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Passenger Carrier's Liability Extended Beyond Its Own Line by Ticket Sale Transaction— *Ephraim v. Safeway Trails, Inc.**

Plaintiff, a Negro woman, purchased a roundtrip bus ticket in New York City for travel between there and Montgomery, Alabama. The ticket was sold by defendant, an interstate common carrier licensed to do business in New York, and consisted of a strip of coupon tickets, each good for a separate portion of the journey over the lines of defendant and other independent carriers. Printed on the back of each coupon was a clause limiting defendant's liability to its own line.[1] Defendant received a ten per cent commission on those connecting tickets it sold for the other lines, and on the face of those tickets there was the statement that they had been issued "for the account of" defendant. Plaintiff was assured by defendant's ticket agent that she would have a seat throughout the trip. In the course of the trip, after plaintiff had changed buses to that of an independent line, she was asked by the driver to move from her seat to one in the rear of the bus in order to accommodate a white passenger. When plaintiff refused, the bus continued to a town in Georgia where the driver left the bus and returned with a policeman, who told her to move to the back. Plaintiff again refused and the officer ordered her to leave the bus. While she was doing so, he shoved her and hit her on the head, causing serious injury. After receiving hospital treatment, plaintiff returned to New York where she instituted a personal injury action against defendant. At trial without jury, *held*, judgment for plaintiff for five thousand dollars. Although the issuing carrier would not ordinarily be liable for the torts of a connecting carrier, factors indicating that the transaction involved more than a mere sale of a ticket served to vitiate the effect of the exculpatory clause limiting the common carrier's liability to its own line.

About the turn of the century, American courts were divided on the issue of whether an initial carrier who sold a through ticket,[2] involving travel on both its own and connecting lines, was liable to passengers for injuries occurring on the other lines in the course of the journey.[3] Most courts, however, were in agreement that the

* 230 F. Supp. 568 (S.D.N.Y. 1964), *appeal docketed*, No. 29064, 2d Cir., 1964.

1. The disclaimer clause read as follows: "In selling this ticket and checking baggage thereon the selling carrier acts only as agent and is not responsible beyond its own line and does not assume expense of transfer at any junction or guarantee any connections."

2. A through ticket is one issued by the initial carrier which is valid to the destination, even though it is beyond the limits of the initial carrier's line and, thus, involves travel over a connecting carrier.

3. *Compare* Central R.R. v. Combs, 70 Ga. 533 (1883) *and* Louisville & N.R.R. v. Spurling, 160 Ky. 819, 170 S.W. 192 (1914), *with* Railroad Co. v. Manufacturing Co.,

initial carrier could limit liability to its own line through the use of a disclaimer clause similar to that used by defendant in the principal case.[4] There have been no intervening federal statutory provisions concerning liability to interstate passengers, and this latter view has persisted to the present.[5] Generally, however, courts have limited the effect of these exculpatory clauses in two instances: They have refused enforcement of the clauses when it has been proved that the carriers involved have formed a partnership or joint venture;[6] and some courts have required that the passenger have actual notice of the clause for it effectively to limit liability.[7] On the other hand, it has been recognized that a carrier may contract with the passenger to extend its liability, and when the existence of such an agreement is in issue, the disclaimer clause is of only evidentiary value, albeit of considerable weight, as to the parties' intention.[8]

Initially, the court in the principal case recognized the general rule that the exculpatory declaration on the back of the tickets would normally be effective for the defendant to avoid liability.[9] However, plaintiff contended that the presence of three factors indicated that the sale of the bus ticket constituted a special contract, by which defendant itself had undertaken the responsibility of transporting her to her destination. In ruling for plaintiff, the court adopted these contentions and set out the three factors as the basis for holding defendant liable despite the exculpatory provision.

First, the court alluded to the receipt by the defendant of a

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83 U.S. (16 Wall.) 318, 324 (1872) *and* Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 295, 74 N.E. 179, 182 (1905).

4. See, *e.g.*, Louisville & N.R.R. v. Chatters, 279 U.S. 320 (1929); Missouri Pac. R.R. v. Prude, 265 U.S. 99 (1924).

5. See, *e.g.*, Spears v. Transcontinental Bus Sys., 226 F.2d 94 (9th Cir. 1955); Solomon v. Pennsylvania R.R., 96 F. Supp. 709 (S.D.N.Y. 1951); Morrison v. Pennsylvania R.R., 6 Fed. Carr. Cas. 2013 (S.D.N.Y. 1946); Louisville & N.R.R. v. Webb, 248 S.W.2d 429 (Ky. 1952). *But see* Berry v. Pennsylvania R.R., 80 N.J. Super. 321, 193 A.2d 569 (1963), which rejects in theory the validity of the disclaimer clause, although holding Louisville & N.R.R. v. Chatters, *supra* note 4, controlling.

6. See Wooten v. Pennsylvania R.R., 288 F.2d 220 (7th Cir. 1961); Gates v. Greyhound Corp., 197 F. Supp. 341 (S.D. Miss. 1960). Similarly, the disclaimer will not exonerate the initial carrier of its own negligence, no matter where occurring on the trip. See Louisville & N.R.R. v. Chatters, *supra* note 4, at 331; Wooten v. Pennsylvania R.R., *supra*.

7. Although it seemed to have been settled by Missouri Pac. R.R. v. Prude, 265 U.S. 99 (1924), that the passenger was bound by the ticket provisions, a state court has recently held otherwise. Hudson v. Continental Bus Sys., Inc., 317 S.W.2d 584 (Tex. Civ. App. 1958). See Note, 33 MARQ. L. REV. 196 (1950); annotation accompanying the report of the *Prude* case, *supra*, 68 L. Ed. 922 (1924).

8. See Morrison v. Pennsylvania R.R., 6 Fed. Carr. Cas. 2013, 2014-15 (S.D.N.Y. 1946); Hudson v. Continental Bus Sys., Inc., *supra* note 7.

9. Principal case at 570-71.

ten per cent commission on tickets it sold for the other lines. No explanation of the significance of this factor was offered by the court. Plaintiff emphasized the fact that defendant derived economic benefit from plaintiff's travels over the lines of the connecting carriers, which she felt established some legal relationship similar to that of a joint venture or partnership.[10] In other cases where this argument has been made, the courts have generally required clear proof of the existence of a joint undertaking,[11] and sharing of benefits is only one of the indicia used in this determination; it is doubtful that the fact of some economic benefit to one party standing alone is sufficient to establish a joint venture.[12] Moreover, defendant's argument that it was acting only as an agent of the other line—as indicated by the express language of the disclaimer clause[13]—is not rebutted by the receipt of a commission,[14] since payment based on a commission is a normal method of compensation for agents. And as an agent, defendant would not be liable for wrongs committed by *other* agents of the connecting carrier.[15] It would appear, therefore, that unless the payment of a commission is itself held to establish a joint venture, which seems unlikely, it should have little significance in determining whether an initial carrier is liable for the torts of a connecting carrier.

The second factor considered by the court in *Ephraim* was the phrase on the face of the tickets that they had been issued "for the account of" defendant. Again, no reason for the relevance of this fact was given by the court. It is questionable, however, whether that language does more than indicate the original seller of the coupon tickets. By this wording, connecting carriers can ascertain from whom to collect the portion of the fare attributable to travel on their lines. Furthermore, it shows to whom these carriers owe a commission for tickets sold. To ascribe greater significance to this wording seems unsupportable on the facts of the case.

10. Brief for Plaintiff-Appellee, pp. 14-15, Ephraim v. Safeway Trails, Inc., Doc. No. 29064, 2d Cir., 1964.

11. See Pennsylvania R.R. v. Jones, 155 U.S. 333, 340, 344-45 (1894).

12. Criteria used recently by other courts are found in Wooten v. Pennsylvania R.R., 288 F.2d 220, 223 (7th Cir. 1961) (agreement to exchange equipment and personnel and to share dining car liabilities); Gates v. Greyhound Corp., 197 F. Supp. 341 (S.D. Miss. 1960) (contract regarding maintenance, service, and rental charges on exchanged equipment).

13. See note 1 *supra*.

14. See Interstate Commerce Act, pt. 2, § 211(a), added by 49 Stat. 554 (1935), 49 U.S.C. § 311(a) (1958), which sets out licensing procedures for those who sell motor carrier tickets for compensation. Specifically exempted from the license requirement, however, are certified carriers who sell tickets on other lines for compensation when the transportation is to be furnished jointly by these lines. See also Administrative Ruling No. 3, Bureau of Motor Carriers, Aug. 19, 1936, FED. CARR. REP. ¶ 25,003 and Brown, Worcester & N.Y. Street Ry., 4 M.C.C. 701 (1938), in which the Interstate Commerce Commission has implemented the policy of the act.

15. RESTATEMENT (SECOND), AGENCY § 358 (1958).

The third factor referred to by the court in the principal case concerned the representations made by defendant's ticket agent to plaintiff during the course of the sale of the ticket. The statements were assurances that plaintiff would have no trouble obtaining a seat for the entire trip.[16] Plaintiff did have a reserved seat to Raleigh, North Carolina, where there was a change of buses, and plaintiff apparently had no difficulty finding a desirable seat on this second bus. Plaintiff's injuries were not due to a failure on the part of defendant to provide a seat, but resulted from the unlawful attempt on the part of an independent company's agent to enforce segregation on a bus of the connecting line. Plaintiff admitted that the representations by defendant's agent did not cause defendant to be an "insurer or guarantor of safe passage."[17] Nevertheless, the court held that this representation, as a part of the totality of defendant's conduct, subjected the issuer to liability. Other courts, in holding that certain statements will extend a carrier's liability, have looked to words in advertisements indicating control of the whole trip by the issuing carrier,[18] to the use of language by the initial carrier that "we" have made arrangements with "our men" in other cities for the completion of a tour,[19] and to statements that a specific incident would not occur.[20] Seemingly, no case has found a common carrier liable for injury on an independent line unless there are facts indicating both an affirmative undertaking by the carrier and some breach of this undertaking resulting in harm to the plaintiff. Thus, the principal case, under an amorphous concept of totality of conduct, creates liability in a common carrier in a situation admittedly otherwise controlled by the exculpatory clause.

The basic policy consideration behind the enforcement of disclaimer clauses is that the initial carrier has no effective control over the actions of a wholly independent line and, thus, should not be liable for the wrongs that it could not have prevented.[21] It is only in the area of property transportation that Congress has felt this policy is overridden by another, more critical, factor. In many instances, shippers could not ascertain at what point on the trip

16. During the trial the following testimony was given by plaintiff: "I asked him (referring to defendant's employee at defendant's ticket booth in New York City) about a reservation for the trip. I told him I wanted to be assured I would get a seat all the way, because it was a long journey. He assured me I would get a seat on the bus." Plaintiff's Post-trial Memorandum of Law, p. 4.

17. Brief for Plaintiff-Appellee, pp. 10-11, Ephraim v. Safeway Trails, Inc., Doc. No. 29064, 2d Cir., 1964.

18. Quimby v. Vanderbilt, 17 N.Y. 306 (1858).

19. Hudson v. Continental Bus Sys., Inc., 317 S.W.2d 584 (Tex. Civ. App. 1958).

20. Louisville & N.R.R. v. Spurling, 160 Ky. 819, 170 S.W. 192 (1914) (plaintiff would not be delayed by floods); Battle v. Central Greyhound Lines, Inc., 171 Misc. 517, 13 N.Y.S.2d 357 (Sup. Ct. 1939) (Negro would not be subjected to discrimination during trip).

21. See Louisville & N.R.R. v. Chatters, 279 U.S. 320 (1929).

their goods were damaged. This fact gave rise to an addition to the Interstate Commerce Act, making the initial or delivering carrier strictly liable under specific circumstances.[22] On the other hand, the only policy consideration favoring the decision in the principal case seems to be that of providing a more convenient forum for the injured passenger. However, the continuous sale by defendant of tickets for the out-of-state connecting carriers would seem to be business transactions in New York within the meaning of that state's recently enacted "single act" statute.[23] Therefore, since under the new statute a contract consummated within the state has been held to provide a basis for personal jurisdiction over nonresident parties to that agreement in causes of action for personal injuries occurring in the performance of the contract,[24] plaintiff should have been able to sue, in New York, the independent connecting carrier on whose line the incident took place.[25]

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22. Interstate Commerce Act, pt. 1, § 20(11), added by 34 Stat. 593 (1906), as amended, 44 Stat. 1448 (1927), 49 U.S.C. § 20(11) (1958). This provision is discussed in Alderson, *Connecting Carrier's Liability for Loss or Damage to Shipments*, 13 CLEV.-MAR. L. REV. 332 (1962).

In Glaser v. Pennsylvania R.R., 82 N.J. Super. 16, 196 A.2d 539 (1963), the plaintiff contended that the omission of passengers from the coverage of this section was a legislative oversight which the court should correct. The court, however, rejected the possibility of a trial court effecting such a change in the statute.

23. N.Y. CIV. PRAC. LAW § 302(a): "A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he: 1. transacts any business within the state . . . ." See also § 301 which permits a court to exercise jurisdiction in all situations in which the court could have acted prior to the passage of this statute.

In Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. 1964), the court held that personal jurisdiction over the nonresident defendant had been acquired when its agent had confirmed hotel reservations via telephone to plaintiff in New York. See also Patrick Ellam, Inc. v. Nieves, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963). *Cf.* Agrashell, Inc. v. Bernard Sirotta Co., 229 F. Supp. 98 (E.D.N.Y. 1964); Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964) (in both cases, the court, in holding that jurisdiction over a nonresident had not been acquired, cited the absence of a contract made within the state as a critical factor).

Continuous ticket sales were held to be indicative of "doing business" under prior New York law in Edwards v. Atlanta & W.P.R.R., 197 F. Supp. 686 (E.D.N.Y. 1961); Allegue v. Gulf & So. Am. S.S. Co., 103 F. Supp. 34 (S.D.N.Y. 1952); Rothenberg v. Western Pac. R.R., 206 App. Div. 52, 200 N.Y. Supp. 428 (1923); Berner v. United Airlines, Inc., 2 Misc. 2d 260, 149 N.Y.S.2d 335 (Sup. Ct. 1956), *aff'd*, 3 N.Y.2d 1003, 147 N.E.2d 732, 170 N.Y.S.2d 340 (1957).

24. See, *e.g.*, Greenberg v. R.S.P. Realty Co., *supra* note 23, where personal injury suffered at defendant's hotel was held to be a proper cause of action "arising" out of the New York contract transaction. See statute cited note 23 *supra*. See also Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 268-69, 115 N.E. 915, 918 (1917), where the court, per Cardozo, J., held that once the foreign corporation was found to be doing business in New York, the cause of action need not have arisen in the state. *But see* Peters v. Robin Airlines, 281 App. Div. 903, 120 N.Y.S.2d 1 (1953).

25. The new statute has been held to be applicable retroactively since it is only

The principal case creates uncertainty in the field of passenger carrier liability. Since the Interstate Commerce Act provides that the Commission may establish through routes and joint rates,[26] motor carriers cannot escape this extended liability by refusing to sell tickets on other than their own lines. Passenger carriers are thus faced with the problem of applying the criteria set out by this court to their own particular situations and attempting thereby to measure their potential liability. There are, however, no adequate guidelines. No indication is given by the court of the importance of any one of the three factors enumerated, nor is anything said about their interrelationship. The emphasis placed on the totality of the factors by the court seems to suggest that all three were necessary to the decision. Individually, however, none of the factors is supportable by law as sufficient to vitiate the exculpatory provision of the ticket. It is not clear, therefore, whether the court would have reached a similar result if only one or two of these factors had been present.

When a court renders ineffective the recognized efficacy of a disclaimer clause, its reasons for so doing should be explicit. Without a clearer exposition than was given in the principal case, the tendency will be toward indeterminate liability for these carriers. It is likely that this will result in an increase in insurance premiums,[27] leading to a higher cost of transportation for the public. And though the initial carrier, or its insurer, may sue the connecting carrier who caused the injury,[28] the consequent increase in litigation would seem to offset any policy considerations in favor of providing the plaintiff with a convenient forum. The situation presented in the principal case should not precipitate a judicial reversal of an accepted trend in passenger carrier liability.

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of a procedural nature. Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964).

26. Interstate Commerce Act, pt. 2, § 216, added by, 49 Stat. 558 (1935), 49 U.S.C. § 316 (1958).

27. In determining rates for liability policies, the insurance industry relies heavily on experience. The speculation that is caused by the *Ephraim* decision would seem to indicate at least a temporary rise in these rates. Items which would require careful analysis would include: (1) the number of plaintiffs who return to their home states to sue the issuing carrier, (2) the changing significance of the territorial classification previously applied to the initial carrier, and (3) the variance in the loss per unit of exposure ratio, due to the increase in passenger miles for which each carrier would be potentially liable. See generally HENSLEY, COMPETITION, REGULATION, AND THE PUBLIC INTEREST IN NONLIFE INSURANCE 78-85 (1962) and MICHELBACHER, MULTIPLE-LINE INSURANCE chs. 5-6 (1957). The effect of insurance on negligence law is discussed in Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953), and James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

28. It has been held that the carriers who are strictly liable under 49 U.S.C. § 20(11) (1958) have a right to pursue the connecting carrier on whose line the damage occurred. Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co., 115 F.2d 736, 740 (5th Cir. 1940). See generally CUSHMAN, TRANSPORTATION LAW 231-32 (1951).