

Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts

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I. INTRODUCTION

People who sign standard form contracts¹ rarely read them.² Counsel for one party (or one industry) generally prepare standard form contracts for repetitive use in consecutive transactions.³ The party who has

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1. Friedrich Kessler, in a pioneering work on contracts of adhesion, described the origins of standard form contracts: “The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract. A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service” Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 628, 631–32 (1943).

2. Professor Woodward offers an excellent explanation:

Real assent to any given term in a form contract, including a merger clause, depends on how “rational” it is for the non-drafter (consumer and non-consumer alike) to attempt to understand what is in the form. This, in turn, is primarily a function of two observable facts: (1) the complexity and obscurity of the term in question and (2) the size of the underlying transaction. The vendee’s perception of the effort to be expended in securing alternatives to the terms in the form is also important in a recipient’s decisions (1) whether to read the form in the first instance and (2) whether to seek alternatives either through negotiation with the vendor or through a search for alternative vendors. The commonly held idea that a business vendee that accepts the goods has assented to the entire form because she could have foregone the purchase (and, by making the purchase, took the risk of whatever happened to be in the form) does not hold up analytically. A single transaction can carry only a given investment in understanding it, however sophisticated, wealthy, or powerful the non-drafter. The more complex or obscure the term, the greater the effort (in the form of reading, puzzling, or legal research) required to understand it; the smaller the transaction, the less such effort the contract can support.

William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 989 (2001).

3. Kessler, *supra* note 1, at 632.

the greater bargaining power usually writes the standard form contract and often presents it for signature on a “take it or leave it” basis.⁴ Both contracting parties usually perform and are satisfied by standard form contracts in the vast majority of transactions.⁵ Performance in some contracts may break down, but the parties are able to come to an amicable resolution of the problem.⁶ Other broken deals go to arbitration, leaving no precedent behind because the results are unreported.⁷ Still other cases are litigated and either settle or go to judgment; in either event, those results are also unreported.⁸ After all of these cases are subtracted, only the reported cases remain. In the reported cases, litigation usually begins after a problem with contract performance arises and one party sues to compel the other to abide by one or more of the contract terms. At this point, the defendant may deny that the term is part of the parties’ agreement. Alternatively, the defendant may argue that even if the term is part of the agreement, the court should not enforce it.

Scholars have suggested a variety of approaches to analyzing the enforceability of terms in standard form contracts since people first began to use them.⁹ These approaches either accept or reject the traditional approach to analyzing all contracts, which relies largely on the

4. See discussion *infra* Part III.A. When the buyer is sophisticated enough to have its own standard forms, the result is usually a bargaining situation in which the parties’ bargaining power is more equal. Of course, it is also possible to have a large powerful buyer, such as a company like the Boeing Corporation or Microsoft, impose its will in contract situations with small “mom and pop” vendors. Although not all standard form contracts are contracts of adhesion, for convenience, this Article refers to the party with the standard form as the “form drafter,” and the party who signs the form as the “adhering party.”

5. See, e.g., Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (assembling and analyzing data to demonstrate that only a small portion of troubles and injuries become disputes; only a small portion of these become lawsuits, and of those that do, the vast majority are abandoned, settled, or routinely processed without full-blown adjudication).

6. See generally Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006) (providing comprehensive discussion over dispute resolution with regards to standard form contracts).

7. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 780–85 (2001) (discussing the problems for contract doctrine of losing contract cases to arbitration).

8. See Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 442–45 (1992) (discussing cases ending before reaching a judgment in litigation).

9. Professor Meyerson traced the first use of standard form contracts to use in connection with marine insurance in the latter half of the eighteenth century. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1264 (1993).

objective theory of assent and a corresponding “duty to read.”¹⁰ The traditional approach usually leads to enforcement of the disputed terms.¹¹ Many contract scholars rationalize and support the enforceability of standard form contracts.¹² Others attack the enforceability of standard form contracts.¹³

Much scholarship questioning the enforcement of standard form contract terms offers interesting insights into possible approaches a court can take in analyzing the issue, but the literature largely fails to examine what courts actually do in these cases.¹⁴ This Article identifies the gap between what scholars are saying about standard form contracts and what courts are doing about them. It notes that courts have not accepted the scholarship that urges a nontraditional approach to analyzing assent.¹⁵ Rather—with but a few exceptions—what has emerged is a case-by-case unconscionability analysis in which courts focus narrowly on particular terms and conditions in standard form contract cases, and refuse to enforce only a limited number of provisions in a limited number of cases.¹⁶

Most courts continue to assert that mutual assent is necessary for contract formation.¹⁷ These courts require some outward manifestation of assent, usually a form of oral or written communication.¹⁸ Courts almost always find the requisite outward manifestation of assent based on the act of signing a standard form contract.¹⁹ In cases in which the contracting parties have unequal bargaining power, courts refuse to enforce standard form contract terms only when the court concludes that both substantive and procedural unconscionability were present when the

10. See discussion *infra* Part II.A.

11. See discussion *infra* Part II.A.

12. See discussion *infra* Part II.A–B.

13. See discussion *infra* Part III.C–E.

14. See discussion *infra* Part III.C–E.

15. A recent study concludes that courts generally ignore contracts scholarship. Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 107–18 (2004). See also Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 17, 2007, at A8.

16. See discussion *infra* Part II.B.

17. See *Schaer v. Webster County*, 644 N.W.2d 327, 338 (Iowa 2002) (citing *Heartland Express, Inc. v. Terry*, 631 N.W.2d 260, 268 (Iowa 2001)) (“For a contract to be valid, the parties must express mutual assent to the terms of the contract.”); *Magnusson Agency v. Pub. Entity Nat’l Co.-Midwest*, 560 N.W.2d 20, 26 (Iowa 1997); 17 C.J.S. *Contracts* § 37 (1999); E. ALLAN FARNSWORTH, *CONTRACTS* § 3.1 (4th ed. 2004).

18. “Mutual assent is based on objective evidence, not the hidden intent of the parties.” *Schaer*, 644 N.W.2d at 338; see also FARNSWORTH, *supra* note 17, § 3.6.

19. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960).

parties signed the contract.²⁰ Most contracts between parties with relatively equal bargaining power are enforced.²¹

Courts seem to enforce most terms in standard form contracts because of judges' underlying belief in the importance of such contracts in commerce. Scholars who support a unitary theory of contract analysis²² bolster the judicial inclination to enforce such terms.²³ If courts analyze standard form contracts in the same way that they analyze contracts negotiated by parties with equal bargaining power, then courts will continue to find the requisite assent, and unconscionability or other broadly-stated "public policy" concerns will continue to be the only basis for excluding challenged terms.

This Article suggests that an unconscionability analysis is an unsatisfactory approach for courts to follow when they determine whether to enforce standard form contract terms. The unconscionability approach requires individual contracting parties to raise the defense and prevail in litigation. However, parties who lack bargaining power will generally also lack the knowledge that they have a legal challenge to the enforcement of terms, and the financial means to litigate. Furthermore, an unconscionability approach requires the challenging party to meet the extremely high burden of showing a serious defect in the bargaining process, in the substance of the challenged term, or in both.²⁴ Most plaintiffs will have a hard time making the necessary showing.

Courts should adopt an assent-based analysis for determining whether to enforce disputed standard form contract terms because such an analysis is superior to an unconscionability analysis. As many scholars and some courts have recognized, it is a fiction to characterize what occurs in the formation stage of a standard form contract as a party's assent to all contract terms.²⁵ Rather than continuing to perpetuate that fiction, courts should separately analyze a party's assent to particular unbargained-for contract terms in standard form contracts and that party's assent to undertaking a contractual obligation.

20. See discussion *infra* Part II.B.

21. Jane A. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SMU L. REV. 1065 (1986).

22. By "a unitary theory," I refer to a theory that attempts to explain and encompass all issues that may arise in connection with contracts, whether they are standard form contracts used between a retail store and its consumer customer or complex carefully negotiated contracts reached between two multi-national corporations after substantial bargaining.

23. See discussion *infra* Part III.D.

24. See discussion *infra* Part II.B.

25. One of the first scholars to articulate this distinction was Karl Llewellyn. See LLEWELLYN, *supra* note 19, at 370.

Courts should determine the enforceability of certain unbargained-for terms based on a concept I call “knowing assent.”²⁶ Knowing assent means more than signing on the dotted line. Knowing assent requires the following: (1) that the unbargained-for term be conspicuous;²⁷ (2) that the importance of that term be explained so that the adhering party understands its significance; and (3) that the adhering party objectively manifests its assent to that term separately from its manifestation of assent to undertaking a contractual obligation.²⁸ Courts would impose the knowing assent requirement on contract provisions that unduly favor the form drafter or deprive the adhering party of a right or remedy that would otherwise be available to the adhering party in the absence of such a contract term or clause.²⁹ The knowing assent analysis is preferable because it would recognize the reality of the situation leading to the formation of a standard form contract.³⁰ An assent-based analysis would shift the burden from the adhering party to the form drafter by requiring the drafter to show that the adhering party knew the terms in the contract and knowingly agreed to those terms. Unlike unconscionability, a knowing assent analysis would not require a showing of extreme unfairness before a court could refuse to enforce a particular contract term.³¹

The seven parts of this Article reflect why an assent-based analysis is preferable to an unconscionability analysis. Part II describes the outer

26. A reference to “knowing assent” or “knowing consent” is certainly not new. See *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 351 (Cal. Ct. App. 1972) (court referred to the principle of “knowing consent” to contract terms); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752–54 (1982) (“much of the scholarly literature and case law concerning unconscionability has emphasized the element of unfair surprise, in which a major underpinning of the bargain principle—*knowing assent*—is absent by hypothesis”) (emphasis added).

27. The Uniform Commercial Code states that a term or clause is “conspicuous” when it is so written that a reasonable person against whom it is to operate ought to have noticed it. U.C.C. § 1-201(10) (1977).

28. The Uniform Commercial Code has used the analogous concept of “separate signing” in connection with the making of a firm offer. Under section 2-205, if the offeror uses a form provided by the offeree, the “term of assurance” that makes the offer irrevocable must be “separately signed” by the offeree. Official Comment 4 explains that “protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror’s attention and he separately authenticates it, he will be bound” U.C.C. § 2-205 cmt. 4 (2003).

29. Such terms include, among others, exculpatory provisions, one-sided arbitration provisions, and remedy limitations. See discussion *infra* Part V, noting some of these types of terms.

30. That reality is that the adhering party does not bargain over terms in standard form contracts. See Woodward, *supra* note 2, at 973 (observing, “the ‘real world’ of sales tends to be dominated by form contracts, rather than contracts that are actually negotiated.”); Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 ST. LOUIS U. L.J. 909 (2000).

31. For a discussion of the requisite showing for a finding of unconscionability, see discussion *infra* Part II.B.

limits of courts' enforcement of standard form contract terms under traditional contract assent and unconscionability analyses. Part III reviews the scholarly literature that introduces and explains the variety of theories regarding enforceability of standard form contract terms. As will be shown, almost every scholarly theory supports enforcement of most standard form contract terms, leaving unconscionability as the main ground for attacking the enforceability of particular terms. Part IV describes some legislative and quasi-legislative attempts to formulate new approaches courts could take in analyzing the enforceability of standard form contract terms. Part IV reveals that legislatures have rarely intervened in this area of law by enacting new laws and that the battle over enforcement of standard form contract terms likely will continue to wage in the courts. Nevertheless, some of the proposed legislation offers a possible model of a knowing assent analysis that courts could follow.

Part V addresses the problems with standard form contracts, and discusses what the courts are doing about them. Specifically, Part V discusses selected standard form contract terms that parties repeatedly litigate. It includes a discussion of illustrative cases that demonstrate that courts rarely strike terms based on unconscionability and that support the need for a knowing assent analysis. Part VI looks at the relatively few instances where courts have used an assent-based analysis to excise standard form contract terms. Part VI demonstrates how other courts can, and when they should, adopt a knowing assent analysis. Finally, Part VII makes the case for a knowing assent analysis.

II. THE ENFORCEMENT OF STANDARD FORM CONTRACT TERMS UNDER TRADITIONAL CONTRACT ASSENT AND UNCONSCIONABILITY ANALYSES

Traditional judicial analysis of standard form contract term enforceability is based primarily on two important concepts: assent and unconscionability.³² An understanding of the deeply entrenched doctrine in these two areas is key to understanding the special challenges raised in the context of standard form contracts and the need for a knowing assent analysis.

32. With apologies to John J.A. Burke, I use the phrase "traditional judicial analysis" or "traditional contract law" to refer to the doctrine commonly used by courts to analyze contract disputes, as represented in large part in the Restatement (Second) of Contracts. In relevant part, Burke provides, "[i]n 1931, Karl Llewellyn clarified that there is no monolithic system of 'traditional contract law . . . However, the truth of that statement has neither stopped nor even slowed down scholars from using the term 'traditional contract law' as shorthand for the standard rules taught in law school about contracts." John J.A. Burke, *Reinventing Contract*, 10 MURDOCH U. ELEC. J.L. 2, n.28 (2003), available at http://www.murdoch.edu.au/elaw/issues/v10n2/burke102_notes.html (citations omitted).

A. Assent

A contract may be loosely defined as a voluntary agreement that the law will enforce.³³ The parties' assent to be contractually bound must be manifested objectively; their subjective intent is irrelevant.³⁴ Traditional contract assent analysis is based on the paradigm of two parties with relatively equal bargaining power who, through a bargaining process, "carve out" particular contract terms to serve their respective self-interests.³⁵

Mutual assent to a contract is generally found in the process of offer and acceptance.³⁶ Both offer and acceptance are defined in terms of an outward manifestation of intent to be bound.³⁷ Before a party's communication constitutes an offer, most of the proposed contract terms must be incorporated into that communication.³⁸ If a communication lacks sufficient detail, a court will conclude that the "offeror" is merely in the process of negotiating and has not yet reached a stage of specificity that warrants classifying the communication as an offer.³⁹ Under the traditional analysis, enforceable contracts require a great deal of specificity.⁴⁰ Even after an offeror communicates an offer to the offeree, the offeree's acceptance must "mirror" the offer before a court will find mutual assent to the bargain.⁴¹

33. The Restatement provides, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . ." RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

34. Meyerson, *supra* note 9, at 1266–67.

35. Robert Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 454 (2002) ("Courts recognize that standard-form transactions do not involve the required 'bargain' of classical contract law."). See also Edward A. Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972). For an in-depth discussion of classical contract assumptions, see Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-AM. L. REV. 255 (1986).

36. See, e.g., FARNSWORTH, *supra* note 17, § 3.3.

37. RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 50 (1981).

38. This is commonly referred to as a requirement of "definiteness." See, e.g., FARNSWORTH, *supra* note 17, § 3.10 (discussing what constitutes an offer); §§ 3.27–3.30 (explaining that the requirement of definiteness is implicit in the premise that contract law protects the promisee's expectation interest because a court must determine the scope of that promise with some precision).

39. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

40. Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641 n.1 (2003) (citing Joseph Martin, Jr., *Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 543 (N.Y. 1981)); *Varney v. Ditmars*, 111 N.E. 822, 824 (N.Y. 1916); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932); 1 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 37–49 (Walter H. E. Jaeger ed., 3d ed. 1957).

41. See FARNSWORTH, *supra* note 17, § 3.13; John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 745 (1982). This

As a corollary to finding assent to contract formation, traditional contract doctrine imposes on the parties a “duty to read.”⁴² Accordingly, if a party objectively manifests assent to be bound to a contract (for example, by signing a written contract document), a court will almost automatically find assent to all terms contained in the writing.⁴³ Courts meet parties’ excuses such as, “I didn’t read it” or “I didn’t understand it” with little sympathy, except in cases where more important policies are expressed in the traditional contract defenses.⁴⁴

Once the parties have manifested assent to a bargain by entering into a written standard form contract, their performance obligations are defined by the terms of that contract. Accordingly, when disputes arise with respect to performance, the court’s starting point for determining liability for non-performance is to analyze the terms of the contract.⁴⁵ Any discussion of contract terms generally is either a question of integration⁴⁶ or interpretation.⁴⁷

When a court analyzes integration—whether a particular term that is not contained in the written contract is part of the parties’ agreement—it must determine whether the parties intended the written contract to embody their entire agreement. However, when a court finds intent based on a signature on a standard form contract, the court ignores the likelihood that the adhering party thought promises made before she signed the writing remained part of the agreement.⁴⁸

rule is not reflected in the Restatement (Second) of Contracts, which reflects the UCC’s approach to acceptances that vary the terms of the offer. RESTATEMENT (SECOND) OF CONTRACTS § 61 (1981).

42. See John D. Calamari, *Duty to Read: A Changing Concept*, 43 FORDHAM L. REV. 341 (1974) (discussing the traditional contract rule that parties have a duty to read contracts).

43. *Id.*

44. *Id.* Justice Holmes explained the objective theory of contracts succinctly: “[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897); see also *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (“It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would [be worthless.]”).

45. If a party raises an enforceability issue, it is usually raised before performance has begun in the context of defending against enforcement of the entire contract based on traditional contract defenses.

46. For example, is the entire agreement of the parties embodied in the writing, or did they agree to something else not reflected in the writing?

47. For example, what did the parties intend by the words they used (what do the words in the contract mean?)

48. An exception is made in the case of fraud. Some courts, and the Restatement (Second), take the position that if a party misrepresents the terms of a writing and the other party relies on the misrepresentation and signs the document without reading it, the adhering party is not bound by the

A court's discussion of integration is usually part of a parol evidence rule analysis.⁴⁹ Historically, the parol evidence rule operated to exclude evidence extrinsic to an integrated writing. It is more than a rule of evidence because, by operating to exclude or admit evidence, it operates to include or exclude contract terms that do not appear in a written contract document.⁵⁰

A common understanding under the parol evidence rule is that a court will exclude evidence of prior or contemporaneous extrinsic agreements if the parties enter into a completely integrated written agreement.⁵¹ However, different jurisdictions follow different rules for determining whether an agreement is "completely integrated," so as to exclude all evidence of prior or contemporaneous agreements not embodied in the writing. Attorneys who draft standard form contracts generally include a provision, commonly referred to as an "integration" or "merger" clause, which is intended to support an interpretation of the writing as completely integrated.⁵² These clauses are often contained in the "boilerplate"⁵³ at the end of the document. "A merger clause

terms of the writing. Calamari, *supra* note 42, at 345; RESTATEMENT (SECOND) OF CONTRACTS, § 21 (1981).

49. The parol evidence rule evolved based on the assumption that when parties adopt a written document as the embodiment of their contract, it is reasonable to assume that they have incorporated all of the terms of their agreement in the writing. Accordingly, the parol evidence rule was initially developed to exclude evidence of agreements extrinsic to (outside of) the writing. Because contract law seeks to enforce the voluntary agreements of the parties, an important element of any parol evidence rule analysis is determining whether the parties intended the written document to be the full, final, complete, and exclusive expression of their agreement. This determination is often framed in terms of whether the writing is partially or completely "integrated."

50. Peter Linzer, *Symposium: A Tribute to Professor Joseph M. Perillo: The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 *FORDHAM L. REV.* 799, 802 (2002); Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 *MONT. L. REV.* 93, 96 (1994). An exhaustive discussion of the parol evidence rule is beyond the scope of this article. Some excellent discussions include the following sources: Richard F. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 *DUKE L.J.* 881 (1970); James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule*, 84 *OR. L. REV.* 369 (2005); Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 *CORNELL L. REV.* 1036, 1049-51 (1968); Burnham, *supra* note 50; and John E. Murray, *The Parol Evidence Rule: A Clarification*, 4 *DUQ. L. REV.* 337 (1965).

51. Burnham, *supra* note 50, at 97.

52. See discussion *infra* Part V.D.

53. Boilerplate has been described as "the building blocks of standard-form, nonnegotiated contracts." Omri Ben-Shahar, "Boilerplate": *Foundations of Market Contracts Symposium Foreword*, 104 *MICH. L. REV.* 821, 821 (2006). The word "boilerplate" has two senses, one wider and one narrower. The broad "boilerplate" refers to any standardized term in a contract. But the word can also be used to refer to provisions that typically are found at the end of a contract and deal with recurring matters like assignment and delegation, successors and assigns, third-party beneficiaries, governing law and forum selection, waiver of jury trial, arbitration, remedies, indemnities, force majeure, transaction costs, confidentiality, announcements and notices, amendment and waiver,

provides that the written contract constitutes the entire agreement between the parties and that any prior or contemporaneous agreements are not considered part of the parties' agreement."⁵⁴ When a merger clause is a term in a standard form contract, it may operate to exclude evidence of oral representations and prior agreements. As a result, an unsophisticated buyer of goods may enter into a contract relying on promises and representations made by the seller. When a dispute arises later, and the buyer bases a claim on those promises and representations, the buyer may find that a court will not enforce them because of a merger clause in the contract of which the buyer was unaware.

After a court determines which agreements are included in the parties' contract, the court must fully understand the parties' obligations by interpreting the meaning of particular contract terms.⁵⁵ The court resolves interpretation issues by using an objective standard.⁵⁶ Thus, if judicial enforcement of a contract becomes necessary, the court determines what meaning a reasonable person would impute to the parties' objective manifestations of agreement.⁵⁷

severability, merger, and captions. Henry E. Smith, *Modularity in Contracts: Boilerplate in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1191 (2006) (citing TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE*, vii–xxii, 5 (ALM Publishing 2003)).

54. Sample merger clauses include the following:

1. Entire Agreement – This Agreement, including the documents and the instruments referred to herein, constitutes the entire agreement between the parties relating to its subject matter and supersedes all prior or contemporaneous negotiations or agreements, whether oral or written, relating to the subject matter hereof. Any amendment or change in this Agreement shall not be valid unless made in writing and signed by both parties.
2. Entire Agreement – This Agreement contains the entire Agreement of the parties hereto with respect to the subject matter hereof and may not be amended except by a written instrument duly executed and delivered by each party.
3. Entire Agreement – This Agreement, and the documents or instruments referred to herein, embodies the entire agreement and the understanding of the parties hereto in respect of the subject matter contained herein. The parties have not relied upon any promises, representations, warranties, agreements, covenants, or undertakings, other than those expressly set forth or referred to herein. This Agreement supersedes all prior agreements and the understanding between the parties with respect to such subject matter.

Brad S. Karp, *The Litigation Angle in Drafting Commercial Contracts*, 1219 PRACTICING L. INST. CORP. L. & PRACT. 487, 519 (2000).

55. For a famous discussion of the process of interpretation and construction of contract terms, see Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964).

56. 1 SAMUEL WILLISTON & RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 3:4 (4th ed. 1999).

57. *Id.* There are some exceptions to this general rule. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201–04 (1981) (stating rules regarding effect of misunderstanding on manifestation of assent) and §§ 201–04 (stating rules of interpretation).

If the court applies the traditional analysis described above, it does not distinguish between assent to contract formation and assent to particular contract terms.⁵⁸ Since the finding of assent to contract formation is coupled with the so-called duty to read, it follows that a party is bound to all terms of a standard form contract if he or she outwardly manifests assent, whether or not the party read or understood the terms.⁵⁹

In the twentieth century, some scholars began to attack the application of traditional contract analysis, which is based on the model of two parties with equal bargaining power, in cases involving standard form contracts.⁶⁰ They recognized that many standard form contract terms are not negotiated, other than deal-specific terms such as price, quantity, delivery dates, and similar terms and that the two parties frequently do not have equal bargaining power.⁶¹ Scholars realized that imposing a duty to read makes little sense when there is no possibility of negotiating a change in terms.⁶² Because standard form contract transactions do not resemble the traditional paradigm of a negotiated contract, such scholars believe that the traditional analysis of mutual assent is no longer appropriate.⁶³ Indeed, there appears to be a general consensus among scholars that a court should not treat the mere act of signing a standard form contract as assent to all of the individual terms of the contract.⁶⁴ The inquiry

58. See discussion *supra* Part II.

59. *But see* Meyerson, *supra* note 9, at 1268, (arguing that such a conclusion is not necessarily dictated by an objective analysis).

60. Many of the commentators limited the scope of their discussions to standard form contracts in consumer transactions. However, as I have discussed elsewhere, I believe that most of the problems associated with standard form contracts relate to the inequality of bargaining power between the parties, a problem that is found in many transactions involving small businesses and other non-consumers. See generally Edith R. Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39 (1996). Accordingly, I do not distinguish in this Article between standard form contract transactions depending on whether the adhering party is a consumer. Although many courts and commentators emphasize that distinction, the same fiction of assent permeates all transactions involving standard form contracts whether the adhering party is a consumer or not. A small business that signs a standard form contract without an opportunity to negotiate its contents has no more power to change the contract terms than a similarly situated consumer. Therefore, there is no reason to treat differently form drafters whose standard form contracts are used in business transactions as opposed to those whose standard forms are used exclusively in consumer transactions. The traditional rules of contract law make sense and should continue to apply only to transactions that meet the traditional paradigm of a bargained-for agreement between parties with relatively equal bargaining power. Otherwise, a "knowing assent" standard should be used to evaluate the enforceability of suspect terms in standard form contracts.

61. See discussion of different scholarly approaches *infra* Part III.

62. See discussion of different scholarly approaches *infra* Part III

63. See discussion of different scholarly approaches *infra* Part III.

64. See discussion *infra* Part III.J.

therefore, shifts to a question of which terms will be deemed part of the contract and which terms will not.⁶⁵

B. Unconscionability

The second legal concept that courts commonly use in analyzing whether to enforce standard form contract terms is unconscionability. Like the doctrine of assent, the doctrine of unconscionability focuses on the formation stage of the contract.⁶⁶ Unlike an assent analysis, however, an unconscionability analysis does not examine whether the parties agreed to the disputed terms.⁶⁷

An unconscionability analysis focuses on (1) the bargaining process leading to purported agreement to the terms (sometimes referred to as “procedural unconscionability”), and (2) the substantive “fairness” of the disputed terms (“substantive unconscionability”).⁶⁸ If a court deems a term unconscionable, the term will be stricken from the contract.⁶⁹

The unconscionability defense developed in the equity courts, where chancellors used the analysis to police bargains which appeared to be unfair, but which resisted attack under traditional contract defenses.⁷⁰ Although the defense long predates legislative enactment, its use became increasingly widespread after its incorporation into Article 2 of the Uniform Commercial Code⁷¹ (UCC) and the Restatement (Second) of Contracts.⁷² Most jurisdictions have applied the doctrine not only to transactions governed by Article 2, but also to contracts outside its purview.⁷³

65. For the different answers scholars have given to this question, see discussion *infra* Part III.

66. U.C.C. § 2-302 begins, “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made . . .” U.C.C. § 2-302 (2003) (emphasis added).

67. See discussion *infra* Part II.B. It is interesting to note that in early drafts of section 2-302, an attempt was made to frame the concept in terms of assent. For a detailed discussion of the drafting history of section 2-302, see Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

68. This distinction is not necessarily apparent from the statutory language, but was highlighted by Arthur Leff. Leff, *supra* note 67.

69. Section 2-302 further provides, “the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” U.C.C. § 2-302 (2003).

70. See Martin B. Shulkin, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C. INDUS. & COM. L. REV. 367 (1968) (reviewing early cases decided under U.C.C. § 2-302).

71. U.C.C. § 2-302 (2003).

72. Section 208 reads as follows:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The most common approach to an unconscionability analysis follows the framework first outlined by Arthur Leff in his seminal article that critiqued UCC 2-302 for its failure to include a definition of the term.⁷⁴ However, although section 2-302 is itself silent on how to determine unconscionability, the Official Comments give some guidance.⁷⁵ Specifically, it can be inferred from the Official Comments that the basic test of unconscionability is

whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.⁷⁶

The Official Comments reflect Leff's proposed analytic framework.⁷⁷ He advanced a two-prong analysis where a court will not enforce the term if it finds both procedural and substantive unconscionability.⁷⁸ Procedural unconscionability typically rests on defects in the bargaining

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). For more in-depth discussions of unconscionability, see M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for UCC Section 2-302*, 67 CORNELL L. REV. 1 (1981); Leff, *supra* note 67; Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); John E. Murray Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); John A. Spanogle Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

73. In some states, such as California, unconscionability has been made applicable to all contracts by statute. See CAL. CIV. CODE § 1670.5 (2006). Courts in many other states continue to apply the doctrine to non-sales contracts as a matter of common law. See *Vockner v. Erickson*, 712 P.2d 379 (Alaska 1986) (applying unconscionability, as set forth in Restatement (Second) of Contracts § 208, to a contract to purchase an apartment house); *Hamm v. Taylor*, 429 A.2d 946, 948 (Conn. 1980) (permitting a challenge to a mortgage note on grounds of unconscionability, citing UCC § 2-302 as a “useful guide”). Comment A to RESTATEMENT (SECOND) OF CONTRACTS § 208 provides the following:

Uniform Commercial Code § 2-302 is literally inapplicable to contracts not involving the sale of goods, but it has proven very influential in non-sales cases. It has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods.

RESTATEMENT (SECOND) OF CONTRACTS § 208 Reporter's Note cmt. a (1981) (citations omitted).

74. Leff, *supra* note 67.

75. U.C.C. § 2-302 cmt. 1 (2003).

76. *Id.*

77. See Leff, *supra* note 67 (noting that the comment's reference to the “prevention of oppression” is recognized now as referring to ‘procedural’ unconscionability; the reference to preventing ‘unfair surprise’ is tied to the concept of ‘substantive’ unconscionability).

78. *Id.*

process, such as clauses that are “buried” in fine print,⁷⁹ or lack of negotiations over terms.⁸⁰ On the other hand, terms are substantively unconscionable when they are “harsh,”⁸¹ or “one-sided.”⁸² Although most courts follow Leff’s view that elements of both procedural and substantive unconscionability must be present before a term is unenforceable, many have adopted the viewpoint that a “sliding scale” is appropriate; that is, the more egregious the procedural unconscionability, the less substantive unconscionability need be present, and vice versa.⁸³ In a minority of jurisdictions, terms may be excised upon proof of either procedural or substantive unconscionability; both are not required.⁸⁴

79. See *Colonial Leasing Co. v. Best*, 552 F. Supp. 605 (D. Or. 1982); *Oldham’s Farm Sausage Co. v. Salco, Inc.*, 633 S.W.2d 177 (Mo. Ct. App. 1982).

80. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (stating that there was “little dispute” that an arbitration agreement was adhesive because “[i]t was imposed on employees as a condition of employment and there was no opportunity to negotiate”). Analysis of procedural unconscionability focuses on “oppression” or “surprise.” *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 852–53 (Cal. Ct. App. 2001). “Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice,” while “[s]urprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.” *Id.* (citing *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121–22 (1982)); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (noting that an agreement to arbitrate is procedurally unconscionable, and therefore unenforceable, because there was no opportunity to negotiate).

81. See, e.g., *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9th Cir. 2005) (provisions in arbitration agreement (1) forcing employees to arbitrate claims against Circuit City, but not requiring Circuit City to arbitrate claims against employees, (2) limiting remedies, (3) splitting costs and fees, (4) imposing a one-year statute of limitations, (5) prohibiting class actions, (6) regarding the filing fee and waiver of the fee, and (7) giving Circuit City the unilateral right to terminate or modify the agreement were all substantively unconscionable under Washington law).

82. See *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (indicating one-sided preservation of the right of access to the courts is unconscionable); *Iwen v. U.S. W. Direct*, 977 P.2d 989 (Mont. 1999) (arbitration provision contained in a contract for advertisement in a telephone directory unconscionably one-sided).

83. See *Spanogle*, *supra* note 72, at 950.

84. The most common instance is where courts have found unconscionability based on excessive price (substantively unconscionable) alone. See *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 888 (N.H. 1964) (holding that contract violated state disclosure statute, but refused to enforce contract on grounds of unconscionability where homeowners would have to pay \$2,568.60 (inclusive of commission, interest and carrying charges) for home improvements valued at \$959.00); *Gilman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988) (“[W]hile determinations of unconscionability are ordinarily based on the court’s conclusion that both procedural and substantive components are present . . . there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone.”). Both the Arizona and Washington Supreme Courts have held that a showing of substantive unconscionability alone is sufficient, but reserved a holding on whether procedural unconscionability alone can render a contract unconscionable. See *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51 (Ariz. 1995) (contract could be unconscionable because of grossly-excessive price and security terms permitting lender not only to repossess water heater that it financed, but also to foreclose on borrower’s home); *Adler v. Fred Lind Manor*, 103 P.3d 773, 781

Immediately after states began adopting Article 2, parties rarely raised unconscionability defenses, and those who did had little success.⁸⁵ Gradually, however, the number of reported cases involving an unconscionability defense swelled.⁸⁶ These cases usually involve the enforceability of particular standard form contract terms.⁸⁷ If a court deems a clause unconscionable, the court will not enforce it.⁸⁸ Sometimes the behavior complained of is so severe that a court will refuse to enforce the entire contract.⁸⁹ What most of the successful cases tend to have in common is a consumer defendant who signed a standard form contract.⁹⁰ Cases involving sophisticated business people who have successfully asserted an unconscionability argument are almost nonexistent.⁹¹ However, courts have been willing to rule in favor of non-consumers who raise the defense that they lack business sophistication and legal representation, because they more closely resemble a consumer than a business person.⁹²

(Wash. 2004) (considering the enforceability of a pre-dispute employment arbitration agreement in the context of employment discrimination litigation). One court appears to have decided a case based on procedural unconscionability alone, but in that case the trial court had also found the challenged arbitration clause to be substantively unconscionable; the appellate court did not address the substantive unconscionability question once it found procedural unconscionability. *E. Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002). The majority of jurisdictions continue to require a showing of both procedural and substantive unconscionability. It makes sense that both elements are required. If the bargaining process is somehow flawed, but the result is a term that is not unfair, why strike the term? Similarly, if the bargaining process is proper, which would insure that the bargaining parties had a reason for agreeing to the term, why “second guess” the parties’ own negotiated risk allocation by striking the term? Note that an assent analysis would more directly address the unspoken problem that unconscionability skirts by its emphasis on whether the parties understood and agreed to the term rather than by trying to substitute the court’s judgment as to the desirability of the term.

85. See Shulkin, *supra* note 70 (stating that although Pennsylvania became the first state to adopt the UCC in 1954, it was not until 1964 that section 2-302 was even cited as an alternate holding in the case of *American Home Improvement Co. v. MacIver*, 201 A.2d 886 (N.H. 1964)).

86. See, e.g., Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (discussing the swelling number of cases attacking arbitration provisions on unconscionability grounds).

87. See discussion *infra* Part V (survey of “typical” types of contract clauses that are attacked on unconscionability grounds).

88. See, e.g., *Zuver v. Airtouch Commc’ns*, 103 P.3d 753 (Wash. 2004) (relying on severability clause in contract to strike substantively unconscionable portions of pre-dispute arbitration agreement in employment contract, while enforcing the remainder of the arbitration provisions).

89. One of the leading examples of a court refusing to enforce the entire contract is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

90. Mallor, *supra* note 21.

91. *Id.*

92. See Warkentine, *supra* note 60, at 41.

Decisions based on unconscionability are fact sensitive and, to a great extent, reflect trial judges' subjective determinations.⁹³ As a result, although there are now many cases that address unconscionability, they have little value as precedents. One can make predictions as to the outcome of a particular case based on how closely the facts resemble a reported decision, but ultimately it will always be necessary to await the decision of the court.

In summary, the traditional view of contract formation required mutual assent.⁹⁴ Once a court found assent by focusing on the objective manifestations of the parties, the court assumed assent to all terms in a written contract.⁹⁵ Parties had a "duty to read" the contents of a contract.⁹⁶ A party's signature on a written document could reasonably be understood by the other contracting party to mean that there was assent to everything in that writing.⁹⁷ A challenging party might recover based on particularly harsh or onerous terms under the doctrine of unconscionability.⁹⁸

III. SCHOLARLY THEORIES REGARDING ENFORCEABILITY OF STANDARD FORM CONTRACT TERMS

To understand the need for a knowing assent analysis of standard form contract terms, it is helpful for one to consider some of the scholarly theories regarding enforceability of standard form contract terms.⁹⁹ The critical article on enforceability of standard form contract terms was Friedrich Kessler's 1943 discussion of contracts of adhesion.¹⁰⁰ That article was followed by a number of other studies that commented on Kessler's analysis and offered additional perspectives.¹⁰¹ This body of

93. Cf. Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 187 (2005-06) (providing that determinations about unconscionability are subjective):

To date no one has been able to articulate an objective standard. Statutes that empower the judiciary to make findings of unconscionability almost uniformly fail to define what qualifies. . . . Judges are left to fashion solutions that they, and they alone, believe address their charge. Different results from different judges are what can reasonably be expected absent an agreed upon definition.

Id.

94. See *supra* text accompanying note 33.

95. See *supra* text accompanying note 43.

96. See *supra* text accompanying note 42.

97. See *supra* text accompanying note 43.

98. See *supra* text accompanying note 72.

99. I apologize in advance to anyone who I may appear to have neglected.

100. Kessler, *supra* note 1.

101. A 2008 LEXIS database [US Law Reviews and Journals, Combined] search for ["Kessler" and "contracts of adhesion"] yielded over 300 authorities citing Kessler's work.

scholarship began to disaggregate the theory of assent in the context of standard form contracts into two distinct concepts: (1) assent to being contractually bound and (2) assent to all terms.

In recent years, there has been a resurgence of articles addressing particular problems in the analysis of standard form contract terms.¹⁰² Some of the renewed interest can be attributed to the rise of Internet contracting, including “shrinkwrap,” “clickwrap,” and “broweware” contracts.¹⁰³ Another group of articles focuses on particular terms found in standard form contracts, such as arbitration and choice of law provisions.¹⁰⁴ Still others were written in response to debates that arose in connection with proposed legislation, such as Uniform Computer Information Transactions Act and revised Article 2 of the UCC.¹⁰⁵ Finally, there is also a group of articles written by leading scholars as part of their participation in symposia on related topics.¹⁰⁶ This Part reviews the scholarly literature in approximate chronological order. It summarizes each author’s suggested analytic approach to standard form contract terms, examines the extent to which each approach has influenced the courts, and explores whether each approach provides a useful framework for a uniform analysis of standard form contract terms.¹⁰⁷

A. Contracts of Adhesion

In 1943, Friedrich Kessler introduced American scholars to the concept of contracts of adhesion.¹⁰⁸ In an influential piece, he defined contracts of adhesion as contracts that are drafted by a party with greater bargaining power than the other contract party and presented for signing

102. A 2008 Westlaw database search [JLR Database] for articles including the phrase “standard form contract” resulted in 2100 citations. Of those articles, 869 were written within the last ten years.

103. Assent issues in these contracts are discussed *infra* Part V.A.

104. See discussion *infra* Part V.A–B.

105. See discussion *infra* Part IV.B–C.

106. See, e.g., *Symposium: A Tribute to Professor Joseph M. Perillo*, 71 *FORDHAM L. REV.* 523 (2002); *Symposium: Consumer Protection and the Uniform Commercial Code*, 75 *WASH. U. L. Q.* 1 (1997); *Symposium: Speeches from The Federalist Society Fifth Annual Lawyers Convention: Individual Responsibility and the Law, Panel III: The Death of Contract and the Rise of Tort, Contracts Is Not Dead*, 77 *CORNELL L. REV.* 1034 (1992); *Symposium “Boilerplate” Foundations of Market Contracts Symposium*, 104 *MICH. L. REV.* 827 (2006).

107. Michael I. Meyerson carefully described some of these scholarly approaches and lamented the lack of a generally accepted solution to the issue of consumer standard form contracts. He proposed his own “modest solution.” Over ten years, his own solution has been largely ignored by the courts. See Meyerson, *supra* note 9.

108. Kessler, *supra* note 1, at 632.

on a “take it or leave it” basis.¹⁰⁹ At the time of his article, Kessler noted that the term “contract of adhesion” was not yet generally recognized in the legal vocabulary.¹¹⁰ In his view, the common law of standardized contracts was highly contradictory and confusing.¹¹¹ He questioned whether the unity of the law of contracts could be maintained in the face of increasing use of contracts of adhesion.¹¹² Kessler highlighted the importance of distinguishing the nature of the bargaining process in situations involving contracts of adhesion from the traditional paradigm of negotiations between parties with relatively equal bargaining power. In recognition of the difference, he urged a new analytic approach to understanding assent in the context of contracts of adhesion.¹¹³

Kessler did not challenge the notion that parties to such contracts objectively manifest their assent to be bound; rather, he questioned whether a court’s enforcement of onerous terms in such contracts serves the basic policies underlying contract enforcement in general.¹¹⁴ As one possible solution, Kessler suggested that a court should refuse to enforce particularly onerous terms when the bargaining power is so unbalanced that the voluntary nature of the assent is called into question.¹¹⁵ Kessler pointed out that courts in the past had twisted doctrine or withheld enforcement on equitable grounds rather than facing the special problems raised by contracts of adhesion.¹¹⁶ He urged that such problems should be faced squarely, and that courts should recognize the distinct nature of contracts of adhesion and the resulting problem of the lack of meaningful assent to such contracts.¹¹⁷ He stated that “in dealing with standardized contracts courts have to determine what the weaker contracting party

109. Kessler attributed the term to Patterson in *The Delivery of A Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). Kessler, *supra* note 1, at 632. The definition continues to the present day. For example, the California Supreme Court defined an adhesion contract as “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

110. Kessler, *supra* note 1, at 633.

111. *Id.*

112. *Id.* at 636.

113. *Id.* at 637.

114. Perhaps I am putting words into Kessler’s mouth; however, in discussing insurance cases in particular, he demonstrated that “freedom of contract” was a fiction when standard form contracts were used by a form drafter imposing one-sided terms on an adhering party who lacked bargaining power. *Id.* at 631.

115. Again, Kessler may not have gone quite this far; however, he emphasized the “elasticity of the common law” and that it was possible for courts to follow the dictates of “social desirability.” *Id.* at 638.

116. *Id.* at 633.

117. *Id.* at 637.

could legitimately expect by way of services according to the enterpriser's calling, and to what extent the stronger party disappointed [the adhering party's] reasonable expectations based on the typical life situation."¹¹⁸

Courts have embraced Kessler's characterization of certain contracts as contracts of adhesion, and many courts employ that characterization as part of their enforceability analysis.¹¹⁹ However, courts will not necessarily determine that a contract is unenforceable merely because a contract is characterized as a contract of adhesion.¹²⁰ Indeed, most courts have acknowledged that a contract of adhesion may be enforceable, depending on the circumstances of its formation and its contents.¹²¹ Accordingly, such a characterization has become only part of an enforceability analysis.¹²²

Kessler's recognition that certain types of contracts raise new sets of problems was a major advance in the analysis of assent to terms in standard form contracts. First, he recognized that the issue of assent to standard form contract terms requires a different analysis than assent in the context of a contract reached through negotiations between parties with relatively equal bargaining power.¹²³ Second, he suggested that not all terms in standard form contracts should be enforced, thus departing from the rigid "objective manifestation of assent" and "duty to read" approach.¹²⁴ In these two ways, Kessler made an important contribution to developing an approach to analyzing standard form contract terms. He

118. *Id.*

119. A 2006 Westlaw database search [ALLCASES] for "adhesion w/1 contract & enforce" limited to the most recent 10 years yielded over 500 cases. In skimming those cases, I observed that the courts across the country were consistently discussing (1) whether the contract was a contract of adhesion and (2) if so, whether it was enforceable. The enforceability discussion generally focused on either unconscionability or undefined "public policy."

120. *See, e.g.,* *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981) ("To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.'").

121. *Id.*

122. Note that this Article does not treat unconscionability as a theory of assent, although the doctrine is certainly an indirect way of addressing the issue of assent. Unconscionability does not test whether a party assented to a particular term. Rather, as is the case with other contract defenses such as fraud, duress, and mistake, it tests whether, regardless of the parties' assent, the term is the type of term that society wishes to enforce. Most courts have accepted an unconscionability analysis that looks for both procedural and substantive unconscionability. The characterization of a contract as a contract of adhesion usually constitutes the bulk of a procedural unconscionability analysis. After that characterization has been made, a court must still determine whether the challenged clause is substantively unconscionable.

123. *Cf. Kessler, supra* note 1, at 637-38.

124. *Kessler, supra* note 1, at 637.

did not, however, offer a concrete approach to analyzing assent in these contract situations.

B. Blanket Assent

Karl Llewellyn is generally acknowledged to be responsible for introducing the concept of “blanket assent.”¹²⁵ He recognized that treating a signature on a written contract as evidence of assent to all of its terms is a fiction, at least in the case of standard form consumer contracts.¹²⁶ To resolve this fiction, he proposed an analytic approach¹²⁷ that recognizes that most parties to standard form contracts generally focus only on the “dickered” contract terms, such as price, quantity, and the subject matter of the contract.¹²⁸ To the extent that a standard form contract contains other terms, Llewellyn maintained that when an adhering party agrees to be bound to a contract, that party knows that there are other terms in the contract.¹²⁹ Because the party does not bargain over those other terms, the party should be understood to have agreed to all terms that would reasonably be expected to be included in the contract.¹³⁰ It should not, however, be understood that the adhering party agreed to unusual or unexpected terms.¹³¹ Rather, because such terms could not reasonably be expected in the contract, it would make more sense to

125. LLEWELLYN, *supra* note 19, at 370. Llewellyn goes on to provide that [i]nstead of thinking about “assent” to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

Id.

126. *Id.*

127. This approach is now embodied in § 211 of the Restatement (Second) of Contracts. See *infra* Part IV.A.

128. LLEWELLYN, *supra* note 19, at 371.

129. *Id.*

130. For another discussion of Llewellyn’s concept that signing a standard form contract should not be deemed to evidence consent to all terms, see C.M.A. McCauliff, *A Historical Approach to the Contractual Ties that Bind Parties Together*, 71 *FORDHAM L. REV.* 841, 845 n.10 (2002). Professor Hillman characterized Llewellyn’s approach as meaning that the contract terms are the bargained-for terms plus all conscionable terms. Although Hillman’s characterization is not exactly what Llewellyn was saying, it appears that as a practical matter, Professor Hillman’s characterization is an accurate reflection of what happens. Unless a term is challenged in court on grounds of unconscionability, all terms are treated as if they have been assented to. Hillman & Raclinski, *supra* note 35, at 461.

131. LLEWELLYN, *supra* note 19, at 371.

anticipate that such agreement was lacking.¹³² Accordingly, Llewellyn's concept of "blanket assent" binds parties to all of the terms in the contract except those that a reasonable person would not expect to be included in the contract.¹³³

Llewellyn's theory is probably best understood as a rejection of the traditional approach of finding an objective manifestation of assent, coupled with a duty to read. Llewellyn argued that courts cannot reasonably determine that a party manifested agreement to terms that no reasonable person would have expected to find if the form contract had indeed been read or understood.¹³⁴ Even the "classic" objective theory of assent recognized that if one contract party knows that the other attributes a different meaning to terms, the meaning attributed by the party who is unaware of a discrepancy controls.¹³⁵ By extension, Llewellyn reasoned that the standard form contract drafter should be aware that the adhering party is unlikely to read or understand the entire standard form contract.¹³⁶ However, instead of concluding that standard form contract terms should not be considered to be part of the contract, Llewellyn proposed an approach that includes most of such terms.¹³⁷ Specifically, terms that the adhering party would normally anticipate would be deemed to have been agreed to; only terms that could not reasonably have been anticipated would be unenforceable.¹³⁸

The importance of Llewellyn's approach is manifested by its wide adoption by courts and commentators.¹³⁹ Its widespread acceptance is explained by its common-sense approach to the problem.¹⁴⁰ Article 2 of

132. *Id.*

133. *Id.*

134. *Id.*

135. See RESTATEMENT (SECOND) OF CONTRACTS §§ 201(2)(a)–(b) (1981). Section 201 provides the following:

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meanings attached by the other, and the other had reason to know the meaning attached by the first party.

Id.

136. LLEWELLYN, *supra* note 19, at 371.

137. *Id.*

138. *Id.*

139. For representative cases citing Llewellyn and specifically tracking his discussion of blanket assent, see, e.g., *Home Fed. Sav. & Loan Ass'n of Algona v. Campney*, 357 N.W.2d 613, 618 (Iowa 1984); *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987).

140. Professors Hillman and Raclinski provide an explanation for Llewellyn's approach:

the UCC reflects Llewellyn's approach.¹⁴¹ His approach is also embodied, to some extent, in the Restatement (Second) of Contracts, § 211.¹⁴² However, some scholars have criticized Llewellyn's attempt to make traditional contract doctrine apply to transactions that no longer resemble the paradigmatic bargain that underlay the traditional doctrine.¹⁴³ These scholars stressed the differences between a transaction based on a standard form contract and a negotiated bargain reached by parties with roughly equivalent bargaining power; while it makes sense to find assent to all terms contained in a negotiated contract, such assent is lacking when standard form contracts are signed.¹⁴⁴ For these reasons, a different analysis of assent to standard form contract terms is needed.

C. "Invisible" Terms

Todd Rakoff agreed with Llewellyn's conclusion that contract parties typically are concerned only with "dickered terms," but he reached a different conclusion regarding enforceability of non-dickered terms in standard form contracts.¹⁴⁵ Rakoff asserted that because parties who assent to standard form contracts only agree to dickered terms (and any terms not dickered but clearly known to the adherent), their rejection of non-dickered terms should be presumed.¹⁴⁶ Thus, he proposed that

Llewellyn's approach to paper-form contracting resonates closely with the rational, social, and cognitive explanations for why users refrain from reading standard form provisions. It recognizes the reality of contracting in that users rationally fail to read boilerplate, are induced not to read boilerplate, and underestimate the importance of the terms contained in the boilerplate.

Hillman & Raclinski, *supra* note 35, at 463.

141. David Slawson explained why Article 2 adopted the concept of blanket assent: Article 2, however, is firmly fixed in the old meaning of contract. Its many interpretive provisions rest on the assumption that it is the writings that the parties exchanged that are being interpreted, and its requirements of conspicuousness all apply to the terms or expressions in those writings." The article also contains provisions that make contracts inoperative to the extent they are "unreasonable" or "unconscionable." Since Karl Llewellyn was the principal architect of the article, it is reasonable to conclude that these are the equivalents of his concept of "blanket assent" which he said does not go so far as to include any terms that are "indecent" or "unreasonable."

W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 56-57 (1984).

142. Section 211 is set forth in full and discussed at length *infra* Part IV.A.

143. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 544 (1971) (arguing that standard form contracts are not "contracts").

144. See, e.g., King, *supra* note 30, at 915 ("matters not discussed and agreed upon by both parties should not be enforceable under general contract theory").

145. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1187 (1983).

146. *Id.* at 1251.

subordinate (non-dickered) contract terms, which he called “invisible terms,” should be presumptively unenforceable.¹⁴⁷ Unlike the “blanket assent” approach, Rakoff’s approach shifts the burden of arguing assent from the adhering party to the drafter.¹⁴⁸ Rather than requiring the adhering party to go to court to argue that particular terms could not have been reasonably anticipated and therefore were not assented to, Rakoff’s approach would require the form drafter to prove the “visibility” of “invisible terms.”¹⁴⁹ In other words, rather than presuming that all terms were part of the parties’ contract, Rakoff began with the presumption that only dickered contract terms were part of the parties’ agreement.¹⁵⁰

Courts did not seem to pay significant attention to Rakoff’s “invisible terms” approach.¹⁵¹ Instead, courts prefer to try to fit all “contract” transactions into the traditional paradigm and traditional assent analysis.¹⁵² The “invisible terms” approach is ignored by courts because it flatly contradicts the traditional “duty to read” approach.

Most of the scholarly discussion of Rakoff’s approach is critical.¹⁵³ The strongest criticism of Rakoff’s approach has come from proponents of the law and economics school, who stress the importance of standard form contracts in commerce and the need to permit sellers to control the risks inherent in any transaction by writing appropriate protections into their form contracts.¹⁵⁴ These critics argue that ignoring a seller-form

147. *Id.* at 1245.

148. *Id.* at 1246.

149. Rakoff goes even further. He states that even if the drafting party tries to show that an invisible term should be upheld, the court cannot evaluate that showing without determining how the case would come out absent the form clause, taking into account the background rule and the reason for deviation from the background rule. *Id.* at 1258.

150. *Id.* at 1251.

151. Westlaw and LEXIS database searches for [“Rakoff” and “invisible terms”] yielded no results. Searches for “Todd B. Rakoff” yielded a handful of cases citing Rakoff, *supra* note 145, but references were to his definition of a contract of adhesion only. His analytic approach was neither discussed nor followed by these courts.

152. See discussion *infra* Part V.

153. See, e.g., Randy E. Barnett, *Consenting to Standard Form Contracts*, 71 *FORDHAM L. REV.* 627, 633 (2002) (applauding Rakoff’s discussion of the value of standard form contracts, but lamenting his approach to “visible” and “invisible” terms).

154. See, e.g., Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 *MICH. L. REV.* 857, 862 (2000).

The suggested solutions of some academics, such as Todd Rakoff’s proposal that (under circumstances identified by a seven-factor test) courts impose a fiduciary obligation on sellers of consumer goods and services to act only in the consumer’s interest, rather than in the interest of their own firm’s profit and sales goals, apparently represented too great a departure from the background principles of free markets for the courts to adopt.

Id.

drafter's efforts at risk-avoidance by refusing to enforce "invisible terms" would increase the seller's legal exposure, which the seller would address either by raising prices or by removing goods from the marketplace.¹⁵⁵ Because they wish to avoid these undesirable results, these critics reject Rakoff's analytic approach.

Although Rakoff's conclusion has not been widely adopted, many commentators cite portions of his analysis with approval.¹⁵⁶ Adopting a knowing assent requirement could limit the "invisible terms" approach by excising only the most egregious of standard form contract terms, thus creating a meaningful compromise between adopting Rakoff's approach in full and flatly rejecting it.

D. Contracts as Sales of Promises, or "Things"

Two scholars, W. David Slawson¹⁵⁷ and Arthur Leff,¹⁵⁸ both suggested in separate articles that agreements based on standard forms should be analyzed differently than traditional contracts because transactions based on standard forms lack assent.¹⁵⁹ They argued that standard form contracts should be treated differently than negotiated contracts, and proposed that the term "contract" be reserved to refer to an enforceable agreement that results from a meaningful bargaining process.¹⁶⁰ Because standard form contract transactions do not entail bargaining, both Slawson and Leff believed that standard form contracts should be viewed as commodities.¹⁶¹

Slawson believed that standard form contracts should be enforced because of the valuable role they play in our economic system; however, he preferred not to analyze such contracts under the traditional paradigm

155. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006). The authors argue that a "one-sided contract" (defined as one with terms that favor the seller) may be preferred ex ante by informed parties as a cheaper mechanism for inducing efficient outcomes, should contingencies arise during the performance of the contract, than a more "balanced" contract that, because of imperfect enforcement, could create costs as a consequence of consumers' enforcing protective provisions in the contract.

156. See, e.g., Daxton R. Stewart, *The Promise of Arbitration: Can it Succeed in Journalism as it has in Other Businesses?*, 6 APPALACHIAN J. L. 135, 143 (2006) (using Rakoff's definition of adhesion contracts, suggesting "Professor Todd Rakoff . . . created a foundation for modern review of adhesion contracts in his 1983 article in the *Harvard Law Review*.").

157. Slawson, *supra* note 143, at 541; W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 SO. CAL. L. REV. 1, 13 (1974).

158. Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 141-44 (1970).

159. Slawson, *supra* note 157, at 13; Leff, *supra* note 158, at 147.

160. Slawson, *supra* note 143, at 540; Slawson, *supra* note 157, at 54; Leff, *supra* note 158, at 147.

161. Slawson, *supra* note 143, at 544; Leff, *supra* note 158, at 150.

that courts use to justify enforcement.¹⁶² Slawson chose to characterize these transactions as sales of promises.¹⁶³ He argued that what a buyer-adhering party is buying and what a seller-form drafter is selling is a set of promises.¹⁶⁴ This set of promises includes a promise by the seller to transfer goods or services with specific attributes and to undertake specific responsibilities.¹⁶⁵ The only thing the buyer can buy is what the seller is selling. Thus, the fiction of the buyer's "assent" to such terms is not necessary. What the buyer buys is the set of promises (the contract terms) that the seller is selling.

Leff went even further. He noted a "conceptual move" to create a new subcategory of contracts called "contracts of adhesion," but suggested that although this new category was a "brilliant coup" as an analytic device, as a practical matter it was a "disaster."¹⁶⁶ Rather, he suggested that the law should recognize that such transactions represent the sale of "things" offered for sale on a "take it or leave it" basis.¹⁶⁷ Because the parties do not negotiate, there is no question as to which terms in a written agreement bind the parties. The "thing" that the seller sells is a package, which consists of a physical product plus "contract terms" chosen by the seller. When the buyer purchases the "thing," the buyer is purchasing not only the physical product, but also the set of seller's terms that make up the rest of the package.¹⁶⁸ As a result, the buyer is bound by all of the terms in a standard form contract, whether or not he or she is aware of and understands the terms.¹⁶⁹

As with the "invisible terms" approach, courts have not adopted the "contract as commodity" approach. Other scholars have criticized the approach because it represents an attempt to take the analysis of standard form contracts, especially adhesion contracts, outside of the realm of traditional contract law.¹⁷⁰ These critics want to retain a unitary theory of mutual assent to contracts rather than carve out a separate category of "things" that are "not contracts."¹⁷¹ Some critics observe that the "contract as commodity" approach effectively results in the enforcement of

162. Slawson, *supra* note 143, at 532.

163. *Id.* at 546.

164. *Id.* Alternatively, Slawson described what the buyer was purchasing as "property" in the sense that the standard forms principally confer rights on a consumer, rather than impose duties. Slawson, *supra* note 157, at 14.

165. Slawson, *supra* note 141, at 39.

166. Leff, *supra* note 158, at 142.

167. *Id.* at 147-48.

168. *Id.* at 147.

169. *Id.*

170. *See, e.g.*, Meyerson, *supra* note 9.

171. *Id.*

all terms in standard form contracts, because the standard form sets forth the extent of the seller's promises.¹⁷² As these critics have observed, the adoption of such a view recognizes that parties to standard form contracts lack any bargaining power. The scholars apparently conclude that sellers can impose any onerous terms they desire with impunity.¹⁷³

Some scholars have pointed out, however, that the "contract as thing" analytic approach need not automatically result in a court's enforcement of all terms in a standard form contract. John J. A. Burke expanded on the concept of "contract as commodity" in a series of articles that began with his work on behalf of the New Jersey Law Revision Commission.¹⁷⁴ Burke explained that when the nature of contract as commodity is recognized,

[A] buyer cannot argue that he did not really buy the terms because he did not understand them just as a buyer cannot argue that he did not buy a radio because he did not understand transistors. The buyer owns the new contract. The only relevant legal questions are which standardized terms should be enforced as recorded, and which legal norms should govern their enforcement.¹⁷⁵

Professor Burke demonstrated that this analytic approach, if combined with appropriate legislation, could be a meaningful solution to the problem of unbargained-for standard form contract terms. Essentially, Burke introduced a legislative approach to requiring "knowing assent." He recognized, as did Arthur Leff,¹⁷⁶ that we are already accustomed to legislative regulation of commodities for the good of the consumer.¹⁷⁷ Similarly, we are already familiar with legislation governing contract

172. *Id.*

173. While working for the New Jersey Law Revision Commission, Burke proposed that these types of contracts require displacing conventional rules and legal analysis of contract law. His work on the Commission led to proposed legislation. See discussion *infra* Part V.

174. John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285 (2000).

175. Burke goes on to provide that a standard form contract is a series of terms embedded by a seller in products marketed for mass distribution and consumption. . . . When the buyer purchases the product, the buyer also purchases the terms, thereby recording the parties' legal rights and obligations resulting from the sale. . . . Embedded terms are neither an exchange of promises nor an agreement reflecting a meeting of the minds between the parties.

Id. at 308-09.

176. Leff, *supra* note 158, at 149.

177. For example, federal law authorizes the Secretary of Transportation to prescribe standards for automobile safety. 49 U.S.C. § 30111 (1994). The Federal Food, Drug & Cosmetic Act authorizes the Food & Drug Administration to regulate the safety of food and cosmetic products. 21 U.S.C. § 301.

terms. For example, the Federal Magnuson-Moss Consumer Warranty Act¹⁷⁸ proscribes or limits sellers' ability to disclaim implied warranties in specified situations.¹⁷⁹ It should also be possible, then, to enact governmental standards to legislate the qualities of the "contract as commodity."¹⁸⁰

E. Meyerson's Application of the Objective Theory of Assent

Professor Michael Meyerson has argued persuasively that even under the traditional objective theory of contract formation, not all standard form contract terms should be enforced.¹⁸¹ He emphasized that the traditional analysis finds assent to terms based on the outward manifestations of the parties.¹⁸² In particular, he noted that it has always been the case that parties do not manifest mutual assent to an exchange if they attach materially different meanings to their manifestations.¹⁸³ Furthermore, when the parties attach different meanings to terms, and one of the parties is aware of that fact while the other is not, the meaning of the party who is unaware of the difference controls if the term is disputed.¹⁸⁴

Applying this traditional approach to the issue of assent to standard form contract terms, Meyerson reasoned that form drafters know that it is unlikely that adhering parties will read the standard form.¹⁸⁵ They also know that if the adhering party reads the standard form, the party is unlikely to understand it.¹⁸⁶ In other words, the form drafter should understand that the adhering party is attaching a more limited meaning to the standard form contract (the bargained-for terms only) than is the form drafter (the bargained-for terms plus the additional unbargained-for terms). Because the adhering party is probably unaware of a particular contract term, and the form drafter knows that, the adhering party's understanding (that the unbargained-for term is not part of the contract)

178. 15 U.S.C. § 2301 (2000).

179. 15 U.S.C. § 2308.

180. For an example of how federal legislation could impact the enforceability of dispute resolution provisions in standard form contracts, see Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998) (proposing language for a statute to "prevent the use of dispute resolution clauses to diminish the value of statutory rights devised and to protect 'one-shot players' (employees, local franchisees and consumers) from economic predation by 'repeat players'"). For a discussion of other legislative approaches to regulating content in standard form contracts, see *infra* Part IV.

181. Meyerson, *supra* note 9, at 1299.

182. *Id.* at 1266.

183. RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981).

184. *Id.* § 20(2).

185. Meyerson, *supra* note 9, at 1271.

186. *Id.*

should prevail.¹⁸⁷ Meyerson explained, “[b]ecause the drafters of these contracts know not only that their forms will not be read, but also that it is reasonable for consumers to sign them unstudied, a reasonable drafter should have no illusion that there has been true assent to these terms.”¹⁸⁸ It follows that unexpected terms would not be part of the contract.¹⁸⁹

Although Meyerson’s approach to analyzing standard form contract terms gives courts a means to overcome the fiction of assent while using traditional contract analysis, courts have not adopted his approach.¹⁹⁰

F. Reasonable Expectations

Robert Keeton is particularly known for his explanation of the doctrine of reasonable expectations and its application to the interpretation of insurance contracts.¹⁹¹ Summarizing the approach, he stated that “objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those

187. *Id.*

188. *Id.* at 1265. Some may argue that Meyerson is not really applying the traditional objective theory of assent; that theory emphasized the parties’ understanding of the *meaning* of terms. Meyerson would extend that approach to the very *existence* of contract terms.

189. *Id.* at 1291.

190. A 2008 Westlaw [ALLCASES] database search of [Meyerson and “reunification of contract”] yielded one case. The same search in the LEXIS database yielded two cases—one was a duplicate. In *In re Shirel*, the court declared void a security agreement on the grounds that a reasonable person would not understand the reference to “all merchandise” to include a refrigerator. 251 B.R. 157, 161 (Bankr. W.D. Okla. 2000). The court cited with approval Meyerson’s position that under the objective theory of contracts the drafter of a long convoluted form agreement reasonably expects the consumer to sign without reading or understanding the agreement, and that in such a case one could argue that the consumer is only assenting to the central terms such as price, interest, and minimum payments. *Id.* It noted that under this argument the only way to have mutual assent to the obscure terms would be to emphasize and explain them to the consumer. *Id.* In deciding the case, however, the court noted that the record was devoid of any evidence regarding whether or not there was genuine assent, and ultimately decided the case on other grounds. *Id.* The second case was *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23 (Mich. 2005). That case involved the enforceability of a one-year limitation clause in an insurance policy. *Id.* The Meyerson article was only referenced as part of the court’s discussion of adhesion contracts.

191. For a helpful reference to a body of literature regarding Keeton’s “reasonable expectations” approach, see Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT TRIAL & INS. PRAC. L.J. 729, 779 n.1 (2000) (citing Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, (pts. 1 & 2), 83 HARV. L. REV. 961, 1281 (1970)). Since 1970, Professor Keeton’s groundbreaking doctrine of reasonable expectations has received widely mixed support and criticism from a number of American courts and commentators. See generally Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981) (noting that the expectations principle is used by courts to favor policyholders in disputes with insurers).

expectations.”¹⁹² Keeton suggested that in view of the adhesive nature of insurance contracts and the imbalance of power between insurer and insureds, courts should interpret insurance policies based on the expectations of an ordinary reader as to the contents of the policy.¹⁹³ Even though Keeton’s analysis focused on insurance contracts, the reasoning and principles arguably apply to all standard form contracts. This point of view is reflected in the Restatement (Second) of Contracts, which incorporates a type of reasonable expectations test into its treatment of standard form contracts.¹⁹⁴

A primary critique of this doctrine is that it is based largely on assumptions about how people entering into (insurance) contracts behave and what expectations they have at that time.¹⁹⁵ Critics challenge both the assumptions and the resulting conclusions that are reached regarding the parties’ “reasonable expectations.”¹⁹⁶

John J. A. Burke summarized criticisms of the reasonable expectations test by suggesting that neither courts nor parties are likely to know the consequences of applying the test to any particular set of facts.¹⁹⁷ First, whose expectations are measured? A court may look to the expectations of: (1) the litigant; (2) the hypothetical consumer; or (3) the hypothetical reasonable person.¹⁹⁸ Second, what is the source of the reasonable expectation? Possible sources include: (1) an ambiguous term in the contract; (2) the subjective preference of the insured; or (3) objectively independent expectations?¹⁹⁹ Judges often bitterly dispute the meaning and effect of the test,²⁰⁰ which has become a muddled and protean

192. Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 824 (1990) (citing Keeton, *supra* note 191, at 967).

193. *Id.*

194. See discussion *infra* Part IV.A.

195. See, e.g., Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989) (arguing that the reasonable expectations doctrine should be abandoned); Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295 (1998) (identifying and then challenging assumptions upon which the reasonable expectations doctrine is based, using research from consumer psychology and survey data collected from insureds, and reassessing the doctrine in light of the problematical nature of its assumptions).

196. See e.g., James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997) (analyzing twenty-five Arizona appellate decisions applying the reasonable expectations doctrine and noting courts’ disagreement over whether the expectations of the particular plaintiff consumer or some hypothetical consumer are to be considered); Thomas, *supra* note 195 (arguing that the courts’ determination of “reasonable expectations” is, in many cases, fiction that allows them to impose their own view of fairness).

197. Burke, *supra* note 174, at 301.

198. *Id.*

199. *Id.*

200. *Id.*

judicial doctrine that lacks a uniform and accepted definition within the common law.²⁰¹ The reasonable expectations test essentially posits that the source of contract terms is outside the written contract and that the written contract itself does not represent the parties' agreement.²⁰² This permits courts to substitute their own judgment for that of the authoring party and to legislate contract standards without the support of clear rules.²⁰³ Consequently, the doctrine does not produce predictable results.²⁰⁴

In a study of cases involving the reasonable expectations approach, Professor Jeffrey Stempel traced the expansion and reduction of the "doctrine" and its applicability in insurance cases. He emphasized its use as a tool of interpretation.²⁰⁵ Few courts have further expanded its applicability outside of the insurance field.

G. Consent

Randy Barnett argues that contracts are best analyzed with what he terms the "consent" theory, rather than the "promise" theory that predominates scholarly thinking.²⁰⁶ He has written at length about the consent theory generally, as well as about its specific application in a court's analysis of standard form contracts.²⁰⁷ His basic contention is that there

201. *Id.*

202. *Id.* at 303.

203. *Id.*

204. *Id.*

205. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of the Judicial Role*, 5 CONN. INS. L.J. 181 (1998-1999).

206. Randy E. Barnett draws a distinction between the assent that is critical to the issue of formation or enforceability (assent to be legally bound) and the assent to perform or refrain from performing a certain act. A particular duty to perform—the promise or commitment—is nested within an overall consent to be legally bound. The consent that legitimates enforcement is the latter consent to be legally bound. Randy E. Barnett, *Consenting to Standard Form Contracts*, 71 FORDHAM L. REV. 627, 635-36 (2002) (citing Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986)); Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421 (1993); see also Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL'Y 62 (1992); Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 866 (1992); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969 (1987).

207. See *supra* text accompanying note 206.

are no special problems that arise out of the use of standard form contracts; rather, the problem is with the promise theory.²⁰⁸ He states:

[H]ostility towards form contracts stems in important part from an implicit adoption of a promise-based conception of contractual obligation. . . . [W]hen one adopts (a) a consent theory of contract based not on promise but on the manifested intention to be legally bound and (b) a properly objective interpretation of this consent, form contracts can be seen as entirely legitimate—though some form terms may properly be subject to judicial scrutiny that would be inappropriate with non-form agreements.”²⁰⁹

Barnett argues that a consent-based analysis of standard form contracts meets the challenges posed by other scholars such as Rakoff.²¹⁰ Those scholars argue that an assent-based analysis compels a court to conclude that the adhering party who neither knows nor understands many of the standard form contract terms should not be bound by them.²¹¹ Barnett’s consent-based analysis rests on the parties’ overall consent to be legally bound.²¹² He likens this assent to a party promising to do whatever is asked in a sealed envelope.²¹³ If someone gives that consent, he reasons, why should he or she not fulfill that promise, even though he or she may not know what is contained in the sealed envelope?²¹⁴ Barnett finds that a court legitimately enforces all of the standard form contract terms when a party manifests consent to be legally bound, although he does concede that there may be more circumstances in which judicial “policing” of particular unbargained-for terms is necessary in standard form contracts than in the case of negotiated tailored contracts.²¹⁵ “True,” he says, “when consenting in this manner one is running the risk of binding oneself to a promise one may regret when

208. Barnett, *supra* note 153, at 634 et seq.

209. *Id.* at 627.

210. *Id.* at 632, 634.

211. Rakoff, *supra* note 145, at 1195.

212. Barnett, *supra* note 208, at 635.

213. *Id.* at 636.

214. My colleague, Professor Patricia Leary, criticizes Barnett’s reasoning for his failure to understand human nature. In fact, she suggests, most people would *not* give such a promise. She argues that if people who sign standard form contracts were actually given a sealed envelope and told that they were agreeing to secret terms, known only to the more powerful party, these transactions would look very different. In fact, she suggests that the typical standard form contract transaction may better be analogized to a situation where the form drafter misleads the adhering party into believing that the envelope contents are disclosed when in fact the envelope is sealed.

215. Barnett, *supra* note 208, at 637.

later learning its content. But the law does not, and should not, bar all assumptions of risk.²¹⁶

What Barnett ignores with this statement is the fact that the doctrine of assumption of the risk is based on a knowing assumption of the risk.²¹⁷ Thus, except where there is express assent (meaning assent to the particular terms)²¹⁸ a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he both knows of the existence of the risk and appreciates its unreasonable character.²¹⁹ By proper analogy to the doctrine of assumption of the risk, an adhering party should not be bound to a contract term unless the party both knows of the existence of the particular contract provisions and appreciates their meaning.²²⁰

A detailed critique of Barnett's consent theory is beyond the scope of this article.²²¹ Even if a court were to adopt that theory, it must still determine when parties have manifested the "consent" to which Barnett refers. However, most courts have remained true to the traditional "objective manifestation of assent" analysis, both with respect to negotiated contracts and non-negotiated standard form contracts, and continue to enforce these contracts.²²²

H. Rolling Contracts

New means of entering into contracts, such as contracting over the Internet, have inspired new approaches to contract analysis. One of the most recent and frequently-criticized approaches to analyzing assent to unbargained-for terms in standard form contracts is known as a "rolling contract" analysis.²²³ The United States Court of Appeals for the Seventh Circuit introduced the idea that contract formation can take place over time, with terms "rolling" into the contract by virtue of inaction, in

216. *Id.* at 636.

217. RESTATEMENT (SECOND) OF THE LAW OF TORTS § 496B (1985).

218. *Id.*

219. *Id.* at § 496D.

220. In fact, this would be the result under a "knowing assent" analysis.

221. For such a critique, see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169 (1993).

222. Cf. Deborah Zalesne, *Enforcing the Contract at all (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 585 (2005) (exploring "the limitations on the ability of contract law to deal with the protection of third parties and the public").

223. An entire symposium was devoted to the idea of a "common sense" approach, as suggested in *Gateway*. See Symposium, *Common Sense and Contract Law*, 16 TOURO L. REV. 1037 (2000).

*ProCD, Inc. v. Zeidenburg*²²⁴ and expanded on it in *Hill v. Gateway 2000, Inc.*²²⁵

The rolling contract approach recognizes that a contract is formed over a period of time. In *ProCD*, a buyer purchased software in a box at a retail store, and later opened the box, which contained the terms and conditions of a software license.²²⁶ The court stated that the contract was not formed when the purchase at the retail store took place; rather, a contract including the software license was formed later when the buyer found the license (which provided that retention of the software constituted acceptance of all the terms of the license) and retained the software.²²⁷ The court explained that transactions in which the exchange of money precedes the communication of detailed terms are common.²²⁸ If the customer has an opportunity to reject the goods after receiving the terms and fails to do so, the customer is deemed to have accepted the seller's terms.²²⁹ In short, the contract has rolled to the point of formation—and it contains all of the seller's desired terms.²³⁰

The rolling contract theory appears to have been developed for the express purpose of assuring that terms that are not disclosed at the time of contract formation will nevertheless be incorporated into the contract without the assent of one of the contract parties.²³¹ Judge Easterbrook wrote, “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”²³² The theory is defective when weighed against all traditional analyses of

224. 86 F.3d 1447 (7th Cir. 1996) (software license contained in shrinkwrap was an “offer” that buyer accepted by failing to return the product).

225. 105 F.3d 1147 (7th Cir. 1997) (contract terms, including arbitration clause, which were contained in box in which computer which had been ordered by telephone was shipped to buyer and which provided that terms governed sale unless customer returned computer within 30 days, were binding on buyer who did not return computer).

226. *ProCD*, 86 F.3d at 1450.

227. *Id.* at 1451.

228. *Id.* at 1451.

229. *Id.*

230. *Id.* Because of this analysis, these types of contracts are also sometimes referred to as “layered contracts” or “payment now—terms later” contracts. See, e.g., Jean Braucher, Commentary, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 757 (2004).

231. Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000).

232. *ProCD, Inc.* 86 F.3d at 1451 (7th Cir. 1996).

contract formation and the modern approach of the UCC, which should control the analysis of contract formation in transactions in goods.²³³

Under traditional contract law, a contract is formed when the parties manifest agreement to the same bargain.²³⁴ Any attempt to 'add' terms at a later point in time would be viewed as an offer to modify the already-existing contract.²³⁵ The traditional rule also states that silence is not acceptance except in rare circumstances, such as where a prior relationship would give a party a duty to speak.²³⁶ Terms sent after contract formation do not become part of the contract without express assent to them.²³⁷ Under the UCC, such changes should also be analyzed as unilateral attempts to modify an existing contract. These terms do not become part of a modified contract without the assent of both parties.²³⁸

Depending on the exact facts, the situation may be one that should be analyzed under UCC section 2-207, which governs written confirmations that contain additional or different terms.²³⁹ Under that section, after contract formation, additional terms in a written confirmation are proposals for addition to the contract.²⁴⁰ Those proposals become part of

233. For an extended discussion of the appropriate legal analysis of this fact pattern, see William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099 (2004).

234. See *supra* text accompanying note 33.

235. Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 745 (2002).

236. RESTATEMENT (SECOND) OF CONTRACTS, § 19 (1981).

237. 1 FARNSWORTH ON CONTRACTS § 3.15 (2d ed. 1998). See also RESTATEMENT (SECOND) OF CONTRACTS § 69. In this connection, courts have consistently determined that no contract is found if a seller sends unsolicited merchandise to a consumer with the suggestion that if the consumer retains the goods, he or she will be obligated to pay. There is no logical reason for treating differently the situation in which a seller sends additional contract terms to a buyer with the suggestion that unless the buyer sends the goods back, the buyer will be obligated to all of the additional contract terms.

238. U.C.C. § 2-209 (2003). For a discussion of contract modification in this context and relevant cases, see JAMES J. WHITE & ROBERT S. SUMMERS, 1 UNIFORM COMMERCIAL CODE 36-37, n.22 (Practitioner's Edition, 3d ed. 1988).

239. Note that Judge Easterbrook erroneously stated, "Our case has only one form; U.C.C. § 2-207 is irrelevant." *ProCD, Inc. v. Zeidenburg*, 86 F.3d 1447, 1452 (7th Cir. 1996). He ignored the fact that § 2-207(1) specifically includes a reference to "written confirmations," which was the form used in *ProCD*.

240. Although U.C.C. § 2-207(1) describes written confirmations that include "additional or different" terms, section 2-207(2) specifically refers to only "additional" terms. There is a jurisdictional split regarding whether section 2-207(2) properly governs the disposition of "different" terms as well as "additional" terms. See, e.g., *Daitom, Inc. v. Pennwalt, Inc.* 741 F.2d 1569, 1578 (10th Cir. 1984) (holding that conflicting terms should not be analyzed under § 2-207(2)); *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319 (N.M. 1993) (suggesting section 2-207(2) does not apply to "different terms;" different terms in offer and acceptance are "knocked out"); *Contra Steiner v. Mobile Oil Corp.*, 569 P.2d 751, 759-60 n.5 (Cal. 1977) (stating that the applicability of § 2-207 subdivision (2), should not turn upon a characterization of the varying terms of an acceptance as "additional" or "different"); *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 527 (Mo. Ct.

the contract only if the parties expressly assent to them, except when both parties are merchants.²⁴¹ If both parties are merchants, the proposals may become part of the contract, unless (a) the offer expressly limits acceptance to the terms of the offer; (b) the terms are “material alterations”; or (c) notification of objection to them has been given or is given.²⁴² Under any of these analyses, additional terms imposed by the seller would not somehow “roll into” the contract, if the buyer retained the already-paid-for goods, simply because the seller included a form in the packaging that listed terms and said, “if you don’t like our terms, send our product back.”²⁴³

Scholarly criticism of the “rolling contract” approach is abundant.²⁴⁴ However, a number of courts have followed that approach, particularly in connection with Internet contracts.²⁴⁵ As is discussed below, however, there is no reason to create a distinct analysis of contract formation for Internet contracting.²⁴⁶ The rolling contract approach represents bad judicial reasoning, and it should not be followed.

App. 1981) (providing in spite of the omission, “different” terms are to be analyzed under § 2-207(2)).

241. U.C.C. § 2-207(2) (2003). *See, e.g.*, *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding that arbitration provisions contained in Standard Terms and Conditions included in instruction manuals shipped with computer are not part of agreement); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 98 (3d Cir. 1991) (held printed terms on computer software package are not part of agreement); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (holding that license agreement shipped with computer software not part of agreement).

242. U.C.C. § 2-207(2) (2003).

243. The District Court for the Northern District of Kansas properly analyzed similar facts in *Klocek v. Gateway*, where it provided the following:

Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement. . . . The Court finds that the act of keeping the computer . . . was not sufficient to demonstrate that the plaintiff expressly agreed to the Standard Terms.

103 F. Supp. 2d 1332, 1340 (D. Kan. 2000).

244. *See, e.g.*, Lawrence, *supra* note 233 (criticizing approaches advanced by advocates of the rolling contract concept).

245. *See, e.g.*, *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (“There is no agreement or contract upon placement of the order or even upon the receipt of the goods. . . . It is only after the consumer has affirmatively retained the merchandise for more than 30 days . . . that the contract has been effectuated.”).

246. *See Hillman & Rachlinski, supra* note 35 (discussing the rationale for the current legal approach to paper-form contracts and whether e-commerce creates a different environment requiring a new legal approach).

I. Circle of Assent

Professor Robert M. Lloyd has described the “circle of assent” doctrine as a new way of dealing with standard-form contracts.²⁴⁷ Professor Lloyd attributes the creation of this doctrine to the Tennessee courts.²⁴⁸ He describes the doctrine as “the party who signs a printed form furnished by the other party will be bound by the provisions in the form over which the parties actually bargained and such other provisions that are not unreasonable in view of the circumstances surrounding the transaction.”²⁴⁹ This doctrine appears to be a variation of both the “blanket assent” doctrine introduced by Karl Llewellyn,²⁵⁰ as well as the “reasonable expectations” approach of the Restatement (Second) of Contracts.²⁵¹ To date, it has not been adopted in other jurisdictions.²⁵²

J. Summary

Common themes and conclusions run throughout the literature on standard form contracts. Commentators uniformly agree that at least one party’s subjective assent—in the sense of knowing and understanding terms and wanting them to be part of the contract—is usually lacking in standard form contract transactions. Although no commentator is willing to come out and say the inquiry should be about subjective, rather than objective, assent, it is plain that subjective assent to some terms is lacking in transactions based on standard form contracts.²⁵³

One group of commentators would solve the dilemma by adhering to the doctrine of objective assent to contract formation, and “policing” the enforceability of certain terms.²⁵⁴ Depending on the commentator,

247. See Robert M. Lloyd, *The “Circle of Assent” Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. L. 237 (2006).

248. Although Professor Lloyd suggests that this approach is innovative, it is interesting to note that Professor John E. Murray discussed the scope of the contractual obligation, which he referred to as “the circle of assent” as early as 1975 in his article, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975).

249. *Id.* at 239 (citing *Parton v. Mark Pirtle Oldsmobile Cadillac-Isuzu, Inc.*, 730 S.W.2d 634 (Tenn. Ct. App. 1987)).

250. See *supra* text accompanying note 125.

251. See *supra* text accompanying note 191.

252. A 2008 Westlaw database search of “circle of assent” in the “all states” database yielded sixteen cases. Of these, eleven were from Tennessee, four were from California, and one was from Virginia.

253. See, e.g., LLEWELLYN, *supra* note 19.

254. See Rakoff, *supra* note 145, at 1197 (citing Llewellyn, Kessler, Leff, and Slawson as examples of scholars who advocated some form of the modern doctrine of presumed enforceability coupled with expanded alleviating doctrines).

that approach would eliminate either all non-dickered terms,²⁵⁵ only those terms that a reasonable person entering in the contract would not expect to find,²⁵⁶ only unconscionable terms, or terms that otherwise violate public policy.²⁵⁷ Yet another group would rationalize a finding that all of the seller's terms are incorporated in the contract.²⁵⁸

What is apparent from the literature, however, is scholarly recognition that the use of standard form contracts raises the issue of assent to individual terms, an issue which must be disaggregated from the issue of overall assent to be bound to a contract.²⁵⁹ The only doctrine remaining to protect unwary adhering parties is unconscionability. The proposed knowing assent analysis is preferable because it represents an opportunity to give more protection to adhering parties than these other analyses.

Most of the commentators discussed above are apparently content to let the status quo continue; however, not all commentators agree. John J.A. Burke suggested that a legislative approach would be desirable. Indeed, several legislative and quasi-legislative bodies have attempted to frame an approach to determining the enforceability of standard form contract terms.

IV. LEGISLATIVE AND QUASI-LEGISLATIVE APPROACHES TO ANALYZING STANDARD FORM CONTRACT TERM ENFORCEABILITY

When courts and commentators cannot agree on a uniform approach to analysis, legislative action may provide a solution. Unfortunately, it is highly unlikely that the legislature will solve the issue of assent to standard form contract terms. In the last decade, legislative debate has become heated as a result of several specific legislative proposals.²⁶⁰ Very few states ultimately adopted these proposals.²⁶¹ To some extent, the absence of a consensus on this type of legislation is explained by the conflicting interests of consumers and businesses.²⁶² Yet another

255. See Rakoff, *supra* note 145, at 1243 ("to justify enforcement of any form term, to the extent that it deviates from background law, cause must be shown").

256. See, e.g., Keeton, *supra* note 191 and accompanying text.

257. LLEWELLYN, *supra* note 19.

258. See, e.g., Barnett, *supra* note 208 and accompanying text.

259. See, e.g., LLEWELLYN, *supra* note 19; Meyerson, *supra* note 9; Slawson, *supra* note 141.

260. Some of these efforts are discussed at length *infra* Part IV of this Article.

261. See *infra* note 299 and accompanying text.

262. It is harder to understand the courts' failure to apply the "reasonable expectations" test beyond the area of insurance or the version of that test represented by the Restatement (Second) of Contracts § 211. In his comprehensive article arguing for the adoption of that test, Professor Barnes did not postulate any reasons for this failure. Perhaps John J.A. Burke's critique of these approaches is the best reason for courts' failure to adopt that test. It may be that judges do not feel comfortable identifying the "reasonable expectations" of adhering parties in any given situation.

explanation is that several recent legislative efforts intended to directly address the consent issue were part of legislative packages that were controversial for other reasons.²⁶³ Nevertheless, it is helpful to review some of the legislative and quasi-legislative efforts that address the issue of assent to standard form contract terms, because the proposed rules could still be adopted by courts based on the same reasoning underlying the proposed legislation. This Part reviews some of the specific proposals embodied in the Restatement (Second) of Contracts, the UCC, the Uniform Computer Information Transactions Act (UCITA), legislation proposed by the New Jersey Law Revision Commission, and a selection of international approaches. What emerges from the review of these proposals is the possibility of a knowing assent analysis.

A. *The Restatement (Second) of Contracts*

Although the Restatement is not a statute, it represents an effort to frame rules of law in language that resembles statutes. Accordingly, its approach to the standard form contract term assent issue is worth examining. The authors of the Restatement (Second) of Contracts recognized the importance of standard form contracts in the modern economy.²⁶⁴ However, they also understood that assent in the context of standard form contract terms should be analyzed differently than it is analyzed in the context of a negotiated contract.²⁶⁵ In the comments to section 211,

263. See, e.g., discussion *infra* Part IV.C.

264. For a more in depth discussion of the position taken by the Restatement (Second), see John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982). For the argument that courts should be applying the test from the Restatement, see Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 265 (2007). Comment (a) to § 211 provides the following:

a. Utility of standardization. Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.

RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

265. Comment (f) to § 211 provides the following:

f. Terms excluded. Subsection (3) applies to standardized agreements the general principles stated in §§ 20 and 201. Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in

the authors seem first to adopt Llewellyn's notion of "blanket assent."²⁶⁶ They then describe some of the means by which "unfair terms" in standard form contracts can be policed.²⁶⁷ Based on these premises, the authors adopted the following approach to standardized agreements:

§ 211 Standardized Agreements (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding

detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.

Id. cmt. f.

266. Comment (b) to § 211 provides the following:

b. Assent to unknown terms. A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms

Id. cmt. b.

267. Section (c) provides the following:

c. Review of unfair terms. Standardized agreements are commonly prepared by one party. The customer assents to a few terms, typically inserted in blanks on the printed form, and gives blanket assent to the type of transaction embodied in the standard form. He is commonly not represented in the drafting, and the draftsman may be tempted to overdraw in the interest of his employer. The obvious danger of overreaching has resulted in government regulation of insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts. Regulation sometimes includes administrative review of standard terms, or even prescription of terms. Apart from such regulation, standard terms imposed by one party are enforced. But standard terms may be superseded by separately negotiated or added terms (§ 203), they are construed against the draftsman (§ 206), and they are subject to the overriding obligation of good faith (§ 205) and to the power of the court to refuse to enforce an unconscionable contract or term (§ 208). Moreover, various contracts and terms are against public policy and unenforceable. See Chapter 8.

Id. cmt. c.

of the standard terms of the writing. (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.²⁶⁸

Subsections 2 and 3 discuss whether a party assented to particular terms and embodies a variation of the “reasonable expectations” approach described by Keeton.²⁶⁹ The Restatement also seems to reflect Meyerson’s position that analyzing assent objectively will determine whether specific contract terms become part of the contract.²⁷⁰ Specifically, section 211 provides that standard form terms will only be deemed assented to if all similarly situated people (1) reasonably would have expected such a term to be included in that contract and (2) would have understood that the document was contractual in nature.²⁷¹

Although Restatement section 211 adopts a specific approach to analysis of standard form contract terms, that approach has not been widely followed by the courts except in cases involving insurance contracts.²⁷² In 1997, Professor James J. White conducted a search of cases citing section 211(3) of the Restatement (Second) of Contracts.²⁷³ He discovered 43 cases that interpreted section 211(3) in the United States, and over half of those were from Arizona.²⁷⁴ Most of the Arizona cases involved contracts that governed tort liability—namely coverage disputes between insurers and their insureds.²⁷⁵ This author found more cases

268. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). The Comments to § 211 suggest that it would apply not only to an analysis of assent to particular contract terms, but also to an analysis of ‘assent’ when a party does not even understand that a document embodies contractual undertakings. They cite, by way of example, baggage checks and parking lot tickets, which a party might not recognize as contractual in nature. The assent issues raised by these types of fact patterns are beyond the scope of this Article. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) cmt. d (1981).

269. This approach has been adopted by some states, usually in connection with insurance contracts. See discussion *supra* Part III.F.

270. See *supra* note 181 and accompanying text.

271. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

272. In a very recent article, Professor Wayne R. Barnes agrees with my conclusions regarding the extent to which the Restatement Section 211 has influenced court decisions. He argues that this overlooked doctrine offers a good solution to the problems I propose to address with the doctrine of knowing assent. See Barnes, *supra* note 264, at 250.

273. James J. White, *Form Contracts under Revised Article 2*, 75 WASH. U. L.Q. 315, 324–25 (1997).

274. White states that he conducted LEXIS and Westlaw database searches using the following query: ((RESTATEMENT OR “REST”) + 1 (SECOND OR “2d”) +2 CONTRACT!) AND ((RESTATEMENT OR “REST”)/6 “211”). He also checked appendices to RESTATEMENT (SECOND) OF CONTRACTS to check the list for completeness.

275. White, *supra* note 273, at 325.

citing § 211(3) after updating that research, but the majority continue to be insurance cases.²⁷⁶

Thus, even though Restatement section 211 adopts a specific approach to analysis of standard form contract terms, that approach has not been widely followed except in cases involving insurance contracts.²⁷⁷

B. The Uniform Commercial Code

The current version of UCC Article 2²⁷⁸ does not have a specific provision to address the issue of assent to unbargained-for terms in standard form contracts. However, a provision was proposed during the Article 2 revision process that incorporates a version of the “reasonable expectations.”²⁷⁹ The 1997 Annual Meeting draft provided:

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide whether the contract should be interpreted to exclude the term.

(c) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty.²⁸⁰

276. I could not produce any results using White’s query. Instead, I used the LEXIS feature to search for cases citing Restatement of Law, Contracts, § 211, and found 114 cases. These articles were found using the LEXIS Restatement—case citations—database, terms and connectors query “Restatement w/6 211.” Twenty-six of them were decided in Arizona, and three were decided after 1993. Thirty-six were decided after 1993. In addition, I reviewed all cases cited in the annotations to the Restatement of Contracts (Second) from July 2006 through August 2006. I found a total of 25 cases cited. In most of these cases, the Restatement was cited by one of the parties to the litigation, rather than cited as authority by the court deciding the case.

277. Barnes, *supra* note 264.

278. Despite Herculean efforts to revise Article 2, as of this date the current version of UCC Article 2 is the unamended pre-2003 version of Article 2. Except as otherwise noted, all references in this article to Article 2 are to that version. As discussed in the body of this Article, to date no state has adopted the post-2003 version of Article 2 and its adoption appears to be unlikely.

279. U.C.C. Revised Article 2, § 2-206 (1997 NCCUSL Annual Meeting Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ucc2/ucc2797.htm>.

280. *Id.*

Two things are particularly noteworthy about this proposal. First, it did not apply to all standard form contracts; it was limited in scope to consumer contracts.²⁸¹ Second, one observer described the debate over this proposed provision as one of the most-contested of all of the revised Article 2 provisions.²⁸²

This proposal essentially took the same approach as the Restatement by applying a form of the “reasonable expectations” test that eliminates unbargained-for terms in standard form contracts.²⁸³ The proposal was ultimately removed from the final approved version of revised Article 2.²⁸⁴ The proposals regarding standard form consumer contracts were only some of the controversial Article 2 revisions.²⁸⁵ By the time the American Law Institute and the National Conference of Commissioners on Uniform State Laws accepted a uniform version, support for the revised version was quite weak.²⁸⁶ Accordingly, no state enacted the Article 2 revisions into law.²⁸⁷

C. The Uniform Computer Information Transactions Act

The UCITA is another uniform law that attempts to address the specific issue of assent to particular contract terms in the context of online sales and licensing of computer information.²⁸⁸ The UCITA

281. In that same draft of Revised Article 2, a “consumer contract” was defined as “a contract for sale between a seller regularly engaged in the business of selling and a consumer.” *Id.* § 2-102(8). “Consumer” was defined as the following:

[A]n individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household use. The term does not include an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for professional or commercial purposes.

Id. § 2-102(8)).

282. For a detailed discussion of the treatment of form contracts under the proposed revisions, see James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997). For discussions of some of the problems with revised Article 2, see Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753 (2004); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of A Search for Balance*, 52 SMU L. REV. 1683, 1690 (1990).

283. U.C.C. Revised Article 2, § 2-206 (1997 NCCUSL Annual Meeting Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ucc2/ucc2797.htm>.

284. See U.C.C. § 2-206 (2003).

285. Rusch, *supra* note 282.

286. Even the ABA UCC Committee had difficulty deciding to support its enactment. Finding support sufficient to move state legislatures proved to be impossible.

287. Posting of Keith A. Rowley, krowley@law.ua.edu, to ucclaw-l@lists.washlaw.edu (Feb. 25, 2008) (on file with author) (providing updates on the status of Articles 1, 2, and 2A).

288. This abbreviated discussion of UCITA’s provisions is included only to illustrate one possible legislative solution. Originally intended as a new Article 2B to supplement Articles 2 and 2A

requires that parties assent to particular terms, and it defines manifestation of assent as having two key components: (1) a party's opportunity to review the term, and (2) a party's affirmative action that a reasonable person would understand as assent. Specifically, section 112 provides:

SECTION 112. MANIFESTING ASSENT; OPPORTUNITY TO REVIEW.

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) authenticates the record or term with intent to adopt or accept it; or

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.²⁸⁹

The history of UCITA is almost as painful as that of the revisions to Article 2.²⁹⁰ Originally intended to be Article 2B of the UCC, it faced such strong opposition that supporters were forced to have it promulgated as a stand-alone uniform law.²⁹¹ It is not surprising that as of this writing, only two states have enacted the UCITA and further adoptions are unlikely.²⁹² The lack of acceptance of the UCITA can be explained by the strong opposition of numerous powerful special interest groups. Some of the hotly contested provisions included those that govern

of the UCC but later proposed as an independent code, UCITA has been adopted by two only states: Maryland and Virginia. See MD. CODE ANN. COM. LAW §§ 22–101 (2008); VA. CODE ANN. §§ 59.1–501.1 (2008). The prospects of additional states adopting it are slim.

289. UCITA § 112 cmt. 8 (1999); *Id.* § 112(e)(1); see also *id.* § 211(1)(b); UCITA § 112(e)(1) (rev. ed. Aug. 23, 2001), available at <http://www.law.upenn.edu/bl/ulc/ucita/ucita200.htm>.

290. Compare Margaret Jane Radin, *Humans Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1141 (2000) (arguing that “UCITA’s definition of manifestation of assent stretches the ordinary concept of consent”), with Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1187 (2000) (“There are no new legal developments [in UCITA’s assent provisions]. The revolution—if any—occurred with [Karl] Llewellyn’s old Article 2, which abandoned most formalisms of contract formation, and sought a contract wherever it could be found.”). Nonetheless, UCITA’s notice and assent provisions seem to be consistent with well-established principles governing contract formation and enforcement. See Hillman & Rachlinski, *supra* note 35 (“we contend that UCITA maintains the contextual, balanced approach to standard terms that can be found in the paper world”).

291. Radin, *supra* note 290, at 1140.

292. *Id.*

disputes over standard form contract terms.²⁹³ Although widely contested, the UCITA serves as an example to litigants and courts of a meaningful way to analyze standard form contract term enforceability in that it requires disclosure of the existence of those terms, and knowing assent to particular terms.

D. New Jersey

At least one state, New Jersey, proposed legislation to meet the challenge of analyzing standard form contracts.²⁹⁴ The history and scope of that proposed legislation, The Standard Form Contract Act, is discussed at length in an article by John J.A. Burke, formerly Associate Counsel of the New Jersey Law Revision Commission.²⁹⁵ Notwithstanding the New Jersey Law Revision Commission's extensive study of the issue, the statute was never enacted.²⁹⁶

The Act would have replaced all judicial devices used to evaluate the enforceability of standard form contract terms with special rules to regulate, and in some cases forbid, particular types of contract clauses.²⁹⁷ The types of clauses specifically covered by the Act were: (1) arbitration; (2) risk of loss; (3) disclaimers of warranties; (4) payment of seller's attorneys fees; (5) unilateral change of contract terms; (6) choice of forum and choice of law; and (7) remedy limitations.²⁹⁸ In addition, the Act created a default rule to govern the analysis of what it defined as "secondary terms."²⁹⁹ The rule was that such terms would become part of the contract unless a hypothetical reasonable person, who knew of the term prior to making a purchase, would have walked away from the sale.³⁰⁰

The critical distinction between the Act's default rule and traditional tests, such as unconscionability, is that the Act's rule focuses on rejection of the entire deal, while the traditional tests focus on the rejection of the disputed term.³⁰¹

293. A significant amount of historical material regarding UCITA and opposition to it can be found at <http://www.badsoftware.com>. Additional information is available at <http://www.ucita.com>.

294. N.J. LAW REVISION COMM'N, NEW JERSEY STANDARD FORM CONTRACT ACT (1998), available at <http://www.lawrev.state.nj.us/rpts/contract.pdf>.

295. Burke, *supra* note 174.

296. E-mail from John J.A. Burke, Professor, Riga Graduate School, to Edith R. Warkentine, Professor of Law, Western State University College of Law (Nov. 2006) (on file with author).

297. Burke, *supra* note 174, at 312.

298. *Id.* at 314–15.

299. *Id.* at 315.

300. *Id.* at 324.

301. *Id.* at 324.

E. International Solutions

Countries outside the United States have formulated specific tests for the enforceability of terms in standard form contracts.³⁰² In general, they distinguish between consumer standard form contracts and other standard form contracts.³⁰³ The applicable law provides for enforcement of only those terms in a standard form contract which a consumer might have reasonably expected. For example, the Unidroit Principles of International Commercial Contracts, which governs contracting under standard terms and when those terms will be enforceable, reads:

- (1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
- (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.³⁰⁴

Other laws go even further to provide that unfair contract terms (terms that are not negotiated) are not enforceable.³⁰⁵ Scholars who have studied these international solutions uniformly suggest that the United States would benefit from taking a similar approach.³⁰⁶

F. Lessons Learned From Legislative Proposals

The legislative proposals reviewed in this Section share many common features. Most focus on assent, which is defined in a variety of ways.³⁰⁷ The alternate approaches included a “blanket assent” ap-

302. This Part is largely based on the work of Professor Jennifer Martin. See Jennifer S. Martin, *An Emerging Worldwide Standard for Protection of Consumers in the Sale of Goods: Did We Miss an Opportunity With Revised Article 2?*, 41 *TEX. INT'L L.J.* 223, 240 (2006) (summarizing laws providing consumer protection in the sale of goods in the European Union, Eastern Europe, the Pacific Rim and North and South America).

303. *Id.* at 229. As discussed above, in my opinion the better view recognizes that standard form contracts all raise the same problems whether or not they involve consumers.

304. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 2.1.20 (1994), available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

305. Martin, *supra* note 302, at 240.

306. See, e.g., *id.*; Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 *VAND. J. TRANSNAT'L L.* 1219 (2001) (comparing and contrasting U.S. and E.U. consumer law); Lawrence Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 *EMORY INT'L L. REV.* 1, 14 n.40 (2002); Eric Mills Holmes & Dagmar Thurmman, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 *GA. J. INT'L & COMP. L.* 323 (1987).

307. See, e.g., *supra* note 290 and accompanying text (defining assent as requiring an opportunity to review terms); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); *supra* note 268 and accompanying text (where assent to a particular term is not found if the form drafter has reason to

proach,³⁰⁸ a “reasonable expectations” approach,³⁰⁹ and an unconscionability approach.³¹⁰ Most of the proposals disaggregate consent to a binding contract from assent to individual terms,³¹¹ and each offers a somewhat different approach to analyzing assent.

The legislative and quasi-legislative proposals, like the scholarly literature, recognize that standard form contracts raise the issue of assent to individual terms, an issue which must be disaggregated from the issue of overall assent to be bound to a contract.³¹² Most of the proposals do not question the possibility that a contract has been formed.³¹³ Instead, the legislation focuses on whether all of the terms represented by the standard form contract provisions should be enforced. Furthermore, failure to enforce a contract term under most of these legislative proposals is the exception rather than the rule.³¹⁴ The only major new idea introduced in these legislative proposals is that assent should be tied to disclosure or at least tied to availability of terms,³¹⁵ and, in some cases, an affirmative showing of assent to terms rather than just assent to be in a contractual relationship.³¹⁶

V. WHAT IS WRONG WITH STANDARD FORM CONTRACTS, AND WHAT ARE COURTS DOING ABOUT IT?

With all the attention that has been paid to standard form contracts, what is missing is a forthright explanation of what is wrong with them. Courts and commentators alike agree that we can no longer do business without using standard form contracts.³¹⁷ Standard form contracts seem

believe that the party manifesting such assent would not do so if he knew the writing contained a particular term).

308. This is the existing approach of Article 2 of the Uniform Commercial Code. *See* U.C.C. art. 2 (2005); *but see infra* note 310.

309. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); *supra* note 268 and accompanying text; *see also*; U.C.C. art. 2 (2005).

310. The current version of Article 2 embodies this approach, by including § 2-302. Official Comment 1 states: “This section is intended to make it possible for courts to police explicitly against the contracts or clauses which they find to be unconscionable.” U.C.C. § 2-302 cmt. 1 (2003).

311. *See, e.g.*, *supra* note 290 and accompanying text.

312. *Id.*

313. As discussed in the body of this paper, none of the legislative proposals discussed in this part suggest that a contract may not be formed; rather, each focuses on the enforceability of particular contract terms.

314. As discussed above, each of the proposals discussed lays out an approach to examining the enforceability of particular terms—the bulk of the standard form contract terms would not be affected. This is particularly the case under the “reasonable expectations” approach.

315. *See, e.g.*, UCITA, *supra* note 289 and accompanying text.

316. *See, e.g.*, *supra* note 294.

317. *See, e.g.*, Hillman & Rachlinski *supra* note 35, at 464.

to be accepted as the status quo. The law and economics folks think that standard forms are more efficient.³¹⁸ Businesspeople like the convenience of being able to use the same form repeatedly: their salespeople can become familiar with the form; legal has blessed it; it is fast and it is predictable.³¹⁹ The adhering parties encounter such forms in isolated transactions and are more interested in the commodity or service they are purchasing than the form they are being asked to sign. They may shop for the price of the goods or the color of the car, but they will almost never think about the form contract they are required to sign. Lawyers, law students, and even law professors are quick to acknowledge that they themselves rarely read the forms they sign or the agreements they “click through” on the Internet.³²⁰

When people began to form contracts in cyberspace, courts and scholars paid close attention and described the “new” issues and “new” concerns raised by such contracts.³²¹ However, there is nothing new to cyberspace contracts when we look at the issues that are raised and the cases that are litigated.³²² The problems are the same as they have been since the advent of standard form contracts. The challenges are with particular provisions tucked away in the standard form contracts for the convenience and benefit of the form drafter. The cyberspace contract cases are of particular interest, however, because in at least some instances courts have made decisions regarding term enforceability using an assent analysis.

Whether a particular clause is contained within an employment contract, an insurance contract, a credit card agreement, an agreement with a financial institution, a seller’s standard form sales agreement or an Internet provider’s agreement, or any of the other commonly used form contracts, the chief problem with the standard form contract is that the form drafter “hides” selected onerous terms in it.³²³ Sometimes the terms are

318. See RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 66–67 (2d ed. 1977) (stating that efficient economic planning is fostered by legal enforcement of private agreements); *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (“form contracts . . . enable enormous savings in transaction costs”).

319. Hillman & Rachlinski, *supra* note 35 at 488.

320. *Id.*

321. *Id.*

322. *But see id.* (asserting that Internet contracting raises new problems, but concluding that traditional contract doctrine is sufficient to address those problems).

323. See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1275 (9th Cir. 2006) (arbitration clause “hidden” on page twenty-five of a thirty-page agreement); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347 (Cal. Ct. App. 1972) (offeree is not bound by inconspicuous allegedly contractual provisions of which he is unaware and which are contained in a document whose contractual nature is not obvious).

“hidden” by means of their location in pages of small print.³²⁴ These terms are discovered by the adhering party only some time after entering into the contract, when a problem arises and the adhering party learns that there is a totally unexpected and un-bargained for clause that alters the rights that party expected under the contract.³²⁵

In addition to the problem of “hidden terms,” it is common for terms in standard form contracts to favor the drafter. Some of the most egregious provisions found in early standard form contracts have been abolished through litigation or legislation. For example, the use of the infamous “dragnet” clause³²⁶ that resulted in the forefather of almost all modern unconscionability cases, *Williams v. Walker-Thomas Furniture Co.*,³²⁷ has been outlawed for use in consumer transactions in subsequent revisions of UCC Article 9.³²⁸ However, other provisions persistently appear in standard form contracts and are contested in the courts. A review of case law suggests that certain clauses have resulted in the bulk of the reported opinions. These include (1) arbitration clauses;³²⁹ (2) choice of law and forum selection clauses;³³⁰ (3) clauses limiting liability (disclaimers of warranties, exclusion of liability for damages, remedy limitations);³³¹ (4) exculpatory and indemnification clauses;³³² and (5) clauses reserving the right to make unilateral changes to contract terms.³³³ These

324. See, e.g., *Nagrampa*, 469 F.3d at 1275 (arbitration clause “hidden” on page twenty-five of a thirty-page agreement).

325. This Article does not address the issue of terms that are “hidden” because they are incorporated into documents that most people would not expect to contain binding contract terms, such as ticket stubs and receipts.

326. For example, a clause stating that a security agreement secures all the debts that the debtor may at any time owe to the creditor.

327. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). In that case, Mrs. Williams bought a variety of goods on secured credit. Under a dragnet clause in the store’s agreement, each new purchase became security for the repayment of the entire debt. Payments were applied pro rata to the debt arising out of each individual sale. As a result, no purchase was ever paid in full. When Mrs. Williams ultimately defaulted, the store repossessed everything she had purchased, even though she had paid an amount that, had it been applied to pay off each debt as that amount was reached, would have paid off the majority of her debt, leaving only a few items as security for the remaining outstanding balance. *Id.*

328. U.C.C. § 9-204(b) (2005).

329. See cases discussed *infra* Part V.A.

330. See cases discussed *infra* Part V.B.

331. See cases discussed *infra* Part V.C.

332. See, e.g., *Krueger Assocs., Inc. v. Am. Dist. Telegraph Co. of Pa.*, 247 F.3d 61 (3d Cir. 2001) (indemnification clause in fire alarm contract not unconscionable); *Maxon Corp. v. Tyler Pipe Indus., Inc.*, 497 N.E.2d 570, 577–78 (Ind. Ct. App. 1986) (the insertion of an indemnification clause not agreed to by parties amounted to procedural unconscionability where the clause appeared in one sentence at the end of a long passage in boilerplate).

333. See, e.g., *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189 (E.D.N.Y. 2004) (under Virginia law, clause not binding on customer where change-in-terms provision in customer

are essentially the same clauses that the New Jersey Law Review Commission identified in its 1998 study.³³⁴ The following discussion looks at some of the standard form contract clauses that are consistently challenged, asks what is wrong with them, explores how courts are addressing the common challenges, and considers how a ‘knowing assent’ analysis might lead to a different result. This Part also looks closely at the enforcement of merger clauses, a type of clause that has not resulted in an abundance of reported cases, but that can be challenged for lack of “knowing assent.”

A. Agreements to Arbitrate

Arbitration clauses may be the subject of more disputes over standard form contract terms than any other type of clause.³³⁵ Binding arbitration clauses provide that disputes shall be resolved through arbitration rather than litigation.³³⁶ The scope of such clauses, i.e., the definition of the disputes that must be resolved by arbitration, might include all disputes between the same parties, all disputes arising out of or related to the agreement, or a narrower range of defined disputes. The abundance of reported cases involving the enforceability of arbitration clauses in standard form contracts is understandable given the context in which such suits will arise. Generally, one contract party (usually the adhering

agreement executed by consumer and bank did not authorize bank to unilaterally add an arbitration clause; court interpreted contract clause to avoid unconscionable result).

334. The New Jersey Law Revision Commission’s proposed law would have specifically addressed clauses regarding the following: (1) arbitration; (2) risk of loss; (3) remedies for non-conforming and defective products; (4) choice of forum; (5) damage limitations; (6) attorneys fees; and (7) unilateral change of contract terms. N.J. LAW REVISION COMM’N, FINAL REPORT AND RECOMMENDATIONS ON STANDARD FORM CONTRACTS 13 (1998), available at <http://www.lawrev.state.nj.us/rpts/contract.pdf>.

335. For a detailed discussion of problems with mandatory arbitration clauses, see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695 (2001). For an empirical study of dispute resolution in consumer transactions, see Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62–63 (2004). For a discussion of some of the procedural issues raised by class action waivers in arbitration provisions, see Carole Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006). Susan Randall states that a systematic examination of reported cases involving claims of unconscionability show that in 2002 and 2003 litigants raised issues of unconscionability in 235 cases and that the courts found contracts or clauses unenforceable in 100 of those cases, or 42.5 percent. Of those 235 cases, 161 or 68.5 percent, involved arbitration agreements. She also states that courts were much more likely to find arbitration agreements, as opposed to other sorts of contracts, unconscionable. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

336. If an arbitration clause is not mandatory, or if it does not provide that the results of the arbitrator are binding, the clause may result in delay, which may discourage challengers from pursuing litigation; but on its face, it does not deprive the adhering party of recourse to litigation. Accordingly, only mandatory binding arbitration provisions present the problems discussed in the text.

party) files suit, and the other (usually the form drafter) seeks to have the suit dismissed because the contract contains a provision that mandates arbitration. In response, the party who filed suit claims that the clause should not be enforced.

One problem with mandatory binding arbitration clauses is that they deprive the adhering party of a judicial resolution of the dispute. Form drafters can lessen the impact of state regulations and case law by assuring that disputes will not be heard in a judicial forum.³³⁷ Such clauses are often combined with outright waivers of the right to pursue class actions. There is a wealth of scholarship discussing whether mandatory or binding arbitration provisions deprive parties of procedural due process.³³⁸ Many scholars have focused on the use of arbitration clauses in particular categories, such as labor and employment,³³⁹ financial services,³⁴⁰ franchise agreements,³⁴¹ and the securities industry.³⁴² Focusing exclusively on what is wrong with such clauses from the perspective of contract law, several scholars have emphasized the lack of meaningful choice, the lack of assent, and the fact that consumers do not understand the clauses.³⁴³ Yet court challenges to arbitration provisions have focused on the doctrine of unconscionability.³⁴⁴

337 See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 76 (1997) (“The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves.”).

338. See, e.g., Buckner, *supra* note 335.

339. See Jeffrey L. Fisher, *State Action and the Enforcement of Compulsory Arbitration Agreements Against Employment Discrimination Claims*, 18 HOFSTRA LAB. & EMP. L.J. 289, 295–97 (2000); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 76 (1997); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255 (1994).

340. See, e.g., Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995).

341. See, e.g., Jean R. Sternlight, *Protecting Franchisees from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45, 47 (2000).

342. Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996). See also Deborah Masucci, *Securities Arbitration—A Success Story: What Does the Future Hold?*, 31 WAKE FOREST L. REV. 183 (1996); IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* ch. 13 (1994 & Supp. 1996); *Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1613 (1995).

343. See Drahozal, *supra* note 335, providing the following:

Analysis of the enforceability of arbitration clauses begins with the Federal Arbitration Act, which specifically provides that arbitration agreements “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”³⁴⁵ The statute expresses a liberal policy that favors enforcement of arbitration agreements.³⁴⁶ As a result of this federal mandate, cases in which courts have upheld arbitration agreements are voluminous.³⁴⁷ The general rule is that federal law favors enforcement of such agreements, and state law may be used to resist enforcement only if the same state law would invalidate any contract provision on the same basis.³⁴⁸ Accordingly, traditional contract defenses such as fraud, duress, and unconscionability may be used to invalidate arbitration agreements (whereas a state law specifically invalidating arbitration agreements may not).³⁴⁹

It is not surprising that courts have been willing to invalidate arbitration clauses based on unconscionability because unconscionability is a traditional contract defense and arbitration clauses are often found in non-negotiable standard form contracts. California courts, in particular, have not enforced arbitration clauses if (1) the clause was contained in a

The criticisms of pre-dispute arbitration clauses in consumer contracts are many. First, arbitration is ‘mandatory’: individuals have no choice but to agree to arbitrate or do without the good or service altogether, and, once they have agreed to arbitrate, they cannot decide to go to court when a dispute arises. . . . Second, arbitration is ‘unfair’: limited discovery, lack of a jury trial or a right to appeal, repeat-player advantages in selecting arbitrators, no class relief, and excessive fees unfairly disadvantage individuals bringing claims. . . . Finally, arbitration clauses likewise can be ‘unfair’: clauses drafted by corporations provide for biased tribunals and distant locations for hearings, preclude recovery of attorneys’ fees and punitive damages, shorten time limits for filing.

Id.; Demaine & Hensler, *supra* note 335; Jean Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002); Katherine Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269 (1998).

344. In some cases, arbitration clauses have also been invalidated on general public policy grounds. *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 683 (Cal. 2000).

345. 9 U.S.C. § 2 (2000).

346. *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) (citing *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)).

347. *See, e.g.*, *Drahozal, supra* note 335 (citing Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 25–39 (1997) (criticizing courts for being too willing to enforce agreements to arbitrate)).

348. *See Casarotto*, 517 U.S. at 684–85 (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987)).

349. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Casarotto*, 517 U.S. at 686.

standard form; (2) evidence showed that the contract was a “contract of adhesion”;³⁵⁰ and (3) the arbitration clause failed to meet the test set forth in a line of cases beginning with *Armendariz v. Foundation Health Psychcare Services*.³⁵¹ The *Armendariz* court held that such an arbitration agreement is lawful if it meets minimal requirements, “including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.”³⁵²

However, even arbitration clauses that meet the *Armendariz* standard can be defeated on unconscionability grounds. One consistently successful attack based on substantive unconscionability is the failure of the clause to require both parties to pursue arbitration under the same set of circumstances.³⁵³ The Ninth Circuit Court of Appeals took this approach in *Circuit City Stores, Inc. v. Mantor*.³⁵⁴ In that case, the court characterized California law as raising a rebuttable presumption that an arbitration clause in an employment contract is substantively unconscionable, and to overcome that presumption, the employer must demonstrate that the effect of a contract to arbitrate is bilateral with respect to a particular employee.³⁵⁵

Although challenges to arbitration clauses in paper contracts are usually based on public policy or unconscionability, in the context of arbitration provisions in contracts posted and formed over the Internet, some courts avoid enforcing the provision by using an assent analysis instead of an unconscionability analysis.³⁵⁶ In *Specht v. Netscape Communications Corp.*, the Second Circuit Court of Appeals found that even

350. California courts define a contract of adhesion as a “standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” See e.g., *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001) (“A finding of a contract of adhesion is essentially a finding of procedural unconscionability.”). These courts equate the finding of a contract of adhesion with the finding of procedural unconscionability.

351. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83 (2000).

352. *Id.* at 90–91.

353. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893–94 (9th Cir. 2002) (arbitration that required employee to arbitrate virtually all disputes without imposing same requirement on employer unconscionable under *Armendariz*).

354. *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003).

355. *Id.* (citing CAL. CIV. CODE § 1670.5 (West 2008)). Similarly, in Montana, courts have refused to enforce arbitration clauses that were not “bilateral.” See, e.g., *Iwen v. U.S. W. Direct*, 977 P.2d 989, 995 (Mont. 1999) (arbitration provision on standardized form used by telecommunications company to market yellow page advertising found unconscionable and oppressive because the rights of the contracting parties were one-sided and unreasonably favorable to the drafter: advertiser was bound to arbitrate all disputes, but telecommunications company was not required to arbitrate disputes arising out of unpaid accounts).

356. See, e.g., *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

though the plaintiffs had clicked “yes” to show agreement to the terms of the license agreement before they downloaded the defendant’s software, they had not assented to an arbitration clause included in Netscape’s on-line software license agreement where they could have learned of the existence of the clause only by scrolling down the webpage to a screen located below the download button.³⁵⁷ It reasoned that “a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms.”³⁵⁸

Consequently, “the plaintiffs’ bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms.”³⁵⁹ The court emphasized that the touchstone of a contract is a party’s manifestation of assent, whether by written or spoken word or by conduct.³⁶⁰ It reasoned that a consumer’s “click” on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.³⁶¹ The court also emphasized an exception to the general “duty to read” rule for situations when the writing does not appear to be a contract and the terms are not called to the attention of the recipient, noting that in such cases, no contract is formed with respect to the undisclosed term.³⁶²

Although the court in *Specht* did not use the phrase “knowing assent,” it plainly departed from the strict “objective manifestation of assent” approach to finding assent when it put the burden on the form drafter to show that the term was called to the attention of the adhering party. This approach is similar to that suggested in the earlier drafts of UCITA and revised Article 2.³⁶³

357. *Id.* (court applying California law).

358. *Id.* at 20.

359. *Id.*

360. *Id.* at 29 (citing *Binder v. Aetna Life Ins. Co.*, 89 Cal. Rptr. 2d 540, 550 (Cal. Ct. App. 1999)); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981) (“The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”).

361. *Id.* at 30 (citing *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 350 (Cal. Ct. App. 1972)).

362. *Id.*

363. *See supra* Part IV.B–C.

B. Choice of Law and Forum Selection Clauses

Choice of law and forum selection clauses determines what law governs in the event of a dispute and where the dispute is to be litigated.³⁶⁴ In standard form contracts, both the choice of law and choice of forum are selected for the convenience of the form drafter, and may have no relationship to the residence of the adhering party or to where the transaction takes place. By controlling the choice of law, the form drafter can avoid substantive state law—both legislative and judicial—that might favor the adhering party. Many commentators agree that some states have a more consumer-friendly or a more business-friendly body of law.³⁶⁵ Thus, by including a choice of law provision a form drafter can control the outcome of potential litigation. By controlling the choice of forum, the form drafter can also almost assure a default judgment, since a location outside of the adhering party's residence³⁶⁶ will usually make it prohibitively expensive for that party to pursue a disputed claim.³⁶⁷ In addition, the form drafter can greatly reduce the amount of potential adverse litigation because of the prohibitive cost to the adhering party of initiating litigation in a forum that is far from the adhering party's residence.

Most judicial analyses of forum selection clauses begin with the decision of the United States Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*,³⁶⁸ where the Court enforced a forum selection clause contained in a cruise line's passage ticket contract. The Shutes, residents of the State of Washington, claimed that they were unaware of the clause at the

364. Some of the recent articles discussing the enforceability of forum selection clauses include William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2006); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000); William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243 (1997); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992).

365. See, e.g., Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 B.U. PUB. INT. L.J. 366, 367 (2001) ("Backed by precedents like *Johnson*, sellers and lenders can avoid legislation protecting consumers by the simple expedient of inserting arbitration clauses into their adhesive contracts."); Melissa Briggs Hutchens, *Commentary: At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 610 n.111 (2001) ("Other states have applied their state contract law in a more consumer-friendly fashion to arbitration provisions in general . . .").

366. Or the principal place of business of a closely held corporation.

367. Whereas the option of a small claims court hearing may make it worth the adhering party's interest to pursue a dispute when that same party has to go to another state, the costs of travel and lodging while going to court will usually inhibit that party from proceeding for a claim with a relatively small monetary value.

368. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

time they purchased their tickets.³⁶⁹ Sometime after the Shutes paid for their tickets, the tickets arrived in the mail; the challenged clause was included in material they received after they had paid for the cruise.³⁷⁰ The tickets stated on their face: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT—ON LAST PAGES 1, 2, 3."³⁷¹ Contract page 1 of each ticket stated:

TERMS AND CONDITIONS OF PASSAGE CONTRACT
TICKET. . . .

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket. . . .

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."³⁷²

The Court reasoned that because the Shutes had time after receipt of their tickets to cancel the cruise if they did not like the forum selection clause, their retention of the tickets constituted acceptance of all of the terms, including the choice of law provisions.³⁷³ The Court ignored the unlikelihood that average cruise-goers would read material received after they paid for their tickets and once they confirmed that their tickets were enclosed in the envelope.³⁷⁴ It further ignored basic contract doctrine, which would treat the language of the terms and conditions as proposals for contract modification, requiring the Shutes to affirmatively assent to those new terms.³⁷⁵

369. *Id.*

370. *Id.*

371. *Id.* at 587.

372. *Id.* at 587–88.

373. *Id.* at 595.

374. *Id.* at 597 (Stevens, J., dissenting) ("I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision.").

375. Under traditional contract analysis, a contract was formed between Carnival Cruise and the Shutes when the Shutes paid the fare to the agent who forwarded the payment to the cruise line's headquarters. The tickets that were then sent to the Shutes contained terms that were not part of the original agreement. Accordingly, they should have been analyzed as proposals for a contract modification, to which the Shutes did not manifest assent.

In the dissenting opinion, Justices Stevens and Marshall challenged the majority's conclusion that the clause should be enforced.³⁷⁶ They noted that forum selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written.³⁷⁷ The first strand was the principle that courts "review with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power."³⁷⁸ In this context, they noted that this clause appeared in the eighth of the twenty-five numbered paragraphs ("hiding" important terms in small print is often a significant factor in a finding of procedural unconscionability).³⁷⁹ The second strand was that contractual provisions that seek to limit the place or court in which an action may be brought are invalid as contrary to public policy.³⁸⁰ The majority's conclusions in *Shute* were fatally flawed for the same reason that Judge Easterbrook's decisions in *ProCd* and *Hill v. Gateway* were flawed: they permitted one party to unilaterally add contract terms, without requiring the other contract party's assent to what was essentially a contract modification. The *Shute* decision has been frequently criticized for the Court's willingness to hold the Shutes to contract terms that were not disclosed until after the contract was formed.³⁸¹ However, because *Shute* is mandatory precedent, lower courts continue to uphold forum selection clauses, even in situations like *Shute* where assent is lacking.³⁸²

Similarly, discussions of choice of law provisions have not focused on enforceability as a matter of contract law.³⁸³ Rather, these discussions assume the enforceability of such provisions as a matter of contract law and explore the enforceability of such provisions vis-à-vis a jurisdiction's interests in applying its own laws and hearing disputes affecting its own citizens.³⁸⁴ Certainly, such concerns are important; however, as

376. *Carnival*, 499 U.S. at 605.

377. *Id.* at 600.

378. *Id.*

379. *Id.* at 597.

380. *Id.* at 598.

381. See, e.g., Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992).

382. See, e.g., *O'Brien v. Okemo Mountain, Inc.*, 17 F. Supp. 2d 98, 103 (D. Conn., 1998) (providing "the validity of a forum selection clause in an adhesion contract depends on whether the existence of the clause was reasonably communicated to the plaintiff." (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991))).

383. Woodward, *supra* note 364.

384. *Id.*

Professor William J. Woodward Jr. illustrated in his article regarding such contract provisions, it may not be necessary to reach those concerns if basic contract doctrine is properly applied.³⁸⁵

Both the majority and dissent in *Shute* and most of the cases following *Shute* ignore the basic contract requirement of assent.³⁸⁶ Although assent might have been found based on the “duty to read” concept, the facts of that case would have been better analyzed like the Second Circuit Court of Appeals analyzed the facts in *Specht*.³⁸⁷ A reasonable person who purchases cruise tickets would not expect to find additional unbargained-for terms in the package of tickets that arrives after payment has been made. Indeed, such purchasers could reasonably assume that they had been told all of the contract terms before they paid for the cruise—either in the brochure advertising the cruise or in paperwork signed in connection with ordering the tickets. Accordingly, the adhering party should not be bound to the new terms mailed with the tickets because those terms were inconspicuous and contained in a document whose contractual nature was not obvious. In short, a knowing assent analysis, which would require disclosure and understanding of those additional terms, would lead to a conclusion that the terms were unenforceable.

C. Clauses Disclaiming Warranties and Limiting Remedies

Warranty disclaimers take away a buyer’s right to expect a certain level of product performance. Remedy limitations deprive the buyer of the legal remedies for breach that would otherwise be available. If such provisions are part of a negotiated contract between parties with equal bargaining power, they represent an agreed upon allocation of risk, which is usually reflected in other aspects of the transaction, particularly the price. In contrast, when such contract provisions are part of a standard form contract the adhering party may not be aware of the provisions. Even if the adhering party is aware of them, the party often lacks the knowledge necessary to understand the import of such provisions, which may be drastically at odds with that party’s reasonable expectations.

Disputes over the enforceability of warranty disclaimers and remedy limitations in transactions for the sale of goods are governed by the

385. *Id.*

386. *Id.* at 2 (“What has been largely missing from the work thus far is a focus on a preceding set of threshold questions: 1) whether the parties’ purported agreement to a choice-of-law or a choice-of-forum clause ought, *as a matter of contract law*, to be enforceable . . .”).

387. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

UCC. UCC section 2-316 governs the disclaimer of express warranties, the implied warranty of merchantability, and implied warranties of fitness for a particular purpose.³⁸⁸ Section 2-719 governs remedy limitations.³⁸⁹ Both of these sections specifically invite, at least in part, an unconscionability analysis.

1. Section 2-316(1)

The enforceability of an express warranty disclaimer most often depends on the application of the parol evidence rule.³⁹⁰ A dispute over the enforceability of an express warranty usually arises in the context of an alleged oral warranty made prior to, or contemporaneously with, the signing of a written contract that purports to disclaim warranties. As a practical matter, if the court excludes evidence of the oral warranty, the warranty disclaimer is effective. If, on the other hand, the evidence is admitted (and believed), the warranty disclaimer will be effective only if it is possible to construe it as consistent with the alleged oral warranty, which rarely is the case. Accordingly, it is section 2-202 of the UCC—the UCC’s version of the parol evidence rule—that is often most important in determining whether the express warranty disclaimer will be effective.³⁹¹ A leading commentator has suggested, and the suggestion has been repeated by many others, that even if a fully integrated writing contains a merger clause, it may be possible to show either that there was no assent to that term or that the term is unconscionable.³⁹² However, cases that have actually stricken a merger clause on unconscionability grounds are few and far between.³⁹³ In rare cases, courts have permitted evidence of an oral express warranty to negate the effectiveness of a written disclaimer, notwithstanding the fact that the contract contained a merger

388. The disclaimer of the warranty of title is infrequently the focus of reported cases and is governed by U.C.C. § 2-312.

389. U.C.C. § 2-719 (2003).

390. *See supra* Part II.A.

391. *See Pennsylvania Gas Co. v. Secord Bros., Inc.*, 343 N.Y.S.2d 256, 265 (N.Y. Sup. Ct. 1973) (Court refused to admit evidence of alleged oral warranties where contract contained warranty disclaimer and merger clause that stated, in part that “there are no promises, terms, conditions, or warranties other than those contained herein”); *Tacoma Boatbuilding Co. v. Delta Fishing Co., Inc.*, Nos. 165-72C3–168-72C3, 1980 WL 98403 (W.D. Wash. Jan. 4, 1980.) (“There is some question whether language that complies with U.C.C. 2-316 could be unconscionable under 2-302. . . . If there is some conduct that could render a disclaimer of warranties ineffective in a commercial setting, such conduct is not present in the case at bar.”).

392. JAMES J. WHITE & ROBERT SUMMERS, *HANDBOOK ON THE UNIFORM COMMERCIAL CODE* § 2-12, 103–08 (5th ed. 2000).

393. *See supra* Part V.D.

clause.³⁹⁴ In such cases, the courts seem to emphasize the exact language of section 2-316(1) and interpret it to mean that a written disclaimer will defeat the policy favoring enforcement of express warranties.³⁹⁵ For that reason, these courts ignore the merger clause and admit evidence of the oral express warranty.³⁹⁶

For example, in *Seibel v. Layne & Bowler, Inc.*,³⁹⁷ the Oregon Court of Appeals considered whether a merger clause would bar evidence of an express warranty.³⁹⁸ In *Seibel*, the plaintiffs were partners in a farming operation who brought suit for breach of contract, breach of warranty, and negligence; they sought consequential damages allegedly caused by the failure of a pump, which they purchased from the defendant, to function properly.³⁹⁹ The buyers alleged that the seller had made oral express warranties regarding the pump; however, the seller disclaimed all warranties except for a very limited warranty in small print on the reverse side of the printed sales contract.⁴⁰⁰ The form also included a provision that limited the seller's liability for breach of that warranty to the cost of repair.⁴⁰¹ In addition, the form contained a merger clause, which indicated that the writing was intended to be a complete and exclusive expression of their agreement. The seller's defense relied upon these contract provisions to defeat the buyers' claims.⁴⁰²

394. *See, e.g.*, *Carpetland USA v Payne*, 536 N.E.2d 306 (Ind. Ct. App. 1989) (Evidence of prior oral warranty by seller showed parties had not intended the writing to be "fully integrated," so warranty was admissible; the warranty disclaimer was inoperative).

395. *See, e.g., id.* at 309 (court emphasized Official Comment 1 to section 2-316, which states that this section, "seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . .").

396. *See, e.g.*, *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668 (Or. Ct. App. 1982).

397. *Id.*

398. *Id.* at 670.

399. *Id.* at 699-70.

400. *Id.* at 670.

401. The court's description of the form and its contents is telling:

Here, the terms and conditions are printed on standard-size paper (8½ X 11) and fill approximately three-quarters of the page. These terms cover numerous aspects of the contractual relationship in addition to the disclaimers. The type is smaller than that used for footnotes in this court's permanent reports and the lines are longer and more closely spaced than in our footnotes. There is neither indentation nor extra spacing between paragraphs. The print is generally difficult to read. The exculpatory provisions themselves are set out no differently than the other terms. Only the paragraph headings, e.g., "WARRANTY," stand out, but such a heading suggests the making of warranties, not their exclusion. (citation omitted). In sum, there is nothing conspicuous about the disclaimers here.

Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 670 (Or. Ct. App. 1982).

402. *Id.* at 670-71.

The court held that the warranty disclaimers, remedy limitation, and merger clause were all invalid because of the manner in which they were set forth in the standard form contract.⁴⁰³ It emphasized the UCC policy of requiring that disclaimers be “conspicuous” (although that term does not appear in section 2-316(1)) and also referred to the UCC’s unconscionability rule.⁴⁰⁴ Specifically, with respect to the issue of whether the merger clause evidenced the parties’ intent, the court stated that “[b]ecause the merger clause is as inconspicuous as the disclaimers, it provides little or no evidence of the parties’ intentions, regardless of the defendant’s intentions.”⁴⁰⁵ The court noted, “[w]e think that a merger clause which would deny effect to an express warranty must be conspicuous to prevent an even greater surprise.”⁴⁰⁶

The majority of cases, however, exclude evidence of an express warranty on the grounds that the merger clause evidences the intent of the parties to make the written agreement a full integration. For example, in *Roland v. MAI Basic Four, Inc.*,⁴⁰⁷ a doctor sued a computer manufacturer, claiming that certain oral express warranties had been breached, but the Florida court upheld a merger clause in the seller’s standard form contract.⁴⁰⁸ Without discussing whether the buyer had assented to that clause, the court noted that under similar circumstances, other courts had held that such language disavows prior expressions of warranty as a matter of law.⁴⁰⁹ The court emphasized the relatively short length of the contract and the fact that the challenged provisions were called to the buyer’s attention by language set forth above the signature line.⁴¹⁰ It is possible that a knowing assent analysis would reach the same result. When an enforced contract is written in a form reasonably calculated to call the signer’s attention to it, the situation is a far cry from enforcing a

403. *Id.* at 671.

404. *Id.*

405. *Id.*

406. *Id.*

407. No. 90-6169, 1992 WL 454480 (S.D. Fla. Oct. 19, 1992).

408. That clause read, “11. Interpretation. This Agreement supersedes all prior communications and agreements between the parties relating to the subject matter of this Agreement and constitutes the full understanding of the parties with respect thereto . . .” *Id.*

409. *Id.* (citing *Earman Oil*, 625 F.2d 1291, 1298 (5th Cir. 1980) (applying Florida law)); *Jaskey Fin. & Leasing v. Display Data Corp.*, 564 F. Supp. 160, 163-64 (D.C. Pa. 1983); *Applications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129, 132-34 (S.D.N.Y. 1980); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39, 44-45 (D.C.S.C. 1974); *Bakal v. Burroughs Corp.*, 343 N.Y.S.2d 541, 544 (N.Y. Sup. Ct. 1972).

410. “[T]he contract itself is only a few pages long. On its back are provisions that severely limit Molinet’s rights; a caption above the signature line declares that those provisions are incorporated into the agreement.” *Molinet v. MAI Basic Four, Inc.*, No. 90-6169, 1992 WL 454480 (S.D. Fla. Oct. 19, 1992).

contract that contains hidden and confusing terms, unless the contract is written in language that a reasonable person would not understand. However, the reported decision does not discuss the facts that would need to be examined for a knowing assent analysis.⁴¹¹ Just as courts interpret the language required to disclaim a warranty of title in sales contracts, courts should also require that merger clause language make it clear to the signer which rights they are losing. For example, a statement in plain English that reads “you cannot rely on any statements made by the salesperson unless they are repeated in this written agreement” in bold print directly above the signature line should satisfy knowing assent requirements. In contrast, a statement that reads “this agreement is a full integration” would not meet the knowing assent test because there is no reason to expect an ordinary person to understand the meaning of such a phrase.

2. Section 2-316(2)

Section 2-316(2) contains specific requirements for disclaiming the implied warranties of merchantability and fitness for a particular purpose.⁴¹² The purpose of these warranties is to protect buyers from surprise.⁴¹³ Accordingly, they emphasize the likelihood that a contracting party will become aware of the disclaimers by describing the required appearance and language of disclaimer.⁴¹⁴ Subsection 2 specifically requires “conspicuous” disclaimers.⁴¹⁵ Under the UCC, a term is conspicuous “when it is so written that a reasonable person against whom it is to operate ought to have noticed it.”⁴¹⁶

411. *See generally id.*

412. U.C.C. § 2-316(2) provides the following:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “[t]here are no warranties which extend beyond the description on the face hereof.”

U.C.C. § 2-316(2) (2003).

413. *Id.* cmt. 1.

414. *See* U.C.C. § 2-316(2).

415. *Id.*

416. *Id.* §1-201(10). The full text of §1-201(1) reads as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is ‘conspicuous’ if it is in larger or other contrasting type or color. But in a telegram any stated term is conspicuous. Whether a term or clause is ‘conspicuous’ or not is for decision by the court.

The “conspicuousness” requirement addresses part of the problem that would be addressed by a knowing assent analysis. The knowing assent analysis is designed to assure that an adhering party has a meaningful opportunity to be aware of the existence of a particular contract term. In addition, it requires that the term be written or explained in such a manner as to make it possible for the adhering party to understand the consequences of agreeing to such term. If a term is “conspicuous,” as defined by the UCC, it assures that the adhering party has a meaningful opportunity to be aware of the existence of that term. In addition to the “conspicuousness” requirement, section 2-316(2) also requires the use of particular language that alerts an adhering party to the meaning of the disclaimer.⁴¹⁷ Hence, courts desiring to adopt a knowing assent analysis could model their requirements and analysis after the statutory analysis required by section 2-316(2).

3. Section 2-316(3)

An alternate means of disclaiming warranties that is described in subsection 3 does not explicitly require that the disclaimer be conspicuous, but many courts have read a conspicuousness requirement into that subsection.⁴¹⁸ Courts reach this result by tracing the legislative history of section 2-316(3), which was once combined in one subsection with the language of subsection (2). They note that it makes no sense to protect buyers by requiring that language be conspicuous when words like “merchantability” or “fitness” are used, and not to impose that same requirement on words like “as is.”⁴¹⁹

Id. § 1-201(1).

417. See U.C.C. § 2-316(3)(a) (providing the general test for disclaimers of implied warranties). Section 2-316(2) provides the following:

[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’

Id. § 2-316(2).

418. This view was supported by Professor William D. Hawkland, who stated, “[w]hile the subsection does not explicitly so provide, it would seem that these phrases and expressions would have to be stated conspicuously to become effective disclaimers.” 1 WILLIAM D. HAWKLAND, A TRANSITIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, 76–78 (Am. Law. Inst. 1964); see also cases collected in Milton Roberts, Annotation, *Unconscionability, Under UCC § 2-302 or § 2-719(3), of Disclaimer of Warranties or Limitation or Exclusion of Damages in Contract Subject to UCC Article 2 (Sales)*, 38 A.L.R.4TH 25 (1985).

419. See, e.g., *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 268 A.2d 345, 352–53 (N.J. Super. 1970). The Court stated the following:

4. Unconscionability and Warranty Disclaimers

Courts have, from time to time, attacked warranty disclaimers on the grounds of unconscionability because the UCC's unconscionability provision, section 2-302, provides that a court may find that any contract clause was unconscionable at the time it was made. Courts are divided on the issue of whether a disclaimer that otherwise satisfies the requirements of section 2-316 can be unconscionable.⁴²⁰ It is difficult to see how an unconscionability analysis could prevail if a warranty disclaimer complies with section 2-316 requirements. The fact that the UCC contemplates a valid warranty disclaimer would make it difficult for a court to find a warranty disclaimer substantively unconscionable. Furthermore, if a disclaimer satisfies the conspicuousness requirements, it will similarly be difficult to show procedural unconscionability. Nevertheless, some courts have excised warranty disclaimers, emphasizing extreme procedural unconscionability and the adhering party's inability to negotiate the terms.⁴²¹

It does not make sense to require conspicuous language when a warranty is disclaimed by use of the words 'merchantability' or 'fitness' and not when a term like 'as is' is used to accomplish the same result. It serves no intelligible design to protect buyers by conspicuous language when the term 'merchantability' is used, but to allow an effective disclaimer when the term 'as is' is buried in fine print. Nor does it make sense to require conspicuous language to disclaim the implied warranties of merchantability and fitness and not impose a similar requirement to disclaim other implied warranties that arise by course of dealing or usage of trade.

Id. See also *Lumber Mut. Ins., Co. v. Clarkliff of Detroit, Inc.*, 569 N.W.2d 681 (Mich. Ct. App. 1997); *Osborne v. Genevie*, 289 So. 2d 21, 22 (Fla. Dist. Ct. App. 1974); *contra De Kalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152, 155 (D. Ala. 1974).

420. See, e.g., *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enter, Inc.*, 396 N.Y.S.2d 427 (N.Y. App. Div. 1977) (warranty disclaimer held unconscionable where equipment, when delivered, did not work at all, even though court acknowledged that the warranty disclaimer "was accomplished by conspicuous and bold print and thus complied with the statute in that respect"); *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc. v. AMC Renault Corp.*, 478 N.Y.S.2d 505 (N.Y. Civ. Ct. 1984) (although disclaimer of warranties contained in car lease complied with requirements of U.C.C. § 2-316(2), question remained as to whether disclaimer was unconscionable under section 2-302); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114 (Cal. App. 1982) (an unconscionable disclaimer of warranty may be denied enforcement despite technical compliance with the requirements of UCC § 2-316); *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296 (6th Cir. 1985) (warranty disclaimers which comply with U.C.C. § 2-316 are limited by section 2-302, which provides that any clause of a contract may be found unconscionable). Compare *FMC Fin. Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980) (it is not clear that U.C.C. § 2-302 applies to a warranty disclaimer which meets the requirements of section 2-316) with *Reibold v. Simon Aerials, Inc.*, 859 F. Supp. 193 (E.D. Va. 1994) (holding one could strictly construe the UCC to prevent the application of unconscionability to disclaimers of warranties under section 2-316 because that section does not explicitly refer to section 2-302).

421. See *FMC Corp.*, 632 F.2d at 419-21.

Based on the reported cases, it seems that only in exceptional circumstances will unconscionability be effective to invalidate warranty disclaimers that otherwise satisfy the requirements of section 2-316. In some cases, however, courts have imposed a standard that is more closely tied to determining whether the parties assented to the contract terms. Specifically, some states require a showing that terms were disclosed or negotiated.⁴²²

5. Section 2-719

Like section 2-316 on warranty disclaimers, section 2-719 on remedy limitations begins with the assumption that contractual limitations on remedies are valid.⁴²³ Instead of requiring particular language, section 2-719 created its own test for determining the validity of remedy limitations.⁴²⁴ That test is whether the remedy limitation has “failed of its essential purpose.” The Official Comments and case law suggest that asking whether a remedy limitation has “failed of its essential purpose” means asking whether, at the time of performance, the remedy limitation has the effect of denying the aggrieved party any meaningful remedy. If so, the limitation is to be ignored, and the aggrieved party is to have recourse to all applicable UCC remedies. The Official Comment suggests that a remedy limitation that fails of its essential purpose is unconscionable. Specifically, the Official Comment to section 2-719 emphasizes that “any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion.”⁴²⁵ This reference to unconscionability appears to be concerned with the substantive unconscionability of such a provision. If a litigant were to attack such a clause based on unconscionability, rather than simply arguing that the limitation failed of its essential purpose, in most jurisdictions it would still be necessary to prove procedural unconscionability.

Section 2-719(3) goes even further and provides that the limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable.⁴²⁶ It then states as a general rule that “[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”⁴²⁷ Many courts have referred

422. See discussion *infra* Part VI.

423. See U.C.C. § 2-719 (2005).

424. *Id.* § 2-719(2).

425. *Id.* § 2-719 cmt. 1.

426. *Id.* § 2-719(3).

427. *Id.*

to this rule as creating a presumption of validity in commercial cases.⁴²⁸ Perhaps as a result of the distinction drawn in this subsection, most courts that have considered the issue have not found such a remedy limitation unconscionable unless the case involves personal injury arising out of defective consumer goods.⁴²⁹

Except for invalidating remedy limitations that would limit consequential damages for injury to the person in the case of consumer goods, section 2-719 focuses on the effect of the challenged contract clause when an adhering party suffers a loss and seeks a remedy for that loss.⁴³⁰ Unlike section 2-316, which governs warranty disclaimers and determines the validity of those provisions at the formation stage, section 2-719's only guidance for evaluating remedy limitations at the time of contract formation is its requirement that unless the limitation is expressly made an "exclusive" remedy, the adhering party retains all rights and remedies otherwise available under the UCC.⁴³¹

A knowing assent analysis would ensure that adhering parties pay more attention to such contract provisions at the formation stage of the agreement. Not only should remedy limitations be conspicuous, so that an adhering party is aware that they are included in the agreement, but they should also be written in language that clearly sets forth their legal effect.⁴³² How many people understand that a clause limiting a remedy to "repair or replacement" means that there can be no suit for damages? A requirement that the remedy limitation be conspicuous and that its legal effect be explained would add little to the burden of the form drafter, but the requirement would greatly enhance the chances that the adhering party would understand the significance of such contract provisions.

D. Merger Clauses

A merger clause, also known as an "integration clause," is a contractual provision designed to preclude the admissibility of parol evidence.⁴³³ A parol evidence rule analysis relies on a determination of

428. See, e.g., WILLIAM H. HENNING & GEORGE I. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* §11.43, 11-150 (Rev. ed. 2002) ("most authorities have read [§ 2-719(3)] as establishing a presumption of conscionability").

429. For further discussion of remedy limitations and unconscionability, see Edward Samuels, *The Unconscionability of Excluding Consequential Damages Under the U.C.C. When No Other Meaningful Remedy is Available*, 43 U. PITT. L. REV. 197 (1981).

430. See U.C.C. § 2-719.

431. *Id.*

432. Some courts have read a "conspicuousness" requirement into § 2-719. See, e.g., *Avenell v. Westinghouse Elec. Corp.*, 324 N.E.2d 583, 587 (Ohio Ct. App. 1975).

433. See BLACK'S LAW DICTIONARY 824 (8th ed. 2004).

whether an agreement is fully integrated; that is, whether the parties intended to state fully and conclusively all of the terms of their agreement in the subject written instrument.⁴³⁴ Historically, many courts treated a merger clause as dispositive on the issue of integration.⁴³⁵ Other courts took the view that such a clause creates only the presumption of integration.⁴³⁶ The two most common approaches in determining integration are Professors Williston and Lord's "four corners" approach and Professor Corbin's "all evidence" approach.⁴³⁷

Williston and Lord took the view that the question of integration could be resolved by looking within the "four corners" of the writing.⁴³⁸ If the writing appeared to be full and complete, a court would have deemed it fully integrated.⁴³⁹ It followed that if the parties included a merger clause in their agreement, it was unnecessary to look outside of the document because they had expressly stated their intent to fully embody their agreement in that writing.⁴⁴⁰ Unless there were obvious blanks in the agreement or missing terms that would have been expected in such a contract were missing, a four corners approach to integration analysis readily leads to a conclusion that a writing is a complete integration.⁴⁴¹

Corbin disagreed with Williston and Lord's view. Corbin believed that integration is a question of the parties' intent to fully integrate their agreement, which must be resolved only by reference to all available evidence of that intent. Accordingly, Corbin argued that courts should always hear extrinsic evidence on the issue of whether the parties had assented to the writing as a complete integration.⁴⁴² Nevertheless, even Corbin apparently took the position that once the parties had agreed to

434. John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975).

435. See, e.g., *Telecom Int'l. Am. Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 202 (S.D.N.Y. 1999) (stating that under New Jersey law, "[w]here a writing purports to be complete on its face, the writing must be accepted as the full expression of the agreement of the parties; parol evidence is not allowed."). *Accord* *UAW-GM Human Res. Ctr. v. KSL Recreation Corp.*, 579 N.W.2d 411, 413 (Mich. Ct. App. 1998).

436. See, e.g., *Bock v. Computer Assocs. Int'l*, 257 F.3d 700, 707 (7th Cir. 2001) (providing "[w]ritten contracts are presumptively complete in and of themselves; when merger clauses are present, this presumption is even stronger").

437. 11 SAMUEL WILLISTON & RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 32:5 (4th ed. 2006); 6 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 581, 145 (Int. ed. 1979) ("it can never be determined by mere interpretation of the words of a writing whether it is an 'integration' of anything . . ."). Accordingly, Corbin took the position that all extrinsic evidence should be considered to determine whether the parties intended a complete integration.

438. 11 WILLISTON & LORD, *supra* note 437, § 32:5.

439. *Id.* § 33:20.

440. *Id.* § 33:21.

441. *Id.* § 32:5.

442. 3 ARTHUR L. CORBIN, *CONTRACTS*, § 588 (1960).

the document as their final contract, they were bound by a merger clause.⁴⁴³

Professor Murray, in a careful examination of the parol evidence rule, noted the difficulty of applying the parol evidence rule to standard form contracts.⁴⁴⁴ He recognized that the real problem with applying the parol evidence rule to standard form contracts is the likelihood that the adhering party has truly assented to all of the contract terms.⁴⁴⁵

Even though there are volumes of cases raising parol evidence rule issues, and even though UCC section 2-302 provides that any contract provision can be challenged on unconscionability grounds, there are surprisingly few reported cases discussing assent to or the unconscionability of merger clauses in standard form contracts.⁴⁴⁶ The two most notable decisions arose in connection with a determination of the validity of a warranty disclaimer.⁴⁴⁷ Nowhere is the choice between an unconscionability analysis and an assent analysis better illustrated than in the case of such clauses.

As discussed above in connection with warranty disclaimers, unbargained-for merger clauses in standard form contracts can effectively deprive the adhering party of contract rights that would otherwise arise from oral express warranties. Such a result is problematic because it encourages misleading and high-pressure sales tactics where salespeople make inflated promises and buyers rely on those promises only to find that the written contract document includes a merger clause excluding evidence of oral warranties. Unless the unwary adhering party in the standard form contract can prove fraud, duress, or other classic

443. 3 *Id.* § 578.

444. Murray, *supra* note 434, at 1374–75.

445. *Id.* at 1389.

446. Westlaw and LEXIS database searches were both performed in 2008 using the terms and connectors: “merger clause” w/s unconscionabl!. These searches yielded only 14 cases. Of these, only a handful explained why a particular merger clause was or was not unconscionable. Even fewer cases discuss assent to a merger clause as the basis for a decision regarding the enforceability of the clause. Although a Westlaw database search using “merger clause” & assent % unconscionabl! resulted in 279 cases, the only cases that actually talked about assent were the handful discussed in the body of this paper. The vast majority of the cases simply noted the presence of a merger clause in passing, while emphasizing other issues. Kerry L. Macintosh similarly found only four cases worth discussing in her article, *When Are Merger Clauses Unconscionable?*, 64 DENV. U. L. REV. 529 (1988) (discussing *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146 (5th Cir. 1979); *Smith v. Cent. Soya, Inc.*, 604 F. Supp. 518 (E.D.N.C. 1985); *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668 (Or. Ct. App. 1982); *Butcher v. Garrett-Enumclaw Co.*, 581 P.2d 1352 (Wash. Ct. App. 1978)). As a theoretical matter, the commentators’ suggestion that a merger clause may be unconscionable is well founded. Macintosh, *supra* note 446, at 547.

447. See discussion *supra* Part V.C.

'exceptions' to the bar of the parol evidence rule, a salesperson engaging in such tactics will get away with his or her unfair conduct.⁴⁴⁸

Perhaps the most notable case, where the Oregon Court of Appeals refused to enforce a merger clause, is *Seibel v. Layne & Bowler, Inc.*⁴⁴⁹ As discussed above, the *Seibel* court analyzed the merger clause both on the bases of assent and unconscionability.⁴⁵⁰ With respect to assent, the court noted that applicable law⁴⁵¹ required that the parties intend for the agreement to be their complete expression.⁴⁵² It reasoned that because the merger clause was inconspicuous, it provided little or no evidence of the parties' intentions, regardless of the defendant's intentions.⁴⁵³ In addition, the *Seibel* court analyzed the merger clause under the UCC's unconscionability provision⁴⁵⁴ and concluded that a merger clause that would deny effect to an express warranty must be conspicuous to prevent an even greater surprise.⁴⁵⁵

Another case in which a court refused to enforce a merger clause was *Sierra Diesel Injection Service, Inc. v. Burroughs Corp., Inc.*⁴⁵⁶ *Sierra Diesel* involved a family-owned-and-operated business which purchased a posting machine from Burroughs Corporation. The buyers signed a standard form contract that contained a merger clause; they later sought to enforce an alleged express warranty in a letter sent before the form contract was signed over the seller's objection that the contract was fully integrated and excluded express warranties. The Ninth Circuit Court of Appeals observed that in determining whether several documents are integrated to form one contract, the presence of a merger clause, while often taken as a strong sign of the parties' intent, is not conclusive in all cases. The court agreed with the trial court and found that the merger clause did not conclusively establish that the form contract was fully integrated because the buyer was not sophisticated; the

448. When salespeople make misrepresentations to induce the adhering party to sign the contract, courts split on the issue of whether the parol evidence rule bars such evidence of fraud in the inducement. In some cases, the admissibility of the evidence will depend on the exact wording of the merger clause. Of course, merger clauses and the parol evidence rule are used to exclude more than just pre-writing express warranties. For example, another common problem area is written employment agreements that do not call for notice of termination with a corresponding employee allegation that the parties orally agreed that notice would be given.

449. *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668 (Or. Ct. App. 1982).

450. *See supra* Part V.C.2.

451. OR. REV. STAT. § 72.2020 (2005).

452. *Seibel*, 641 P.2d at 671.

453. *Id.*

454. OR. REV. STAT. § 72.3020 (2005).

455. *Seibel*, 641 P.2d at 671.

456. *Sierra Diesel Injection Serv. Inc. v. Burroughs Corp., Inc.*, 890 F.2d 108 (9th Cir. 1989).

seller knew of the buyer's needs; the agreement consisted of at least four separate writings; it was impossible to understand what basic transaction was intended without some coordinating explanation; and the seller's subsequent repair efforts showed that it intended to live up to the representations it made in the letter.⁴⁵⁷

Some of the cases deal with assent to a merger clause in the context of a UCC section 2-207 "battle of the forms." For example, in *White Consolidated Industries, Inc. v. McGill Manufacturing Co.*,⁴⁵⁸ the Eighth Circuit Court of Appeals construed language in the buyer's purchase order form as merger clause language.⁴⁵⁹ The buyer had sent its form in response to the seller's detailed price quotation; the court characterized the quotation as an offer.⁴⁶⁰ The court found that the buyer's acceptance was expressly conditional on the seller's assent to the additional terms, which included a merger clause.⁴⁶¹ Because the seller did not "expressly assent" to those additional terms, the merger clause did not become part of the contract. Indeed, the court found that no contract was formed until the parties began to perform, at which point contract formation occurred under section 2-207(3), which also determined the terms of the contract.⁴⁶²

In *Franz Chemical Corp. v. Philadelphia Quartz Co.(PQ)*,⁴⁶³ the Fifth Circuit Court of Appeals addressed the issue of the parties' assent to a merger clause in a conclusory manner. The parties in *Franz* entered into a temporary, nonexclusive, nontransferable patent license agreement under which Franz was licensed to buy, repackage, and resell a PQ product. When the product failed, Franz sued for damages, and PQ defended based on a remedy limitation clause. Although the court's opinion does not set forth the facts in detail, it appears that Franz wanted to introduce evidence of preliminary negotiations to show that other remedies should be available; but the trial court excluded the evidence because the contract included a merger clause that read in part: "[T]his agreement is executed and delivered with the understanding that it embodies the entire agreement between the parties and that there are no prior representations, warranties, or agreements relating thereto."⁴⁶⁴ The court determined that the clause made the intent of the parties clear that the terms of the

457. *Id.* at 113.

458. *White Consol. Indus., Inc. v. McGill Mfg. Co., Inc.*, 165 F.3d 1185 (8th Cir. 1999).

459. *Id.* at 1191.

460. *Id.* at 1190.

461. *Id.* at 1191.

462. *Id.* at 1191-92.

463. *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146 (5th Cir. 1979).

464. *Id.* at 148.

contract were complete and exclusive; thus UCC section 2-202(b) prohibited the court's consideration of any additional consistent terms. It also noted (without elaborating) that there was "no indication that the merger clause should be deemed unconscionable under UCC section 2-302."⁴⁶⁵

Franz illustrates a typical approach to treating a merger clause as a statement of the intent of the parties without exploring whether there was actual knowing assent to that particular contract term. Under the UCC's parol evidence rule, it would have been appropriate for a court to explore evidence of the prior negotiations to see if both parties in fact intended the writing to be the exclusive statement of the terms of their agreement.⁴⁶⁶ If it could be demonstrated that *Franz* was relying on representations made during the negotiations, then the court should have examined whether *Franz* was aware of the merger clause and its meaning.⁴⁶⁷

A court analyzed a similar provision in *Bakhico Co. Ltd. v. Shasta Beverages*,⁴⁶⁸ a case in which both parties, a buyer and seller, were engaged in business and entered a contract for the purchase of 107,100 cases of canned soft drinks destined for Moscow, Russia.⁴⁶⁹ The documentation included a manufacturing agreement, which provided the following:

Entire Agreement. This Agreement, including the exhibits hereto, constitutes the entire and only agreement between the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral or written, of the parties in connection herewith. This Agreement shall not be amended other than by a written instrument executed by all parties. No agent of [Shasta] or [Bahico] is authorized to make any representation, promise, or warranty not contained in this Agreement. No interpretation or waiver of any of the provisions hereof shall be binding upon any party unless in writing and signed by its authorized officer.⁴⁷⁰

Based on that paragraph, the court precluded the admission of extrinsic evidence, emphasizing that the parties were experienced in business and that the contract was "fully negotiated and voluntarily

465. *Id.* at 149.

466. See U.C.C. § 2-202 (2005).

467. Because the reported case does not include enough facts, it is not clear that the parties signed a standard form contract.

468. *Bakhico Co. Ltd. v. Shasta Beverages, Inc.*, No. Civ.A.3:94-CV-1780-H, 1998 WL 25572 (N.D. Tex. Jan. 15, 1998).

469. *Id.* at *3.

470. *Id.* at *19.

signed.”⁴⁷¹ The court did not address the specific issue of the unconscionability of the merger clause, nor did the parties challenge it on those grounds.⁴⁷²

Likewise, in *Patray v. Northwest Publishing*,⁴⁷³ the plaintiff author filed suit against a publishing company, publisher, and operations manager, alleging that the defendants engaged in fraud, misrepresentation, and deceit concerning the publication date and projected return on plaintiff’s book.⁴⁷⁴ The court, while ruling on a variety of procedural issues, noted that a merger clause will typically bar an action for fraud if it purports to merge all prior representations (in this case, Van Treese’s underlying representation that Northwest would publish Patray’s book by December 1994 in exchange for Patray’s money, manuscript, and entry into the contract).⁴⁷⁵

Yet another unconscionability and merger clause case was *Agristor Leasing v. Bertholf*, which involved an appeal from a summary judgment on the validity of a lease.⁴⁷⁶ The court distinguished an early case⁴⁷⁷ where the lessee had agreed to the terms of the written lease that contained a merger clause.⁴⁷⁸ The court found that the merger clause, which stated that the lessee did not rely on any promises or conditions except those in the written lease, was conspicuous, and it noted that each lessee had signed his initials directly below the bold lettered provision.⁴⁷⁹ Notwithstanding, the court found that the primary issue in the case was whether the lessees were fraudulently misled into believing that reading the lease was not necessary.⁴⁸⁰ Even though the lease contained a merger clause, there were facts to support a finding that the merger clause itself was entered into under “duress, overreaching, undue influence, or fraud.”⁴⁸¹ There was also sufficient factual support to preclude summary judgment on the issue of unconscionability.⁴⁸²

471. *Id.*

472. There was, however, a challenge to the transaction as a whole for unconscionability.

473. 931 F. Supp. 865 (S.D. Ga. 1996).

474. *Id.* at 868.

475. *Id.* at 872.

476. *Agristor Leasing v. Bertholf*, 753 F. Supp. 881 (D. Kan. 1990).

477. *Agristor Leasing v. Schmidlin*, 601 F. Supp. 1307, 1313 (D. Or. 1985).

478. *Bertholf*, 753 F. Supp. at 891.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.* The court emphasized that the lessee did not read the lease, was not given any opportunity to read the lease, and relied on the lessor’s representative to explain the terms of the lease. Due to the inequality in bargaining power and the lessor’s insistence that the lease could not change, the court concluded that the lease was an adhesion contract. *Id.* It appears that the unconscionability

A final example of a merger clause situation involved franchisor and franchisee disputes, which more often reflect a customer's uneven bargaining power than do other "business" transactions.⁴⁸³ Many franchisees are unsophisticated, albeit engaged in business. Thus, one might predict a decision more favorable to the adhering party in cases in which a franchisee challenged a contract term in the franchise agreement.⁴⁸⁴

VI. WHEN COURTS HAVE USED AN ASSENT ANALYSIS TO EXCISE STANDARD FORM CONTRACT TERMS

In the limited instances when courts have purposely looked for assent to terms in standard form contracts, apart from consent to the contract as a whole, courts have usually found that assent is lacking and refused to enforce the terms. It is therefore useful to examine those limited cases.

A. Cases Decided Under UCC Section 2-207

UCC section 2-207 requires a court to examine assent in two instances: (1) where an acceptance is "expressly made conditional" upon assent to additional or different terms under section 2-207(1)⁴⁸⁵ or (2) where a "definite and seasonable expression of acceptance" operates as an acceptance under section 2-207(1), but the contract is between merchants and the acceptance contains a "material alteration" under section 2-207(2).⁴⁸⁶

In the first group of cases, the UCC provides that no contract is formed unless the original offeror "expressly assents" to the conditional

argument related to the lease and the lease transaction as a whole, rather than to the merger clause itself.

483. See, e.g., *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 668 (2005) (discussing enforceability of arbitration provisions in franchise agreements and determining that "[t]here is a clear disparity in the bargaining power of franchisors versus franchisees.").

484. Of course, if the franchisee were represented by counsel, the "procedural" aspect of unconscionability would be difficult to establish.

485. See, e.g., *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443 (9th Cir. 1986) ("If a definite and seasonable expression of acceptance expressly conditions acceptance on the offeror's assent to additional or different terms contained therein, the parties' differing forms do not result in a contract unless the offeror assents to the additional terms.") (citing *WHITE & SUMMERS*, *supra* note 238, §§ 1-2, at 32-33).

486. Under U.C.C. § 2-207(2)(b), if both parties are merchants, additional terms automatically become part of the contract unless "(b) they materially alter it." U.C.C. § 2-207(2)(b). Such terms do not become part of the contract absent explicit agreement by both parties. See, e.g., *Matter of Marlene Indus. Corp. v. Carnac Textiles*, 45 N.Y.2d 327, 408 (N.Y. 1978) (arbitration clause in a confirmation constitutes a material alteration of an existing contract between merchants, which does not become part of the contract without explicit agreement by the recipient of the invoice).

acceptance.⁴⁸⁷ In almost every reported case in this group, courts conclude that there is no express assent when the original offeror fails to respond to the conditional acceptance, but instead proceeds to ship the goods involved.⁴⁸⁸ In those cases, most courts and commentators agree that no contract is formed by virtue of the exchange of forms. Instead, a contract is formed by conduct under section 2-207(3),⁴⁸⁹ and the terms of the contract are those on which the writings agree plus supplementary terms incorporated under other provisions of Article 2.⁴⁹⁰ These cases make it clear that silence in response to the conditional acceptances will not constitute the necessary assent to the additional or different terms.⁴⁹¹

In the second group of cases, even when a court finds that a contract was formed under section 2-207(1), additional terms are treated as proposals for addition to the contract. Most of the cases in this category involve situations in which the parties were either unaware that the additional terms were in the offeree's form or ignored that fact until a dispute arose where the additional terms would apply if they were part of the contract.

Whether additional terms are part of the contract depends on whether the transaction is "between merchants."⁴⁹² Unless both parties are merchants, the additional terms are merely proposals for addition to the contract and must be agreed to or they do not become part of the contract.⁴⁹³ On the other hand, if both parties are merchants, terms that "materially alter" the terms of the offer are not incorporated into the contract without express assent.⁴⁹⁴ In the majority of cases involving merchants, courts have concluded that silence in response to an acceptance that contains additional terms does not constitute assent to those additional terms.⁴⁹⁵

487. U.C.C. § 2-207(1) (2003).

488. *See, e.g.*, *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972).

489. *Id.*

490. *Id.*

491. Some authorities disagree, however, and would find that when the original offeror accepts goods shipped after dispatch of an "expressly conditional" assent, that conduct constitutes the requisite assent to the terms. *See* WHITE & SUMMERS, *supra* note 238, § 1-3; John E Murray, Jr., *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978).

492. *See* U.C.C. § 2-104 (2003) (defining "merchant" and "between merchants").

493. U.C.C. § 2-207(2) (2003).

494. There is not always uniformity regarding whether a particular term constitutes a material alteration. For a discussion of this issue, see WHITE & SUMMERS, *supra* note 238, §1.3, n.34.

495. *See* N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726-27 (8th Cir. 1977) (providing that express assent under § 2-207(2) cannot be presumed by silence or mere failure to object); *Coastal Indus., Inc. v. Automatic Steam Prods. Corp.*, 654 F.2d 375, 379 (5th Cir.1981) (Mere receipt of the goods without comment does not meet the UCC's express acceptance requirement);

Courts have split over whether section 2-207(2) applies to both “different” and “additional” terms or only “additional” terms.⁴⁹⁶ The majority of courts that have considered the issue adopted the “knock-out” rule to govern the analysis of different terms.⁴⁹⁷ Specifically, these courts find that if the offeror’s form and the offeree’s form have provisions that address the same issue differently, there is no assent to either term.⁴⁹⁸ Accordingly, they reason, although there is still a contract under section 2-207(1), the different terms “drop out” of the contract. Any remaining gaps in the contract are filled by reference to supplementary terms incorporated under other provisions of Article 2.⁴⁹⁹

Finally, terms that do not materially alter the agreement are incorporated into the contract if (1) the offeror and offeree are both merchants, (2) the offer does not limit acceptance to its terms, and (3) there has been no notice of objection to terms.⁵⁰⁰

When section 2-207 is applied to cases involving shrinkwrap, clickware, and browseware contracts, courts reach these same results⁵⁰¹ except in cases where the court adopts the erroneous “rolling contract” analysis.⁵⁰²

B. Other Cases Imposing an Assent Requirement

The other instances in which courts have looked for specific assent have been in jurisdictions where courts have determined for public policy reasons that particular terms must be negotiated to be incorporated into a contract.⁵⁰³ For example, under Washington law, warranty disclaimers

Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E.2d 1154, 1156 (N.Y. 1979) (providing repeated use of forms on prior occasions does not constitute express assent).

496. See Richardson v. Union Carbide Indus. Gases, Inc., 790 A.2d 962, 968 (N.J. Super. Ct. App. Div., 2002).

497. *Id.*

498. *Id.* at 967.

499. *Id.* at 968. This approach is known as the “knock-out rule.”

500. U.C.C. § 2-207(2) (2003).

501. See, e.g., Klocek v. Gateway, Inc., 103 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (Additional or different terms contained in “written confirmation” located in package containing computer and shipped after contract was formed by phone, did not become part of the contract because the buyer did not expressly agree to them even though standard terms indicated that buyer’s retention of computer amounted to acceptance of its terms.).

502. See critique of the “rolling contract” analysis in Lawrence, *supra* note 233.

503. Although these courts have not necessarily couched their analyses in terms of assent, as the textual discussion reveals, their approach reflects the building blocks of the knowing assent analysis proposed in this article.

must explicitly be negotiated and set forth with particularity.⁵⁰⁴ In *Berg*, a case decided under the Uniform Sales Act, the Washington Supreme Court fashioned its own test for determining the validity of warranty disclaimers in consumer transactions. In *Berg*, the buyer of a new automobile experienced a series of serious mechanical problems immediately after the purchase. The buyer periodically returned the car to the seller for repairs; the car was in the shop for repairs for twenty days during the first four months after delivery, and problems still continued.⁵⁰⁵ Eventually, the buyer sued for rescission of the purchase contract.⁵⁰⁶ The seller refused, relying in part on the buyer's signature on written contracts that waived all warranties of fitness, express or implied, and acknowledged that he was buying the automobile without any guarantee whatsoever.⁵⁰⁷

The Washington Supreme Court carefully described the two contracts signed by the buyer and the location of the warranty disclaimer in each of the two contracts.⁵⁰⁸ For each contract, the court observed that the disclaimer language was located in the midst of many other printed provisions. In the purchase order, the disclaimer was on the reverse side of the form where all of the "dickered" terms appeared.⁵⁰⁹ In the conditional sale contract, the disclaimer language took up "1 of 26 lines of mass-printed material" among five printed paragraphs which occupied nearly one-half of the entire page.⁵¹⁰ The court rejected the notion that these written provisions accurately represented the bargain assented to by the buyer:

The purported disclaimers of warranty in the conditional sale contract form and the waiver of warranty in the purchase order form highlight the absurdity of a rule of law which elevates these bland and substantially meaningless terms and conditions above the individually and expressly negotiated terms and conditions, and gives them controlling effect over specifically agreed upon items and conditions of the contract. To adhere to such a rule means that the

504. *Berg v. Stromme*, 79 Wash. 2d 184, 484 P.2d 380 (1971). The "Berg rule" was followed in, among other cases, *Cox v. Lewiston Grain Growers Inc.*, 86 Wash. App. 357, 936 P.2d 1191 (1997).

505. *Id.* at 383.

506. *Id.* at 380.

507. *Id.* at 381.

508. The buyer signed both the seller's form purchase order and conditional sale contract. Each document stated that no warranties, express or implied, had been made by the seller. *Id.* at 383.

509. The court noted that "all items of contract sufficient to identify the car by name, kind, style, size, power and all optional extra equipment on it were handwritten or hand printed in the blank spaces of the order form." *Id.* at 383.

510. *Id.* at 385.

law presumes that the buyer of a brand new automobile intends to nullify in general all of the things for which he has specifically bargained and will pay. We would presume the buyer does just the opposite.⁵¹¹

The court emphasized that nothing in the record reflected that the parties ever discussed, contemplated, or agreed that the buyer intended to waive his bargained-for rights.⁵¹² It then fashioned the rule that has come to be known as the *Berg* rule: waivers of [implied] warranties are ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being waived.⁵¹³

The similarity of the *Berg* rule to the concept of knowing assent is readily apparent. Like the proposed knowing assent analysis, the *Berg* rule requires that disclaimers be set forth with particularity (paralleling the knowing assent “conspicuousness” requirement). It also mandates that waivers of implied warranties are ineffectual unless explicitly negotiated between buyer and seller (paralleling the knowing assent requirements that (a) the importance of that term be explained so that the adhering party understands its significance, and (b) the adhering party objectively manifest its assent to that term separately from its assent to undertaking a contractual obligation).⁵¹⁴

After the court’s decision in *Berg*, the Washington legislature amended Washington’s version of the UCC to require particularity in consumer (non-commercial) transactions.⁵¹⁵ The *Berg* rule has been extended to some commercial transactions⁵¹⁶ and some other contract pro-

511. *Id.*

512. *Id.*

513. *Id.* at 386.

514. The Washington Supreme Court has recognized that the “negotiation” requirement “overlaps with [an] evaluation of the manner in which the parties entered into the contract and whether the parties had a reasonable opportunity to understand the terms of the contract. *See, e.g., Puget Sound Fin. v. Unisearch*, 47 Wash. 2d 428, 442, 47 P.3d 940, 947 (2002).

515. WASH. REV. CODE § 62A.2-316(4)(2006), governing warranty disclaimers provides: Notwithstanding the provisions of subsections (2) and (3) of this section and the provisions of RCW 62A.2-719, as now or hereafter amended, in any case where goods are purchased primarily for personal family or household use and not for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers except insofar as the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted.

Id.

516. *See, e.g., Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20, 24 (1975) (but the court shifted the presumption from the party seeking to validate the disclaimer to the party seeking to invalidate the liability limitation by presuming that the limitation was prima facie conscion-

visions in subsequent cases. For example, Washington law also requires that any exclusion of remedies be explicitly negotiated and set forth with particularity.⁵¹⁷

Like the Washington Supreme Court, the North Dakota Supreme Court held that under North Dakota law, an exclusion of implied warranties is only effective if the exclusion was explicitly negotiated by the parties.⁵¹⁸ Colorado has also required negotiation of disclaimers in consumer transactions.⁵¹⁹ Similarly, Louisiana courts have required that a warranty disclaimer be clear and unambiguous and called to the buyer's attention or explained to him.⁵²⁰

Each of the above-described requirements is best understood not in terms of negotiations, but as a definition of knowing assent. The purpose of a requirement that parties negotiate over particular contract provisions (or that the provisions be called to the buyer's attention or explained to him or her, as in Louisiana) can only be seen as a judicial effort to carve out a mechanism for assuring not only that the parties consent to be bound to a contract but also that they assent to individual contract terms. In other words, the negotiation requirement is designed to ensure that the adhering party knows that the contract contains the particular term. If an adhering party signs a form contract containing a disclaimer after steps are taken to assure his awareness and understanding of the term, it could be said that at that point there has been knowing assent.

VII. CONCLUSION: THE CASE FOR KNOWING ASSENT AS THE BASIS FOR ANALYZING STANDARD FORM CONTRACT TERMS

Standard form contracts are here to stay. But adherence to outdated doctrine and legal fictions is unnecessary. Notwithstanding repeated

able in a commercial transaction). In *Schroeder*, the Court adopted a "totality of circumstances" approach for interpreting the permissibility of exclusionary clauses in a commercial setting instead of the two-prong approach the *Berg* court applied to warranty disclaimers in a consumer transaction. The nonexclusive factors for assessing the totality of the circumstances include (1) the conspicuousness of the clause in the agreement, (2) the presence or absence of negotiation regarding the clause, (3) the custom and usage of the trade, and (4) any policy developed between the parties during the course of dealing. *Id.* at 260–61, 544 P. 2d at 23–24.

517. *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971). Washington, however, has not extended the *Berg* rule to every disclaimer situation. For example, in *Frickel v. Sunnyside Enters.*, the Court held that explicit negotiation is not required for an effective disclaimer in a commercial contract for the sale of an apartment complex. 106 Wash. 2d 714, 725 P.2d 422 (1986).

518. *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146 (S.D. 1991).

519. *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983 (Colo. 1975).

520. *Prince v. Paretti Pontiac Co., Inc.*, 281 So.2d 112 (La. 1972) (holding that a waiver of implied warranties, to be effective, must be contained in the written document, be clear and unambiguous, and be brought to the purchaser's attention or explained to him).

cries for the need for predictability and for controlling legal risk from industry representatives and apologist scholars, the vast majority of contracts are performed.⁵²¹ Most contracts will continue to be performed regardless of the analytic approach taken to enforcing particular standard form contract terms. If particularly troublesome contract terms are identified and omitted from standard form contracts, predictability will not be a problem.⁵²² In fact, a recent article in the American Bar Association Journal suggests that because there has been so much litigation over arbitration clauses, many in-house counsel do not even try to enforce arbitration provisions contained in their own standard form contracts.⁵²³

It is not unduly burdensome for form drafters to anticipate a knowing assent requirement and make appropriate adjustments in their standard form contracting procedures. As W. David Slawson explained in 1971:

[T]he new meaning of contract does not prevent a form-user from defining the legal implications in its forms if it does so in an honest and reasonable way. The forms can be drafted so that the other parties can reasonably understand their terms, or a business can draft its forms in conformity with the reasonable expectations that the other parties will already have. To the extent a form-user does not do either of these things, it is evidently trying to cheat, and it does not deserve the certainty that its forms could otherwise provide.⁵²⁴

For example, if arbitration is extremely important to the form drafter, let the drafter call the adhering party's attention to the presence of an arbitration clause and explain its meaning. A bold-faced, extra-large print, statement written in plain English that says "**NOTICE: IF YOU SIGN THIS CONTRACT AND YOU LATER HAVE A DISPUTE YOU WILL NOT BE ABLE TO SUE IN COURT**" and requires the adhering party to sign an acknowledgement could solve the problems raised by a hidden arbitration clause. It may not be possible to protect every ignorant or uncaring party from an unwelcome result—a

521. See, e.g., Steven L. Schwarcz, *Explaining the Value of Transactional Lawyers*, 12 STAN. J.L. BUS. & FIN. 486, 496 (2007) (citing results of survey indicating that on average, both lawyer-respondents and client-respondents said that only about two percent of contracts actually end up in litigation).

522. As the New Jersey Law Revision Commission study indicated, it is possible to identify the particular types of contract clauses that are consistently challenged. Form drafters can either modify their forms to delete these provisions, or choose not to enforce them if and when they are challenged. See *supra* note 334.

523. Leslie A. Gordon, *Clause for Alarm: As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, 91 A.B.A. J. 19 (Nov. 2006).

524. Slawson, *supra* note 141, at 28.

duty to read would remain a part of the doctrine—but at least people who care would have an opportunity to learn of the presence of particular terms in their contracts.

Ideally, legislation reflecting a public policy that addresses the power imbalance between form drafters and adhering parties—as the New Jersey legislation attempted to do⁵²⁵—would be a solution to the problem. Unfortunately, the age of consumer protection legislation seems to have passed us by. The New Jersey legislature’s failure to enact the Standard Form Contract Act, and the opposition to incorporating special standard form contract provisions in revised Article 2 demonstrate that we cannot rely on legislatures to address the situation.

The courts remain the last clear chance for bringing a balance back to understanding standard form contract terms. Courts can find support for closer scrutiny of non-negotiated terms in standard form contracts in some of the scholarly articles discussed in this article and in public policy. Like courts in Washington, North Dakota, Colorado, and Louisiana, other courts should determine that certain contract clauses are presumptively invalid and require the form drafter to prove that the adhering party knowingly consented to the term at issue before the court enforces the term. The proposed knowing assent analysis will protect adhering parties from unbargained-for and unfair contract terms.

525. *See supra* note 294 and accompanying text (discussing the New Jersey Standard Form Contract Act).