Spring 1978

Standard Form Contracts

Ronald C. Griffin
ronald.griffin@famu.edu

Recommended Citation
Ronald C. Griffin, Standard Form Contracts, 9 N.C. Cent. L.J. 158 (1978)

STANDARD FORM CONTRACTS

RONALD C. GRIFFIN*

INTRODUCTION

The study of contracts is an honorable pursuit. However, the work ethic in contracts has been difficult to implement given the statement made by some that all contracts are the product of a bargained for exchange.[1] Statistics tell us that ninety-nine per cent of all contracts are unbargained for agreements.[2] What contemporary thinkers have regrettably done is to extend bargain-for-exchange law to cover flaws in the formation of unbargained-for-agreements.

Shell Oil Co. v. Boyer is an illustration.[3] In that case, the defendant (Boyer) signed a standard form, in legalese, giving the Shell Oil Company a first option to buy his gas station. The agreement, prepared by Shell, had a confusing clause in it. On the strength of a representation made by a Shell agent, Boyer assented to the entire writing. Later, when a dispute arose over the ambiguous clause, which covered a first option to purchase, the court construed it against the defendant. It found that Boyer was bound by the engagement, since he had occasion to read it, and chose to disregard its meaning in favor of a representation made by an agent.

Without doubt, this case would have been decided differently if the court had given a realistic flavor to the negotiations and the writing between the parties. Shell would have had to show that the option to purchase clause was meaningfully explained to Boyer (who had a high

* B.S. 1965, Hampton Institute; J.D. 1968, Howard University; L.L.M. 1974, University of Virginia; Associate Professor, Washburn University of Topeka School of Law.

1. Contracts have served us well. As a commercial nation we have used them to validate commercial transactions; and to trace the movement of commodities in expanding markets. At one time, these agreements were the product of hard bargaining. The parties literally sat down and hammered out the rules governing their performance. Lamentably, there is a difference between the contracts we used to make and the ones we make today. Although written agreements continue to carry out their validating and tracing functions, the conditions governing their performance are now prepared by one party and offered to another on a "take it or leave it" basis. *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

2. Slawson, *Standard Form Contracts and the Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1970).

3. 234 Or. 270, 381 P.2d 494 (1963).

school education); and that Boyer gave his assent.[4] The court would have had to consider the relative business competence of the parties; and reminded itself that the writing was prepared by attorneys for Shell and offered to Boyer on a take it or leave it basis.

At present, there is some evidence to suggest that a number of states are ready to accord dignity to the reasonable expectations of people who sign standard form contracts.[5] However, there is little evidence to suggest that state judiciaries are working on a comprehensive strategy to bring this about.

Given that, this article should be treated as a purposeful attempt to prompt meaningful discussion. Today, there are three devices which one can use to rectify legal shortcomings caused by standard form contracts: Section 237 of the Second Restatement of Contracts; Article II of the Uniform Commercial Code; and unconscionability. As an alternative to the above, I would recommend the following: a redefinition of standard forms as something different from contracts; and the enactment of new principles of law covering standard forms to better protect the reasonable expectation of people who sign them.

THE FIRST TWO DEVICES

Restatement section 237 covers standard form contracts.[6] A person is presumed to have adopted a form if he manifests his assent to it, and has reason to believe that the form in question is used to frame conditions governing the performance of similar agreements.[7]

Subsection three permits a party assenting to the form to escape the application of one or more questionable clauses. He must show that the other party to the form had reason to believe that something in the form would prompt the assenting party to withhold his assent.[8]

---

4. *E.g.*, Weaver v. American Oil Co., 257 Ind. 458, 462, 276 N.E.2d 144, 148 (1971). *See* the Appellate Court discussion of this case in 261 N.E. 2d 99 (Ind. App. 1970), noted in *Recent Developments*, 6 IND. L. REV. 108 (1972).

5. New York, for example, has a *plain English* law covering standard form contracts. The 1977 Amendment to the General Obligation Law, Section 5-701, was sponsored by Assemblyman Peter Sullivan. It was introduced in the state Senate by Joseph Pisani.

The Amendment adds new subdivisions b and c to Section 5-701, requiring that each written agreement entered into after 1 June, 1978, for residential leases or for the sale of goods or services for personal, family or household use be:

1. Written in non-technical language and in a clear and coherent manner using words with common and everyday meaning;
2. Appropriately divided and captioned by its various sections.

A creditor, seller or lessor, who fails to comply is made liable to the consumer for actual damages plus $50.00; the total class action penalty (which would appear to refer to the aggregate liability for the statutory $50.00 damages) is limited to $10,000. N.Y. GEN. OBLIG. LAW § 5-701(b)-(c) (McKinney 1978).

6. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1973).

7. *Id.* § 237(1).

8. *Id.* § 237(3).

This subsection quite obviously raises questions of fact. Were there prior negotiations between the parties? Does a clause in the writing clash with a prior oral understanding? Were there prior business dealings between the parties? Is the writing a radical departure from what they have done as businessmen in the past? By community standards, is the clause in question bizarre or oppressive? Is the disputed clause cast in illegible or fine print? Does it eviscerate a non-standard term explicitly agreed to by the parties?

To date, there are no cases citing section 237 as an authority for resolving differences over clauses in standard form contracts. However, there is some case history preceding the adoption of the section. It is useful in varying degrees.[9]

Article II of the Uniform Commercial Code also covers standard forms. Courts have used it on various occasions to bring a form in line with the reasonable expectations of the adhering parties.[10] Generally speaking, contracts are looked upon as engagements in which the parties expect some gain.[11] Where a standard form clashes with that impression of a contract, the form, in light of Article II, is adjusted. *Berg v. Stromme* is an illustration.[12] In that case, a court refused to give effect to a commercially acceptable disclaimer of warranty clause in a form contract. Where a disclaimer of warranty is written into a form contract, said the court, and the evidence suggests that the item to be purchased was discussed by the parties, the disclaimer will be ignored.

Of course, Article II has other uses. Courts have used it to test the resiliency of certain clauses in a form contract. Every seller, for example, has a right to limit the remedies available to a buyer should the seller fail to perform his promises as prescribed by a sales contract.[13] Under Article II, the limited remedy is deemed to have failed of its purpose if the item sold contains numerous defects, and the seller is unable to cure them under the limited remedy.[14]

---

9. RESTATEMENT (SECOND) OF CONTRACTS §§ 131, 137, 140 (Tent. Draft No. 5, 1970).

10. *See, e.g.*, Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974); Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968); *aff'd in part, vacated in part*, 422 F.2d 1205 (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); Earl M. Jorgensen Co. v. Mark Constr. Inc., 56 Hawaii 466, 540 P.2d 978 (1975); Wilson Trading Co. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

11. *See, e.g.*, E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 8, 9 (1970).

12. 79 Wash. 2d 184, 484 P.2d 380 (1971).

13. U.C.C. § 2-719(2).

14. *See, e.g.*, American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976); Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572 (D.D.C. 1974); *rev'd mem.*, 527 F.2d 853 (D.C. Cir. 1975); Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (N.D. Ill. 1970); Adams v. J. I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

THE THIRD DEVICE

Over the years, unconscionability has been used by courts to establish the validity of form contracts. Regrettably, many judicial statements employing this notion are uninforming.[15] *Williams v. Walker-Thomas* is an illustration.[16] In that case, the trial court failed to compile complete data on the purpose of a contract and the market setting. Faced with an incomplete record, the court decided not to venture beyond announcing some vague unconscionability criteria which could be used by a court to evaluate a disputed clause in a contract.

Of course, there are ways to capture the essence of unconscionability. If one thought hard enough, an idea could be assembled a priori. Tested against the cases, a meaningful definition would emerge. Consider the following: Unconscionability is a guide to assist courts confronted with contracts which have gone sour. It is a doctrine in some cases. In others, it is an adjective describing a setting in which the court's moral sense is allowed to operate.

Unconscionability was born in the 18th century and advertised as a moral ethic.[17] Lawyers revived it in the 20th century to bring the consequences of real bargaining in line with industrial reality. In the name of unconscionability, courts have struck clauses in a contract where a party lacked the power to determine the terms of his agreement.[18] Others have ignored objectionable clauses where a party used wizardry to draw attention away from provisions which the other party would not ordinarily accept.[19]

In each case, the legal presupposition was that the parties could bargain. Each theoretically negotiated to achieve a desired end, but did not press their interests at the expense of the other party to the agree-

---

15. Some cases contain incomplete data. *E.g.*, *In Re* Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966); Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc., 3 U.C.C. Rep. Serv. 858 (N.Y. Sup. Ct. 1966). Others discuss unconscionability without making it the stated ground for decision. *E.g.*, Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3rd Cir. 1967); Unico v. Owens, 50 N.J. 101, 232 A.2d 405 (1967); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1968). Still others raise unconscionability as an alternative ground for decision without rigorous analysis. *E.g.*, American Home Improvement v. McIver, 105 N.H. 435, 201 A.2d 886 (1964).

16. 350 F.2d 445 (D.C. Cir. 1965).

17. One of the earliest statements on unconscionability was made by Lord Hardwicke in the famous Case of Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1751).

18. *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). For a similar case deciding the same issue without announcing *unconscionability* as the basis for decision, *see*, Tunkl v. Regents of the Univ. of Cal. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

19. *E.g.*, Avenell v. Westinghouse Electric Corp., 41 Ohio App. 2d 150, 324 N.E. 2d 583 (1974); Grossman Furniture Co. v. Pierre, 119 N.J. Super. 411, 291 A.2d 858 (1972). In a somewhat similar case decided on different grounds a Texas court noted, with apparent approval, that unconscionability is an alternative ground for decision in other states. Bal-Fel, Inc. v. Boyd, 503 S.W.2d 673 (Tex. Civ. App. 1973).

ment. Under this construct, jurists asked: To what extent does an agreement in hand resemble the ideal of a contract? If there is a difference, what amount counts as a reason for calling a contract unconscionable?

The answer to the second question was often difficult to ascertain. It turned on judgments one had to make about the market setting and the acts of the parties.[20] Was a material risk shifted under the contract? Did the ceremony for shifting it mirror the one prescribed by federal or local statutes? Was there genuine assent?

There are other schemes. Dean Speidel has invented one which works well.[21] Some call it the *purposive* manipulation of the burden of proof.[22] Under it, a person claiming unconscionability has to come forward with a prima facie case. That, says the Dean, can be done by producing evidence of a material disparity between the price of a bargain agreed to and a comparable opportunity in the market place.[23] To legitimize a contract, the other party has to come forward with data showing that the price recited is commercially reasonable.[24] Failing that, the result is a finding of unconscionability.

Professor Slawson has invented perhaps the most interesting scheme.[25] He proposes a set of principles to reconcile the interests of a seller in setting the terms of a form contract with the interests of a buyer in having his reasonable expectations fulfilled. If a buyer approves a part of an agreement, says Slawson, that part becomes an authoritative standard against which the other parts must conform. Incompatible parts, and those on which the buyer has not made a comment, fall away from the contract. Courts are free to ignore them—perhaps saying that they are unconscionable clauses in an otherwise conscionable contract—if a seller presses for their enforcement.

Of course, there are many ways of looking at unconscionability. Some discussions begin with a statement about "unfair surprise" and end with the declaration that unconscionability is present each time a contract clause clashes with a federal pronouncement.

Henningsen v. Bloomfield Motors is the best public statement on record about unfair surprise.[26] There the court expressed its concern for

20. *See* Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).
21. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1969).
22. *Id.* at 367.
23. *Id.* at 368.
24. *Id.* at 369.
25. Slawson, *Standard Form Contracts and Democratic Control of Law Making Powers*, 84 HARV. L. REV. 529, 533-56, 565-66 (1971).
26. 32 N.J. 358, 161 A.2d 69 (1960).

the novice consumer in the market place. It asked if he was fully aware of what he was giving up in exchange for what he had decided to buy. Deciding that he was not, the court ruled that he was a party to an unconscionable contract.[27]

Swarb v. Lennox is one of several cases covering clashes between contract clauses and federal pronouncements.[28] Confession of judgment clauses are apparently invalid where one of the parties to a form contract earns less than $10,000 dollars a year.[29] There are admittedly cases to the contrary.[30] If the parties to a dispute have comparable economic strength; and if the clause in question was arranged by them, the law will allow it to take effect. Yet, a number of commentators suggest that a questioned clause highlight the right to be waived.[31] They urge that it be cast in large type, on a separate sheet of paper, and signed by the parties separately.[32] If these requirements are not met, a court could arguably discredit a questioned clause by declaring it unconscionable and invalid.

What are other countries doing with unconscionability? Interesting developments have taken place in England, Germany and Italy. In these countries, legal conventions have been established to protect the reasonable expectations of people who sign form contracts.

The United Kingdom has developed a doctrine called fundamental breach.[33] It directs a court to review the expressed and implied

---

27. *Id.* at 400, 161 A.2d at 92-3. The language of the Court is both enlightened and humane. Other courts have made similar statements. *E.g.*, Architectual Cabinets, Inc. v. Gaster, 291 A.2d 298 (Del. Super. Ct. 1971).

28. 405 U.S. 191, *rehearing denied*, 405 U.S. 1049 (1972).

29. On the other hand, a creditor can hold a debtor to his contract if he intentionally, understandingly and voluntarily agrees to a clause covering a confession of judgment. *Id.* at 199-202.

30. *E.g.*, D. H. Overmeyer v. Frick, 405 U.S. 174 (1972).

31. *See, e.g.*, Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 79 CASE AND COMM. 24 (1974); Krahmer, Clifford, Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23 (1972).

32. If the clause is printed on a separate sheet, it should be phrased as follows:

> If a default occurs under the accompanying contract, the Secured Party may elect to repossess the goods sold under said contract by obtaining a writ of replevin from a court of appropriate jurisdiction which will order you to surrender such goods to the court. In most circumstances, if the Secured Party seeks such a writ, YOU HAVE THE RIGHT TO A HEARING AND DUE NOTICE OF SUCH HEARING BEFORE A WRIT OF REPLEVIN IS ISSUED. BY SIGNING THIS FORM YOU WAIVE ANY AND ALL RIGHTS TO ANY SUCH HEARING.
>
> /s/_____ WITNESS
>
> /s/_____ /s/_____
> DEBTOR

It should be noted that the above would have no legal significance in Oregon. That state has enacted a statute outlawing confession of judgment clauses in all retail installment contracts. OR. REV. STAT. § 83.670(1) (1975).

33. *E.g.*, Yeoman Credit Ltd. v. Apps. [1962] 2 Q.B. 508; Alexander v. Railway Executives. [1951] 2 K.B. 882; Smeaton Hanscomb & Co., Ld. v. Sassoon I. Setty, Son & Co. [1953] 1 W.L.R.

promises between the parties—apart from the exculpation clauses in a form contract—to ascertain its main purpose. If the court finds that the conduct of one party, or the exculpatory provision is inconsistent with the main purpose of the contract, it will ignore the conduct or clause to give effect to what it perceives to be the agreement between the parties.

Karsales (Harrow) Ltd. v. Wallis is an illustration.[34] In that case, two people entered into a contract for the sale of a used car. The agreement contained the following clause: "No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied therein." At trial, the buyer was able to prove a substantial difference between the car he had seen at the car lot and the one the seller delivered to him. For example, the radio and cylinder heads were missing. The engine valves were burned out; and new tires on the car had been replaced with old ones.

In reversing the judgment of the trial court for the seller, Lord Denning said the following:

> Notwithstanding earlier cases which might suggest the contrary it is now settled that exempting clauses . . . no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms . . . which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.[35]

That statement makes *Karsales* the celebrated case on fundamental breach.

Germany has written a provision into its civil code dealing with unconscionability. The text reads as follows:

> (1) A transaction that offends good morals is void.
> (2) Void in particular is a transaction whereby one person with exploitation of the necessity, thoughtlessness or inexperience of another, is promised or acquires, for himself or for a third party, economic advantages whose value exceeds the value of his own performance to such a degree that, under the circumstances, there

---

1468. The doctrine has gone through several stages of development. At first, it was said that every contract has some main obligation. Exemption clauses were construed so as not to detract from this main obligation, or ignored in so far as they did so. By widely construing the main obligation, many exemption clauses were struck down.

Next, the concept was extended to mean that a contracting party who was in fundamental breach lost the protection of *all* of his exemption clauses, including those covering matters other than the alleged fundamental breach. Finally, it was held to cover *any* breach of *any* obligation in a contract which led to serious consequences. Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447. *But see*, Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale. [1967] 1 A.C. 361.

34. [1956] 1 W.L.R. 936.

35. *Id.* at 940-41.

is a striking disproportion between them.[36]

The statute covers a range of contracts, and is responsive to something called *shackling*.[37] Generally, the court must find a striking disproportion in the values exchanged by the parties, and a bargaining handicap in one of them.[38] The hypothetical which follows illustrates how the code provision works.

Frantz entered into an agreement with Ray to operate two retail stores. Frantz, the senior but silent partner, contracted the use of his name plus 40,000 marks to buy two retail stores. Ray, the desperate, poverty stricken junior partner, agreed to repay the 40,000 mark loan in a year; to manage the stores; and to refrain from engaging in a similar business adventure for 15 years. The contract provided that a number of penalties would take effect if Ray defaulted on his promises. Frantz was to have one-half of all profits over 15 years, with a minimum guarantee of 10,000 marks a year. His total liability was limited to 30,000 marks.

Under German law, this contract would be invalid. One party is operating under a bargaining handicap. The other has acquired several promises whose value exceeds the value of his own promised performance. On one hand, Ray, having no foreseeable job prospects, is without a real alternative to the terms of his agreement with Frantz. On the other, Frantz expects an extraordinary gain. He will realize a 110,000 mark profit on a 40,000 mark investment.

Then there is *shackling*. In this case, the contract sharply curtails the control Ray has over his own business life. He cannot pursue a frolic of his own. He is obligated to run several businesses, skillfully, for 15 years, or suffer the application of severe contract penalties.

Italy has a provision in its civil code covering one-sided agreements. The text reads as follows:

> General conditions, prepared by one of the parties, are binding on the other party if known by the latter at the time when the contract was concluded or if he might have known thereof by using ordinary diligence. The following conditions, however, have no effect unless specifically approved in writing:
>
> (1) Conditions limiting the liability of the party who has prepared the general conditions or giving said party a power to withdraw from the contract or to suspend the execution thereof.
>
> (2) Conditions burdening the other party with time limits for the exercise of a right or limitations to such party's power to raise

36. The translation found in the text appears in Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1052 (1976) [hereinafter cited as Dawson].

37. *Id.* at 1073.

38. *Id.* at 1052-53.

defenses, or with restrictions on freedom of contract with third persons, or with tacit extension or renewal of the contract.

(3) Clauses providing for arbitration or derogations from the normal venue or jurisdiction of the courts.[39]

The incorporation of standard conditions will be discussed first.

Under the first paragraph, a seller defending a standard condition must show that a person of ordinary diligence, in the position of the buyer, had or should have had knowledge of the questioned clause. Further, he is required to show that the clause in question was commonly used.[40]

In a thoughtful article, Professor Gorla says the following transactions fall under paragraph one: First, vendee signs a contract with standard conditions. He merely has to read it, although it is long, complicated, and in fine print. Second, vendee signs a contract which refers to standard conditions printed on the bottom or the reverse side of an agreement. Third, vendee signs a form which makes reference to standard conditions not found in the document. Fourth, vendee enters into a contract under circumstances which do not afford him time to read the standard conditions, although the text is before him. In each case, says Gorla, Italian legal authorities hold the vendee to his contract.[41]

As to paragraph two, it need only be mentioned in passing. By its separate treatment of one-sided clauses, it has eliminated confusion which arises when one-sided clauses are added to form contracts. Although one may encourter theoretical criticisms of this paragraph, no reported cases under this subtitle mention them.

A CRITIQUE

The above ideas, indigenous and foreign, clearly evidence a realization that a contract is not simply a signature fixed to a writing, but a genuine understanding reached by a process of bargaining. It gives the state authority to strike or modify a clause in a contract where free choice is absent; where a term to which a party never agreed is invoked; or where a literal reading of the agreement would cast it beyond the original intent of the parties.

Yet that is not enough. Some attention should be given to extending these ideas to the time for contract performance. Where, for example, a gain under a contract undergoes dramatic devaluation, in the interim between formation and performance, the contract should be declared

39. The translation found in the text appears in Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1, 2 (1962) [hereinafter cited as Gorla].

40. *Id.* at 3.

41. *Id.* at 5-7.

unconscionable.[42] No reasonable man would make the resulting agreement in the first instance. No fair man would accept it.

Unconscionability should perhaps be extended to contracts for the rent of money—credit cards and the like.[43] Some will argue that this will dry up credit desparately needed by low income consumers. Others will argue that this will not take place since the rules for extending credit are targeted for wealthy income groups. Of course, tagging the amount of tribute a business can exact will protect those consumers who unscientifically shop for credit. It will undoubtedly limit business profits. Yet it will not change the pool of people to whom credit is profitably extended.

In the final analysis, unconscionability and other concepts should be broadened to cover menacing *acts* and *practices* in the market place.[44] Taking advantage of the inability of a consumer to protect his interest (because of ignorance, illiteracy, or unfamiliarity with English) could be made a tort by statute.[45] Entering into a transaction in which, at the time of the transaction, there is no reasonable possibility of full payment by a consumer could be treated as a tort as well.[46]

Of course, these suggestions presuppose that the average person has the wherewithal to file law suits. Knowing that to be untrue, the question is what machinery can one employ to make these recommendations meaningful judicial remedies. A *state market court* might work. It would have jurisdiction over all cases involving consumer credit and sales contracts. Decisions rendered by this court would be reviewed by the state supreme court.

The market court would implement a two step procedure. The first step would require the parties to submit their differences to mediation. Failing that, a judge would decide the differences between the parties. Of course, the mediation sessions would be conducted without counsel.

---

42. Thanks to the Westinghouse case, this notion has moved to center stage. *Westinghouse Plans to Break Some Pacts on Uranium Deliveries Due to Price Rise*, Wall St. J., September 9, 1975, at 5, col. 2; *Cost to Westinghouse on Uranium Pacts Estimated at 2.5 Billion as Trials Open*, Wall St. J., October 21, 1976, at 2, cols. 3 and 4. Of course we have viewed it under different trappings. Eastern Air Lines Corp. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975), is a recent illustration. If the profit picture of a business is healthy and improving, a dramatic devaluation of its contract expectations—increased costs which turn burdensome and unattractive—will excuse its performance.

43. *See* Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 287, 388-94 (1968); CONSUMER CREDIT IN THE UNITED STATES: REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 220-21, 224-30, 244 (1972).

44. Note, *The Doctrine of Unconscionability: A Sword as Well as a Shield*, 29 BAYLOR L. REV. 309 (1977).

45. *E.g.*, OHIO REV. CODE ANN. § 1345.03(B)(1) (Anderson 1976); KAN. STAT. ANN. § 50-627(b)(1) (1976).

46. *E.g.*, OHIO REV. CODE ANN. § 1345.03(B)(4) (Anderson Supp. 1976); KAN. STAT. ANN. § 50-627(b)(3) (1976).

Court rules would require that all matters subject to mediation, or review by the market court, be pleaded by the parties themselves.

The court would have two officers. In addition to a judge, there would be a master. His principle function would be to promote settlements. More specifically, he would preside over mediation sessions; impose fines upon sellers who refused to submit to them; and prepare records of matters before him that are referred to the market court for judgment.

Vendor-Vendee councils could be established in urban centers. Conceptually, the council would have seven members. Three would be selected by downtown merchants. Three would be elected by urban consumer groups. The seventh person would be selected by the council itself.

This council would meet at least once a week. Its jurisdiction would cover complaints arising out of contracts between buyers and downtown merchants. Its principle function would be to encourage settlements. It would hear complaints and make findings. Council rules would require that all matters reviewed by it be pleaded by the parties themselves. If a party decided not to abide by a council finding, the matter would be reported to participating merchants and consumer groups for action. Failing that, the council would alert public officials responsible for the enforcement of state consumer protection statutes.[47]

Of course, people should be encouraged to pursue traditional remedies. The reward for doing so should be enhanced by the state. Damages could be enlarged to reflect the actual cost of litigation. At present, the common law limits damages to an amount necessary to put a party in a position he would have enjoyed if the promise had been performed.[48] If the cost of litigation consumes half of a damage claim, the state could increase the final damage award by that amount.[49]

The state could modify current damage formulas to accommodate an

47. State Attorney Generals could be urged to enact new rules under their unfair and deceptive trade practices acts. *E.g.*, OR. REV. STAT. § 646.608(1)(s),-(4) (1975). District attorneys could be pressured to enforce them.

New regulations could include the following: a statement that it is unfair and deceptive for a vendor to forego notifying a maker of a note, before it is made, that it will be surrendered to a third party, Certified Building Products, Inc., 82 F.T.C. 217 (1973); that it is unfair and deceptive for a vendor to use a sales agreement with a waiver of defense clause inconspicuously written into it, Architectual Cabinets, Inc. v. Gaster, 291 A.2d 298 (Del. Super. Ct. 1971); and that it is unfair and deceptive for a vendor to forego notifying the vender of the dollar difference between the cash and credit price under a sales contract.

48. *E.g.*, J. CALAMARI & J. PERILLO, CONTRACTS § 14-4 (2d ed. 1977).

49. Professor Slawson has said:

> The victim of a breach of contract is supposedly fully compensated under existing law; and is supposedly as well off as he would have been if his contract had been fully performed. No elaborate discussion is needed to demonstrate how far this supposition is from the truth. Every lawyer knows that legal fees and costs, the difficulties of proof, and the damage doctrine which limits damages to substantially less than those actually incurred, reduces the com-

emotional distress component.[50] When a merchant advertises a product, there is an implied assumption that every purchaser will enjoy its uninterrupted use for a substantial period of time. When that assumption goes unrealized, a court should be free to award damages for the wrong and inconvenience which result. Admittedly, the amount to be awarded to the injured party is uncertain. Yet the injury itself is certain and concrete. Under these circumstances, common sense dictates that it is better to have damages which are approximately accurate than to have none at all. Twenty dollars per day for a loss seems to be a reasonable amount for a court to award.

Finally, the state could amend existing damage formulas to accommodate a punitive damages component.[51] In appropriate cases, a plaintiff would have to show that: (a) the seller had grounds for knowing that what he did was a breach of contract; (b) the seller had grounds for expecting his breach to cause the buyer to suffer an injury for which damages are inadequate; (c) the seller had no *reasonable* grounds for believing that his breach was in the public interest; (d) the buyers recoverable damages are insufficient to deter the breacher, or others like him, from committing the same offense.[52]

The goals pursued by these recommendations are self-evident. In addition to rewarding a person for his own enterprise, steps are being taken to discourage people from engaging in predatory conduct. These recommendations, in part, represent administrative ways to avoid inertia, conservatism and red tape. Frankly, there are times when it is better for one to do for oneself.

THE ALTERNATIVE

Given the above information, what can be critically said about it? Unconscionability has been expounded by a number of people, but no one has dealt with it satisfactorily. Article II has been haltingly applied to recent cases, while section 237 of the Restatement has not been applied at all.

Consequently, it may be appropriate to look at contracting in a new light.[53] Generally, when we buy something, a piece of paper ceremoni-

---

pensation a plaintiff receives in a contracts case . . . . Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 29 (1974) [hereinafter cited as Slawson].
That statement expresses my view on existing contract damages.

50. *Id.* at 37-39.

51. *See* Sullivan, *Punitive Damages in the Law of Contracts: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977). *But see* 5 A. CORBIN, CONTRACTS §§ 1054, 1077 (1960).

52. Slawson, *supra* note 49, at 42.

53. *E.g.*, Leff, *Contract, as Thing*, 19 AM. U. L. REV. 131 (1970) [hereinafter cited as Leff].
The public needs a meaningful statement about form contracts. The following may satisfy that need:

alizes our agreement. The piece of paper may be simple or complex. The question is, what importance should be attached to it? It could be treated as a by-product of a deal to buy goods. When viewed in this light, important decisions can be made about its commercial value.[54] A contract is supposed to increase the quantity and quality of information upon which good buying decisions are made. If a person sustains an injury because a form disguises important information, the form, or a clause in it, denying the injured party compensation should go unenforced.

Under this scheme, unconscionability is treated as a term of art describing the quality of a writing voluntarily made. A plaintiff could establish a lack of quality by showing a difference between a contract in hand and its ideal in the *real* world—*e.g.*, violations of the Uniform Commercial Code or the Consumer Products Warranty Act. Presumably, there would be no limit on the types of form contracts which might be scrutinized in this way. A finding of unconscionability would render a form, or a clause in it, invalid.

As an alternative, we could retain our cherished ideas about classic contracts. Standard forms would be treated as documents which are qualitatively different. We could describe them as deeds to personal property—as the outward manifestation of the rights a party has in something which is the object of a writing.[55] If the form is lengthy or difficult for its owner to read, a court would be free to declare it invalid. A showing that the form was different from the oral exchange between the parties would lead to the same result.

Finally, we could treat verbal exchanges of values between parties as contracts. We could treat standard forms as an objectification of the transaction between the parties. Under this scheme, standard forms

---

> We, the citizens of Oregon, want contracts in which legal remedies are remotely considered by the parties. To that end, some contracts will be negotiated by the parties. Mass produced contracts covering *frequently* used commodities will be dictated by the state—totally or to the extent of a major standardization of terms.

Under this scheme, bargaining would be permitted on basic terms—*e.g.*, type of item to be purchased and the time for performance. The consumer would be at liberty to select different commodities for which the market had set a price. Once the price had been fixed, other conditions would be determined by the state. No agreement would take effect until it had been reviewed by someone. A state official, with the aid of a computer, would ask each party if he understood what he was getting and what he promised to give in exchange. If the parties answered affirmatively, the computer would print out the warranties, credit terms and litigation information should subsequent events require one to file suit. *See* Sweet, *The American Contract System: Today and 2001*, 7 IND. L. REV. 309, 343-44 (1973).

To some this approach is too bizarre to accept. Short of that, there are ways to give definition to form contracts. A statute, for example, could be enacted requiring a party (drafting a form contract) to put the following in bold print: The dollar disparity between the price agreed to under a form contract and the *current* market price assigned to the item to be purchased; every provision covering remedies for breach; any provision covering cross-collateral security.

54. Leff, *supra* note 53, at 144-55.

55. Slawson, *supra* note 49, at 14.

would be valid, if the verbal exchange between the parties was valid. A standard form would be valid, if it informed the adhering party of his rights and remedies. On the other hand, a standard form would be invalid, if it extracted an important value from the adhering party without giving anything of value in exchange.[56]

At this point, many people are unwilling to surrender their right to participate in contract formation. However, some are willing to give the state some power to deal with worrisome provisions in form contracts. The following is a summary of an emerging point of view: A contract is a verbal exchange of values between people or a group; a standard form is evidence of a contract, operative only if the verbal exchange is valid. If I mistakenly confer a value on someone else, I have a right in contract to disgorge him of it. If someone makes a promise upon which I rely, I have a right in contract to recover the damages sustained if the promise goes unrealized. If I choose to treat a negotiated contract and a standard form as functional equivalents, the standard form must be in conformity with federal and state statutes. If a defective product sold to me is the focus of my concern, I have a right in tort to recover damages for the injury I have sustained.

Whatever is done, the following observation should be taken into account. There is data which suggests that consumer frustrations contributed significantly to recent civil disorders.[57] Additionally, such frustrations must disorient Americans who find that our complex world strains their ability to cope. On one hand, we are confronted with an efficiency problem in contract formation. On the other, we face a serious disenchantment with our system for civil justice. Random tinkering with form contracts, pouring old wine into new bottles, can only exascerbate the problem. If allowed to continue, the trust which keeps the economy and the society going will be the worst for it.

Who benefits from schemes like this? It is the ill-informed. If low and middle income consumers are ill-informed, these schemes undoubtedly enure to their benefit.

Generally, consumers are presumed equipped to deal with the business world on an even footing. They are supposed to have the following characteristics:[58]

(1) A desire to shop around for the best buy;

(2) A capacity to decide which product offers the greatest value for the least money;

---

56. *E.g.*, Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

57. *See* REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 274-77 (Bantam ed., 1968).

58. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 748 (1967). *See generally*, Shapo, *Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1302-17 (1974) [hereinafter cited as Shapo].

(3) A familiarity with one's legal rights, and a strength of will to use them in post sale conflicts.

Sadly, none of the traits are possessed in great abundance by low income consumers. A number of studies suggest that they lack the knowledge and ability to efficiently compare values presented to them by the business constabulary.[59] There is additional evidence to suggest that they lack an understanding of our justice system and their rights under form contracts.[60]

The middle income profile differs little.[61] They generally lack an understanding of their contracts. The rare exception who takes time to unravel his agreement almost never finds himself dealing with people who have the power to change it. If he decides to visit other businesses which offer similar products, he finds himself confronted with the same form. He knows that anything he signs is likely to be against his best interests. Nevertheless, he will sign the form and hope for the best.

Indiana courts have tried to do something about this problem. *Weaver v. American Oil*,[62] a form contract case, is an illustration of what can be done. Howard Weaver, a 40-year old gas station attendant, with 18 months of high school education, learned that the American Oil Company had a filling station for rent. Weaver told an agent for the oil company that he had worked in several filling stations, and that he was prepared to assume financial responsibilities envisaged under the lease. Subsequent to that discussion, American Oil agreed to rent its gas station to Weaver. After inventorying the products he would have to promote, the oil company agent took a form lease from his pocket, laid it on the table, and said "sign." This was the only conversation between the parties. At no time did the agent call attention to important provisions in the lease. Weaver signed the document without reading it.

Sometime later, an American Oil employee came to the gas station to repair the gas pumps. During his post repair demonstration, he sprayed gas over Weaver and one of his employees. The gas ignited, burning both of them. Thereafter, Weaver filed a law suit against the oil company and its employee to recover damages for personal injuries. The oil company commenced its own action, claiming that the contract between the parties barred Weaver from recovering damages from the oil company. It asked the trial court to examine the exculpatory clause

59. *E.g.*, Note, *Consumer Legislation and the Poor*, *supra* note 58, at 749-50.

60. *Id.* at 53. *See* Jones & Boyer, *Improving the Quality of Justice in Our Market Place: A Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 359-60 (1972).

61. Sweet, *The American Contract System: Today and 2001*, 7 IND. L. REV. 309, 329-30 (1973). The text that follows is a condensation of his comments. *See generally* Shapo, *supra* note 58.

62. 257 Ind. 458, 276 N.E.2d 144 (1971).

in the lease, and asked the court to declare that the clause exonerated the oil company of all responsibility for personal injury.

The trial court considered evidence covering the educational and business background of Weaver, and the size and structure of American Oil. It considered data covering the way in which the lease was presented to Weaver and signed by him. While noting that the provisions in question imposed greater liability on Weaver than the dollar value he derived under the lease, it concluded that the provision in question was binding. Weaver could not recover damages from American Oil.

On appeal the state supreme court reversed the trial court. It said that the exculpatory clause was adhesive. After sketching the usual adhesion contract background, the court announced that it was also unconscionable.[63] No sensible man, it said, would make such an agreement. To be enforceable, a clause like the one in question had to be known by the adhering party and willingly accepted by him.[64]

THE HYPOTHETICAL

What we have said should be put to a test. The following hypothetical should tell us which of the aforementioned schemes works.

On an unimportant day, an advertisement appeared in an Oregon newspaper:

> Unprecedented Carpet Value. September Clearance Sale. Nationally Advertised Broadloom Rugs. 100% nylon at 60% off. No Gimmicks. No Extras. Buy six areas of wall to wall carpeting for $150. Call National Carpets, Inc. 345-8007.

Tom Workman read it. Although his budget did not allow for the purchase of a new carpet, he felt that it would not hurt him to talk to a local sales representative.

At his home, the salesman told him about a new promotional scheme. Under it, Tom could earn $25 on each person who bought carpeting from National Carpet after being referred by him. The plan would allow Tom to pay for carpet and make additional money at the same time. The salesman told him to purchase quality carpets selling for a reduced price in place of the inferior carpeting advertised by his company. Since the carpet was to be used for a referral purpose, the salesman advised him that the better carpeting could be purchased at cost plus a thirty dollar installation fee.

Since the commissions were going to cover his costs, the terms of the contract were presented to Tom as formalities. In the interim between the time when the contract was presented and later signed, the sales-

63. *Id.* at 461-62, 276 N.E.2d at 146.
64. *Id.* at 463-65, 276 N.E.2d at 147-48.

man promised to install the carpet the next day. He insisted that nothing need be paid at the time of signing, excluding a $10 fee to cover the cost of a credit check and the preparation of the agreement. Tom signed a blank contract. Thereafter the salesman advised him that his company would insert the details upon which they had agreed.

Several days later, Tom received a letter from the Friendly Finance Company. The text of that letter read as follows:

> In view of your credit rating and fine character references, the Friendly Finance Company has agreed to finance your recent purchase of a carpet. In order to better serve you, we would appreciate your acknowledgement of the statement below and respectfully request that you return it to us.
>
> * * * *
>
> I understand that I have signed an instrument in which I promise to pay $12.20 per month for 36 months. First payment due on 1 October 1978.

The terms were correct, although they did not take into account future commissions Tom would earn. Tom signed the statement and mailed it to the finance company. He never received a copy of his contract with National Carpet. After the carpet company serviceman installed his purchase, he discovered that the carpet was frayed.

The following day, Tom tried to reach his salesman at National Carpet. The company told him that the gentleman no longer worked for them, and that a new salesman would be out for a visit. Receiving no visit, Tom took time away from work and went to the company. His visit was futile. No one would see him until the following week.

Since it was impossible to earn referral commissions until the carpet was repaired, Tom thought it was justified for him to withhold his first installment payment. When it was past due, the finance company sent him a polite letter requesting payment. It advised him that stronger measures would be taken in the future if the payment was not forthcoming. Again Tom visited with the carpet company. This time it denied responsibility for the damaged carpet. The company told him that it would not make repairs despite pictures showing the condition of the carpet.

By this time the second payment was due. When Tom went to the finance company for assistance, he was told that he had to make his payments. When he balked at this order, the company showed him the paper he had signed. The fourth paragraph read:

> The Friendly Finance Company cannot accept responsibility for your purchase, and offers no guarantee that the representation made to you by the seller of the purchased item is correct. We are a financing institution only. Our only commodity is money.

Tom had glanced at these terms, but did not expect that he would have

to pay the finance company if the carpet he received was defective. What result?

As a rule, a valid contract is one which conforms with a federal pronouncement. The Federal Trade Commission requires a door-to-door salesman to surrender a completed sales contract to buyers of his wares.[65] In this case, the writing is out of conformity with a federal pronouncement. Tom signed a blank contract. He never received a completed copy of the engagement with National Carpet. This contract is invalid.

The contract with National Carpet is also out of conformity with a state statute. Absent a disclaimer, implied warranties of merchantability spring from sales agreements. If the carpet company is a merchant, as defined by section 2-104(1) of the Uniform Commercial Code, it is required to convey goods which are fit for their ordinary purpose.[66] Of course, a fit carpet is one which is not frayed. Since Tom does not presently have such a carpet, it is reasonable to surmise a breach of an implied warranty.

Tom can rescind this agreement. If the item he purchases was unfit for its ordinary purpose, and if it was accepted on the unrealized assumption that the defect would be corrected, state law permits him to renounce his contract.[67] Since all of these conditions have been met, Tom is free to renounce this engagement.

There is also a question of unconscionability. Generally, a qualitative flaw in a writing is deemed to exist where differences are shown between a contract in hand and its ideal in the real world. In this case, there are differences if we count the violations of federal and state statutes. These differences are dramatic. They merit the judgment that the contract in hand is unconscionable and invalid.[68] The main purpose of this agreement was to convey a good carpet for a fair price. If the carpet the company conveyed was defective, its contract with Tom should be declared inoperative.

What about Friendly Finance? This discussion covering the differences between Tom and the carpet company may be of little value in resolving the difference Tom has with the finance company. People are

---

65. 16 C.F.R. § 429.1(a) (1974).

66. OR. REV. STAT. §§ 72.3140(1),-.3140(2)(c) (1975). This contract may be invalidated on another state ground. The Oregon Home Solicitation statute requires a door-to-door salesman to incorporate a *buyers right to cancel clause* in all its contracts. Through an agent, National Carpet is acting as salesman. If it has failed to comply with this law, Tom is free to cancel the agreement. OR. REV. STAT. § 83.730 (1975).

67. OR. REV. STAT. § 72.6080 (1975).

68. This problem could be cast in a different light. Section 237 of the Second Restatement of Contracts could be employed by someone. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1973).

bound by the contracts they make. If Tom signed a contract with Friendly Finance covering a loan of money, he is bound by it.

On occasion, courts will ignore this principle where the data suggests that a party will not have his contract expectations fulfilled. In Oregon, for example, money lenders are subject to the claims and defenses of their borrowers.[69] If a vendor prepares a sales contract and conveys it to a money lender, who later uses it in connection with a loan, the money lender is subject to the same defenses which his borrower could have brought against the vendor. In this case, National Carpet is a vendor and Friendly Finance is a money lender. In every other respect, the rule corresponds with the facts. Tom is seemingly free to raise defenses against Friendly Finance he could have raised against National Carpet.

CONCLUSION

We are faced with an historic choice in contracts. We can lump together standard forms and classic contracts, or we can treat the former differently. The ideas offered in this paper are useful if we make the second choice. They encourage the judiciary to approve of standard forms when compatible with federal and state pronouncements. They recommend that a court pass on the validity of standard forms that are readable, and that resemble the oral exchange between the parties.

A support system for these ideas has been urged. We are asked to change damage formulas to better compensate persons who pursue a private remedy; establish a vendor-vendee counsel; and utilize a special court to settle differences between consumers and merchants.

Some people will certainly consider these ideas too progressive.[70] They will suggest that the courts are ill-equipped to implement these

69. OR. REV. STAT. §§ 83.850(3)(e), .860 (1975).

70. With a few exceptions, no state has the right to tell a person of ripe years how to make a contract. *See generally*, Calamari, *Duty to Read—A Changing Concept*, 43 FORD. L. REV. 341, 342 (1974). Yet it is plausible that a person might agree that others should force him to act in certain ways. Let us assume we know a person who is unfamiliar with the English language. He is aware that he risks injury if he makes a contract in English. Nevertheless, he decides that the inconvenience attached to making a contract in his native language outweighs the danger to himself. In that case, I am inclined to think that such weighing is irrational. I am inclined to think that a rational man similarly situated would join with others in the adoption of ideas which would protect such a person against himself.

The United States is changing. The great shift in population has not been without attending social consequences. Note, *Infant Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law*, 41 IND. L. J. 140, 144-49 (1965). Whereas rural dwellers could gain contracting experience at an early age (by helping relatives with the management of the family farm), urban dwellers arguably acquire little of this. Under these circumstances, the *new* ideas covering contract formation are appropriate. After all, bargaining is supposed to be at the heart of meaningful agreements. If real bargaining is not taking place, the application of these ideas might encourage it or bring about contracts with traits as if bargaining had taken place.

thoughts; or that the political climate is not such that a state legislature will entertain them: "There are other matters commanding their attention. They have a higher priority. These ideas mean *more* government."

The critics may have a point. The social distance between current events in the market place and the business experience of judges and legislators suggest that they, at the very least, are today less equipped than ever to implement these thoughts.

The solution is to appoint people to the bench and the legislature who are familiar with modern contract formation. These appointees would hopefully invent new rules to capture the reality of making contracts. If elected to their posts, the voters would have an opportunity to comment on their performance.

Of course, the states can decide to do nothing by tabling these ideas. In that event, it is important to consider the relevant social costs and benefits (and decide whether we are willing to absorb them). On the cost side, consumers will *lose* their right to meaningfully participate in the formation and incorporation of meaningful provisions in consumer contracts. Over time, commercial institutions will gain complete control over this, and will, by implication, invert the *value* of contract over goods and services. On the benefit side, these same institutions will become more proficient in the movement of goods and services. Credit will be made available to an increasing number of people. The added cost built into the price for goods and services by market forces will hopefully be kept at an absolute minimum.

History reveals that civilization takes begrudging and stumbling steps forward. Suggestions for change are often greeted with suspicion and negative reaction. Yet there are times, like the present, when we *must* change. The rules of the quiet past are simply too cumbersome to deal with the complexities of a stormy contract future. Thankfully, some states have not had time to develop deep contractual traditions, nor time to react negatively to novel ideas. That may be fortuitous. It gives each an opportunity to consider ideas like the above for what they are—delicate, fragile and immensely valuable pathways to the future.