THE RUINOUS ROOF

In an April 1986 press conference, former President Ronald Reagan, referring to unauthorized disclosures of confidential information, complained that "The White House is the leakiest place I've ever been in." Dave Polson would probably disagree.

Mr. Polson operated "Autoworks," a business in Brooklyn Heights, Ohio, which restored and repaired investment automobiles. He conducted his business in a portion of a commercial building, which he had rented from United Industries in July 1987 under a written five-year commercial lease.

During the term of the lease, the building's roof began to leak, causing significant damage to the automobiles Polson stored in the building. Although United made several attempts to repair the leaking roof, these repairs failed to stem the flow of water.

Because of the leaking roof, Polson refused to make his rent and utility payments to United. On October 8, 1989, United sued Polson for the nonpayment of rent. Polson filed an answer and a counterclaim. Polson's counterclaim was based upon the water damage caused by the leaking roof and asked for $31,995 in damages.

On January 2, 1990, United's complaint for the nonpayment of rent was settled and dismissed. However, Polson's counterclaim remained.

On May 18, 1990, United filed a motion to dismiss Polson's counterclaim, alleging that the counterclaim failed to state a valid claim. The trial granted summary judgment for United with regard to Polson's counterclaim. Polson appealed, arguing that the case should have been allowed to go to trial because issues of fact regarding United's liability for damage to his automobiles caused by the leaking roof still had to be decided.

On April 2, 1992, the Court of Appeals of Ohio, Cuyahoga County, affirmed the trial court's ruling in United's favor.

The Court of Appeals concluded, based on its review of the evidence, that no genuine issues of material fact existed that would have required a trial. The Court pointed to a paragraph of the written lease between Polson and United providing that United "shall not be liable for any damage occasioned by failure to keep said premises in repair and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewage or the bursting, leaking or running of any cistern, tank, washstand, water closet or waste pipe in, above, upon or about said building or premises, nor for damage occasioned by water, snow or ice being upon or coming through the roof, skylight, trap-door or otherwise, nor for any damage arising from acts or negligence of co-tenants or other occupants of the same building, or any owners or occupants of adjoining or contiguous property."

The Court observed that, pursuant to this paragraph of the written lease, United was not liable to Polson for any damage resulting from a leaking roof.

The Court examined the further question of whether, under Ohio law, such a "limitation of liability" clause in a commercial lease was permissible. Reviewing prior Ohio court decisions, the Court of Appeals concluded that such a provision was acceptable. These cases provided that, as long as there is no great disparity of bargaining power between the parties, a commercial lease which clearly and unequivocally relieves the lessor (United) from liability for damages suffered by the lessee (Polson) resulting even from the lessor's own negligence may be valid since parties have "freedom of contract" to agree to terms they desire. These cases further noted that, while Ohio recognizes the validity of such an exculpatory clause, such a clause will be interpreted as narrowly as possible in support of the party seeking to enforce it. Moreover, the language of the provision must be clear and conspicuous.

The Court of Appeals noted that, in this case, the paragraph of the written lease, which limited United's liability for damages caused by a leaking roof, was simple, direct and easily understood. In addition, there was no evidence that Polson and United were not of equal bargaining power. Finally, there was no evidence that the parties had modified the paragraph in question by any subsequent agreement.

Thus, the Court concluded that the trial court had not erred in granting United's motion for summary judgment, since United was not liable to Polson for any damage caused by the leaking roof.

Although other courts interpreting the laws of other states might come to conclusions different from those of the Court of Appeals of Ohio in the *Polson* case, the case provides an important lesson to car collectors and restorers. If you store and/or work on your (or someone else's) prized possessions in space you lease from another, check carefully whether the terms of that lengthy, legalese-laden, and myopia-inducing-typefaced agreement you signed contains a provision that might soak you somewhere down the road.

LAWRENCE SAVELL

Lawrence Savell is an attorney and writer in New York City. *This column provides general information and is not intended as a substitute for consulting a lawyer.*