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Contracts of Adhesion and Enforceability

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Abstract

Modern consumer purchases from relatively large companies are mainly conducted through contracts of adhesion prepared by sophisticated merchants and signed by individuals lacking the legal knowledge and resources of their counter-parties. These contracts have come to represent the standard means by which merchants bind consumers in credit agreements, service contracts, and purchases of standard consumer items, including telephones, automobiles, and appliances that are the staple of American life. Such contracts are drafted by merchants in a superior bargaining position and with superior resources, including legal counsel, with respect to consumers, who rely on the product rendered and have only the opportunity to reject a service or to accept the contract without negotiation. Such an imbalance of power conflicts with the traditional notion that contract formation represents expression of mutual assent by equally positioned parties. This paper will seek to reconcile the conflict between contracts of adhesion and classical contract theory through an analysis of the economic and societal benefits served by such agreements. The research concludes that legislative regulation and judicial enforcement of contracts of adhesion can accommodate this inherent clash and facilitate into society legal and justifiable means of conducting volumes of transactions on which the public relies.

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University Honors Capstone

Contracts of Adhesion and Enforceability

The majority of contemporary purchases of common items, including telephones, automobiles, and appliances, are facilitated by promises exchanged between individual consumers and large companies. The promises are outlined in contracts prepared by a sophisticated merchant and signed by the individual purchaser. The company both is in a superior contracting position with respect to the consumer and maintains possession of dominant resources, compared to the individual, who relies on the product rendered and has only the opportunity to reject a service or to accept the contract without negotiation.

The existence of these dealings raises a question as to the extent that a contract should be enforced to meet the demands of individual parties or to prioritize a public matter. In the contract of adhesion outlined above, the individual party is a consumer who lacks the legal knowledge and resources of its contracting counterpart, the merchant. This imbalance of power conflicts with the traditional notion that a contract is the result of a mutual expression of assent between equally positioned parties. While the one-sided nature of the consumer contract may result in this imbalance, such contracts serve an important public benefit by expediting countless purchases of items staple to living in modern times. This paper seeks to reconcile the conflict between contracts of adhesion and classical contract theory in an attempt to transcend their inherent clash and facilitate into society legal and justifiable means of conducting volumes of transactions on which the public relies.

I. Introduction to Standard Form Contracts

A contract of adhesion is a form or standardized contract prepared by a party of a superior bargaining power, to be signed by a party in a weaker position, who has only the opportunity to agree to or to reject a contract, without an opportunity to negotiate or bargain its terms.¹ This legally binding agreement is written primarily to the advantage of the superior party. Consumer credit card contracts, insurance contracts, residential leases, and contracts for purchases of products and services on which individuals rely are drafted in this way by merchants represented by legal counsel.²

Adhesive contracts offer goods and services to consumers on a “take it or leave it” basis and therefore eliminate the individual’s opportunity to negotiate the terms of the agreement. The individual terms that together construct a standard form contract are representative of necessary parts of the product or service purchased by the consumer, not independent and optional choices in the transaction.³ It is for this reason that the consumer must either accept the agreement as it is outlined in the contract, or reject the desired product or service altogether.

The prevalence of contracts of adhesion in commercial dealings developed over time as a result of changing economic conditions. Furthermore, until the nineteenth century, consideration and bargained-for exchange were recognized as the dominant features of a validly formed contract. Socio-economic influences throughout the nineteenth century, however, resulted in a general societal acceptance of individuals’ freedom of action in the commercial sphere. Those

¹ *Lawrence Feldman v. Google, Inc.*, 513 F. Supp. 2d, 229 (E.D. PA. 2007).

² Restatement, Section 211.

³ Russel A. Hakes, *Focusing on the Realities of the Contracting Process – An Essential Step to Achieve Justice in Contract Enforcement*, 12 Del. L. Rev. 95 (2011), at 10.

involved in the market could now take charge of their own decisions and control their own liabilities.⁴

After the industrial revolution, the classic contract requirements of bargained-for exchange and consideration became less significant. Individuals found themselves taking part in a greater number of commercial transactions, and judicial and legislative bodies recognized that the growth of the economy came in hand with the need to set forth standards that would serve the “greater good.” The standardization of merchandise and contracts therefore served to establish a well-functioning and proficient society able to address evolving market demands.⁵

Today, standard form contracts of adhesion dominate a wide variety of consumer transactions, including those for insurance, leases, deeds, mortgages, car purchases, technology services, and numerous forms of consumer credit. They can be found in both paper and electronic form. Hard copies of such contracts are presented to consumers who speak to company employees, representatives who themselves often have a limited understanding of the terms of the agreement, and electronic forms of such contracts are presented by websites utilized by consumers who seek to acquire certain products and services.⁶

In online agreements, the most commonly recognized contracts of adhesion are referred to as “click-wrap agreements” and “browse-wrap agreements.” The click-wrap agreement appears on a webpage and requires that the user consent to any terms or conditions by clicking a

⁴ Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. Rev. 123 (2005).

⁵ *Ibid.*, at 128.

⁶ *Ibid.*

dialog box on the screen in order to proceed with the transaction.⁷ The browse-wrap agreement is one in which the individual can browse the website's Terms and Conditions and use the website's services without explicitly assenting to these provisions. Furthermore, the consumer's assent to the website's terms and conditions is assumed as the consumer continues to visit the website after opening and reading its "Terms and Conditions" link.⁸

II. Unequal Bargaining Power

Classical contract theory holds that the four basic requirements of a contract are mutual assent, consideration, legality, and capacity. The doctrine of mutual assent refers to the fact that the parties to a contract, through words or conduct, must indicate that they have agreed to enter into the contract. Mutual assent can be analyzed through one contracting party's offer to enter into the agreement, and the other party's acceptance of that offer.⁹

Consideration in a contract is that part of the agreement which shows that each contracting party has intentionally exchanged a legal benefit or incurred a legal detriment as an enticement to the other to make a like exchange in return. Legality speaks to the purpose of the contract as a whole. The nature of the contract must not be criminal, tortious, or otherwise

⁷ *Lawrence Feldman v. Google, Inc.*, 513 F. Supp. 2d, 229 (E.D. PA. 2007).

⁸ Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008).

⁹ Richard A. Mann & Barry S. Roberts, *Business Law*, 166 (15th ed. 2012).

against public policy. Finally, the parties to the contract must have contractual capacity, meaning that each individual has the legal ability to make the agreement.¹⁰

Traditional contract theory recognizes both freedom to contract and freedom from contract. Freedom to contract describes the fact that individuals in a developed economy must be recognized as free to enter into contracts and bind themselves to various agreements. The state should not preclude individuals from their ability to make such promises, but instead should respect the individual's "will of contract" by maintaining a society in which contracts can be liberally made and generally enforced.¹¹

Freedom to contract is guaranteed through the doctrines of autonomy and mutuality. Autonomy relates to the freedom of the parties to select the law to which the contract is subject. Individuals are free, within general limits, to establish their own contractual obligations, and they should thus be able to express their intent in a contract and expect to receive what was bargained for without "fear of interference."¹²

Mutuality refers to the position of the parties with respect to one another. During the bargaining process, the contracting parties must have equal power to negotiate the contract's terms, as the resulting contract will represent the substantive law which governs their future relationship. Any disputes which arise between the two parties will be resolved by referring to

¹⁰ Richard A. Mann & Barry S. Roberts, *Business Law*, 166 (15th ed. 2012).

¹¹ Cohen, Morris Raphael. "The Basis of Contract," in *Readings in the Philosophy of Law*, ed. John Arthur and William H. Shaw (New Jersey: Prentice Hall, 2010), 516-522.

¹² Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 *Akron L. Rev.* 123 (2008), 133.

the agreed upon provisions of the contract. The significance of the contract's language therefore mandates that both parties be able to express the outcome which they wish the agreement to facilitate. The presence of mutuality in contract formation establishes a legal justification as to why the parties must be bound to the contract – if each party has had an equal opportunity to express his will, the resulting contract must be a valid representation of rights and duties fully understood and accepted by each contracting party.¹³

A contract of adhesion conflicts with the requirement for mutual assent in contract formation. Traditionally, a contract represents the agreement resulting from exchanges and bargaining between two parties who are on equal footing. A contract of adhesion is instead drafted by one party to the agreement, and there is no opportunity for the other party to negotiate what is set forth in the pact. The question therefore arises as to whether such a bargaining process guarantees that the inferior contracting party has actually been able to make a legitimate expression of his assent to the standard terms.¹⁴

Furthermore, in the case of consumer contracts, the mutuality component of freedom to contract is limited because the contract of adhesion is drafted by the merchant and presented to the individual consumer for acceptance. These contracts are not only characterized by the inequality outlined above, but they are also arguably impractical for the consumer to read and understand.¹⁵ The drafted contract is very long and is filled with “legal jargon” which the

¹³ Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008).

¹⁴ Amy J. Schmitz, *Pizza Box Contracts: True Tales of Consumer Contracting Culture*, 45 Wake Forest L. Rev. 863 (2010).

¹⁵ Daniel D. Barnhizer, *Context as Power: Defining the Field of Advantage in Contractual Interactions*, 45 Wake Forest L. Rev. 607 (2010).

average consumer is highly unlikely to fully comprehend.¹⁶ The verbal and legal obscurity of the contract also drives up the cost of searching through and analyzing the contract's language. The cost of searching is too high compared to the relatively low dollar value of the majority of purchases governed by contracts of adhesion. In addition, there is a low probability of the terms in the contract, such as those governing dissatisfaction with the product or the procedure for addressing a claim held against the merchant, actually coming into play.¹⁷

The consumer is also rushed in his decision to adhere to the terms of the contract, as he will either find himself standing behind a counter and awaiting the desired product or service, or sitting behind a computer in anticipation of access to a website. There is moreover a social pressure to quickly sign the contract, as the consumer who reviews the fine print of a standard form contract may feel awkward in front of a company employee with whom he has just had a lengthy conversation. He is likely to simply sign the contract in order to avoid appearing confrontational and doubtful of trusting the company's good faith. Therefore, the average consumer will choose to "remain ignorant" of the preprinted terms.¹⁸ He neither expects to be subject to the situations outlined in the contract, nor does he expect to be able to alter the contract's terms in any regard.

The merchant is justified in his acceptance of the contract, as he is the superior contracting party whose interests are reflected in the contract's terms. The merchant has received

¹⁶ Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008).

¹⁷ Wayne R. Barnes, *Towards a Fairer Model of Consumer Assent to Standard Form Contracts : In Defense of Restatement Subsection 211(3)*, 82 Wash. L. Rev. 227 (2007).

¹⁸ *Ibid.*, at 256.

the advice of legal counsel and is aware of the exact provisions of the contract which set forth his duties, as well as the exact terms which establish his rights.¹⁹ Consumers, on the other hand, are generally aware of only those terms of a sale that relate to the price of the product or service, the general subject matter of the agreement, and the quantity of the good purchased. The rest of the contract remains unread and thus unknown, even though the consumer has indicated his assent to its terms by signing the presented form.²⁰ Many scholars therefore express a great deal of concern about the ability of the consumer, as an inferior party to a contract of adhesion, to express his assent to the standard form contract and subsequently be bound to its terms.²¹

III. Consumer Assent

The contract should be viewed as a collection of promises that obligate each party to respect individual autonomy and trust. By making a promise, the party intentionally initiates in his contracting counterpart an expectation of performance. To turn back this promise is to abuse a “confidence” on which the other party has a valid reason to rely. Entering a contract, or making a promise, binds an individual to the future. Although the promisor may eventually regret his promise based on a mistaken assumption of facts, or because he no longer values the promise as

¹⁹ Amy J. Schmitz, *Pizza Box Contracts: True Tales of Consumer Contracting Culture*, 45 Wake Forest L. Rev. 863 (2010).

²⁰ Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. Va. L. Rev. 839 (2010).

²¹ Wayne R. Barnes, *Towards a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 Wash. L. Rev. 227 (2007).

highly as at the time of entering the contract, his prior assent has nevertheless been given and his counterpart thus expects him to adhere to what was originally pledged.²²

In a contract of adhesion presented by a merchant to an individual consumer, the consumer assents to the terms of the contract by signing the agreement, either in paper form or virtually. Although the consumer may not be aware of all the terms outlined in the contract, his signature nonetheless indicates acceptance of what has been offered.²³ The consumer's assent to an adhesive contract is therefore much like the voter's decision to vote for a certain politician. Furthermore, voting is an indication of consent to allow a politician to act in one's place regarding issues of policy, legislation, and governance. Voters may ultimately become disappointed with the outcomes of the politician's term in office due to predictable issues, such as party alignment, or issues that were not originally contemplated by the voter, such as a national crisis. However, the voter's decision to vote for the politician came in hand with this volatility and therefore endorses acceptance of some unforeseen result.²⁴

When entering a standard form contract, the consumer will likely choose to remain ignorant of the contract's terms and instead place trust in the merchant to guarantee "fair handling and resolution" of future disputes. The consumer thus votes for a company by choosing to enter a transaction with that specific merchant, as opposed to other merchants, via the standard

²² Fried, Charles. "Contract as Promise," in *Readings in the Philosophy of Law*, ed. John Arthur and William H. Shaw (New Jersey: Prentice Hall, 2010), 523-527.

²³ Russel A. Hakes, *Focusing on the Realities of the Contracting Process – An Essential Step to Achieve Justice in Contract Enforcement*, 12 Del. L. Rev. 95 (2011).

²⁴ Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. Va. L. Rev. 839 (2010).

form contract. Although the consumer may ultimately become dissatisfied with some outcome of his decision, he has nonetheless consented to the agreement and thus indicated his acceptance of subsequent decisions made by the merchant.²⁵

Furthermore, upon signing a standard form consumer contract, the consumer basically makes a “blanket assent” to the unknown and unread terms, just as the voter assents to the future policies of government officials. The consumer must be bound to the contract for its entire duration because the time period is a fixed and defined term presented in the agreement. For instance, a consumer entering a telephone service contract for two full years will be bound to that agreement for the entire two-year time period.²⁶ The stability of commercial relations would be jeopardized if courts chose to only enforce some standard form contracts and not others. The extent to which the individual is bound to the contract is similar to how elected officials run for fixed and definite terms in order to allow for the “orderly operation of government” and avoid problems associated with inefficiency.²⁷

The consumer’s assent to the standard-form contract is further justified by the fact that he has an opportunity to make a new manifestation of assent once the duration of the contract has expired. Once the term of the contract has expired, the consumer has a chance to continue dealing with the original merchant or to pursue another provider of the good or service.

Consumers are similar to voters in this regard, as elections present to voters a chance to consent

²⁵ Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. Va. L. Rev. 839 (2010).

²⁶ *St. Paul Mercury Insurance Company v. Duke University*, 849 F.2d 133 (1988).

²⁷ Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. Va. L. Rev. 839 (2010).

to the reelection of a given official. If voters are unhappy with the established politician's past behaviors, they can place a vote for another official whom they feel will better represent their interests.²⁸

IV. The Purpose of Contracts of Adhesion

Contract law is an extension of public law. Just as the public law must have regard for the general effects of substantive law on individuals, contract law must have regard for the general and institutional effects of the classes of transactions governed by contracts. Contractual agreements should be enforced in a way that enables society to rely on contractual obligations and make transactions more secure.

An advanced society in which individuals frequently enter into commercial agreements with one another requires for its progress societal acceptance of the laws that govern transactions. As dealings among individuals and consumers become both more developed and complicated, the uncertainty associated with these changes must be addressed through the standardization of contract terms. Such standards will expedite consumer purchases and thus encourage the proliferation of efficient economic activity that addresses the needs of both individuals and society as a whole.²⁹

²⁸ Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. Va. L. Rev. 839 (2010).

²⁹ Cohen, Morris Raphael. "The Basis of Contract," in *Readings in the Philosophy of Law*, ed. John Arthur and William H. Shaw (New Jersey: Prentice Hall, 2010), 516-522.

Individuals in contemporary times rely on the products and services delivered by merchants through agreements founded in contracts of adhesion. The consumer does not pay attention to the details of the deal into which he chooses to enter because his desire to attain the good or service is outweighed by his perception of the need to become familiar with the contract's exact terms. Adhesive contracts also serve a purpose for retailers who wish to expedite transactions by eliminating the need to bargain the details of agreements with all of their customers. The retailer can instead rely on the standard terms of the contract as being able to govern its rights and responsibilities with respect to its relationship with consumers.³⁰ Finally, societal welfare will be maximized through contracts of adhesion, as "reputation concerned" merchants competing with one another for consumers' consideration of their business will incorporate efficient and interest-maximizing terms into their agreements.³¹

V. Enforcing Contracts of Adhesion

Those who are concerned about the consumer's assent to a contract of adhesion further demand that consumers be protected from strict judicial enforcement of such contracts' terms. This group emphasizes the doctrine of freedom from contract, which holds that an individual may be freed from contractual liabilities to which he has not given affirmative assent.³² These

³⁰ Amy J. Schmitz, *Pizza Box Contracts: True Tales of Consumer Contracting Culture*, 45 Wake Forest L. Rev. 863 (2010).

³¹ *Ibid*, at 865.

³² Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008).

scholars argue that courts should instead interpret contracts through an expansive use of context – meaning that analysis should take into account each contracting party’s status, the bargain’s circumstances, and party performance. Moreover, the one-sided nature of contracts of adhesion should be scrutinized and enforcement crafted in such a way that limits the advantages of the apparently stronger party and balances these out with the disadvantages of apparently weaker party.³³

Contract law is an extension of public law. Just as the public law must have regard for the general effects of substantive law on individuals, contract law must have regard for the general and institutional effects of the classes of transactions governed by contracts. Contractual agreements should be enforced in a way that enables society to rely on the obligations individuals assume when entering a contract and therefore make transactions more secure. Although some scholars are hesitant to acknowledge consumer assent to the contract of adhesion, the agreement must nevertheless be enforced. Contract enforcement is a reflection of respect for individuals’ capacity to “determine their own values” and requires individuals to take responsibility for their chosen course of action. Contract enforcement is thus necessary if society wishes to recognize its members as autonomous individuals able to manage their own commercial decisions and liabilities.³⁴

Inconsistency and doubt in market transactions must be avoided, as they impede the development of a society in which economic activity is encouraged and public welfare

³³ Daniel D. Barnhizer, *Context as Power: Defining the Field of Advantage in Contractual Interactions*, 45 Wake Forest L. Rev. 607 (2010).

³⁴ Fried, Charles. “Contract as Promise,” in *Readings in the Philosophy of Law*, ed. John Arthur and William H. Shaw (New Jersey: Prentice Hall, 2010), 523-527.

maximized.³⁵ Standard form contracts serve a purpose in a society that relies on the certainty of developed and complicated transactions, and their benefit must be acknowledged by the judiciary through enforcement of these agreements according to their terms.³⁶

Common law developments in decisions on the enforceability of contracts of adhesion allows for recognizing the prevalence of adjudicial recognition of the validity of such agreements and the need to enforce them in order to simplify market activity. To begin with, in 1991, the Supreme Court decided a case relating to consumer purchase of cruise tickets from a travel agent. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1552 (1991), began when the Shutes purchased tickets for a Carnival cruise from their local travel agent. While on the cruise, Eulala Shute tripped over a floor mat and was injured as a result. Upon returning home, the Shutes raised a negligence claim in their home state against Carnival Cruise Lines. Carnival Cruise Lines filed a motion for summary judgment on the basis that their contract with the Shutes contained a forum selection clause stating that any claims against the company must be raised in Florida.³⁷

The Supreme Court ultimately enforced the forum selection clause and the contract with Carnival Cruise Lines to which the Shutes had assented purchasing the tickets and attending the cruise. The Court reasoned that Carnival Cruise Lines had a valid interest in incorporating the forum-selection clause into its contract in order to prevent a large number of passengers from

³⁵ Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008).

³⁶ Cohen, Morris Raphael. "The Basis of Contract," in *Readings in the Philosophy of Law*, ed. John Arthur and William H. Shaw (New Jersey: Prentice Hall, 2010), 516-522.

³⁷ *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991)

raising claims in multiple jurisdictions based on issues that began at sea. The Court found that the establishment of a certain forum for dispute resolution lowers costs for both parties to the contract, and may ultimately result in reduced prices on the services Carnival provides.³⁸ The Supreme Court in its decision recognized that the overall economic and societal benefit served by the contract drafted by Carnival Cruise Lines outweighed the Shute family's conflict with an individual term within the agreement's text.

In 1999, in the case *Caspi v. Microsoft Network, LLC* 323 NJ Super 118, a New Jersey court decided to uphold a forum selection clause contained in an electronic click-wrap agreement. The consumers in this case were MSN members who expressed their opposition to the forum selection clause presented in the last paragraph of the click-wrap agreement. The consumers indicated their assent to the contract and its specified terms by clicking on the "I agree" dialog box presented at the bottom of the computer screen. The Court ruled that the contract could be fully enforced because its terms did not violate New Jersey public policy, and enforcement of the forum selection clause would not amount to inconveniencing a trial. The forum selection clause was displayed clearly and presented in a fair and straightforward way. There was nothing extraordinary about the font size of the clause or the placement of the clause in the contract, and no consumer fraud policy was violated in its formation.³⁹ Therefore, the contract was enforced as it was originally presented to the consumer.

³⁸ *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991).

³⁹ *Caspi v. Microsoft Network, LLC*. 323 NJ Super. 118 (1999).

A similar line of reasoning was adopted by the Eastern District of Pennsylvania in 2007. Lawrence Feldman, the plaintiff in *Feldman v. Google* 513 F. Supp, 2d, 229, was a lawyer who maintained his own law firm and decided to purchase advertising from Google's "AdWords" program. He sought to resolve a dispute over issues with a forum selection clause within the click-wrap agreement and his subsequent overcharge as a result of not reading the entire contract's terms. In order to determine whether the agreement could be enforced, and thus the forum selection clause validated, the court chose to apply "traditional principles of contract law."⁴⁰ It asked whether the plaintiff had notice of and manifested his assent to the agreement and whether there was any evidence of fraud in the contract formation process. If the plaintiff did have notice of the contract's terms and did in fact manifest his assent (by clicking "I agree"), then failure to read the contract will not excuse the consumer's refusal to comply with those terms of which he was not aware due to his own fault.⁴¹

The court further held that Feldman had reasonable notice of the contract and its provisions, because in order to activate the account, he had to open the webpage and was presented with the agreement in the text box. There was a prominent warning displayed in bold to read the agreement's terms carefully, and the instructions specified that the consumer should indicate his assent only if he agrees with all of the terms contained within the contract. Feldman's failure to read the agreement before he clicked "I agree" does not excuse him from

⁴⁰ *Lawrence Feldman v. Google, Inc.*, 513 F. Supp, 2d, 229 (E.D. PA. 2007), at 236.

⁴¹ *Ibid.*

being bound to his prior expression of assent. Google's request to enforce the forum selection clause is therefore valid and reasonable.⁴²

In the case *Tom Burcham v. Expedia, Inc.* a browse-wrap agreement was held enforceable by the District Court of Missouri because the individual, Burcham, had an opportunity to make himself aware of the website's terms. His use of Expedia's services indicated his assent to the terms of the contract which bound Burcham to behavior outlined in the Terms and Conditions of the website. The court reasons that, although it was unfortunate that Burcham failed to read the terms, he must nevertheless perform according to their language. If Burcham had a conflict with the website's way of conducting business, he should have simply chosen to use one of the numerous other websites offering services similar to those provided by Expedia.⁴³

In 2010, a case was raised in the Supreme Court dealing with employment contracts and arbitration agreements. *Rent-A-Center West, Inc. v. Antonio Jackson*, 130 S. Ct. 2772 (2010) centered on an arbitration agreement in a Rent-A-Center employment contract that designated to an arbitrator the authority to resolve disputes regarding "the interpretation, applicability, enforceability, or formation of the [arbitration] agreement, including ... [the] claim that ... [it] is void or voidable." When Jackson raised the claim that he was a victim of employment discrimination, Rent-A-Center filed a motion to arbitrate the dispute. Jackson opposed the motion and claimed that the arbitration agreement was unenforceable on the grounds that it was unconscionable under Nevada law. Rent-A-Center countered that the contract provided for a fair

⁴² *Lawrence Feldman v. Google, Inc.*, 513 F. Supp. 2d, 229 (E.D. PA. 2007).

⁴³ *Tom Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, WL 586512 (E.D. Mo. March 6, 2009).

evaluation of the enforceability of agreements and the merits of claims brought before an outside party.

The Court held that individuals who wished to challenge the specific provision of the contract must raise challenges to the explicit disagreeable term in the agreement. Jackson had instead chosen to form his argument as a challenge to the contract as a whole, leaving the arbitration provision unchallenged. Therefore, the Court presumes the clause to be valid. According to the terms of the employment contract to which Jackson indicated his assent, the arbitrator is to decide questions raised by the contracting parties.⁴⁴

A final recent Supreme Court case concerning the enforceability of arbitration agreements in contracts of adhesion was raised in 2011. The case *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), began when Vincent and Liza Concepcion purchased cell phone service from AT&T through a promotion offering free mobile devices. The Conceptions were later charged \$30.22 in sales tax on their purchase. The couple filed a complaint in the California district court, and their case was consolidated with a class action suit. AT&T moved to compel arbitration to resolve the dispute, as the contract signed by the Conceptions indicated that claims arising against the merchant would be settled through arbitration. The Conceptions argued that the arbitration agreement in the contract was “unconscionable and unlawfully exculpatory” under California law because it disallowed class-wide procedures.⁴⁵

⁴⁴ *Lawrence Feldman v. Google, Inc.*, 513 F. Supp. 2d, 229 (E.D. PA. 2007).

⁴⁵ *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011).

The case was ultimately heard by the Supreme Court, which held that the arbitration agreement should be enforced in order to allow for meeting the overarching purpose of the FAA, which was passed to ensure the enforcement of arbitration agreements according to their terms so as to facilitate “streamlined proceedings.”⁴⁶ Although the contract drafted by AT&T disallows class arbitration procedures, the provision must be enforced because class arbitrations sacrifice procedural informality and are slower and more costly than bilateral arbitration proceedings. The parties’ risks are also increased in class arbitration, as the absence of multi-layered appellate review comes in hand with arbitration. Such risks can be accepted on an individual basis, but class actions contain larger numbers of parties and would thus elevate the risk to an unacceptable level. Therefore, requiring class arbitration to be available would interfere with the fundamental attributes of arbitration” and be inconsistent with the FAA. The federal statute preempts the parties’ argument that the agreement is not enforceable.⁴⁷

The common law has therefore developed in a way that represents strict enforcement of contractual obligations in standard form consumer contracts of adhesion. The courts recognize that there may be unequal bargaining power under these contracting circumstances, but they remain adamant in their will to enforce such agreements, therefore guaranteeing that commercial transactions will be seen through according to the terms to which the contracting parties originally agreed. While some may argue that such patterns have limited consumers’ rights, it must be noted that the significance of efficiently conducted consumer transactions surpasses this concern. Market dealings must be able to proceed without impediments from judicial decisions that alter the terms of an accepted agreement.

⁴⁶ *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011), at 5.

⁴⁷ *Ibid.*

VI. Protecting the Consumer

It is important to guarantee that the judicial system is not abused by individuals who call for high-context analysis of consumer contracts solely in an effort to avoid their duties arising from an agreement. The judicial body must not become an avenue for the parties seeking the advantages of such analysis to change systematic bargaining power advantages which have been accepted to serve a general societal purpose.⁴⁸

The issue of consumers' rights in contract formation should instead be recognized as a political question and debate to be settled by legislative bodies. These institutions must be responsible for passing regulatory provisions that accept the processes under which contracts of adhesion are formed and call for the resulting terms of the contract to be scrutinized. Such maintenance will allow for meeting both the market and consumer needs. Furthermore, market demands will be addressed through the guarantee that contracts adhering to the established guidelines will be enforced. Consumer's expectations will also be addressed by rules that serve to level the playing field between the individual and the consumer.⁴⁹

Furthermore, although unequal bargaining power is present in most consumer contracting processes, it is not always abused, and can effectively be moderated by certain legal doctrines. These doctrines come into play when the relationship between the individual and the drafting party is governed by a contract of adhesion, which is a legally acceptable covenant that the drafter may construe against the consumer. In such instances, the consumer is protected by

⁴⁸ Daniel D. Barnhizer, *Context as Power: Defining the Field of Advantage in Contractual Interactions*, 45 Wake Forest L. Rev. 607 (2010).

⁴⁹ Russel A. Hakes, *Focusing on the Realities of the Contracting Process – An Essential Step to Achieve Justice in Contract Enforcement*, 12 Del. L. Rev. 95 (2011).

his option to claim that the contract or one of its terms is unconscionable, and thus “shocks the conscience” of an outside observer.⁵⁰ The consumer may also raise the contention that the contract is contrary to public policy and thus must be mitigated in order to recognize the rights of the individual with respect to the agreement into which he entered.⁵¹

The unconscionability doctrine addresses realistic contracting circumstances. It protects core human values and provides a “safety net” for revealing unfairness when formal contract defenses, such as duress, fraud, misrepresentation, lack of consideration, etc., do not apply. The unconscionability doctrine has been put in place to protect the norms of morality, fairness, and equality. It is not strictly defined in order to further serve its purpose in contract law. In place of a clear definition, the unconscionability defense relies on context, common sense, and conscience to prove that the procedure for forming a contract and the resulting language of the arrangement are unexpectedly oppressive.⁵²

The unconscionability defense is referenced to in Restatement Sections 208 and 211, which allow courts to limit a contract provision on the grounds that the term was “unconscionable at the time the contract was made.”⁵³ Section 208 leaves the definition of unconscionability open to common law interpretations, and Section 211 simply sets forth that courts have the ability to strike terms that are proven to be “bizarre or oppressive” and therefore

⁵⁰ *California Grocers Association, Inc., v. Bank of America, National Trust and Savings Association*, 22 Cal. App. 4th 205 (1994).

⁵¹ Russel A. Hakes, *Focusing on the Realities of the Contracting Process – An Essential Step to Achieve Justice in Contract Enforcement*, 12 Del. L. Rev. 95 (2011).

⁵² Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 Ala. L. Rev. 73 (2006).

⁵³ Restatement, Section 208.

result in surprising a contracting party.⁵⁴ The unconscionability doctrine has also been incorporated into the Uniform Commercial Code, and is outlined in Section 2-302,

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.⁵⁵

Since the law allows the courts to rule on unconscionability, it is the responsibility of the legislature to craft criteria that can be used to determine whether the term with which the individual is dissatisfied was in fact unconscionable.⁵⁶

Legislative regulation of the fairness of consumer contracts will address substantive and procedural concerns with the content of the agreement. Taken together, the statutes and guidelines passed by the legislature establish public policy and set standards to which commercial dealings must conform. Courts can then refuse to enforce those agreements brought to their attention that divert from such principles and thus violate the rights of individual consumers looking to acquire products and services in a market dominated by powerful commercial agents.⁵⁷

⁵⁴ Restatement, Section 211.

⁵⁵ UCC, §2-302.

⁵⁶ Daniel Watkins, *Terms Subject to Change: Assent and Unconscionability in Contracts that Contemplate Amendment*, 32 Cardozo L. Rev. 545 (2009).

⁵⁷ Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 Nw. U.L. Rev. Colloquy 53 (2011).

VII. Conclusion

It has therefore been established that standard form consumer contracts of adhesion limit an individual's ability to indicate his expression of full assent to all of the terms the merchant has chosen to incorporate into the agreement. However, the effect of the absence of full mutuality in contract formation has been rendered inferior to the societal advantages served by these promises. Consumer contracts govern the majority of relations between individuals and consumers entering into business agreements for purchases of essential consumer products and services. Standard forms of consumer contracts further serve a purpose by eliminating the need for the merchant to bargain the exact terms of an agreement with each of its customers, thereby expediting efficient consumer transactions.

An overall policy of enforcement of consumer contracts will enable society to rely on the obligations that both individuals and merchants incur as a result of assenting to the contract of adhesion. This further secures the facilitation of transactions in accord with the agreed-upon terms declared in the contract. Legislative bodies should be responsible for acknowledging extreme cases of inequality by promulgating regulatory provisions that balance the power of the contracting parties at times when the contract produces unforeseeable outcomes detrimental to the consumer's interests. The judiciary must subsequently adopt these regulations and enforce consumer contracts in a manner consistent with the social and economic policies shaped by the legislature.

By adhering to the above behavior, the legislative and judicial institutions of the state will work to complement one in another in a manner that legitimizes the standard form consumer

contract of adhesion. Merchants will be willing to conduct transactions with consumers whom they can expect to perform according to the promises outlined in the contract. Consumers will also be eager to enter into agreements with merchants on whom they rely for the acquirement of essential products and services. Moreover, contracts will be drafted by the merchant in a way that adheres to legislative regulations and therefore secures the interest of both the party responsible for writing the agreement as well as the individual that will subsequently be bound to the contract's terms. This order in the marketplace allows for the development of a society in which contracts are predictably regulated and enforced to maximize economic efficiency and serve public welfare.

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