NEW MEXICO LAW REVIEW

Volume 12
Issue 2 *Summer 1982*

Spring 1982

Contracts - Exculpatory Provisions - A Bank's Liability for Ordinary Negligence: Lynch v. Santa Fe National Bank

Margaret B. Alcock

CONTRACTS—EXCULPATORY PROVISIONS—A Bank's Liability for Ordinary Negligence: *Lynch v. Santa Fe National Bank*

INTRODUCTION

In *Lynch v. Santa Fe National Bank*,[1] the New Mexico Court of Appeals held that a bank acting as an escrow agent may excuse itself from its own ordinary negligence by means of an exculpatory clause contained in a standard-form escrow agreement. The negligence of the bank in *Lynch* was uncontested, and the court's decision rested solely on the issue of whether the exculpatory clause should be enforced under the circumstances of the case.[2] The New Mexico court applied parts of a six-point test borrowed from the California case of *Tunkl v. Regents of the University of California*,[3] and upheld the bank's freedom to contract away liability for its own negligence. This Note will explore the desirability of that holding in light of the position which a bank occupies in the community and in light of the reasonable expections of a bank's customers.

STATEMENT OF THE CASE

The bank's negligence in *Lynch* arose from the release of documents held by the bank under an escrow agreement with Lynch and Lucero, parties to a real estate sale.[4] Lynch entered into a real estate contract with Lucero to purchase property located in San Miguel County, New Mexico. The contract was placed in escrow with the Santa Fe National Bank in February 1976.[5] The escrow agreement, which was a standard printed form provided by the bank, contained the following exculpatory clause:

> As a controlling part of the consideration for the acceptance of this escrow, it is agreed that the Bank shall not be liable for any of its acts or omissions done in good faith, nor shall it be liable for any claims, demands, losses or damages made, claimed or suffered by any party to this escrow, excepting such as may arise through or be caused by the Bank's wilful or gross negligence.[6]

---

1. _____ N.M. _____, 627 P.2d 1247 (Ct. App. 1981).
2. *Id.* at _____, 627 P.2d at 1248–49.
3. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
4. _____ N.M. at _____, 627 P.2d at 1248.
5. Transcript of Record [hereinafter cited as Record] at 38–39, Lynch v. Santa Fe Nat'l Bank, _____ N.M. _____, 627 P.2d 1247 (Ct. App. 1981). The Record is presently on file at the University of New Mexico Law Library, Albuquerque, New Mexico.
6. _____ N.M. at _____, 627 P.2d at 1249.

This clause appeared on the back of the bank's standard form, in small print.

One month after the first escrow was set up, Lynch entered into a second real estate contract to sell the property purchased from Lucero to a third party, Buckley.[7] The second contract, which was also placed in escrow with Santa Fe National Bank, was a wraparound agreement by which Buckley assumed the annual payments due Lucero.[8] When Buckley failed to make the annual payment due in March of 1977, Lucero gave him written notice of default. Buckley promised that payment would be made by May 1.[9] The annual payment was still outstanding in May, and Lucero asked the bank to release both sets of escrowed documents, declaring that Buckley had defaulted on his contract.[10] The bank complied with Lucero's request, even though the terms of the escrow agreement between Lucero and Lynch provided that default would occur thirty days after the bank received a copy of written notice of non-payment directed to Lynch.[11] The bank knew that it was Buckley, and not Lynch, who had received written notice from Lucero.[12] In fact, the bank had specifically advised Lynch, who had become aware of the situation, that he should not make the overdue payment himself, but should wait and see if Buckley responded to Lucero's notice.[13]

As a result of the bank's release of the documents to Lucero, Lynch expended more than $20,000 in attorney's fees to recover the documents and reinstate the escrow.[14] He then sued Santa Fe National Bank for negligence in releasing the documents, seeking damages in the amount of his attorney's fees.[15] The bank raised the exculpatory clause in its

7. Record at 39.

8. *Id.* A wraparound agreement is a form of secondary financing by which a buyer assumes the seller's existing obligation on the property and also agrees to make additional payments to the seller. In the Lynch-Buckley contract the Buckleys agreed to assume the balance on the Lucero contract and to pay the Lynches for their equity over a 17-year period. *Id.*

9. *Id.* at 39–40.

10. *Id.* at 40.

11. *Id.* at 8, 40.

12. *Id.* at 40.

13. *Id.* In July 1977, still unaware that the escrow with Santa Fe National Bank had been terminated, Buckley sold the property to Weldon Carmichael, who immediately tendered payment of the amounts in default to the bank. *Id.* His payment was refused, and he was notified that the contracts concerning the property had been returned to Lucero. *Id.*

14. *Id.* Litigation began in San Miguel County between Carmichael, as plaintiff, and Lynch and Lucero as defendants, with Lynch entering a counterclaim against Lucero for specific performance of the terminated contracts. Carmichael v. Lynch, No. 12,123 (N.M. Sup. Ct., decided May 24, 1979 in an unreported opinion). The trial court held that the escrow at Santa Fe National Bank had been improperly terminated and ordered that all documents be returned to the bank for specific performance of the terms of the contracts. The supreme court affirmed. _____N.M. at _____, 627 P.2d at 1248.

15. Record at 40. Another issue raised at trial was whether attorney's fees are a recoverable item of damages in a subsequent suit against the party who created the necessity for incurring those fees.

escrow agreement as a defense. The sole issue at trial, as stipulated by the parties, was whether the exculpatory provision should be enforced.[16] The trial court upheld the provision and granted the bank's motion to dismiss.[17] Lynch appealed.

ANALYSIS

The court of appeals affirmed the trial court. The court of appeals' decision turned on its adoption and interpretation of a six-point formula set out in a California case, *Tunkl v. Regents of the University of California*.[18] This formula was developed by the California courts to determine at what point an exculpatory clause so transgresses public interests that it should be held unenforceable.[19] The test, as accepted by the New Mexico court, provides that an exculpatory clause will not be given effect where:

> [1] [The transaction] concerns a business of a type generally thought suitable for public regulation.
>
> [2] The party seeking exculpation is engaged in performing a service

---

The bank argued the general proposition that, absent statutory authority, attorney's fees are not properly recoverable damages. Transcript of Proceedings [hereinafter cited as Proceedings] at 18–19, Lynch v. Santa Fe Nat'l Bank, ____N.M. ____, 627 P.2d 1247 (Ct. App. 1981). While acknowledging that the present case was unlike prior New Mexico cases, in that Lynch was seeking to recover attorney's fees in an action subsequent to the original litigation in which the fees were incurred, the bank directed the court's attention to the case of Insurance Shares Corp. of Delaware v. Northern Fiscal Corp., 42 F.Supp. 126 (E.D. Pa. 1941), which involved a similar situation. Proceedings at 20. In that case, a suit was brought subsequent to a tort action in order to recover attorney's fees from someone who was not a party to the original suit. The federal court held that "a Plaintiff cannot recover attorney's fees incurred in connection with the suit to recover damages for a tort. Nor can he avoid the effect of this rule by bringing a separate and subsequent action to recover them." 42 F.Supp. at 129.

The trial court granted Santa Fe National Bank's motion to dismiss on the ground that the exculpatory clause should be upheld, and this was the issue addressed on appeal. The Transcript of Proceedings, however, indicates that the conclusions of the trial court were based as much on the issue of attorney's fees as on that of the exculpatory clause. In its decision from the bench, the trial court made the following remarks:

> [T]he evidence in this case further indicates and the law of New Mexico persuades the Court, that even if there were found to have been an exception to the general rule relating to exculpatory clauses of this nature, that, generally attorney's fees are not awarded unless there is a statute which permits the recovery of that or where there is the existence of a contract right, such as in the customary provision in a promissory note. I believe the third exception is in cases in equity such as injunctions, dissolutions of marriages and so on.

Proceedings at 42.

16. Record at 31. The parties stipulated at the opening of the trial that "[t]he issue between the parties is whether or not the exculpatory provision in the escrow agreement is to be enforced in this case." *Id.* They then proceeded to argue a second issue on the recoverability of attorney's fees. *See* note 15, *supra*. This second issue was never discussed on appeal.

17. Record at 44.

18. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

19. 60 Cal. 2d at ____, 383 P.2d at 444–45, 32 Cal. Rptr. at 36–37.

> of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> [4] 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.
>
> [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
>
> [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller [of the service], subject to the risk of carelessness by the seller or his agents.[20]

It was not made clear in *Tunkl* how many of these elements must be present before an exculpatory clause contravenes the public interest. The California Supreme Court merely stated that "[t]o meet that test, the agreement need only fulfill some of the characteristics above outlined. . . ."[21] Of the six points in the *Tunkl* test, the New Mexico Court of Appeals addressed itself to Points 1 and 2, dealing with public interest, and to Points 4 and 5, dealing with bargaining advantage.[22]

Bargaining Advantage:

The *Tunkl* formula considers two aspects of bargaining advantage. The first, as expressed in Point 4, is the superior bargaining position occupied by a party offering an essential service to members of the general public. The second, as expressed in Point 5, is the use of this superior bargaining position to impose an exculpatory provision, in the form of a standardized adhesion contract, on those members of the public who seek that party's services.

---

20. _____ N.M. at _____, 627 P.2d at 1251–1252.

21. 60 Cal. 2d at _____, 383 P.2d at 447, 32 Cal. Rptr. at 39.

22. _____ N.M. at _____, 627 P.2d at 1250, 1252, 1253. The six points of the *Tunkl* formula are set out in full in the second section of the *Lynch* opinion, dealing with public interest. *Tunkl*, however, is also cited in the first section on bargaining advantage, as is Akin v. Business Title Corp., 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968), a case with a fact pattern similar to that in *Lynch*. The California court in *Akin* applied Points 4 and 5 from *Tunkl* in reaching a decision on the bargaining position of the parties involved. The issues raised in Points 3 and 6 are not specifically discussed in *Lynch*, but the facts set out in the opinion itself and in the record on appeal confirm that they were met in this case: Santa Fe National Bank did hold itself out as willing to perform escrow services, Proceedings at 13–14; and it was the bank's control over the documents held in escrow which made the negligent release of the documents to Lucero possible. _____N.M. at _____, 627 P.2d at 1249.

At trial, Lynch laid the foundation for establishing that the escrow agreement was a contract of adhesion.[23] Generally, a contract of adhesion is one drawn up by the party in the stronger bargaining position and presented on a take-it-or-leave-it basis to the second party, who is forced by economic or business circumstances to accept the terms of the contract.[24] Lynch's position, at trial and on appeal, was that the escrow agreement used by Santa Fe National Bank was of this type,[25] citing *Akin v. Business Title Corp.*[26]

Akin was a California case which applied the *Tunkl* formula to determine that an exculpatory clause in an escrow agreement should not be given effect. In that case, as in *Lynch*, the plaintiff was presented with a standard, printed form escrow agreement drafted entirely by the escrow agent; there was no opportunity for bargaining between the parties before the agreement was signed; and the customer was not given the opportunity of paying an additional fee to have the exculpatory language removed from the agreement.[27] The *Akin* court held that the escrow agent did possess superior bargaining strength in relation to its customers and that its standard-form contract did qualify as a contract of adhesion under the *Tunkl* formula.[28] In reaching its holdings, the court implied a lack of choice by the weaker party on the basis of his weakness alone.[29] It distinguished

23. Proceedings at 32.

24. Sybert, *Adhesion Theory in California: A Suggested Redefinition and Its Application to Banking*, 11 Loy. L.A.L. Rev. 297, 301–302 (1978) [hereinafter cited as Sybert, *Adhesion Theory in California*]. Several judicial and scholarly definitions of contracts of adhesion are collected in Sybert's article. Edwin Patterson, in his article, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 856 (1964), suggested that the term "contract of adhesion" had its origin in R. Saleilles, De La Declaration De Volunte § 89, at 229–30 (1901):

> There are pretended contracts that have only the name, the juridical construction of which remains yet to be made. For these, in any event, the rules of individual interpretation should undergo important modifications, if only that one might call them, for lack of a better term contracts of adhesion, those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an indeterminate collectivity, and which in advance undertakes unilaterally, subject to the adhesion of those who would wish to accept the law [loi] of the contract and to take advantage of the engagements imposed on themselves.

Concern over the use of adhesive contracts is of long duration. As early as 1917 with Nathan Isaacs' article, *The Standardizing of Contracts*, 27 Yale L.J. 34 (1917), America's legal commentators have struggled with the best way to deal with these "pretended contracts." New Mexico does not appear to have recognized the concept of adhesive contracts. The only references to the term in *Lynch* are found in material quoted from the California decisions in *Tunkl* and *Akin*. By means of a footnote, the New Mexico Court of Appeals referred the reader to *Akin* for an explanation of "contracts of adhesion." ____ N.M. at ____, 627 P.2d at 1252, n. 1.

25. ____ N.M. at ____, 627 P.2d at 1250.

26. 264 Cal. App. 2d 153, 70 Cal. Rptr. at 287 (1968).

27. *Id.* at ____, 70 Cal. Rptr. at 287 (1968).

28. *Id.*

29. *Id.* The court stated that "superior bargaining power need not have its source in monopoly, but that it may simply be the result of a 'monopoly' in judgment, brains and foresight as where one party prepares the contract from which the other signs without considering the possible consequences." *Id.*

an earlier holding in *Delta Airline, Inc. v. Douglas Aircraft Co.*,[30] in which an adhesion contract was found not to exist, on the ground that Delta possessed economic strength and resources equal to that of the other contracting party.[31] The *Akin* court emphasized the difference in bargaining position between individual people and huge corporations: "[T]he individual seller of property . . . in dealing with the escrow company, is not comparable to Delta Air Lines dealing with Douglas. The individual seller of property does not have the economic power or legal and executive assistance that Delta had . . . ."[32]

In contrast, the New Mexico court in *Lynch* set a much more rigorous standard for establishing a party's absence of choice. It refused to accept Lynch's contention that the bank had taken advantage of its position as the more powerful bargainer to include within the contract a clause relieving itself of the consequences of its own negligence.[33] The New Mexico court held that Lynch could not claim to have been required to deal with Santa Fe National Bank unless he could establish an absence of alternatives.[34] This could be accomplished only by showing that he had actively sought, and had been unable to find, an escrow agent willing to offer its services without the protection of an exculpatory clause.[35] The court's position was based on its interpretation of the phrase "required to deal" used in *Tyler v. Dowell, Inc.*,[36] a case from the United States Court of Appeals for the Tenth Circuit: Exculpatory clauses "will not be enforced if the promisee enjoys a bargaining power superior to the promisor, as where the promisor is required to deal with the promisee on his own terms."[37]

With its decision in *Lynch,* the New Mexico court did not rule out the possibility that, under certain circumstances, an inequality of bargaining positions might make a contract suspect. Instead, it put the burden on the party seeking the court's protection to prove that he did, in reality, have no choice but to enter into that contract. This is a heavier burden than that imposed by the California courts, which require only that no *practical* choice exist in dealing with a particular party. It is left to future cases to determine whether a consumer must exhaust every possible source of the goods or services he seeks before entering into a restrictive contract in order to obtain relief from the terms of that contract in New Mexico's courts.

30. 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965).
31. 264 Cal. App. 2d at ———, 70 Cal. Rptr. at 290.
32. *Id.*
33. ——— N.M. at ———, 627 P.2d at 1250.
34. *Id.*
35. *Id.*
36. 274 F.2d 890 (10th Cir. 1960).
37. *Id.* at 895.

The holding in *Lynch* is entirely consistent with New Mexico's traditional position upholding freedom of contract.[38] The court of appeals acknowledged that the issue of whether an exculpatory clause should be enforced is a matter of policy.[39] The California court in *Tunkl* saw this policy in terms of shifting the risk of negligence from the consumer to the business entity with which he deals.[40] In contrast, the New Mexico court in *Lynch* saw the policy as one involving freedom of contract and the conditions under which that freedom should be restricted.[41]

Public Interest:

The second aspect of the exculpatory clause discussed by the court of appeals in *Lynch* concerned the effect of its enforcement on public interest. Lynch argued that because of the nature of a bank's relationship with its customers, the escrow services offered by Santa Fe National Bank affected public interest.[42] The court rejected this argument, holding that the public service nature of the escrow agreement must be determined "without regard to the fact that defendant is a bank."[43]

In reaching its decision, the court used Points 1 and 2 of the *Tunkl* formula,[44] as well as examples from New Mexico cases which have found specific contracts to violate public policy.[45] Looking first to New Mexico law, the court concluded that the exculpatory clause in *Lynch* did not contravene any of the previously established standards of statutory law, public duty imposed by statute, or public policy as defined by the state or one of its municipalities.[46]

The court then turned to the concept of public interest outlined in *Tunkl*. The New Mexico application of the criteria set out in *Tunkl* was extremely narrow. The *Tunkl* court held that public interest is affected if the trans-

38. *Cf.*, *In re* Carson's Will, 87 N.M. 43, 529 P.2d 269 (1974) (upholding a contingency fee contract between attorney and client); *In re* Tocci, 45 N.M. 133, 112 P.2d 515 (1941) (denying motion to set aside settlement agreement between wife of deceased worker and employer for compensation under Workmen's Compensation Act); Ravany v. Equitable Life Assurance Soc. of United States, 26 N.M. 514, 194 P. 873 (1921) (upholding annuity contract where the trial court found the consideration offered by the insurance company to be grossly inadequate in relation to the purchase price of the policy).

39. ____ N.M. at ____, 627 P.2d at 1253.

40. This was the interpretation of *Tunkl* made by the New Mexico Court of Appeals. *Id.*

41. *Id.* As stated by the court:

> The cases cited herein, which discuss whether an exculpatory clause should be enforced, recognize that such a decision is one of policy. Thus, Tunkl v. Regents of University of California, supra, discusses the policy of shifting the risk of negligence. The basic issue, however, involved the policy of freedom of contract and is concerned with when that freedom is to be restricted.

42. *Id.* at ____, 627 P.2d at 1252.

43. *Id.*

44. ____ N.M. at ____, 627 P.2d at 1252–1253; *See supra* text accompanying note 19.

45. ____ N.M. at ____, 627 P.2d at 1251.

46. *Id.*

action "concerns a business of a type generally thought suitable for public regulation."[47] In *Lynch*, the New Mexico court refined this holding to require that the particular activity in which the regulated business is engaged be specifically subject to regulation.[48] Distinguishing the California cases of *Tunkl* and *Akin*, the court noted that neither party had pointed out any regulation of escrow services in New Mexico,[49] and stated that: "[a]lthough defendant is a bank, that fact alone does not make defendant's escrow service either a banking function or a public service."[50] The only concession the court made to Lynch's position, and that only "for the purposes of this appeal," was that the second point of the *Tunkl* test, requiring the service to be one of great importance to the public, had been met.[51]

With its requirement that the activity be specifically regulated to be a "public interest" activity, the *Lynch* court overlooked the nature of the relationship between a bank and its customers. This relationship exists regardless of the particular service involved. The American banking industry is a highly regulated business. While privately owned, all banks must be incorporated under the requirements of either state or federal law and are further subject to government supervision and control in virtually every phase of their organization and operation.[52] This network of state and federal regulation developed during the 1930's when public confidence in the country's banks was almost non-existent. Following the stock market crash of 1929, thousands of banks closed their doors and billions of dollars in individual deposits were lost.[53] In an effort to restore public confidence in the banking system, the federal government passed several emergency measures, including the reorganization of the Federal Reserve System and the creation of the Federal Deposit Insurance Corporation in 1933.[54]

Since the 1930's, banks have carefully nurtured the aura of stability and security created by state and federal regulation. One measure of their success can be seen in the express sanctions given to the use of banks by trustees and fiduciaries, traditionally held to the highest standards of care in the preservation and management of capital.[55] Because of the historical development of the banking industry, and the fact that so many aspects of banking *are* regulated, the average bank customer normally

47. 60 Cal. 2d at _____, 383 P.2d at 445, 32 Cal Rptr. at 37.
48. _____ N.M. at _____, 627 P.2d at 1253.
49. *Id.*
50. *Id.* at _____, 627 P.2d at 1252.
51. *Id.*
52. R. Rodgers, Banking 180 (1965).
53. *Id.* at 146.
54. *Id.* at 146–47.
55. *See* N.M. Stat. Ann. §§ 45-5-424C(6) and 45-7-401D(6) (1978).

assumes that whatever business he transacts with a properly chartered banks falls within some area of regulated activity. To allow a banking institution to take advantage of public confidence when offering services which, in fact, provide its customers with no protection from the bank's ordinary negligence, and which can result in substantial financial loss for the customer, contravenes public interest.[56]

An Alternative to the Court's Decision in Lynch:

A parallel can be drawn between the circumstances in *Lynch* and the provisions of the Uniform Commercial Code, adopted in New Mexico.[57] The UCC applies only to the sale of goods. It does not apply directly to other consumer transactions, such as the sale of services or the rental of property. Some of the warranty concepts contained in the UCC, however, have been extended to analogous sales situations. Courts have frequently made this extension in the area of rental agreements.[58] In *Lemle v. Breeden*,[59] one of the first cases to apply warranty concepts to a lease agreement, the court used the following reasoning to affirm the recovery of damages by a lessee: "a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication."[60]

By analogy, a bank's services correspond to the goods dealt with in the UCC, and the bank is a merchant with respect to such services. The UCC states that "[u]nless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[61] A similar warranty should arise under a contract for the sale of escrow services by

56. In a few jurisdictions the everyday bank-customer relationship has been elevated to a fiduciary level, usually based on the reasonable expectations of the customer and on his reliance on the bank's advice and expertise. *See* Hagedorn, *The Impact of Fiduciary Principles on the Bank-Customer Relationship in Washington*, 16 Willamette L. Rev. 803 (1980).

Two early California cases also present examples of a bank's obligation to explain the terms of agreements entered into with its customers. Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293 (1919) and Frankini v. Bank of America, 31 Cal. App. 2d 666, 88 P.2d 790 (1939). Both cases involved exculpatory provisions in account agreements which absolved the bank from liability to the customer for cashing forged checks from funds in the customer's account. At the time these cases were decided, liability was based on common law tradition rather than on a statutory duty or regulation, but the California court held the exculpatory provisions in both cases invalid, characterizing them as a trap for the unwary which the bank was under a duty to disclose to its customers before enforcement of the provisions would be permitted.

57. N.M. Stat. Ann. §§ 55-1-101 to 55-9-507 (1978).

58. *See* Annot., 40 A.L.R.3d 646 (1971) for a survey of jurisdictions which have accepted the application of an implied warranty of habitability to rental agreements.

59. 51 Hawaii 426, 462 P.2d 470 (1969).

60. *Id.* at _____, 462 P.2d at 474.

61. N.M. Stat Ann. § 55-2-314(1) (1978).

a "merchant" bank. Such a warranty would require that the services be designed to accomplish the purpose set out in the bank's contract with its customers, and that the manner of the execution of the services pass without objection within the banking and financial community.[62] The use of an exculpatory clause would be permissible, but only if it conformed to the requirements of the UCC for the exclusion or modification of warranties.[63]

A similar analogy to the UCC was made by the Kansas Supreme Court in *Belger Cartage Service, Inc. v. Holland Construction Co.*[64] The court in *Belger* held that it would be against public policy to enforce an exculpatory clause releasing the lessor of a crane from liability for the negligence of its employees.[65] The decision was based, in part, on an application of the requirement in Section 2-316(2) of the UCC that any exclusion or modification of implied warranties be in writing and be "conspicuous."[66] The exculpatory clause in *Belger* was in small print on the reverse side of the lessor's work order form, and no attempt was made to draw the lessee's attention to the clause.[67] The Kansas Supreme Court held that in determining the enforceability of the exculpatory clause, the trial court was entitled to consider the totality of the transaction, including whether the lessee had knowledge of the clause by having it pointed out to him, or by the clause itself being conspicuous in the contract.[68]

In *Lynch,* the exculpatory clause in Santa Fe National Bank's escrow agreement was also in small print on the reverse side of its standard form.[69] No attempt was made to draw Lynch's attention to the clause relieving the bank from liability for negligence in the performance of its duties as an escrow agent.[70] Had Santa Fe National Bank been a merchant of goods rather than a provider of services, the escrow agreement between the bank and Lynch would not have withstood the scrutiny of the courts. Hedged as the banking industry is with the sanctity of government support and regulation, it would be reasonable for the courts to hold that it is in the public interest for customers of a bank to enjoy at least the same protection as customers of a local department store.

In rejecting Lynch's arguments on the public interest issue, the court of appeals again chose to favor a policy of encouraging freedom of

62. *See* N.M. Stat. Ann. § 55-2-314(2) (1978).
63. *See* N.M. Stat. Ann § 55-2-316 (1978), which sets out the methods by which warranties may be excluded or modified.
64. 224 Kan. 320, 582 P.2d 1111 (1978).
65. *Id.* at _____, 582 P.2d at 1120.
66. *Id.*
67. *Id.*
68. *Id.*
69. Proceedings at 12.
70. *Id.* at 12–13.

contract rather than one protecting the consumer.[71] In dealing with this issue, the court missed an opportunity to reach a workable compromise between these competing philosophies. By requiring banks to give the same type of notice of a disclaimer of liability that is presently required for the exclusion or modification of warranties under the UCC, the court could have given some protection to the consumer of banking services without any damage to the banking industry. Under a notice requirement, similar to that required of other merchants, banks would retain the option of limiting the extent of their liability through the use of exculpatory provisions. Their only additional burden would be to insure that such provisions are sufficiently conspicuous to alert the consumer to the terms of the contract into which he is entering.

CONCLUSION

Lynch v. Santa Fe National Bank is a reaffirmation of New Mexico's traditional approach to contract law. It is a decision based on policy and, as such, is a warning to New Mexico practitioners. Other jurisdictions, most notably California, have chosen to extend protection to the individual consumer through a more liberal interpretation of contracts entered into with such businesses as hospitals,[72] escrow companies,[73] and insurance companies.[74] New Mexico has chosen to treat all contracting parties equally and to enforce contract terms strictly. As a result, citing precedent from other jurisdictions, even precedent directly on point, is likely to be ineffective in overcoming the traditional attitude of New Mexico courts toward freedom of contract. Changes in this attitude will come only when the courts are willing to accept the proposition that protection extended to the consumer will not necessarily jeopardize the effective use of contracts by the business community.

MARGARET B. ALCOCK

71. ____ N.M. at ____, 627 P.2d at 1253.

72. Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal Rptr. 33 (1963).

73. Logan v. John Hancock Mutual Life Ins. Co., 41 Cal. App. 3d 988, 116 Cal. Rptr. 528 (1974); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

74. Akin v. Business Title Corp., 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968).