after the dealer has been given some fair chance and amount of time to repair, the limited remedy of repair or replacement can be said to have failed of its essential purpose. See WHITE & SUMMERS, *supra* note 7, at 466-67; Anderson, *supra*, at 767-70; Eddy, *supra*, at 68-84. In *Stream v. Sportscar Salon, Ltd.*, 91 Misc.2d 99, 397 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1977), the court held that a provision for "one repair or replacement" of a car's engine failed of its essential purpose because the single repair still left the car with a defective engine. *Id.* at 106, 397 N.Y.S.2d at 683.

unfair or oppressive at the time of contracting.³⁵ Unfortunately, the leading New York case discussing the "failure of essential purpose" concept neglected to recognize this crucial distinction. In *Wilson Trading Corp. v. David Ferguson, Ltd.*,³⁶ a provision in a contract for the sale of yarn prohibited the buyer from making claims for defects more than ten days after shipment or after the yarn had been knitted into garments. The New York Court of Appeals held that the provision failed of its essential purpose because some defects would not be "reasonably discoverable" within this period, thereby leaving the buyer with no remedy.³⁷ However, this difficulty with the remedy limitation should have been apparent, at least to members of the trade, at the time the contract was entered into. As the failure of essential purpose doctrine is intended to police clauses whose inadequacies only become apparent at the time a breach occurs,³⁸ the *Wilson* court's reliance on that doctrine was misplaced.

The second restriction imposed by the Code upon the modification or limitation of remedies is specifically directed toward those provisions that can be judged at their inception to be inequitable. This is the concept of unconscionability as explicitly applied by the Code to questions of limitations or modifications of remedy. The final subsection of section 2-719 provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injuries to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is com-

³⁵ See WHITE & SUMMERS, *supra* note 7, at 466.

³⁶ 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

³⁷ *Id.* at 405, 244 N.E.2d at 689, 297 N.Y.S.2d at 114.

³⁸ See WHITE & SUMMERS, *supra* note 7, at 466; Anderson, *supra* note 34, at 764-67; Eddy, *supra* note 34, at 30-40.

An important question that remains is the range of remedies that a buyer will have available in the event a substituted remedy is found to have failed in its essential purpose. See Eddy, *supra* note 34, at 84-92; *Special Project*, *supra* note 7, at 234-43. Generally, the buyer is allowed to pursue any of the remedies provided for in the Code. See WHITE & SUMMERS, *supra* note 7, at 469-70. Some courts have held, however, that a separate clause excluding any consequential damages will survive the failure of a repair or replacement provision. See, e.g., *American Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976); *County Asphalt, Inc. v. Lewis Welding & Eng'g Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir. 1971), *cert. denied*, 404 U.S. 939 (1971). *But see* *Erie County Water Auth. v. Hen-Gar Constr. Corp.*, 473 F. Supp. 1310, 1315 (W.D.N.Y. 1979) (stating that law in this area is unsettled).

mercial is not.³⁹

It must be noted initially that the opening words of this subsection explicitly recognize and approve of the possibility that limitations of consequential damages may be included in contracts of sale.⁴⁰ Where the party seeking damages is a commercial entity such a limitation is easily upheld; although a limitation of remedy could in theory still be found unconscionable, the instances of such a finding would be rare.⁴¹ On the other hand, the section is of great significance in stating that limitation of consequential damages for personal injury in the case of consumer goods is prima facie unconscionable,⁴² and only in the exceptional case is this presumption overcome.⁴³

Section 2-719(3) is on its face directly applicable only to clauses limiting or modifying remedies, not to warranty disclaimers, and then only to clauses that specifically restrict consequential damages.⁴⁴ The reach of the unconscionability doctrine may, however, exceed the limited scope of section 2-719(3) to include limitations of remedies other than consequential damage and general warranty disclaimers. The courts have indicated that a limited or substituted remedy may fall because of unconscionability, as distinct from failure of its essential purpose, even when the remedy provided is not primarily directed at the exclusion of consequential damages. Limitations of remedies in general are subject to the conscionability review.⁴⁵ In the case of

³⁹ N.Y.U.C.C. § 2-719(3) (McKinney 1964). See generally Note, *The Enforceability of Contractual Clauses Excluding Sellers From Liability For Consequential Damages Under Section 2-719 of the Uniform Commercial Code*, 58 WASH. U.L.Q. 317 (1980).

⁴⁰ N.Y.U.C.C. § 2-719(3) (McKinney 1964).

⁴¹ See *American Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 458 n.41 (S.D.N.Y. 1976); *County Asphalt, Inc. v. Lewis Welding & Eng'g Corp.*, 323 F. Supp. 1300, 1308 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir. 1971), *cert. denied*, 404 U.S. 939 (1971); *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 343 N.Y.S.2d 541 (Sup. Ct. Schenectady County 1972).

⁴² N.Y.U.C.C. § 2-719(3) (McKinney 1964).

⁴³ See *WHITE & SUMMERS*, *supra* note 7, at 482 n.234. A New York court recently held that a limitation of consequential damages as applied to property loss in the case of a consumer product was unconscionable. See *Fischer v. Gen. Elec. Hotpoint*, 103 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct. Suffolk County 1981).

⁴⁴ See N.Y.U.C.C. § 2-719(3) (McKinney 1964).

⁴⁵ See *Stream v. Sportscar Salon, Ltd.*, 91 Misc.2d 99, 397 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1977) (limitation of remedy to one repair or replacement "might very well" be unconscionable). Subjecting limitations to the conscionability test has the approval of the Court of Appeals, which has said that "contractual limitations upon remedies are gener-

clauses worded as warranty disclaimers, two approaches have been taken. First, section 2-719(3) has itself been held applicable to warranty disclaimers that have the effect of denying consequential damages. In *Walsh v. Ford Motor Co.*,⁴⁶ a New York trial court held the defendant's disclaimer of implied warranties unconscionable under section 2-719(3) because his express warranty left the plaintiff with no remedy for personal injuries.⁴⁷ Conceding that the disclaimer met the formal requirements of section 2-316,⁴⁸ the court nonetheless regarded it as essentially a limitation of remedies provision and thus subject to the unconscionability standard of section 2-719(3).⁴⁹

Warranty disclaimers may also be subject to scrutiny under the Code's general unconscionability provision, section 2-302.⁵⁰ Because warranty disclaimers are governed by the specific requirements set forth in section 2-316,⁵¹ the question arises whether disclaimers meeting these requirements are exempted from scrutiny under section 2-302, which expressly extends the unconscionability standard to "any clause of the contract"⁵² The applicability of section 2-302 to disclaimers otherwise valid under section 2-316 is a hotly debated question and is as yet unresolved.⁵³ New York cases, however, generally support the view that warranty disclaimers must withstand attack under both Code sections.⁵⁴

ally to be enforced unless unconscionable." *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y. 398, 403, 244 N.E.2d 685, 687, 297 N.Y.S.2d 108, 112 (1968).

⁴⁶ 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. Special Term Nassau County 1969).

⁴⁷ *Id.* at 242, 298 N.Y.S.2d at 540.

⁴⁸ *Id.*

⁴⁹ *Id.* White and Summers criticize this approach as inconsistent with the overall scheme of the Code. See WHITE & SUMMERS, *supra* note 7, at 483-84.

⁵⁰ N.Y.U.C.C. § 2-302 (McKinney 1964). Section 2-302 permits a court to refuse to enforce a contract if the contract or any clause thereof is found to be unconscionable at the time it was made. *Id.* The court may also delete the unconscionable clause or limit its application to preclude an unconscionable result. *Id.*

⁵¹ See notes 18-23 and accompanying text *supra*.

⁵² N.Y.U.C.C. § 2-302 (McKinney 1964). See Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 516-28 (1967); WHITE & SUMMERS, *supra* note 7, at 475-81.

⁵³ See WHITE & SUMMERS, *supra* note 7, at 475-81.

⁵⁴ See *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427 (2d Dep't 1977); *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 A.D.2d 1004, 318 N.Y.S.2d 352 (2d Dep't 1970), *aff'd*, 30 N.Y.2d 613, 282 N.E.2d 126, 331 N.Y.S.2d 40 (1972).

II. PRODUCTS LIABILITY

From the task of interpretation and application of a complex, comprehensive, and much considered Code, we turn to an area that has developed in a far less organized fashion. The part that an attempted exculpatory clause in a contract will play in an action brought under the theory (or theories) of products liability is open to question because of the uncertain quality of that field of law in New York.⁵⁵ It is well-established in New York that an action based on a defective product may proceed on one or more of the theories of breach of warranty, strict liability in tort, or negligence.⁵⁶ The nature of each cause of action and the manner in which the causes of action interrelate is far from clear.⁵⁷ Under section 2-318 of the Code, recovery under a breach of warranty theory is not limited to immediate purchasers; both remote purchasers and third parties are entitled to the benefits of the seller's warranties, express or implied.⁵⁸ However, these persons are no less subject to valid warranty disclaimers and remedy limitations than are immediate purchasers. The

⁵⁵ Attempts are now underway, however, to systematize and codify the law of products liability. See generally 9 PROD. SAFETY LIAB. REP. (BNA) 797, 797-808 (1981) (draft of proposed uniform national products liability law).

⁵⁶ See *Lancaster Silo & Block Co. v. Northern Propane Gas Co.*, 75 A.D.2d 55, 427 N.Y.S.2d 1009 (4th Dep't 1980).

⁵⁷ For example, dictum in *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 533, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978), suggests that a plaintiff seeking recovery for injury caused by a defective product may be limited to proceeding on a tort liability basis and may be barred from bringing an action based on warranty theory. See *Howard & Watkins, Strict Products Liability in New York and the Merging of Contract and Tort*, 42 ALB. L. REV. 603, 608-09 (1978). This observation was made in spite of the fact that § 2-318 of the Code expressly extends warranty protection to all persons who might be "affected by" a manufacturer's defective product. See N.Y.U.C.C. § 2-318 (McKinney Supp. 1981-1982); *Donnelly & Donnelly, 1975 Survey of New York Law: Commercial Law*, 27 SYRACUSE L. REV. 277, 279 (1975). Whatever power the courts may have to extend the doctrine of strict liability in tort, the plaintiff's right to proceed on a contractual warranty theory as provided for in the Code would appear safe from judicial contraction or modification. See *Atkinson v. Ormont Machine Co., Inc.*, 102 Misc. 2d 468, 423 N.Y.S.2d 577 (Sup. Ct. Special Term Kings County 1979); Note, *Products Liability in New York: Section 2-318 of the U.C.C. — The Amendment Without a Cause*, 50 FORDHAM L. REV. 61 (1981).

⁵⁸ See N.Y.U.C.C. § 2-318 (McKinney Supp. 1981-1982); note 57 *supra*. Section 2-318 provides that:

A seller's warranty whether express of implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

drafters made clear their intention to give remote plaintiffs no greater protection than that enjoyed by those to whom warranties are initially given.⁵⁹

The effectiveness of exculpatory clauses against claims based on strict liability in tort is quite another matter. As strict liability in tort emerged partly as a response to the harshness of applying contract formalities in such situations, most courts and commentators take the position that attempted disclaimers or limitations of liability are ineffective against all potential plaintiffs.⁶⁰ Unfortunately, the development of the doctrine of strict liability in New York has not been this straightforward. The New York courts have left many questions regarding strict liability unresolved, including the effect of a contractual disclaimer of liability.⁶¹ This confusion, and the possibility that such a disclaimer may have far greater effect in New York than in many other jurisdictions, is traceable to the New York Court of Appeals' decision in *Velez v. Craine & Clark Lumber Corp.*⁶²

Velez, decided shortly after the Court of Appeals' approval of a separate tort theory of recovery in *Codling v. Paglia*,⁶³ directly addressed the validity of an otherwise effective warranty disclaimer in an action based on a strict liability theory. The *Velez* plaintiffs, injured after the collapse of a defective scaffold plank bought by their employer,⁶⁴ sued the lumber company,

⁵⁹ The Code speaks of "extending" warranty protection to persons other than the immediate purchaser. N.Y.U.C.C. § 2-318 (McKinney Supp. 1981-1982). A comment to § 2-318 explains that "[t]o the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." *Id.* comment 1 (McKinney 1964). The same result was reached with no reference to this Code section in *Icelandic Airlines, Inc. v. Canadair, Ltd.*, 104 Misc. 2d 239, 428 N.Y.S.2d 393 (Sup. Ct. New York County 1980).

⁶⁰ See McNichols, *Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494, 494-95 (1975).

⁶¹ This is in part due to the Court of Appeals' refusal to adopt § 402A of the Restatement (Second) of Torts. See Howard & Watkins, *supra* note 56, at 610-17. Section 402A sets forth the Restatement's substantive criteria for bringing a cause of action in strict tort liability. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (Restatement). Comment M to this section expressly states that "[t]he consumer's cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer" or otherwise. *Id.* comment M.

⁶² 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

⁶³ 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). See Howard & Watkins, *supra* note 56, at 605-06.

⁶⁴ 33 N.Y.2d at 119-20, 305 N.E.2d at 751, 350 N.Y.S.2d at 618.

limiting their legal theories to negligence and breach of warranty⁶⁵ presumably because the strict liability doctrine had not been adopted in New York at the time of the commencement of their action. The trial court dismissed the negligence count, but the jury awarded substantial damages on the breach of warranty theory.⁶⁶ The Appellate Division found that "the only serious question presented" was the effect to be given a disclaimer that appeared on the seller's invoice.⁶⁷ The trial court had held that the disclaimer was not sufficiently conspicuous under section 2-316,⁶⁸ but the Appellate Division found otherwise holding that "the disclaimer of warranty was effective against plaintiff's employer Nasso and thus effectively barred plaintiff's action for breach of warranty."⁶⁹

The Court of Appeals reversed and remanded the case for a new trial in light of its decision in *Codling*.⁷⁰ The court then discussed the effect to be given the disclaimer under a strict liability theory, assuming for the purposes of its discussion that the clause met the formal requirements of the Code.⁷¹ The court first considered the Code, but concluded that it did not provide any guidance as to what parties are bound by valid warranty disclaimers and remedy limitations.⁷² Finding itself "thrown back

⁶⁵ *Id.* at 120, 305 N.E.2d at 751, 350 N.Y.S.2d at 619.

⁶⁶ *Id.* The verdict was apparently based upon a finding of a breach of the warranty of fitness for a particular purpose, specifically, that the lumber was unsuitable for scaffolding. See *Velez v. Craine & Clark Lumber Co.*, 68 Misc. 2d 499, 500, 326 N.Y.S.2d 928, 929-30 (Sup. Ct. Kings County 1971), *rev'd*, 41 A.D.2d 747, 341 N.Y.S.2d 248 (2d Dep't 1973).

⁶⁷ *Velez v. Craine & Clark Lumber Co.*, 41 A.D.2d 747, 748, 341 N.Y.S.2d 248, 251 (2d Dep't 1973).

⁶⁸ 68 Misc. 2d at 502, 326 N.Y.S.2d at 931.

⁶⁹ 41 A.D.2d at 749, 341 N.Y.S.2d at 252.

The dissent would have sustained the plaintiff's recovery under an independent strict liability theory like that which was later adopted by the Court of Appeals in *Codling*. See note 63 and accompanying text *supra*. The dissent emphasized that as strict liability derives from tort principles, the rights of remote users should not "be cut off by concessions made by the immediate purchaser." 41 A.D.2d at 750, 341 N.Y.S.2d at 254.

⁷⁰ 33 N.Y.2d at 121, 305 N.E.2d at 752, 350 N.Y.S.2d at 620. The trial court was instructed to consider those issues that had not been originally addressed but had since become relevant because of the availability of the separate strict liability theory.

⁷¹ *Id.* at 124, 305 N.E.2d at 753-54, 350 N.Y.S.2d at 622-23. See notes 18-23 and accompanying text *supra*.

⁷² The court noted that § 2-316, which governs warranty disclaimers, "does not undertake, nor does any other section of the Code undertake, to specify who shall and who shall not be bound by an exclusion of warranties." 33 N.Y.2d at 124, 305 N.E.2d at 754, 350 N.Y.S.2d at 622. As noted previously, comment 1 to § 2-318 indicates that remote

on broad principles of contract law,"⁷³ the court saw no reason to prohibit limitations of liability between the immediate parties to a contract even though the cause of action itself sounded in tort rather than contract.⁷⁴ But where, as in *Velez*, the plaintiff was a stranger to the contract without notice of the disclaimer he will not be bound by its terms. "[I]n the absence of special circumstances," the court held, "buyer and seller cannot contract to limit the seller's exposure under strict products liability to an innocent user or bystander."⁷⁵ It is hard to criticize a rule that exempts strangers to a contract from its limitations, particularly when suit is brought not on the contract itself but on a separate tort doctrine.⁷⁶ One wonders, however, what "special circumstances" would change this result. The court seemed to suggest that actual notice of the disclaimer would be sufficient.⁷⁷ Whether this should bind plaintiffs that are powerless to affect the contractual relationship is open to question. As the facts in *Velez* illustrate, the notion that such plaintiffs "assume the risk" by using a product with knowledge of a disclaimer is trouble-

users and third parties are to receive no greater protection than that accorded to immediate purchasers, and therefore are subject to valid disclaimers under the Code. See note 59 *supra*. The court overlooked this comment in reaching its decision.

At the time *Velez* was decided § 2-318 was not in its present form but extended its warranty protection only to "any natural person who is in the family or household" of the buyer "or who is a guest in his home." N.Y.U.C.C. § 2-318 (McKinney 1964). Thus the plaintiffs, as employees of the buyer, would not have been covered by the section. Their reliance on a warranty theory, and the acceptance of that theory at the trial level, reflected the common law expansion of the cause of action for breach of warranty beyond the bounds provided by the Code as a matter of statutory right. Perhaps this is the explanation for the troublesome remark of the Court of Appeals in *Martin*, *supra* note 57, which suggests, contrary to the plain language of § 2-318, that breach of warranty is no longer available to a consumer who lacks privity of contract. The court may wish to be taken as saying only that the extension of the contractual action as a matter of common law to cases outside the limits set forth in the Code, which had preceeded its adoption of strict liability in tort, had been rendered superfluous by that tort doctrine and could be abandoned.

⁷³ 33 N.Y.2d at 124, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.

⁷⁴ *Id.* at 125, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.

⁷⁵ *Id.*

⁷⁶ An interesting variant is provided by *John R. Dudley Constr., Inc. v. Drott Mfg. Co.*, 66 A.D.2d 368, 412 N.Y.S.2d 512 (4th Dep't 1979), holding that a disclaimer of warranty and an "as is" provision in the purchase contract between the plaintiff and his immediate seller could not bar a liability action against the product's manufacturer, at least where there was no suggestion that the seller intended disclaimers to benefit the manufacturer.

⁷⁷ 33 N.Y.2d at 125, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.

some. Had the plaintiffs been fully aware of the warranty disclaimer on the lumber, they can hardly be said to have assumed the risk of its being defective simply because they did not refuse to use the scaffold.

Even more troublesome is the court's seeming approval of disclaimers in the context of a suit by a buyer against his immediate seller.⁷⁸ If this dictum develops into a rule giving effect to disclaimers only in cases brought by a buyer against his immediate seller where the disclaimer was actually bargained for by the parties in a sophisticated commercial setting, New York law may not be radically different from the law of strict liability as it has evolved elsewhere.⁷⁹ But if New York law is seen as protecting the seller, even in the consumer context,⁸⁰ whenever a carefully worded and displayed disclaimer is used, strict products liability in New York could have a much different scope than in other jurisdictions. Its principal effect might only be to impress upon manufacturers and sellers of consumer products the need to draft even longer and more protective disclaimer language.

III. STATUTORY PROHIBITIONS IN PARTICULAR CASES

Standing alongside the comprehensive scheme governing the sale of goods under the Code and the evolving common law rules

⁷⁸ The court stated that "[a]lthough strict products liability sounds in tort rather than in contract, we see no reason why in the absence of some consideration of public policy parties cannot by contract restrict or modify what would otherwise be a liability . . . grounded in tort." *Id.* at 124-25, 305 N.E.2d at 754, 350 N.Y.S.2d at 623. The court did not suggest what policy considerations might limit the parties' right to disclaim liability. Commentators have read this dictum as a rejection of the position, taken in the comment to § 402A of the Restatement, *see note 61 supra*, that disclaimers are completely irrelevant in the strict liability context. *See McNichols, supra note 60*, at 512-13. The possible role of "policy considerations" renders this judgment somewhat premature, and the precise meaning of the *Velez* dictum must await further elaboration by the courts.

⁷⁹ Even those jurisdictions that have adopted section 402A of the Restatement have shown a willingness to uphold disclaimers negotiated in a commercial context, at least where the provision is clearly worded so as to disclaim strict tort liability. *See, e.g., Delta Airlines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Keystone Aeronautics Corp., v. R. J. Enstrom Corp.*, 499 F.2d 146 (3d Cir. 1974); *McNichols, supra note 60*, at 505-13.

⁸⁰ In his concurrence in *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 407 n.2, 335 N.E.2d 275, 281 n.2, 373 N.Y.S.2d 39, 47 n.2 (1975), Judge Fuchsberg stated that "[i]n *Velez* . . . this court indicated that disclaimers negotiated by a consumer might well be valid under proper circumstances." *See generally Twerski, From Codling, to Bolm to Velez: Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).

in the area of products liability, New York has adopted, beginning in 1937, a series of statutes prohibiting the disclaimer of liability for negligence in certain situations. The first of these statutes to be adopted, now found in section 5-321 of the General Obligations Law (GOL),⁸¹ changed the New York common law rule⁸² by making unenforceable any disclaimer by the lessor of liability for his negligence or that of his employees in a lease of real property. Judicial construction has given the statute a broad application. A landlord may not, under the statute, defend a negligence action by relying upon a lease provision requiring that the lessee give written notice of defects.⁸³ Neither may he rely upon a provision that the lessee indemnify him for the lessee's injuries arising out of the lessor's negligence.⁸⁴ However, additional defenses given the landlord will not be invalidated simply because they appear in the same paragraph as the illegal exculpatory clause.⁸⁵

⁸¹ N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978). Section 5-321 provides that:

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

⁸² See *Bernard Katz, Inc. v. East 30th Street Corp.*, 172 Misc. 873, 16 N.Y.S.2d 640 (Sup. Ct. Special Term New York County 1939), *aff'd*, 259 A.D. 707, 19 N.Y.S.2d 145 (1940); *Hanfeld v. A. Broido, Inc.*, 167 Misc. 85, 3 N.Y.S.2d 463 (N.Y. Mun. Ct. 1938). This section's constitutionality was upheld in *Billie Knitwear Inc. v. New York Life Ins. Co.*, 174 Misc. 978, 22 N.Y.S.2d 324 (Sup.Ct. Special Term N.Y. County 1940), *aff'd*, 262 A.D. 714, 27 N.Y.S.2d 328 (1st Dep't 1941), *aff'd*, 288 N.Y. 682, 43 N.E.2d 80 (1942).

⁸³ See *Kean v. 34 West 34th Street Corp.*, 190 Misc. 914, 75 N.Y.S.2d 498 (Sup. Ct. N.Y. County 1947); *Gordon v. McAfee*, 184 Misc. 469, 54 N.Y.S.2d 443 (N.Y.C. Civil Ct. 1945), *modified on other grounds*, 186 Misc. 132, 61 N.Y.S.2d 635 (Sup. Ct. App. Term 1st Dep't 1945).

⁸⁴ "[The lessor] cannot choose a circuitous method to do indirectly what it cannot accomplish directly. It cannot expose itself to liability to the lessee, yet require that if liability be proved the lessee must repay any recovery under the terms of an indemnity clause in the lease." *Redding v. Gulf Oil Corp.*, 38 A.D.2d 850, 851, 330 N.Y.S.2d 158, 161 (2d Dep't 1972).

The statute has also been held applicable to cases involving the lessor's passive negligence. See *International Underwear Corp. v. Brooklyn Trust Co.*, 287 N.Y. 589, 38 N.E.2d 386 (1941); *Palanker v. Edwards Properties, Inc.*, 32 Misc. 2d 772, 222 N.Y.S.2d 266 (Sup. Ct. Erie County 1961); *Bullock v. Sinclair Ref. Co.*, 164 N.Y.S.2d 452 (Sup. Ct. Oneida County 1956).

⁸⁵ See *Gislason v. Willard Realty Corp.*, 14 A.D.2d 740, 220 N.Y.S.2d 108 (1st Dep't 1961) (tenant's breach of provision limiting items stored with lessor to empty trunks

A second statute, adopted in 1949, GOL 5-325,⁸⁶ prohibits garage owners and parking lot operators from disclaiming liability for personal injuries or property damage resulting from their negligence. This section does not, of course, render the parking garage liable as an insurer of cars parked at its facility.⁸⁷ Liability depends in the first instance upon whether the relationship between the garage owner and the vehicle owner is that of a bailment or only that of a license for use of the space;⁸⁸ only in the bailment situation does the statutory prohibition of liability disclaimers become applicable.⁸⁹ Section 5-325 does not prevent the parties from creating a licensing relationship, the result of which will be to lower the garage's duty of care.⁹⁰ However, once a bailment is found the statute voids any attempt to exempt or limit⁹¹ the bailor's liability, regardless of whether the exemption is presented on the ticket provided by the garage or set forth in

absolved lessor of liability for damage to contents, despite invalidity of provision generally exempting him from liability for damage to articles stored in his storeroom).

In addition, the statute will not invalidate provisions requiring that the parties carry their own insurance and limiting their recovery to the amount of the insurance coverage with no right of subrogation. See *Brentano's Inc. v. Charter Management Corp.*, 46 A.D.2d 861, 361 N.Y.S.2d 665 (1st Dep't 1974).

⁸⁶ N.Y. GEN. OBLIG. LAW § 5-325 (McKinney 1978). The statute requires that the storage or repair be "for hire or other consideration." *Id.* This requirement is met where parking is just one of a "totality of . . . services" provided by a hotel for a single fee. See *Mindlin v. Kiamesha Concord, Inc.*, 31 A.D.2d 988, 988, 297 N.Y.S.2d 1003, 1010-11 (3d Dep't 1969). The statute applies to garages operating on properties owned by the Port of New York Authority. *Nargi v. Parking Assoc. Corp.*, 36 Misc. 2d 836, 234 N.Y.S.2d 42 (N.Y.C. Civ. Ct. 1962); *Continental Ins. Co. v. Meyer Bros. Operations, Inc.*, 56 Misc. 2d 435, 288 N.Y.S.2d 756 (N.Y.C. Civ. Ct. 1968). See generally *Freedman, Avoidance of Agreements Exempting New York Garages and Parking Places From Liability For Negligence*, 18 *FORDHAM L. REV.* 261 (1949).

⁸⁷ See *Rudolph v. Riverdale Management*, 202 Misc. 586, 113 N.Y.S.2d 524 (N.Y.C. Mun. Ct. 1952).

⁸⁸ See *Motors Ins. Corp. v. American Garages, Inc.*, 98 Misc. 2d 887, 889, 414 N.Y.S.2d 841, 842 (Sup. Ct. App. Term 1st Dep't 1979); 25 N.Y. *JUR. Garages, Filling and Parking Stations* § 36 (1962).

⁸⁹ See *Horowitz v. Ambassador Assoc., Inc.*, 108 Misc. 2d 412, 415, 437 N.Y.S.2d 603, 610-11 (N.Y.C. Civ. Ct. 1981); *Rudolph v. Riverdale Management, Inc.*, 202 Misc. 586, 113 N.Y.S.2d 514 (N.Y.C. Mun. Ct. 1952).

⁹⁰ See *Rembert v. Co-op City Parking Garage*, 86 Misc. 2d 399, 400, 381 N.Y.S.2d 160, 161 (Sup. Ct. App. Term 1st Dep't 1975); *Langenthal v. American Stuyvesant Garage*, 72 Misc. 2d 189, 338 N.Y.S.2d 727 (N.Y.C. Civ. Ct. 1972).

⁹¹ An attempt to limit liability for negligence to \$100 unless the car owner paid a greater amount, equal to the cost of theft insurance, was held "tantamount to an exemption" and contrary to section 5-325 in *Motors Ins. Corp. v. American Garages, Inc.*, 98 Misc. 2d 887, 891, 414 N.Y.S.2d 841, 843-44 (Sup. Ct. App. Term 1st Dep't 1979).

a sign on the premises.⁹² It makes no difference that the vehicle owner was aware of the disclaimer at the time he parked the car.⁹³

The New York Real Property Law (RPL) was amended in 1953 to prohibit clauses in contracts "affecting real property" that exempted building contractors from liability resulting from their negligence in the course of "work performed or services rendered in connection with construction, maintenance and repair of real property or its appurtenances."⁹⁴ Legislative history suggests that this amendment, presently codified as GOL 5-323,⁹⁵ was enacted in response to the inclusion of exculpatory clauses in various appliance service and maintenance contracts.⁹⁶ The question then arose in the mid-1970s whether the statute was limited to maintenance contracts or encompassed general construction contracts as well.⁹⁷ In 1975, more than twenty years after the amendment of the RPL, the legislature enacted GOL 5-322.1,⁹⁸ which explicitly extended this prohibition to general construction contracts. Four years later, the New York Court of Appeals, addressing what was by then primarily an academic is-

⁹² See *Continental Ins. Co. v. Meyer Bros. Operations, Inc.*, 56 Misc. 2d 435, 439, 288 N.Y.S.2d 756, 760 (N.Y.C. Civ. Ct. 1968); *Makower v. Kinney System*, 65 Misc. 2d 808, 811, 318 N.Y.S.2d 515, 518 (N.Y.C. Civ. Ct. 1970). As to the effect of the statute on the liability, if any, which the garage owner may have for the insurance of personal property taken from a parked car, see *General Motors Acceptance Corp. v. Grafinger*, 61 Misc. 2d 670, 672, 306 N.Y.S.2d 606, 608-09 (N.Y.C. Civ. Ct. 1969).

⁹³ See *Continental Ins. Co. v. Meyer Bros. Operations, Inc.*, 56 Misc. 2d 435, 438, 288 N.Y.S.2d 756, 760 (N.Y.C. Civ. Ct. 1968); *Nargi v. Parking Assoc. Corp.*, 36 Misc. 2d 836, 234 N.Y.S.2d 42 (N.Y.C. Civ. Ct. 1962).

⁹⁴ See 1953 N.Y. Laws ch. 716.

⁹⁵ N.Y. GEN. OBLIG. LAW § 5-323 (McKinney 1978). Section 5-323 is not violated by contractual provisions that require one party to provide insurance covering all parties and to look only to the proceeds for relief, at least in the absence of overreaching or unconscionability. See *Board of Educ., Union Free School Dist. No. 3 v. Valden Assoc.*, 46 N.Y.2d 653, 389 N.E.2d 798, 416 N.Y.S.2d 202 (1979).

A separate statute, GOL § 5-324, renders void any agreements under which an architect, engineer or surveyor is indemnified for damages to person or property arising out of defects in his work. See N.Y. GEN. OBLIG. LAW § 5-324 (McKinney 1978).

⁹⁶ See *St. Vincent's Medical Center v. Vincent E. Iorio, Inc.*, 78 Misc. 2d 968, 970, 358 N.Y.S.2d 993, 996-97 (Sup. Ct. Richmond County 1974).

⁹⁷ Compare *St. Vincent's Medical Center v. Vincent E. Iorio, Inc.*, 78 Misc. 2d 968, 970-71, 358 N.Y.S.2d 993, 996-97 (Sup. Ct. Richmond County 1974) with *Board of Education, Utica School Dist. No. 1 v. Cese*, 65 Misc. 2d 473, 477, 318 N.Y.S.2d 46, 50 (Sup. Ct. Oneida County 1971).

⁹⁸ See 1975 N.Y. Laws ch. 408, § 1 (codified as amended at N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 1978 & Supp. 1981-1982)).

sue,⁹⁹ announced that GOL 5-323 itself banned exculpatory clauses in general construction contracts.¹⁰⁰

Two other sections of the GOL similarly prohibit disclaimers of liability for negligence in situations where the interest in protecting the public is particularly strong and the likelihood of individual bargaining is particularly weak. GOL 5-322¹⁰¹ prohibits caterers and catering establishments from contracting away their duty of care.¹⁰² Lastly, GOL 5-326,¹⁰³ added in 1976, prohibits exemptions from liability for negligence in contracts, membership applications, admissions tickets or similar writings entered into for a fee between the owner of "any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities."¹⁰⁴

IV. PUBLIC SERVICE AND QUASI-PUBLIC SERVICE PROVIDERS

The concern for fairness has a special significance when a public service corporation¹⁰⁵ claims an exemption from negligence liability as part of its tariff or rate schedule filed with the

⁹⁹ The addition of § 5-322.1 did not render the question before the court moot because the statute was expressly limited to agreements entered into on or after August 7, 1975. See N.Y. GEN. OBLIG. LAW § 5-322.1(2) (McKinney 1978).

¹⁰⁰ See Board of Educ., Union Free School Dist. No. 3 v. Valden Assoc., Inc., 46 N.Y.2d 653, 656, 389 N.E.2d 798, 799, 416 N.Y.S.2d 202, 203 (1979).

¹⁰¹ N.Y. GEN. OBLIG. LAW § 5-322 (McKinney 1978).

¹⁰² See Goodman v. Imperion Manor, 62 Misc. 2d 561, 563-64, 309 N.Y.S.2d 287, 289 (N.Y.C. Civ. Ct. 1970), *aff'd*, 64 Misc. 2d 813, 316 N.Y.S.2d 152 (App. Term. 2d App. Term 2d Dep't 1970).

¹⁰³ N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978).

¹⁰⁴ This statute was apparently intended to deal with the result of the Court of Appeals decision in Ciofalo v. Vic Tanney Gyms, Inc., 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961), and similar cases that upheld such disclaimers on common law principles. See Beardslee v. Blomberg, 70 A.D.2d 732, 733-34, 416 N.Y.S.2d 855, 857-58 (1979) (Kane, J. & Mikoll, J., concurring separately). In *Beardslee*, a divided Appellate Division held that the statute was not applicable to a release signed by the plaintiff who, after she had gained admission to an auto race track, had responded to a call for participants in a "Powder Puff Derby." A majority of the Appellate Division concluded that the separate release signed at this time was not an agreement "in or in connection with" her ticket of admission. *Id.* at 733, 416 N.Y.S.2d at 857.

¹⁰⁵ The term "public service corporation" refers to the various utilities and common carriers subject to regulation under the New York Public Service Law. See, e.g., N.Y. PUB. SERV. LAW § 2(3) (McKinney 1955 & Supp. 1981-1982) (defining "corporation"); *id.* § 2(11) (defining "gas corporation"); *id.* § 2(13) (defining "electric corporation"); *id.* § 2(17) (defining "telephone corporation"); *id.* § 2(19) (defining "telegraph corporation"); *id.* § 2(22) (defining "steam corporation"); *id.* § 2(27) (defining "water works corporation").

Public Service Commission.¹⁰⁶ While the relationship between the utility and its customers is considered contractual in nature,¹⁰⁷ the individual customer is not free to bargain over any disclaimer clause;¹⁰⁸ in fact, he is unlikely to be aware of it. Accordingly, our dissatisfaction with limitations of liability in "contracts of adhesion" is particularly strong in this context. At the same time, a utility's potential liability as a result of an interruption of service could be staggering. Since the utility's rates are not a matter of free contract but are administratively established, not to allow the utility some protection from liability would presumably be reflected in generally higher rates.¹⁰⁹

These conflicting pressures are evident in *Lee v. Consolidated Edison Co.*,¹¹⁰ a case arising out of the 1977 New York City blackout. The plaintiffs, customers of the defendant Consolidated Edison (Con Ed) and workers who suffered lost wages because of the blackout, brought a small claims action against the utility.¹¹¹ Although the Civil Court found "no legal relationship between the wage earners and Con Ed upon which relief could be based,"¹¹² it held that the utility could be held liable to its customers for damages caused by the interruption in service.¹¹³ Con Ed's main defense was based on an exculpatory clause in its rate schedule, which provided that "in case the supply of service shall be interrupted or irregular or defective or fail

¹⁰⁶ Utilities and common carriers are required to file rate schedules, including all rules and regulations related to rates, with the Public Service Commission. *See, e.g., id.* § 66(1) (gas and electric utilities); *id.* § 92(1) (telephone and telegraph companies).

¹⁰⁷ *See Lee v. Consolidated Edison Co.*, 95 Misc. 2d 120, 128, 407 N.Y.S.2d 777, 783 (N.Y.C. Civ. Ct.), *rev'd on other grounds*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. App. Term 1st Dep't 1978).

¹⁰⁸ Once a tariff schedule is accepted by the Public Service Commission, neither the Commission nor the consumer can depart from a limitation of liability provision appearing in the schedule. *See Lee v. Consolidated Edison Co.*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826, 828 (Sup. Ct. App. Term 1st Dep't 1978).

¹⁰⁹ In a case often cited by the New York courts, the United States Supreme Court characterized the limitation of liability in such situations to be "an inherent part of the rate." *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921). *See Abraham v. New York Tel. Co.*, 85 Misc. 2d 677, 680, 380 N.Y.S.2d 969, 972 (N.Y. Civ. Ct. N.Y. County 1976).

¹¹⁰ 95 Misc. 2d 120, 407 N.Y.S.2d 777 (N.Y.C. Civ. Ct.), *rev'd*, 98 Misc. 2d 304, 413 N.Y.S.2d 826 (Sup. Ct. App. Term 1st Dep't 1978).

¹¹¹ *Id.* at 123, 407 N.Y.S.2d at 780.

¹¹² *Id.* at 132, 407 N.Y.S.2d at 786 (relying on *Beck v. FMC Corp.*, 42 N.Y.2d 1027, 369 N.E.2d 10 (1977)).

¹¹³ *Id.* at 138, 407 N.Y.S.2d at 790.

from causes beyond its control or through ordinary negligence of employees, servants, or agents the Company will not be liable therefor."¹¹⁴ The court found that Con Ed's negligence had been established on the basis of certain reports on the blackout, as well as on the theory of *res ipsa loquitor*.¹¹⁵ Stating that the effect of an exculpatory clause in a public service corporation's tariff was an open question,¹¹⁶ the court declined to enforce the exculpatory clause in Con Ed's tariff as against public policy.¹¹⁷

The Appellate Term reversed, noting that limitations of liability are "an inherent part of the rate-making process."¹¹⁸ Once accepted by the Commission, in the court's view, a tariff "takes on the force and effect of law and governs every aspect of the utility's rate and practices."¹¹⁹ The court rejected the public policy argument, noting that "similar provisions have been repeatedly sustained by the appellate courts of this State as reasonable limitations on the liability of a public service corporation, so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence."¹²⁰ This result has

¹¹⁴ *Id.* at 132, 407 N.Y.S.2d at 786. However, the tariff expressly acknowledged the company's liability for gross negligence or willful misconduct. Also, as the trial court noted, a subsequent portion of the tariff provided that the company *would* be liable for damage caused by its negligence "resulting in any way from the supply or use of electricity or from the presence or operation of the Company's structures, equipment, wires, pipes, appliance or devices on the Customer's premises." *Id.* at 133, 407 N.Y.S.2d at 786. It seems this second provision was meant to deal with a different situation than interruption of services as in a black-out, but the trial court read the two clauses together as creating doubt as to their effect and held that the first clause, on which Con Ed relied, was void for ambiguity. *Id.*, 407 N.Y.S.2d at 787. The Appellate Term, in reversing this decision, made no mention of this point.

¹¹⁵ *Id.* at 127, 407 N.Y.S.2d at 782. Although the court held that gross negligence was not established, *id.* at 128, 407 N.Y.S. 2d at 783, in at least one case arising out of the same black-out an opposite conclusion was reached. See *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167, 445 N.Y.S.2d 60 (1981).

¹¹⁶ 95 Misc. 2d at 129, 407 N.Y.S.2d at 784 (citing *Wazalen v. Consolidated Edison Co.*, 43 A.D.2d 985, 352 N.Y.S.2d 1014 (2d Dep't 1974)). The court did acknowledge however, see *id.* at 131, 407 N.Y.S.2d at 785, that other courts had decided in favor of the enforceability of this type of exculpatory clause, see *id.* See also *Devers v. Long Island Lighting Co.*, 79 Misc. 2d 165, 359 N.Y.S.2d 940 (Sup. Ct. App. Term 2d Dep't 1974); *Newman v. Consolidated Edison Co.*, 79 Misc. 2d 153, 360 N.Y.S.2d 141 (Sup. Ct. App. Term 2d Dep't 1973).

¹¹⁷ 95 Misc. 2d at 138, 407 N.Y.S.2d at 790.

¹¹⁸ 98 Misc. 2d 304, 305, 413 N.Y.S.2d 826, 828 (Sup. Ct. App. Term 1st Dep't 1978).

¹¹⁹ *Id.* at 305, 413 N.Y.S.2d at 828.

¹²⁰ *Id.* at 306, 413 N.Y.S.2d at 828.

been frequently cited with approval¹²¹ and stands as New York law.¹²² Moreover, it is bolstered by the fact that similar exculpatory provisions insulating telephone companies from liability for providing inadequate service in the absence of gross negligence or willful misconduct have long been held not to violate public policy.¹²³

Unlike the customers of regulated utilities, the customers of quasi-public entities such as common carriers¹²⁴ are free, at least in theory, to choose whether or not to deal with any particular carrier or whether to use such services at all. The reality, however, is hardly one of independent arms-length bargaining. The carrier's involvement in matters of "public interest" is deemed sufficiently great so that its freedom of contract cannot be absolute. A common carrier is generally required to deal with anyone wishing to use its service; it cannot pick and choose its customers as would a truly private concern.¹²⁵ Further, its rates may be regulated by state or federal law, at least to the extent of prohibiting discrimination among its users.¹²⁶

A full discussion of the law of common carriers, or even a

¹²¹ See, e.g., *Sisters of St. Dominic v. Orange & Rockland Power Co.*, 79 A.D.2d 1021, 435 N.Y.S.2d 332 (2d Dep't 1981); *LoVico v. Consolidated Edison Co.*, 99 Misc. 2d 897, 420 N.Y.S.2d 825 (Sup. Ct. App. Term 2d Dep't 1979); *Devers v. Long Island Lighting Co.*, 79 Misc. 2d 165, 359 N.Y.S.2d 940 (Sup. Ct. App. Term 2d Dep't 1974).

¹²² In *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167, 172, 445 N.Y.S.2d 60, 61-62 (1981), the New York Court of Appeals accepted without question the effectiveness of Con Ed's tariff clause.

¹²³ See *Jurewicz v. Lucarelli*, 77 A.D.2d 751, 751, 431 N.Y.S.2d 186, 188 (3d Dep't 1980); *Long Island Central Station, Inc. v. New York Tel. Co.*, 54 A.D.2d 893, 893, 387 N.Y.S.2d 897, 898 (2d Dep't 1976). *But see Denmark v. New York Tel. Co.*, 97 Misc. 2d 205, 209, 411 N.Y.S.2d 506, 511 (N.Y.C. Civ. Ct. 1978). The same legal standard is applicable to omissions or errors in the preparation of telephone directories. See *Hamilton Employment Serv. v. New York Tel. Co.*, 253 N.Y. 468, 471-72, 171 N.E. 710, 711 (1930); *Russell v. New York Tel. Co.*, 57 Misc. 2d 227, 228, 291 N.Y.S.2d 709, 711 (Sup. Ct. Suffolk County 1968); *Thonn v. New York Tel. Co.*, 55 Misc. 2d 586, 588, 285 N.Y.S.2d 926, 928 (Sup. Ct. Bronx County 1967).

¹²⁴ For the definition of "common carrier" see N.Y. TRANSP. LAW § 2(7) (McKinney 1975).

¹²⁵ See *Gerhard & Hey, Inc. v. Cattaraugus T. Co.*, 241 N.Y. 413, 417, 150 N.E.2d 500, 501 (1926) ("A common carrier . . . is one who agrees for a specified compensation to transport such property . . . for all persons that see fit to employ him."). *Accord Weiss Bros. v. De Martis*, 14 Misc. 2d 522, 524, 179 N.Y.S.2d 723, 725 (Sup. Ct. New York County 1958). See generally 17 N.Y. JUR. 2d *Carriers* §§ 2, 3 (1981).

¹²⁶ See, e.g., 49 U.S.C. § 10701(a) (Supp. IV 1980) (common carriers may only charge "reasonable" rates); N.Y. TRANSP. LAW § 102 (McKinney 1975) (prohibiting discrimination among customers of common carriers).

review of the detailed aspects of that law relating to the ability of carriers to limit their liability by contract, is well beyond the scope of this Article. Of interest in the present context is the type of rules, seen in broad outline, that have evolved to deal with the questions of such quasi-public institutions. These are in a sense hybrid entities, and it is not surprising that the rules that have developed are themselves hybrids. Common carriers may not simply limit their liability to levels deemed acceptable by the state as is the case with true public service providers such as electric companies. But neither are their obligations absolute; they may in some cases insulate themselves, at least with respect to the extent of their liability. When and how they may do so is not treated purely as a matter of private bargaining. The law recognizes that individuals are not in a position to bargain over the terms and conditions of their carriage. The customer makes a decision, but it is basically whether to use the service and by so doing accede to the rate structure already in place. That structure may give the customer certain defined options, but it is not open for negotiation.¹²⁷

Exculpatory provisions in contracts for carriage are generally held violative of public policy, but only where the user is given no choice between full or limited liability.¹²⁸ This qualification stands not for the opportunity for individual bargaining and adjustment of rights as is assumed to be present in the classic contracting situation, but for a system under which the carrier must offer the user some choice among previously established rates corresponding to varying degrees of protection. Individual bargains over the degrees of liability that the carrier will assume are not contemplated, or even allowed,¹²⁹ but the carrier is expected to include in its published rate structure the opportunity to purchase a greater degree of protection at additional cost. This compromise was apparently first a creation of the common law,¹³⁰ but is now typically found in legislation gov-

¹²⁷ See N.Y. TRANSP. LAW § 103 (McKinney 1975).

¹²⁸ See *Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 57, 69-70, 218 N.E.2d 661, 667-68, 271 N.Y.S.2d 932, 946 (1966); *Montalbano v. New York Central R. Co.*, 267 A.D. 617, 620, 47 N.Y.S.2d 877, 880 (4th Dep't 1944).

¹²⁹ See N.Y. TRANSP. LAW § 103 (McKinney 1975).

¹³⁰ See Herzog, *Validity of Contracts Exempting Carriers in Interstate and Foreign Commerce From Liability*, 11 SYRACUSE L. REV. 171, 172 (1960); Note, *Damages-Carriers-Limited Liability — Effects of Failure to Charge Rate Specified in Filed Tariff —*

erning common carriers.¹³¹

The base measure of liability from which variations are to be made, and the allocation of the burden between the carrier and its customers to seek out variation from this norm, are treated differently in the cases of limitations relating to injury to the person or property. Limitations on damages due to negligently caused personal injury are held violative of public policy and will not be enforced, but only where passengers have paid "full fare" for their transportation. Where a carrier agrees to transport a passenger at a reduced rate, he may legally limit his liability for personal injuries.¹³² In the case of property damage, the carrier will typically impose a ceiling on its liability unless the owner has declared his goods to be of greater value and has paid an additional fee for their protection.¹³³ The dollar limitation made part of the carrier's regular rate need not be agreed to by any individual owner, but the limitation generally must be stated in the tariff, and notice of the limitation and of the opportunity for greater coverage must be conspicuously posted.¹³⁴

This type of compromise between the notion of unfettered freedom of contract and the public policy favoring protection of consumers is seen in at least two other similar situations. The Uniform Commercial Code provisions regulating warehousemen and warehouse receipts permit damages to be limited by the terms of the warehouse receipt, provided that the bailor has the opportunity to increase the limitation by paying a higher rate.¹³⁵ It is also general practice for telegraph companies to limit their liability by including notices on their forms, and to offer varying

W.R. Grace & Co. v. Railway Express Agency, 25 ALB. L. REV. 160, 161 (1961).

¹³¹ See N.Y. TRANSP. LAW § 109 (McKinney 1975) (carriers may impose a "reasonable charge" for accepting liability in excess of \$150); *id.* § 174 (motor carriers may limit liability based upon declared value of freight).

¹³² See *Hopkins v. Long Island R.R. Co.*, 21 A.D.2d 814, 815, 251 N.Y.S.2d 590, 591 (2d Dep't 1964); *McDougall v. Lehigh Valley R.R. Co.*, 21 Misc. 2d 946, 947, 198 N.Y.S.2d 91, 92 (N.Y.C. Civ. Ct. 1959). See generally 7 N.Y. JUR. *Carriers* §§ 399-409 (1959).

¹³³ See generally 7 N.Y. JUR. *Carriers* §§ 195-234, 448-54 (1959).

¹³⁴ See, e.g., *Egan v. Kollman Instrument Corp.*, 21 N.Y.2d 160, 171-72, 234 N.E.2d 199, 204, 287 N.Y.S.2d 14, 19-20 (1967), *cert. denied*, 390 U.S. 1039 (1967); *Greenberg v. United Airlines, Inc.*, 98 Misc. 2d 544, 545, 414 N.Y.S.2d 240, 241 (N.Y.C. Civ. Ct. 1979).

¹³⁵ See *Kimberly-Clark Corp. v. Lake Erie Warehouse Div.*, 49 A.D.2d 492, 494-95, 375 N.Y.S.2d 918, 921 (4th Dep't 1975), *appeal dismissed*, 39 N.Y.2d 888, 352 N.E.2d 580, 386 N.Y.S.2d 393 (1976); N.Y.U.C.C. § 7-204 (McKinney 1964). See generally 9 N.Y. JUR. 2d *Bailments and Chattel Leases* §§ 63-70 (1980).

degrees of protection corresponding to varying rates for different services. These limitations have been upheld and have become part of the telegraph companies' general tariffs as provided for in state and federal law.¹³⁶

V. THE RESIDUAL CASE

This Article began with the question of how the "contract law of New York" treats provisions purporting to limit or disclaim liability. Having described the various areas that have been carved out for special treatment, either by the Code, by statute, or by court decreed exceptions, we are left with the question of how the common law deals with the residual case that fits into none of these special situations. The most interesting thing about the residual case may be how infrequently it arises; the exceptions have not completely done away with the rule, but their very existence (and their number, variety, complexity and scope) make it impossible not to see the traditional and historic common law response in a far different light.¹³⁷ The general statements of law relevant to such exculpatory clauses may seem less than they once would have, broad powerful statements of policy telling us how "the law" in its wisdom reacts to such human activity. They now seem almost to be statements about the exceptional situation: unless the case involves the sale of goods, a lease, a construction contract, a common carrier, a caterer or what-have-you, this is to be the law.¹³⁸

¹³⁶ See, e.g., *Sims v. Western Union Tel. Co.*, 37 Misc. 2d 943, 946, 236 N.Y.S.2d 192, 195 (Sup. Ct. Erie County 1963). See generally 58A N.Y. JUR. *Telecommunications* §§ 97-100 (1977).

¹³⁷ The number of cases in which the "exceptions" apply is multiplied by the tendency of some courts to analogize to the Uniform Commercial Code in situations otherwise governed by common law principles. See note 4 *supra*.

¹³⁸ In fact, the largest group of cases where the common law rules have been applied involve a type of contract where the disputed provision is written in such a way that it does not appear to be governed by the rules at all. Burglary alarm contracts typically include a provision whereby the parties agree that a fixed sum will constitute "liquidated damages" in the event of a breach. A true liquidated damages clause, of course, is distinct from the kind of clause that is the subject of our discussion, but the New York courts have recognized that these provisions are actually attempts to limit the potential liability of the alarm companies, and thus are subject to the common law restrictions on such provisions. See *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Serv., Inc.*, 47 A.D.2d 462, 467, 367 N.Y.S.2d 518, 522 (2d Dep't 1975), *rev'd on other grounds*, 39 N.Y.2d 191, 347 N.E.2d 618, 383 N.Y.S.2d 256 (1976). These provisions are uniformly upheld. See *Florence v. Merchants Central Alarm Co.*, 51 N.Y.2d 794, 795, 412 N.E.2d 1317, 1318,

The classic common law approach to exculpatory clauses in what I have called the residual case is well illustrated by the recent case of *Gross v. Sweet*,¹³⁹ where the New York Court of Appeals examined the effect of a "Responsibility Release" executed by a student in a parachute jumping school.¹⁴⁰ The court held that the release would not bar recovery if negligence could be shown.¹⁴¹ While acknowledging that exculpatory agreements are completely void where they grant protection from claims based on willful conduct or gross negligence,¹⁴² the court determined that such agreements might be effective when limited to claims based on simple negligence.¹⁴³ The court emphasized, however, that the law generally "frowns upon" such attempts to limit liability for negligence and only "grudgingly accepts" the proposition that parties to an agreement may contract in this way.¹⁴⁴ Accordingly, the court held that exculpatory clauses would be denied effect unless the parties' intent is "expressed in

433 N.Y.S.2d 91-92 (1980); *Chami v. Automatic Burglar Alarm Corp.*, 106 Misc. 2d 559, 562, 434 N.Y.S.2d 330, 332 (N.Y.C. Civ. Ct. 1980); *Public Serv. Mut. Ins. Co. v. Royal Burglar & Fire Alarm, Inc.*, 90 Misc. 2d 517, 518, 394 N.Y.S.2d 524, 525 (N.Y.C. Civ. Ct. 1977).

Perhaps the most interesting aspect of the common law decisions in this area is the extent to which they encourage legislative intervention. Prior to *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979), see notes 139-49 and accompanying text *infra*, the leading New York case discussing the common law of exculpatory clauses was *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961), in which the New York Court of Appeals upheld a limitation of liability for negligence included in a membership contract of a private gymnasium. Later decisions upheld the same type of clause. See *Whalen v. Vic Tanney Hicksville, Inc.*, 23 A.D.2d 778, 258 N.Y.S.2d 562 (2d Dep't 1965); *Putzer v. Vic-Tanney-Flatbush, Inc.*, 20 A.D.2d 821, 248 N.Y.S.2d 836 (2d Dep't 1964). In 1976, the legislature added a section to the General Obligations Law which rendered all such provisions void. See N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978); see notes 103-04 and accompanying text *supra*.

¹³⁹ 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979).

¹⁴⁰ *Id.* at 105, 400 N.E.2d at 308, 424 N.Y.S.2d at 366.

¹⁴¹ *Id.* at 105, 400 N.E.2d at 307, 424 N.Y.S.2d at 366.

¹⁴² *Id.* at 106, 400 N.E.2d at 308, 424 N.Y.S.2d at 367.

¹⁴³ *Id.* at 107-08, 400 N.E.2d at 309, 424 N.Y.S.2d at 368. The court acknowledged the existence of certain situations where exculpatory clauses are unenforceable regardless of the degree of negligence involved. *Id.* at 109, 400 N.E.2d at 310, 424 N.Y.S.2d at 369. One such situation, which would be of little applicability today, is the old common law prohibition against an employer imposing on an employee a limitation of negligence liability as a condition of employment. See *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388 (1906).

¹⁴⁴ 49 N.Y.2d at 106, 110, 400 N.E.2d at 308, 311, 424 N.Y.S.2d at 367, 370. See, e.g., *Gottschalk v. Consolidated R.R. Corp.*, 469 F. Supp. 254, 257 (S.D.N.Y. 1979); *Phibbs v. Ray's Chevrolet, Inc.*, 45 A.D.2d 897, 357 N.Y.S.2d 211, 213 (3d Dep't 1974).

unmistakeable language."¹⁴⁵ The court noted that if the parties intend to exclude liability for negligence the fairest and best course is to provide explicitly that such claims are included. While the word "negligence" need not actually appear in the clause, it must include words conveying a similar import.¹⁴⁶ This test has been applied to hold such provisions to a very high standard. In particular, its effect is to invalidate provisions written in broad and general terms, as where one party agrees not to hold the other party liable for "any and all" injuries which might arise for "any and all reasons."¹⁴⁷ Thus, in *Gross*, the plaintiff's agreement to waive "any and all claims . . . for any personal injuries or property damage . . . which may arise" was held not to bar the plaintiff's action.¹⁴⁸ In the court's view, the clause merely alerted the plaintiff to the dangers inherent in the training — that "accidents will happen" — and to the instructor's refusal to assume the role of an insurer of the plaintiff's safety in all events.¹⁴⁹ The clause did not sufficiently alert the plaintiff that there were particular risks, what the court refers to as "enhanced exposure to injury," resulting from the fault of the instructor to live up to his duty of care, for which the instructor would normally be expected to pay but which the student was in this instance being asked to bear.¹⁵⁰

Thus, for a clause to pass the strict scrutiny of the court, we may conclude that it should speak directly to the situation at hand, to the particular risks involved that one party is seeking to shift to the other, and to the fact that this is an attempt to shift these risks off of the shoulders of the party whom we would normally expect to bear them. The decisions indicate that explicit reference to negligence will meet this test, as where one party agrees not to hold the other liable for "any and all injuries, including those caused by your failure to use due care."¹⁵¹ Cases upholding such provisions usually involve even more particular-

¹⁴⁵ 49 N.Y.2d at 107, 400 N.E.2d at 309, 424 N.Y.S.2d at 368.

¹⁴⁶ *Id.* at 108, 400 N.E.2d at 310, 424 N.Y.S.2d at 369.

¹⁴⁷ *Id.* at 108-09, 400 N.E.2d at 310, 424 N.Y.S.2d at 369.

¹⁴⁸ *Id.* at 109-10, 400 N.E.2d at 310-11, 424 N.Y.S.2d at 369-70.

¹⁴⁹ *Id.* at 109, 400 N.E.2d at 310-11, 424 N.Y.S.2d at 369.

¹⁵⁰ *Id.* at 109, 400 N.E.2d at 311, 424 N.Y.S.2d at 369.

¹⁵¹ See, e.g., *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 296, 177 N.E.2d 925, 926, 220 N.Y.S.2d 962, 964 (1961); *Franzek v. Calspan Corp.*, 78 A.D.2d 134, 137, 434 N.Y.S.2d 288, 290 (4th Dep't 1980).

ized language. For example, in *Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc.*,¹⁵² an insurance inspecting firm escaped liability for a faculty inspection report under two exculpatory provisions. One provision of the inspection report stated that "[w]e do not assume any legal liability due to misinformation given our inspector, nor for inaccuracies, human error, etc."¹⁵³ In addition, the plaintiff had been given a booklet entitled "Outline of Operations," which expressly disclaimed liability for errors or omissions in the defendant's inspection report. The booklet pointed to the limited expertise of the auditors and to their dependence upon information provided by the insured in making their reports.¹⁵⁴ Under these circumstances, the court had little difficulty upholding the limitation of liability as an effectively bargained allocation of risk.

Once an exculpatory clause is worded with sufficient clarity, the courts will not be concerned with whether a party was actually aware of its existence or had read it. The only requirement is that the clause *could* have been read with no unusual difficulty; an unsuspecting party will not be bound by a hidden or illegible provision.¹⁵⁵ While the courts will insist that a limitation not be "so obscured . . . as to make it probable that it would escape [a party's] attention,"¹⁵⁶ the test is not as strict as the "conspicuousness" requirement of the Uniform Commercial Code.¹⁵⁷ In *Florence v. Merchants Central Alarm Co.*,¹⁵⁸ the

¹⁵² 485 F. Supp. 351 (S.D.N.Y. 1980).

¹⁵³ *Id.* at 353.

¹⁵⁴ *Id.* at 354. For other examples of sufficiently well-written exculpatory clauses, see *Della Corte v. Village of Williston Park*, 60 A.D.2d 639, 640, 400 N.Y.S.2d 357, 358 (2d Dep't 1977) (engineer's report covered only such portions of property as "may be examined visually"); *Piercy v. Citibank, N.A.*, 101 Misc. 2d 302, 304, 424 N.Y.S.2d 76, 77 (Sup. Ct. N.Y. County 1978) (investment advisor disclaimed liability for his actions or omissions other than "willful misconduct").

¹⁵⁵ See *Florence v. Merchants Central Alarm Co.*, 51 N.Y.2d 794, 795, 412 N.E.2d 1317, 1318, 433 N.Y.S.2d 91, 92 (1980); *Franzek v. Calspan Corp.*, 78 A.D.2d 134, 138, 434 N.Y.S.2d 288, 290 (4th Dep't 1980).

¹⁵⁶ *Florence v. Merchants Central Alarm Co.*, 51 N.Y.2d 794, 795, 412 N.E.2d 1317, 1318, 433 N.Y.S.2d 91, 92 (1980). See *Gross v. Sweet*, 49 N.Y.2d 102, 107, 400 N.E.2d 306, 309, 424 N.Y.S.2d 365, 368 (1979) ("[A] provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and a lexicon.").

¹⁵⁷ See *Arnold v. New City Condo. Corp.*, 78 A.D.2d 882, 433 N.Y.S.2d 196, 198 (2d Dep't 1980) (disclaimer not invalid because it appeared in same type size as surrounding language). The Code expressly requires that disclaimers be "conspicuous." See N.Y.U.C.C. § 2-316(2) (McKinney 1964); notes 18-23 and accompanying text *supra*.

New York Court of Appeals upheld a limitation included, but not highlighted, in a contract printed in uniform size type on the face of one sheet of paper and that contained no paragraph headings or subtitles that could mislead a reader.¹⁵⁹ Such a provision would probably not meet the Code's test.

It should be noted, however, that in *Florence* the court was faced with a contract arising in a commercial setting, a factor of obvious importance in the resolution of such cases. Although this factor is not dispositive, and while exculpatory clauses have been upheld in a consumer setting,¹⁶⁰ the scrutiny given such clauses presumably is heightened by their appearance in a consumer "adhesion contract."¹⁶¹ On the other hand, faced with a limitation made part of an agreement between two supposedly sophisticated commercial parties, the courts are less quick to find them ineffective. In such cases the courts are hesitant to undo what they believe the parties have done and to set aside a legitimate allocation of business risk knowingly entered into.¹⁶²

¹⁵⁸ 51 N.Y.2d 794, 412 N.E.2d 1317, 433 N.Y.S.2d 91 (1980).

¹⁵⁹ *Id.* at 795, 412 N.E.2d at 1318, 433 N.Y.S.2d at 92.

¹⁶⁰ See, e.g., *Della Corte v. Village of Williston Park*, 60 A.D.2d 639, 400 N.Y.S.2d 357 (2d Dep't 1977) (contract for real property inspection report); *Piercy v. Citibank, N.A.*, 101 Misc. 2d 302, 424 N.Y.S.2d 76 (Sup. Ct. N.Y. County 1978) (contract for investment advice). It should be noted that in both of these cases the cost of the services was presumably very low in comparison with the amount of the damage claimed, and the liability limitation was spelled out in great detail. See note 153 *supra*.

¹⁶¹ In fact, there seem to be few recent cases decided on common law principles where New York courts have had to take on this "consumer protection" role. Presumably this is attributable to the wide scope of the Uniform Commercial Code and the other statutory provisions discussed in this Article.

¹⁶² In *B.V.D. Co. v. Marine Midland Bank-New York*, 46 A.D.2d 51, 360 N.Y.S.2d 901 (1st Dep't 1974), the court held that the policy of invalidating disclaimer and limitation clauses on public policy grounds did not extend to major commercial dealings, stating that the policy "can have no application to agreements made by a corporate body of vast experience, continuously advised by counsel at every step in the proceeding." *Id.* at 53, 360 N.Y.S.2d 901. See also *Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc.*, 485 F. Supp. 351, 355 (S.D.N.Y. 1980); *Hong Kong Export Credit Ins. Corp. v. Dun & Bradstreet*, 414 F. Supp. 153, 158 (S.D.N.Y. 1975). The New York Court of Appeals, in *Gross v. Sweet*, also recognized this principle in distinguishing a line of cases dealing with exoneration clauses in indemnification agreements. The court indicated that such agreements are usually "negotiated at arm's length between . . . sophisticated business entities." 49 N.Y.2d at 108, 400 N.E.2d at 310, 424 N.Y.S.2d at 368.

