O/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 REPLY BRIEF ON MERITS

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PREFACE

Honeywell's brief ignores the fundamental issues in this case. Apparently unable or unwilling to address the merits, for the full 50 pages allowed by the Rules, Honeywell discusses abstract points in lieu of the precise issues and seeks refuge in irrelevant points, matters outside the record and, on occasion, outright misstatements.

Absent in its brief is any discussion of why clauses exculpating complete liability in a burglar alarm contract should be summarily enforced, when avoidances have been raised. Absent in its brief is any discussion of how such issues can be decided as a matter of law on the initial pleadings. Absent in its brief is any case which holds that they should be. Absent in its brief is any citation to a decision which permits exculpation from liability for gross negligence as a matter of law. Absent in its brief is any serious discussion of whether the clause renders the contract illusory and lacking in mutuality of obligation. And, absent in its brief is any authority or justification for treating exculpatory clauses in burglar alarm contracts differently than such clauses in other contracts in other commercial settings. Yet these are the central holdings of the decisions below.

Before proceeding to the merits of the case before the Court, several of Honeywell's completely irrelevant points must be disposed of. First, spread throughout Honeywell's brief are suggestions and parenthetical references to the notion that Continental Video's pleadings were deficient in raising defenses or avoidances to the exculpatory portion of the contract. That is not the reason this case was dismissed or this Court granted certiorari. Had it been, reversal would still be required since dismissal with leave to amend, rather than a dismissal with prejudice, is the well settled remedy for such a problem. See, e.g., Ellison v. City of Ft. Lauderdale, 175 So.2d 198 (Fla. 1965); Highlands County School Board v. K.D. Hedin Const. Co. Inc., 382 So.2d 90 (2d DCA Fla. 1980).

Second, Honeywell argues that this case is just an action for breach of contract despite Continental's allegations of negligence. (Honeywell's Brief, pp. 10-11). But breach of a duty to exercise due care owed to someone in the context of a contractual relationship has long been recognized as the basis for a tort action. Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932); see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §53, 56 (4th ed. 1971). Moreover, this Court has specifically recognized that a negligence action can arise from the failure of an alarm company to use due care in its contractual relationships with alarm customers. Nicholas v. Miami Burglar Alarm Co., Inc., 339 So.2d 175 (Fla. 1976). Honeywell is wrong. And, Honeywell never explains why this argument is relevant in the first place.

Next, Honeywell repeatedly notes that its exculpatory clause provides that (a) Honeywell is not providing insurance against a burglary loss; (b) was not guaranteeing that no loss would occur; and (c) was not assuming any responsibility for potential losses (Honeywell's Brief, pp. 4, 12, 23). All well and good, but it has nothing to do with anything. Continental is not suing Honeywell as an insuror. Continental is not suing Honeywell as a guarantor. Nor is Continental asking Honeywell to "assume" any responsibilities not already imposed upon it by operation of law.

Finally, Honeywell latches on to the classic argument of final resort — the "parade the horribles". Honeywell claims that the sky will fall on the alarm industry if its exculpatory clauses are not rotely enforced by courts solely on the pleadings. The sky will fall because the total value of inventories protected by alarm systems is astronomical, the risk of loss is beyond the control of alarm companies and the cost of insuring against this risk will prohibit alarm companies from providing economical services. Respectfully, this is all bunk. The risk of loss is not beyond, but directly within Honeywell's control. Nobody suggests that Honeywell is liable everytime one of its subscribers suffers a theft loss. There are

countless scenarios in which a loss will occur through no fault of Honeywell. Continental contends only that Honeywell should be held responsible for the consequences of its own tortious acts and breaches of contract. The ability to prevent these acts of wrongdoing is totally within Honeywell's control. Further, had Continental been permitted to proceed with the evidence in this case, it is submitted that the evidence would have shown that this universal cost of doing business has already been factored into Honeywell's price equation — Honeywell already carries insurance for this very risk!

The history of the common law is littered with the rejected remains of similar arguments made by all sorts of industries to the effect that they shouldn't be liable for the consequences of their wrongful acts because it might be too expensive. The bank safety deposit box cases Honeywell discusses are a prime example. For a modest fee the banks provide the service of a deposit box, contracting to allow only authorized access. Upon breach or negligent performance of this duty, the banks have been held liable, despite exculpatory clauses, for the customer's loss. Yet the total value of all goods in all safety deposit boxes is also astronomical. And in terms of ability to evaluate the risk of loss, the banks are in a far worse position than alarm companies. At least the alarm companies can get a reasonable idea of their subscribers inventory. It's none of the banks' business what is in the deposit boxes or how much it is worth. The simple point is that both the alarm companies and the banks control their risk factor, their own negligence.

ARGUMENT

A. Exculpatory Clause

Once Honeywell exhausts its rhetoric, it gets around to admitting that the issue of unconscionability or adhesion has to be dealt with before its exculpatory clause can be enforced.

> [A]ttention must now be directed to the question of whether enforcement of this contractual provision is prohibited for some other reason.

* * *

> By definition, an adhesion contract is drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot be readily obtained elsewhere. Moreover, even though a contract is on a printed form and offered on a 'take it or leave it' basis, those facts alone do not cause it to be an adhesion contract. In order to establish that a contract is one of adhesion, it must be alleged and proven that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation, and that the services could not be obtained elsewhere. (Emphasis added.)

Honeywell's Brief, p. 26 (citations omitted).

Continental accepts the burden of proving each of these elements. Unfortunately, it was never allowed to do so. Continental has been precluded from proving[1] that the contract was unilaterally drafted by Honeywell; that the exculpatory clauses were forced upon an unwilling public; that Honeywell would not negotiate these clauses; that Honeywell's bargaining power was vastly superior to Continental's; and that alarm services were not readily available in South Florida without the same or similar clauses.

Continental could have proven these elements. But instead, Honeywell — in a blatant violation of the appellate rules — goes outside the record and represents as a matter of fact that the contract was not one of adhesion.[2] And, it brazenly expects this Court to accept those representations when Continental has

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[1] Under Honeywell's version of this case — that the pleadings were insufficient — Continental has even been precluded from alleging the elements of adhesion.

[2] Honeywell's consistent reference to both Continental Video and itself as "commercial entities" is a perfect example of its attempt to substitute rhetoric for evidence. The great white shark and the anchovy are both fish, but their limited commonality hardly gives them equal "bargaining power" in the oceans. The necessity for an evidentiary record upon which to make a determination as to the validity of the exculpatory clause is particularly apparent here. Honeywell is a corporation with a net worth in excess of 2 billion dollars doing business throughout the world. Continental Video was a corporation with a very small net worth doing business in one small location in North Dade County. Had a record of facts been permitted by the lower courts, it would have established vastly disparate bargaining power.

been denied the opportunity to establish facts to the contrary. Continental is not asking this Court to declare the exculpatory clause invalid on its face as Honeywell suggests. It merely asks for the right to prove it is invalid, a right that is afforded litigants in all other contexts when adhesion is an issue.

In a hopefully transparent attempt to avoid the real issues before the Court, Honeywell goes to great lengths to create the impression that courts across the land uniformly uphold such exculpatory clauses without even a glance at the evidence. However, an examination of each of the cases relied upon by Honeywell demonstrates one of two things: the issue of unconscionability as an avoidance was neither raised nor dealt with; or the issue of unconscionability was resolved on the evidence.[3] In reality, Honeywell is asking this Court to go far beyond any existing precedent. It wants this Court to hold that it is legally impossible to prove that the exculpatory clause is unconscionable under any version of facts.

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[3] Each case cited by Honeywell, in text or footnote, for the proposition that its exculpatory clause is ipso facto valid is cited herein. The parentheticals show that, when the issue of unconscionability is raised, evidence is by no means dispensible. Central Alarm v. Ganem, 116 Ariz. 74, 567 P.2d 1203 (Ariz.App. 1977) (decision based on evidence not pleadings); Bargaintown of D.C. Inc. v. Federal Engineering Co., Inc., 309 A.2d 56 (D.C. App. 1973) (decision based on evidence not pleadings); Ace Formal Wear, Inc. v. Baker Protective Services, Inc., 416 So.2d 8 (Fla. 3d DCA 1982) (unconscionability not raised); L. Luria & Son, Inc. v. Alarmtec International Corp., 384 So.2d 947 (Fla. 4th DCA 1980) (unconscionability not raised); Orkin Exterminating Co., Inc. v. Montagano, 359 So.2d 512 (Fla. 4th DCA 1978) (unconscionability not raised; exculpatory clause struck down); Rubin v. Randwest Corp., 292 So.2d 60 (Fla. 4th DCA 1974) (decision based on evidence not pleadings; strong dissent); Kinkaid v. Avis Rent-A-Car Systems, Inc., 281 So.2d 223 (Fla. 4th DCA 1973) (decision based on evidence not pleadings; strong dissent); Middleton v. Lomaskin, 266 So.2d 678 (Fla. 3d DCA 1972) (unconscionability not raised; decision on evidence); Advance Service, Inc. v. General Telephone Co., 187 So.2d 660 (Fla. 2d DCA 1966) (unconscionability not raised; decision based on evidence); Firemans Fund American Ins. Cos. v. Burns Electronic Security Services, Inc., 93 Ill.App.3d 298, 417 N.E.2d 131 (Ill.App. 1981) (finding of conscionability); First Financial Ins. Co. v. Purolator Security, Inc., 69 Ill.App.3d 413, 388 N.E.2d 17 (Ill.App. 1979) (decision based on evidence not pleadings); General Bargain Center v. American Alarm Co., Inc., 430 N.E.2d 407 (Ind.App. 1982) (decision based on evidence not pleadings); Lazybug Shops, Inc. v. American District Telegraph Co., 374 So.2d 183 (La.App. 1979) (decision based on evidence not pleadings); Alan Abis, Inc. v. Burns Electronic Security Services, Inc., 283 So.2d 822 (La.App. 1973) (unconscionability not raised, decision based on evidence); New England Watch Corp. v. Honeywell, Inc., 416 N.E.2d 1010 (Mass.App. 1981) (unconscionability not raised); Morgan Co. v. Minnesota Mining & Mfg. Co., 246 N.W.2d 443 (Minn. 1976) (decision based on

On the other hand, the Fourth District's opinion in Ivey Plants, Inc. v. FMC Corp., 282 So.2d 205 (Fla. 4th DCA 1973), cert. denied 289 So.2d 731 (Fla. 1974), sets forth with crystal clarity the fact that unconscionability cannot be determined without reference to the facts:

> 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 a superior bargaining position, enforcement of the exculpatory clause has been denied. 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.

282 So.2d at 208-209 (citations omitted).

The attempt to distinguish this case borders on the ludicrous. Honeywell asserts that it is apparent no conflict exists because the services provided to Continental are not a public necessity and the same or similar services were widely available (Honeywell's Brief, p. 27-28). The argument is legally

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Footnote 3 (Continued)

evidence not pleadings); Reed's Jewelers, Inc. v. ADT Co., 43 N.C.App. 744, 260 S.E.2d 107 (N.C.App. 1979) (unconscionability not raised); Shaer Shoe Corp. v. Granite State Alarm, Inc., 262 A.2d 285 (N.H. 1970) (unconscionability not raised); Abel Holding Co., Inc. v. American District Telegraph Co., 138 N.J.Super. 137, 350 A.2d 292 (1975), aff'd 147 N.J.Super. 263, 371 A.2d 111 (1977) (decision based on evidence not pleadings); Foont-Freedenfeld Corp. v. Electro-Protective Corp., 126 N.J.Super. 254, 314 A.2d 69 (N.J. 1973) (unconscionability not raised; decision based on evidence); Florence v. Merchants Central Alarm Co., 73 A.D.2d 869, 423 N.Y.S.2d 663 (S.Ct.App.Div. 1980) (unconscionability not raised; decision based on evidence); Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc., 39 N.Y.2d 191, 347 N.E.2d 618 (Ct. of Appeals N.Y. 1976) (unconscionability not raised; decision based on evidence); H. G. Metals, Inc. v. Wells Fargo Alarm Services, 45 A.D.2d 490, 359 N.Y.S.2d 797 (S.Ct.App. Div. 1974) (unconscionability not raised); Lobianco v. Property Protection, Inc., 437 A.2d 417 (Pa.Super. 1981) (decision based on evidence not pleadings); Wedner v. Fidelity Security Systems, Inc., 307 A.2d 429 (Pa.Super. 1973) (decision based on evidence not pleadings); Vallance & Co. v. De Anda, 595 S.W.2d 587 (Tex. Civ. App. 1980) (decision based on evidence not pleadings).

meaningless. The concept of unconscionability has never been limited to the provision of quasi-public services. The subject of the contract in Ivey Plants was the leasing of fruit processing marchinery! And the landmark decision on the unconscionability of liability limiting clauses, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960), dealt with the purchase of an automobile! Beyond this, Honeywell's bald statement that similar services were widely available demonstrates once again its "rhetoric over evidence" approach. The relevant question is not whether other alarm services were readily available, but whether such services were readily available without exculpatory or limitation of liability clauses. And Honeywell cannot supply the Court with the answer, because there is no evidence in this case.

Finally, Honeywell completely avoids a critical aspect of the question concerning the unconscionability and enforceability of its exculpatory clause. Does the elimination of any liability by reason of the exculpatory clause render Honeywell's obligation to install, maintain and monitor the system illusory, and the contract devoid of mutuality of obligation?

Other than to acknowledge that Continental Video raised the issue, in 50 pages of discussion Honeywell gives neither a citation nor a reason to show why, if the alarm service customer cannot enforce the alarm company's specific contractual undertaking, the very heart and sole purpose of the contract is not rendered meaningless or illusory, and the contract completely lacking mutuality of obligation. Sniffen v. Century National Bank of Broward, 375 So.2d 892 (4th DCA Fla. 1979), Ivey Plants, Inc. v. FMC Corp., supra. Even the Third District has acknowledged that these cases are at the heart of the conflict between the decision below and established Florida law. Mankap Enterprises v. Wells Fargo Alarm Serv., 427 So.2d 332, 333 n. 4 (Fla. 3d DCA 1983). As Judge Schwartz observed in his separate Opinion below:

> I believe, in accordance with the directly conflicting holdings in Ivey Plants v. FMC Corp.,

> and Sniffen v. Century National Bank of Broward [citations omitted] that such a clause is unenforceable when, as here, the breach of a specific contractual obligation is involved; to hold otherwise is to render the agreement itself nugatory and meaningless.

Apparently Honeywell has no response on the merits.

A disclaimer of liability simply cannot remove the very essence of the contract, Corneli Seed Co. v. Ferguson, 64 So.2d 162 (Fla. 1953), without the contract being lacking in mutuality of obligation. See Balter v. Pan American Bank of Hialeah, 383 So.2d 256 (Fla. 3rd DCA 1980); Bacon v. Karr, 139 So.2d 166 (Fla. 2d DCA 1962).

B. Gross Negligence

Honeywell has not cited a single case which holds that liability for the consequences of gross negligence can be excused by an exculpatory clause. Indeed, it cannot, because the law in Florida, Thomas v. Atlantic Coast Line R. Co., 201 F.2d 167 (5th Cir. 1953); Factory Insurance Association v. American District Telegraph Co., 277 So.2d 569, 570 (Fla. 3d DCA), cert. denied 284 So.2d 392 (Fla. 1973), and elsewhere, is otherwise. See generally RESTATEMENT (SECOND) OF CONTRACTS § 195; Fidelity Leasing Corp. v. Dun & Bradstreet, Inc., 494 F.Supp. 786 (E.D. Pa. 1980).

Nor is this just a matter of public policy. It is also a function of one of the very legal principles acknowledged and relied upon by Honeywell.

> HONEYWELL recognizes that liability limiting clauses contained in contracts are not looked upon with favor by the courts. Because of the disfavor in which these clauses are held, they must intially pass the 'test of clarity and unequivocation'. Orkin Exterminating Co., Inc. v. Montagano, 359 So.2d 512 (Fla. 4th DCA 1978); Middleton v. Lomaskin, 266 So.2d 678 (Fla. 3d DCA 1972).

(Honeywell's Brief, p. 20). When it comes to gross, willful and wanton negligence, Honeywell's excuplatory clause does not even mention it. On its face, the clause

only purports to apply to breach of contract and simple negligence. Thus, before the public policy question is even reached, the Court would have to extend the reach of Honeywell's excuplatory clause beyond its plain, unequivocal language to hold that it bars an action based on gross negligence or willful and wanton conduct.[4] And this, as Honeywell admits, is not permissible.

Honeywell's only real attempt to avoid the gross negligence issue comes in the form of an argument that Continental did not sufficiently plead gross negligence so as to hold Honeywell vicariously liable under Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). However, the allegations paraphrased by Honeywell concerning the acts of John Doe and Richard Roe "knowingly and intentionally" ignoring the signals are from Counts IV and V of the Amended Complaint, which were not the subject of the Motion to Dismiss or this appeal.[5] In Count III, which is only against Honeywell, its gross negligence is alleged.[6] Moreover, even if Honeywell were correct, the trial court's failure to grant leave to amend would still constitute reversible error.

C. Damage Limitation

Honeywell emphatically prounounces that provisions in alarm service agreements which limit liability or purport to liquidate damages have been

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[4] Honeywell on page 42 of its Brief infers that the cases cited by Continental Video only deal with "willful and wanton" negligence, not "gross" negligence. Yet the case Honeywell attacks, Douglas W. Randall, Inc. v. AFA Protective Systems, Inc., 516 F.Supp. 1122 (E.D. Pa. 1981) repeatedly discusses gross negligence. The distinction, however, is without a difference inasmuch as Continental Video alleged Honeywell's acts were done "knowingly" and "intentionally", constituted "reckless disregard" of Plaintiff's rights, and were "gross, willful and wanton negligence" (A-9).

[5] The identity of the employees was unknown at the time of the Motion to Dismiss and, thus, there had been no service on them. These counts did not include Honeywell and are presently pending at the trial court level, awaiting the Opinion of this Court.

[6] See paragraph 16 of the Amended Complaint (A-8-9).

uniformly upheld. With this inaccurate statement,[7] the question goes begging. The real issue before the Court is whether such provisions can be upheld on a motion to dismiss, without any factual record or findings whatsoever, when the avoidances of unconscionability and penalty have been pled. The long line of precedent Honeywell seeks to invoke fragments and disappears when the issue is accurately described.[8]

If the clause is to be interpreted as a liquidated damage clause, which is what Honeywell's standard form contract calls it, the Court need look no further than the familar Nicholas case for the answer to the question. In Nicholas v. Miami Burglar Alarm Co., Inc., 266 So.2d 64 (Fla. 3d DCA 1972), the alarm company's contract contained a clause purporting to liquidate damages at twenty-five dollars. In reversing the trial court's granting of a motion to dismiss with prejudice, the Third District held:

> The rule in Florida has been stated in Stenor, Inc. v. Lester, Fla. 1951, 58 So.2d 673
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> * * * * * *

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[7] For example, the liquidated damage clause was struck down as a penalty in Wackenhut Protective Systems, Inc. v. Eterna of Miami, Inc., 375 So.2d 352 (Fla. 3d DCA 1979). Although Honeywell suggests that this case should be ignored, it demonstrates that the "uniformity" claim can't even make it out of Dade County.

[8] In footnote 31 on page 44 of Honeywell's Brief, a string of cases is cited which purportedly shows that the trial court was correct in disposing of Continental's avoidances of unconscionability and penalty on a motion to dismiss. In fact, as set forth in the following parentheticals, none of the cited cases involved all of the avoidances raised by Continental, and none of them were disposed of on a motion to dismiss. American District Telegraph Co. v. Roberts & Son, Inc., 122 So. 837 (Ala. 1929) (unconscionability not raised; disposition after full trial); Niccoli v. Denver Burglar Alarm, Inc., 490 P.2d 304 (Colo.App. 1971) (unconscionability not raised; liquidated damage clause upheld after full trial); Bargaintown of D.C., Inc. v. Federal Engineering Co., Inc., 309 A.2d 56 (D.C. App. 1973) (clause neither unconscionable nor a penalty on facts adduced at trial); Foont-Freedenfeld Corp. v. Electro-Protective Corp., 64 N.J. 197, 314 A.2d 68 (1974) (unconscionability not raised; disposition after full trial); A.G. Schepps v. American District Telegraph Co., 286 S.W. 2d 684 (Tex. Civ. App. 1955) (unconscionability not raised; liquidated damage clause upheld on facts adduced on summary judgment).

> The fundamental rule recognized almost universally is that when the actual damages contemplated by the parties upon breach are susceptible of ascertainment by some known rule or pecuniary standard and the stipulated sum is disproportionate thereto, it will be regarded as a penalty. The prime factor is whether the sum is just compensation for the damage resulting from breach!
>
> 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.

266 So.2d at 66-67 (emphasis added) (citations omitted). This holding of the Third District in Nicholas has never been expressly overruled by any court, and indeed was reviewed and left standing by this Court. Nicholas v. Miami Burglar Alarm Co., supra.

The only Florida case relied upon by Honeywell for the proposition that a liquidated damage clause in an alarm contract can be upheld on a motion to dismiss is Factory Insurance Association v. American District Telegraph Co., supra. However, the case does not address the issue before this Court and offers no support for Honeywell's position. In the first place, the case was decided on summary judgment and not a motion to dismiss. Thus, evidence was taken and considered. More importantly, the avoidances of unconscionability and penalty were neither raised nor discussed. The plaintiffs contention was that a liquidated damage clause did not, as a matter of law, apply to claims for breach of warranty and negligence. The Plaintiff was wrong and lost. Continental makes no such claims in this case.

In short, before Honeywell's liquidated damage clause can be upheld or struck down, facts need to be determined. Was there any attempt made by

Honeywell at the time of contracting to determine if the damages that would flow from its breach or negligence were readily ascertainable? Were they? Was there any attempt made by Honeywell to determine if $250 (or $404.16) was a reasonable estimate of just compensation? Was there ever any intent on the part of Honeywell that this figure represent liquidated damages? What damages were actually suffered? Honeywell's appellate representations (p. 45) concerning these factual matters cannot take the place of evidence that would have been developed had the motion to dismiss been properly denied.

If the clause is considered a limitation of liability clause rather than a liquidated damage clause, the result is the same. Under this approach, Honeywell again begins with an inaccurate statement that begs the question: "Florida courts have uniformly recognized and upheld limitation of liability clauses contained in contracts.[9] (Honeywell Brief, p. 47). Again, the real issue is whether such a provision can be upheld on a motion to dismiss, without any factual record or findings whatsoever, when the avoidance of unconscionability has been pled. None of the cases cited by Honeywell stand for this proposition, and some suggest just the opposite.

In Advance Service, Inc. v. General Telephone Co., 187 So.2d 660 (Fla. 2d DCA 1966), the limitation of liability clause was upheld on summary judgment on the basis of evidence. In addition, the avoidance of unconscionability was neither raised nor discussed. Likewise, in Orkin Exterminating Co. v. Clark, 253 So.2d 884 (Fla. 3d DCA 1971), the avoidance of unconscionability was neither

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[9] The statement is simply false. For example, the Second District struck down a limitation of liability clause as unconscionable in Varner v. B.L. Lanier Fruit Co., 370 So.2d 61 (Fla. 2d DCA 1979). The Second District relied upon provisions of the Uniform Commercial Code, which codified the pre-Code law of unconscionability in commercial settings. See Section 672.302, Florida Statutes; Kuharske v. Lake County Citrus Sales, 44 So.2d 641 (Fla. 1949).

raised nor discussed, and the validity of the limitation clause was not determined until after a full trial.

In L. Luria & Son, Inc. v. Alarmtec International, 384 So.2d 947 (Fla. 4th DCA 1980), the avoidance of unconscionability was never raised, and the Fourth District remarked pointedly in its opinion that the "appellant made no request to amend its complaint". 384 So.2d at 948. The Third District was less oblique in pointing out the problem and crux of the matter in the last Florida case upon which Honeywell relies, Ace Formal Wear, Inc. v. Baker Protective Services, Inc., 416 So.2d 8 (Fla. 3d DCA 1982). In affirming a summary judgment based in part upon a limitation of liabiltiy clause, the Court stated:

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

416 So.2d at 9.[10]

Unlike the appellant in Ace Formal Wear, Continental did raise the issue of unconscionability. And all of the factual issues regarding unconscionability that have been discussed above stand between Honeywell and a dismissal with prejudice.

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[10] The foreign cases cited by Honeywell in footnote 32 are equally inapplicable. None of them sanction a determination regarding unconscionability on the pleadings rather than on the evidence. Central Alarm v. Ganem, 116 Ariz. 74, 567 P.2d 1203 (Ariz. App. 1977) (limitation of liability found conscionable on the evidence); First Financial Ins. Co. v. Purolator Security, Inc., 69 Ill.App. 3d 413, 388 N.E. 2d 17 (Ill.App. 1979) (limitation of liability found conscionable on the evidence); Lazybug Shops, Inc. v. American District Telegraph Co., 374 So.2d 183 (La.App. 1979) (no evidence of unconscionability after full trial); Reed's Jewelers, Inc. v. ADT Co., 43 N.C. App. 744, 260 S.E.2d 107 (N.C. App. 1979) (avoidance of unconscionability not raised); Morgan Co. v. Minnesota Mining & Mfg. Co., 246 N.W.2d 443 (Minn. 1976) (limitation of liability found conscionable on the evidence); Shaer Shoe Corp. v. Granite State Alarm, Inc., 262 A.2d 285 (N.H. 1970) (avoidance of unconscionability not raised); Wedner v. Fidelity Security Systems, Inc., 307 A.2d 429 (Pa.Super. 1973) (limitation of liability found conscionable on the evidence); Vallance & Co. v. De Anda, 595 S.W.2d 587 (Tex. Civ. App. 1980) (determination made after full trial).

Finally, in a last ditch attempt to support the disposition of Continental's avoidances on a motion to dismiss, Honeywell leaps from the ridiculous to the sublime. It argues that bargaining power and other issues relating to a proper finding of unconscionability are merely "paper issues" because the agreement provided for bargaining between the parties whereby the limit of liability could be increased if the subscriber paid an increased fee (Honeywell Brief, pp. 48-49).

In fact, this is the most unconscionable provision in the entire contract. As Honeywell has pointed out at least five (5) times in its Brief, the limitation of liability clause only "complements" the exculpatory clause,[11] and only comes into play if the excuplatory clause providing that Honeywell has no liability for its negligence or breach of contract is found to be invalid or unenforceable. Against this backdrop, Honeywell now has the nerve to suggest that meaningful bargaining was available to increase the maximum limit of its liability. In other words, despite the fact that Honeywell will maintain it has no liability at all, it is purportedly[12] willing to extend the customer the "privilege" of buying higher limits

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[11] For example, Honeywell states on page 12 of its brief:

> If this later provision [the exculpatory clause] were to be held invalid for any reason, then the complementary clause contained in the Agreement would become operative. This complementary clause provided that HONEYWELL's maximum liability, in any event, would be limited to an amount equal to one-half of the annual service charge under the contract or $250, whichever was greater.

See also, Honeywell's Brief, pp. 13, 43, 48, 50.

[12] Continental uses the word purportedly because it firmly believes the evidence would have shown that the "graduated scale of rates" for higher limits did not even exist, and the higher limits were not, in fact, available.

on the off chance that Honeywell might be wrong about the exculpatory clause and guilty of breach of contract and/or negligence. A very profitable "Catch 22"! To borrow a quotation from Honeywell's Brief, this is a bargain which:

> . . . no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.

Hume v. United States, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889). It is an unconscionable bargain!

CONCLUSION

Petitioner submits that alarm company contracts should be governed by the same law that applies to any other commercial undertaking. When contracts involve exculpatory clauses, on proper proof, they should be avoidable. When contracts involve limitation of liability/liquidated damage clauses, on proper proof, they should be avoidable or subject to being determined to be penalties. And, in any event, such clauses should not insulate grossly negligent conduct, especially when such conduct is not within the express terms of the clause.

For all these reasons, Petitioner respectfully requests that this Court quash the decision below and remand this cause with directions to reinstate Petitioner's complaint.

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Bruce A. Christensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11 day of July, 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