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Landlord-Tenant—Exculpatory Clauses: Exculpation Contrary to Public Policy When It Totally Relieves a Landlord from the Duty to Maintain Common Areas—McCutcheon v. United Homes Corp., 79 Wn.2d 443, 486 P.2d 1093 (1971

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LANDLORD-TENANT—EXCULPATORY CLAUSES: EXCULPATION CONTRARY TO PUBLIC POLICY WHEN IT TOTALLY RELIEVES A LANDLORD FROM THE DUTY TO MAINTAIN COMMON AREAS—*McCutcheon v. United Homes Corp.*, 79 WN.2d 443, 486 P.2d 1093 (1971).

In separate accidents, plaintiffs were injured when they fell due to the defective conditions of the stairways outside their apartments. Both plaintiffs had signed a form lease with the defendant landlord which contained a broadly worded exculpatory clause.[1] The trial court granted the defendant's request for summary judgment on the ground that the exculpatory clause precluded plaintiffs' suit, and the Washington Court of Appeals affirmed.[2] The Washington Supreme Court reversed and remanded the case for trial. *Held:* An exculpatory clause in a lease of residential housing within a multi-unit apartment complex which totally relieves a landlord from his affirmative duty to maintain "common areas"[3] contravenes long-established rules of tort liability and is invalid as against public policy. *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971).

Although the issue as to the validity of the exculpatory clause in *McCutcheon* was characterized as one of first impression, the Washington court has in the past evidenced disfavor toward exculpatory clauses in general. In *Thomas v. Bremerton Housing Authority*,[4] the court refused to uphold, as contrary to public policy, an exculpatory clause in a Public Housing Authority lease. Significant in *Thomas* was the court's recognition of the inherent disparity of bargaining power between a low-income tenant and the Housing Authority, and its general concern for tenant safety and well-being. Although the basic rationale of *Thomas* could support a broad rule which would invalidate residential lease exculpatory clauses in general, the court restricted the

1. The clause, included within a rather lengthy "Month to Month Rental Agreement" form, provided:

> . . . neither the Lessor, nor his Agent, shall be liable for any injury to Lessee, his family, guests or employees or any other person entering the premises or the building of which the demised premises are a part.

McCutcheon v. United Homes Corp., 79 Wn.2d 443, 444, 486 P.2d 1093, 1094 (1971).

2. McCutcheon v. United Homes Corp., 2 Wn. App. 618, 469 P.2d 997 (1970).

3. "Common areas" are those areas in or around the demised premises under the lessor's dominion and control, but available for the tenant's use; for example, outside stairways, courtyards, and sidewalks. Schedler v. Wagner, 37 Wn.2d 612, 225 P.2d 213 (1950).

4. 71 Wn.2d 69, 426 P.2d 836 (1967), *noted in* 44 WASH. L. REV. 498 (1969).

applicability of the decision by basing the result upon specific public housing legislation.[5]

The Washington court's disfavor toward exculpatory clauses has been further illustrated in areas other than landlord-tenant law. For example, the court has held that a professional bailee for hire cannot contract away responsibility for its own fraud or negligence[6] and has indicated that it would follow the nearly universal rule that exculpatory clauses between a common carrier and its customers are invalid.[7] The court has also indicated in dicta that it would adopt the widely accepted rule that employers may not contract with employees to free themselves from responsibility for their own negligence.[8] Also, the court has often used strict construction to defeat various exculpatory clauses when other legal doctrines were not available.[9] Yet, prior to *McCutcheon,* it was assumed that a broad exculpatory clause in a normal residential lease would be enforced.[10]

5. In *Thomas,* the court held that it was contrary to public policy, as expressed by the legislature in WASH. REV. CODE Ch. 35.82, to allow a public housing authority to exempt itself from liability to its tenants for its own negligence. The chapter as a whole does indicate a desire to make relatively safer housing available to low income tenants, but does not contain any express statements of public policy regarding tenant safety or exculpatory clauses.

6. Althoff v. System Garages, Inc., 59 Wn.2d 861, 371 P.2d 48 (1962) (parking lot operator); Ramsden v. Grimshaw, 23 Wn.2d 864, 162 P.2d 901 (1945) (parking lot operator); Sporsem v. First Nat'l. Bank of Poulsbo, 133 Wash. 199, 233 P. 641 (1925) (bank renting safe deposit boxes); Patterson v. Wenatchee Canning Co., 59 Wash. 556, 110 P. 379 (1910) (storage of beef). It should be noted, however, that while total exculpation is generally not allowed by "professional" bailees, limitation of liability to a specified sum is often permitted.

7. Broderson v. Rainier Nat'l. Park Co., 187 Wash. 399, 60 P.2d 234 (1936) (dictum). *Broderson* has since been overruled on other grounds. Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971).

8. In Griffiths v. Henry Broderick, Inc., 27 Wn.2d 10, 182 P.2d 18 (1947), and Broderson v. Rainier Nat'l. Park Co., 187 Wash. 399, 60 P.2d 234 (1936), the court cited with approval RESTATEMENT OF CONTRACTS § 575 (1932). The *McCutcheon* court also referred indirectly to the employer-employee exculpatory clause prohibition when it concluded that "[i]t makes little sense for us to insist, on the one hand, that a workman have a safe place in which to work, but, on the other hand, to deny him a reasonably safe place in which to live." 79 Wn.2d at 450, 486 P.2d at 1097.

9. Feigenbaum v. Brink, 66 Wn.2d 125, 401 P.2d 642 (1965) (rental of a beach house); LeVette v. Hardman Estate, 77 Wash. 320, 137 P. 454 (1914) (rental of storage room in hotel basement); Glandt v. Lloyd's Register of Shipping, 141 Wash. 253, 251 P. 274, *aff'd on rehearing,* 141 Wash. 269, 252 P. 943 (1926) (liability for inaccurate inspection of metal goods). In each of the above cases, the court went to rather extreme and often illogical lengths to hold that the exculpatory clause involved did not cover the damage or injury in question.

10. In Magerstaedt v. The Eric Co., 64 Wn.2d 298, 391 P.2d 533 (1964) the court upheld the validity of the following clause:

> . . . [L]essee will not hold the lessor liable for any damages to property or persons caused by or arising out of any defect in the construction, maintenance or use of

In *McCutcheon*, the defendant contended that the exculpatory clauses were[11]

> not contrary to public policy because the landlord-tenant relationship *is not a matter of public interest, but relates exclusively to the private affairs of the parties concerned and that the two parties stand upon equal terms. Thus there should be full freedom to contract.*

The court's rejection of the view that a lease is a private contract emphasized the burgeoning impact of the apartment rental industry in this state and the tenant's almost total dependency upon his landlord to provide for his safe use of "common areas." The court also exposed the vulnerability of the freedom of contract doctrine,[12] noting that "in recent years the law has enforced duties toward the general public, which override strict contract principals"[13] and that, under some circumstances, traditional contract principles must give way to public policy considerations. The court also rejected the contention that the *McCutcheon* exculpatory clause was valid under Washington precedent.[14] The *McCutcheon* court stated that it found the "key" to

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the premises, their fixtures, appurtenances, or of the building fixtures and appurtenances of which the demised premises constitute a part.

Although *Magerstaedt* involved a business lease, the court gave no indication that a similar residential lease, worded to clearly cover the injury in question, would not be valid.

11. 79 Wn.2d at 446, 486 P.2d at 1095.

12. For a general discussion of "freedom of contract," particularly as it relates to restrictions upon exculpatory clauses see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Comment, *Contractual Exculpation from Tort Liability in California—The "True Rule" Steps Forward*, 52 CALIF. L. REV. 350 (1964); Comment, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248 (1937); Llewellyn, Book Review, 52 HARV. L. REV. 700, 702-704 (1939); 45 IOWA L. REV. 843 (1960).

13. 79 Wn.2d at 449 n.4, 486 P.2d at 1097 n.4, citing Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960), and Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966). The court discussed the effect of public policy on "freedom of contract" more fully in Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971).

14. 79 Wn.2d at 446, 486 P.2d at 1095. The defendant asserted that Broderson v. Rainier Nat'l. Park Co., 187 Wash. 399, 60 P.2d 234 (1936), and Griffiths v. Henry Broderick, Inc., 27 Wn.2d 10, 182 P.2d 18 (1947), were controlling precedent. *In Broderson*, the validity of an exculpatory clause printed on a rental agreement for toboggan equipment was upheld. The *McCutcheon* court, however, noted that *Broderson* has since been overruled by Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971), insofar as *Broderson* had held that "a plaintiff who has unwittingly signed [a rental agreement] 'is not thereby relieved from the consequences of his act.'" *Id.* at 200, 484 P.2d at 406. *Baker* held that for a disclaimer of liability to be effective, it must, *inter alia*, be clearly and conspicuously evidenced within the terms of the agreement. In *Baker* the court manifested a trend away from strict application of contract principles in favor of a more pragmatic assessment of the actual circumstances under

the exculpation problem in the *Restatement of Contracts* § 574 which states:[15]

> A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal . . .

The court indicated that the standard of care established by law for the maintenance of "common areas" is an *affirmative duty* to maintain and keep such areas safe for tenant use,[16] and concluded that any

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which the agreement was reached to determine the extent of true "arms length" bargaining.

The exculpatory clause in *Griffiths*, also cited by the defendant, was part of a business agreement wherein an apartment rental agent indemnified himself from liability to the landlord of the apartment for losses suffered by the landlord (through tenant claims) as a result of the agent's negligence. In rejecting the applicability of *Griffiths* to the *McCutcheon* situation, the court made, but did not articulate, an important distinction between indemnity exculpation (as in *Griffiths*), and liability exculpation (as in *McCutcheon*). In indemnity exculpation, the landlord protects himself by shifting the risk to another party (or to an insurance company), but the injured tenant is still able to recover on an action based on the landlord's negligence, even though the landlord is not personally responsible for such payments. A landlord who exculpates himself from liability by means of an exculpatory clause in the lease itself, however, prevents any action by the tenant for the landlord's negligence, and leaves the tenant with no remedy except that which he may or may not be able to provide for himself. *See* Comment, *The Effect of Exculpatory Agreements upon Landlords' Tort Liability in Illinois*, 54 NW. U.L. REV. 64, 66 (1959).

15. RESTATEMENT OF CONTRACTS, § 574 (1932). The *McCutcheon* court's treatment of section 574 is unclear, perhaps because the section itself is imprecise. It seems that the phrase "not falling greatly below the standard established by law" modifies negligence. In other words, section 574 makes the degree of *negligence* sought to be avoided determinative of the validity of the exculpatory clause. For example, a lessor might be able to exculpate himself for liability for his negligence, but not for his "gross" negligence. However, the court held that section 574 dealt with the consequences of exempting oneself from liability for one's own negligence, and, therefore, that the consequences of the exemption must not fall greatly below the standard established by law. 79 Wn.2d at 447, 486 P.2d at 1095. The court found the consequences of the landlord's exculpation in this case to be the destruction of an affirmative duty of care. Since this not only fell greatly below the standard established by law, but completely destroyed the standard, the *McCutcheon* court refused to enforce the exculpatory clause. The court's misconception concerning the Restatement is certainly not fatal to the result, but it should be noted that an exculpatory clause drafted to fully comply with the Restatement will not necessarily be valid under the *McCutcheon* decision.

16. *McCutcheon*, 79 Wn.2d at 445, 486 P.2d at 1094. The existence of an affirmative common law duty of the landlord to exercise reasonable care to inspect and repair "common areas" is well established, and was not controverted by the defendant. *See* Schedler v. Wagner, 37 Wn.2d 612, 225 P.2d 213 (1950); RESTATEMENT (SECOND) OF TORTS, § 360 (1965); H. TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY, § 85 (1940). In *McCutcheon*, the court characterized this affirmative duty as follows, 79 Wn.2d at 445, 486 P.2d at 1094, 1095:

> The landlord is required to do more than passively refrain from negligent acts. He has a duty of affirmative conduct, an affirmative obligation to exercise reasonable care to inspect and repair the previously mentioned portions of the premises ["common areas"] for the protection of the lessee.

attempt to exculpate oneself from such a duty not only *lowers* the standard set by law, but in effect *destroys* the standard. It is the total destruction of this affirmative duty that offends public policy, the court reasoned, and thus exculpatory clauses of the type involved in *McCutcheon* will not be enforced by the courts of this state.

It appears that *McCutcheon* invalidates exculpatory clauses in Washington state residential leases at least to the extent that such clauses apply to "common areas" in multi-unit buildings. But although the *McCutcheon* opinion produced a laudable result, it is analytically weak, because the court failed to articulate the components of the public policy which the exculpatory clause violated. Consequently it is extremely difficult to ascertain the potential reach of the decision.

For example, it is unclear, in light of *McCutcheon,* whether a landlord can validly exculpate himself from liability for negligence in areas where he does *not* have an affirmative duty of care,[17] or from mere property damage, as opposed to personal injury.[18] It is also uncertain whether *McCutcheon* would apply in the case of a single unit dwelling,[19] or have any bearing upon business leases.[20] Equally un-

17. It is submitted that the existence of an affirmative duty of care should not be conclusive of the validity or invalidity of an exculpatory clause. The tenant suffers the same detriment whenever an injury for which the landlord would otherwise be legally liable goes uncompensated due to an exculpatory clause, regardless of whether the duty breached by the landlord was an affirmative one (such as that attaching to "common areas"), or one involving the "normal" standard of due care.

18. While it is no doubt true that uncompensated tenant losses due to property damages are, on the average, of less magnitude than uncompensated personal injury, the arguments against the validity of exculpatory clauses, presented throughout this casenote, are logically applicable to both types of damage.

19. Because *McCutcheon* involved a multi-unit apartment building, the court's general frame of reference encompassed only multi-unit dwellings. Assuming the initial existence of an affirmative duty on the landlord, however, it is submitted that the number of units in a dwelling structure is of no substantive consequence in the determination of whether exculpatory clauses should or should not be permitted in residential leases.

20.

> Whether such a clause may be used in a lease of property for *business purposes* (as differentiated from residential purposes) to exculpate a landlord from the result of his own negligence in the event of *property damage* is not before the court at this time.

McCutcheon, 79 Wn.2d at 448 n.2, 486 P.2d at 1096 n.2. By restricting its "nonconsideration" of the validity of exculpatory clauses in business leases to the question of property damage the court perhaps indicated that exculpation from liability for personal injury is invalid in both residential and business leases. Note also that UCC §2-719 makes attempted exculpation from liability for personal injuries "prima facie unconscionable" in certain business situations.

clear is whether a landlord may specifically negotiate a valid exculpatory clause in exchange for lower rental payments.[21] The discussion which follows delineates the components of a public policy in Washington which would support a rule of law which totally prohibits exculpatory clauses in all residential leases, and suggests two well-developed legal grounds upon which such a rule can be founded.

There are compelling public policy reasons why residential lease exculpatory clauses should not be enforced. The exculpatory clause is a landlord's bonanza. It provides a wealth of benefits to the landlord —relief from worry over possible lawsuits, lower insurance rates, and the opportunity to reduce maintenance costs—[22] but typically results only in additional risk and/or expense to the tenant.[23] Because the exculpatory clause is generally the result of a disparity of bargaining power,[24] or the tenant's lack of legal sophistication,[25] the tenant has no choice but to assume the impractical burden of maintaining "common areas" on his own or accept an increased risk of injury.[26] Furthermore, it is difficult for a tenant to protect himself adequately

21. The *McCutcheon* court explicitly refused to pass on the validity of an exculpatory clause negotiated in exchange for a reduced rental payment. 79 Wn.2d at 450 n.5, 486 P.2d at 1097 n.5. The most serious drawback to allowing "negotiation" to validate an exculpatory clause in the face of a general prohibition against such clauses is the difficulty in determining true "arms length" bargaining. Widespread abuse could result, for example, through the use of illusory consideration, as where a landlord would grant a "reduction" from a pre-inflated rental payment in exchange for an exculpatory clause. Furthermore, given the average tenant's overall lack of expertise concerning exculpatory clauses, there is the problem of determining whether the tenant has in fact knowledgably entered into negotiation with the landlord, as well as the opportunity for landlords to "gloss over" the significance of an exculpatory clause. Finally, in those instances where a tenant could intelligently negotiate an exculpatory agreement that would be equitable, it is submitted that such individuals should give up this contractual "right" for the good of society, just as the employee now gives up a similar right to negotiate with his employer for an exculpatory clause in exchange for higher pay. *See* note 8, *supra*.

22. *See generally* Comment, *Drafting Exculpatory Clauses in a Landlord-Tenant Relationship*, 21 U. MIAMI L. REV. 676 (1967).

23. *See generally*, Comment, *The Effect of Exculpatory Agreements Upon Landlord's Tort Liability*, 54 NW. U. L. REV. 61 (1959).

24. *See* note 44, *infra*.

25. *See* note 49, *infra*.

26. Tenants generally regard their occupancies as temporary, and would obviously be reluctant to undertake repairs from which they could expect to receive little future benefit. Fuerstein and Shestack, *Landlord and Tenant-The Statutory Duty to Repair*, 45 ILL. L. REV. 205, 230 (1951). Also, few tenants would have the skill, time and resources to maintain common areas, particularly in a large multi-unit apartment building. Furthermore, it has been suggested that even if a tenant were prepared to maintain common areas, he could not legally do so. O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 447-48, 155 N.E.2d 545, 551 (1958) (dissent).

by purchasing insurance.[27] Even if a reasonable insurance plan is available, low income tenants, who are most vulnerable to injury because of the greater likelihood that they reside in substandard housing, are also least able to afford insurance protection. Prohibition of exculpatory clauses in residential leases would also result in certain economic efficiencies, because the landlord could insure against "common area" injuries under one policy, and cover additional cost with slightly increased rent, instead of each tenant attempting to secure his own insurance.[28] Conversely, to enforce exculpatory clauses in residential leases would undoubtedly result in substantially more uncompensated losses, because such clauses tend to remove a major incentive for the landlord to keep common areas in good repair.[29]

There is evidence in *McCutcheon* and other Washington cases that the court could adopt a residential lease exculpatory clause prohibition as broad as that advocated. In support, one of two major foundations could be utilized, either of which provides a more clearly articulated and legally satisfactory basis for the proposed rule than that enunciated in *McCutcheon*. First, the court might find that the landlord-tenant relationship falls within the broad category of "essential services," and should thus be subject to the same type of contractual restrictions as those placed upon common carriers, employers, and professional bailees. Second, the court might conclude that residential leases are indirectly subject to the principles of the Uniform Commercial Code, and therefore exculpatory clauses can be invalidated under the "unconscionability" provisions of UCC § 2-302.[30]

When the *McCutcheon* court analogized the "right" to a safe place to live with the already established "right" to a safe place to work, it invited comparison of the landlord-tenant relationship with that of

27. *See* Comment. *The Effect of Exculpatory Agreements Upon Landlord's Tort Liability,* 54 NW. U.L. REV. 61, 67 n.36. Since the insurance company issuing such a policy would have no subrogated cause of action against the tortfeasor-landlord, the premium for such a policy would be relatively expensive.

28. One of the features of insurance most advantageous to society is said to be the risk-spreading factor whereby a large number of policy holders bear the losses. 2 F. HARPER & F. JAMES, TORTS, § 13.4 (rev. ed. 1956). If landlord-tenant exculpatory clauses are valid, the entire loss of "common area" injuries falls upon those tenants who are unable to carry such insurance. If landlord-tenant exculpatory clauses are invalid, however, the landlord is forced to protect himself against possible losses by insuring under a "master policy" which would cover all tenants. Such a policy would obviously result in fewer uncompensated tenant injuries.

29. *See generally* Annot., 12 A.L.R. 3d 958 (1967).

30. WASH. REV. CODE § 62A.2-302(1966).

employer-employee, common carrier-passenger, and bailor-bailee. In *Broderson v. Rainier Nat'l. Park Co.*,[31] the court recognized in dictum the rule that "corporations engaged in the performance of public duties, as for instance, common carriers, and . . . public utilities, cannot by contract relieve themselves of liability for negligence in the performance of their duty to the public," but implicitly recognized that exculpation was valid where "the service rendered is not essential to public welfare or convenience."[32] A more recent federal court decision concluded that, under Washington law, the "common carrier" rule against exculpation would extend to any party engaged in a public or *quasi-public* service or enterprise.[33] In *McCutcheon,* the court clearly emphasized the essential nature of housing, and the affirmative duties a landlord owes to his "public." Since an employer, common carrier, and professional bailee are restricted or prohibited from exculpation for negligence, it seems appropriate that a landlord should be similarly restrained. Moreover, the underlying rationale of the "common carrier" rule is equally applicable to the landlord-tenant relationship.[34] Nor does it seem necessary to the rule's applicability to find a formal "duty to serve" the public, since there is no such duty present in the employer or bailee situations.[35] It is untenable that the law should be more concerned about uncompensated property loss (as in the present restriction of exculpatory clauses in professional bail-

31. 187 Wash. 399, 404, 60 P.2d 234, 236 (1936).

32. *Id.* at 405, 60 P.2d at 237. The implication is that exculpation may not be allowed where the service rendered *is* essential to public welfare or convenience. From the language and tenor of the decision, it would seem that the *McCutcheon* court would place rental housing within this "essential" category.

33. Air Transport Associates v. United States, 221 F.2d 467 (1955).

34. The rationale behind the limitation on exculpatory clauses in "public service" industries generally centers around the disparity of bargaining power between such companies and their customers, the opportunity for such companies to drive an unconscionable bargain, and that to allow exculpation would promote negligence, or at least dilute the special duty of care owed to the public by such companies. Annot., 175 A.L.R. 8, 14-20 (1948). *See also* 44 WASH. L. REV. 498, 501 (1968); Comment, *The Effect of Exculpatory Agreements Upon Landlord's Tort Liability,* 54 NW. U.L. REV. 61, 66 (1959); Comment, *Contractual Exemption From Liability for Negligence in Alabama,* 17 ALA. L. REV. 283 (1964); Alaska Airlines v. Northwest Airlines, 228 F. Supp. 322 (1964), *aff'd,* 351 F.2d 253 (1965); Simmons v. Columbus Venetian Stevens Bldgs., Inc., 20 Ill. App. 2d 1, 17-21, 25-30, 155 N.E.2d 372, 380-82, 384-86 (1959).

35. *See* notes 6 and 8, *supra. See also* Tunkl v. Regents of Univ. of Calif., 32 Cal. Rptr. 33, 383 P.2d 441 (1963). In *Tunkl,* the court accepted a willingness to serve the public as a criterion for prohibiting exculpation from negligence, discarding the old view that a *duty* to serve the public must be found.

ment) than the suffering and uncompensated loss of an injured tenant.[36]

Although Article 2 of the UCC was originally intended to apply only to the sale or transfer of tangible goods,[37] the scope of this article has been gradually expanded by many courts to include items and transfers not within the traditional definition of "sales."[38] For example, in *Baker v. Seattle*[39] the Washington court recently applied UCC policy to the rental of a golf cart, and enunciated the principle that, for warranty purposes, there is no distinction between the sale and the rental of goods.

In addition, the court, indicating a willingness to treat residences as "goods" within the influence of the UCC,[40] has applied UCC-type warranties to the sale of a new home.[41] The rationale behind UCC "implied warranties"[42] is to give the buyer some protection against defective and/or dangerous goods. Placing an affirmative duty upon landlords to maintan "common areas" was intended to provide similar protection for residential tenants, but this protection is meaningless if it can be dispensed with easily by the landlord. Bringing residential leases under the policy of the UCC would help provide this protection, and would give the courts an opportunity to deal with exculpatory clauses in terms of substance, rather than form.[43]

36. *See* Arensburg, *Limitation by Bailees and by Landlords of Liability for Negligent Acts,* 51 DICK. L. REV. 36, 37 (1946) [hereinafter cited as Arensburg]; 40 MICH. L. REV. 807 (1942).

37. *See* WASH. REV. CODE § 62A.2-102, § 62A.2-105 (1966), and accompanying comments.

38. *See, e.g.,* Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code,* 39 FORDHAM L. REV. 447 (1970).

39. 79 Wn.2d 198, 201, 484 P.2d 405, 407 (1971). *Baker* can be narrowly interpreted to mean that, although the UCC is not *per se* applicable to the rental of goods, the UCC is important evidence of legislative intent upon which disputes involving public policy can be resolved.

40. For a definition of "goods" under the UCC see WASH. REV. CODE § 62A.2-105 (1966).

41. House v. Thornton, 76 Wn.2d 428, 457 P.2d 199 (1969); Hoye v. Century Bldrs., Inc., 52 Wn.2d 830, 329 P.2d 474 (1958); Fain v. Nelson, 57 Wn.2d 217, 356 P.2d 306 (1960). In each of the above cases, the court held that there is an implied warranty of fitness for human habitation in the sale of a new house, although the court did not directly include houses under the Uniform Commercial Code. *See also* 34 WASH. L. REV. 171 (1959).

42. WASH. REV. CODE § 62A.2-314, § 62A.2-315 (1966).

43. The court would not have to apply the Uniform Commercial Code directly to residential leases to gain the benefit of UCC provisions. Rather, it could refer to the UCC to define "public policy" as stated by the legislature and then indirectly apply UCC policy to invalidate exculpatory clauses on the basis of unconscionability, ineffective waiver, etc. This analysis was used recently in Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971). *See* note 39 and accompanying text, *supra.*

Having recognized the inherent disparity of bargaining power that exists in the typical landlord-tenant relationship,[44] some states have gone so far as to totally prohibit exculpation in real property leases, either by statute,[45] or by case law.[46] But the problem with a rule based solely upon disparity of bargaining power, perhaps recognized by the *McCutcheon* court in its avoidance of this rationale, is the questionable validity of such a rule when fluctuations in the rental market ostensibly shift the bargaining "advantage" to the tenant.[47] The fallacy of this apparent shift of advantage is that, even in a "tenant's" market, the more subtle components of a tenant's disability generally remain, such as the adhesionary nature of the form lease,[48] the tenant's lack of knowledge and/or understanding concerning the exculpatory clause and its effects,[49] and the overall lack of opportunity for bargaining in

44. Note, *Exculpatory Clauses in Standard Form Leases: A Need for Direct Judicial Action,* 28 U. PITT. L. REV. 85 (1966); 44 WASH. L. REV. 498 (1968); Kuzmiak v. Brookchester, 33 N.J. Super. 575, 111 A.2d 425 (1955). The disparity of bargaining power argument has been most prominent in cases where a "tight" rental market has given a very visible superiority in bargaining power to the landlord.

45. New York: N.Y. REAL PROP. LAW § 234 (1940), re-enacted as N.Y. GEN. OBLIGATIONS LAW § 5-321 (1964) (strictly prohibits exculpatory clauses in both residential and business leases). This statute was held constitutional in Billie Knitwear Inc. v. New York Life Ins. Co., 174 Misc. 978, 22 N.Y.S.2d 324 (Sup. Ct. 1940), *aff'd* 262 App. Div. 714, 27 N.Y.S.2d 328 (1941), *aff'd mem.* 288 N.Y. 682, 43 N.E.2d 80 (1942).

Illinois: ILL. REV. STAT. Ch. 80, § 15(a) (1959) (similar to the New York statute, but exempts certain business leases from its provisions).

A model statute similar to that of Illinois has been proposed by the American Bar Foundation. MODEL RESIDENTIAL LANDLORD TENANT CODE § 2-406 (tent. draft 1969).

46. Papakolos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941) (held that exculpatory clauses between a landlord and his tenant are invalid in New Hampshire).

47. *See* O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 155 N.E. 2d 545 (1958).

48. There is little doubt that the typical form lease would qualify, in many instances, as a contract of adhesion. Such leases are generally submitted on a "take-it-or-leave-it" basis, the form to be accepted as it stands or the tenant must look elsewhere for his lodgings. Comment, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract,* 111 U. PA. L. REV. 1197, 1205-06 (1963); Galligan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966). In *Galligan,* the Pennsylvania court invalidated a residential lease exculpatory clause specifically on the basis that it was a contract of adhesion. *See also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 68 (1960), and the following Washington decisions which have significantly relied on *Henningsen:* Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971); Berg v. Stromme, 79 Wn.2d 184, 484 P.2d 380 (1971); Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 450 P.2d 470 (1969).

49. It has been said that even if he does bother to read his lease, the average tenant often does not understand the exculpatory clause, or comprehend its significance. Rehberg, *Exculpatory Clauses in Leases,* 15 GA. B.J. 389, 395 (1953). If he does understand the clause, he is likely to regard too lightly the possibility of injury. If there is anything in the lease which does not appear "legal" in the lay sense of the word, the tenant feels that the law will protect his ordinary rights. Arensburg, *supra* note 36, at 37. The tenant,

the typical lease transaction.[50] Inclusion of residential leases under the general policy of the UCC would tend to alleviate this problem by affording the opportunity to recognize such intangible factors under the broad provisions of the UCC §2-302 "unconscionability clause."[51] UCC § 2-719[52] also provides needed direction by its recognition that "[1]imitation of consequential damages for injuries to the person in the case of consumer goods is prima facie unconscionable . . . ."

In *McCutcheon,* the Washington court provided much-needed relief in an area where patent injustices have long existed, by prohibiting exculpation from liability for negligence in maintaining "common areas" in multi-unit residential housing. But by its failure to clearly articulate the public policy components behind its decision, the court has left the potential reach of *McCutcheon* principles in doubt. Because of the disparity of bargaining power inherent in the landlord-tenant relationship, the widespread opportunity for abuse in the utilization of exculpatory clauses and the generally inequitable impact of such clauses, the court should adopt a rule which would totally prohibit exculpation in residential leases. Legal support for such a rule is available through either a "quasi-public service" or a "UCC

in need of shelter, is frequently not in a position to "shop around" for better terms, because all competitors use the same clauses. Levinson, *Basic Principles of Real Estate Leases,* 1952 U. ILL. L.F. 321, 328. Also, it is submitted that many tenants are totally unaware that their leases contain an exculpatory clause, either because they failed to read their leases, or because the exculpatory clause therein was inconspicuous. The inconspicuousness of the exculpatory clause in *Baker v. Seattle* was a significant factor in the Washington court's determination that the clause was invalid. The exculpatory clause in *McCutcheon* was even more inconspicuous than the disclaimer in *Baker.*

50. In a number of residential lease situations, the tenant is dealing with a manager or rental agent who has no authority to deviate from the form lease. Arensberg, *supra* note 36, at 38-39.

51. WASH. REV. CODE § 62A.2-302 (1) (1966). The advantage of using UCC "unconscionability" to invalidate an exculpatory clause in a residential lease rather than use of the traditional "disparity of bargaining power" argument lies primarily in the breadth of criteria available to the court under the former. The following comment is illustrative: "The principle [of unconscionability] is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." WASH. REV. CODE § 62A.2-302, comment 1, (1965). Under the more traditional analysis of disparity of bargaining power the emphasis has been primarily upon the ostensible superiority of bargaining power resulting from the greater or lesser availability of apartment housing. *See* note 44, *supra.* The weakness of the "traditional" analysis is that it fails to account for those factors which are present in the bulk of lease transactions which militate against the tenant regardless of market conditions. *See* notes 43-45 and accompanying text, *supra.* Under the UCC "unconscionability" analysis, the court would be more free to take judicial notice of these and whatever other factors it feels may be relevant. *See* 41 WASH. L. REV. 621, 624-25 (1966); Kuzmiak v. Brookchester, 33 N.J. Super. 575, 111 A.2d 425 (1955).

52. *See* WASH. REV. CODE § 62A.2-719 (1966).

policy" analysis. At the very least the court should not enforce a residential lease exculpatory clause without a clear showing by the landlord that the clause is truly a result of "arms length" bargaining.[53] By elimination, or at least restriction, of exculpatory clauses in residential leases, the court will have taken a long overdue step toward rejecting the strictures of form in favor of a pragmatic recognition of substance.

53. The Washington court employed a similar policy in Berg. v. Stromme, 79 Wn.2d 184, 484 P.2d 380 (1971), where it held that in the sale of an automobile, there is a presumption that the buyer would not waive his right to an implied warranty of merchantability and fitness for use, and that for a waiver of these warranties to be effective, the burden is upon the seller to show with particularity just what the buyer is waiving. Implicit in this "shift of burden" is that the seller must also clearly prove that the buyer was actually aware of such waiver, and willingly entered into an agreement concerning it.