D/a 9-2-83.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,058

(Third District Court Case No. 81-1978)

CONTINENTAL VIDEO CORPORATION, a Florida corporation,	:
Petitioner,	:
vs.	:
HONEYWELL, INC., a foreign corporation, d/b/a HONEYWELL PROTECTION SERVICES,	:
Respondent.	:

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Jurisdiction has been accepted to review the Opinion of the District Court of Appeal, Third District, filed October 12, 1982. That Opinion, which included a special concurrence by Judge Schwartz, affirmed the trial court's dismissal with prejudice of Petitioner/Plaintiff's Amended Complaint. Petitioner/Plaintiff, Continental Video Corporation, will be referred to as "Continental," while Respondent/Defendant Honeywell, Inc. will be referred to as "Honeywell." References to the Appendix will be denoted by an "A" followed by a page citation.

STATEMENT OF THE CASE AND FACTS

This was an action for breach of contract, negligence and reckless conduct which resulted in the loss of Continental's property. The contract involved was for monitoring a burglar alarm system and, in the case of an alarm signal, notifying the police and Continental. Briefly the facts are as follows.[1]

In August, 1980, Honeywell installed a "Central Station Burglar Alarm Service System" in Continental's store, pursuant to an Installation and Service Agreement (A. 12). The alarm system was designed to detect the entry of burglars into Continental's store and send a repeating signal to one of Honeywell's central monitoring stations. Upon receipt of an alarm signal, the contract required Honeywell to

> . . . make every reasonable effort to transmit the alarm promptly to the headquarters of the police; and [Honeywell] shall make a reasonable effort to

[1]Since this case was determined upon a Motion to Dismiss, the facts are solely contained in the Amended Complaint. (A. 6)

> notify [Continental Video] or his designated representative by telephone. . . .

This is not an action for malfunction of the alarm system. Nor does this case involve a claim of inadequate design. Here the alarm system worked. When burglars broke into the Continental store in the early morning hours of March 6, 1981, they tripped the Honeywell alarm. The repeating alarm signal was received at Honeywell's monitoring room for more than two hours and completely ignored. In violation of its contractual undertaking, Honeywell did not inform the police, Continental or take any other action to foil the burglary. Honeywell was still receiving the alarm when the police later in the morning of March 6, 1981, discovered the break-in and called both Honeywell and Continental.

In the three counts of the Amended Complaint, Continental alleged that Honeywell's flagrant failure to do anything upon receipt of the alarm signal was a breach of contract (Count I), constituted negligence that was a proximate cause of the loss (Count II), and was of such a reckless nature in complete disregard of the rights of the Plaintiff that it constituted gross negligence (Count III).

For purposes of motion to dismiss, Honeywell admitted its fundamental breach of contract and negligence. It sought, however, to avoid all liability for those wrongs by raising what are essentially affirmative defenses. (A. 13) The motion was predicated on certain provisions of the parties' contract which Honeywell claimed released it from any liability. Paragraph 7 of the Installation and Service Agreement is a purported exculpatory clause:

> It is understood and agreed by the parties hereto that Contractor [Honeywell] is not an insuror and that insurance, if any, covering personal injury and property loss or damage on Subscriber's [Continental] premises shall be obtained by the Subscriber; that the Contractor is being paid for the installation and maintenance of a system designed

> to reduce certain risks of loss and that the amounts being charged by the Contractor are not sufficient to guaranty that no loss will occur; that the Contractor is not assuming responsibility for any losses which may occur even if due to Contractor's negligent performance or failure to perform any obligation under this Agreement.

As to this exculpatory clause, the Amended Complaint in paragraph 12 stated:

> The purported waiver of liability in paragraph "7" of Exhibit "A" is invalid, void and unenforceable because it is an adhesion contract due to the inequality of bargaining power between the parties, it would make the terms of the contract illusory and it is against public policy.

In moving to dismiss the Amended Complaint, Honeywell stated that the purported exculpatory clause "unequivocally expresses the intention of the parties such that the Defendant, Honeywell, is relieved of any and all liability." Honeywell's motion ignored Plaintiff's allegation that the clause was unenforceable because of its adhesion nature due to the inequality of bargaining power between the parties, or that the enforcement of it would render the contract illusory.[2]

The same paragraph of the Installation and Service Agreement also contains a purported liquidated damages clause:

> Since it is impractical and extremely difficult to fix actual damages which may arise due to the faulty operation of the system or failure of services provided, if, notwithstanding the above provisions, there should arise any liability on the part of the Contractor, such liability shall be limited to an

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[2]In its Motion to Dismiss Honeywell did not challenge the sufficiency of these allegations. However, on appeal Honeywell did attempt to raise the sufficiency question, however, the District Court made no mention of that subject in its opinion. If sufficiency were an issue and there is any deficit in Continental's pleadings, the proper course would have been dismissal with leave to amend. The trial court, however, granted dismissal without leave to amend.

amount equal to one-half the annual service charge provided herein or $250.00, whichever is greater.

The Amended Complaint in paragraph 10 alleged that this clause was in fact a penalty and unenforceable because it does not provide just compensation in the event of injury. Honeywell's Motion to Dismiss also ignored those allegations and stated that the liquidated damages clause would limit any liability to below the jurisdictional level of the Circuit Court.

After receiving memoranda and oral argument, the acting Circuit Judge dismissed the Amended Complaint with prejudice, holding the clauses valid and enforceable. Despite the factual issues raised in the Amended Complaint as to the validity of the purported exculpatory and liquidated damages clauses, the trial court thus held both clauses to be a bar to the action as a matter of law.

The Opinion of the Third District (A. 1) upheld the bar of the exculpatory and liquidated damages clauses, affirming the trial court's dismissal with prejudice. In a specially concurring opinion Judge Schwartz expressed his view that the Court's approval of the absolute bar of the exculpatory clause directly conflicts with the holdings in Ivey Plants, Inc. v. FMC Corp., 282 So. 2d 205 (Fla. 4th DCA 1973), cert. denied 289 So. 2d 731 (Fla. 1974) and Sniffen v. Century National Bank of Broward, 375 So. 2d 892 (Fla. 4th DCA 1979). Since the decision in this case, the Third District has acknowledged that its holding in this case is in direct conflict with other Florida decisions. Mankap Enterprises v. Wells Fargo Alarm Serv., 427 So.2d 332 (Fla.Appp. 3 Dist 1983). Petitioner showed conflict with other decisions as well, and this Court accepted jurisdiction[3] and set oral argument.

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[3]Fla. Const. Art. V, Sect. 3(b)(3)

POINT ON APPEAL

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT NO DEFENSES EXIST TO ENFORCEMENT OF EXCULPATORY AND LIQUIDATED DAMAGES CLAUSES WHICH PURPORT TO BAR LIABILITY FOR BREACH OF CONTRACT, NEGLIGENCE AND GROSS NEGLIGENCE.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT NO DEFENSES EXIST TO ENFORCEMENT OF EXCULPATORY CLAUSES WHICH PURPORT TO BAR LIABILITY FOR BREACH OF CONTRACT, NEGLIGENCE AND GROSS NEGLIGENCE.

The essence of the District Court's decision in this case is that there is no legal way to avoid exculpatory or liquidated damage clauses. This is a revolutionary concept that flies in the face of decades of common law precedent and established public policy.[4] Its impact, when considered in the context of the almost infinite variety of possible contractual relationships, is mind boggling.

If, on the other hand, it is contended that this rule of law applies only to burglar alarm contracts, then there would be one rule of law for those contracts and a different rule for all others. Fundamental fairness should decree that such cannot be the case. And, to complete the point, if burglar alarm contracts must be

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[4]For substantial public policy reasons, clauses in contracts which exculpate liability are not looked upon with favor. Middleton v. Lomaskin, 266 So. 2d 678 (3d DCA Fla. 1972); see Kinkaid v. Avis Rent-A-Car Systems, Inc., 281 So. 2d 223 (4th DCA Fla. 1973), and Rubin v. Randwest Corp., 292 So. 2d 60 (4th DCA Fla. 1974) (dissenting opinions). Clauses limiting liability historically have been declared unenforceable in a variety of situations. See Henningsen v. Bloomfield Motors Inc., 161 A.2d 69 (N.J. 1960) [disclaimer of warranty]; Vermes v. American Dist. Tel. Co., 251 N.W.2d 101 (Minn. 1977) [exculpatory clause in lease].

measured by the same legal rules that apply to all other contracts, then the decision below is wrong.

That the Third District Court has by this case created a separate standard for viewing exculpatory clauses in burglar alarm contracts became more evident by its decision in Steinhardt v. Rudolph, 422 So.2d 884 (Fla.App. 3 Dist. 1982). There the Third District recognized the continued validity of equitable defenses to unconscionable contract provisions in a non-burglar alarm contract context. In the Opinion, Chief Judge Hubbard reiterated the long established law in Florida concerning relief from unconscionable exculpatory clauses:

> Stated differently . . ."[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

Id. at 889.

Any analysis of the decision below must start with the fact conceded by Honeywell's motion, i.e., Honeywell was negligent, grossly negligent and did breach its contract. When Honeywell received the alarms it was bound to take certain action which it failed to do. It simply ignored the signals. Therein lies the absolute fallacy of Honeywell's legal position. Continental has sued to enforce its rights. In essence Honeywell's position is that those rights are not enforceable. If Honeywell were correct, the contract and Honeywell's corresponding duty would be meaningless.

What then would be the purpose of contracts? As long as one party, through control of the market, dominance of bargaining power or for any other reason had the ability to require either exculpatory or liquidated damage clauses he

would be forever free to perform or not as he saw fit without fear of having to answer in court. The conceptual foundation of enforceable duties would be gone. Continental submits that this is not and should not be the law of the State of Florida.

A. Exculpatory Clause

Numerous Florida decisions have held that exculpatory clauses are not sacrosanct and that in certain circumstances - such as adhesion contracts where inequality of bargaining power exists - they are not enforceable. For example in Ivey Plants, Inc. v. FMC Corporation, 282 So. 2d 205 (4th DCA Fla. 1973), the Fourth District Court reversed a trial court summary judgment in favor of the defendant based upon a limitation of liability exculpatory clause because there existed a substantial fact issue as to the relative bargaining power of the contracting parties.[5] The Court stated:

> No clear-cut rule can be adduced from the various decisions of the courts of this state or our sister states as to the circumstances when exculpatory clauses will not be enforced. Public policy as well as the relationships of the parties to each other have been considered as significant determining factors. For example, where the relative bargaining power of the contracting parties is not equal and the clause seeks to exempt from liability for negligence the party who occupies the superior bargaining position, enforcement of the exculpatory has been denied. (Citations omitted.)

Id. at 208.

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[5]In foreign jurisdictions, as well as in Florida, the inequality of the bargaining power of the parties has traditionally provided a basis by which courts refuse to enforce exculpatory clauses in contracts as to the liability of the party enjoying the superior position. See, Weaver v. American Oil Company, 276 N.E. 2d 144 (Ind. 1971); Danna v. Con Edison Co., Inc., 337 NYS 2d 722 (Civ. Ct. NY 1972); Phillips Home Furnishings, Inc. v. Continental Bank, 331 A.2d 840 (Pa. Super. 1974); Cardona v. Eden Realty Co., 288 A.2d 34 (NJ App. 1972); Hy-Grade Oil Co. v. New Jersey Bank, 350 A.2d 279 (NJ App. 1975); College Mobile Home Park & Sales, Inc. v. Hoffmann, 241 NW2d 174 (Wis. 1976).

The court then ruled:

> Ascertaining the relative bargaining positions of the contracting parties requires a consideration of material issues of fact which, of necessity, would preclude the entry of summary judgment.

Id. at 209.

Unquestionably, the allegations of paragraph 12 of the Amended Complaint, which directly affect the enforceability of the purported waiver of liability provisions of the exculpatory clause, create issues of fact for the jury's consideration which will ultimately determine the enforceability of that clause.

The fact that Honeywell is using the exculpatory clause to excuse a breach of its duty and thereby render the contract illusory was also clearly recognized in Ivey Plants:

> To read [the exculpatory clause] as defendant suggests would result in plaintiff being bound to pay the rental under the terms of the lease yet the defendant would not be bound to perform its obligations under the terms of the lease. Rhetorically, how could defendant be made to perform if liability for non-performance were limited. And even if it be contended that there is mutuality of obligation but merely there is lacking mutuality of remedy without affecting the reciprocal obligation of the parties, an examination of the "remedy" available to plaintiff suggests it is somewhat nonexistent and beyond "the bounds of reasonableness and fairness." See, Bacon v. Karr, Fla. App. 1962, 139 So. 2d 166.

Id. at p. 208 n. 2.

That an exculpatory clause cannot alleviate all liability to perform under a contract and still leave a valid contract is the heart of the decision in the case of Sniffen v. Century National Bank of Broward, 375 So. 2d 892 (4th DCA Fla. 1979), with which the decision below also directly conflicts. In Sniffen, the bank had raised an exculpatory clause to obtain a dismissal of the complaint with

prejudice where the plaintiff alleged that the bank had breached its contract and committed acts of negligence by allowing unauthorized persons into his safety deposit box. The Court held that the exculpatory clause could not be employed to negate the specific contractual undertaking of the bank. The Court emphasized that:

> [A] n acceptance of the bank's position in this case would render the agreement between the parties entirely nugatory. If a safety deposit customer cannot enforce the bank's undertaking to preclude unauthorized persons from entry to his box — which is the very heart of the relationship and the only real reason that such a facility is used at all [citation omitted] —it is obvious that he will have received nothing whatever in return for his rental fee. The authorities are unanimous in indicating that no such drastic effect may properly be attributed to contractual provisions such as those involved here.

(Citations omitted.) Id. at 894.

This Court has uniformly held that a party cannot exculpate itself from liability for failure to perform a specific contractual undertaking. Allowance of such clauses would render the contract illusory and lacking mutuality of obligation. Corneli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953); Balter v. Pan American Bank of Hialeah, 383 So. 2d 256 (Fla. 1980).

In Goyings v. Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (2d DCA Fla. 1981), the Second District similarly reasoned:

> By their own choice of language, appellees agreed to take reasonable precautions to assure Leigh Anne's safety. This duty to undertake reasonable care expressed in the first part of the provision would be rendered meaningless if the exculpatory clause absolved appellees from liability.

Id. at 1146.

In this case, Honeywell undertook the specific contractual obligation upon receipt of an alarm signal to transmit the same to the police and notify Continental. If the exculpatory clause of the contract is read as broadly as allowed by the District Court, it removes the very heart of the agreement. Without liability for breach, negligence or even gross negligence, nothing is left of the contract.

The three appellate decisions in the Nicholas v. Miami Burglar Alarm Co., Inc. cases likewise demonstrate that it was error for the District Court to validate the exculpatory clause despite defenses raised as to its enforceability without any evidence being received on those issues.[6] Nicholas is factually almost identical to this case. Mr. Nicholas was the owner of a tobacco warehouse who brought suit against a burglar alarm company alleging breach of contract, breach of warranty, negligence and seeking punitive damages. His claim arose when his warehouse was burglarized resulting in the alarm company receiving a signal[7] and then failing to inform the police or Mr. Nicholas. Notably the contract in the Nicholas case (A. 15) contained an exculpatory clause essentially identical to the

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[6]Interestingly, Honeywell included copies of pages from the Yellow Pages in both its Appendices to its Brief on Jurisdiction here and in the Third District. Since these were not part of the record at the trial court level they are not properly part of the appellate record. They do, however, highlight the central error committed. They are evidence relevant to the issue of the inequality of bargaining power of the parties, one of the defenses to the exculpatory clause raised by Continental. Similarly, Continental would have shown that it was a one man corporation with a few hundred dollars of capital, dealing with one of the world's largest high-technology corporations for a service where exculpation from all liability is standard, "no-bargaining" language, in the industry. The error is that none of this evidence was ever received or weighed by the trier of fact, but the waiver of all liability was held valid despite the defenses raised, without proof.

[7]Because the burglars cut the phone wires the company received a "trouble signal" not an alarm.

one here.[8] The Nicholas Complaint (A. 17) alleged the exculpatory provision was null and void.

The Nicholas case visited the District Court twice before being reviewed by this Court.[9] It its first Nicholas decision the District Court reversed, in part, the dismissal of the complaint with prejudice by the trial judge holding that the damages limitation provision in the burglar alarm contract presented factual questions as to whether the clause was valid or unenforceable, and, thus, could not be determined on a motion to dismiss.[10]

The remaining portion of this Nicholas decision affirmed the trial court's dismissal of certain Counts of the complaint based upon the theory that the burglary was an intervening criminal act which broke the chain of causation such that the negligence of the burglar alarm company was not the proximate cause of

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[8]The Nicholas contract contained this clause:

> It is agreed by and between the parties hereto that the Contractor is not an insurer, and that the payments herein named are based solely upon the value of the service in the operation of the system described, and in the case of failure to perform such service, and a resulting loss, its liability hereunder shall be limited and fixed at the sum of twenty-five dollars as liquidated damages and not as a penalty, and this liability shall be exclusive, and in no case shall it exceed the amount recieved by us for installation.

[9]The District Court decisions are reported at 266 So. 2d 64 (Fla. 3d DCA 1972) and 297 So. 2d 49 (Fla. 3d DCA 1974).

[10]The Court reasoned as follows:

> * * *
>
> . . . It is true that whether a sum specified in a contract represents a penalty or liquidated damages is a matter of law for determination by the court. . . . Nevertheless, it is clear that a proper determination of this question cannot be made solely from examining the complaint.

Id. at 66-67 (citations omitted).

the damage. The short second District Court decision in Nicholas affirmed the directed verdict of the trial court on remand of the count of the complaint concerning gross negligence inasmuch as the trial court determined that the Plaintiff had failed to prove the same. In dissent Judge Haverfield noted:

> [I] f as a matter of law the defendant burglar alarm company was under no duty to do anything in the instant case (which I believe is the real result of the majority opinion), then plaintiff-appellant is paying for protection which in reality he simply is not receiving.

297 So. 2d at 50.

This Court in reversing noted its agreement with Judge Haverfield and held:

> We hold a burglar alarm company under contract to monitor an alarm system may be negligent for failure to inform the police or the warehouse owner of a trouble signal which its employees had received.

339 So. 2d at 177.

This Court did not alter the original District Court holding that the trial court could not determine the validity of the damages limitation upon a motion to dismiss. Of course, had this Court determined the contractual provision limited or barred liability as a matter of law (the holding in this case), it would not and could not have remanded for jury trial.[11]

The Nicholas decisions raises two additional errors as reasons for reversal, both oddly ignored completely by the Third District. First is that

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[11] As Justice Adkins noted in his separate opinion in Nicholas, the Supreme Court was reviewing the whole case, including what the District Court did on its first visit there, since no conflict may have existed after the first decision by the District Court. 339 So. 2d at 179.

allegations of gross negligence most certainly cannot be determined on a Motion to Dismiss. Secondly, the validity of the separate limitation of damages provision could not be resolved on a Motion to Dismiss.

Count III of the Amended Complaint alleges gross negligence and willful and wanton conduct by Honeywell. By its dismissal the trial court erred since even a valid exculpatory clause cannot legally apply to gross negligence. Thomas v. Atlantic Coast Line R. Co., 201 F.2d 167 (5th Cir. 1953), accord, Ringling Bros.-Barnum & Bailey C. Shows v. Olivera, 119 F.2d 584 (9th Cir. 1941) [both applying Florida law].

The Restatement of Contracts, 2d, clearly states that gross negligence cannot be exempted by contract:

> **§195.** Term Exempting from Liability for Harm Caused Interntionally, Recklessly or Negligently
>
> (1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

Thus, it was error for the exculpatory clause to be allowed to operate to defeat allegations of gross negligence as a matter of law. Douglas W. Randall, Inc. v. AFA Protective Systems, Inc., 516 F.Supp. 1122 (E.D. Pa. 1981).[12]

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[12]Because contractual provisions which exculpate the liability of a party for its own negligence are disfavored, those which are enforceable are required to be completely clear and unambiguous. Middleton v. Lomaskin, supra; Gulf Oil Corp. v. Atlantic Coast Line R. Co., 196 So. 2d 456 (2d DCA Fla. 1967). Thus, exculpatory clauses which are not "clear and unequivocal" or which possess "possible ambiguity" have not been upheld even where the general intent to exculpate liability seems reasonably apparent. E.g., Orkin Exterminating Co. Inc. v. Montagano, 359 So. 2d 512 (4th DCA Fla. 1978). This is true even where the exculpatory clause may appear to cover any liability for the type of injury sustained. Goyings v. Jack and Ruth Eckerd Foundation, supra. Honeywell's Motion to Dismiss alleged that the exculpatory clause was clear, although it is not apparent whether the trial judge considered the question in his ruling. In this case, the exculpatory clause also should be held unenforceable because it does not

Notably, the case of L. Luria & Son, Inc. v. Alarmtec Intern. Corp., 384 So. 2d 947 (4th DCA 1980), (the sole basis upon which the trial court dismissed the Amended Complaint), does not at all address the question of unequal bargaining power as an avoidance of an exculpatory clause. Since the Complaint in Luria (A. 22) did not contain allegations concerning the inequality of bargaining power, the Fourth District Court of Appeals had no reason to address that issue. It is clear, however, from the Ivey Plants decision that the Fourth District Court of Appeals regards the existence of such issues as requiring determination by the trier of fact. In other words, it could not be decided by motion to dismiss.

Regretably in this case the Third District compounded as error by affirming "based upon the reasoning found in Ace Formal Wear, Inc. v. Baker, 416 So.2d 8 (Fla. 3d DCA 1982)" which cited Luria. Not only did Ace Formal Wear not contain a single word regarding defenses to enforcement of exculpatory clauses, it specifically pointed out such defenses were not raised or considered.

Footnote 12 continued

contain that absolute degree of clarity required to uphold such disfavored clauses. Here the exculpatory language is contained in one long, multi-clause sentence, which begins with language to the effect that Honeywell is not providing insurance against injury or loss and that it cannot guaranty that no loss will occur. It is in this context of not providing insurance that Honeywell states it "is not assuming responsibility for any losses which may occur" even if due to its negligent performance or failure to perform its obligations. Clearly, the most reasonable interpretation of this sentence is simply that Honeywell is not assuming the responsibility of an insuror against all losses which could occur, and not that it is relieving itself completely from any liability whether it performs its contractual obligations or commits negligence. Certainly, these were not responsibilities which were being "assumed" by Honeywell, but responsibilities which it was charged with simply by entering into the contract. The exculpatory clause itself resembles the overused defensive argument that they are not the insuror against loss. Continental, of course, is not seeking to interpret the contract with Honeywell as one for insurance. Certainly circumstances could have occurred which would have still resulted in a loss by theft to Continental which were not the fault of Honeywell, such as the late arrival of the police once called, or a quick escape by the burglars.

> "Counsel for the appellant has attempted to argue unconscionability in this court, but the record fails to disclose that an issue to unconscionability was ever made in the trial court."

416 So.2d at 9 (Emphasis added).

Though disfavored, the notion that exculpatory clauses can sometimes be enforceable is not the issue in this case. Whether defenses are available to such clauses is the issue — addressed by neither Luria nor Ace Formal Wear nor, erroneously, by the trial or District courts here.

Interestingly, in Wackenhut Protective Systems, Inc. v. Eterna of Miami, Inc., 375 So. 2d 352 (3d DCA Fla. 1979), the Third District had affirmed per curiam a final judgment in favor of a burglarized plaintiff against a burglar alarm company in a case which is factually very similar to that presented here.[13] The burglarized plaintiff in Wackenhut had signed an agreement with the burglar alarm company which, according to the Final Judgment, provided that Wackenhut "shall not be liable for any negligence or by their failure to notify the police department." Wackenhut received a "trouble signal" on the alarm system indicating some problem within the system (which may or may not have been a burglary), but failed to take any action to notify the police or otherwise protect the plaintiff's store. Plaintiff recovered against Wackenhut for the full amount of its loss. The Third District affirmed the trial court's decision after considering the arguments presented in the briefs concerning the effect of the exculpatory clause in the agreement. Its Opinion here is silent as to its reason for a change of mind.

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[13]The trial court here had before it the complete text of the final judgment in the Wackenhut case.

The District Court below cited various cases from other jurisdictions upholding exculpatory clauses in burglar alarm contracts. A close examination of the cases relied upon by the District Court reveals they do not support the District Court's holding. These cases fall in two categories: (1) those where defenses raised to the particular exculpatory clauses were found not supported by sufficient evidence in the record, and; (2) those where no defenses to the liability limitation were raised at the trial court level. Clearly, neither category supports the Opinion below since defenses were raised, but no evidence permitted by the dismissal with prejudice upon motion.[14]

In Lazybug Shops, Inc. v. American Dist. Telegraph, 374 So. 2d 183 (La. App. 1979) the Louisiana court found as to the unequal bargaining position defense that "no evidence appears in the record" to support the allegations. Id. at 186. Likewise the records did not support proof of unconscionability defenses in Central Alarm of Tucson v. Ganem, 567 P. 2d 1203 (Ariz. App. 1977) or First Financial Ins. Co. v. Purolator Sec., 388 N.E.2d 17 (Ill. App. 1979).

The New Jersey court in Abel Holding Co. v. American Dist. Tel. Co., 350 A.2d 292 (N.J. Super 1975) specifically recognized the defense to exculpatory clauses based upon unequal bargaining power as well established law under Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R. 2d 1 (N.J. 1960). It noted that a standardized printed contract used throughout an industry where there is no alternative but to accept its terms is a basis for non-

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[14]Though cases have upheld such exculpatory clauses as to claims of breach of contract and negligence, the Opinion below is the first discovered upholding the clause as a bar to allegations of gross negligence, without proof, as a matter of law.

enforcement of the unconscionable clause.[15] After an extensive review of the record, the Court found that the evidence did not support the defense. Abel, supra, 350 A.2d at 303-05.

Pick Fisheries, Inc. v. Burns Electron. Sec. Serv. Inc., 342 N.E.2d 105 (Ill. App. 1976), also cited by the District Court below, noted "we find no claim of disparity in bargaining power" raised. Thus, it too is inapposite.

"The real question is whether any reason exists why the limitation on liability should not be given effect", one Court stated, thus requiring a review of the facts found in the record. Wedner v. Fidelity Sec. Sys. Inc., 307 A.2d 429 (Pa. Super 1973). Other cases also recognize the defenses raised require proof of facts on a record. General Bargain Center v. American Alarm Co., 430 N.E.2d 407 (Ind. App. 1982); Rubin v. AMC Home Inspection & Warr. Serv., 418 A.2d 306 (N.J. Super 1980); A&Z Appliances Inc. v. Electric Burglar Alarm Co. Inc., 455 N.Y.S.2d 674 (N.Y. App. 1982).

The trial court should not have held the exculpatory clause in this contract enforceable. In doing so it failed to treat the factual allegations of the Amended Complaint as true and also failed to consider the several public policy reasons why enforceability can be denied. The unequal bargaining power and adhesion contract

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[15] An often quoted definition of unconscionability in this context was written by Judge Skelly Wright in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (1965):

> "unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction."

allegations of the Amended Complaint raise fact questions for jury determination. By affirming, the District Court compounded the error.

B. Liquidated Damages Clause

The trial court's alternative ruling, affirmed without comment, that the purported liquidated damages provision of the contract is valid and enforceable is likewise reversible error. Paragraph 10 of the Amended Complaint contains the allegation that the liquidated damages provision "is in fact a penalty and is unenforceable because it does not provide just compensation in the event of injury and because the actual damage as sustained by plaintiff are readily ascertainable." The same District Court had previously held that the question of whether a liquidated damage provision of a burglar alarm system contract is a proper liquidated damages clause[16] or an unenforceable penalty may not be determined upon a motion to dismiss. Nicholas v. Miami Burglar Alarm Co., 266 So. 2d 64 (3d DCA Fla. 1972).

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[16] In its dismissal of the Amended Complaint, the trial court construed the clause limiting Honeywell's liability to $250.00 as a liquidated damages provision rather than an exculpatory clause limiting liability. Florida courts recognize not only exculpatory clauses which exempt liability altogether, but also those which merely limit liability. Orkin Exterminating Co. v. Montagano, supra. The issue of whether a particular clause is a limitation of liability or a liquidated damages clause is significant since as a limitation of liability the clause is subject to all of the scrutiny and public policy challenges which apply to exculpatory clauses, as discussed above. The Supreme Court of Minnesota in Morgan Company v. Minnesota Mining & Mfg. Co., 246 N.W.2d 443 (Minn. 1976), thoroughly analyzed this important distinction (a case involving a similar burglar alarm contract limitation of liability to $250). Also see Restatement of Contracts §339, Comment g, and Wedner v. Fidelity Security Systems, Inc., 307 A.2d 429 (Penn. 1973)

It is, of course, not necessary to determine at this juncture whether the purported liquidated damages clause is such, a penalty, or a limitation of liability because, regardless of its character, it was clearly error to determine its validity upon a motion to dismiss.

It is well-settled that where damages for breach of contract are readily ascertainable at the time the contract was drawn, a purported liquidated damages clause that does not provide just compensation in the event of breach is a penalty and therefore unenforceable. Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972); Hyman v. Cohen, 73 So. 2d 393 (Fla. 1954); McNorton v. Pan American Bank, 387 So. 2d 393 (Fla. 5th DCA 1980); Wackenhut Protective Systems v. Eterna of Miami, supra.

Hyman v. Cohen, supra, recognized the long established law that a liquidated damages clause will be determined to be a penalty if the damages flowing from a breach were ascertainable at the time the contract was drawn. Here it required no great stretch of the mind to ascertain the damages which would occur in the event Honeywell failed to relay an alarm to the police. At the time of entering into the contract, it should have been apparent to both parties that such a failure by Honeywell could easily result in the loss of the entire inventory of the Continental store. The approximate value of that inventory, although it may fluctuate from time to time as any store inventory does, was certainly within the reasonable contemplation of the parties at the time the contract was made.[17] Most clearly, such a loss would exceed the $250.00 liquidated damages provision contained in the contract. As such, the provision is at best a penalty and unenforceable. Lastly, regardless of its character, the determination of validity upon the Motion to Dismiss, without evidence, was premature, reversible error, and conflicting new law with prior Florida decisions.

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[17] Justice Clark of the California Supreme Court in Better Food Markets, Inc. v. American Dist. Tel. Co., 253 P.2d 10, 17 (Cal. 1953) (dissent) suggested that inventory and cash on hand averages could easily be determined, thus facilitating making a reasonable estimate of losses which could occur as a result of breach.

CONCLUSION

Reversible error was committed by the District Court in these aspects:

(a) holding the exculpation from liability valid, as a matter of law barring the action, without receiving evidence as to the facts relevant to the defenses to enforceability raised in the Amended Complaint;

(b) holding that the exculpatory clause relieved Honeywell of liability for gross negligence;

(c) holding the limitation of damages provision enforceable without determination on the record of whether it constituted a penalty or liquidated damages.

The District Court's error as to the latter two aspects occurred by affirming the trial court's Order of dismissal with prejudice, which the District Court did without comment or citation of authority. With regard to the first error, the District Court in effect created a new and absolute rule for enforcement of exculpatory clauses, markedly different from all previously existing law. Its decision is without support in Florida law and, likewise unsound. The decision should be reversed.

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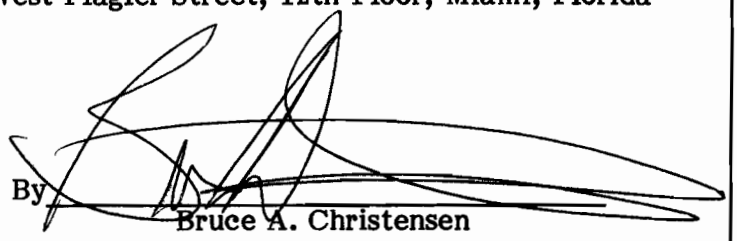
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand this 31 day of May, 1983 to: G. William Bissett, Esquire, Preddy, Kutner and Hardy, P.A., 66 West Flagler Street, 12th Floor, Miami, Florida 33130.



By Bruce A. Christensen