

Incorporating the Doctrine of Reasonable Expectations in Article 2

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I. INTRODUCTION

The greatest problem facing modern contract law is how to deal with the contract of adhesion.¹ By definition, such a contract is prepared in advance of the transaction by the party with greater bargaining power, who then offers it to the other party on a take it or leave it basis.² Most of the concern about contracts of adhesion focuses on the consumer, for a consumer is generally offered contract terms on this basis, and generally lacks the sophistication to understand the terms of the transaction.³ Nevertheless, many commercial contracts fit this description; for example, franchise agreements and financing agreements with small businesses. This essay argues in favor of reforms that will mitigate the harsh effects of the contract of adhesion on all parties, and not just on consumers.

Our concern is not with the contract of adhesion itself. In one form or another, these contracts have been a fact of contract life since the industrial revolution made it more efficient to have not only interchangeable parts, but interchangeable contracts. Our concern is with the ability of the party with the greater bargaining power to use that power to impose terms that either take undue advantage of the other party, or take the other party by surprise.

Many remedies have been proposed, from a free market in contracts that would drive out the bad terms, to a heavily regulated market. Terms that take undue advantage have been dealt with under the common law and under Article 2 of the Uniform Commercial Code (“U.C.C.” or “Code”) by the doctrine of unconscionability.⁴ Terms that take the party by surprise have

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1. Many fine articles have been written on and around this topic. A bibliography is found in Appendix II.

2. This description covers a number of contracts, or contracts entered into in a number of different ways, including consumer contracts, boilerplate contracts, form contracts, shrinkwrap contracts, click-wrap contracts, and clickthrough contracts.

3. U.C.C. § 1-201(b)(11) defines “consumer” as “an individual who enters into a transaction primarily for personal, family, or household purposes.” Unless otherwise indicated, cites to Article 1 refer to Revised Article 1 (2008), which has been enacted in most jurisdictions. For an up-to-date report on the progress of Revised Article 1, see Keith Rowley, *The Often Imitated, But (Still) Not Duplicated, Revised UCC Article 1*, http://www.law.unlv.edu/faculty/rowley/ra1_updates.htm (last updated Feb. 5, 2009).

4. See Restatement (Second) of Contracts § 208 (1981); U.C.C. § 2-302 (2002). Unless otherwise indicated, references to Article 2 are to the 2002 version, which has been enacted in most jurisdictions.

been dealt with sometimes by the doctrine of procedural unconscionability⁵ and more recently by the nascent doctrine of reasonable expectations.⁶

This essay explores a narrow question: How can Article 2 be revised to address the problem of contracts of adhesion? At present, the Code contains some regulation, but largely places the regulatory burden on other statutes. This essay examines a number of approaches to revision, concluding that the best solution is required disclosure of unanticipated terms.

This result could be attained through development of the common law. The author, however, believes that incremental common law development will not be sufficient to resolve the problem. He concludes that enactment of the doctrine of reasonable expectations as part of Article 2 would provide an effective solution that is consistent with freedom of contract and with Code methodology.

Part II explores the spectrum of solutions to the problems posed by contracts of adhesion, from freedom of contract to strict regulation. Part III explores the Middle Way, the doctrine of reasonable expectations. Part IV examines what the doctrine might look like as part of Article 2. Part V explores whether this revision of Article 2 would be consistent with Code methodology. Part VI concludes, in the words attributed to Buddha, that the Middle Way is the best way.⁷ Appendix I reiterates the proposed statute.

II. THE SPECTRUM OF SOLUTIONS

There are a number of proposed solutions to the problems posed by contracts of adhesion. At one end of the spectrum is the solution that denies there is a problem—freedom of contract. Under this approach, the market would dictate the terms of the contract. This approach is best exemplified in the writings of Judge Richard Posner.⁸ Presumably terms are in contracts because the parties believe they are necessary. Thus, the apparently unconscionable term is in there for a commercial reason. If it is not, then competing parties will offer better terms that will attract contracting parties away. In this manner, contract terms will always be efficient. This is a very attractive solution, and one that should not be readily discounted. It has been demonstrated, however, that the preparers of contracts under this regime may not be offering the most efficient terms.⁹ Because strong parties often do not compete, but offer the same terms, there seems to be a lack of competition. And while the free market is premised on free access to information, most consumers do not use the information that is before them regarding

5. See Arthur A. Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

6. See Part III, *infra*.

7. Buddha, *Dhammacakkappavattana Sutta* (SN 56.11).

8. See, e.g., Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* § 4.7 (5th ed. 1998).

9. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

contract terms, and thus do not shop for contract terms. Finally, those concerned with fairness find a downside to freedom of contract. Perhaps Addison Mueller said it best:

Unless his claim is based on accidental injury to person or property caused by a defective product and is thus eligible for relief in tort, he [the average citizen] claims in contract and must use a deck of doctrine that is stacked against him. Most of his losing cards are colored “freedom of contract.”¹⁰

At the other end of the spectrum, the government could be the agent who bargains for better terms for the little guy. A Contract Approval Administration might review all contracts *ex ante* in order to determine which terms would be permitted. While such a scheme makes little sense in terms of the transaction costs (although something like it is done with insurance contracts in many jurisdictions), it raises an interesting hypothetical question: What terms would be permitted or not permitted under such a scheme? Presumably the governing body would approve the terms that the parties would have arrived at had they exercised their freedom of contract. Thus, it makes more sense for government to let the parties arrive at the terms themselves. Logically, the government should attend not to the regulation of contract terms, but to the creation of circumstances in which a free market in contracts can flourish.

While the existence of a Contract Approval Administration may seem a bizarre fantasy, the extent to which there is *ex ante* regulation of contract terms may not be appreciated, especially in the Contracts classroom. In *The Path of the Law*, Oliver Wendell Holmes wrote, “One mark of a great lawyer is that he sees the application of the broadest rules.”¹¹ Holmes demonstrated this point with the story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a butter churn. According to Holmes, the judge looked in the statutes and cases but was unable to find any precedent involving butter churns. He therefore gave judgment to the defendant.¹²

We are often reminded of Holmes’ point when students consult us about their cases, bemoaning that they cannot find any law on point. We ask them for the facts of the case and they tell us it involves a dispute over butter churns. We ask them what they have been researching, and they inevitably respond, “Cases involving butter churns.”

Unfortunately, these students are on to something—contract law has increasingly become the law of butter churns. The dirty secret of contract law is that it has become so fragmented that before we apply what Holmes called

10. Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 432, 579 (1968-69).

11. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

12. *Id.*

“the broadest rules,” we must first look for the statute governing the subject matter; e.g., the law of butter churns. Yet we are reluctant to acknowledge this development. Contract law in the treatises and contract law in the classroom holds on to a canon of principles while in practice contract law is fragmented.¹³ The principal reason for this disconnect between the law in theory and the law in action is the emergence of consumer law, where the law of butter churns is likely to be found, largely as a response to the contract of adhesion.

Trained to begin researching a case involving the sale of goods by looking to Article 2, we find little guidance there regarding consumer contracts. The word *consumer* appears only three times in the text of Article 2.¹⁴ The first appearance is in § 2-102:

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.¹⁵

This provision performs no substantive work, but merely cautions us that Article 2 does not “impair or repeal any statute regulating sales to consumers.” In this instance, the tail is wagging the dog, for these statutes govern an enormous number of transactions.

We must then look carefully to see if our transaction is among the legions of the regulated. The granddaddy of all these statutes is the Federal Trade Commission Act.¹⁶ Initially enacted in 1914, it simply provides that “unfair

13. There is a good argument that it was always so, and the writers of the great treatises have deduced us into thinking there is a coherent body of contract law. See E. Allan Farnsworth, *CONTRACTS* § 1.8 (4th ed. 2004).

14. The appearances other than the one described in the text are a definition of “consumer goods” in § 2-103(3) and the use of that defined term in § 2-719(3). That section provides:

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719(3) (2002). While the statute relates to *consumer goods*, the person injured “in the case of consumer goods” will generally be a consumer, who bought or used the goods for that purpose. The provision regulates the transaction, stating that a provision limiting consequential damages in that context is prima facie unconscionable. It is the only provision in Article 2 that expressly regulates a transaction for the benefit of consumers.

15. U.C.C. § 2-102 (2002).

16. 15 U.S.C. §§ 41—58 (2006).

or deceptive acts or practices in commerce are prohibited,”¹⁷ with enforcement by the Federal Trade Commission (“FTC”). In recent years, the FTC has proceeded by promulgating industry guides and trade regulation rules, determining *ex ante* that a particular act is unfair or deceptive and then prosecuting violations of the rule. These guides and rules regulate the terms of the transaction in order to enable the weaker party to make a better bargain. Some of those guides and regulations include:

- Guides for the nursery industry¹⁸
- Guides for the jewelry, precious metals, and pewter industries¹⁹
- Guides for select leather and imitation leather products²⁰
- Guides for the law book industry²¹
- Retail food store advertising and marketing practices²²
- Power output claims for amplifiers utilized at home²³
- Funeral industry practices²⁴
- Used motor vehicle trade regulation rule²⁵
- Ophthalmic practice rules (eyeglass rule)²⁶

In part because the FTC does not permit a private right of action, the states have gotten into the fray with their own consumer protection acts.²⁷ While these acts, often called “Little FTC Acts,” broadly forbid “unfair or deceptive acts or practices,” they also frequently by statute or regulation address particular transactions. Here are several examples from Nevada:

Chapter 597 - Miscellaneous Trade Regulations and Prohibited Acts

NRS 597.010 Lease of Personal Property with Option to Purchase²⁸

NRS 597.112 Dealers of Farm Equipment²⁹

NRS 597.120 Franchises Between Liquor Suppliers and Wholesalers³⁰

17. 15 U.S.C. § 45(a)(1) (2006). This section provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” *Id.*

18. 16 C.F.R. § 18 (2008).

19. 16 C.F.R. § 23 (2008).

20. 16 C.F.R. § 24 (2008).

21. 16 C.F.R. § 256 (1998) (repealed 2001).

22. 16 C.F.R. § 424 (2008).

23. 16 C.F.R. § 432 (2008).

24. 16 C.F.R. § 453 (2008).

25. 16 C.F.R. § 455 (2008).

26. 16 C.F.R. § 460 (2008).

27. A representative example is the Montana Unfair Trade Practices and Consumer Protection Act of 1973. The Consumer Protection portion is at Mont. Code Ann. §§ 30-14-101—30-14-143 (2007).

28. Nev. Rev. Stat. 597.010 (2008).

29. Nev. Rev. Stat. 597.112 (2008).

30. Nev. Rev. Stat. 597.120 (2008).

- NRS 597.262 Assistive Devices³¹
- NRS 597.270 Service Stations³²
- NRS 597.480 Automotive Repairs³³
- NRS 597.720 Works of Art³⁴

Chapter 598 - Deceptive Trade Practices

- NRS 598.305 Sellers of Travel³⁵
- NRS 598.405 Sightseeing Tours³⁶
- NRS 598.840 Organizations for Buying Goods or Services at Discount³⁷
- NRS 598.940 Dance Studios and Health Clubs³⁸
- NRS 598.943 Butter Churns³⁹
- NRS 598.968 Provision of Telecommunication Services⁴⁰
- NRS 598.971 Repair of Motor Vehicles⁴¹

In some jurisdictions, notably Texas, these statutes apply to transactions between businesses as well as to consumer transactions.⁴² In addition, most jurisdictions have also enacted Unfair Trade Practices statutes that regulate transactions between businesses.⁴³ Given this plethora of regulation, one would be foolish to look only to the common law or to Article 2 for guidance.

Article 2 is at present largely facilitatory.⁴⁴ Should we expand its regulatory function by incorporating some of these regulations? I submit we should not. It would not be within the spirit of Article 2 to increase its regulatory function. This was one of the weaknesses of Revised Article 2, which contained substantially more regulation of terms.⁴⁵ If the ideal is freedom of

31. Nev. Rev. Stat. 597.264 (2008).

32. Nev. Rev. Stat. 597.270 (2008).

33. Nev. Rev. Stat. 597.480 (2008).

34. Nev. Rev. Stat. 597.720 (2008).

35. Nev. Rev. Stat. 598.305 (2008). *See also* Nev. Rev. Stat. 598.335 (2008).

36. Nev. Rev. Stat. 598.405 (2008).

37. Nev. Rev. Stat. 598.840 (2008).

38. Nev. Rev. Stat. 598.940 (2008).

39. Okay, I admit it. I made this one up.

40. Nev. Rev. Stat. 598.968 (2008).

41. Nev. Rev. Stat. 598.971 (2008).

42. *See* the Texas Deceptive Trade Practices – Consumer Protection Act, Tex. Code Ann. § 17.41 et seq. (2007). Section 17.45(4) defines “consumer” as “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.” *Id.*

43. A representative example is the Montana Unfair Trade Practices and Consumer Protection Act of 1973. The Unfair Trade Practices portion is at Mont. Code Ann. §§ 30-14-201—30-14-226 (2007).

44. *See* Scott J. Burnham, *Is UCC Article 2 Facilitatory or Regulatory?*, 68 OHIO ST. L.J. 57 (2007).

45. The 1999 Annual Meeting draft of Revised Article 2 can be found at <http://www.law.upenn.edu/bll/archives/ulc/ucc2/ucc299am.htm>. Comments on the extent to which it is regulatory can be gleaned from the articles cited from 75 WASH. U. L.Q. Number 1, *infra* Appendix II.

contract, then the law will best develop not by increasing the amount of regulation, but by diminishing it. How can we address the problem of contracts of adhesion without increasing the regulatory function, indeed, by limiting it?

This question leads us to explore the middle of the spectrum, between the Scylla of freedom of contract and the Charybdis of regulation. That Middle Way is disclosure.⁴⁶ Disclosure is an interesting alternative to regulation, for while it mandates disclosure of terms, it does not dictate the substance of those terms. The presumption is that contracting parties who are aware of the terms through disclosure will then have the information required to act as shoppers in the free market. If contracting parties are shopping for better terms, then presumably those preparing the contracts will compete to offer better terms. Through this process, the contract terms will become more efficient, not through regulation of the terms, but through the operation of the free market. Examples of disclosure legislation include the Magnuson-Moss Warranty Act, requiring clear disclosure of warranty terms,⁴⁷ and the Truth in Lending Act, requiring uniform and clear disclosure of interest rates.⁴⁸

In a thoughtful discussion of the advantages and disadvantages of disclosure, Stephen G. Breyer, now Associate Justice of the United States Supreme Court, concludes:

Thus, disclosure is likely to be effective only where the public can understand the information disclosed, where it is free to choose on the basis of that information, and where it believes the information is materially relevant to the choice. Where these conditions exist, disclosure standards offer a less restrictive means to obtain a regulatory end than do standards governing primary conduct or outright banning of a substance.⁴⁹

With these concerns in mind, let us now explore what disclosure under Article 2 might look like.

46. After I wrote those words, I found that another author had expressed exactly the same thoughts, if not so elegantly:

The present challenge of contract law, in fact, is to successfully combine its two different functions, that is, concerns of fairness and of efficiency, in order to give sufficient scope to both. This challenge results from the necessity to combine what has been presented as incompatible and antagonistic. These impediments to the possible combination of both concerns can be overcome by promoting a balanced framework that enables the two functions of contract law to be co-ordinated. This Section proposes that the notion of reasonable expectations may achieve this.

Clarisse Girot, *USER PROTECTION IN IT CONTRACTS* 33 (2001) (footnote omitted).

47. 15 U.S.C. § 2301 et seq. (2006).

48. 15 U.S.C. § 1601 et seq. (2006).

49. Stephen G. Breyer, *REGULATION AND ITS REFORM* 164 (1982).

III. REASONABLE EXPECTATIONS

One of the common law solutions to the problem of contracts of adhesion has been the doctrine of reasonable expectations. One version of the doctrine is found in Restatement (Second) of Contracts § 211:

§ 211. Standardized Agreements

- (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.⁵⁰

The doctrine has taken a subtle change from the expression in § 211(3), and now looks not at what the offering party has reason to believe, but at what the party to whom the term is offered has reason to believe.⁵¹ If the offeree did not reasonably expect the term to be in the contract, then it is not part of the agreement. Note that it is a doctrine of *reasonable* expectations and not *actual* expectations. Under the latter approach, a person who actually reads the contract would be deprived of the power to argue the doctrine. This makes no sense, for our presumption is that in this particular situation the person has no bargaining power, so it does not matter whether the person has read it and understands it because the person cannot act on that understanding. Besides, we should not give a person an incentive not to read the contract. That is the significance of § 211(2), which provides that the doctrine applies equally to all, whether ignorant shopper or learned Contracts professor.

This approach to contract is compatible with freedom of contract. Reasonable expectations does not prevent an offeror from putting a term in a contract. It merely requires the offeror to do so in such a way as to apprise the other party that the term is there. This is consistent with the view, already found in Article 2, that parties will generally pay attention to the ma-

50. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

51. See Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 458-59 (2002).

terial terms such as description of the goods, price, and quantity, but will not pay attention to the boilerplate terms.⁵²

Some authorities are concerned that the doctrine of reasonable expectations may permit the offeror to include more harsh terms in the contract.⁵³ Under the concept of “procedural unconscionability,” a term may be found to be unconscionable because of the manner in which it is concealed from the offeree, and clear and conspicuous disclosure would deprive the party of that defense.⁵⁴ I must say I do not share this concern.⁵⁵ If a term is unconscionable, it is by definition so bad that it does not belong in a contract. Therefore, it does not matter how clearly it is written or how conspicuously it is presented. It is, at best, a clearly written and conspicuously presented unenforceable term. A term within the doctrine of reasonable expectations, on the other hand, must first pass the test that it is not unconscionable. Subsection (2) of § 2-302 provides a means for determining whether there is a justification for the provision in its commercial setting:

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.⁵⁶

Once the provision has passed that hurdle, it is determined that it is not unconscionable. Its deficiency, if any, is that the offeree, who did not reasonably know it was in the contract, was taken by surprise.

A good example may be found in the case of *Steven v. Fidelity & Casualty Co.*⁵⁷ Mr. Steven purchased a flight insurance policy from a vending machine and, as required, immediately signed it and dropped it back in the box. Could there be a clearer example of a contract of adhesion? He then found that his scheduled flight was canceled, so he chartered a flight on an unscheduled airline. The plane crashed and he was killed. The insurer refused to pay on the grounds that a provision in the policy excluded from coverage flights on unscheduled airlines.

Is there anything wrong with such a provision? An insurer need not take all risks, and the poorer safety records of unscheduled airlines may well be “evidence as to its commercial setting, purpose and effect”⁵⁸ that could lead

52. See Part V, *infra*.

53. See, e.g., Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

54. See Leff, *supra* note 5.

55. In fact, for different reasons, the author concurs. Professor Hillman concludes that “[d]espite all that has been said, mandatory website disclosure may still be the best strategy for dealing with the problem of e-standard forms.” Hillman, *supra* note 53, at 855.

56. U.C.C. § 2-302(2) (2002).

57. 377 P.2d 284 (Cal. 1962). I realize that the transaction is not governed by Article 2, but it is too good an example to overlook.

58. U.C.C. § 2-302(2).

a court to conclude that such a provision is not unconscionable. Under the doctrine of reasonable expectations, the issue comes down to whether a reasonable person would have known of the exclusion. If not, then the insurer had a duty to bring it within Mr. Steven's reasonable expectations in order to bind him to it.

I stated that it should not matter in the decision whether or not to enforce an unconscionable provision that the provision is stated clearly. But the drafter must by definition present the provision conspicuously and write it in plain English in order to bring it within the reasonable expectations of the offeree. A good example is the cross-collateralization clause that was the subject of the leading unconscionability case, *Williams v. Walker-Thomas Furniture Co.*⁵⁹ Ms. Williams bought a number of items on credit from the store over a period of years. Under the default clause in the contract for the purchase of each item, the seller could repossess the item if she was in default. Furthermore, under the provision in issue, no item was paid for until all were paid for, and thus, upon her default, the store could repossess everything she ever bought from them.

It may be that in the commercial setting, the store had a justifiable business reason for the provision, making it not unconscionable.⁶⁰ But even if it was not unconscionable, it was probably not reasonably expected. To bring it within reasonable expectations, the store would have to conspicuously present it by, for example, stating it in bold print on the front of the agreement. The provision, however, was not made conspicuous in any way and read as follows:

If I am now indebted to the Company on any prior leases, bills or accounts, it is agreed that the amount of each periodical installment payment to be made by me to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by me under such prior leases, bills or accounts; and all payments now and hereafter made by me shall be credited pro rata on all outstanding leases, bills and accounts due the Company by me at the time such payment is made.⁶¹

I submit that even bold print would not bring this provision within reasonable expectations because it cannot be readily understood. In order to bring it within reasonable expectations, the store could have cast it in terms such as this:

If you fail to make a payment on time, we may repossess everything we have ever sold you on credit.

59. 350 F.2d 445 (D.C. Cir. 1965).

60. Recall U.C.C. § 2-302(2).

61. *Id.*

The requirement that certain terms be written in plain language produces the added benefit of producing more readable contracts. Such a requirement would not impose an undue burden on businesses, for many states have plain language laws that require that consumer contracts be written in plain language.⁶² Interstate businesses should already have prepared their forms to comply.

Another issue that must be addressed is *when* the terms must be provided to come within reasonable expectations. In the notorious case of *Hill v. Gateway 2000*,⁶³ for example, Judge Easterbrook found that terms in a “rolling contract” can be discovered after the purchase is made. As an Official Comment in Amended Article 2 suggests, the issue of whether the terms in rolling contracts are part of the “basis of the bargain” might best be left to the common law.⁶⁴ However, the doctrine of reasonable expectations might well place a greater burden on such an offeror. It seems reasonable that for the purposes of the doctrine, the offeror might have to present at least the unexpected terms in the initial offering.

When contracts are formed through electronic commerce, the doctrine of reasonable expectations is readily accommodated. Many offerors now give the offeree an opportunity to read the “terms and conditions.”⁶⁵ Under the doctrine, the offeror would have to present those terms that the offeree would not have reasonably expected in a more conspicuous manner; for example, the offeree might have to individually click on those items to make them enforceable.

There are some practical problems with broadly applying a doctrine of reasonable expectations. An overly apprehensive seller, concerned that many of its terms were not within reasonable expectations, might try to conspicuously disclose all of them. But when everything is conspicuous, nothing is conspicuous. This dilution of disclosed terms may be one of the weaknesses of the Truth in Lending Law,⁶⁶ which attempted to require disclosure of interest rates, but may have required so many disclosures that the

62. See e.g., the Montana Plain Language in Contracts Act, Mont. Code Ann. §30-14-101 - §30-14-143 (2007).

63. 105 F.3d 1147 (7th Cir. 1997).

64. Official Comment 5 to Amended § 2-207 provides:

The section omits any specific treatment of terms on or in the container in which the goods are delivered. Amended Article 2 takes no position on the question whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to these cases; the “rolling contract” is not made until acceptance of the seller’s terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and “shrink wrap” terms or those in the container become part of the contract only if they comply with provisions like Section 2-207).

Id. See the 2002 Annual Meeting Draft, available at www.law.upenn.edu/bll/archives/ulc/ucc2/annual2002.htm.

65. In my view, they are just “Terms,” but I have pretty much given up on getting drafters to avoid this inaccurate expression.

66. 15 U.S.C. §§ 1601—1667f (1968).

essence was lost. As with most everything else in contract law, there must be a standard of reasonableness. Perhaps market researchers could help provide guidance as to what terms consumers expect to find in certain contracts.

At the other extreme from “clickwrap” contracts offered over the internet is the case of the negotiated contract. Would the doctrine apply to a form contract that was negotiated? It would seem to be applicable, for often the parties to a contract negotiate the essential terms, and then embody them in a form contract that contains boilerplate terms that they have not negotiated. A contract for the sale of real estate, for example, is often the subject of careful negotiation as to price, and then the price term is embodied in a standard form. This is an arm’s length transaction, often between parties of equal bargaining power. But suppose in advance of the signing, an unscrupulous seller went through the standard form on a computer and wherever the standard language said that a particular cost was imposed on seller, the seller substituted the word *buyer* for *seller*. After the buyer discovered the problem and complained, the seller would maintain that it was the duty of the buyer to read the contract. That is no doubt true. But our presumption is that parties do not read the non-negotiated terms of standard form contracts. It would seem to me that in this situation the doctrine of reasonable expectations would apply, and the reasonable expectations of the parties were that custom and usage applied. If the seller wanted terms that deviated from those established by custom and usage, it was the duty of the seller to clearly and conspicuously present those unexpected terms to the buyer.⁶⁷

Let us now turn to what such a provision might look like in Article 2.

IV. REASONABLE EXPECTATIONS AND THE CODE

Article 2 is a common law code, with many gaps that are filled by the common law. This principle is expressly stated in § 1-103(b), which provides:

§ 1-103. Construction of [U.C.C.] to Promote its Purposes and Policies; Applicability of Supplemental Principles of Law.

(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.⁶⁸

67. I realize this is an example outside of Article 2. I could have made it the sale of a widget, but this is such a clear example, and in fact one that I have encountered in my practice, that I hope I will be pardoned for using it.

68. U.C.C. § 1-103(b) (2008).

It would be consistent with this principle for courts to apply the doctrine of reasonable expectations in cases involving the sale of goods. If reasonable expectations could be made part of Code methodology through the common law, then does the doctrine need to be codified? I think the answer is yes, for a number of reasons.

The first reason is uniformity, which is important in commercial law. One of the purposes of the Code is to make uniform the laws of the several jurisdictions. Section 1-103(a)(3) provides:

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:

...

(3) to make uniform the law among the various jurisdictions.⁶⁹

The common law can be painfully slow in its incremental approach, with some jurisdictions adopting a rule and others lagging behind. Codification of a helpful approach can speed the process of making that rule uniform among the jurisdictions.

Uniformity would also address the problem of courts applying different versions of the doctrine. Many courts, for example, think that the doctrine should be confined to insurance contracts. And even if they recognize it, courts may misunderstand it. My home state of Montana, for example, thinks that it has recognized the doctrine, but in applying it, the Montana Supreme Court determined that a consumer was not entitled to the benefit of the doctrine because she read the contract and knew what terms it contained!⁷⁰ In doing so, the Court applied a doctrine of *actual* expectations, not reasonable expectations. It is a particularly perverse application because if a person who read and understood the contract could not claim the benefit of the doctrine, then it would deprive the person of any incentive to read the contract, not to mention deprive the person of the pleasure of reading the contract.

Recall that the Restatement version of the doctrine focuses on the reasonable expectations of the offeror of the term.⁷¹ But I think the more appropriate emphasis is on the reasonable expectations of the offeree, and the rule should be codified that way. The drafters of Revised Article 2 at times in-

69. U.C.C. § 1-103(a)(3) (2008).

70. *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 149-50, (1993). In *Kloss v. Edward D. Jones & Co.*, 310 Mont. 123 (2002), *cert. denied*, 538 U.S. 956 (2003), the Court explained that “[i]n *Chor* . . . [w]e also held that the arbitration provision was clearly within Chor’s reasonable expectations based on her own testimony that she understood her obligation to arbitrate based on her review of the agreement.” *Id.* at 132. The Court distinguished the facts in *Kloss*, explaining that the arbitration provision was not within Kloss’s reasonable expectations because “Kloss did not read the contract and was not aware of the arbitration provision in the contract.” *Id.* at 132-33. See also Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 189-200 (2005).

71. See text accompany note 50, *supra*.

cluded a reasonable expectations provision in their draft. The 1997 Annual Meeting draft of § 2-206(a), for example, looked at the term from the point of view of the consumer, providing:

SECTION 2-206. CONSUMER CONTRACTS; RECORDS.

(a) In a consumer contract, if a consumer agrees to a record, *any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record* is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.⁷²

Although the drafters looked at the expectations of the consumer, it nevertheless appears that they did not show the same appreciation for the objective approach, for the language of that draft provides that the term is excluded “unless the consumer had knowledge of the term before the contract was authenticated.”⁷³ This approach would make the term inapplicable if the consumer had read the contract. This approach also raises other fact questions, such as whether the consumer was told about the term, by the seller or otherwise. I would advocate changing the standard to an objective one: “unless a reasonable consumer would have had knowledge of the term before the contract was authenticated.” Under this approach, knowledge becomes a drafting issue. The drafter can bring its terms within the doctrine of reasonable expectations by presenting them in a clear and conspicuous fashion. The appearance of the contract language, not the testimony of the consumer, would determine whether there was knowledge; i.e., we would look to imputed knowledge rather than actual knowledge.

There is also an issue of whether the doctrine should be restricted to consumer contracts. There is no such restriction in the Restatement approach,⁷⁴ and I do not see a strong argument for it. Form contracts are equally used by commercial parties, and commercial parties equally do not read them. In some jurisdictions, commercial parties are protected against unfair or deceptive terms, and in most jurisdictions they are protected against unfair trade practices. A seller to Wal-Mart would seem just as entitled to protection from unexpected terms as a buyer from Wal-Mart.

Given these preferences, the author’s version of the doctrine would look like this:

Form Contracts.

72. Revised § 2-206(a) (1997) (emphasis added). See www.law.upenn.edu/bll/archives/ulc/ucc2/ucc2797.htm. James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997) details the changes this provision went through during the drafting process.

73. Revised § 2-206 (1997), *supra* note 72.

74. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981), *supra* note 50.

In a form contract, any non-negotiated term that a reasonable person in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless a reasonable person would have had knowledge of the term before the contract was authenticated.

Even if the doctrine were codified, there is plenty of room for the common law to develop understandings of which terms fall within reasonable expectations. It might be a good idea for the drafters to include the same suggestion to the court to look at the commercial context that is currently contained in § 2-302(b) regarding unconscionability, with appropriate modifications.⁷⁵ Such a provision was included in the 1997 Annual Meeting draft in subsection (b):

Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, after affording the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide whether the contract should be interpreted to exclude the term.⁷⁶

My only quibble with this draft is that we should not pretend that the process of excluding the term involves interpretation of the contract. The question is simply whether the court should exclude the term.

In addition to the statute, an Official Comment might be helpful to provide guidance. A good model is found in Official Comments 4 and 5 to § 2-207, which enumerate examples of terms that would and would not “materially alter” the contract under the § 2-207(2)(b) analysis.⁷⁷ The common law would also determine whether the term was sufficiently clear and conspicuous to fall within reasonable expectations.

Finally, the provision as enacted in the Code should provide for attorneys’ fees. Under the default “American Rule,” each party pays its own attorneys’ fees whether the party wins or loses.⁷⁸ The default rule can be changed by the parties or by statute. Article 2 does not provide for attorneys’ fees, although Article 2A does in the case of unconscionability.⁷⁹ This is a good provision, but would be unnecessary for our purpose, because consumer protection statutes provide for attorneys’ fees⁸⁰ and an unconscionable provision is likely to also constitute an unfair or deceptive act or practice under those statutes. But providing for attorneys’ fees in the event that an offeree is able to prove that a provision is not within reasonable expectations would

75. U.C.C. § 2-302(b) (2002).

76. Revised U.C.C. § 2-206(b) (1997). See www.law.upenn.edu/bll/archives/ulc/ucc2/ucc2797.htm.

77. U.C.C. § 2-207 Official Comments 4 and 5 (2002).

78. Joseph M. Perillo, *CALAMARI AND PERILLO ON CONTRACTS* § 14.35 (5th ed. 2003).

79. U.C.C. § 2A-108(4) (2002).

80. See, e.g., MONT. CODE ANN. § 30-14-133(4) (2007). The Montana statute is a bit unusual in that it provides that a person who is not an attorney may recover attorneys’ fees!

provide an incentive both for offerors to call the provision to the attention of offerees and for offerees to litigate these claims. On the other hand, attorneys' fees should be awarded against the plaintiff who brings a frivolous case, for such litigation should be discouraged. If those incentives and disincentives work properly, then only the worthiest claims will be brought. The attorneys' fee provision, modeled on present § 2A-108(4), might look something like this:

In an action in which a party claims that a contract term is not within reasonable expectations:

- (a) If the court finds that a term is not within reasonable expectations, the court shall award reasonable attorneys' fees to the claimant.
- (b) If the court finds that the term is within reasonable expectations, and the claimant has brought or maintained an action that was groundless, the court shall award reasonable attorneys' fees to the party against whom the claim is made.
- (c) In determining attorneys' fees, the amount of the recovery on behalf of the claimant is not controlling.⁸¹

The careful reader will note that some of the examples of reasonable expectations that I have used do not involve the sale of goods. This inclusiveness suggests that I see no reason to confine the doctrine to such transactions. I mentioned that it is possible, although too slow a process for my taste, for the common law to lead to the incorporation of the doctrine in Article 2. The reverse process is more likely to lead to widespread application of the doctrine, for once incorporated in Article 2, the doctrine is very likely to influence the common law. The extent to which the progressive provisions of Article 2 have affected the common law of contracts is astonishing, as a review of provisions of the Restatement (Second) of Contracts will affirm.

We will now turn to the question of whether such a statutory provision is consistent with the methodology of the Code.

81. U.C.C. § 2A-108(4) (2002) provides:

In an action in which the lessee claims unconscionability with respect to a consumer lease:

- (a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.
- (b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he [or she] knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.
- (c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

V. REASONABLE EXPECTATIONS AND CODE METHODOLOGY

Would incorporating the doctrine of reasonable expectations radically alter Article 2? Unlike many statutes, Article 2 is generally not regulatory, but preserves freedom of contract.⁸² Section 1-302(a) embodies this concept. It provides:

Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.⁸³

Sometimes the Code performs a channeling function, encouraging parties to conform their behavior to desirable patterns. For example, § 2-201, the statute of frauds, throws some roadblocks in the way of those who rely on oral contracts,⁸⁴ and § 2-202, the parol evidence rule, strongly encourages the parties to incorporate all of the terms of the agreement in their writing.⁸⁵

In general, however, the Code is agnostic, accepting existing business patterns and recognizing the reality of contracting parties' behavior. Section 2-205, the firm offer rule, for example, can only be explained as the embodiment of a practice that merchants take for granted.⁸⁶ The exception to the parol evidence rule in § 2-202(a) for omitted terms that embody a course of performance, a course of dealing, or a trade usage⁸⁷ reflects the reality, as explained in Official Comment 2 to that section, that "[s]uch writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased."⁸⁸ Another example may be found in §§ 2-210(4) and (5).⁸⁹ Those sections accept the fact that parties are not going to use the vocabulary of assignment and delegation correctly, and provide the meaning that they intended.

Consistent with its acceptance of the reality of human behavior, in many instances the Code incorporates the doctrine of reasonable expectations, permitting parties to agree to certain terms as long as one party has clearly communicated its intentions to the other party. Let's look at some examples from Article 2.

Under § 2-207(2), the proposed additional terms on the offeree's form become part of the contract "between merchants."⁹⁰ Here, the doctrine can be

82. See Burnham, *supra* note 44.

83. U.C.C. § 1-302(a) (2008).

84. U.C.C. § 2-201 (2002).

85. U.C.C. § 2-202 (2002).

86. U.C.C. § 2-205 (2002).

87. U.C.C. § 2-202(a) (2002).

88. U.C.C. § 2-202 Official Comment 2 (2002).

89. U.C.C. § 2-210(4) (2002); U.C.C. § 2-210(5) (2002).

90. U.C.C. § 2-207(2) (2002). The section provides in part: "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless . . ." *Id.*

found by implication, for if there is one rule for merchants, it is implied that there is another rule when one party is not a merchant. Although the subsection does not tell us the status of the proposed terms in an agreement not between merchants, it seems fair to presume that if the terms become part of the contract in a contract between merchants, then they do not become part of the contract in a contract not between merchants. The nonmerchant would have to affirmatively accept them rather than have them automatically govern. This is a sensible rule because the inexperienced party would not reasonably know the consequences of its inaction. Therefore, the party proposing the terms must make sure that the other party reasonably expects them to be part of the contract.

The same principle that was found by implication in § 2-207(2) is made express in § 2-209(2), which provides:

A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.⁹¹

This provision recognizes that the parties may create their own statute of frauds by agreeing that modifications must be in writing. Such a term is often referred to as a “no oral modification clause.” The statute states that “a requirement on a form supplied by the merchant must be separately signed by the other party.”⁹² Again, the merchant must bring it to the attention of the other party. This rule applies “except as between merchants.”⁹³ In other words, merchants are expected to be more aware and would not need to have the provision brought to their attention. Official Comment 3 to this provision reiterates that the separate signing rule would apply to a transaction between a merchant and a consumer. It states in part:

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.⁹⁴

The “no oral modification” clause is not enforceable against the consumer unless it has been “separately signed.”⁹⁵ I take this provision as meaning

91. U.C.C. § 2-209(2) (2002).

92. *Id.*

93. *Id.*

94. *Id.*, Official Comment 3.

95. U.C.C. § 2-209(2) (2002).

that this step is required to reasonably call the clause to the attention of the consumer.

Section 2-205 contains a clear example of reasonable expectations, but one that rarely arises in practice. It provides in part that “any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.”⁹⁶ Official Comment 4 to this section provides:

Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror’s attention and he separately authenticates it, he will be bound;[.]⁹⁷

When the offeree proposes a firm offer term, the offeree must call it to the attention of the offeror, who must separately authenticate it, presumably in some fashion such as initialing the clause, in order to be bound. Preventing an “inadvertent” agreement to a term, that is, an agreement the party makes without knowing the term is there, serves the purposes of reasonable expectations doctrine.

The Hadley Rules, incorporated in § 2-715(2), are also a good example of reasonable expectations, because a seller is only responsible for “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know.”⁹⁸ Thus, the burden is on the buyer to make those requirements or needs known to the seller. Once the seller knows of them, that is, once they are within the seller’s reasonable expectations, the seller can determine whether to contract around them or not.

Not surprisingly, the warranty provisions of the Code contain the most examples of reasonable expectations, for the extent of the warranty term is likely to be important to a buyer. A significant example of application of the doctrine is found in § 2-316(2), which provides for the exclusion of implied warranties:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”⁹⁹

96. U.C.C. § 2-205 (2002).

97. U.C.C. § 2-205 Official Comment 4 (2002).

98. U.C.C. § 2-715(2) (2002).

99. U.C.C. § 2-316(2) (2002).

Curiously, this subsection contains the only use of the term *conspicuous* in Article 2. Courts have generally required that the exclusion in § 2-316(3) also be conspicuous.¹⁰⁰ And the disclaimer of the warranty of title in § 2-312(2) embodies the concept, if not the vocabulary, for the warranty is excluded only “by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself”¹⁰¹ Making language conspicuous is a way of calling it to the reasonable attention of the contracting party. In fact, that is exactly what the definition of *conspicuous* in § 1-201(b)(10) provides:

“Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.¹⁰²

The warranty disclaimer provisions are part freedom of contract, part regulation, and part disclosure. A seller is free to disclaim warranties, but must do so in certain ways that call the attention of the buyer to the disclaimer. Official Comment 1 explains that the purpose of the provision is to “protect the buyer from surprise.”¹⁰³ That is exactly what the doctrine of reasonable expectations is designed to do. Comment 1 to § 2-316 provides in full:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.¹⁰⁴

100. James J. White & Robert S. Summers, *UNIFORM COMMERCIAL CODE* 439 (5th ed. 2000).

101. U.C.C. § 2-312(2) (2002).

102. U.C.C. § 1-201(b)(10) (2008).

103. U.C.C. § 2-316 Official Comment 1 (2002).

104. *Id.*

In consumer law, this area has been substantially supplemented by the Magnuson-Moss Warranty Act.¹⁰⁵ Magnuson-Moss generally does not regulate the content of warranties, but accomplishes its task through disclosure. A seller is not required to give a warranty, but if it does, the warrantor must clearly state whether it is giving a full or limited warranty and what the warranty terms are. Consumers are thereby empowered to discriminate between sellers on the basis of the quality of the warranty. And if consumers are so acting, then presumably sellers will compete to see who can give the best warranty. Thus the market, rather than regulation, will lead to an improvement in the quality of warranties given to the consumer.

Our final exemplar of reasonable expectations doctrine in the Code is the much-maligned § 2-207.¹⁰⁶ However badly it may have worked out in practice, this section was designed to achieve its goals not through regulation nor by channeling behavior, but through reasonable expectations. The drafters faced certain realities of human contracting behavior and shaped a rule around those realities. They assumed that parties who exchange form contracts are giving what Karl Llewellyn called a blanket assent; that is, agreement on the dickered terms, but not a specific assent to all terms.¹⁰⁷ Each party did not bother to read the boilerplate terms on the other party's form. In this respect the drafters treated merchants the same as nonmerchants; because neither group is likely to read their non-negotiated contracts, the rule is applicable to both. Given these realities, they then turned the common law upside down by providing that a contract was formed even though the terms on the two forms were different.

Saying that a contract is formed through the exchange of unread forms is only a first step, however, for it then becomes necessary to find the terms of that contract. Where do the terms come from? Therein lies the genius of § 2-207, for it answers that question by excluding from the contract terms that the offeror would not reasonably expect. In subsection (2), the offeror is given three opportunities to reject the offeree's proposed terms; even if the offeror is passive, proposed terms that materially alter the offeror's terms are deemed rejected under subsection (2)(b). The section thereby sends a message to the offeree that if it wants terms that are materially different from those proposed by the offeror, it is not going to get those terms through the subterfuge of sneaking them in through its unread form. It is going to have to bargain for them. In this way, the expectations of the offeror are met.

The Code could have embodied a harsh rule that the parties are responsible for reading the contract and knowing what is in it. But in § 2-207, the drafters took the realistic approach that nobody reads a form contract—not even the party who drafted it. The common law does not have a reasonable

105. 15 U.S.C. § 2301–2312 (2006).

106. U.C.C. § 2-207 (2002).

107. Karl N. Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

solution to this problem, for the “mirror image rule” results in the offeree getting all of its terms, a result that does not square well with the expectations of the offeror. We need a rule that accommodates the interests of both parties, preventing one from getting all of its terms. Amazingly, if a party tries to short-circuit the process by inserting words in its form to the effect that “we don’t have a contract unless you agree to my terms,” that party still does not get its terms.¹⁰⁸ Thus, the rule plays out in a reality in which no one reads the contract, and the result is that a party is not bound by unusual terms of which it was not aware.

This same approach that § 2-207 made expressly applicable to the exchange of forms is equally applicable to a form contract supplied by one of the parties for the signature (or *authentication* in the case of electronic commerce) of the other. We can assume that the party to whom the contract is offered will not read terms other than the material terms. Even though there is only one form here, the offeree’s conception of the transaction is, pun intended, like one of Plato’s forms, an ideal form of that transaction that contains only reasonable terms.¹⁰⁹ The party seeking to deviate from the reasonable terms should not be able to get every term into the contract by taking advantage of this situation, for again, there is blanket assent—assent to the Platonic ideal of the form—but not specific assent to each term. Because they are outside of that ideal, unconscionable terms will be excluded. Unfair or deceptive terms in the case of a consumer contract and unfair trade practices in the case of a commercial contract will be excluded. And, under the rule proposed by this essay, terms that would not be reasonably expected by the offeree will also be excluded. This is not to say that parties are not free to agree to unreasonable terms. If the offeror of those terms wishes to have them included in the agreement, the offeror can clearly and conspicuously present them in a manner similar to the presentation of the material terms.

Not only is reasonable expectations consistent with Code methodology, but it is also the method by which common law contracts developed in the early twentieth century to drag contract law kicking and screaming into the modern world. In *Wood v. Lucy, Lady Duff-Gordon*,¹¹⁰ for example, Judge Cardozo tells us that although the literal words of the contract do not present a case for enforceability, we must look beyond the literal language to the context in order to see what reasonable parties intended by their words. In *Jacob & Youngs, Inc. v. Kent*,¹¹¹ he teaches a similar lesson: Yes, it looks

108. The quoted language would satisfy the requirement in subsection (1) that “acceptance is expressly made condition on assent to the additional or different terms,” which, if the goods were delivered and accepted, would result in a contract under subsection (3), which provides that the additional or different terms are replaced with “any supplementary terms incorporated under any other provisions of this Act,” i.e., the default rules.

109. Plato, *Phaedo* 75b.

110. 222 N.Y. 88 (1917).

111. 230 N.Y. 239 (1921).

like the words of the contract have created an express condition, but reasonable parties in that context would not have so intended, and we are going to treat parties as though they were reasonable, and did not intend payment to turn on the use of Reading Pipe.

Did these cases mark, as some have alleged, the death-knell of freedom of contract? Aren't contracts for the parties to make and not for the courts to make? Ah, but that is the beauty of the decisions. The court assumes the parties are reasonable, but the presumption is rebuttable. Parties are perfectly free, in Cardozo's words, to indicate otherwise "by apt and certain words."¹¹² Wood and Lucy could have styled their agreement a "Memorandum of Understanding," signaling their intention not to be bound, or they could have imposed specific performance goals on Wood. Kent could have made clear to Jacob & Youngs that of all the specifications, Reading Pipe was the one that was of signal significance to him. Freedom of contract is preserved by the power of one party to bind the other to a term that is not within the other's reasonable expectations simply by clear and conspicuous presentation of the term.

An exculpatory clause by which one party agrees to give up its right to hold the other liable for simple negligence is probably a good example of a term that is not within reasonable expectations. Courts are all over the board on the issue of the enforceability of the clause, generally determining that it is enforceable in a transaction within the private sphere but not enforceable in a transaction within the public sphere.¹¹³ But could not this be an area where freedom of contract was preserved through the bargaining process? Richard H. Thaler and Cass R. Sunstein promote the use of such a clause as a way to reduce the costs of medical care.¹¹⁴ A patient could be offered the choice of the full price contract, which includes the right to sue the doctor for malpractice, or the contract with the 15% discount for giving up the right to sue; i.e., agreeing to an exculpatory clause.¹¹⁵

The arbitration clause presents a special case because of its treatment under the Federal Arbitration Act.¹¹⁶ The stickler is § 2, which provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹¹⁷

112. *Id.* at 243.

113. *See, e.g.*, *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963).

114. Richard H. Thaler and Cass R. Sunstein, *NUDGE* 207-14 (2008).

115. Some courts will nevertheless find that the bargain was not freely made and will refuse to enforce the agreement. *See, e.g.*, *Cardona v. Eden Realty Co., Inc.*, 288 A.2d 34 (N.J. Super. 1972).

116. 9 U.S.C. §§ 1-14 (2006).

117. 9 U.S.C. § 2 (2006).

Under this provision, the court cannot treat an arbitration clause any differently than it treats any other provision in a contract. Let us assume that the arbitration clause in issue passes the unconscionability test. The issue then becomes whether such a provision would be a candidate for reasonable expectations. The amount of vitriol that arbitration clauses have produced should tip off the offeror that it would be prudent to give the clause such treatment. But if the arbitration clause is not presented in such a manner as to be called to the attention of the consumer, could a court refuse to enforce it under the doctrine of reasonable expectations, or would that be singling out the arbitration clause for different treatment?

To some extent, the issue has been litigated. A Montana statute provided that an arbitration clause was not enforceable unless notice that it was in the contract was "typed in underlined capital letters on the first page of the contract."¹¹⁸ The United States Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*, correctly held that the statute violated the Federal Arbitration Act, which declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹¹⁹ In other words, states cannot single the arbitration clause out for special treatment.

In an interesting footnote in that case, the Court noted that at oral argument, the plaintiff had argued that a court could refuse enforcement to an arbitration clause not because it was singled out by a statute, but because the court could apply the doctrine of reasonable expectations to it, as it would to any other unexpected contract term. The Court noted that the record was confined to ruling on an arbitration clause barred by statute, not by the doctrine of reasonable expectations:

The court did not assert as a basis for its decision a generally applicable principle of "reasonable expectations" governing any standard form contract term. Cf. *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 180 (1983) (invalidating provision in auto insurance policy that did not "honor the reasonable expectations" of the insured). Montana's decision trains on and upholds a particular statute, one setting out a precise, arbitration-specific limitation. We review that disposition, and no other. It bears reiteration, however, that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987).¹²⁰

118. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (citing MONT. CODE ANN. § 27-5-114(4) (1995) (repealed)).

119. 9 U.S.C. § 2 (2006).

120. *Casarotto*, 517 U.S. at 681, n. 3.

I am not sure what the Court meant to reiterate with those final words. It emphasized that a court could not single out an arbitration clause on grounds of unconscionability, but it is my thesis that reasonable expectations is something different from unconscionability. If that is the case, then an arbitration clause could be brought within the ambit of reasonable expectations without violating the Federal Arbitration Act. We await further developments.¹²¹

We are now ready to conclude our discussion.

VI. CONCLUSION

A contract of adhesion should be put through a triple filter in order to determine which terms should be excluded. The first filter is statutory, the collection of consumer protection, trade regulation, or special interest legislation that regulates the particular transaction. The second filter is the doctrine of unconscionability, which would weed out those terms which are, well, unconscionable. The third filter is the doctrine of reasonable expectations, which would exclude those terms that a reasonable person would not have expected to find in a contract for this kind of transaction. Unlike an unconscionable term, such a term can be saved by clear and conspicuous presentation, for then it comes within reasonable expectations.

Will enactment of the doctrine of reasonable expectations solve the problem of adhesion contracts? The strength of reasonable expectations doctrine is that it is not regulation. A drafter is free to put clauses that are not unconscionable into the contract as long as the content is conspicuously disclosed. The weakness of reasonable expectations doctrine, on the other hand, is that it is not regulation. A drafter is free to put clauses that are not unconscionable into the contract as long as the content is conspicuously disclosed. So, for example, all the sellers in a particular business are free to put the same conspicuous term in the contract, thus not giving buyers any choice, and an individual seller is still free to put in a one-sided term.

But is that so bad? If the term were unconscionable, it could be knocked out by that doctrine. If the term were unfair or deceptive, it could be knocked out by Consumer Protection Acts. Thus, the most onerous terms will not survive scrutiny. And there is always the possibility of competition. Although I agree it is unlikely to happen, a seller could compete by offering more favorable contract terms in the hopes that consumers would discriminate on that basis.¹²² Modern consumers are quick to share their experiences with various vendors on the web; in this manner, a business can build its

121. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

122. In *The War Against Arbitration in Montana*, *supra* note 70, I facetiously suggested that a bank choosing not to include an arbitration clause in its contract might advertise itself as the friendly bank that *sues* its customers. *Id.* at 202 n. 255.

reputational capital, some of which may be earned by favorable contract terms.

Ultimately reasonable expectations may not work because consumers will pay no attention, failing to shop on the basis of terms. Recent evidence, however, suggests that consumers may indeed be willing to shop for terms.¹²³ But even if that is not the case, then we come down to a choice of values. Do we want regulators to determine what is best for consumers in their contracts, or do we want to give consumers freedom of contract, even knowing freedom of contract will be used against them? I have always thought that freedom of choice included the freedom to make bad choices. So that is where I would ultimately come down in that debate.

My goal in this essay has been to find a way in which Article 2 could address the problem of contracts of adhesion while remaining free of additional regulation. Incorporating the doctrine of reasonable expectations is a modest step that would be consistent with the Code methodology of looking at the transaction in context, reflecting the reality of human behavior, and providing for freedom of contract. Ideally, reasonable expectations would lead to a reinvigoration of the common law, obviating the need for the law of butter churns.

APPENDIX I. THE PROPOSED STATUTE

§ 2-XXX. Form Contracts.

(a) In a form contract, any non-negotiated term that a reasonable person in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless a reasonable person would have had knowledge of the term before the contract was authenticated.

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

(c) In an action in which a party claims that a contract term is not within reasonable expectations:

(1) If the court finds that a term is not within reasonable expectations, the court shall award reasonable attorneys' fees to the claimant.

123. Robert P. Bartlett III and Victoria C. Plaut, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, available at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1233&context=berkeley_law_econ.

(2) If the court finds that the term is within reasonable expectations, and the claimant has brought or maintained an action that was groundless, the court shall award reasonable attorneys' fees to the party against whom the claim is made.

(3) In determining attorneys' fees, the amount of the recovery on behalf of the claimant is not controlling.

APPENDIX II. BIBLIOGRAPHY

My method is to read widely, write without reference to sources, and then research. I have interspersed the text with footnotes citing particular points. If there are some points that should have been attributed, I apologize, but please consider the possibility of independent thought.

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