

## CONTRACTS OF ADHESION UNDER CALIFORNIA LAW

Contracts between parties of unequal bargaining strength are becoming more common in the mid-twentieth century than ever before. Over recent decades, businesses have grown in both size and relative market domination in many fields of commerce. While the small businessman has not disappeared, in many segments of our economy he is at least dominated by big business. This development in modern society was the theme of a recent speech delivered by California Supreme Court Associate Justice Mathew Tobriner. He summed up the trend as follows:

. . . As society has become more complex, it has become more institutionalized, not only in government, but in private groups—in the corporation, the labor union, the agricultural cooperative, the medical society, the insurance company and the public utility. . . . The manner of organization may range from the monolith of the corporation to the loose and scattered confederacy of landlords. But in all these organizations there runs a common factor: an individual's needs and interest depend more and more upon the control of these dominant groups.<sup>1</sup>

The analysis which follows will concentrate upon one important facet of big business with which the California courts have been confronted—contracts of adhesion. Such contracts, often in the guise of standardized forms, are being offered to society by many firms dealing in necessary products or services in such a quantity that they have become substantially (if not totally) immune from the pressures of the bargaining table.

The dangers of standardized contracts today have been strongly described in the following terms: "Standard contracts . . . could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."<sup>2</sup> The term "contract of adhesion" refers to a contract not formulated as a result of the give-and-take of bargaining where the desires of one party are balanced by those of the other. But instead, due to the basic inequality of bargaining position, the customer, by entering the transaction, is forced to "adhere" to the terms presented by the stronger party; only a very few items may be open to his determination.<sup>3</sup> A *standard* contract of adhesion is simply a contract which is drafted by the party of superior bargaining power and is used exclusively in all dealings with the product or service he offers. The contract is printed in great numbers, and the agent with whom the weaker party deals has little or no authority to alter the printed terms of the "bargain."

---

<sup>1</sup> Address by Hon. Justice Mathew O. Tobriner, Associate Justice, California Supreme Court, Inglewood Bar Association, April 1, 1964.

<sup>2</sup> Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

<sup>3</sup> Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1961-1962).

It should not be concluded that standard contracts are in all cases undesirable.

Mass production of contracts, like mass production of goods, may serve the interests of all parties. Among the advantages claimed for the use of standard form contracts are these: it takes advantage of the lessons of experience and enables a judicial interpretation of one contract to serve as an interpretation of all contracts; it reduces uncertainty and saves time and trouble; it simplifies planning and makes the skill of the draftsman available to all personnel; it makes risks calculable and "increases that real security which is the necessary basis of initiative and the assumption of foreseeable risks."<sup>4</sup>

While the pioneer literature on this subject was written in the 1940's,<sup>5</sup> judicial recognition of "adhesion contracts" has been slow to take hold. Until quite recently the statutes and cases in California attempted to reach what the court feels to be the "just" result in each individual situation, rather than looking at the problem as a whole, in general terms, as a part of general contract law.

American law has developed a variety of judicial techniques to restrain the prophylactic draftsman: (1) exculpatory clauses are strictly construed; (2) exculpatory clauses in contracts "effected with a public interest" may be void as against public policy; (3) "unconscionable" clauses are unenforceable; and (4) clauses in derogation of normal venue or jurisdictional provisions must satisfy special, though uncertain, criteria.<sup>6</sup>

The inevitable judicial recognition of contracts of adhesion as a doctrine in itself occurred in 1960 in *Henningsen v. Bloomfield Motors, Inc.*,<sup>7</sup> a decision already accepted as a leading case in tort and contract law. (Hereinafter, the terms "adhesion doctrine" and "doctrine of adhesion" will be used to indicate the rationale that was applied in *Henningsen*, namely, that the superior party will not be permitted to rely upon the contract clause in issue.) In the *Henningsen* case the Supreme Court of New Jersey held that the disclaimer found in virtually all contracts for the sale of new automobiles would not protect either the manufacturer, or the dealer who actually contracts with the purchaser from a suit for personal injury caused by a defective automobile. The Court observed that all of the major automobile manufacturers in the United States, as members of the Automobile Manufacturers Association, use a uniform disclaimer clause.<sup>8</sup> Neither the manufacturer nor the dealer, the Court reasoned,

<sup>4</sup> JONES, FARNSWORTH & YOUNG, *CASES AND MATERIALS ON CONTRACTS* 150 (1965).

<sup>5</sup> Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>6</sup> Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1179, 1187 (1964).

<sup>7</sup> 161 A.2d 69 (N.J. 1960).

<sup>8</sup> *Id.* at 87.

should be allowed to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer (who in effect has no real freedom of choice when it comes to allocating the risk of loss for injury) the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. The Court set forth its attitude toward such disclaimers in the following manner:

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of the burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. *Manufacturers are few in number and strong in bargaining position.* In the matter of warranties on the sale of their products, the Automobile Manufacturers Association has enabled them to present a united front. *From the standpoint of the purchaser, there can be no arms length negotiating on the subject.* Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security.<sup>9</sup> [Emphasis added.]

The California courts adopted this attitude in two steps. In *Greenman v. Yuba Power Products, Inc.*,<sup>10</sup> a broad pronouncement of the existence of public policy disallowing warranty disclaimers was made. Henceforth in California no manufacturer of a product of such a nature that it will be placed into use by the purchaser without inspection for defects, will be permitted to hide behind a disclaimer of liability for injury to life or limb. The California courts will hold the manufacturer strictly liable in tort and will not permit a shifting of the risk under the contract of sale. The tenor of this decision was based upon the theory of product liability.

In *Vandermark v. Ford Motor Company*<sup>11</sup> the second step was taken. Here the attempted shift of risk from manufacturer to consumer was discussed both in terms of strict liability in tort *and* on the basis of the adhesion doctrine, which, as the *Henningsen* court had found, was applicable to the standard warranty clause used in the contract of sale. Behind this policy of non-recognition of the disclaimer is a general recognition that

<sup>9</sup> *Id.* at 94.

<sup>10</sup> 59 Cal.2d 57, 27 Cal.Rptr. 697 (1963).

<sup>11</sup> 34 Cal.Rptr. 723 (Cal.App. 1963). The California Supreme Court affirmed the decision regarding liability of the manufacturer, basing its decision on strict liability in tort, 61 Cal.2d 256, 37 Cal.Rptr. 896 (1964). The District Court of Appeal decision was based in part on the adhesion doctrine, which the Supreme Court found unnecessary, since the same result could be more easily reached on strict liability grounds. The District Court of Appeal opinion is included here since its reasoning as regards the adhesion doctrine is applicable as part of general contract law as discussed in the following cases.

manufacturers are in a far stronger bargaining position than the consumer. To allow the strong party to shift the risk of loss would place the weak party at the former's mercy.

The *Henningsen* view of contracts of adhesion, however, is not limited to the sale of goods. While it is too soon to determine just how far-reaching the adhesion theory will become, a study of various areas of the law may be suggestive. The problem of inequality of bargaining power has been before the courts for years and will undoubtedly become even more frequent in a society where business firms are becoming larger and larger.

Often the courts can find an ambiguity in the contract and thereby construe the offending clause against the superior party, as was done in a telegraph company case in 1912,<sup>12</sup> where the Court used virtually identical reasoning as is applied today to contracts of adhesion.

These contracts are prepared by the telegraph company and printed upon all of its blanks provided for the use of the public. They are not often the result of negotiation between the parties. The sender has no choice, nor any reasonable opportunity to make terms not specified in the printed contract. . . .<sup>13</sup>

An excellent contemporary discussion of the field of adhesion contracts is found in *Tunkl v. Regents of University of California*,<sup>14</sup> where the California Supreme Court squarely based its decision on the adhesion doctrine. In this case, a patient entered University of California at Los Angeles Hospital and was required to release the hospital from all liability except that arising from the negligent hiring of employees. The Court held that such a release was void as against public policy under California Civil Code §1668,<sup>15</sup> on the basis of a finding that the contract was one of adhesion. The adhesion doctrine, the Court noted, was part and parcel of general public policy. Under such an interpretation of public policy, adhesion contracts can be decided squarely on the basis of §1668. The Court listed what falls within the "public interest":

In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits *some or all* of the following characteristics. It concerns a business of a type generally thought suitable for public regula-

---

<sup>12</sup> *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298, 125 P. 242 (1912).

<sup>13</sup> *Id.* at 315, 125 P. at 248.

<sup>14</sup> 60 Cal.2d 92, 32 Cal.Rptr. 33 (1963).

<sup>15</sup> CAL. CIV. CODE §1668: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

tion. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. \* \* \* As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.<sup>16</sup> [Footnotes omitted, emphasis added.]

This case, reviewing most of the important California decisions in which the adhesion doctrine could come into play, promises to be an excellent guide for the future. Using §1668, the California courts will now hold that when a contract affects the "public interest," California *public policy* requires that its adhesive portions be ineffectual in insulating the stronger party.

Having looked at the adhesion doctrine in general terms, this analysis will now turn to several specific fields of contract law. The selection of the fields of law discussed below is by no means exclusive. The areas of contract to be investigated were chosen here as a survey of some of the more commonly found situations where the doctrine of adhesion might apply.

#### INSURANCE

One of the most fundamental rules which is applied in California when the courts are faced with the problem of interpreting a contract of insurance is that an insurance policy must be strictly construed against the party who drafted the instrument.<sup>17</sup> Usually this rule is applied where the contract is ambiguous in one of its clauses. However, it is important to note that an actual ambiguity is not always necessary. Where the Court concludes that justice between the parties requires a construction not clearly indicated from the words of the contract, it may judicially "interpret" against the insurer even absent an ambiguity. Such was the case in *Raulet v. Northwestern National Insurance Company*<sup>18</sup> where a clearly phrased insurance contract stated that the insurer would not be contractually liable if the insured suffered loss or destruction of personal property if such property was encumbered. The property in issue was indeed encumbered with a chattel mortgage. While the Court realized that it was proper for the insurer to limit its exposure to certain specified risks, it looked behind the characterization of the risk and concluded that since the chattel mortgage was small in relation to the value of the personalty it

<sup>16</sup> *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 98, 32 Cal.Rptr. 33, 36 (1963).

<sup>17</sup> *Steven v. Fidelity & Casualty Co. of N. Y.*, 58 Cal.2d 862, 27 Cal.Rptr. 172 (1962).

<sup>18</sup> 157 Cal. 213, 107 P. 292 (1910).

did not "encumber" the chattel or substantially change the risk of loss. Thus the Court expansively interpreted the word "encumbrance", in effect adding a modification to the word (substantial) to come to a result contrary to the terms of the contract. The underlying reason for this change was justice between the parties.

But, in reaching "justice between the parties" the court will not always construe the contract against the insurer. Where justice requires, the court will enforce the strict wording of the contract. In 1962 the California Supreme Court, recognizing that it must construe ambiguities against the insurer, and that insurance contracts were contracts of adhesion, nevertheless refused to "interpret" where it felt it best not to do so. Thus, ". . . while we are sensitive to the plight of the assured who is confronted by multiple and complex clauses of insurance, [citation], nevertheless we are bound by the language of a contract which is itself clear and unchallengeable."<sup>19</sup> The Court held that a clause which automatically incorporated any statutory requirement did not include a statutory inclusion of uninsured motorist insurance which was to be required on all policies of insurance, since the policy in question had been issued prior to the enactment of the statute. The Court did not feel it proper to increase the risk of loss on a policy already in force. Justice here favored the insurer.

During the same year, the Court had occasion to look again at contracts of insurance, and the policy discussed above was clearly affirmed. Here, however, the balance was struck in favor of the insured. In this case, *Steven v. Fidelity & Casualty Co. of N.Y.*,<sup>20</sup> a truly classic example of an adhesion contract was involved. The insured had purchased a trip insurance policy from a vending machine located in an airport. The policy was several pages long with the small print that is often found in contracts of insurance. The insurer specifically conditioned liability upon the suffering of loss while en route on a scheduled airline. The insured had no way of reading such condition until he paid for the policy, at which time the "contract" emerged from the faceless machine. Further, he was instructed to mail the policy to the beneficiary, which he did, and there was no showing that he was given a copy to retain. When faced with the necessity of finding alternate transportation at a stopover, the insured chose a non-scheduled airline, which was a reasonable choice under the circumstances. This non-scheduled airplane crashed, killing the insured. When the beneficiary sued for the proceeds of the insurance policy, the insurer asserted the defense of failure of condition. The Court, emphasizing the inequality of bargaining power, said,

---

<sup>19</sup> *Ball v. California State Automobile Inter-Insurance Bureau*, 201 Cal.App.2d 85, 20 Cal. Rptr. 31, 33 (1962).

<sup>20</sup> 58 Cal.2d 862, 27 Cal.Rptr. 172 (1962).

In standardized contracts, such as the instant one, which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous, or unconscionable. The attitude of the courts has been manifested in many areas of contract.<sup>21</sup>

And,

We examine the question in light of the purpose and intent of the parties in entering into the contract, Mr. Steven's knowledge and understanding as a reasonable layman, his normal expectation of the extent of coverage of the policy and the effect, if any, of the substitution of the transportation upon the risk of the insurer.<sup>22</sup>

Thus, it is clear that henceforth insurance contracts will be viewed in light of the "reasonable expectation of the parties." Clauses which the insured might not expect to find in such a policy which would limit the effect of the policy will not be effective unless, of course, the limitation is clearly pointed out at the time of execution of the contract. Further, the *Steven* case said that where the limitation proves to be "unconscionable," even if the insured has notice, the limitation will be without effect. In the *Steven* case, of course, this statement was mere *dicta*, since the decision rested primarily on the fact that the insured was not shown to have known of the condition in question, but the sentiment was quite strongly expressed, and will undoubtedly serve as a guideline for future decisions where a clearly understood, but unconscionable clause is encountered. This result seems inescapable, as part of the development of the adhesion doctrine now being squarely incorporated into California public policy.

Insurance contracts are likely to be challenged quite frequently as standard contracts of adhesion because, while there may often be negotiation as to how much the premium will be, and correspondingly, how much protection will result from the insurance policy, most of the terms simply are in the contract to stay. If the purchaser does not want them his only choice is non-acceptance of the whole contract of insurance.

#### BAILMENT

In our modern society people often find it desirable or necessary to bail their goods to one in the business of storing such goods. These professional bailees prosper because they can usually care for goods more inexpensively due to their specialization of function, and for the same reason, they can often provide safer custody of the goods than could the owner. Thus, bailee businesses such as parking lots, parcel checking rooms, warehouses, etc., are both necessary and unavoidable. In many instances the bailor is in no position to shop around for such services since there may be few

<sup>21</sup> *Id.* at 879, 27 Cal.Rptr. at 183.

<sup>22</sup> *Id.* at 869, 27 Cal.Rptr. at 176.

bailees offering the service in the geographical area. Even where there is competition among many bailees it is likely that they all take bailed goods only on the same general terms. These bailees, then, fall into much the same category as do the automobile dealers and manufacturers discussed in *Henningsen*. They are able to force terms upon their clientele. Usually the bailee desires to limit his liability for loss or damage to the bailed goods, either by way of a dollar limitation or insulation in full for losses from certain or all causes. The courts have long looked upon such limitations with disfavor and have often held them unenforceable. *Dieterle v. Bekin*<sup>23</sup> was a case in which a fire destroyed goods worth \$1,500. Plaintiff claimed full damages and defendant asserted full exculpation under a limitation in the standard form contract of bailment which disclaimed liability for loss of goods from fire damage. The California Supreme Court reversed a judgment for the defendant and remanded, instructing the trial court to ignore the disclaimer and try the case solely on the issue of defendant's negligence. In this early case no mention of public policy was made by the court.

Subsequently a definite pattern emerged. In *Northwestern Mut. Fire Assn. v. Pacific Wharf & Storage*<sup>24</sup> it became clear that the *Dieterle* doctrine would not be blindly applied. When the warehouseman notified the would-be bailor that the former could not be responsible for injury to goods, due to an impending strike (union violence was apparently a threat) the bailor was held to have assumed all risk of loss including loss totally unrelated to the threatened strike when he nevertheless delivered the goods to the bailee's wharf. Here, however, the decision reflected the notion that *public policy* was the important issue to be resolved. The Court held that the limitation of liability *under the circumstances* was simply not contrary to public policy, the Court again looking to the policy of the State to render justice between the parties.

Turning to the current state of the law in this field, three general rules can be found to have evolved, stemming from the desire to effectuate justice. First, if the bailee desires, he may, under certain circumstances, limit his liability. He must clearly call it to the attention of the bailor. Small print buried in the body of the contract will not serve as adequate notice.<sup>25</sup> If the bailee inserts a limitation by incorporation, using a standard warehouse receipt, without calling the attention of the bailor to the limitation, again the notice is insufficient to make the limitation effective.<sup>26</sup>

---

<sup>23</sup> 143 Cal. 683, 77 P. 664 (1904).

<sup>24</sup> 187 Cal. 38, 200 P. 934 (1921).

<sup>25</sup> *Wilson v. Crown Transfer & Storage Co.*, 201 Cal. 701, 258 P. 596 (1927).

<sup>26</sup> *Scott's Valley Fruit Exchange v. Growers Refrigerator Co.*, 81 Cal.App.2d 437, 184 P.2d 183 (1947).



Where, however, the bailee conforms to the California Commercial Code<sup>27</sup> he can insert in his receipt any terms and conditions which are not contrary to other provisions of the Code. This allows the bailee to limit his liability even for negligence if he gives the bailor an option to obtain full-value responsibility from the bailee, although such liability may be conditioned upon the payment of a higher fee.<sup>28</sup> Here again, the limitation and option must be clearly pointed out to the bailor.

Second, it is important to notice an "interpretation" doctrine which comes into play in this area (as it also does in insurance contracts) which is a product of long standing judicial philosophy. While a party may absolve himself from liability if this is not discountenanced by public policy or some other statutory inhibition, the courts will still look at the disclaimer with disfavor when it has the effect of exempting one from his liability due to negligence (rather than a mere shifting of risk if neither party be at fault). The courts also often conclude that, in absence of consideration given to compensate for the shifting of the risk of loss, public policy requires liability for damages resulting from one's own negligence.<sup>29</sup> The court will usually construe such provisions strictly against the person relying upon them, *especially where that person is the author of the document*.<sup>30</sup> It thus becomes extremely important for draftsmen of standard contracts of bailment (as well as other types of contracts) to make such clauses clear, and to call the bailor's attention to them.

Third, where the bailee is a public warehouseman he is now classed in California as a public utility and must comply with the numerous regulations found in the Public Utilities Code.<sup>31</sup> Thus, if he files his tariff with the appropriate commission and draws attention adequately to such tariff, the bailor will be bound by the terms even if he refuses to read the limitation of liability.<sup>32</sup> However, the California Commercial Code §7204, which is similar in this respect to the Warehouseman Act<sup>33</sup> which it displaced, requires the warehouseman to be answerable for his own negligence. Here there is a clear statutory expression of public policy upon which the courts can and do ignore such limitations upon liability.<sup>34</sup>

Perhaps the best view of the position the courts are currently taking when faced with limited liability bailment contracts in cases where there

---

<sup>27</sup> CAL. COMM. CODE §7402.

<sup>28</sup> *Ibid.*

<sup>29</sup> Dieterle v. Bekin, 143 Cal. 683, 77 P. 664 (1904).

<sup>30</sup> Sproul v. Cuddy, 131 Cal.App.2d 85, 280 P.2d 158 (1955).

<sup>31</sup> CAL. PUB. UTIL. CODE §§216, 219.

<sup>32</sup> Hischmoeller v. National Ice & Cold Storage Co., 46 Cal.2d 318, 294 P.2d 433 (1956).

<sup>33</sup> Section 21, adopted as part of CAL. CIV. CODE §1858.30.

<sup>34</sup> England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 271 P. 532 (1928). See also CAL. CIV. CODE §1668.

is no controlling statute can be found in the two cases below. In a 1963 case,<sup>35</sup> the City of Los Angeles attempted to shift all liability from damages from any source whatever to the bailor. The city was operating, in a proprietary capacity, a cargo dump at the wharf. The Court (following *Tunkl v. Regents of University of California*<sup>36</sup>) stated that: "In view of the dominant bargaining position of the city with respect to those who, because of the nature of their business, must make use of harbor facilities of the kind here involved, the conclusion . . . appears to be compelled . . ." that the plaintiff recover damages resulting from the city's negligence, despite the waiver of liability clause in the contract.<sup>37</sup> The language quoted above clearly indicates that the basis of the decision is the adhesion doctrine.

The second case, *Constantian v. Mercedes Benz*,<sup>38</sup> is an example of an "arms-length" transaction of parties of relatively equal bargaining strength. An automobile agency rented a rug for its showroom from the bailor and was contractually liable for any damages from any source. Here the bailment was not of the usual sort discussed above in that the bailor by contract wanted to shift the risk of all loss to the bailee; the principles involved are, however, the same. This is often the situation when a party rents or leases personal property. It is important to note that in *Constantian* the party who was "forced" to assume the risk of loss was not a weak party when compared to the bailor. Further, the placing of all risk on the party in possession of the goods is quite reasonable and is not at all oppressive. The *Henningsen* adhesion doctrine therefore does not require this type of contract to be held ineffectual, because of the relative equality of bargaining position, and the lack of necessity to take or leave the contract as a whole, with any offending terms forced upon an unwilling party. The party taking the risk could have looked elsewhere to satisfy his needs, or could have easily insured the property, the insurance premiums being no more than a normal, reasonable business expense. The cases, then, revolved around the consideration of justice between the parties. Only when the adhesion doctrine is applicable will the courts hold the attempted shift-

---

<sup>35</sup> *E. B. Ackerman Importing Co. v. City of Los Angeles*, 33 Cal.Rptr. 243 (1963); *vacated* 61 Cal.2d 595, 39 Cal.Rptr. 726 (1964). Upon hearing the case, the California Supreme Court reversed and remanded, with instructions for the trial court to stay the proceedings until a determination as to the effect of the exculpatory clause as determined by the Federal Maritime Commission, which the Court felt had primary jurisdiction over the case. It was felt that the Commission would be the best party to determine whether or not the exculpatory clause was reasonable and justified based upon the rates charged, etc. However, the theory behind the original decision discussed in the text would appear still to apply: if the exculpation is unreasonable, it would not be enforced, due to the finding that the contract was adhesive.

<sup>36</sup> *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 32 Cal.Rptr. 33 (1963).

<sup>37</sup> *E. B. Ackerman Importing Co. v. City of Los Angeles*, 33 Cal.Rptr. 243, 245 (1963).

<sup>38</sup> 5 Cal.2d 631, 55 P.2d 841 (1936).

ing of liability ineffectual, unless of course, some other policy makes the provision objectionable.

Contracts of shipment or personal carriage fall into similar categories as do the general contracts of bailment discussed above. Here, as in the bailment situation, carriers cannot limit their liability for damages which result from their own negligence even if such limitation is filed with the Interstate Commerce Commission unless the shipper or passenger is given an option to receive full protection (though at a higher cost).<sup>39</sup> However, if the federal government does in any particular situation declare that the shipper or passenger is bound even if there is no option, then of course, under the Supremacy Clause of the Federal Constitution<sup>40</sup> the national public policy would take precedence over the state's public policy against adhesion contracts. It is held that any such limitation of liability must be the result of free and fair negotiation between the parties and must of course be reasonable.<sup>41</sup>

The cases noted in the footnotes to the preceding paragraph do not mention "adhesion" contracts. But the principles of the adhesion doctrine, it is suggested, would lead to the same results. It would seem that unless there is federal authority for such, no carrier will be permitted to force a shipper or passenger to adhere to unreasonable limitations of liability on a "take-it-or-leave-it" basis. And, in drawing an analogy to the *Constantian* case, the courts might enforce a contract between a carrier and a large corporation offering a large volume of business to the carrier, while the same clause would be held ineffectual if a housewife or a small merchant were the party contracting with the carrier.

Thus, bailment contracts, while often subject to rules of law peculiar to that field, still would seem to fit into the general scheme of the adhesion doctrine just as easily as insurance contracts or contracts for the sale of goods, the subject of the next section.

#### CONTRACTS FOR THE SALE OF GOODS

As noted above,<sup>42</sup> under California law all manufacturers of standard products used by consumers will be held strictly liable in tort for damages to person or property which result from a defect in the product, and such manufacturer will not be permitted to exculpate itself from such liability contractually.<sup>43</sup> The doctrine of adhesion contracts is not, however, limited to such attempts at exculpation. Although the question is not likely to appear in the case of product liability now that California has indicated

<sup>39</sup> *Franklin v. Southern Pac. Co.*, 203 Cal. 680, 265 P. 936 (1928); *Hubbard v. Matson Nav. Co.*, 34 Cal.App.2d 475, 93 P.2d 846 (1943).

<sup>40</sup> U. S. CONST. art. VI.

<sup>41</sup> *McQueen v. Tyler*, 61 Cal.App.2d 263, 142 P.2d 466 (1943).

<sup>42</sup> See text accompanying notes 10 and 11.

<sup>43</sup> See also RESTATEMENT (SECOND) TORTS, §402A (1965).

that such cases will be decided on the basis of strict liability, an occasional case undoubtedly will arise where other matters in the contract are adhesive. One such case was decided in 1964. In *Walnut Creek Pipe Distributors, Inc., v. Gates Rubber Sales Division*<sup>44</sup> the court squarely met the question of adhesion and quite reasonably concluded that the contract was not adhesive. Here the distributor contested the manufacturer's contract right to cancel a distributorship agreement alleging that the cancellation clause was forced, unfairly, upon the jobber. The Court held that the contract was not adhesive on the basis that there was no showing that the goods in question could be purchased only from the defendant, and further, that there was no evidence introduced that would tend to show that the parties were not bargaining as equals. The plaintiff was urging that as a matter of law, merely because the contract was one of "distributorship," a presumption should be raised to the effect that the manufacturer had the upper hand at the bargaining table. In another case, *Ury v. Jewelers Acceptance Corporation*,<sup>45</sup> the issue of adhesion was again raised in a contract for the sale of goods. Here the court held that due to a showing of extensive negotiation, it was apparent that the contract was not one of adhesion. Thus, while the two cases concluded that the contracts under review were *not* the result of "bargaining" between the strong and the weak, it seems clear that the issue is now being openly decided by the courts, and it is suggested that when the facts do arise where the parties are substantially unequal in position, the courts will meet the issue squarely on the basis of the adhesion theory and will strike the offending clause, to arrive at justice between the parties.

#### LANDLORD—TENANT

While as yet there have been no cases in California holding a lease contract adhesive as such, this field of law is a fertile one for the growth of the doctrine. As early as 1895 the California Supreme Court discussed the equality of bargaining power of the parties to a lease agreement.<sup>46</sup> In that case the lessor, a railroad, disclaimed liability, placing the risk of all loss, including fire, on the lessee. A fire caused by the negligence of the lessor's employees destroyed the tenant's property. The Court examined the contract from the standpoint of both public policy and equality of bargaining. Since the plaintiff's property was not too large, the Court concluded that shifting of the risk of loss in this one small geographical area would not have the effect of lowering the railroads normal exercise of care (which was required as a matter of public interest). This brought the Court to the issue of adhesion, though the current terminology was not used. The

<sup>44</sup> 228 Cal.App.2d 810, 39 Cal.Rptr. 767 (1964).

<sup>45</sup> 227 Cal.App.2d 11, 38 Cal.Rptr. 376 (1964).

<sup>46</sup> *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 41 P. 783 (1895).

parties were found to have stood on common ground dealing “. . . with each other as A. and B. might deal with each other with reference to any private business undertaking.”<sup>47</sup> Thus, the shifting of the risk of loss was allowed, and the railroad was allowed to fully exculpate itself from liability resulting from its own negligence.

Two interesting cases arose in the early 1950's. In both cases the lessor attempted to completely exculpate himself from liability for any and all tort damages which might subsequently arise. Both cases involved “aggravated” or affirmative negligence, where the landlord refused to correct known defects over a long period of time; such defects caused, in the first case, substantial property damage,<sup>48</sup> and in the second, constructive eviction.<sup>49</sup> Both cases held that the limitation of liability should be interpreted to include only “passive” negligence, such being the “presumed intent” of the parties. Here, clearly, we find the court changing the terms of the contract (as is done in insurance contracts, discussed *supra*) in order to reach what the court felt was the just result. Perhaps the adhesion theory would have served well in coming to the same conclusion, allowing the court to meet the issue squarely without “interpreting” a contract which is clear in the first place.

In the case of *Inglis v. Garland*<sup>50</sup> the view that leases were matters of private contract was clearly enunciated.

We think it is the law that “a lease is a matter of private contract between the lessor and the lessee with which the general public is not concerned. And if they see fit to contract that the lessor shall not be liable for damages resulting from his negligence or the negligence of his employees, the law permits him to do so; and the courts must give effect to and enforce such contracts.”<sup>51</sup>

This statement of the law was repeated with approval in *Mills v. Rupert*,<sup>52</sup> a 1959 case. As in the *Inglis* case, the facts called for such a conclusion. The Court looked to the relative position of the parties. This leasehold was not a normal residential estate, but one of a rental of a motel. As noted by the trial judge, “Mrs. Mills is undoubtedly an excellent business manager and motel operator. (The day she signed this lease must have been one of her off days.)”<sup>53</sup> Thus it would appear that the *Inglis* rationale may not be applicable in all cases, since the Court is now inquiring more deeply into what was previously accepted as a matter of private concern. It is here suggested that today's standard residential lease, which is used

<sup>47</sup> *Id.* at 88, 41 P. at 784.

<sup>48</sup> *Butt v. Bertola*, 110 Cal.App.2d 128, 242 P.2d 32 (1952).

<sup>49</sup> *Barkett v. Brucata*, 122 Cal.App.2d 264, 264 P.2d 978 (1953).

<sup>50</sup> 19 Cal.App.2d 767, 64 P.2d 501 (1936).

<sup>51</sup> *Id.* at 773, 64 P.2d at 504.

<sup>52</sup> 167 Cal.App.2d 58, 333 P.2d 818 (1959).

<sup>53</sup> *Id.* at 64, 333 P.2d at 821.

by virtually all landlords and real estate management firms, should indeed be held, in some cases, to be adhesive. Often the would-be tenant, in going from building to building in search of a home or apartment, is faced with the same standard lease form with no opportunity to bargain its limitations out of the contract. Such leases usually include a waiver of statutory rights<sup>54</sup> (often referred to only by reference, so that the tenant generally has no idea just what he has waived). Since the adhesion doctrine is becoming implanted in California, it is seemingly only a matter of time before it is applied to this field. Where the question involves a waiver of rights under the Civil Code,<sup>55</sup> an appellate case is unlikely to arise simply because the amount involved is limited by the statute itself. However, where the question involves a release of liability for tort damages, the amount of damages in question may be substantial, offering incentive to test the effectiveness of the waiver of liability. Perhaps when the two issues come to an appellate court at the same time the problem will be resolved in favor of the weaker party, the tenant, in both instances. However, this has not as yet been enunciated by the courts, and thus the current state of the law in California remains, nominally at least, as it did in 1936 as shown in the *Inglis* case.

#### CONCLUSION

The purpose of this comment has been to point out some of the dangers present in those contracts which fall into the pattern described in *Tunkl*.<sup>56</sup> It is clear that a contract need not be standardized to qualify as an adhesion contract. However, it would seem that if it is standardized, the court may more readily find it to have been imposed on a take-it-or-leave-it basis. Parties who offer such contracts to the public should be aware that such contracts, where oppressive, are less likely to be accepted by the courts of this State. It would seem to be in the best interests of the client that the attorney who actually drafts such contracts makes it clear to the client that any potentially oppressive clause be clearly pointed out to the

---

<sup>54</sup> CAL. CIV. CODE §§1941, 1942. Section 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of any agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable. . . ." Section 1942 provides: "If within a reasonable time after notice to lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent on the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions." These provisions certainly constitute valuable rights to the lessee. While the waiver of them is not forbidden in the Code, it is suggested that a forced waiver is arguably oppressive, subject to the general arguments in favor of non-enforcement of the waiver under the adhesion doctrine.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 32 Cal.Rptr. 33 (1963).

offeree. Further, it seems wise, where possible, that the offeree be encouraged to negotiate concerning such matters, with a reasonable opportunity to bargain the clause out of the contract, perhaps in return for higher consideration on his part, since even where the weaker party has notice, the clause still may be stricken where justice requires this. Perhaps this could be done in many situations by allowing the offeree to pay additional consideration in an amount related to the premium an insurance company might charge for protection in such a case. Whatever method is found most applicable under the circumstances, it would seem that some adaptation to the current philosophy of the courts, that the individual in today's society must be protected from the strong businessman, if necessary.

Clearly it is economically impractical to abandon the use of standardized contracts. Such contracts serve a useful purpose in both facilitating and lowering costs of the large volume of business being conducted in America. Standard leases, bailment contracts, product warranties, insurance policies, bankbooks, conditional sales contracts, standard promissory notes, confession of judgment contracts and many other such contracts have simply become part of the contemporary community. However, those fortunate enough to have attained a position in the community which enables them to "dictate" to the remainder of society, regarding the terms and conditions under which the average citizen may obtain those products and services necessary for comfortable living must use more self-restraint in the future. If they do not, they will soon find themselves on the losing side of an increasing amount of litigation.

In each of the separate topics discussed in this analysis the adhesion doctrine is, or could in the future be, found to be applicable. The courts will not look only to legislative protections geared to protect weak members of society (as it has in usurious situations and contracts with minors, for example) but will continue to find new fields in which its protection is needed. It seems clear that the expression and the philosophy behind the adhesion doctrine will become an increasingly important part of contract law within a very short time.

*Steven Louis Saxe*