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## Expert Testimony Required to Prove Negligent Approval of Fraudulent Credit Card Application

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## Cruise Ship Ticket

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able and stated that, absent any fraud or undue influence, a forum selection clause was valid. After analyzing the Ninth Circuit's application of *The Bremen*, the Court concluded that the lower court had ignored important differences in a contract between businesses and a contract between a consumer and a business.

The Court began by rejecting the Ninth Circuit's conclusion that a non-negotiated forum selection clause was never enforceable because it was not the subject of bargaining. Instead, the Court stated that this particular clause was permissible for several reasons. First, because of the likelihood that its passengers would be from many locales, Carnival had a special interest in limiting the geographical locations of courts in which it potentially could be sued. Second, the clause establishing the forum for any future litigation had the beneficial effect of dispelling any confusion about where the dispute must be brought and defended. This certainty spared time, expense, and judicial resources. Finally, the Court reasoned that when the cruise line limited the courts in which it could be sued, it saved money which was passed on to the passengers in the form of reduced fares.

Next, the Court addressed the Shutes' assertion that litigating their claim in Florida would be inconvenient. The Court noted that here, as in *The Bremen*, the party claiming inconvenience had a heavy burden of proof. Using this standard, the Court found that the Shutes did not meet the burden needed to set aside a forum selection clause on the grounds of inconvenience. Since the district court made no findings of fact regarding physical and financial impediments derived from litigation in Florida, the Ninth Circuit's conclusion of inconvenience had no basis in the record and, therefore, was not valid.

The Court also found that the Ninth Circuit misinterpreted the statement in *The Bremen* that, "the serious inconvenience of the con-

tractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 U.S. at 17. The Court noted that this statement contemplated a hypothetical agreement between two Americans to resolve their local disputes in a remote, alien forum. In the instant case, however, Florida was not a remote forum nor was the dispute an essentially local one, since Mrs. Shute was injured in international waters. Therefore, the litigation was not inherently more suited to resolution in the state of Washington than Florida.

The Court then determined that the forum selection clause was fair; it found no evidence that Carnival selected Florida as the forum in an attempt to discourage passengers from pursuing legitimate claims. The Court based this conclusion on the facts that Carnival's principal place of business was Florida and that many of its cruises departed from and returned to Florida ports. Similarly, the Court found no evidence indicating that Carnival obtained the passengers' approval of the forum selection clause by fraud.

Finally, the Court addressed the Shutes' contention that enforcement of the clause violated 46 U.S.C. App. 183c, which proscribes a right to trial by a court of competent jurisdiction. The forum selection clause, the Court noted, specifically designated that all actions be brought in a Florida court. Since Florida courts are courts of competent jurisdiction, no violation of 46 U.S.C. App. 183c existed.

### The Dissenting Opinion

In their dissenting opinion, Justices Stevens and Marshall concluded that the forum selection clause should not be enforceable since passengers did not have notice of the clause until after they purchased the tickets. Further, the dissenters concluded that, even if the passengers had received prominent notice of the forum selection clause before they committed to the cost of the cruise, the clause was void under The Limitation of Vessel Owners Liability Act, 46 U.S.C. App. 183C, which invali-

dates express limitations on a shipowner's liability for negligence. Further, traditional admiralty law prohibits exculpatory clauses in passenger tickets because they are typically the product of disparate bargaining power between the carrier and the passenger and undermine the strong public interest in deterring negligent conduct.

Kathrine Schmitt Hilder

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## Expert Testimony Required To Prove Negligent Approval of Fraudulent Credit Card Application

In *Beard, et al. v. Goodyear Tire & Rubber Company, et al.*, 587 A.2d 195 (D.C. 1991), the District of Columbia Court of Appeals held that, due to lack of expert testimony as to the standard of care in the retail industry, a consumer had failed to show negligence on the part of merchants approving unauthorized credit card applications in his name. The court further found that the consumer had no cause of action under consumer protection regulations requiring retail sellers to register with the Office of Consumer Protection because no actual injury occurred.

### Background

Ms. Roberts ("Roberts"), a former girlfriend of Eugene Beard ("Beard"), applied for and obtained credit cards in his name from several department stores. The department store companies included May Department Stores, Inc. ("Hecht's"), Saks Fifth Avenue, Inc., and Woodward & Lothrop, Inc. among others.

This case began as a debt collection suit brought by Hecht's against both Beard and Roberts. Beard counterclaimed against Hecht's and the other department stores that issued fraudulent credit cards in his name, or jointly in his and Roberts' names. He argued that the cards had been issued negligently without verification of the application information. Beard claimed no knowledge of or con-

sent to the cards' issuances. Beard also alleged that the reporting of the balances due on the cards to CBI, a credit reporting company, caused his credit rating to suffer substantially. These claims are referred to as Beard I.

Additionally, Beard, together with another consumer, brought a second suit against several of the stores involved in Beard I. Beard alleged that, because the companies had failed to register as retail creditors, they had not complied with the District of Columbia Consumer Retail Credit Regulations, 16 D.C. Mun. Regs. 102.1 (1987). This claim is referred to as Beard II. The two cases were consolidated on appeal.

### No Evidence of Negligence

The trial court, the Superior Court of the District of Columbia, granted the merchants' summary judgment motion in Beard I. Beard appealed, claiming negligence on the part of the companies in accepting fraudulent credit applications and reporting detrimental credit information pertaining to the balances owed on the accounts.

Beard claimed that the merchants' negligence was proven by their failure to exercise due care in verifying the application information. He argued that if the merchants had exercised proper due care, the credit cards would not have been issued and, therefore, the injury to his credit rating would have been avoided. He also claimed the merchants were negligent in failing to adhere to their own application review process.

In the appellate court, the merchants again filed a motion for summary judgment on the basis that there was no evidence of negligence. Relying on affidavits describing their processing procedures, the merchants argued that their guidelines had been followed in Beard's case, and therefore, due care had been exercised. Several of the merchants claimed that their credit application review procedures were standard in the retail industry.

Beard submitted an investigator's affidavit stating the merchants had failed to contact Beard's employer to verify the ap-

plication information. However, Beard failed to submit any expert affidavits demonstrating the standard of care applicable to the merchants, nor did he define such a standard by any other method.

The appellate court held that while the affidavits submitted by the merchants were relevant to proving due care, a mere showing that their procedures conformed with industry custom was not enough to support a summary judgment motion. Rather, the court held that summary judgment must be granted due to Beard's failure to submit expert testimony demonstrating the merchants' negligence.

The court held that, in general, where the subject matter is beyond the knowledge and understanding of the average person, expert testimony is necessary in order for plaintiffs to prove negligence. The court then explained that the general public is not aware of the available methods for detecting application fraud, nor how much the adoption of such methods would ultimately cost the merchants' customers. Therefore, the court held that the proper standard of care to be used by merchants in the processing of retail credit card applications was beyond the knowledge of the average juror, and Beard needed expert testimony to establish negligence.

Beard's allegation that the merchants failed to adhere to their own procedures for processing applications was also rejected. Beard had submitted affidavits and exhibits showing the inaccuracies of some of the information on the applications, such as incorrect social security numbers, salary figures, and address listings. The court found, however, that such inaccuracies could not be detected from the face of the applications and that Beard failed to prove a duty of further inquiry. Consequently, the court held that Beard had failed to present any issue of fact for trial regarding evidence of the merchants' negligence.

### Consumer Regulations Do Not Apply

In Beard II, the Superior Court of the District of Columbia granted

summary judgment in favor of the merchants. Beard appealed on the grounds that several of the merchants failed to comply with 16 D.C. Mun. Regs. 102.1 (1984), which requires all retail sellers to register with the Office of Consumer Protection. Beard claimed that as a result of their failure to register, the merchants must return all money paid to them for goods purchased during the non-registration period.

The appellate court rejected Beard's registration argument for two reasons. First, the regulation provided several means of enforcement, none of which allow for a private party to bring a civil action. The court held that the regulation was intended to be enforced by public officials or through privately instigated administrative proceedings.

Further, the appellate court did not recognize the remedies Beard demanded. The regulation intended relatively small penal sanctions, such as fines of up to \$300 or imprisonment for no more than 10 days. The court rejected the argument that the regulation had intended to allow for drastic forfeitures. Due to its penal nature, the law was to be strictly construed and could not support such forfeiture by implication.

Beard admitted to having suffered no injury as a direct result of the merchants' failure to register according to 16 D.C. Mun. Regs. 102.1. The legislation from which the regulation stemmed only provided protection and relief to consumers who had suffered actual injury. The court held that injury was a condition precedent to suit under the regulation and thus barred Beard's claim. The court upheld the grant of summary judgment.

Gwen M. Geraghty

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## Wyoming Extends Warranty Of Habitability To Minor Construction Defects

In *Deisch v. Jay*, 790 P.2d 1273 (Wyo. 1990), the Supreme Court of  
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