

FOCUSING ON THE REALITIES OF THE CONTRACTING PROCESS — AN ESSENTIAL STEP TO ACHIEVE JUSTICE IN CONTRACT ENFORCEMENT

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A comparison of the process involved in creating a written contract with the principles and assumptions which underlie common law rules and doctrines that govern the enforcement of contracts reveals powerful inconsistencies. In effect, significant legal myths underlie the law in this area. Yet, the ability of private parties to structure their transactions and relationships is fundamental to our economic and social system. What can be done to bring the rules and doctrines governing contracts into harmony with reality? This article examines important realities of the contracting process and, based upon those realities, makes several recommendations that, if followed by courts, would help to harmonize common law contract rules and doctrine with real-world contract formation.

The process occurring between parties that results in a written or electronic document, the contract, has not received adequate focus in legal discourse. There has been significant scholarship on the topic of abuse of unequal bargaining power¹ and one-sided contracts,² which constitute important subparts of the contracting process. Other significant scholarly attention has been directed toward standardized provisions, or boilerplate, in contracts.³ However, the focus of

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1. See, e.g., Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005); Daniel D. Barnhizer, *Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract - Symposium Introduction*, 2006 MICH. ST. L. REV. 841 (2006) (SYMPOSIUM); W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853 (2006); Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883 (2006); Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925 (2006); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006); Curtis Bridgeman, *Misrepresented Intent in the Context of Unequal Bargaining Power*, 2006 MICH. ST. L. REV. 993 (2006); James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011 (2006).

2. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

3. See, e.g., Omri Ben-Shahar, *Foreword*, 104 MICH. L. REV. 821 (2006); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire*, 104 MICH. L. REV. 837 (2006); 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); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006); Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075 (2006); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

such scholarship generally has been to create, and then justify or criticize, theories regarding standard form contracts or contracts of adhesion and their effects in the relevant economic markets.

This article explores the contracting process more generally, with standard form contracts and contracts of adhesion comprising only a subset, albeit an important subset, of the contracts examined. Unequal bargaining power is present in most contracting processes, but is not always abused and can be effectively mitigated if the contracting process is understood and incorporated into the courts' interpretive and enforcement processes. The objective of this article is to highlight realities of the contracting process that can be used by courts to restructure some of the principles and assumptions that underlie common law contract rules and doctrines. The intent is to help courts resolve issues that are troubling to many legal observers.⁴ The prescriptions in this article would not undermine in any way the ability of private parties to structure their relationships via contract, but would strengthen contract law, thereby permitting contracts to more effectively fulfill their role in a free and vibrant society.

Part I of this article briefly describes the relevant historical and theoretical roots of some key doctrines governing contract enforcement. Part II explores the contracting process and identifies realities that can be applied to the interpretation and enforcement of contracts. Part III briefly explores an array of existing common law doctrines available to courts faced with the problems created by the contracting process and the shortcomings of those doctrines. Part IV makes specific recommendations for incorporating an understanding of the contracting process into judicial decisions in order to bring the common law in line with the realities of the contracting process and make the law governing contracts more robust in achieving justice and in facilitating private relationships in our society.

I. HISTORICAL AND THEORETICAL ANTECEDENTS

At the outset, it is essential to clarify the use of the term "contract" in this article. The term has three readily identifiable meanings. Those meanings are related, but each has a significantly different focus. The first possible meaning of the term "contract," a set of legally enforceable promises, is fundamentally captured, albeit with significantly different nuances, by the definitions of "contract" provided by the Restatement of the Law Second, Contracts (the "Restatement"),⁵ and the Uniform Commercial Code (the "UCC").⁶ The second possible meaning, the specialized body of law governing a set of legally enforceable promises, is frequently used in academic literature and is poignantly captured by the title of Grant Gilmore's well-known book, *The Death of Contract*.⁷ The third possible meaning, the written document (or the complete, readable, electronic document used on-line), is the meaning of most import to transactional lawyers (and probably the meaning understood by non-lawyers). When this article uses the term "contract," it is this third meaning to which the term refers. Employing this definition of "contract" has important implications. In much of the literature discussing contract doctrines and principles, an important concern is whether an enforceable obligation was created. That

4. A succinct but very informative history of scholarly works and views regarding standard form contracts is set forth in Johnston, *supra* note 3, at 860-64.

5. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

6. "'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." UCC § 1-201(11) (2003).

7. GRANT GILMORE, *THE DEATH OF CONTRACT* (OHIO STATE UNIVERSITY PRESS 1974).

issue arises only rarely when the term “contract” refers to the written document.⁸ In the context of a written contract, the common legal issues are: what do its terms mean, has there been a breach, and what are the remedies?

A few observations about the relationship of the other meanings of the term “contract” to the meaning used in this article are appropriate. The UCC definition - the resulting legal obligation between the parties⁹ - provides a concept that aids the study of the contracting process: drawing a distinction between the terms “agreement” – “the bargain of the parties in fact”¹⁰ – and “contract” – “the total legal obligation that results from the parties’ agreement.”¹¹ While the UCC, and thus that express distinction, only governs a limited universe of contracts, the distinction between the parties’ *bargain in fact* and the *legal obligation that arises out of it* is essential to understanding the contracting process, the resulting contract, and the law that should govern the contract. The distinction was drawn by Professor Karl Llewellyn in his article, *What Price Contract? – An Essay in Perspective*,¹² decades before the UCC was promulgated. In fact, as we analyze the contracting process, a similar distinction between the bargain in fact and the content of the resulting written contract becomes apparent.¹³ Two central and critical issues arise from the distinction between the bargain in fact and the written contract that arises from that bargain: what should be the resulting legal obligation, and what are the appropriate rules and procedures for ascertaining and enforcing that obligation?

When this article refers to the body of law known generally as “contract,” it uses the phrase “law governing contracts.” An examination of the question “what is encompassed in the body of law governing contracts” would produce a lengthy article, or perhaps even a book. A very useful short answer to the question, providing a valuable focus for this article, comes from Professor Lawrence Friedman’s social and economic study of the law governing contracts.¹⁴ He focused on the close tie between our free market economic system and our concept of freedom of contract, although he was certainly not the first to recognize that close relationship.¹⁵ In his study, Professor Friedman stated: “[T]he rough equation of the

8. Of course, there is always the question whether each party assented to the document, and sometimes the closely related issues of capacity to contract, *see, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16, duress or undue influence, *see, e.g., id.* §§ 174-177, and fraudulent inducement, *see, e.g., id.* § 164. There are also interesting questions that arise if each party sends a different document; compare the offer/counter-offer approach at common law, *see, e.g., id.* §§ 39, 40, 59, & 61, with the so-called battle of the forms approach in the UCC, *see* UCC § 2-207 (2002).

9. *See supra* note 6.

10. The UCC’s definition of “agreement” is: “the bargain of the parties in fact as found in their language or by implication from other circumstances ...” UCC § 1-201(3) (2003).

11. *Id.* § 1-201(11).

12. 40 YALE L.J. 704 (1931). In that essay, Professor Llewellyn set forth and chose for purposes of the essay among four different concepts for the term “contract.” He described two of the concepts as involving “agreements-in-fact.” In describing the third, the concept he used in the essay, Llewellyn distinguished between the terms “‘promise’ for the promise-in-fact, [and] ‘contract’ for the legal effects of such a promise.” *Id.* at 707-08.

13. Llewellyn made a similar distinction by contrasting “dickered” terms with “boilerplate.” *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370-71 (1960).

14. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY, 10, 22-23 (UNIVERSITY OF WISCONSIN PRESS 1965).

15. *See, e.g.*, Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454-56 (1908); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367-68 (1920); Friedrich Kessler, *CONTRACTS OF ADHESION--SOME THOUGHTS ABOUT FREEDOM OF CONTRACT*, 43 COLUM. L. REV. 629, 629 (1943).

free market and the law of contract has value. For one thing, it furnishes a workable criterion for measuring and defining what cases and activities should be treated as part of the law of contract.”¹⁶ He further distinguished the law governing contracts as being judge-made common law separate from regulatory efforts: “Since the law of contract concerns and provides legal support for the residue of economic behavior left unregulated (the free market), it naturally spends much of its energy asking: what range and type of transactions fall within the sphere of contract?”¹⁷ This concept closely approximates considering the law governing contracts to be that body of common law whereby our society permits private individuals to structure the legal relationship that will govern their behavior with each other concerning economic matters.¹⁸

Courts had been enforcing contractual-type obligations for centuries before the cases resolving those disputes were designated to be “contract law,” and such law was developed and studied under that rubric. Under early English common law, legal actions needed to fit within recognized forms of action. Three of those forms of action were the way that what we now consider “contract” disputes were resolved, covenant, debt, and assumpsit. Each of the three forms of action provides valuable insights into our modern law governing contracts and helps us understand why some of the principles of that law developed. Understanding that history can help guide us in determining the path future development should take.

An *action in covenant* was available for an obligation under seal. For an obligation under seal, two important facts were established: the party had authenticated the obligation and the terms of the obligation were known.¹⁹ Although contracts under seal play only a limited role in our law governing contracts today,²⁰ the approach of enforcing all provisions of a written contract clearly is consistent with, and possibly derived from, this early concept, even though a signature on a contract is not a seal.

The second common law form of action, debt, permitted actions for obligations that were not under seal if the obligation was to pay a definite sum of money, provided that money had been loaned, goods had been delivered, or services had been performed.²¹ Such actions were obviously of limited utility, but they did have the advantage to the courts of establishing a clear relationship between the remedy sought, money, and the action of the party that had not performed an obligation.

Eventually actions in debt were replaced by actions in assumpsit, the third of the relevant common law forms of action, as the situations in which assumpsit was available were expanded to include more and more of what we now consider contractual disputes.²² The term assumpsit refers to an undertaking to do something.²³ The action in assumpsit was

16. FRIEDMAN, *supra* note 14, at 23.

17. *Id.*

18. *See* notes 38-42 and accompanying text *infra*.

19. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

20. Contracts under seal are acknowledged as being subject to special rules. *See* RESTATEMENT (SECOND) OF CONTRACTS § 6(A). Some jurisdictions, including Delaware, recognize contracts under seal, but only for limited purposes. *See* DEL. CODE ANN. TIT. 10, § 8106(a) (2009); *Di Biase v. A & D, Inc.*, 351 A.2d 865, 867 (Del. Super. 1976). Under the UCC, the effect of sealed instruments is eliminated in contracts for the sale of goods. *See* UCC § 2-203 (2002).

21. *See* W. S. Holdsworth, *Debt, Assumpsit and Consideration*, 11 MICH. L. REV. 347, 348 (1913).

22. *Id.* at 348-51.

23. *Id.* at 594-98.

originally meant to address physical injury to persons or property that arose from a consensual undertaking.²⁴ A central concept of the law governing contracts arising from this origin in *assumpsit* is the idea of an undertaking, which, perhaps better than the concept of a promise, captures the essence of why a contract should be enforced. Undertaking has a strong tie to the idea of agreeing to, or bargaining for, the obligation. As the *assumpsit* form of action expanded, the concept of consideration developed as a way to qualify for that form of action.²⁵ Consideration, as a key element of the law governing contracts today, inherently involves something that is bargained for.²⁶

Forty years ago, in April 1970, Professor Grant Gilmore gave a series of lectures at Ohio State University, which he subsequently elaborated upon and published in his book, *The Death of Contract*.²⁷ Under any of the three meanings of the term, “contract” is obviously still very much alive forty years later. However, what Professor Gilmore was discussing and agreeing with, the “Contract is Dead” movement, was based upon valid points made by a group of legal scholars and provides some profound truths in understanding the current law governing contracts. Gilmore’s key point was that the general theory of contract, as a specialized body of law with a coherent philosophy, had been changing dramatically throughout the twentieth century, and many significant initial conceptions of that classical contract theory could be said to be dying, if they had not already died. That death resulted from both codifications of certain areas of law covered by the general theory of contract²⁸ and significant changes in doctrines arising from court decisions and scholarly analysis.

Dean Langdell, Justice Holmes, and Professor Williston promulgated classical contract theory almost out of whole cloth in the late-nineteenth century.²⁹ Professor Gilmore credited Justice Cardozo and Professor Corbin as engineers of the destruction of that theory, primarily by demonstrating that the theory was historically wrong.³⁰ One such error was the attempt to doctrinally require consideration before a promise could be enforced; other justifications had long been recognized by courts.³¹

A central feature of classical contract theory that was losing force was its attempt to shift from a subjective theory of contract, captured to a significant extent by the concept of meeting of the minds, to an objective theory,³² which focused

24. Scholars have demonstrated that tort law played a significant role in the origins of the law governing contract; actions in *assumpsit* are where this occurred. See Allan E. Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 594-96 (1969).

25. *Id.*

26. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

27. GILMORE, *supra* note 7.

28. The UCC, developed and promulgated in the 1940’s and 1950’s by the National Conference of Commissioners on Uniform State Laws in cooperation with the American Law Institute, constitutes a significant example of this. The codification of areas of the law included within “contract” under the classical theory, however, was much broader and earlier than this, and included insurance law, labor law, and antitrust law. See FRIEDMAN, *supra* note 14, at 23-24.

29. See GILMORE, *supra* note 7, at 12-34.

30. See *id.* at 57-58.

31. Promises could be enforced based upon principles of reliance or restitution. Much of this changing theoretical model is reflected in tracing the development of Sections 75 and 90 of the Second Restatement of Contracts from the First Restatement of Contracts. See RESTATEMENT (FIRST) OF CONTRACTS §§ 75, 90; RESTATEMENT (SECOND) OF CONTRACTS §§ 75, 90.

32. The continuing inadequacy of the objective theory to describe actual court decisions is described in Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007).

on external manifestations of mutual assent.³³ The concept of assent,³⁴ tied closely by classical contract theory to its objective view, has important ramifications when the bargained-for exchange is documented by a written contract. Under an objective theory, the general rule is that a party's signature on the contract is clear evidence of such assent. The general rule loses logical force, however, where the provisions of the contract are not negotiated.³⁵

An important insight into the problems caused by the attempt to impose a completely objective theory onto the law governing contracts can be drawn from the work of Professor Richard Barnes in *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*.³⁶ Professor Barnes explains that the subjective concepts of unconscionability and contracts of adhesion were developments in the law governing contracts under an objective theory that were essential in order to preserve that theory. In other words, subjective elements or concepts needed to be grafted onto the law to bring it closer to reality. The converse should also be true. If courts had been enforcing contracts under a subjective theory, such doctrines would probably not have been necessary, because in situations involving unconscionability or contracts of adhesion, the same results should flow from a subjective determination of the substance of the parties' bargain. There is theoretical appeal to objectivity in the law governing contracts, because it is much easier to determine facts objectively than to try to understand what is subjectively going on in someone's mind. However, examining the contracting process without paying close attention to subjective realities will yield an incomplete understanding.

Another interesting reality of early court decisions that classical contract theorists ignored, or perhaps even intentionally hid, was that courts imposed a pre-contractual duty to bargain in good faith.³⁷ The reality that courts examining contracts prior to the development of classical contract theory would take into account the bargaining process and the parties' duties during that process reveals the deep and ancient roots of the idea of focusing on the process of contract creation as an important part of determining how to enforce them.

Another overarching theory that has been closely related to the development of the law governing contracts is the so-called "freedom of contract" the choice of the participants to enter into an agreement.³⁸ Professor Friedman described classical contract theory as "a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy ... parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision."³⁹ He also observed that "the economic system of the United States gives freedom of contract (on which contract law depends) more legal scope than do pre-industrial and socialistic economic systems."⁴⁰ Professor P.S. Atiyah traces the

33. See GILMORE, *supra* note 7, at 35-44.

34. Assent is one of the few required elements to create a contract under the rules set forth in the Restatement. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

35. The decline of the importance of consent is clearly set forth in scholarly critiques of standard form contracts. See, e.g., Radin, *supra* note 3, at 1231-32; Rakoff, *supra* note 3, at 1237-38; Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEA. U. L. REV. 469 (2008).

36. 2005 LA. L. REV. 123 (2005).

37. See GILMORE, *supra* note 7, at 56 (discussing Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964)).

38. See P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 36, 402-03 (CLARENDON PRESS, OXFORD 1979).

39. FRIEDMAN, *supra* note 14, at 20-21.

40. *Id.* at 10.

development of the idea of freedom of contract from its origins in the industrial revolution in England (roughly 1779 through 1870) to its demise, or at least its significant limitation, from 1870 to the present.⁴¹ An important portion of this decline was caused by regulation: “In Statute law the process of overriding individual freedom of choice has been taken far beyond the lengths which most lawyers would regard as compatible with the principles of contract law.”⁴² This reality illustrates two important points. First, the contracting process inherently is tied to the freedom and autonomy of the actors, and second, that autonomy has too frequently resulted in injustices requiring legal intervention.

Out of this brief historical review, several important concepts and principles emerge. The law governing contracts has been and should be closely tied to the concept of bargaining and bargained-for exchanges. The attempt to create a completely objective theory of contract involved a shift from long-standing approaches, required the development of ameliorating doctrines, and created distortions in the concept of assent to terms in a contract. The nature of assent to a contract is an important concept to explore. The concept of freedom of contract is profoundly linked to our economic and social system, but it inherently facilitates abuse, which must be effectively addressed by our legal system. Finally, there are deep historical roots supporting courts’ consideration of the parties’ contracting process when determining whether and how to enforce the resulting contract.

II. THE CONTRACTING PROCESS

Examining the process of drafting contracts provides a number of valuable insights that courts can consider to more effectively resolve challenges to contract provisions. When two parties enter into an agreement, there is a bargaining process in which some type of exchange is agreed upon.⁴³ The concept of consideration itself contemplates a bargained-for exchange.⁴⁴ If the agreement is not evidenced by a written (including electronic) contract, the terms of the agreement would be established by proving what had been agreed upon in the bargaining process. Having the agreement evidenced by a contract dramatically simplifies proof of what was bargained for and agreed upon, but it also introduces new issues. Do the contract’s provisions accurately reflect what was bargained for? Did the party drafting the contract add provisions that were not part of the bargaining process?

When the agreement is evidenced by a contract, the events leading up to the production of that contract vary significantly depending upon many factors. Aside from the subjective factors that play a role, those factors include: the economic size of the agreement, the nature and amount of future interaction between the parties contemplated by the agreement, the number of legal issues the agreement raises, how frequently each party enters into that type of agreement, and each party’s bargaining power. Out of the many possible combinations of those factors, however, there are some important commonalities that assist in the analysis of whether to enforce or modify particular provisions in the resulting contract.

It is helpful, first, to identify the two extremes of the continuum. On one end is the so-called contract of adhesion⁴⁵ involving primarily, but not exclusively, contracts with consumers. These are becoming even more common with electronic

41. ATTYAH, *supra* note 38, at 398-505, 681-764.

42. *Id.* at 726.

43. The general rule requires a bargain to establish a “contract” with a few minor exceptions relating to promises that are enforceable without consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17.

44. *See id.* §§ 17 cmt.a, 71.

45. This concept was first introduced in 1919 in connection with insurance contracts. *See Edwin Patterson, The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). The concept was further developed several decades later in Friedrich

contracting on the internet.⁴⁶ The process at this extreme involves one party simply signing a contract that contains the minimal, essential and important, bargained-for content, together with many additional provisions added by the attorney for the other party to cover whatever the attorney, with the client's approval, deemed important to include for all similar transactions. The party who did not draft the contract is required to accept it in order to enter into the transaction. The additional content is often referred to as "boilerplate" and has been the subject of significant scholarly debate and attention.⁴⁷ It is not uncommon for the content of some of those additional provisions, or the failure to include provisions on certain issues, to be the result of perceived potential market reaction to such provisions.⁴⁸

The few bargained-for terms in these contracts are clearly assented to, but what is the nature of the assent, if any, to the remaining provisions?⁴⁹ Signing a contract leads to the assumption that the party read and understood the contract. But, scholars recognize, and some research has verified, that standard form contracts are not read by consumers.⁵⁰ Even attorneys with expertise in the area of contract law do not regularly read standard form contracts they sign. They understand the contracts are not negotiable and therefore do not waste their time. A recent news report describes Judge Richard Posner's statement at a conference that he did not read the extensive documentation he signed for a home equity loan and also describes managing attorneys from major New York law firms participating on conference panels and signing release forms without reading them.⁵¹ When addressing contracts of adhesion, courts have recognized that consumers do not read them, but, drawing upon the concept of assent, they often assert that the adhering party had the *opportunity* to read and understand the contract before going forward, or at least had the responsibility to read the contract to know what it was signing and agreeing to.⁵² The concept that such provisions could or should have been read, to say nothing of being understood, simply does not reflect real world activity.

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Kessler's *CONTRACTS OF ADHESION — SOME THOUGHTS ABOUT FREEDOM OF CONTRACT*. See 43 COLUM. L. REV. 629 (1943). More recently, contracts of adhesion were thoroughly and carefully explored in Todd D. Rakoff's *Contracts of Adhesion: An Essay in Reconstruction*. See 96 Harv. L. Rev. 1173, 1177-79 (1982).

46. See, e.g., Sam S. Han, *Predicting the Enforceability of Browse-Wrap Agreements in Ohio*, 36 OHIO N.U. L. REV. 31 (2010) (describing the dramatic expansion of internet contracting and attempting to predict enforceability of certain agreements under UETA); Ronald J. Mann & Travis Siebneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008) (suggesting, based on empirical data, that rapidly expanding electronic contracting is not as problematic as many have asserted); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002) (describing the rapidly growing field and suggesting new contract law may become necessary).

47. See note 3 and accompanying text *supra*.

48. Significant scholarly discussion has either described this aspect or criticized claims that it makes such provisions less of a concern. For a brief look into a segment of scholarly debate, see Mann & Siebneicher, *supra* note 46 (discussing evidence that pro-seller terms are much less common than many would predict) and Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1414-15 (1983) (using economic and psychological theories to suggest that legislation should focus on contract terms consumers actually find important).

49. See notes 34-35 and accompanying text *supra*.

50. Rakoff, *supra* note 45.

51. Debra Cassens Weiss, *Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan*, ABA JOURNAL LAW NEWS NOW, June 23, 2010 at http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan.

52. See, e.g., *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1362 (Del. Super. 1990); see, generally John D. Calamari, *Duty to Read: A Changing Concept*, 43 FORDHAM L. REV. 341 (1974).

At the opposite end of the continuum is the contract in which every single provision is fully negotiated by each party. Although the number of fully negotiated contracts is relatively small, those contracts are extremely important to an understanding of the contracting process. Such contracts typically involve attorneys representing each party drafting and negotiating the final product. One very interesting part of the process in this context is that different persons for each party are often involved in negotiating different parts of the contract. These contracts truly reflect the freedom of contract model, where the parties work out the details to which they are willing to commit. When such a contract is signed by each party, it accurately reflects what they have bargained for and assented to, limited only by the drafters' ability to accurately capture in the contract's wording what the parties agreed upon. A fully negotiated contract does not mean the parties have necessarily anticipated all issues that may arise and resolved them, but that shortcoming is of limited relevance to the key question: should courts enforce what the parties expressed in their finished product, the contract?

The part of the contract-drafting continuum lying between these two endpoints is the most critical to explore and understand. Most commonly, even when attorneys represent all parties to a contract, the parties do not fully negotiate each provision of the contract. For example, this author can count on one hand the number of truly, fully negotiated contracts on which he worked during ten years of practice as a transactional attorney. For the hundreds of other contracts negotiated with attorneys on both sides of the transaction during that period, one side, usually this author's clients, controlled the drafting process. This generally meant that the drafting and negotiation process began with a form the client had developed for that type of transaction.⁵³ When the other party's attorneys raised concerns about provisions in the initially produced drafts, we discussed, and occasionally modified, them. The other attorneys' client usually was most interested in the transaction being completed based on the key business terms that had been negotiated and did not give the attorneys free rein to carefully negotiate the other provisions in the contract, either because their client thought it unlikely the issues covered by those provisions would become important or because the client was not willing to pay the additional attorneys' fees that detailed negotiations of all the other provisions would entail. This author was occasionally on that side of the negotiations and experienced such an approach and limitations first hand.

The foregoing characterization of contract negotiations involving attorneys on both sides of the transaction is by no means limited to this author's personal experiences. Many transactional attorneys in large firms have described the contracting process they have experienced, and the approach described above is common. In contracts that are not fully negotiated, as long as the essential negotiated business terms of the transaction are included, the party not controlling the drafting will accept many additional provisions if they are within the realm of reason.

The reality that contract provisions are not fully negotiated, even when attorneys represent each side during contract negotiations, is vividly captured by this simple illustration. One of the clients my firm represented had approved forms for all the transactions it regularly negotiated and entered into. One such transaction was the purchase or sale of commercial real property. The client had two different form real estate purchase agreements - one for use if it was the buyer, the other if it was the seller. The "buyer" form was more than twice the length of the "seller" form. It was clear that, even after negotiation, the seller form would never resemble the buyer form and vice versa. It simply would have been too complicated to have that detailed a set of negotiations over the contract itself.

The lack of negotiation of all contractual provisions when both parties are represented by attorneys was also described by professors Omri Ben-Shahar and James White when they examined the process of contracting in the auto manufacturing business. They were surprised to learn how different the process was from what theories would have

53. Scholars have described a number of reasons that standard form provisions may be used, from control over the discretion given to agents in large organizations, *see, e.g.*, Ahdieh, *supra* note 3, at 1040 n.30, to cost savings devices in contract negotiations, *see, e.g., id.* at 1034.

predicted.⁵⁴ Although the parties were sophisticated and had legal counsel, their contracts were not fully negotiated. Instead, outside of the essential business terms, the contracts were standard forms and strongly one-sided.⁵⁵

Additional insights into the reality that many contract provisions are not fully negotiated are found in an article about preparing contracts governing information technology consulting services and software from the perspective of the user.⁵⁶ The author of that article noted that there were numerous articles on the subject viewed from the perspective of the provider of such services but that his article appeared to be the first to view the process from the perspective of the customer.⁵⁷ He also observed that in “more routine projects, it will not be appropriate to invest time and fees in the protracted negotiation that is likely to ensue.”⁵⁸ He further described his personal experience that in these contracts “vendors are willing to make at least some concessions in the areas discussed if the vendor’s need to balance risk and reward is respected.”⁵⁹ That last observation focuses us on another issue relevant to many of these *other provisions* in contracts. For one of the parties, the economic effect of certain provisions will be much more significant. If that provision is negotiated, it will take a form acceptable to the party most affected, but not overly detrimental to the other party. If the provision is not negotiated at all, however, it will by nature be very one-sided.

Additional insights into the contract drafting process in the center of the spectrum can be gleaned from several articles describing how to teach or enhance the process of drafting contracts. For example, in an article discussing the contract drafting course he designed to simulate actual law practice for students,⁶⁰ Professor Charles Lewis described a four step process: first, interview the client to determine the client’s goals; second, plan the contract so it will cover everything necessary to achieve those goals; third, negotiate the draft contract with the other party; and fourth, draft the final contract.⁶¹ He subsequently published a short article describing how the same techniques could be used by law firms to teach contract drafting to young associates.⁶²

In discussing the client interview, Professor Lewis provides important insight into the entire contract drafting process by observing “how hard it can be to get the facts from a person who does not know what to tell the lawyer, does not have all the information the lawyer needs, and may be misinformed.”⁶³ Implicit in this observation are two realities:

54. Ben-Shahar & White, *supra* note 3, at 956-64.

55. *Id.* at 981-82.

56. B. Robbins, *Computing the contract: Getting that tech stuff in writing – from a user’s perspective* 13 No. 5. BUS. LAW TODAY 45 (May/June 2004). The fact of incomplete contract negotiation, even where attorneys represent each party, was also illustrated in an article in *Business Law Today* discussing problems that arise when commercial leases are not carefully negotiated and drafted. See Jennifer L. Wolf, *Dangerous document: Buried land mines can sabotage the future*, 13 No. 4 BUS. LAW TODAY 10 (March/April 2004).

57. Robbins, 5 BUS. LAW TODAY at 45.

58. *Id.*

59. *Id.*

60. Charles C. Lewis, *The Contract Drafting Process: Integrating Contract Drafting in a Simulated Law Practice*, 11 CLINICAL L. REV. 241 (2004).

61. *Id.* at 268-69.

62. Charles C. Lewis, *Turning the Firm into a School*, 15 No. 3 BUS. LAW TODAY 25 (January/February 2006).

63. *Id.* at 27.

the provisions of a contract beyond the essential business terms are of a fundamentally different character from the essential business terms, and those bargaining for the essential business terms may not understand all the legal issues that could arise or how best to bargain for the provisions in the contract to govern those issues.

The reality that different persons must negotiate various contract provisions is captured by another author describing how attorneys should negotiate an information technology consulting service and software contract. He concludes that such contracts “require that counsel draw on the expertise of the client’s IT experts in order to adapt to the IT area the legal techniques that are effective in other situations.”⁶⁴ The appropriateness of different persons negotiating different parts of a contract is also reflected in an article describing what is involved in drafting effective arbitration provisions in LLC agreements.⁶⁵ That author recommends having litigators work closely with the transactional attorneys in drafting those provisions.

This particular reality of the contracting process results in either: both parties delegating parts of the negotiating process to different persons who will have an understanding of particular issues relating to the contract; or an inherently flawed attempt to achieve a truly bargained for set of functional contract terms. It is important to note that costs or resource allocation issues may well result in one party opting for the second of those possibilities. Thus, in contracts that are not fully negotiated, there is a significant chance that provisions in the contract beyond the essential terms are not only not negotiated but that they are not understood by one of the parties.

Additional valuable insights into the process of negotiating contracts whose provisions are closely related to specialized knowledge can be extracted from the recent experiences of task forces established by committees in the Section of Business Law of the American Bar Association. For example, the Banking Law Committee, Commercial Financial Services Committee, Consumer Financial Services Committee and Uniform Commercial Code Committee recently appointed a joint task force to draft a model Deposit Account Control Agreement (“DACA”) to help simplify the negotiation of secured transactions when part of the collateral is a deposit account.⁶⁶ In addition, the Commercial Finance Committee established a task force to draft a model First Lien/Second Lien Intercreditor Agreement (“Model Intercreditor Agreement”).⁶⁷

In drafting the DACA, representatives of the key players in such secured transactions worked for several years to complete the project. Even so, the members of the task force could not reach consensus on all terms. While there is always some difficulty associated with the drafting of a form document, because consideration must be given to situations that are not present in all transactions, the bigger challenge in the process of drafting the DACA was ensuring that each provision would be both effective and acceptable to each side of the transaction. “Although not everyone is in agreement with every provision, the DACA was forged in an effort to reach as broad a consensus as possible. There was wide representation, good will and good humor throughout [the] process.”⁶⁸ The result was a five-page document with two attachments totaling an

64. Robbins, *supra* note 56, at 49.

65. Dominick T. Gattuso, *Drafting Arbitration Provisions for LLC Agreements: The Devil is in the Details*, 18 No. 4 BUS. LAW TODAY 53 (March/April 2009). That article points out that several judges have made public comments about how many “inarticulately worded agreements [are] flowing through their courts.” *Id.* at 53.

66. Joint Task Force on Deposit Account Control Agreements, ABA Section of Business Law, “*Initial Report of the Joint Task Force on Deposit Account Control Agreements*” 61 BUS. LAW. 745 (2006) (hereinafter “*DACA Task Force Report*”).

67. Committee on Commercial Finance, ABA Section of Business Law, “*Report of the Model First Lien/Second Lien Intercreditor Agreement Task Force*,” 65 BUS. LAW. 809 (2010) (hereinafter “*Model Intercreditor Agreement Task Force Report*”).

68. DACA Task Force Report, *supra* note 66, at 780.

additional ten pages. The DACA contains several alternative provisions, as well as a number of provisions designed to be tailored to any specific transaction.

The typical deposit account control agreement, even in the most sophisticated secured financing, would be negotiated in a tiny fraction of the time it took to develop the DACA. Typically, the depository bank would produce a proposed form, and only the most critical provisions would be negotiated. Those negotiations would rarely, if ever, involve the persons on either side of the transaction who would be tasked with implementing the resulting detailed provisions.⁶⁹

The DACA task force's status reports during the drafting process, given at the spring and annual meetings of the Section of Business Law, were replete with discussion of how difficult (to the surprise of task force members) it had been to negotiate some provisions. Many of those difficult-to-negotiate provisions were relevant to how banks functioned in their back office operations. The attorneys on the task force who would normally negotiate such contracts learned much they would not have otherwise known because parties intimately familiar with such back office operations were brought to the negotiating table.

Similar experiences characterized the drafting of the Model Intercreditor Agreement. The process involved face-to-face meetings three times per year and regular meetings by conference call over a four year period.⁷⁰ The final agreement is 71 pages in length and includes 107 explanatory footnotes.⁷¹ The final report of the task force points out that the resulting form included alternative provisions favoring second lien lenders.⁷² The obvious implication of having alternative provisions is that, even after extensive negotiations, it was not possible to craft neutral provisions on all issues.

The second stage in contract drafting described by Professor Lewis, the planning stage, involves both foreseeing protections that will be needed in the event of a breach and anticipating ways to protect the client against external risks that may threaten the contractual arrangement.⁷³ To a very significant extent, a contract is a document prepared in anticipation of potential litigation. In fact, most of the provisions beyond the essential business terms are devoted to minimizing the possibility of litigation as well as to increasing the likelihood of faster resolution in the event litigation does arise.

Professors Scott and Triantis have suggested, contrary to much contract theory, that significant economic efficiencies might be created in many transactions by shifting the cost from the front end of the contracting process – attempting to anticipate and cover everything in the contract – to the back end –renegotiating or enforcing the contract.⁷⁴ This shift would be accomplished by the use of general standards (or “vague terms”) in the contract, such as reasonable care, as contrasted with more specific rules (or “precise terms”) in the contract.⁷⁵ Another alternative is to leave those provisions out of the contract. The absence of a contract term may reflect (i) a choice to reduce contracting costs (ii) a failure to anticipate the potential implications of the provisions chosen, or (iii) the extent to which one of the parties had greater control over the drafting of the contract.

69. See notes 85 - 87 and accompanying text, *infra* for a discussion of this issue.

70. Model Intercreditor Agreement Task Force Report, *supra* note 67, at 811-12. Over 200 attorneys were members of the task force, many of whom attended the meetings.

71. *Id.* at 813, 883.

72. *Id.* at 812.

73. Lewis, *supra* note 62, at 29.

74. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 878-79 (2005).

75. *Id.* at 818-19.

A recent article in *Business Law Today* focused on learning to draft contracts by carefully using form contracts and rewriting them to apply to the current transaction and set forth a more expansive goal for that training effort: “[D]rafting contracts that effectuate their ... clients’ needs, and ... anticipate, and hopefully avoid, potential legal disputes.”⁷⁶ In addition to anticipating litigation, the article advocates drafting anticipated details of performance of the contract. Such provisions are important elements of a contract, but they are fundamentally different from the essential business terms of the bargain. Here, the attorneys’ focus is on regulating the transaction as it moves forward. These drafting techniques do not focus upon how to document what was negotiated, but upon how to anticipate and describe contingencies that may arise in the future and how to resolve those anticipated problems.

Professor Lewis’ planning stage discussion also includes consideration of contract provisions designed to achieve a result that is not in accordance with current applicable law.⁷⁷ Again, such provisions are designed to resolve potential problems. The idea is not to draft provisions that permit or require an illegality, but rather to achieve a different result by qualifying for a different set of legal rules. The concept is illustrated by an example in an article authored by Jennifer Wolf discussing commercial lease negotiations.⁷⁸ Under the general legal rule, contract covenants are dependent; the breach of a minor covenant by the landlord could excuse performance by the tenant, permitting it to withhold rent or terminate the lease. If the parties consider that possibility in connection with less critical landlord covenants in the lease however, they can expressly agree that such covenants are independent, thereby avoiding application of the general rule and eliminating the ability to withhold payment or terminate.⁷⁹ That same result of permitting the transaction to flow more smoothly could be achieved by the landlord including such a provision in its lease form that is not negotiated by the parties.

Ms. Wolf’s commercial lease article highlights an important reality in the difference between “essential business terms” and the other terms “[h]idden behind the essential terms.”⁸⁰ The *non-essential* terms are less likely to be fully negotiated and in many situations are not negotiated at all.⁸¹ Yet, the non-essential terms of a contract may be very beneficial to one of the parties and very problematic to the other.⁸² An example from the article that the author advises counsel for tenants to look for and avoid, is the common provision in leases giving the landlord a security interest in the tenant’s personal property on the leased premises.⁸³ The author advises attorneys that “careful reading and understanding of more than just the basic terms ... can help you identify and avoid [provisions] that may cause your client to incur unnecessary

76. Susan M. Chesler, *Drafting Effective Contracts: How to Revise, Edit, and Use Form Agreements*, 19 No. 2 BUS. LAW TODAY 35, 35 (November/December 2009).

77. Lewis, *supra* note 62, at 27.

78. Wolf, *supra* note 56.

79. *Id.* at 12 (citing as an example, *Wesson v. Leone Enterprises, Inc.*, 774 N.E.2d 622 (Mass. 2002) (failure by landlord permits tenant to terminate lease)).

80. *Id.* at 11.

81. See, e.g., note 54 and accompanying text *supra*.

82. Ben-Shahar & White, *supra* note 3, at 956-64.

83. *Id.* at 12. As a practicing attorney, I remember vividly preparing a form commercial lease which, at the client’s request, included such a security interest. When the client had its leasing agent look at the form before it was finalized, that clause was the only provision the leasing agent objected to. The objection was that it would hinder leasing the property to a tenant who read the lease carefully. The client decided to remove that provision.

legal or liability expenses.”⁸⁴ This advice raises an important question: If some of the provisions in a contract are not, in fact, negotiated by the parties, when should those provisions be part of the contract, and when should a court ignore or modify them? The nature of a party’s assent to non-essential terms differs from the nature of the party’s assent to essential terms, and this difference should be considered in the interpretation and enforcement process.

Non-essential provisions tend to be of greatest interest to attorneys and are intended to regulate the future relationship of the parties as their agreement moves forward. Two particular types of non-essential provisions are common: those governing the performance of the contract, which may include provisions designed to modify general legal rules, and those attempting to anticipate and deal with disputes.

One additional reality of contractual relationships needs to be explored. Oddly, the non-essential provisions that are of such interest to the parties during the negotiation of a contract are rarely reflective of the parties’ conduct after a contract is signed. The persons who negotiate a contract, or prepare the form to be used, are in most instances not the same persons who implement the contract on a day-to-day basis. As a result, even though the resulting contract is designed to govern the relationship between the parties as the transaction moves forward, it is not necessarily followed by the parties. Moreover, the completed contract is rarely used as a guide to instruct the employees who will implement the contract. In fact, more frequently than contract drafters would like to imagine, the contract is probably not even consulted when issues first arise. This is consistent with evidence scholars have presented of businesses negotiating with consumers who have entered into standard form contracts, after the contracts have been entered into, in ways that benefit the consumers and help develop more loyal customers.⁸⁵

Two other examples illustrate this reality. In their study of contracting in the automotive manufacturing industry, Professors Ben Shahaar and White describe one of the “Supplier Frequently Asked Questions” appended to Ford Motor Company’s “Global Terms and Conditions,” which explains that a particular provision in the contract is “never used literally and only infrequently used at all.”⁸⁶ The second example comes from a lawsuit between Wal Mart and a supplier. Wal Mart’s standard agreement required all changes to the agreement to be in writing and signed by both parties. When Wal Mart became dissatisfied with the product and was negotiating a change in settlement of the dispute, it made no attempt to create a written modification, but in a subsequent lawsuit filed by the supplier tried to enforce the \$600,000 settlement.⁸⁷ This disconnect between the provisions in a contract and the subsequent behavior of the parties is also illustrated by that fact that when conflicts arise between the parties, they are more frequently settled out of court than by judicial decision. In arriving at settlements of such disputes, the parties are not bound by the provisions of the contract, even if their starting negotiation posture was based on them. They have the opportunity to view the current dispute in the light of current conditions, whereas the contract provisions that could govern were prepared in anticipation of what might happen, and so are inherently not as directly on point as they could be.

What can be learned from the less-than-rigid adherence parties often give to provisions in their contracts? First, as contrasted with the essential business terms that are bargained for, the types of provisions that may get overlooked or ignored are an attempt by one, or if negotiated, both, of the parties to set down rules to govern the relationship going forward. One could refer to this as private legislation. Characterizing it in this way does not mean that it is outside the realm

84. *Id.* at 15.

85. *See, e.g., Johnston, supra note 3; Bebchuk & Posner, supra note 2.*

86. Ben-Shahaar & White, *supra* note 3, at 964.

87. *General Trading Int’l, Inc. v. Wal Mart Stores, Inc.*, 320 F.3d 831, 834-35 (8th Cir. 2003).

of private parties' appropriate actions, but it does establish a reason for taking a different approach when courts are called upon to interpret and enforce such provisions. Second, provisions which were designed to anticipate future circumstances may not be a good fit when the time for them to apply arises. Contracts, once entered into, can be modified by the parties, and any party can waive performance by the other party or a condition to its own performance. To the extent modification or waiver explains the actions of the parties, courts already have the rules when dealing with relevant contract provisions to find that under the facts of a particular case, a modification or waiver has occurred.

The third step in the contracting process described by Professor Lewis is the negotiation of terms with the other party. Professor Lewis' course contemplates a fully negotiated contract.

The fourth and final phase of the process is drafting the written contract. It is here that nuanced changes to negotiated terms may creep into the contract, intentionally or inadvertently. This can be avoided only where the party not controlling the drafting carefully reviews the resulting document. An effort to minimize the opportunity for such intentional or unintentional nuances is developing in many contexts, with the growing trend to limit negotiations to which of several alternative standard terms will be used in the contract. This process has been described as modularity in contracting.⁸⁸ The model agreements described earlier contemplate this approach in their use.

III. LEGAL DOCTRINES THAT MITIGATE CONTRACTING PROBLEMS

It is often said that “[t]he basic rule of contract law is that contracts are presumptively valid and enforceable according to their terms.”⁸⁹ There are a number of well-established legal principles that create exceptions to the basic rule. Courts have traditionally applied these doctrines conservatively, however. The doctrines and their conservative use appear inadequate to resolve problem contracts in light of contract drafting realities.

One straightforward-sounding rule that, on its face, would appear to resolve many of the problems identified, is that a contract is construed against the drafter in an appropriate case.⁹⁰ That description of the rule, however, is far broader than its standard application. First, the rule is only applied when a court is asked to interpret ambiguous terms.⁹¹ In addition, it is applied almost exclusively in construing contracts of adhesion.⁹² Furthermore, jurisdictions vary in how strictly they apply the rule.⁹³ It thus plays only a small role in resolving overreaching that may result when contracts are not fully negotiated.

88. See, e.g., Radin, *supra* note 3, at 1224-25; Davis, *supra* note 3, at 1078-79.

89. FRIEDMAN, *supra* note 14, at 23.

90. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

91. The rule was so described by the Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

92. See, e.g., *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 695 (Cal. Ct. App. 1961). A contract of adhesion is a contract presented by one party for acceptance by the other party without change. See *supra* notes 45-48 and accompanying text. Contracts of adhesion are not unenforceable *per se*. See, e.g., *Cornejo v. Spenger's Fresh Fish Grotto*, No. C 09-05564 MHP, 2010 WL 1980236, *6 (N.D. Cal. May 17, 2010) (contracts of adhesion are so common something else has to be present to render it unenforceable).

93. Compare *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 838 (7th Cir. 2002) (Iowa applies the rule strongly, construing the language “strictly” against the drafter), with *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 440 (5th Cir. 2002) (Louisiana uses the rule only if there is no other way to resolve the ambiguity and then generally only for contracts of adhesion).

The doctrine of unconscionability provides another potential avenue for a court interpreting a contract and attempting to reach a just result. The doctrine of unconscionability was not in the First Restatement of Contracts, and its inclusion in the Second Restatement is further evidence of the inadequacy of classical contract theory and the need for legal doctrines that mitigate the problems it created.⁹⁴ The doctrine of unconscionability is available to preclude the enforcement of a contract, eliminate particular provisions, or limit the application of a term to avoid an unconscionable result.⁹⁵ For courts that require that both procedural and substantive unconscionability to be established to defeat a contract, or a provision thereof, procedural unconscionability is frequently established by proving that the contract is one of adhesion.⁹⁶ While the doctrine of unconscionability can be applied independent of whether the contract was one of adhesion, the doctrine is rarely used in contracts between two commercial parties.⁹⁷ Unconscionability is a doctrine courts can choose to use, and the situations in which courts employ it are captured by both the Restatement suggestion that it be used to prevent “oppression and unfair surprise”⁹⁸ and by the description by many courts when applying the doctrine that the challenged contract or provision “shocks the conscience of the court.”⁹⁹ Despite wide recognition, individual states apply the doctrine of unconscionability quite differently, as aptly illustrated by an article comparing the approaches of Michigan, Minnesota, and Washington.¹⁰⁰ The doctrine is available, but its name, as well as concepts like “oppression,” “unfair surprise” and “shocks the conscience” make it applicable only to deal with extreme provisions in contracts. The doctrine and its use still reflect strong deference to the provisions that appear in the contract.

Contract provisions can also be defeated if they are found to be contrary to public policy.¹⁰¹ For example, a New York court used that principle to support the grant of summary judgment to a former employee, finding a clause in her employment contract prohibiting the solicitation any of the former employer’s workers to constitute an unreasonable covenant restricting competition.¹⁰² While language as flexible as “public policy” would appear to create significant power for courts to defeat objectionable contract provisions, the doctrine is applied quite conservatively.¹⁰³ Much of the description of the doctrine in the Restatement focuses on public policy as drawn from legislation,¹⁰⁴ in effect reducing the doctrine to one that for the most part enforces legislative regulation of contracts.

94. Hogg, *supra* note 1, at 1012-18.

95. That description reflects both the rule set forth in the Restatement and the UCC. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); UCC § 2-302 (2002).

96. *See, e.g.*, 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1212-13 (Cal. Ct. App. 1998).

97. *See* Reznor v. J. Artist Management, Inc., 365 F. Supp. 2d 565, 577 (S.D.N.Y. 2005).

98. RESTATEMENT (SECOND) OF CONTRACTS § 208. cmt. b.

99. *See, e.g.*, California Grocers Ass’n, Inc. v. Bank of America, 22 Cal. App. 4th 205, 214-15 (Cal. Ct. App. 1994).

100. *See* Hogg, *supra* note 1.

101. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179, 181.

102. Lazer Inc. v. Kesselring, 823 N.Y.S. 2d 834, 835-36, 839 (N.Y. Sup. Ct. 2005).

103. The fact that courts’ use of this concept has been too reserved is discussed in Arnov-Richman, *supra* note 1.

104. RESTATEMENT (SECOND) OF CONTRACTS §§ 178(1), (3), 179(a), 181. But, judicially determined public policies can also be used under the doctrine, the prime example being the policy against restraint of trade. *Id.* §§ 179(b)(i), 186, 187, 188.

A duty of “good-faith and fair dealing” is also implied into every contract.¹⁰⁵ Again, the language is very broad and could arguably be used to limit many unfair contract provisions. Generally, however, the doctrine is asserted in complaints regarding another party’s performance under the contract. Under limited circumstances, this implied duty has been used to create a specific duty not otherwise expressly provided for in the contract or to limit a party’s enforcement of contract terms. For example, in *Trevino v. Merscorp*,¹⁰⁶ the defendant argued that it had no duties under a particular contract and thus the duty of good faith and fair dealing could not arise. In that case, the claims of breach of contract and breach of the duty of good faith survived a motion to dismiss.¹⁰⁷ Otherwise, however, the doctrine has been of limited utility in defeating unjust contract provisions.

Another principle courts have used to defeat contract provisions in standard form contracts is the test of whether the drafter had a reasonable expectation that the provision would not have been accepted by the consumer.¹⁰⁸ The argument has been asserted successfully in several cases. For example, in *Sears Roebuck and Co. v. Avery*,¹⁰⁹ a North Carolina court applying Arizona law invoked the reasonable expectations principle to defeat a unilaterally added provision requiring arbitration of disputes under a credit card agreement. The principle was also relied upon in *State Farm Fire & Cas. Ins. Co. v. Grabowski*¹¹⁰ to defeat an exclusionary clause in an umbrella insurance policy that was not contained in the basic auto insurance policy. In that case, however, the appellate court reversed the decision of the trial court because the issue of reasonable expectations had been submitted to the jury under an erroneous instruction. Namely, the instruction did not include the requirement that the party drafting the provision needed “reason to believe” that the consumer would not agree to it.¹¹¹ The court was concerned that the jury could have simply found the provision was “unusual” and not read by the policy holder.¹¹²

But, challenges under the doctrine have also been rejected in circumstances where application would appear to be ideal. In *Woodruff v. Anastasia International, Inc.*,¹¹³ the court considered a forum selection clause in a “click-through” agreement concerning the provision of foreign brides to American men. The court found the contract to be one of adhesion, but it also found that the forum selection clause requiring suit to be brought in Maine or Kentucky was “within the reasonable expectations of an ordinary person,” and upheld the trial court’s dismissal. How can it be anyone’s reasonable expectation when contracting for a foreign bride online that any resulting lawsuit would have to be brought in Maine or Kentucky?

105. See RESTATEMENT (SECOND) OF CONTRACTS §§ 205, 211 cmt.c.

106. 583 F. Supp. 2d 521, 532 (D. Del. 2008).

107. The allegations included the claim that under an express contractual right for the mortgagee to recover certain expenses, there was a breach because the expenses being charged were higher than those the mortgagee had worked out under independent contracts with other parties. *Id.* at 524-25, 533-34.

108. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (excluding from a standard form contract a provision the drafters had reason to know the other party would not assent to).

109. 593 S.E.2d 424, 430-31 (N.C. App. 2004).

110. 150 P.3d 275 (Ariz. Ct. App. 2007).

111. *Id.* at 281-82.

112. *Id.*

113. No. E2007-00874-COA-R3-CV, 2007 WL 4439677 (Tenn. Ct. App. Dec. 19, 2007).

The foregoing doctrines have long been available to achieve justice when enforcing contracts. Although courts recognize the doctrines, they are consistently applied very conservatively. The explanation appears to be that courts still defer as much as possible to party autonomy.

IV. PROPOSED CONTRACT PRINCIPLES TO ACHIEVE JUSTICE

There are two ways to counter the misuse of power in the drafting of contracts: legislative action and judicial action. Relying on legislative action reduces the influence of courts and delays corrective action until the relevant legislature decides to take action for a particular type of transaction. Another problem with legislative corrective action is that it is only partially effective or not well tailored to many specific situations.¹¹⁴ Judicial action has a far greater ability to adapt from situation to situation, without needing to rely on unpredictable rules. Relying on judicial action also gives parties who are willing to take the time to respond to common law rules the opportunity to modify their contracts to be in harmony with those rules.¹¹⁵ When courts do not clearly apply rules to limit what parties misusing economic power put in one-sided contracts, the drafters of such contracts have significantly fewer incentives to include terms that are just and fair.¹¹⁶ Thus, the court system is clearly the institution best situated to protect citizens from the unfair use of disparate bargaining power in drafting contracts by recognizing and considering the real world experience of the negotiating parties.

Explicitly recognizing that few contracts reflect fully negotiated transactions raises the important question: How can this knowledge be implemented to improve the law governing contracts? This author suggests separating contracts into meaningful categories and applying appropriate doctrines of contract interpretation to each.

One natural and meaningful category is contracts which have been fully negotiated. To a significant extent, the current rules of contract interpretation presume that all contract provisions are fully negotiated. For example, section 209(3) of the Restatement reflects this category of contract, when it provides: "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Once the contract is determined to be integrated, the parol evidence rule applies and permits a court to consider information outside the writing only for limited purposes and in limited circumstances.¹¹⁷ Fully negotiated contracts do not require application of any of the doctrines limiting the enforcement of contract provisions; rather, the basic issues confronting courts are the meaning of ambiguous terms and how to apply contract provisions to situations that were not contemplated at the time of drafting. The law governing contracts is conceptually consistent with this category of contracts.

A second useful category would be contracts that were not fully negotiated, but in which each party was represented by counsel in drafting the contract. One obvious question that arises with respect to this category is how a court would

114. See, e.g., Hillman, *supra* note 3 (discussing ways in which well-intentioned legislative action can result in an overall effect that, in time, works against those intentions or results in counter-productive activities by those affected); Johnston, *supra* note 3, at 870 (describing credit card issuers' objections to proposed guidelines that would undermine beneficial approaches currently taken when working out problems with many consumers).

115. There is important evidence that many parties relying on standard form contracts pay little attention to judicial treatment of the provisions, especially in the insurance industry. See Boardman, *supra* note 3.

116. Occasionally the market will have some effect here to improve conditions. A recent article provides significant support for the fact that many parties continue to use clauses that courts have found to be unenforceable. See Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

117. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 213-216 (1981).

determine whether a contract falls within this category. Courts can readily identify and eliminate contracts of adhesion; they have done that for years. Courts can likewise readily determine whether one of the parties did not have an attorney involved in drafting the contract. Thus, the primary difficulty would seem to be distinguishing between those contracts that are “fully negotiated” and those that are not, even though counsel represented each party when the contract was drafted.

Before considering how courts might make that distinction, it is important to determine whether there are features of those contracts that require different treatment by courts. One may assume that where contracts are not fully negotiated, there is some level of economic power at play and thus a potential for abuse of that power by drafting unfair provisions covering the “non-essential matters.” To what extent should our legal rules facilitate this unequal use of economic power? In *Richard Whillock, Inc. v. Ashton Development, Inc.*,¹¹⁸ an appellate court in the State of California made a very interesting and provocative observation relevant to that question in a 1984 opinion:

Hard bargaining, “efficient” breaches and reasonable settlements of good faith disputes are all acceptable, even desirable, in our economic system. That system can be viewed as a game in which everybody wins, to one degree or another, so long as everyone plays by the common rules. Those rules are not limited to precepts of rationality and self-interest. They include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of values. Such exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system.¹¹⁹

While comparing our economic system to a game may be less than ideal, the concept of having common rules which “preclude wrongful exploitation” used to “obtain disproportionate exchanges” is significant to the present inquiry. In this second proposed category of contract, the party choosing not to fully negotiate the contract is making a business decision. Should a court second guess that decision if it results in contract provisions that are less than fair? It may be assumed that the party’s attorneys at least review each contract provision, ensuring that significantly unfair provisions will not survive, or will do so only with their client’s knowledge. “Wrongful exploitation” and “disproportionate exchanges” are thus unlikely when attorneys represent each party in the preparation of the contract, even if all the terms are not fully negotiated.

This suggests a rational and easy-to-apply approach to enforcing such contracts: treat contracts that were drafted with attorneys representing each party the same way fully negotiated contracts are treated. This approach supports certainty, an extremely important consideration to those drafting contracts. The approach also directly implicates and furthers the concepts underlying freedom of contract. There is an important benefit to giving the parties control of structuring the rules governing their relationship, because they have a much better understanding of the transaction governed by the contract than a court or legislature would have.

But, how should courts enforce the remaining contracts - those not fully negotiated and in which not all parties were represented by counsel during the drafting process? It is in these situations that parties face significantly greater risks of what the *Richard Whillock* court described as “the wrongful exploitation of business exigencies to obtain disproportionate exchanges of values,” which, the court concluded, make a “mockery of freedom of contract and undermine ... our economic system.”¹²⁰ Because the potentially unfair contract provisions in this category of contracts are products of attorneys for one party, without input from attorneys for the other party, there are no strong reasons to further subdivide

118. 157 Cal. App. 3d 1154 (Cal. Ct. App. 1984).

119. *Id.* at 1159.

120. *Id.*

this category.¹²¹ The next question is whether there are commonalities in these contracts that can be used to develop rules that would achieve justice in resolving contract disputes and avoid undermining freedom of contract and our economic system. It appears that three different general types of contract provisions can be identified from the contracting process that a court could use to resolve more justly the legal disputes that arise.

First, common to all contracts is the bargaining process, during which the parties agree on the essential terms of the transaction. In the simplest transactions, this may only be an offer and acceptance, using those terms in their generic, not their technical legal, sense. For example, the seller, or in some cases the buyer, of goods or services offers a price, a description of what is to be sold or bought, the amount involved, and the time the exchange is to occur. The other party then either agrees to the transaction on those terms or suggests modifications until an agreement is reached. Obviously, the more complex the agreement and the more bargaining that is involved, the greater the number of terms there will be that are important to the parties to specifically bargain for before completing the contract. I will refer to this group of contract terms as “bargained-for terms.” By definition, a fully negotiated contract contains only bargained-for terms.¹²²

The additional provisions in the contract, by definition, did not result from bargaining. It is important to keep in mind that the nature of assent to these additional provisions is fundamentally different from assent to bargained-for terms. The nature of assent to these additional terms was captured to a significant extent by Professor Llewellyn when he characterized consent to “boiler-plate” as being “on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.”¹²³ Note that such assent is implied and thus has implications fundamentally different than the actual assent that describes the assent to bargained-for terms. Because assent to these terms is implied, courts will not violate the principle of freedom of contract if they modify or refuse to enforce one or more of these terms. The issue of the nature of assent and its implications is particularly important in contracts of adhesion where, more and more frequently, terms are added to a contract after it is initially signed, often referred to as “rolling contracts.”¹²⁴ Many scholars implicitly recognize the question of assent, but discount its importance, when they contend that terms in standard form contracts are more like integral parts of the product being purchased than they are independent parts of the transaction.¹²⁵

Among the additional provisions in these contracts are provisions that are very important to at least one of the parties but that are more technical in nature. Such provisions may be called “accompanying terms.” Accompanying terms would include, but not necessarily be limited to, those setting forth the details of performance during the life of the contract.¹²⁶ The nature and number of accompanying terms will obviously vary significantly from transaction to transaction.

121. This category would include, but certainly not be limited to, contracts of adhesion.

122. The fact that the terms have been bargained for does not mean that the particular terms chosen are not standardized terms that are used in other contracts. It refers to the fact that the concept covered by the term was negotiated and the content agreed upon.

123. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 13, at 371.

124. A brief, but clear, discussion of this is available in Ronald J. Mann, *Contracting for Credit*, 104 MICH. L. REV. 899, 902-03 (2006).

125. See Radin, *supra* note 3, at 1229-30; Baird, *supra* note 3, at 933; Bebchuk & Posner, *supra* note 2, at 829.

126. In setting forth his theory of how boilerplate terms can facilitate post-contractual bargaining with consumers, Professor Johnston makes a somewhat similar distinction by separating what he calls “performance terms” from what he refers to as “breakdown terms.” See Johnston, *supra* note 3, at 858. His distinction, however, is narrower, in that some of his “breakdown terms” may, in some transactions, fit within what I refer to as “accompanying terms.”

Where the parties will have a long-term relationship, such as with rental agreements, insurance contracts or employment contracts, the contract will obviously need and contain more accompanying terms. In a fully negotiated contract, the content of the provisions covering such matters would likely be different.

For example, when a borrower and lender negotiate a loan, the bargained-for terms are the amount of the loan, the interest rate, and the frequency, amount and number of payments. The accompanying terms would include items such as where and how payments are to be made, provisions regarding notices from one party to another, remedies available to the lender if payments are not made, and whether or not the borrower can pay the loan off early. Another good illustration of accompanying terms are those relating to back office operations included in the model DACA.¹²⁷ In the typical deposit account control agreement, the bargained-for terms are simply that the secured party can give instructions regarding the deposit account to the depository institution and that those instructions will be followed and given priority. Virtually all remaining provisions would fit into the category of accompanying terms.

The third category of contract provisions is best described as “risk allocation terms.” Some common examples of risk allocation terms are one-sided attorneys’ fees clauses, choice of forum clauses, choice of law clauses, arbitration clauses, indemnification clauses, and damage limitation clauses. Such provisions are often included in the label “boilerplate,” but that label is not precise enough for these purposes. In the introduction to a symposium on boilerplate, the term was defined as “the building blocks of standard-form, non-negotiated contracts.”¹²⁸ One of the included articles, however, discussed the use of boilerplate in sophisticated, negotiated, transactions.¹²⁹ The label boilerplate is not precise enough here because it is both under inclusive (risk allocation terms are not necessarily standardized provisions and they appear in contracts that are “negotiated,” but not fully) and over inclusive (accompanying terms in contracts of adhesion would certainly be included in the label boilerplate). These provisions could be labeled simply “additional terms,” but that label misses the motivation for placing them in the contract.

Risk allocation provisions are distinguishable because they are neither bargained-for terms (essential and central to the transaction) nor accompanying terms (important to the future performance of the transaction). Risk allocation terms are included in a contract because one party can imagine possible risks and would like to use its power as the drafter to allocate them to the other party. By their very nature, risk allocation terms reflect the use, and a clear potential for abuse, of contracting power.

The “risk allocation” label, however, needs further clarification, because some provisions that allocate risk could be bargained-for terms and some could be accompanying terms. In order to determine into which category a risk allocation provision falls, one must examine closely the nature of the transaction governed by the contract. For example, a party agreeing to provide trust services will consider indemnification provisions essential to what is being agreed upon, and failure to include such provisions would result in significantly higher costs for the services. Thus, the indemnification clause would be an accompanying term. A choice of law clause could be important because the nature of the transaction is such that a particular jurisdiction’s laws are essential to the transaction functioning effectively. Similar examples could be cited for a number of clauses allocating risks in many other types of contracts.

By focusing on each of the three types of contract terms: bargained-for terms, accompanying terms and risk allocation terms, one can craft solutions to the problems courts face in enforcing provisions in contracts that are not fully negotiated and do not involve attorneys representing all parties in the drafting process. Because of the differences

127. See the discussion in the paragraph following note 68 *supra*.

128. Omri Ben-Shahar, *supra* note 3, at 821.

129. Ahdieh, *supra* note 3, at 1035-36.

between how and why these types of provisions are drafted, there is practical as well as theoretical value in treating each type differently.

First, bargained-for terms accurately reflect assent and should be interpreted and enforced applying the same rules used to interpret and enforce fully negotiated contracts. This approach to bargained-for terms makes logical and theoretical sense and creates virtually no practical problems. Bargained-for terms fit nicely with the concept of freedom of contract that underlies those rules and has its roots in early contract theory.¹³⁰ Enforcing bargained-for terms under current contract rules promotes freedom of contract in an area where it makes perfect sense to let the parties operate freely and independently. If one of the parties to the contract had not been able to exercise free will in the bargaining process, or if one of the parties had misled the other in the bargaining process, those situations would raise concerns about enforcement, but existing contract doctrines are available to avoid enforcement.¹³¹ Conceptually, one can hardly refer to such situations as truly involving bargained-for exchanges, so there is no theoretical inconsistency.

This approach raises the question of how a court determines which provisions of the contract were bargained-for terms. In many disputes that arise under this category of contracts, it is not difficult to determine that the provisions at issue were not bargained for, particularly if the contract is a standard form contract or a contract of adhesion. To the extent that there is any uncertainty regarding whether any particular provision is a bargained-for term, eliminating application of the parol evidence rule would go a long way toward resolving that question. Treating such contracts as “integrated” so that the parol evidence rule may apply is an illustration of how current rules of the law governing contracts are out of harmony with the realities of the contracting process.¹³²

The next question is how courts should handle accompanying terms in this category of contracts. Accompanying terms are fundamentally different from bargained-for terms. They are of much greater importance to one party than to the other, yet they play an important role for both parties because they attempt to ensure that the contemplated transaction proceeds smoothly and rationally. How one-sided particular accompanying terms are will, of course, vary significantly from contract to contract. Considering these terms part of the parties’ bargain is not accurate; thus, it is not quite fitting to use the same contract principles that make sense when enforcing bargained-for terms. But, how much scrutiny should courts give to accompanying terms in the pursuit of justice?

For accompanying terms, it is not as hard to make the choice between blanket non-enforcement, which would eliminate the ability of the party drafting the contract and understanding the transaction to structure it in a meaningful and economic way, and enforcement with rational limitations. Because accompanying terms are important to the particular contractual relationship, the starting point should be to enforce them, but with the important caveat that the potential for unfairness and over-reaching needs to be policed as well.¹³³ Accompanying terms could well be the place to implement

130. See Kessler, *supra* note 15, at 630-31. Kessler concludes his discussion of the close tie between contract principles and the free enterprise system with a quote from an 1875 British case, *Printing and Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465 (1875), to the effect that courts are obligated to enforce contracts freely and voluntarily entered into.

131. Duress or undue influence over one of the parties either can prevent creation of an enforceable contract or make it voidable. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 174, 177 (1981). Abuse of a fiduciary relationship can make a contract voidable. See *id.* § 173. Fraudulent or material misrepresentations that induce assent to a contract can preclude creation of the contract or render it voidable. See *id.* §§ 163, 164.

132. Courts have recognized that in some contexts standard form integration clauses are to be given less force than negotiated integration clauses. See, e.g., *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 416 (2d Cir. 2006) (the issue was whether fraudulent inducement had occurred).

133. “Accompanying terms” provide a much better fit for the arguments a number of law and economics scholars have made in support of boilerplate and standard form contracts. See, e.g., Baird, *supra* note 3; Bechuk & Posner, *supra* note 2.

doctrines currently in use in the law governing contracts that limit enforceability in some contexts. Doctrines of unconscionability, rational expectations and construing provisions against the drafter,¹³⁴ could achieve justice in those contracts where the accompanying terms reflect misuse of power in drafting the contract. Although those doctrines currently are typically applied hesitatingly by courts, that hesitation reflects the bias of giving significant deference to party choice and autonomy. Applying those principles more vigorously to accompanying terms, still provides the parties autonomy to structure the relationship, but avoids the fallacy that the provisions were actually the result of assent.

Finally, how should courts enforce risk allocation terms? These terms, by definition, are one-sided in nature. Should they simply be ignored as neither bargained for nor essential to the contractual relationship? Given the lack of assent to such terms and the inherent potential for overreaching, courts should feel much less restrained to modify or ignore such a provision and refuse to enforce it as part of the agreement. Automatically eliminating such terms, however, leaves resolution of whatever dispute implicated them to “default rules,” if such rules exist, or to whatever rules the court wants to create under the circumstances. Because of these problems, less severe options should be considered. If a particular risk allocation term could be rewritten to create mutuality on the issue, such an interpretation of that provision would be an easy solution. For example, a contract which provides for attorneys’ fees to be paid to one party could be read to apply the provision in favor of the other party as well. For example, a California statute provides that if a contract allows attorneys’ fees to be paid to one party, those fees are recoverable by whichever party prevails, and if those fees are only recoverable in certain types of disputes, the provision is read to apply to any dispute under the contract “unless each party was represented by counsel in the negotiation and execution of the contract.”¹³⁵

For risk allocation terms that cannot readily be expanded to become mutual obligations, courts could analyze the provisions and enforce only those found to be reasonable, or readily modified to become reasonable. Professor Rakoff suggested a similar approach in his 1983 article about contracts of adhesion: presume the provision is unenforceable and put the burden on the drafter to establish that it should be enforced.¹³⁶ A number of courts have cited Rakoff’s article to define a contract of adhesion, but none have cited it to apply his recommended approach. Limiting such an approach to risk allocation terms that cannot be cured by making them mutual and only applying it to contracts that were drafted without attorneys representing all parties should increase courts’ comfort with the approach.

This stricter approach would have been justified in the well-known Carnival Cruise Lines case.¹³⁷ In that case, the United States Supreme Court enforced a forum selection clause in a consumer contract that required any lawsuit to be brought in Florida, the location of the cruise line’s headquarters, notwithstanding that the consumers lived in the State of Washington, the cruise departed from and returned to Los Angeles, California, and the consumers’ cruise took them nowhere near Florida.¹³⁸ The Ninth Circuit had refused to enforce the provision, finding that it “was not freely bargained for.”¹³⁹ The Supreme Court reversed. Although the High Court recognized that the relevant precedent involved a fully negotiated contract, and that the litigants before the Court had no chance to negotiate theirs, the Court chose to enforce

134. See *supra* notes 89-112 and accompanying text.

135. CAL. CIV. CODE § 1717(a) (2009).

136. Rakoff, *supra* note 45, at 1245-46.

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

138. *Id.* at 587-88.

139. Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990).

the forum selection clause because the cruise line had a special interest in limiting the fora for litigation, the clause dispelled confusion about where legal action could be brought, the provision might have reduced the cost of cruise tickets, and there was no evidence of bad faith or overreaching on the part of the cruise line.¹⁴⁰ In essence, the Supreme Court found the provision presumptively valid and placed the burden of defeating the provision on the challenging party. The Supreme Court's rationale is consistent with a freedom of contract model; the consumer could read the contract and, if dissatisfied, choose another cruise line. Unfortunately, this rationale ignores completely the realities of the contracting process. The dissenting Justices applied the better analysis; they determined that the contract was one of adhesion and that the forum selection clause should be enforced only if it could survive a strict scrutiny analysis or was determined to be reasonable.¹⁴¹

A key issue for courts applying these proposals is how they will determine whether the particular contract provision at issue is an accompanying term or a risk allocation term. The types of terms that are accompanying terms, and are therefore entitled to more deference by the courts, will vary from transaction to transaction. Central to this inquiry is the nature of the relationship created by the contract. Most accompanying terms can be readily identified simply by asking if the particular term governs a circumstance that has a significant probability of arising based simply on the nature of the transaction. To the extent that inquiry is inadequate, another question is whether the particular term clearly affected the pricing arrived at in the bargained-for terms. An example of a term classified as an accompanying term by the latter inquiry would be an indemnity clause in an escrow agreement or a trust agreement. Because different interpretive rules would be applied to accompanying terms than to risk allocation terms, the parties to the contract have an incentive to present evidence on the issue to the court, thereby helping it to make the determination when the characterization is less clear.

V. CONCLUSION

Investigating the realities of the contract drafting process reveals that, except in rare circumstances, all provisions in a contract generally are not bargained for and assented to by the parties. Yet, the principles applied by courts to resolve contract disputes are based upon faulty assumptions about the bargaining process. This article posits that contracts fall into one of two groups and that courts should develop appropriate rules for each. The first group, consisting of fully negotiated contracts and contracts that are not fully negotiated but are drafted with each party having the assistance of legal counsel, should be enforced using all the current rules and principles that are based on freedom of contract and deference to the autonomy of the contracting parties. These contracts do not even require application of existing doctrines that limit enforcement of some contract provisions.¹⁴²

The second group, consisting of contracts of adhesion and contracts not fully negotiated or not drafted with each party having the assistance of counsel, should be interpreted and enforced pursuant to a different set of rules and principles, which explicitly take into account the fact that the contract does not represent a completely bargained-for set of provisions. Courts have long recognized the unique nature of some contracts in the second group: standard form contracts and contracts of adhesion. Nevertheless, courts have generally interpreted those contracts pursuant to rules and principles

140. 499 U.S. at 592-95.

141. *Id.* at 597-602.

142. This is illustrated by the treatment given by the Ninth Circuit Court of Appeals to claims regarding pre-payment provisions in a note financing a commercial building in Los Angeles. The parties had been represented by counsel in the negotiation and drafting of the loan documents. Although it overturned the district court's award of sanctions, it gave short shrift to arguments to get around the contract provision. *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566, 568-69 (9th Cir. 1988).

based on the implicit assumption that all contracts reflect agreement. That assumption creates the judicial expectation that before signing a contract a party is expected to have read and understood it, an expectation that does not reflect the realities of the contracting process.¹⁴³

This article recommends a new approach, which expands current legal rules and principles of interpretation in two ways. First, it includes with contracts of adhesion all other negotiated contracts in which all sides were not represented by counsel when the contract was drafted. Second, it proposes that courts explicitly recognize that those contracts are not fully negotiated and apply different rules, depending upon the type of provision being examined. Only bargained-for terms in those contracts would be enforced using traditional rules and principles. Accompanying terms would be subject to current rules and principles limiting the enforcement of contract provisions, but the principles would be applied more rigorously and with a broader ability to modify or limit the provisions. Finally, risk allocation terms would be interpreted and enforced with a high level of scrutiny and the court would be obligated to modify or eliminate those terms if necessary to achieve justice.

Whatever rules courts apply, drafters of contracts will be motivated to modify their contract provisions based upon those rules. If courts clearly recognize that many of our current rules and principles are still heavily influenced by the errors of classical contract theory and could be comfortably changed to track the realities of the contracting process, unjust provisions in contracts would not be enforced and freedom of contract would be enhanced. Certainty would not suffer, except to the extent contract provisions are drafted to push the limits. The approach suggested in this article would have a constructive effect on the contract drafting process and would result in contracts that are more substantively fair. If such an approach is not affirmatively and consistently implemented by the courts, the common law will continue to facilitate the misuse of power in the drafting process,¹⁴⁴ and only the occasional legislative attempt to direct parties' behavior will move the contracting process toward greater justice.

143. The same problem was articulated in an article comparing the treatment of standard form contracts in the United States with their treatment in Germany. See Eric Mills Holmes & Dagmar Thurmman, *New and Old Theory for Adjudicating Standardized Contracts*, A, 17 GA. J. INT'L & COMP. L. 323 (1987).

144. A similar conclusion about the current system is set forth in Danielle Kie Hart's *Contract Formation and the Entrenchment of Power*. See 41 LOY. U. CHI. L.J. 175 (2009).

