ADHESION CONTRACTS AND THE TWENTY FIRST CENTURY CONSUMER

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by

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Ecommerce has transformed the law of contract. Consumers are increasingly subject to myriads of conditions in shrink-wrap, box-wrap, click-wrap and browse-wrap contracts. Opening software wrapping or clicking “I agree” in a dialog box on a computer subjects the user to a series of onerous conditions that restrict end use and limit the supplier’s liability.

These developments are counterbalance by the growth of new market-savvy classes of consumers who are willing and able to sue brand name producers in class and other actions.

Faced with these Twenty First Century developments, courts struggle to find middle ground between regulating mass transactions in fairness to consumers and facilitating free commerce.

Analyzing adhesion contracts in light of the evolving law of unconscionability, this article proposes ways in which to regulate mass transactions while preserving a liberty of contract that is essential to a liberal democracy.
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>II.</td>
<td>THE ADHESION CONTRACT</td>
<td>9</td>
</tr>
<tr>
<td>i.</td>
<td>The Twentieth First Century consumer</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Repeat-order consumers</td>
<td></td>
</tr>
<tr>
<td>iii.</td>
<td>Merchant-consumers</td>
<td></td>
</tr>
<tr>
<td>iv.</td>
<td>Implications arising from new merchant-consumers</td>
<td></td>
</tr>
<tr>
<td>III.</td>
<td>THE TWENTY FIRST CENTURY “WRAP” CONSUMER</td>
<td>24</td>
</tr>
<tr>
<td>i.</td>
<td>Repeat-order consumers</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Merchant-consumers</td>
<td></td>
</tr>
<tr>
<td>iii.</td>
<td>Consumers with market choice</td>
<td></td>
</tr>
<tr>
<td>iv.</td>
<td>Simplified conditions</td>
<td></td>
</tr>
<tr>
<td>IV.</td>
<td>CHALLENGING THE NEW ORTHODOXY</td>
<td>29</td>
</tr>
<tr>
<td>V.</td>
<td>REGULATING MASS CONTRACTS</td>
<td>33</td>
</tr>
<tr>
<td>i.</td>
<td>Enter Judge Easterbrook</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Some tentative conclusions</td>
<td></td>
</tr>
<tr>
<td>VI.</td>
<td>ENTER THE DRAGON: END USERS’ LICENCE AGREEMENT</td>
<td>40</td>
</tr>
<tr>
<td>i.</td>
<td>The End Users’ License Agreement [EULA]</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Restricting EULAs and service contracts</td>
<td></td>
</tr>
<tr>
<td>VII.</td>
<td>THE ART OF DISTINCTION</td>
<td>48</td>
</tr>
<tr>
<td>i.</td>
<td>Declaring browse-wrap clauses unenforceable</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Declaring click-wrap clauses enforceable</td>
<td></td>
</tr>
<tr>
<td>iii.</td>
<td>Grounding distinctions</td>
<td></td>
</tr>
<tr>
<td>iv.</td>
<td>Making distinctions</td>
<td></td>
</tr>
<tr>
<td>VIII.</td>
<td>LEGAL DIFFERENCES</td>
<td>58</td>
</tr>
<tr>
<td>i.</td>
<td>Trends in consumer protection</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Differences of fact</td>
<td></td>
</tr>
<tr>
<td>IX.</td>
<td>CODE INCURSIONS</td>
<td>62</td>
</tr>
<tr>
<td>X.</td>
<td>PERFECTING ASSENT</td>
<td>64</td>
</tr>
<tr>
<td>i.</td>
<td>Perfecting incomplete contracts</td>
<td></td>
</tr>
</tbody>
</table>
ii. The judicial management of “wrap” contracts
iii. The perimeter of gap filling
iv. Legislative gap filling

XI. GUIDELINES
i. Regulating transactions by contract
ii. Guidelines in regulating contracts

XII. CONCLUSION
I. INTRODUCTION

Fifteen years after American courts first began considering whether shrink-wrap software licenses\(^1\) are enforceable, the law governing shrink-wrap,\(^2\) box-wrap\(^3\) and now click-wrap\(^4\) and browse-wrap\(^5\) remains uncertain. At one extreme, courts consider whether to protect consumers from powerful suppliers that package onerous conditions in shrink-wrap or box-wrap, or require online customers to click “I agree” to onerous conditions in click-wrap contracts, or direct consumers by hyperlink to onerous conditions in browse-wrap contracts. At the other extreme, courts evaluate whether to enforce software and computer contracts and Internet licenses to protect the commercial interests of producers and distributors from the demands of new kinds of consumers who are market savvy and adept in mass purchasing. The problem for courts is to find a middle ground between these two extremes: to establish principles of practice by which to govern our fastest growing global e-commerce industries, while continuing to work through the applicable codes and the common law of contract.\(^6\)

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1 Shrink-wrap licenses are named after the clear plastic wrapping in which most software packages are contained on purchase. It sets out the binding conditions to which the software purchaser must “adhere” on opening the package.
2 On the distinctive judicial treatment of different types of wrap contracts, see infra section VII.
3 Box-wrap refers to the conditions to which the purchaser must adhere on opening the box. Click-wrap and browse-wrap contracts refer to online transactions.
4 In a click-wrap contract the user is provided with the terms and conditions of the contract, usually an end user agreement, at the end of which a dialog “I agree” box pops up on the screen which the user must sign in order to download or otherwise use the product.
5 In browse-wrap contracts the user is not presented with the terms and conditions of the contract, but is provided with a hyperlink to another website at which those terms are included.
The history of Article 2 of the Uniform Commercial Code [UCC] displays pervasive policy tensions. One tension is between a code that facilitates merchant practice in a free market and a code that protects consumer interests from the predatory practices of large scale producers of goods and services. A related tension revolves around the regulatory function of Article 2 of the Code, notably in relation to unconscionable contracts under Article 2-302. These tensions are apparent in the judicial treatment of end user contracts, notably End Users Licensing Agreements [EULAs].

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8 See Seona Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL.& PUB.AFFAIRS 205 (2000) who states: “The unconscionability doctrine, famously, operates as a shield and not as a sword. One may protect oneself against enforcement of an unconscionable contract, but one may not obtain damages for having been subject to an unconscionable offer; nor may one seek restitution for compliance with an unconscionable contract” (at 229).


This article considers whether the traditional principles of deterrence that regulators and courts apply to adhesion contracts should be extended to “new” classes of Twenty First Century consumers who are contractually sophisticated in a consumer-centric era. Concentrating on the evolving law of unconscionability in jurisdictions like California and New York, it considers how courts treat consumers who resell goods and services, engage in repeat order transactions, and have market choice. Exploring the judicial treatment of

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12 Article 2-302 states: § 2-302. Unconscionable contract or Clause: (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. On the history and scope of 2-302 see esp. Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485 (1967). On the history and scope of Article 2 more generally, see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 270–71 (5th ed. 2000); Julian B. McDonnell, Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence, 126 U. PA. L. REV. 795, 797 (1978); Caroline Edwards, Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment, ST. JOHN’S REV.663 (2004); James J. White, Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition, 75 MICH.L.REV.1262 (1977); Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 621 (1975); H.C.C. Jr., Unconscionable Sales Contracts and the Uniform Commercial Code, section 2-302, 45 VA.L.REV.583 (1959).

unconscionability in box-wrap, shrink-wrap, click-wrap and browse-wrap contracts, it identifies judicial conceptions of “bargaining naughtiness” leading to procedural unconscionable, and “evils lurking” in “wrap” contract giving rise to substantive unconscionability. It concludes that, however sophisticated new classes of consumers may be, they are insufficiently representative of

14 The prototype shrink-wrap license case is Step-Saver Data Sys., Inc. v. Wyse Tech, 939 F.2d 91 (3d Cir. 1991) in which Step-Saver purchased a software program, MultiLink, from Wyse Tech for the purpose of resale. Each MultiLink package included a shrink-wrap license by which Wyse Tech disclaimed all express and implied warranties and limited remedies against it for replacement of the program. Following a class action against Wyse Tech that the program was defective, it sued Step-Saver. The Court held that the disclaimer and limitation of liability clauses in the shrink-wrap license were not enforceable because Step-Saver had not assented to them. Id. See too Arizona Retail Sys. v. Software Link, Inc. 831 F. Supp. 759 (D. Ariz. 1993). This 3rd Circuit diverges from the 7th Circuit decision of Judge Easterbrook in ProCD, Inc. v. Zeidenberg, 86 3d 1447 (7th Cir. 1996) (holding shrink-wrap license enforceable). See infra section V.i.

15 Perhaps the first click-wrap contract considered by the courts was Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002), involving the choice of a forum clause in a click-wrap licensing agreement. The plaintiffs, in a class action, sought to establish that the services provided by Verizon, the defendant, were subject to disruptions and were slower than warranted. The class action was dismissed at trial based on the choice of law clause in the subscription agreement. On appeal, the court dismissed plaintiffs’ argument that the small size of the scroll box rendered notice inadequate, Id. at 1010-11. The appellate court also dismissed the argument that the clause was unreasonable because it designated a forum (Virginia) in which the case could not proceed as a class action, id, at 1012.


17 See Arthur Allen Leff, Unconscionability and the Code. The Emperor's New Clause, supra note 12.

18 Id. On such evils associated with EULA, see infra section VI.
consumers as a whole to justify remodeling the application of unconscionability to consumer contracts in general.

II. THE ADHESION CONTRACT

When should suppliers be free to dictate the terms of an “unbargained” contract to customers by imposing onerous conditions on them on unwrapping a package, opening a box, clicking an “I agree” dialog box, or receiving access to a hyperlink? When should suppliers be mandated to provide customers with advance notice of an intention to exclude or limit liability in a shrink-wrap, box-wrap, click-wrap or browse-wrap contract? Ought suppliers to explain those conditions to customers in user friendly language? And when is a consumer an end user who is entitled to such protection or a de facto merchant engaged in product resale with a lesser entitlement? These and other questions arise in relation to adhesion contracts, defined in Comb v. PayPal, Inc as a

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19 For a libertarian conception of the free market in relation to cyber law, see Bruce L. Benson, The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State J., 1 LAW, ECONOMICS & POLICY 269 (2005), available at http://www.sjsu.edu/depts/economics/faculty/powell/docs/econ206/Cyber-Law-Evolution.pdf. These new legal developments include the adoption of the Uniform Computer Information Transactions Act [UCITA], previously proposed 2B of the UCC which would render enforceable restrictions on contract practices that were previously in contract law and under intellectual property law. UCITA in particular renders shrink-wrap licences enforceable under state contract law. See http://www.law.uh.edu/ucc2b/UCITA_final_02.pdf. See too, Pamela Samuelson, Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium, 87 CAL.L.REV.1 (1999).

20 On the potential explosion of lawsuits against shrink-wrap suppliers including for failing to provide purchasers with reasonable notice of conditions, see e.g. Corey Doctorow, Shrinkwrap Licenses: An Epidemic of Lawsuits Waiting to Happen, http://www.informationweek.com/news/showArticle.jhtml?articleID=197003052.

21 218 F. Supp. 2d 1165 (N.D. Cal. 2002)
standardized contract drafted by the party with superior bargaining power and forcing the subscribing party to either adhere to or reject the contract.\textsuperscript{22}

In a legal tradition initiated by Edwin Patterson in 1919\textsuperscript{23} and expounded upon by Frederick Kessler in 1943,\textsuperscript{24} “adhesion contracts” have long been construed in favor of the weaker bargaining party.\textsuperscript{25} As Karl Llewellyn, legal realist and primary drafter of Article 2 of the UCC stated: “Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the

\textsuperscript{22} On the legal consequences of a plaintiff clicking the “I agree” dialog box in a click-wrap agreement: “Although plaintiff in his affidavit, states ‘I never saw, read, negotiatiated for or knowingly agreed to be bound by the choice of law, ’ he does not point to any conduct of defendant or other reason why he could not. Indeed as pointed out in defendant’s affidavit and argued in his memorandum, one could not enroll unless they clicked the ‘I agree’ button which was immediately next to the “read now” button or, finally, the ‘I agree’ button next to the ‘I disagree’ button at the conclusion of the agreement.”, in Groff v. America Online, Inc., 1998 R.I. Super., LEXIS 46 (Super.Ct.,R.I., Providence, May 27 1998) (C.A. No. PC 97-0331), at 12-13. But see Ian Macneil, Bureaucracy and Contracts of Adhesion, 22 OSGOODE HALL L.J. 5 (1984) (arguing that adhesive conditions are often drafted to discourage consumers from reading them, should the drafter subsequently wish to invoke them).

\textsuperscript{23} Patterson is reputed to have coined the phrase “adhesion contract.” See Edwin W. Patterson, supra note 13, p.222.


\textsuperscript{25} For classic cases on adhesion contracts and the law of unconscionability, see Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1960) (“Extreme inequality of bargaining between buyer and seller [regarding adhesion contracts] . . . is now often conspicuous. Many buyers no longer have any real choice in the matter.”) (Citing LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES 447 (2d ed. 1959). See too A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 125 (Cal. Ct. App. 1982) (“[O]ne suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller’s preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing.”).
specific, there is no assent at all.”

The result has been that, on establishing the existence of an “adhesion contract,” judges have declined to enforce such “contracts” or severed unconscionable clauses from them; or they have upheld such contracts while construing adhesive clauses within them in favor of the weaker party. Courts have ordinarily done so by disparately, emphasizing those facts which they regard as material evidence of unconscionability in each discrete case.

The primary malady associated with adhesion contract in the early Twentieth Century was that they were drafted by parties with superior bargaining power that dictated the terms of one-sided take-it-or-leave-it “deals” to inferior bargaining parties. The evil lay in the potential abuse by producers and employers of their monopolistic and oligopolistic power and in complex

26 See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960). Llewellyn added: “The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement…” supra in note. See too WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1985).

27 The logic behind this large body of law is that “The ideal adherent who would read, understand, and compare several forms is unheard of in the legal literature and, I warrant, in life as well.” Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1173, 1179 n.22 (1983).


29 “Contracts of adhesion … will not be enforced against the weaker party when it is (1) not within that party's reasonable expectations; or (2) is unduly oppressive, unconscionable or against public policy.” AEB & Associates Design Group, Inc. v. Tonka Corp., 853 F. Supp. 724, 732 (S.D.N.Y. 1994) (citations omitted)

standard form contracts they presented to a captive audience of customers and employees. As was stated in the Restatement (Second) of Contracts:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.

The idealized response to such adhesion contracts was for courts to remedy imbalances in bargaining power without trampling the freedom of contract of the parties. The purpose was to ensure that, if a condition in an adhesion contract was unduly harsh, oppressive, or unconscionable, it should be declared unenforceable. If an adhesion contract was capable of different constructions, it should be construed contra proferentum, namely, against the drafter and in favor of the weaker party.

31 Critical legal theorists like Duncan Kennedy challenges, as false, the conception of unfair bargaining power in adhesion contracts. He considers that the real concern revolves around the naiveté of the inferior bargaining party and the need for “the decision maker has to take the beneficiary under his wing and tell him what he can and cannot do.” See Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 634 (1982).


33 This concern is central to Melvin Eisenberg’s thesis that the principles of unconscionability often justify placing limitations on the bargain principle in contract in an imperfect market. See Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 HARV.L.REV.741 (1982).

34 For a critical discussion on the efficiency -- or inefficiency -- of paternalism in contract law, notably in relation to unconscionability, see Eyal Zamir, supra note 10. See too David L. Shapiro, Courts, Legislatures, and Paternalism, VA.L.REV.519 (1988).

35 The contra proferentum rule is a rule of construction, as distinct from a rule of law by which courts interpret contracts against the drafter. Courts can also apply this rule of construction to fill a “gap” or casus omission in adhesion contracts. See further infra section X. On the application of the contra proferentum rule, see Beanstalk Group, Inc. v. AM General
The law of unconscionability provided courts with a particular way of rendering oppressive or unfair contracts unenforceable. The legal basis was for a plaintiff to allege that one or more conditions in an adhesive contract was either procedurally or substantively unconscionable, or both.36 The guiding approach was for courts to scrutinize transactions in which parties had unequal knowledge about and ability to bargain over conditions, without unduly interfering with their contractual autonomy or regressing into unbridled paternalism.37 The guiding directive was for courts to apply a property rule that declined to enforce

adhesive conditions in consumer contracts, as distinct from a liability rule leading to damages.\textsuperscript{38}

The overriding directive was for courts to redress the alleged lack of mutual assent arising from the inability of weaker bargaining parties to influence the terms of such contracts,\textsuperscript{39} including negotiating for fairer terms.\textsuperscript{40} The guiding approach was for courts to arrive at rules of construction to govern such “unbargained” contracts, more accurately described as “as if” or quasi contracts.\textsuperscript{41} As John Murray proclaimed:

\begin{quote}
This process does not deserve to be called contractual. It is not democratic and, in a society based on mass production which
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\textsuperscript{39} On a classic adhesion -- bullet proof -- securities contract, see Judge Posner’s decision in \textit{Carr v. CIGNA Securities, Inc.} 95 F.3d 544, 548 (7th Cir. 1996). “[I]t would be unreasonable to expect Carr to pore through 427 pages of legal and accounting mumbo-jumbo looking for nuggets of intelligible warnings.”
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\textsuperscript{41} Such “contracts” are more accurately conceived as “quasi-contracts” due to the adhering party’s failure to assent to their material conditions and in particular, to conditions imposed on that party after the date of “contracting”. See further infra section X.
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requires standardized forms even among competitors, it is essentially unfair.\textsuperscript{42}

Conditions excluding or limiting liability in such imperfect contracts were deemed not only to be oppressive, but as inducing consumers to contract based on a dubious and inchoate consent.\textsuperscript{43} Key factors in determining the enforceability of allegedly oppressive contract conditions included: the complexity, size, location and number of those conditions, the reasonable comprehension of them by adhering parties, and whether their use crossed a procedural threshold of enforceability in contract law akin to the threshold of due process in constitutional law.\textsuperscript{44}

Even those who maintained that contract efficiency was the true mission of contract law sometimes acknowledged that contracts were hardly efficient when big business sought to impose onerous conditions that most consumers either did not read or did not comprehend.\textsuperscript{45} Such supplier imposed conditions were often

\textsuperscript{42} See John E. Murray, Jr., The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 CORNELL L. REV. 735 (1982)
\textsuperscript{43} “A party misled as to the utility to be derived from a proposed transaction cannot properly evaluate the true benefits and costs of the deal . . . The presumption that the agreement will lead to a value increasing exchange, therefore, is rebutted.” See Michael I. Myerson, \textit{Efficient Consumer, The Efficient Consumer Form Contract: Law and Economics Meets the Real World}, 24 GA. L. REV. 583, 589 (1990).
\textsuperscript{45} See \textit{WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW} 281–82 (1987) [Dealing with the exclusion of liability by manufacturers of, among others, motor vehicles, for personal injury].
not only unfair, but also inefficient. Behavioral economists, in turn, opined that consumers lacked the capacity to make rational choices in the face of unduly complex contracts, and proposed regulating mass consumer contracts in the public’s best interests.

v. The Twentieth First Century consumer

The prototype early-Twentieth Century “victims” of unconscionable contracts were consumer presented with complex fine print clauses providing all-or-nothing choices who lacked the capacity to understand the unfair significance of those terms, change them, or avoid the harsh legal consequences of acceding to such one-sided “deals.” Twenty First Century jurisprudence has cast some

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47 This analysis is based on a conception of “economic rationality” that includes assessing how consumers form perceptions and how those perceptions influence their decisions. See generally Daniel McFadden, Rationality for Economists?, 19 J. RISK & UNCERTAINTY 73, 73 (1999).

48 On asymmetrical conception of paternalism grounded in behavioral psychology to contract law, see supra note 37.

49 This is not to suggest that many consumers could not ascertain the meaning of exclusion clauses in contracts; it is simply that the cost of them doing so often exceeds the value of the contract. On the cost disincentive to study detailed contract terms, see Melvin A. Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211, 243 (1995).

50 One can rationalize complexity in contracts by asserting that contracts are inevitably more complex because they plan for an uncertain future. See Karen Eggleston, Eric A. Posner, and Richard Zeckhauser, The Design and Interpretation of Contracts: Why Complexity Matters, 95 NW.L.REV.91 (2000). Appropriate responses include: that the same case can be made about any form of law that facilitates or regulates future
doubt on this monolithic image in a new era of e-commerce and instantaneous contracting. The monolithic supplier who dominated the market and the supplicant consumer who satiated that producer’s every whim is marginally less obvious today than it was for Edwin Patterson in 1919. Some online consumer-purchasers have higher levels of product awareness and access to more reliable product data in making purchasing choices than a century ago. They enjoy a wider selection among goods and service and better understand consumer markets. They engage in more comparison shopping directed at securing the best deal in modern mass information markets. They are also better conduct; and that the law of contract provides for an uncertain future, such as when claims are made that contract performance has become commercially impracticable due to unforeseen circumstances beyond control under article 2-615 of the UCC. See further Trakman, Winner Take Some: Loss Sharing and Commercial Impracticability, 69 MINN. L. REV. 471 (1985).

51 On a now classical discussion of the growth of global cyber-commerce involving consumers, see David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367 (1996).


53 See Edwin W. Patterson, supra note 13.

able to influence suppliers to provide preferable services in competitive supply markets.  

The late Twentieth Century has also heralded reformulated conceptions of both fair and efficient contracting. Some hold that “new” classes of consumers make informed choices not to study fine print clauses because of the low probability that such knowledge will subsequently be required. In purchasing without discussion of contract terms, these “new” consumers help to reduce the costs of their suppliers, leading to lower prices in markets in which consumers enjoy choice. “If enough consumers comparison shop to make it profitable for firms to compete on price and quality, firms also are likely to compete on terms.”

According to this rationale, the Twenty First Century boiler-plated contract is simply the means by which new classes of consumers bargain, whether expressly or tacitly, for the most efficient price. The drafter presents these consumers with a “bargain” by formalizing its contracts, reducing transaction costs and ultimately, lowering prices. New consumer classes that sacrifice the “give and take” of active engagement, tacitly accept the drafter’s “bargain.” The unbargained contract remains a “bargain” because both parties want to benefit

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56 See e.g. Michael I. Myerson supra note 43 at 598. On the consumers’ inability to influence the terms of such contracts, see infra section IV.

57 Typically, in the recent case of Gatton v. T-Mobile USA Inc., 152 Cal. App. 4th 571 (2007) the court noted that “subscribers' claims involved individual damages as small as $200, making a class action the only practicable way for subscribers to seek redress…” Westlaw para. 15.

from the efficient manner in which it is concluded. In Ronald Coase’s economic vernacular, absent income effects and transaction costs and regardless of their initial position, consumers and producers avoid dickering over terms because such avoidance is efficient. Mass suppliers draft contract conditions in light of how effectively they protect their economic interests, bypassing terms that elicit unfavorable consumer reactions.

In defense of the “unbargained” Twenty First Century contract, new consumer classes are sometimes depicted as opportunistic, “bribing” suppliers into reducing price and outwitting sales agents into sacrificing commissions. Aggressive customers are presented as securing concessions from mass suppliers by threatening to incite copycat behavior by other consumers including through


60 See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON.1 (1960). The problem with this analysis is twofold. Firstly, it ignores the extent to which parties including consumers accept the status quo rather than the status ex post. See Robert Prentice, Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis, 2003 ILL.L.REV.337 (2003); Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 CORNELL L. REV. 608, 611–12 (1998). Secondly, the Coase analysis assumes that consumers presented with form contracts are able to so bargain. The underlying rationale of supplier-consumer contracting is that consumers lack this capacity. See further infra section IV.

61 That is not to say that mass contracting is not costly, except that it is less costly for a supplier to devise a contract that is litigation proof. The problem is that seemingly litigation proof contracts are often challenged. See Alan Schwartz and Joel Watson, The Law and Economics of Costly Contracting, 20 J.LAW, ECONOMICS & ORGANIZATION 2 (2004).

62 On these categories of consumers see infra section III, i. & ii. On such purchaser abuse, see e.g. DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 156–57 (2000); Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J.LEGAL STUD.549 (2003).
class action. The presumed result is that suppliers that are faced with increased transaction costs will make concessions in order to avert losses arising from such consumer activism.

Despite these claims of new consumer power, the underpinnings of mass adhesion contracting in the Twenty First Century remain intact. Mass suppliers still have economic incentives to rely on standardized methods of contracting including modifying conditions in mass contracts at their discretion after the date of purchase. Even if they make concessions to a few aggressive consumers, suppliers still use contracts to subjugate the vast majority of their customers, including by excluding class actions.

63 Argument over the percentage of consumers who can understand complex terms in adhesion contracts is speculative. It is easier to determine the percentage that bring suit on account of such terms. See e.g. Steven P. Croley & Jon D. Hanson, Rescuing the Revolution: The Revived Case for Enterprise Liability, 91 MICH. L. REV. 683, 687 (1993); See Schwartz & Wilde, supra note 58, at 660.
64 The assumptions here are twofold, that aggressive customers may display a “herd” mentality, with the mass following a few leading bulls; and that suppliers may also display a “herd” mentality in reacting to consumer demand. See further Marcel Kahan & Michael Klausner, Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior, and Cognitive Biases, 74 WASH. U. L.Q. 347, 353–59 (1996); David Scharfstein & Jeremy Stein, Herd Behavior and Investment, 80 AMER.ECON. REV. 465, 466 (1990); Myerson, Efficient Consumer, supra note 43, at 596; Schwartz and Wilde, supra note 58, at 630.
65 Rakoff describes this standardization is as much directed at maintaining organizational hierarchies as trying to be efficient. See Rakoff, supra note 27, at 1220–29.
66 For the argument that such after-the-fact “modifications” do not form part of the contract under Article 2 of the UCC unless they are expressly agreed upon by the parties, see e.g. Richard E. Speidel, Symposium: The Revision of Article 2 of the Uniform Commercial Code: Contract Formation and Modification Under Revised Article 2, 35 WM. & MARY L. REV. 1305, 1323 (1994).
Mass suppliers may well assume that a small proportion of Twenty First Century consumers are more discriminating today in choosing among suppliers, in repeat purchasing and in buying goods for resale than in decades past. They may know that some customers will accept one-sided adhesive conditions involving low cost goods in return for lower prices. They may satisfy the demands of aggressive consumers, while continuing to impose harsh conditions on the rest. They may believe that the risk of ensuing conflict arising over adhesive conditions in contracts is marginal compared to the profitability of high volume sales; and they may hide concessions to litigious customers by enforcing those conditions on others on the assumption that most customers will not complain so long as they are not so informed. Suppliers may be wrong about any one of these assumptions; but most will bear the risk of error as the price of doing business.

ii. Repeat-order consumers

Repeat-order consumers include those who order goods and services by telephone or online over a sustained period of time. They include repeat order purchasers of products like computers or software purchased and downloaded from the Internet. Not infrequently, repeat order customers are familiar with contractual terms governing comparable sales. A few may have studied

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68 On these categories of “new” consumers, see infra section III.
69 The assumption is that standardization reduces negotiation costs. For such arguments in relation to incomplete (unperfected) contracts, see e.g. Ronald A. Dye, Costly Contract Contingencies, 26 INT’L ECON. REV. 233, 236–37, 245–46 (1985).
70 For comparable arguments, see Meyerson, Efficient Consumer, supra note 46, at 602
71 On such cost efficiencies associated with standardized consumer contracts, see Michael I. Myerson, supra note 43, at 599.
applicable contract conditions, have access to informed legal advice and even be lawyers themselves.\textsuperscript{72}

Repeat-order consumers may know about comparable products and services including similarities in contractual conditions. They may also tolerate adhesive conditions in such contracts in return for the opportunity to pay less for goods and services, not unlike consumers who accept a greater share of the risk of lower prices in product liability cases.\textsuperscript{73}

iii. Merchant-consumers

A second class of consumers includes merchant-consumers who have varying degrees of understanding about conditions governing the sale of goods and services, alternative supply contracts and market conditions.

\textsuperscript{72} On a lawyer-consumer plaintiff, see e.g. \textit{Forrest v. Verizon Communications, Inc.}, 805 A.2d 1007 (D.C. 2002) where the purchaser of an online DSL service license was a lawyer working for the Department of Justice, and presumably able to understand the legal significance of the forum selection clause in the applicable contract. But see Stewart Macaulay, \textit{Freedom from Contract: Solutions in Search of a Problem?}, 2004 Wis.L.REV.778, 802-819 (arguing that educated consumers are unlikely to comprehend clauses that refer disputes to the National Arbitration Forum).

Illustrating this class are merchant-consumers who purchase domain names for resale. In *DeJohn v. TV Corporation Intern.*[^245] the plaintiff claimed that .TV Corporation had violated the *Illinois Consumer Fraud and Deceptive Practices Act* in declining to permit him to register a domain name. In rejecting DeJohn’s claim, the court held that, in intending to purchase domain names for resale, DeJohn was not a "consumer" protected by that Statute. In effect, DeJohn was a merchant-consumer.^[75]

Cyber-squatters who purchase for resale domain names that are “confusingly similar” to famous brand trademarks are a distinct class of merchant-consumers.^[76] They purchase online one or more domain names for a few dollars for the explicit purpose of using them to direct online traffic away from famous to alternative websites, or to resell them to trademark holders whom they target.^[77] Cyber-squatters are sophisticated in appreciating that tribunals may

[^74]: The name “merchant-consumer” is my own, although it may have been used by others.
[^76]: The Anticybersquatting Consumer Protection Act (ACPA), 15 USC §1125(D) “was intended to prevent ‘cybersquatting’, being the registration of a distinctive trademark and domain name of others in respect of which the registrants has no legal right, acts in and/or uses that registration in bad faith with the intention of profiting from the name and goodwill associated with the disputed mark or domain name.” See further *Shields v. Zuccarini*, 254 F3d 476 (3d Cir. 2001) [“T]he intentional registration of domain names that are misspellings of distinctive or famous names,
cancel disputed domain names on grounds that they lack a legal right to them or for using them in bad faith. They also know that, should those domain names be cancelled or transferred, they can purchase substitute names at limited cost. 

iv. Implications arising from “new consumers”

Growing classes of merchant-consumers are better able to exploit the vulnerabilities of large scale producers with deep pockets and reputations to lose than in years past. Some classes of merchant-consumers are also better able to take advantage of their fellow consumers, such as by trafficking in online gambling and pornography. However, the existence of new classes of merchant-consumers does not infer that most consumers are equipped to outmaneuver suppliers that devise one-sided adhesion contracts. The presence of budding networks of online consumers who exchange complaints is more than offset by the massive number of consumer who continue to lack the resources, know-how and confidence to challenge large scale producers.

causing an Internet user who makes a slight spelling or typing error to reach an unintended site . . . is a classic example of a specific practice the ACPA was designed to prohibit.”] See Jacqueline D. Lipton, supra note 76; Lisa M. Shrrock, supra note 76.

Redressing these concerns are a key goal of, among other legislation, the Anticybersquatting Consumer Protection Act (ACPA), 15 USC §1125(D). See too supra note 77.

Public policy directed against activities like gambling is a two edged sword. States are interest in discouraging gambling; but they are also interested in revenues generated from gambling. See e.g. People of New York v. World Interactive Gaming Corp., 185 Misc. 2d 852, 714 N.Y.S.2d 844 (N.Y. County Sup. Ct. 1999) in which the Court’s decision that state and federal law prohibited the offer of Internet gambling in New York benefited offline gambling in New York. But cf. In re Mastercard Int’l Inc. Internet Gambling Litig., 313 F.3d 257, 263 (5th Cir. 2002) in which the Court held that the Wire Act does not prohibit non-sports internet gambling.

This statement is difficult to prove. There are too many variables to measure in determining the percentage of consumers who surpass selected thresholds of market and legal sophistication. It is also more reasonable to assume that the growth of new classes of savvy consumers, however
III. THE TWENTY FIRST CENTURY “WRAP” CONSUMER

Included among new classes of Twenty First Century consumers are those who conclude shrink-wrap, box-wrap, click-wrap or browse-wrap contracts with large scale producers and distributors with varying degrees of regularity. This class is most closely associated with traditional adhesion contracting. The conditions contained in applicable “wrap” contracts of supply and service are often detailed, syntactically complex and favor the superior drafting supplier; and the “wrap” consumer must agree to the adhesive conditions or decline to contract. In extreme forms, these adhesion contracts include clauses that exclude rules of construction like the *contra proferentum* rule by which contracts are construed against the drafter.\(^82\)

This class of consumers is also distinguishable from traditional consumer contracts in that it includes, among others, repeat order consumers, consumer-merchants who resell products and services, and consumers who have significant market choice. The first two sub-classes are discussed above and will be dealt with only briefly below;\(^83\) the third is a more pervasive category of “wrap” consumers. All three classes share to varying degrees the improbability that they will selectively scrutinize conditions in “wrap” contract due to the cost and

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\(^82\) A technique used by drafters of mass contracts is to exclude the *contra proferentum* rule, providing that the rule “that a contract be interpreted against the drafter” “should not apply to this agreement.” See generally, Michael E. Sykuta, *Empirical Research on the Economics of Organization and the Role of the Contracting and Organizations Research Institute, CORI, Contracting and Organizations Research Institute, University of Missouri-Columbia, Dec 19, 2001*.

\(^83\) See section II, ii & iii.
limited benefit of disseminating such information. They will also act rationally in not reviewing conditions in comparative low price contracts. “[I]t [is]clear that in some cases, paradoxically, it would be irrational to become fully informed.”

i. Repeat-order consumers

Repeat-order consumers buy and sell goods and services regularly, primarily by phone or online. They may be familiar with shrink-wrap, box-wrap, click-wrap and browse-wrap contracting including some of their take-it-or-leave-it conditions. They may also encompass merchant-consumers who resell “wrap” products and services as well as those who exercise market choice by selecting among competing off- or online suppliers on the basis of quality, price and other conditions of purchase.

ii. Merchant-consumers

“Wrap” consumers include those who purchase online products like software that are subject to supplier conditions regarding use and resale and who then resell them to third parties. The question, in each case, is whether the supplier’s conditions on use and resale are enforceable against these merchant-

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85 Cyber-squatters engage in such selective target practices when they choose “target” companies upon whose trade marks they can most beneficially “squat”. See supra section II, ii.

86 See e.g. ProCD Inc. v. Zeidenberg, 86 F.3d 1447(7th Cir 1996).
consumers in particular.\textsuperscript{87} The underlying issue is whether such consumers are end-users, or more truly resellers. Illustrating this sub-class of merchant consumers is the shrink-wrap case of \textit{ProCD, Inc. v. Zeidenberg}.\textsuperscript{88} The question there was whether Matt Zeidenberg, in purchasing a CD which he resold to his own customers was bound by a shrink-wrap contract that included conditions restricting resale, as will be discussed later.\textsuperscript{89}

iii. Consumers with market choice

A third sub-class, often combined with other classes of consumers, includes those who are able to exercise extensive market choice among competing suppliers. What they lack in capacity to influence the conditions of supply contracts, they have in choices among market alternatives. Illustrating this class of consumers is \textit{Brower v. Gateway}.\textsuperscript{90} On its face, Gateway’s shrink-wrap contract to sell computers and software by telephone or mail directly to customers was adhesive: Gateway’s customers did not have equal bargaining power to Gateway. The court nevertheless concluded that the contract, including its disputed arbitration clause did not constitute an onerous take-it-or-leave it option. Firstly, the contract provided plaintiff consumers with the option to return the goods. “The consumer has 30 days to make that decision. … [U]ntil those 30 days have elapsed, the consumer has the unqualified right to return the merchandise, because the goods or terms are unsatisfactory or for no reason at all.”\textsuperscript{91}

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\textsuperscript{87} On the argument that a purchaser for the purpose of resale, here of domain names, is not really a “consumer”, see \textit{DeJohn v. TV Corporation Intern}, 245 F. Supp. 2d 913 (C.D. Ill., 2003)
\textsuperscript{88} \textit{ProCD, Inc. v. Zeidenberg}, 86 F.3d 1447(7th Cir 1996); see further supra section V,i.
\textsuperscript{89} Id.
\textsuperscript{90} 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998)
\textsuperscript{91} Id at 248.
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Secondly, plaintiff consumers had the option to buy comparable goods from other suppliers. The court acknowledged that doing so required them to act affirmatively and involved additional cost; but the tradeoff of buying by telephone and mail was justified by “the convenience and savings” of direct shopping.\(^\text{92}\)

These judicial statements presuppose that the appearance of consumer choice in mass contracts is real, not feigned. The fact that consumers have thirty days in which to return products is less self-evidently a market choice when return clauses are buried among a plethora of legal provisions at the back of the owners’ manual and not highlighted for the consumer.\(^\text{93}\)

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\(^{92}\) “While returning the goods to avoid the formation of the contract entails affirmative action on the part of the consumer, and even some expense, this may be seen as a trade-off for the convenience and savings for which the consumer presumably opted when he or she chose to make a purchase of such consequence by phone or mail as an alternative to on-site retail shopping.” Id at 247. On a “law and society” reflection that businessmen, as distinct from consumers, often are not concerned with the fine print in contracts, but with performance, see Stewart Macaulay, \textit{Non-Contractual Relations in Business: A Preliminary Study}, 28 AM.SOCIOLOGICAL REV.55,58 (1963). Arguably, consumers do not read fine print for similar reasons as business people at least in sharing the hopeful expectation of performance under the contract, not default. However, consumers lack the protection of “back room” lawyers to protect their legal interests should such optimism prove unjustified. See William C. Whitford, \textit{Comment on a Theory of the Consumer Product Warranty}, 91 YALE L.J. 1371, 1383 (1982). On optimism as a behavioral motivation in psychology, see Neil D. Weinstein, \textit{Unrealistic Optimism About Future Life Events}, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 809–14 (1980).

iv. Simplified conditions

A final category of “new” mass consumer contracts includes contracts that lack key ingredients of adhesion contracts. Typically, supply contracts may be expressed in simple language; their conditions may be tailored to consumer needs and they may be explained to customers before finalizing the contract. One could argue that *Brower v. Gateway*, involving the right of consumers to return goods, was tailored to the needs of consumers.

Mass producers and distributors that use simplified conditions ordinarily do not forego their bargaining power. In providing customers with the opportunity to review “wrap” conditions and to void contracts within an allowable period, they choose rather to enhance their reputations for fair dealing while also discouraging adventitious suit against them.94

On their face, seemingly consumer friendly contracts are poor candidates for claims of unconscionability. Some judges are also unlikely to hold that contracts that provide customers with due notice of conditions and the opportunity to void them are procedurally unconscionable. As the court held in enforcing AOL’s click-wrap license in *Groff v. America Online, Inc.* 95 “[P]laintiff effectively ‘signed’ the agreement by clicking ‘I agree’ not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc.

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and is bound to the terms of his agreement.”

Likeminded courts are also less likely to hold suppliers that provide customers with notice of onerous performance conditions in their contracts acted unconscionably, even though consumers are unlikely to have read them. As was stated in Brower v. Gateway 2000 Inc.:

“That a consumer does not read the agreement or thereafter claims he or she failed to understand or appreciate some term therein does not invalidate the contract any more than such claim would undo a contract formed under other circumstances.”

Nor are courts that are similarly disposed likely to hold against suppliers because of their self-interested motivates in making concessions to their customers. Judges ordinarily evince the intention of suppliers from their contracts as distinct from their motives in devising contracts.

IV. CHALLENGING THE NEW ORTHODOXY

Balanced against the vision of consumer-merchants and repeat business consumers is, not that consumers choose not to read or understand boiler plated contracts, but that their suppliers do not want them to read those contracts.

96 Id, at *13.
97 Id, at 247.
98 Motive relates to the reason why a party enters into a contract, for example, because of a desire to receive a particular good or service. Intention relates to the state of mind of that party specifically in contracting, namely, to enter into a binding legal relationship. On the distinction between motive and intention, see Robert L. Hale, Bargaining, Duress and Economic Liberty, 43 COLUM. L.REV.603 (1943); Robert L. Hale, Force and the State: A Comparison of “Political” and “Economic” Compulsion, 35 COLUM. L.REV.149 (1935).
Consumers who read contracts and ask questions slow down sales; they also invite negotiations that suppliers have good economic reasons to avoid.  

Repeat-order and merchant-consumers operate at the fringes of consumerism, not the center. Most consumers are unaware of the intricacies of form contracts because the cost of acquiring such information is exorbitant and suppliers create barriers to acquiring it. Even were such barriers to acquiring information not in place, as the late Arthur Allen Leff would have it, “[m]any people don’t read contracts at all. . . . Some people would sign a contract even if ‘THIS IS A SWINDLE’ were embossed across its top in electric pink.”

Even proponents of efficient contracting question whether efficient outcomes are likely to eventuate from adhesion contracts that lack a *laissez faire* bargain. The assumption that suppliers reduce prices in return for conditions that favor them presupposes that they believe that their customers are sensitive to such contractual strategies. The assumption that purchasers bargain for and accept

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100 On this cost to consumers, see Croley & Hanson, supra note 66, at 776; R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 664 (1996).


such conditions in return for lower prices are doubtful in contracts in which no bargaining occurs.\textsuperscript{103}

Large scale producers of software and computer products and online service providers still operate as oligopolies. They sell goods and services within markets inhabited by traditional consumers -- moms and dads, teenagers, office workers and students. The simplified language in their software and service licenses usually stems, not from their awakened appreciation of consumer power, but from a calculated design to insulate themselves from costly disputes.\textsuperscript{104} From software manufacturers to sellers of mobile phones, suppliers carefully carve out exclusion and limitation of liability clauses to minimize unexpected losses and to maximize on profits.\textsuperscript{105} However seemingly simplified their contracts may be, they stipulate for binding arbitration and against class actions to reduce their costs of conflict, to discourage consumers from suing and failing that, to pre-select a business-oriented tribunal. Their goal is not to establish a consumer friendly, or even a mutually convenient forum in which to redress consumer disquiet.\textsuperscript{106} In compromising with aggressive consumers over

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\textsuperscript{103} On consciousness of consumers about price, rather than other contract terms, see William C. Whitford, \textit{Law and the Consumer Transaction: A Case Study of the Automobile Warranty}, 1968 WIS. L. REV. 1006, 1097.
\textsuperscript{104} On these arguments, see e.g. Todd D. Rakoff, supra note 27.
\textsuperscript{106} For discussion as to whether binding arbitration is more efficient than trial by jury, given the expertise of arbitrators, and the cost and time of litigation, see e.g. Stephen J. Ware, \textit{Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights}, 67 LAW \& CONTEMP.PROB.167 (2004); Jeffrey.W. Stempel, \textit{Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism}, 19 OHIO ST.J.DISPUTE RES. 757 (2004).
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stringent conditions while applying those conditions to all other consumers, they play the odds that most consumers will not complain and yet fewer will sue.\textsuperscript{107}

The prevalent consumer contract remains, as it was a Century ago, a take-it-or-leave-it arrangement.\textsuperscript{108} Whether or not consumers have sufficient advance notice of conditions in software and service licenses and whether or not they can void contracts with which they are dissatisfied, the conditions which large scale software producers and online service providers proscribe remain one sided, “their” sided. However sophisticated repeat business consumers may have become, most are still profoundly open to exploitation by mass suppliers who dominate the world of artificial intelligence and cyberspace. In advertising the just-a-click-away-deal-of-the-month, computer and software sellers and online service providers alike seek to maximize on sales volume while continuing to discourage consumers from pursuing options that threaten to reduce profit margins.\textsuperscript{109}

In summary, despite the hype about sophisticated post-modern consumers, market dominance by more knowledgeable, better skilled and better resourced producers of mass goods and services about which Edwin Patterson wrote about in 1919 and Frederick Kessler reiterated in 1943 remains part of our post-2000 world.\textsuperscript{110}

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\textsuperscript{107} See e.g. Cruz & Hinck, supra note 100, at 674; Goldberg, Institutional Changes, supra note 7, at 485; Meyerson, Objective Theory, supra note 46, at 1270–71.
\textsuperscript{109} For argument that non-drafting parties to standardized contracts are rational decision-makers only about some contract terms, and that drafting parties have the incentive to include terms, whether efficient or not, that favor themselves, see Russell B. Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, CHI.L.REV.1203 (2003).
\textsuperscript{110} See Edwin W. Patterson, supra note 13, at 222; Friedrich Kessler, supra note 24, at 642.
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V. REGULATING MASS CONTRACTS

To the extent that the Twenty First century has given rise to a two-sided “wrap” Law Merchant, notably in e-commerce, how can courts recognize this development while still paying heed to the adhesive predicament of most consumers?111 If large scale producers impose self-serving rules of practice upon consumers in most “wrap” contracts, how can judges devise suitable rules of construction to regulate these contracts without stultifying the free exchange of goods and services?112

i. Enter Judge Easterbrook

A few determined judges can change legal practice. In 1996, Judge Frank H. Easterbrook, an influential law professor and even more influential judge,113 decided that a CD producer could use an end-user licensing agreement [EULA], to restrict the purchaser’s use of a copyrighted CD. In ProCD, Inc. v. Zeidenberg,114 Easterbrook ruled that Mathew Zeidenberg, in opening a CD package, assented to be bound by shrink-wrap conditions prohibiting copying

113 Judge Easterbrook, now Chief Judge of the United States Court of Appeals for the Seventh Circuit was formerly a professor of law at the University of Chicago. See further on his background and experience, http://en.wikipedia.org/wiki/Frank_Easterbrook
114 86 F.3d 1447 (7th Cir. 1996)
the data for resale. Judge Easterbrook’s reasoning was grounded in the flip side of the principle of freedom of contract: just as parties are autonomous in deciding with whom to contract, they were bound by that to which they agreed: *pacta sunt servanda*, agreements are binding. By agreeing to the license restricting the use of data on the CD purchased from ProCD, Zeidenberg consented to be so bound.

Judge Easterbrook’s decision is important because it emphasizes that the regulation of end user sales is effectuated, not only by how vendors package and market goods and services, but by how customers enter and participate in those markets. On the nature of the software market and in particular, “the product” purchased by consumers, Easterbrook remarked: “[t]erms of use are no less a part of ‘the product’ than are the size of the database and the speed with which the software compiles listings.”

Implicitly endorsing the conception of a merchant-consumer, Judge Easterbrook debunked the image of a monolithic consumer to an adhesion contract. Zeidenberg was no ordinary consumer. A PhD student and a repeat buyer of software, he was aware of restrictions in the software license which he chose to ignore. He misrepresented himself as an end user consumer while reselling the data on the CD to his own customers. As such, Zeidenberg was bound by the

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116 See supra note 114 On EULA’s, see http://www.webopedia.com/TERM/E/EULA.html%23
117 Supra note 114, at 1453.
118 Easterbrook added: “[c]ompetition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.” Id, at 1453.
law explicated in the contract including its shrink-wrap conditions, not by principles of equity superimposed upon it by the law of unconscionability.\textsuperscript{120}

For Judge Easterbrook, the State of Wisconsin has passed Article 2 of the UCC, including section 2-204 which stated: "A contract for sale of goods may be made in any manner sufficient to show agreement…"\textsuperscript{121} Judge Easterbrook did not canvass the UCC’s definition of “agreement” in section 1-201(3) as "the bargain of the parties in fact..",\textsuperscript{122} presumably on the assumption that Zeidenberg had concluded such “a bargain”. Easterbrook also did endorse the District Court’s unqualified rejection of ProCD’s argument that copying a CD including non-copyrightable data constituted copyright infringement.\textsuperscript{123} He also hurried over the fact that purchasers received notice of the licensing restriction only after purchasing the CD, and that such notification was printed in minute font on the bottom flap of the box.\textsuperscript{124}

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\textsuperscript{120} On the Law Merchant, see Leon E. Trakman, From the Medieval Law Merchant to E-Merchant Law, supra note 111; LEON E. TRAKMAN, THE EVOLUTION OF THE LAW MERCHANT: OUR COMMERCIAL HERITAGE (Fred B. Rothman, 1983).
\textsuperscript{121} See supra note 114, at 1452. On Chief Judge Crabb’s very different construction of s.2-204 in the District Court, see ProCD, 908 F. Supp.645, at 652.
\textsuperscript{122} On the District Court’s consideration of s.2-204, see id. At 655-656.
\textsuperscript{123} Id. at 645, at 648-658.
\textsuperscript{124} See e.g. Stewart Macaulay, Freedom from Contract, supra note 72, at 802-819; Stewart Macaulay, Relational Contracts Floating On a Sea of Custom? Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein, 94 NW. L. REV.775, 779 n.25 (2000) “When we look at a ProCD box, Judge Easterbrook’s ‘offer’ becomes pure fantasy. The notice is printed on the bottom flap of the box, flanked by a statement in large type that there are 250 million telephone numbers on 11 CD-Roms and the bar code for the scanner. The notice is printed in 6-point type in a space 2 3/4th inches by 1 inch.” See too, Roger C. Bern, “Terms Later” Contracting: Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding, 2004 J.LAW & POLICY 642; Batya Goodman, Comment, Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract, 21 CARDOZO L. REV. 319, 352 (1999); Kristin Johnson Hazelwood, Note, Let the Buyer Beware: The Seventh Circuit’s Approach to Accept-or-Return
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ii. Some tentative conclusions

On its face, ProCD v. Zeidenberg presents a transformative view of the Twenty First Century merchant-consumer. In support of this transformation is the alleged emergence of new patterns of consumerism that includes more discriminating, discerning and better educated consumers than in past eras. Influencing this development is the emerging sophistication of consumers in direct telephone and online shopping in our modern technological age. The “new” cyberspace consumer presumably gleans information about software products and Internet services from the Internet, including about conditions restricting legal action and governing return policies, as well as about competition. So too, cyberspace consumers increasingly populate online networks in which they exchange complaints about products and services.

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On debate over the extent to which Article 2 of the UCC is a merchant code to which consumer protection is peripheral, see e.g. Scott J. Burnham, Why Do Law Students Insist That Article 2 of the Uniform Commercial Code Applies Only to Merchants and What Can We Do About It? 63 BROOK. L.REV. 1271,1271(1997).

Shiffrin, supra note 8, rejects judicial paternalism on grounds that it undermines the capacities, powers and entitlements of the autonomous agent, Id, at 220. She favors a “self-regarding” theory of unconscionability that empowers a court to decline to enforce a contract by which one party takes unfair advantage of, or exploits, the other, Id, at 230-1.

Despite the diffusion of one-sided adhesion contracts and the alleged ascent of new cyberspace merchant-consumers in cases like ProCD v. Zeidenberg, the classical adhesion contract is still primarily at work in producer driven markets. Notwithstanding the emergence of cyberspace merchant-consumers, software producers continue to maximize on profits and reduce costs by limiting access of customers to legal redress.128 Offline sellers and online service providers that direct consumer complaints to automated email responses and devise end-user licenses as barriers to class actions are better able to meet profit margins than by wooing customers with customer friendly contract conditions.129


129 See e.g. Klocz v. Gateway, Inc., 104 F. Supp.3d 1332 (D. Kan., June 16, 2000). A box-wrap case, the court dealt with the rules governing the formation of a contract under UCC § 2-207. In declining to enforce an arbitration clause included in a computer box, the court held that, “Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff’s acceptance of [Gateway’s] Standard Terms. Id. at 134
Those who dispute the existence of new arms length relationships between online service providers and their customers also question the efficiency and fairness of consumer transactions. They rekindle Karl Llewellyn’s concern in 1931 that competition among big businesses leads to self-protective rather than consumer protective results.\textsuperscript{130} They challenge the pervasiveness of Zeidenberg merchant-consumers, resurrecting in their place subservient end-users, including Matt Zeidenberg, to whom contract conditions suppliers dictate conditions in supply driven mass markets.\textsuperscript{131} For them, the case of \textit{Pro-CD v. Zeidenberg} is less about disciplining Zeidenberg for acting as a merchant-consumer than about reducing \textit{Pro-CD}'s costs and increasing its returns on sales. Companies like \textit{Pro-CD} may pass on some benefits to consumers, offering them a more comprehensive database at more affordable prices. However, that outcome derives, not from the “contract” between suppliers and their customers, but from suppliers acting as private “legislatures.” The issue is not whether \textit{Pro-CD} acted conscionably in “contracting” with Zeidenberg but whether its private legislation ought to have been declared “unconstitutional.”\textsuperscript{132}

In deciding whether to impose “constitutional” limits on suppliers in “wrap” relationship with their customers, courts straddle a difficult divide between facilitating mass exchange and regulating “legislated” transactions in fast growing mass markets such as the Internet.\textsuperscript{133} Their dilemma is to resolve fairly and efficiently the tension between market competitiveness and unfair

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\textsuperscript{131} For an interview with Matt Zeidenberg, see William C Whitford, \textit{ProCD v. Zeidenberg in Context}, 2004 WISC.L.REV. 821. See too, supra Section V, i.
\textsuperscript{132} See Macaulay, supra note 72 and Whitford, id.
\textsuperscript{133} On the primarily facilitative function of Article 2 of the UCC and its regulatory function of unconscionable conduct, see supra note 7 and section II.
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VI. ENTER THE DRAGON: END USERS’ LICENCE AGREEMENT

The analysis thus far has concentrated on the legal significance of “new” classes of consumers in Twenty First Century mass markets. What needs to be determined now is the nature of “wrap” contracts in these markets, the extent to which their terms are adhesive, and the manner in which courts ought to construe them. This requires focusing on the types of conditions to which consumers are asked to assent, including the conditions imposed on them after concluding a contract. It also entails asking: Who is a reasonable consumer in a “wrap” contract: a sophisticated or a neophyte, or someone between these two extremes? So too, judges must determine the standard of reasonableness upon which to frame the assent of consumers to mass supply contracts?

i. The End Users’ License Agreement [EULA]

The modern End Users’ License Agreement [EULA] is widely used by producers and distributors to grant licenses to end users of software among other products and services. EULAs and comparable end-user service agreements

134 For the view that such competition benefits consumers, see SLAWSON, BINDING PROMISES, supra note 115, at 32. For the comparability of car manufacturer warranties among Ford, GM and Chrysler, see Whitford, Law and the Consumer supra note 92, at 1013. These issues are by no means new. See George G. Bogert & Eli E. Fink, Business Practice Regarding Warranties in the Sale of Goods, 25 ILL. L. REV. 400, 406 (1930).
135 See Slawson supra note 115, at 35.
ordinarily contain conditions limiting use including resale, as well as governing product returns, complaints and disputes.\(^\text{136}\)

At their best, EULAs are framed in simple language. Their conditions, while protective of the drafter, redress consumer needs both equitably and effectively.\(^\text{137}\) At their worst, EULA clauses require a decipherer’s code to unpack their technical, legal and self-serving jargon including the right of suppliers to change their terms virtually at any time.\(^\text{138}\) Consumer friendly or not, most EULAs include conditions that avoid or limit supplier liability and are directed at reducing supply costs and preserving profit margins.\(^\text{139}\) Despite provisions in EULAs allowing consumers to return products within specified time periods, retailers often decline to accept such returns once the software package has been opened.\(^\text{140}\) Contrary to the principles governing consent to

\(^\text{136}\) See e.g. How to Write an End User License Agreement, EULA: More Than a Contract? available at http://www.avangate.com/articles/eula-software_75.htm

\(^\text{137}\) On the equitable and/or efficient use of onerous “wrap” conditions including in EULAs, see infra section XI.


\(^\text{139}\) Drafters have access to multiple instruments in drafting contract terms including their own prior form contracts, contracts used in the industry, usages giving such contracts meaning and drafting guidebooks. See e.g. Scott J. Burnham, THE CONTRACT DRAFTING GUIDEBOOK: A GUIDE TO THE PRACTICAL APPLICATION OF THE PRINCIPLES OF CONTRACT LAW (3rd ed., 2003); Robert A. Feldman & Raymond T. Nimmer, DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER’S GUIDE (2nd ed., 2004).

\(^\text{140}\) On judicial responses to these practices, see e.g. http://www.gripe2ed.com/scoop/story/2004/12/20/8257/4850
contract, suppliers sometimes modify the conditions governing the use of their products after the date of purchase without prior or contemporaneous consent of their purchasers.

The rationale behind EULAs is both economic and legal. EULAs recognize in principle the need for modern distributors of readily reproducible products like software to restrict end use of their products if they are to operate profitably. That protection is justified on grounds that, if producers are to develop goods that can easily be copied and sold, they are entitled to impose conditions to dissuade copying and resale. The reasoning is familiar. Copying an original CD or DVD for resale contrary to an EULA is akin to forging a painting and reselling it as the original. As long as the prohibition does not over-extend the intellectual property rights of the copyright holder which arguably occurred in Pro-CD v. Zeidenberg, the result is also justified in law. So far as barring copying promotes software security without stifling creativity, the result is also efficacious.

142 On scepticism whether ex post modification of conditions in sales contracts by suppliers under Article 2 of the UCC are valid in the absence of their purchasers’ express consent, see Richard E. Speidel, *supra* note 66.
143 On the limits of such copyright protection, see Pamela Samuelson, *supra* note 19. For the argument that Judge Easterbrook over-extended that protection in *Pro-CD v. Zeidenberg*, see *supra* section V, ii.
144 On comparable arguments in products liability cases, see Epstein, *supra* note 73; Priest, *supra* note 73; Schwartz, *Proposals for Products Liability Reform*, *supra* note 73.
Typifying judicial support for EULAs that restrict end use is *M.A. Mortenson Co., Inc. v. Timberline Software Corp.* Typifying judicial support for EULAs that restrict end use is *M.A. Mortenson Co., Inc. v. Timberline Software Corp.* There, the court enforced a shrink-wrap license limiting a software producer’s liability for consequential damages on grounds that the limitation was part of the bargain reached by the parties and was legally supportable.

With some End Users Licensing Agreements growing more complex and invasive however, concern over their misuse is growing. In doubt is the extent to which suppliers use EULAs more as swords than as shields. In contention is whether conditions in EULAs sublimate the rights of consumers who are ill-informed, misled or intimidated into “accepting” them. Questioned is whether conditions in EULA’s that are disclosed after the date of purchase are part and parcel of pre-existing contracts. In issue is the extent to which draconian conditions in EULAs are not only unconscionable, but also lack cognizable purchaser consent.

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146 Typifying an invasive ex post licensing arrangement imposed on consumers is Microsoft’s past practice of imposing security patches that make changes to computer operating systems, affecting computer speed and performance, without prior notice to or consent of consumers. See e.g Microsoft Security Bulletin MS02-032: 26 June 2002 Cumulative Patch for Windows Media Player (Q320920) http://www.microsoft.com/technet/security/bulletin/MS02-032.mspx 2007.
The fairness of EULAs does not reside in general assumptions about their virtues and vices, but in how judges apply them in fact.\textsuperscript{149} In issue is not that EULAs are patently unfair, inherently oppressive, or fundamentally unreasonable, but that some suppliers may use them in an unfair or oppressive manner. EULAs can be valuable if they promote a robust exchange of goods and services, but troubling if they promote an exchange that is unfair.\textsuperscript{150} EULA’s can be effective if they foster cooperation between the parties, as when suppliers warrant the quality of their products, but unfair if they deny consumers the right to complain about the paucity of that warranty.\textsuperscript{151}

Given these issues, according to what criteria should courts determine the legitimacy of end user agreements? And how should they determine when a particular EULA has crossed the line between conscionable and unconscionable conduct, procedurally and substantively?\textsuperscript{152}

\textbf{ii. Restricting EULAs and service contracts}

Concern over suppliers using licensing agreements to sublimate consumers is not limited to EULAs in online purchasing. Comparable issues arise when suppliers of cellular phones employ service agreements to restrict use and bar

\textsuperscript{149} This conception of “the law in action” is a key theme in Karl Llewellyn’s realism including in the drafting of Article 2 of the UCC. See e.g. Karl L.Llewellyn, \textit{Some Realism about Realism -- Responding to Dean Pound}, 44 HARV.L.REV.1222 (1931).


\textsuperscript{151} On efficiency in product liability cases, see Epstein, supra note 73; Priest, supra note 73.

\textsuperscript{152} On this line, see e.g. Arthur Allen Leff, \textit{Unconscionability and the Code. The Emperor's New Clause}, supra note 12.
class actions against suppliers. In the recent California Court of Appeal decision, *Gatton v. T-Mobile*, the court declined to enforce a condition in the service contract of a mobile phone supplier, T-Mobile, requiring purchasers to submit claims to binding arbitration if they wished to dispute T-Mobile’s practices. The court considered several related conditions in T-Mobile’s service contract: selling locked mobiles that prevented switching to other mobile carriers, prohibiting consumers from bringing class actions, and imposing fees on purchasers who terminated their contracts prior to expiration. In issue was whether these conditions were unconscionable.

In declaring the arbitration clause requiring waiver of a class action in the cellular service contract unenforceable, the court found that T-Mobile’s conduct was both procedurally and substantively unconscionable. In particular, the arbitration clause denied consumers an affordable method of dispute resolution, seeking to undermine an apt process of consumer protection and facilitating corporate malfeasance.

The complicating feature in *Gatton* was that only some attributes of a traditional Twentieth Century adhesion contract were present. As evidence of an adhesion contract, T-mobile was in a superior bargaining position in relation to its purchasers; its complex service contract was drafted in its favor; and prospective customers were presented with a take-it-or-leave-it option. They had the choice

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155 As the court stated: “To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree, rather, the analysis employs a sliding scale in that the more substantively oppressive the contract term the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” 152 Cal.App. 4th 571 (2007), Westlaw, para. 3.
to buy on T-mobile’s terms or to forego purchasing, but not to dicker over terms.156

However, some of the trappings of adhesion contracts were debatable in Gannon. For example, whether notice to customers was adequate or not, T-Mobile claimed that it had explained the existence of qualifying conditions to prospective purchasers.157

T-Mobile also did not dominate the mobile market, but was one among multiple mobile sellers. Customers could take their mobile business elsewhere if they were dissatisfied with the notified conditions of sale in T-Mobile’s contract.158

Nor was the provision for arbitration in T-Mobile service contracts necessarily unfair. Expert arbitration is often perceived to be more reliable than reliance on judges in commercial cases and juries with limited commercial expertise.159

157 It is doubtful that T-Mobile adequately explained the legal significance of these conditions to its customers, nor if it did, whether its customers reasonably understood its explanations. Providing an accurate legal explanation to customers would have been both time-consuming and discouraged customers from purchasing.
158 Id, Westlaw, para.13.
What the court found most disturbing in *Gatton* was that T-Mobile sought to ban customers from bringing class actions directed at avoiding consumer protection laws in California. In effect, T-Mobile had crossed the line between conscionable and unconscionable conduct by denying purchasers the most reasonable means of protecting their legal interests, a cost-effective class action.

*Gatton* can be conceived at different levels of abstraction. At its most simplistic, the court responded to an “unbargained” contract. T-mobile was far better resourced than its average customers. It sold a specialized product to largely unsophisticated end users. It used forceful sales techniques to persuade them to sign service agreements; and it relied on volume sales to multiple consumers to cover costs and build profit margins. T-mobile also intended customers to “adhere” to conditions that prohibited them from pursuing litigation in the most

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160 On a Washington State Supreme Court decision holding that the waiver of a class action in an arbitration clause in a cellular service contract was substantively unconscionable, see *Scott v. Cingular Wireless*, 161 P.3d 1000 (2007). However, in earlier cases, both 4th and 11th Circuit Courts dismissed arguments that arbitration clauses precluding class actions are unconscionable. See *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Jenkins v. First Am. Cash Advance of Georgia*, 400 F.3d 868 (11th Cir. 2005). For a decision by the 9th Circuit Court of Appeals, overturning an arbitration clause waiving in a New Cingular Wireless contract as unconscionable under California law and rejecting that the Federal Arbitration Act preempts state law, see *Shroyer v. New Cingular Wireless*, No. 06-55964.


economically feasible manner possible, namely, by sharing resources and costs through class actions.\textsuperscript{163}

At a higher level of abstraction \textit{Gatton} is about more than adhesion contracts. It is about a process of contracting that crossed the boundary between conscionable and unconscionable contracting. The arbitration clause in \textit{Gannon} was unconscionable because it sought to repress due process itself. Absent was an essential feature of a contract, namely, “a bargained for” exchange.\textsuperscript{164}

What is salient about \textit{Gatton} is the court’s exploration of unfairness in determining, not only when a condition is unfair, but also the nature of that unfairness. What is distinctive is the court’s treatment of the availability of market choice to purchasers as a mitigating factor, not a cure to unconscionability.\textsuperscript{165}

\textbf{VII. THE ART OF DISTINCTION}

A key question arises about the kind and degree of unconscionability in Twenty First Century “wrap” contracts. If such contracts are contingent on different

\footnotesize{\textsuperscript{163} On questions about the constitutionality of such binding arbitration clauses, see e.g. Jean R. Sternlight, \textit{Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns}, 72 TUL. L. REV. 1, 1 (1997).
\textsuperscript{164} Id, Westlaw, para.5.
\textsuperscript{165} On the finding of procedural unconscionability when a superior bargaining party fails to provide advance notice of its exercise of its superior power, see 9th Circuit Court of Appeals in \textit{Douglas v. U.S. District Court (Talk America)}, No. 06-75424 (9th Cir. July 18, 2007). (Online service provider could not bind customers to modified contract terms posted on its website unless it provided customers with advance notification of those modified terms).}
kinds and degrees of unconscionability, what are those differences; and how should courts address them? Among other concerns:

- Are there principles upon which courts can differentiate between types of “wrap” contracts, such as between click-wrap and browse-wrap contracts?

- If so how should these distinctions influence findings of procedural and substantive unconscionability without leading to rigid results?\(^{166}\)

Let us start with two cases, the one holding that conditions in a browse-wrap contract are unconscionable and the other declaring a click-wrap agreement conscionable.\(^{167}\)

i. **Declaring browse-wrap clauses unenforceable**

In an “early” case in 2002, the U.S. District Court for the Northern District of California in *Comb v. PayPal, Inc.*\(^{168}\) held that a browse-wrap clause was


\(^{167}\) A browse-wrap contract is distinguishable from a click-wrap contract in that, in the former, the terms of the agreements do not appear on the screen and the user is not compelled to accept or reject the terms before being able to proceed further. The browse-wrap agreement appears as a hyperlink to which the user gains access by clicking on the link which is an option, but not required. See Kaustuv M. Das, *Forum-Selection Clauses in Consumer Click-wrap And Browse-wrap Agreements and the "Reasonably Communicated" Test*, 77 WASH. L. REV. 481, 500 (2002).

procedurally unconscionable on grounds that the consumer lacked the opportunity to negotiate the terms of a take-it-or-leave-it contract. The court held that the clause was unconscionable because it permitted PayPal unilaterally to freeze customer accounts; it prohibited customers from consolidating their claims; and it required customers to submit disputes to the American Arbitration Association which was prohibitively expensive given that the price of the average transaction was $55. The court was persuaded, too, that, PayPal acted unconscionably in requiring that arbitration take place in Santa Clara County, California, “PayPal's backyard”.

In its defense, PayPal failed to convince the court that its browse-wrap clause was conscionable. PayPal argued that the disputed clause did not encompass such essential items as food or clothing; and consumers had access to alternative services to those provided by PayPal. In rejecting these arguments, the court found that PayPal had engaged in an adhesive take-it-or-leave-it contract with

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169 Id, at 1173. Procedural unconscionability refers to the procedures governing the formation of the contract, including the respects in which mutual assent may be absent or imperfect. Substantive unconscionability refers to the unfairness or unreasonableness of the terms. See further Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & ECON.293 (1975); Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 VA. L. REV.1053, 1054 (1977).

170 While not the basis of the decision in Comb v. PayPal, supra note 168, arbitration clauses sometimes are not contained in supply contracts, but imposed upon purchasers after the fact. See e.g. Manning v Paypal Inc 2001 U.S. Dist. LEXIS 23410

171 Like Comb v. PayPal, the case of Caspi v. Microsoft LLC, 323 N.J. Super. 118; 732 A.2d 528 (N.J. App. Div. 1999) involved a disputed membership agreement including a forum selection clause that provided for both jurisdiction and venue in Microsoft's backyard, King County, Washington. Unlike Combe, the court in Caspi enforced the online subscription agreement. It held, inter alia, the Microsoft had not abused a position of market dominance; the disputed click-wrap agreement was not contrary to public policy; and plaintiffs had sufficient notice of the “I agree/do not agree” click option because they could scroll through the contract before accepting its terms. Id.
customers who lacked meaningful choice. The fact that consumers could resort to alternative suppliers was insufficient to hold that PayPal’s click-wrap clause was enforceable under California law.\textsuperscript{172}

The court in \textit{PayPal} restricted the power of online service providers in browse-wrap contacts, not by distinguishing between browse-wrap and click-wrap contracts, but on grounds of the particularly adhesive nature of the applicable browse-wrap contract and the unfairness of disputed conditions within it. In support of its determination, the court was also not persuaded that customers who were dissatisfied with arbitration could have resort to courts of law.\textsuperscript{173}

\textbf{vi. Declaring click-wrap clauses enforceable}

In contrast to \textit{PayPal}, in \textit{DeJohn v. TV Corporation International} the U.S. District Court for the Northern District of Illinois in 2003 upheld a click-wrap contract.\textsuperscript{174} In applying New York Law,\textsuperscript{175} the \textit{DeJohn} court used reasoning quite different to that employed in \textit{Comb v. PayPal}.\textsuperscript{176}

The \textit{DeJohn} court held that the click-wrap clause would have been unenforceable only if the drafter had used considerable pressure tactics, or the language in the contract had been deceptive, or an inequality in bargaining

\\[\text{\textsuperscript{172} Supra note 168 at 1172-73. On procedural or “non-substantive,” see Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 VA.L.REV.1053 (1977).}\]
\[\text{\textsuperscript{173} Id, at 1174-75.}\]
\[\text{\textsuperscript{174} DeJohn v. TV Corporation Intern., 245 F. Supp. 2d 913 (C.D. Ill. 2003).}\]
\[\text{\textsuperscript{175} DeJohn argued that disputed click-wrap conditions were unenforceable in not being displayed unless the applicant clicked on a hyperlink to them, that the contract was an unconscionable adhesion and boilerplate contract, and that is was inherently unfair and lacked arm's length bargaining.}\]
\[\text{\textsuperscript{176} Comb v. PayPal, Inc.,218 F. Supp. 2d 1165 (N.D. Cal. 2002).}\]
power had resulted in significant unfairness to the weaker bargaining party. The DeJohn court reasoned further that, despite the use of a click-wrap take-it-or-leave-it clause in its own favor, TV Corporation International did not use unduly high pressure tactics or deceptive language to induce prospective customers to click their assent. The court treated as irrelevant the fact that, absent fraud, the weaker party had not read the contract, stating: “failure to read a contract is not a get out of jail free card.” The court reasoned that “it is the unfair use of, not the mere existence of, unequal bargaining power that is determinative.”

Nor was the court swayed by the argument that the weaker party lacked market choice. So long as the weaker party could reject the contract and purchase comparable services elsewhere, here a domain name registration, that party had market choice.

iii. Grounding distinctions

One conclusion flowing from the difference in reasoning between PayPal and DeJohn is that each court held different views about the nature of adhesion contracting and unconscionability. For the DeJohn court, consumers who conclude click-wrap agreements should be bound to have assented to them other than in exceptional circumstances when undue pressure tactics and the abuse of bargaining power renders that assent imperfect. For the PayPal court, the issue was less about purchasers in browse-wrap contact lacking notice of conditions at the time of acceptance, but whether the disputed conditions were fundamentally unfair.

177 Id, at Westlaw para. 4.
178 Id, at Westlaw, para 3.
179 Id, at Westlaw, para 4.
180 On such imperfect or “unperfected” consent, see infra section X.
Despite their differences, both cases share key attributes of adhesion contracts: the disputed conditions were dictated by superior bargaining parties; the weaker parties had little opportunity to dicker over conditions in “unbargained” contracts; and the plaintiffs had some market choice. One can speculate over whether either plaintiff would have resorted to alternative suppliers ab initio on appreciating the onerous conditions in dispute and whether other suppliers would have imposed similar conditions. What is probable, however, is that plaintiffs in comparable circumstances would not have studied the conditions before assenting to them, given their complexity, their inclusion among a myriad of other clauses, and the improbability of fully comprehending their legal significance.\textsuperscript{181} In effect, what is formally dubbed a “contract” is more truly an “as if” or quasi-contract: the essential features of a “contract” in which both parties have a reasonable opportunity to review and disseminate its conditions before accepting, is more fictional than real.\textsuperscript{182}

iv. Making distinctions

One conclusion to draw is that material differences between cases like PayPal and DeJohn lie in their different characterizations as “wrap” agreements. The applicable conditions in PayPal were included in a browse-wrap contract. The

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\textsuperscript{181} Such speculation, had it been fully explored during the suit, would have invited further discourse on the nature that choice, whether it was real or “feigned”, and whether suppliers that used comparable clauses did so in accordance with reasonable trade practice or de facto collusion. See further infra section X, i.
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\textsuperscript{182} The fiction lies in “the theory of the shrink-wrap license …that the user manifests assent to [the license] terms by engaging in a particular course of conduct that the license specifies constitutes acceptance.” See M.A. Lemley, supra note 147, at 467. For argument that consumer contracts, not limited to “wrap” contracts, often do not fit the normative model of a contract, see generally, Stewart Macaulay, Freedom From Contract, supra note 72.
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applicable conditions in *DeJohn* were contained in a click-wrap contract. All other factors being constant, click-wrap agreements are more likely to be declared enforceable than browse-wrap contracts. The reasoning is that, in browse-wrap contracts users ordinarily gain access to the product being purchased only by accessing a hyperlink to the applicable contract. As a result, users may be subject to onerous conditions without ever having accessed and “agreed” to them. In contrast, prospective users in click-wrap contracts can only gain access to the product being purchased after having clicked a dialog box indicating “I agree” to the applicable conditions that precede that dialog box. The result is that the click-wrap user has advance notice of those conditions and cannot use the product without signifying assent to them, regardless of the fact that most consumers are unlikely to read such conditions.

The courts in *PayPal* and *DeJohn* could have decided by distinguishing between click-wrap and browse-wrap contracts, but chose not to do so. In contrast, in declining to enforce a condition compelling arbitration in Netscape’s browse-wrap agreement in *Specht v. Netscape Communications Corp.*, the court

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183 *DeJohn* is a hybrid click-wrap/browse-wrap contract. Users were provided with a hyperlink to the contractual conditions, but the link was included directly above the dialog box in which they were asked to “click” their assent.

184 Differences between click-wrap and browse-wrap contracts include the following: Users in click-wrap agreements have constructive notice of “wrap” conditions which they receive prior to contracting. Users in browse-wrap contracts receive notice only after clicking on a hyperlink. Users in click-wrap agreements cannot access products or services without clicking a button. Users in browse-wrap contracts can access products or services without ever accessing the conditions through the hyperlink. Browse wrap users may be unaware that they are concluding a contract. Click wrap users are more likely aware that they are doing so. See further Das, supra note 167; and Kunkel supra note 17.

185 306 F.3d 17 (2d Cir. 2002). *Specht* dealt with a Netscape license agreement that appeared on downloading and browsing through "Smart Download" software on its website that enhances the downloading files from the Internet. Concentrating on procedural unconscionability, the court
distinguished between advance notice of licensing restrictions in click-wrap contracts from lack of advance notice in browse-wrap agreement.\textsuperscript{186} It reasoned that click-wrap and shrink-wrap contracts "require users to perform an affirmative action unambiguously expressing assent before they may use the software."\textsuperscript{187} In comparison, Netscape's browse-wrap license

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\ldots \text{ allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.} \textsuperscript{188}
\]

The court concluded that Internet browsers were not bound by the Netscape license which they had not previously viewed and which they had not known in advance of using Netscape. In providing users with access to the disputed license only after downloading the program and only after scrolling down to the disputed clause, the court held that Netscape had acted procedurally unconscionably.\textsuperscript{189}

\textsuperscript{186}Netscape's site did not require that users click the browse-wrap link. It stated: "Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software." Id
\textsuperscript{187}Id, at 595. The court added: "that affirmative action is equivalent to an express declaration stating, 'I assent to the terms and conditions of the license agreement' or something similar." Id. at 595.
\textsuperscript{188}Id.
\textsuperscript{189}Id. at 595.
There is no magic in holding click-wrap contracts enforceable and browse-wrap contracts unenforceable. Courts can decide cases on other grounds, for example, by deciding that disputed conditions are insufficiently large or visible to be enforceable, or that the selection of a forum in the “backyard” of the licensor is unfair. They can also “cure” procedural defects in a plaintiff’s assent on grounds that the defendant provided \textit{ex post facto} notice of the disputed conditions to which the plaintiff acquiesced. Judges may also diverge

\textit{190} On advice to defendants as to how to render click-wrap contracts enforceable, see Martin Samson, Click-wrap Agreements Held Enforceable, available at http://www.internetlibrary.com/publications/cwahe_art.cfm:

“(A) Contract or license terms should be displayed to the prospective purchasers on the offeror’s website; (B) The purchaser should be asked to accept or reject those terms by clicking on buttons saying “I agree” or “I do not agree”; (C) The purchaser should not be permitted to purchase the product (or gain access to pay-per-view information) unless he/she has indicated assent to be bound by the terms of the contract; (D) The offeror’s contract should include a representation or warranty that the party entering into the contract is authorized to do so on behalf of any entity he is seeking to bind thereto; (E) The terms of the proposed contract should be measured against traditional contract principles -- such as the prohibitions against adhesion contracts, and UCC §2-316 governing warranty disclaimers; and (F) Follow the procedures specified by proposed UCC Article 2B governing the formation of enforceable online licenses.”

\textit{191} in \textit{Gatton} the court declared a backyard forum selection clause unenforceable. In contrast, in \textit{Caspi v. Microsoft Network LLC}, 323 N.J. Super. 118; 732 A.2d 528 (N.J. App. Div. 1999), involving a click-wrap contract the plaintiffs subscribed to Microsoft's MSN online network. The terms of the MSN's membership agreement were contained in a scrollable window including a prompt the purchase could click indicating: "I agree" or "I Don't Agree" in which case the online registration process aborted. Plaintiff alleged that Microsoft engaged in "unilateral negative option billing" by rolling subscribers into more expensive plans without their advance assent. The Court enforced the forum selection clause, holding: (1) there was no fraud or exercise of dominant bargaining power by Microsoft, (2) the disputed clause did not violate public policy, (3) it did not seriously inconvenience the trial process and (4) MSN members had adequate notice of the clause because they were free to scroll through the computer screens displaying the terms for any amount of time before agreeing to it. Id. Cf. \textit{Forrest v. Verizon Communications, Inc.}, 805 A.2d 1007 (D.C. 2002)
in drawing inferences from conditions in contracts based on the parties, products and markets in issue. Consider two illustrations. In *Specht v. Netscape Communications Corp.*, the court decided that an arbitration clause in the browse-wrap contract was procedurally unconscionable. In *Forrest v. Verizon Communications, Inc.*, the court declined to find that the scroll box in a browse-wrap contract for a DLS service was so small as to provide insufficient notice to plaintiffs. Both cases involved browse-wrap contracts in which the courts could have reasoned that plaintiffs lacked prior notice of special conditions and therefore did not assent to them; but the court in *Forrest* did not do so. Instead, courts may find that conditions in licenses are procedurally or substantively unconscionable on grounds that are distinguishable from whether or not those conditions are contained in shrink-wrap, browse-wrap, or click-wrap contacts.

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192 Typifying this division among courts are these remarks by an appellate court in Wisconsin: “we are, however, persuaded by what appears to be a growing minority of courts that a waiver of class-wide relief is a significant factor in invalidating an arbitration provision as unconscionable.” *Coady v. Cross Country Bank*, 729 N.W.2d 732 (Wis. Ct. App. 2007).

193 306 F.3d 17 (2d Cir. 2002)

194 805 A.2d 1007 (D.C. 2002)

195 Id note 3, at 1010-11. Customers brought a class action on grounds of frequent and lengthy disruptions in the DSL service and slower service speeds than promised by Verizon. The DSL online service license contained a forum selection clause in a small computer window in which only a portion of the agreement was visible, and a scroll bar that allowed customer to scroll through the agreement. Below the scroll box was an "accept" button, which the customer could click to assent to the agreement. The court held that the forum selection was enforceable.


On forum selection clauses in click-wrap and browse-wrap agreements, see Kaustuv M. Das, supra note 167, at 500.
None of this is to declare that “wrap” decisions are decided by judicial whim. The purpose is rather to demonstrate the difficulty of predicting on what grounds courts will decide cases involving Twenty First Century consumers and adhesion contracts. A further purpose is to demonstrate that, however materially similar or different cases may appear to be, one may end up attempting to reconcile the irreconcilable.

VIII. LEGAL DIFFERENCES

Judicial decisions relating to the protection of consumers sometimes are construed differently in different legal traditions. Some states like California are perceived to be consumer-friendly. Others like New York are considered less friendly to consumers. The question arises as to the impact of consumer protection laws on the manner in which judges “make” law in “wrap” contracts.

i. Trends in consumer protection

At the outset, it is important not to overstate the importance of trends in consumer protection law in predicting how judges will decide particular “wrap” contract cases. Judicial trends do not invariably follow legislative policy on

197 The pursuit of predictability, inherent in American legal realism is reflected in Karl Llewellyn’s conception of Article 2 of the UCC. See Llewellyn, supra note 7. Applied to unconscionability, the goal is to be able to predict shifts in the judicial construction of procedural and substantive unconscionability in Twenty First Century “wrap” contracts. See further infra section VII.

consumer protection in different states because legislative policy, being general and often variable in nature, cannot anticipate the precise issues that arise for determination by courts of law. Courts also often apply legislative policies disparately to accommodate evolving contract practices such as in relation to e-commerce.

Even in states with strong consumer protection laws like California, there is no assurance that courts will develop consistent decisions to protect consumer interests and even less assurance that courts in other jurisdictions will follow suit. Strong opinions like Zeidenberg that declare conditions in “wrap” agreements enforceable may be offset by countervailing opinions that declare them unenforceable. Decisions that declare clauses unenforceable on grounds that they produce grave inconvenience or unfairness may be offset by decisions enforcing such clauses as efficient and fair. Opinions that declare mandatory

199 On the codification of law governing shrink-wrap contracts in UCITA, see infra section IX

200 On variations in the judicial treatment of conditions in “wrap” contracts in California, see supra note VII, iii & iv.

201 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) in which they decided that shrink-wrap licensing agreements were legally enforceable. See further supra section V,ii.

202 On the enforceability of “wrap” contracts, see supra section VII, ii.

arbitration unenforceable in *Gatton* are buttressed by cases like *Brower v. Gateway* that enforce mandatory arbitration.

**ii. Differences of fact**

Far from deciding according to law, judges are often “fact skeptics”: they decide cases according to their conception of the facts, including their differentiation between material and immaterial facts.  

As an illustration, in *Hotmail Corp. v. Van$Money Pie* Hotmail applied for an injunction against defendants who used Hotmail’s free online services to distribute unsolicited commercial e-mail, notably spam which advertised pornography. Hotmail’s click-wrap contract expressly prohibited users who assented to its Terms of Service from using Hotmail e-mail accounts to transmit such unsolicited e-mail. Defendants assented to those Terms of Service by clicking a dialog box and then used Hotmail accounts to send spam. They also altered return email addresses to indicate falsely that email had been sent from a Hotmail account, rather than from its true source and they inserted plaintiff’s mark in the e-mail reply address. Hotmail moved to enjoin defendants from

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204 *Gatton v. T-Mobile USA Inc.*, 152 Cal. App. 4th 571 (2007). It is difficult to predict such judicial outcomes, given that the law before *Gatton* included the enforcement of conditions in allegedly adhesive contracts. See *eg, Mandel v. Household Bank*, 2003 WL 57282, at *4 (Cal. Ct. App. Jan. 7, 2003) where the California Court of Appeal affirmed that arbitration clause that barred a class arbitration action was unconscionable. It is probably, but not certain, that *Gatton* has signified a shift towards greater judicial scrutiny of “wrap” contracts in California.  


206 See generally, Jerome Frank supra note 28.  

sending spam which falsely stated that it came from Hotmail's service and from using Hotmail accounts as mail boxes for replies.\textsuperscript{208}

The court imposed a preliminary injunction on the defendants. It also upheld the prohibition in the click-wrap contract on grounds that defendants had agreed to be bound by Hotmail's Terms of Service by clicking "I agree" after having the opportunity to view those Terms.\textsuperscript{209} The court held further that defendants' use of Hotmail’s mark in the reply address likely would confuse the public, causing recipients to think that Hotmail was implicated in sending them unwanted spam. The court also found that defendants' conduct was likely to violate the \textit{Computer Fraud and Abuse Act}, and constituted a trespass on chattel.\textsuperscript{210}

The issue is not that the court in \textit{Hotmail} ill-conceived of evolving governmental policy in regard to the use of spam. Legislative and judicial “policies” increasingly regulate the use of spam in circumstances like \textit{Hotmail}.\textsuperscript{211} The issue rather revolves around those factors that particular courts consider material in distinguishing between the legitimate and illegitimate use of email, including in regard to policies regulating the use of spam.\textsuperscript{212} For some judges, the

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\item[\textsuperscript{208}] Id. 1998 WL 388389, N.D.Cal.1998, Westlaw, para.188.
\item[\textsuperscript{209}] Id. The court also held that Hotmail would likely succeed in asserting defendants’ false designation of origin and unfair competition. Id, Westlaw, para.9
\item[\textsuperscript{210}] Id. On the \textit{Computer Fraud and Abuse Act}, see 18 U.S.C., s.1030 at *6.63, See too Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997) [court upheld a 30 day box-wrap agreement]
\item[\textsuperscript{211}] See e.g. Christopher Engel, \textit{The Role of Law in the Governance of the Internet}, 20 INT’L. REV. LAW, COMPUTERS & TECHNOLOGY 201 (2006); R.K. Zimmerman, 4 N.Y.U.J.LEGISL. & PUBLIC POLICY 438 (2001). A further issue is the extent to which corporations can and should self-regulate the use of spam within a democracy. See e.g. CHRISTINE PARTKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (CAMBRIDGE UNIVERSITY PRESS, 2002)
\item[\textsuperscript{212}] See Evangelos Moustakas, C. Ronganathan and Penny DuQuennoy, \textit{Combating Spam Through Legislation: A Comparative Analysis of US And European Approaches}, Proceedings of
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overriding concern is to regulate abusive consumer practices in the public interest.\textsuperscript{213} For others, the goal is to balance the commercial interests of service providers in light of the free use of their services.\textsuperscript{214} For yet others, the aim is to identify those facts which are material to the application of the law governing the mutual assent to contract.\textsuperscript{215}

Whatever the judicial approach adopted, the law regulating “wrap” contracts is likely to adapt to changing consumer practices, along with the reaction of online providers to those practices. Courts are likely to develop divergent responses to a new consumer Law Merchant by giving different weights to the changing supplier and consumer use of new technologies in an information age.\textsuperscript{216}

\textsuperscript{213} Such consumer action does not involve obviously threaten the economic interests of a service provider, save possibly by clogging servers and undermining its good name. A decision that such consumer actions violate public policy is also difficult to reach, given that violations of public policy ordinarily render contractual “rights” unenforceable, not enforceable. Still, the use of an injunction as an equitable remedy may evolve into an effective weapon by which online service providers and courts together may try to regulate consumer action.

\textsuperscript{214} In \textit{Hotmail}, id.


\textsuperscript{216} So too, courts may diverge over the transaction costs associated with applying public policy in specific cases. See e.g. \textsc{Santa Fe Natural Tobacco Co., Inc. v. Spitzer}, 2001 WL 636441 (S.D.N.Y. June 8, 2001) (No. 00 CIV. 7274(LAP); 00 CIV. 7750(LAP)) [The court held that "[b]ecause of the widespread parental supervision of children's Internet activities and the availability of various technological tools to assist this supervision, the need to obtain unsupervised, Internet access is a significant transaction cost to minors attempting to purchase cigarettes over the Internet." Id. at 20. The court ultimately decided that the state had "failed to
IX. CODE INCURSIONS

Commercial codes have evolved, more slowly than case law, to regulate new commercial and consumer practice. The adoption of the Uniform Computer Information Transaction Act [UCITA], originating in Draft Article 2B of the UCC, stipulates that click-wrap users consent to applicable conditions only after the provider has given them the opportunity to review the terms of the contract and decide whether or not to assent. A key intention of the drafters was for click-wrap contracts to be enforceable subject to service providers giving users reasonable notice of material conditions in their service agreements. The UCITA comments provide further instruction, notably comment 5 of section 112 which sets out a model contract clause permitting purchasers to return products within thirty days of the purchase date.

It is too early to determine the functional impact of the UCITA. In some measure, it codifies existing judicial practice on click-wrap contracts. Its provisions are comprehensible to contract drafters as well as to courts that demonstrate that the statute will affect any material local benefit in reducing direct sales of cigarettes to minors." Id. See too Swedenburg v. Kelly, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y., Sept. 5, 2000) (No. 00-CV-778).

UCITA was previously UCC draft article 2 B-207 and 208. See further supra note 19.

UCITA, section 112 deals with “manifesting assent to a record or term” by a person or electronic agent “acting with knowledge of, or after having an opportunity to review it.” Conduct or operations manifesting assent “may be proved in any manner” including obtaining and using the information or by reaffirming their assent by subsequent conduct. Sub-section (f) stipulates that providers of online services, network access, and telecommunications services “do not manifest assent to a contractual relationship simply by their provision of those services to other parties …at the request or initiation of a person other than the service provider.”

Comment 5 is reproduced infra in note 273.
interpret “wrap” contracts. The UCITA is limited, however, in falling short of an all-encompassing “wrap” code. It deals with a contentious but still manageable category of “wrap” contracts, namely, click-wrap contracts; and it regulates “wrap” conditions on the basis of changing experience in a complex and evolving field of consumer and business practice.220

X. PERFECTING ASSENT

 Courts that adhere to the strict interpretation of “wrap” contracts ordinarily differentiate between conscionable and unconscionable contracts according to whether consent to them is perfected or unperfected and inchoate.221 They interpret “wrap” contracted as perfected when they determine that the parties are in mutual accord or in consensus ad idem.222 They interpret contracts as unperfected when they determine that the assent of the inferior bargaining party to a “wrap” contract is flawed or absent.223


223 Should an end-user in a shrink-wrap or browse-wrap “contract” be deemed to assent to conditions which were not included in the contract at the time of acceptance? The answer depends on whether courts are willing to infer ex post facto assent by implication of fact or law. See further Lemley, infra note 147, at 469; Michael Madison, Legal Ware: Contract and Copyright in the Digital Age, FORDHAM L.REV.1025, 1049-54 (19980); Apik Minassian, The
Unperfected assent can be divided into two components: assent that can be perfected or cured and assent that is so defective that it cannot be cured.\textsuperscript{224} Perfecting the unperfected assent of the inferior bargaining party to a “wrap” contract can take place when a court resolves an ambiguity in a contract or “fills a gap” in it through a rule of construction, by operation of law, or both.\textsuperscript{225} Such perfection typically occurs when judges interpret a “wrap” contract \textit{contra proferentum}, against the drafter and in favor of the weaker bargaining party.\textsuperscript{226} This practice is envisaged by § 2-302(1) of the UCC in providing that courts may “so limit the application of any unconscionable clause as to avoid any unconscionable result.”\textsuperscript{227}


\textsuperscript{226} The classic case of courts interpreting contracts against the drafter is \textit{Raffles v. Wichelhaus}, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). There a fixed price contract for the sale of cotton “ex Peerless” was complicated by two factors: there were two ships named Peerless that sailed and arrived at different dates; and that the date of arrival was crucial in light of the volatility of the price of cotton. In determining whether or not the contract was enforceable, the court interpreted it against the drafter. On the history and significance of this case, see A. W. BRIAN SIMPSON, \textit{LEADING CASES IN THE COMMON LAW} chapter 6 (1995). See too \textit{Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications International Union, AFL-CIO,} 20 F.3d 750, 753 (7th Cir. 1994).

\textsuperscript{227} On § 2-302 in the UCC, see supra note 12.
Courts perfect conditions in “wrap” contracts when they are reasonably satisfied that both parties assented to their terms with reasonable knowledge and understanding of their nature and significance.\textsuperscript{228}

Courts interpret conditions in “wrap” contracts as unperfected and incapable of being perfected when they hold that the weaker bargaining party did not reasonably assent to those conditions and that the absence of such assent cannot be cured.\textsuperscript{229} A judicial determination that an imperfect assent cannot be cured may arise on grounds that the weaker party lacked reasonable knowledge and understanding of the applicable conditions, as typified by procedural unconscionability, or that the conditions were unfair so as to constitute substantive unconscionability. In both cases, but especially in the latter, courts will not enforce those “wrap” conditions.\textsuperscript{230}

Courts treat “wrap” contracts as unperfected but capable of being perfected when they are satisfied that they can cure the defect by “filling gaps” or implying terms into the contract by judicial construction or by operation of law.\textsuperscript{231} Such judicial construction occurs, for example, when a judge implies

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\textsuperscript{229} Construing contracts in favor of weaker bargaining parties is implicit in the construction of adhesion contracts, even if those contracts are not unconscionable. See supra section II.

\textsuperscript{230} See e.g. “Even if instant agreement is procedurally unconscionable, it may nonetheless be enforceable if the substantive terms are reasonable.” In Comb v. PayPal, Inc. 218 F.Supp.2d 1165, 1173 N.D.Cal., 2002.

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that the weaker party had constructive notice of a “wrap” condition,232 or when it construes an ambiguous condition so as to render its application fair.233

The majority of “wrap” cases involve all-or-nothing conceptions of assent. Either courts interpret assent to the conditions in dispute as mutual and enforceable; or they interpret assent to those conditions as imperfect, incapable of being cured and unenforceable. The practical effect of courts declaring conditions either enforceable or unenforceable is the absence of middle ground in which courts fill gaps or imply terms into conditions in “wrap” contracts in order to render them efficient and fair to consumers.234

i Perfecting incomplete contracts

The classical reason to discourage courts from perfecting imperfect assent by implying terms into contracts is that courts should “not make contracts”.235 The concern is that courts that modify conditions in “wrap” contracts may interfere

232 Such constructive notice might arise, for example, when the purchaser is given the opportunity to read an online document, but fails to do so, in which case the notice may be actual or constructive depending on the circumstances. See e.g., Groff v. America Online, Inc., 1998 R.I., Super. Ct., LEXIS 46 (Super. Ct. R. I. Providence May 27 1998) (C.A. No. PC 97-0331) at *13 [Plaintiff in a click-wrap contract was invited to read the contract not just once, but twice.].

233 Such ambiguity might arise, for example, when a court determines a reasonable period of notice, a reasonable period in which the purchaser may void the contract, return or replace the product. See too Gertner, supra note 231.

234 On the conception of middle ground in which the winner takes some, see Leon E. Trakman, Winner Take Some: Loss Sharing and Commercial Impracticability, 69 MINN. L. REV. 471 (1985)

235 Judges use various techniques to accomplish this, usually finding the meaning in the plain words of the agreement, rather than by superimposing that meaning into the contract. See generally, Eric A. Posner, supra note 30 at 533; Mark K. Glasser and Keith A. Rowley, On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation, 49 BAYLOR L. REV. 657 (1997).
with freedom of contract. An overworked distinction is sometimes drawn between judges who “make” conditions in contracts by perfecting imperfect assent and those who “unmake” conditions by declining to perfect consent. This distinction is strained when courts decline to perfect imperfect assent on grounds that they should not “make” conditions, despite having a material basis to fill gaps in adhesive contracts, resolve ambiguities in favor of the weaker party and imply reasonable terms based on trade practice into the contract. Conversely, judges who perfect an inchoate consent engage in a process of interpretation for which they are both trained and expected to engage as courts of law and equity. Arguably, too, they fill gaps in contracts, not by resort to

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236 On the reluctance of courts to fill gaps by implying price and quantity terms into contracts, see Transact Technologies, Ltd. v. Evergreen Partners, Ltd., 366 F.3d 542, 546 (7th Cir. 2004); Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 292 (7th Cir. 2002); Echols v. Pelullo, 377 F.3d 272, 276 (3d Cir. 2004); Interstate Litho Corp. v. Brown, 255 F.3d 19, 27 (1st Cir. 2001). On court’s resolving ambiguities in mass consumer contracts, see supra section VII and note 225.

237 For argument that courts do not “make” contracts, or unmake them generally, see W. Friedman, Changing Functions of Contract in the Common Law, 9 TORONTO L.J.15 (1951); Christine Jolls, Contracts as Bilateral Commitments: A New Perspective on Contract Modification, 26 J.LEG.STUD.203 (1977).

238 On courts “making contracts” such as by resort to parol evidence, see e.g. Posner, supra note 35 at 533; Glasser and Rowley, supra note 235.

239 Reliance on party practice and trade usage is a “more direct” way of resolving ambiguities in contracts than by constructing unconscionability to fill gaps. Party practice and trade usage inheres in the contextual interpretation of contract, whereas filling gaps through § 2-302(1) of the UCC, while permissible, is more difficult for courts to accomplish. On the reluctance of courts to fill gaps, see supra section VII, ii. On the interpretation of ambiguities in, inter alia, mass consumer contracts, see supra note 225.

240 The obstacle to such interpretation arises, not because judges are unable to decide, but because judges often subscribe to legal formalism that highlights the plain meaning of words and avoids expansive methods of interpretation. On judicial reliance to fill gaps in contracts, see supra notes 236 & 237.
whim or caprice, but by interpreting “wrap” contracts in the context of party practice, trade usage and industry custom.\textsuperscript{241}

The final justification for judges perfecting an imperfect assent in “wrap” contracts is to balance the stability of contracts against the floodgate of mass consumer litigation directed at voiding those contracts for unconscionability. A related benefit is that judges who engage in gap filling manage “wrap” transactions while also regulating them.\textsuperscript{242} These justifications are discussed immediately below.\textsuperscript{243}

\textbf{ii. The judicial management of “wrap” contracts}

The judicial management of “wrap” contracts by filling gaps in contracts is controversial. Firstly, it presupposes that courts have ongoing management

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responsibility under a law of contracts that is essentially consensual and therefore managed by the parties themselves. Secondly, judges are more likely to manage the contractual duties of parties involved in long-term relationships involving continuing duties of trust and confidence than the duties of suppliers and consumers who are engaged in short-term transactions. The assumption is that, when a consumer makes a purchase, the discrete transaction is at an end: presumptively, there is no need for further judicial management of the transaction.

The judicial management of “wrap” contracts challenges the distinction between the judicial management of long-term relationships and one-off “wrap” transactions in a key respect. “Wrap” contracts are one-off in the sense that, on acceptance of an offer in a discrete transaction, the sale is concluded. However, the discrete transaction has a tail, consisting of ongoing duties which the conditions of contract place upon the supplier towards consumers as a class: to that extent, the court manages the supplier’s ongoing performance duties to that class.

\[\text{\textsuperscript{244}}\] On the distinction between relational and discrete contracts, see e.g. Ian R. Macneil, Contracting Worlds and Essential Contract Theory, 9 SOC. & LEG. STUD. 431 (2000); Relational Contract Theory: Challenges and Queries, 94 NW. L.REV.877 (2000).

\[\text{\textsuperscript{245}}\] On Macneil’s differentiation between long-term relational contracts and short-term discrete transactions, see Ian R. Macneil, Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-Classical and Relational Contract Law, 72 NW. L.REV.854 (1978).

\[\text{\textsuperscript{246}}\] This argument is controversial, since the course of dealings between mass suppliers and customers other than the plaintiff are not part of the consensual transaction between the supplier and each particular customer. On the challenge to this argument on grounds that such discrete transactions are “related” through the supplier’s course of dealings, they are admissible as extrinsic evidence, and judges are expected to decide adhesion cases in light of public policy, see text immediate below and infra section XI.
A further justification for the judicial management of “wrap” contracts is that, while the contract of sale is rooted in a one-off transaction, the supplier is involved in a continuing relationship with a series of consumers. \(^{247}\) That series of transactions constitutes a composite course of dealings giving rise to continuing duties of a supplier to act in good faith in relation to a range of consumers who are comparably situated and in respect of whom courts indirectly manage transactions. \(^{248}\) By implying duties of good faith performance into “wrap” contracts, the court manages a series of transactions that are mutually related through the supplier.

A final justification for courts managing contracts is in response to the quasi-public character of transactions that are mass marketed to the public. The quasi-public duties of a supplier arise on account of adhesive conditions in its “wrap” contracts that exclude or limit its ongoing performance duties across a consumer market. \(^{249}\) The judicial function is to identify and manage those ongoing duties in light of the reasonable practices it imputes to the supplier, not by imposing duties ex post on that supplier to re-negotiate those “wrap” contracts. \(^{250}\)

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\(^{247}\) Courts cannot “directly” manage transactions between suppliers and non-parties to litigation. However, they can manage such transactions “indirectly.” Such indirect management occurs when judges decide cases in light of “social fact evidence” based on the impact their decisions have upon other consumers in positions like plaintiff customers. On consideration of the “social effects” of decisions in sociological jurisprudence, see ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1982); Roscoe Pound, Liberty of Contract and Social Legislation, 17 COLUM.L.REV.538 (1917).

\(^{248}\) On the conception of good faith performance in contract jurisprudence, including under Article 2 of the UCC, see e.g. Robert Dugan, Good Faith and the Enforceability of Standardized Terms, 22 WM. & MARY L. REV. 1, 5–7 (1980).

\(^{249}\) On the quasi-public roots of adhesion contracts, see supra section II.

\(^{250}\) Suppliers do not have a legal duty to “negotiate” in good faith, only to so perform under the UCC and Restatement. See e.g. infra notes 251 and 254.
As illustrations of the judicial management of “wrap” transactions, courts may imply terms that require a supplier to provide its customers with reasonable notice of product defects, that set out reasonable times within which customers may return products and that provide those customers with reasonable legal recourse. The basis for judicial management lies in the justification for implying those duties into “wrap” contracts in the absence of reasonable contractual management by the parties themselves. A further foundation for implying such duties resides in the obligation of suppliers to use “best efforts” and to perform their contractual duties in good faith. As Justice Antonin Scalia once observed, the duty to perform in good faith under the UCC Code is significant “in implying terms in the contract.”

Finally, these performance duties may extend beyond the express terms of the contract. They may also transcend all-or-nothing remedies that lead to enforcement or no enforcement of “wrap” contracts or conditions within them.

iii. The perimeter of gap filling

Judges who clarify ambiguities or fill gaps in “wrap” contracts ordinarily consider the adjudicative facts, such as the kind and degree of disparities in bargaining power between the parties and the adhesiveness of the disputed

251 See Article 1-203 of the UCC: “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Section 205 of the Restatement which post-dated and was influenced the UCC, stipulates: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”

252 See Tymshare v. Covell, 727 F.2d 1145 (D.C. Cir. 1984) [per Scalia prior to his appointment to the Supreme Court; also citing E. Allan Farnsworth on good faith performance]. See too Best v. United States National Bank, 739 P.2d 554 (Or. 1987); RESTATEMENT, SECOND, OF CONTRACTS § 205, Comment d.

253 On these all-or-nothing remedies, see section X, i & iii.
conditions. They also evaluate the design and impact of those conditions according to the type of parties, transaction and market in issue. They may stipulate, for example, that a dominant party exercise “best efforts” and that it provide customers with reasonable notice of onerous conditions as a demonstration of its good faith performance. Judges may construe expansively the period in which customers can return computers or software. They may interpret a choice of law or arbitration clause in favor of the consumer.


255 On these good faith performance duties under the UCC and Restatement, see id and infra note 251 & 254.

256 Courts that supply “reasonable” terms in commercial transactions will usually provide a reasonable price or quantity of goods to be delivered. Of note, § 2–305 of the UCC provides that courts can fill gaps in contracts of sale, such as by establishing a reasonable market price. See further Lickley v. Max Herbold, Inc., 984 P.2d 697 (Idaho 1999); Koch Hydrocarbon Co. v. MDU Resources Group, 988 F.2d 1529, 1534 (8th Cir. 1993). The logic behind implying reasonable terms applies equally to terms other than price and quantity, including special conditions governing performance and the resolution of disputes.

257 On arbitration clauses in securities contracts to which investors or employees do not really “consent”, see Sung J. Lim, Mandatory Arbitration in the Securities Industry: Efficiency at the Cost of Justice for All?, 26 J. CORP. L. 771 (2001); Cheryl Nichols, Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias, 15 OHIO ST. J. ON DISP. RESOL. 63 (1999); Marc I. Steinberg, Securities Arbitration: Better for Investors than the
Courts that manage “wrap” contracts by filling gaps in them may be influenced to varying degrees by the economic and social impact of their decisions. They may adopt as guidelines, the certainty and predictability of their decisions and the ongoing costs of enforcing them, such as by supervising the supplier’s continuing duties of performance. Courts may also consider the social impact of their decisions, varying from the threat of a floodgate of litigation to the supplier’s bankruptcy.

Judges may resist resolving ambiguities or filling gaps in “wrap” contracts in order not to be seen to substitute their will for the intention of the parties. Cautious judges may insist that they are bound to decide according to the adjudicative facts, not wider social fact evidence which they regard as within the purview of legislatures. They may also avoid considering the longer-term economic hardship borne by either consumers or suppliers on grounds that these

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258 On the efficiency of judicial gap filling, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 44 (1973).
259 Judicial gap-filling including is based on evidence including at its narrowest the discrete transaction between the parties and at its broadest the communal environment in which mass contracts are concluded. See further section X, i.
are policy considerations outside the jurisdiction of courts of law. This approach ordinarily reflects a new formalism in interpreting contract law; it also resists the legal realism by which courts construe contracts expansively in light of the context surrounding each contract.

A more practical reason for courts not filling gaps in “wrap” contracts is that the conditions in such contracts may be unambiguous in denying or limiting the supplier’s liability, providing courts with an insufficient basis to fill gaps. This reason is understandably given that sophisticated suppliers may devise “bullet-proof” contracts with clear take-it-or-leave-it options that are specifically aimed at avoiding legal challenges. This reasoning, however, bypasses the equitable

262 This is an age-old conflict between “positivist” judges who decide cases strictly “according to law” and “realist” and “social behavioral” judges who decide according to the interdisciplinary (and economic) context surrounding the law. For an erudite debate over the separation between law and morals, see H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV.L.REV.593 (1959); Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 Harv.L.Rev.630 (1958). See generally, DENIS GALLIGAN, LAW IN MODERN SOCIETY (2007); Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics, 278 (2001); WILFRED J.WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); ROGER COTTERELL, THE SOCIOLOGY OF LAW (1992); WOLGANG GASTON FRIEDMANN, LEGAL THEORY (1967).


264 This judicial recourse is strengthened when conditions in “wrap” contracts are framed decisively to exclude or limit the supplier’s liability. The result is that courts can either enforce those conditions or declare them unenforceable. Section X, i & ii supra, challenge this all-or-nothing approach; it argues that courts have an alternative legal basis under § 2-302(1) of the UCC upon which to enforce the performance duties of suppliers not necessarily based on the precise terms in the contract.
basis for gap filling. The fact that drafters frame adhesive contracts to be bullet-proof may itself justify courts construing those contracts in favor of the weaker party. Filling gaps to redress unfairness in adhesive contracts, notwithstanding plain words used to avoid legal challenges, is an argument more in support of judicial gap filling than the contrary. It is also germane in reaching socially responsible decisions in regard to private “legislation” by mass suppliers.

Finally, courts may fill gaps in contracts on grounds that they are required to do so, notably in consequence of unfair contract provisions within consumer protection laws. The rationale is that courts are doing no more than applying a legislative mandate or scheme.

iv. Legislative gap filling

The perceived need for more systematic regulation of “wrap” contracts may lead to ever greater legislative scrutiny of consumer-supplier contracts, primarily in

265 Courts may arrive at determinations that diverge from that specified in the contract, usually on equitable grounds. For example, they declare contracts unenforceable because the price is uncertain, even though one party has performed in good faith, while permitting a restitution claim for the market value of performance. In effect, the court constructs an alternative price to the contract based on market value. See Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1248, N.Y.1983).

266 As a pragmatic response, judges may find that the adjudicative facts are adequate to ground their decisions without having recourse to social fact evidence. As an ideological matter, however, they may refrain from social fact analysis because they believe that social facts are better determined by legislatures than by courts or law. See further supra note 247 & 261.

267 For a classical illustration of how lawyers in Wisconsin resort to consumer protection laws in contracts, see Stewart Macaulay, Lawyers and Consumer Protection Laws, 14 L & SOC. REV. 115 (1979)
regulating new fields like the Internet on public policy grounds. Legislatures may fill gaps in consumer protection laws out of concern about dubious commercial practices. They may also react to inconsistencies in the judicial treatment of consumer contracts, or in order to codify judicial decisions that protect consumer interests. More often than not, legislatures will remain on the sidelines because the contractual issues are too variable to justify legislated consolidation, the political climate is unsuitable for law reform and courts will be expected to protect consumer interests on a case by case basis. Whatever its form, the regulation of “wrap” contracts by legislatures is likely to be


269 For a classical representation of the regulatory function of law on contract and property, see John Henry Wigmore, Problems of the Law’s Mechanism in America 4 Va.L.Rev.337 (1917).
controversial in inception, operation, or both. Inertia, being part of the legislative legacy on consumer protection to date, is likely to continue.

XI. GUIDELINES

The law governing adhesion contracts is all about regulation. Regulation occurs through the contract itself, as when dominant suppliers use contracts to regulate sales. Regulation is also the means by which courts and legislatures curb the practices of those dominant parties that use contract conditions to regulate relationships in a manner which is deemed to be unconscionable.

i Regulating transactions by contract

Drafters of “wrap” contracts can plan their drafting in anticipation of consumer protection legislation and to avoid litigation. For example, click-wrap suppliers

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can limit the risk of adhesive contracts being declared unenforceable by providing users with contractual choices, such as thirty days in which to opt out of the contract in accordance with the UCITA.\textsuperscript{272} Suppliers can also be guided by specific code comments such as comment 5 of section 112 of the UCITA illustrating when user consent to contracting will suffice.\textsuperscript{273}

Despite taking drafting guidance from codes, contract drafters cannot be assured when courts will enforce conditions in “wrap” contracts. Judges in the same jurisdiction may act inconsistently in applying consumer protection laws and in enforcing “wrap” conditions.\textsuperscript{274} Judges may also diverge significantly from jurisdiction to jurisdiction in their treatment of such conditions.\textsuperscript{275} As a result,

\begin{itemize}
\item \textsuperscript{272} On the history of UCITA, see supra note 19.
\item \textsuperscript{273} \textbf{Illustration 1}: The registration screen for NY Online prominently states: “Please read the License. It contains important terms about your use and our obligations. If you agree to the license, indicate this by clicking the “I agree” button. If you do not agree, click “I decline”. “ The on-screen buttons are clearly identified. The underlined text is a hypertext link that, if selected, promptly displays the license. A party that indicates “I agree” assents to the license and adopts its terms...” \textbf{Illustration 3}: “The purchasing screen of an on-line software provider provides the terms of the license, a space to indicate the software purchased, and two on-screen buttons indicating “I agree” and “I decline” respectively. A user that completes the order and indicates “I agree” causes the system to move to a second screen. This second screen summarizes the order and indicates “I agree” causes the system to move to a second screen. This second screen summarizes the order and asks the user to click, either confirming its order, or cancelling it. This satisfies subsection (a)(2) on intentional conduct and reason to know. It also satisfies the error correction procedure in section 213.” See \url{http://www.law.uh.edu/ucc2b/UCITA_final_02.pdf}
\item \textsuperscript{274} On cases in jurisdictions that enforce click-wrap agreements, see \textit{Koch v. America Online}, 139 F. Supp. 2d 690 (D. Md. 2000)) and Florida (\textit{America Online, Inc. v. Booker}, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001).
\item \textsuperscript{275} On differences in the judicial treatment of arbitration clauses in states like New York and California, see supra notes 93, 105, 106, 128, 129 and 160.
\end{itemize}
the manner in which courts delineate substantive and procedural unconscionability is likely to remain fluid.  

ii. Guidelines in regulating contracts

A variety of general drafting guidelines can assist drafters of “wrap” contracts to avoid findings of procedural and substantive unconscionability. Conditions can be drafted succinctly; they can include advance notice of onerous conditions; they can provide customers with time limited opt out entitlements; and they can incorporate explanatory notes directly or by references into the contract.

There are no assurances that courts will heed these guidelines. However, drafters may reasonably assume that courts are more likely to enforce conditions about which consumers have prior notice than in the absence of such notice. Courts are more likely to enforce conditions that are highlighted in “wrap” contracts than those that are not. Judges are less likely to void conditions that are clearly visible than those that are expressed in legal jargon and hidden amidst complex clauses. All other factors being constant, the more opportunity end

276 Such fluidity is evident across the law of unconscionability. See Eric A. Posner, The Parol Evidence Rule, supra note 30, at p. 540 (“In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.”)
277 On the significance given by courts to prior notice of conditions, see supra section X, ii & iii.
278 On the requirement that suppliers draw customers’ attention to conditions in “wrap” contracts, see e.g. Gatton v. T. Mobile Inc., discussed supra in section VI, ii.
279 This approach presupposes that courts engage in deduction in interpreting contracts, moving from higher to lower levels of abstraction. In effect, their decisions are grounded in policies and principles governing adhesion contracting and unconscionability, expressed through standards of reasonable and good faith, and applied by rules of application to specific cases. An inverted hierarchy of contract interpretation accords primacy to standards of reasonableness and good faith governing unconscionability applied in light of legal default rules and trade usages. See
users are given to choose whether or not to contract, the more likely will courts be to enforce conditions in those contracts.

No consistent jurisprudence has emerged over the limits of substantive unconscionability upon which the drafters of “wrap” contracts can comfortably rely. There are simply too many variables that influence judges in reaching determinations. For example, they may construe conditions in “wrap” contracts according to the subjective intention of the parties, or objectively based on inferences they impute to them. They may rely on the literal wording of “wrap” contracts or upon the wider trade context in which those contracts are concluded. Judges may decide according to the form of each “wrap” contract, whether it is a shrink-wrap, click-wrap or browse-wrap agreement, or according to the substance unfairness of specific conditions in that contract.\textsuperscript{280}

Courts may also diverge in construing “wrap” contracts, not only from jurisdiction to jurisdiction, but also in the same jurisdiction. Typifying shifts in judicial attitudes towards “wrap” contracts are changes in the State of New York from skepticism by judges towards consumer protection in Zeidenberg\textsuperscript{281} to their

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\textsuperscript{280} The wider context surrounding the contract includes extrinsic evidence beyond the literal or “plain word” meaning of the contract. Such evidence is conceived of as “objective” which may nevertheless include the practices of one or both parties that is not explicated through the “plain word” meaning of the contract. See \textit{Matthews v. Sears Pension Plan}, 144 F.3d 461, 467 (7th Cir. 1998); \textit{Cole Taylor Bank v. Truck Insurance Exchange}, 51 F.3d 731, 737–738 (7th Cir.1995); \textit{AM International, Inc. v. Graphic Management Associates, Inc.}, 44 F.3d 572 (7th Cir. 1995); \textit{Kerin v. United States Postal Service}, 116 F.3d 988, 992 n. 2 (2d Cir. 1997); \textit{Duquesne Light Co. v. Westinghouse Electric Corp.}, 66 F.3d 604, 614 (3d Cir. 1995); \textit{Carey Canada, Inc. v. Columbia Casualty Co.}, 940 F.2d 1548, 1557–1558 (D.C. Cir. 1991); \textit{Mellon Bank, N.A. v. Aetna Business Credit, Inc.}, 619 F.2d 1001, 1009–1013 (3rd Cir. 1980).

\textsuperscript{281} For discussion on Zeidenberg, see supra section V, i.
more recent protection of consumers. Notably, the Attorney General of New York in early 2007 successfully sued security company, Blue Coat Systems, over a condition in the EULA that prohibited customers from testing and benchmarking its services against those of competitors.\footnote{282} The State won even though Blue Coat Systems had advised consumers about the disputed conditions in advance of their purchasing its services.\footnote{283}

When all is said and done, “wrap” jurisprudence will depend significantly on judicial inferences of facts combined with judicial assumptions about the law. Judges may find “wrap” contracts procedurally conscionable yet enforceable on grounds that they are substantively conscionable. They may enforce browse-wrap contracts that do not provide prior notice of “wrap” conditions on grounds that those conditions are not unduly onerous, that they are widely used or reasonably known by end-users.\footnote{284} Others may decline to enforce conditions in click-wrap contracts that provide parties with prior notice of applicable

\footnote{282} See
\footnote{283} The company settled the suit and agreed not to enforce the anti-benchmarking condition and to pay a fine. A distinctive feature was that the plaintiff was the Attorney-General of New York, albeit acting in a public interest capacity, as distinct from a consumer. Nevertheless, commentators have treated this case as a victory against abusive click-wrap contracts. See further Jennifer Grannick, \textit{Courts Turn Against Abusive Clickwrap Contracts, Commentary, WIRED}, available at
\footnote{284} On the enforcement of a browse-wrap contract on grounds other than prior notice of the disputed conditions, see \textit{Forrest v. Verizon Communications, Inc.}, 805 A.2d 1007 (D.C. 2002), supra note 194. On the enforcement of a click-wrap contract on grounds that plaintiff received sufficient prior notice of the disputed conditions, see \textit{Groff v. America Online, Inc.} supra note 232 and section X.
conditions on grounds that they are oppressive. The manner in which courts decide specific cases will hinge upon when they value the sanctity of promises and how they redress contractual unfairness. There is nothing new in all this, except that judicial shifts in attitudes towards “wrap” contracts will inevitably influence how “wrap” contracts are drafted and how courts construe them.

XII. CONCLUSION

However much we live in a consumer driven, price conscious and information laden era, the fundamental character of consumer dependence upon dominant suppliers still prevails. So, too, does the basis for legally protecting consumers under the law of unconscionability.

Even accepting that Twenty First Century consumers are more market savvy than their predecessors were a Century ago, they are not sophisticated en masse in the subtleties of law in fields like intellectual property. Nor are they adequately resourced to defend themselves against the litigation muscle of software and computer suppliers and online service providers. Conditions in

285 On the uneven judicial treatment of conscionability, see Rakoff, supra note 27, at 1197 (referring to the law of unconscionability as a “jumble of contradictions.”
286 See e.g. Eric A. Posner, Contract Law in the Welfare State, supra note 10, at p.283.
287 On allegedly distinctiveness features of Twenty First Century consumers, see supra section III.
288 For a study on the statistical chance of winning a domain name dispute, see Michael Geist, Fundamentally Fair.Com: An Update on Bias Allegations and the ICANN UDRP, at http://aix1.uottawa.ca/~geist/fairupdate.pdf. Geist’s study reveals that Complainants [famous brand name owners] win 85% of the time in single panel determinations, and 64.3% of cases involving a three party panel. The study sampling ended in July 2001. See too http://www.udrpinfo.com/; Milton Mueller, Rough Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy, 17 INFORMATION SOCIETY 151 (2001)
“wrap” contracts that prohibit class actions make it virtually impossible for the average consumer to sue when litigation costs considerable more than the value of individual transactions. ⁴²⁸⁹ Even sophisticated cyber-squatters who buy “confusingly similar” domain names to famous brands for resale are unrepresented in almost all legal proceedings; and in 90% of cases heard, the disputed name is either expunged or transferred to the holder of the famous trademark. ⁴²⁹⁰

Even though most consumers in mass online markets are more agile than their counterparts were a century ago, the vast majority are inadequately resourced to stand off against the well oiled machinery of software producers and Internet service providers. However opportunistic consumers who shop online may have become, they are no match for well heeled suppliers that build formidable barriers to suit against most consumers. Even as repeat business and merchantconsumers have grown in sophistication in a global electronic economy, neophyte consumers continually enter the software and online marketplace. Most consumers also lack confidence to sue in the legal or arbitral “backyard” of their online suppliers.

What is debatable today is the extent to which mass producers devise bullet proof barriers to liability in their “wrap” contracts that consumers cannot avoid and from which they should be legally protected. As a practical matter, consumers who are subject to onerous conditions in End Users Licensing Agreements are disadvantaged, not simply because they lack deep pockets, but because large scale suppliers have strong economic incentives to devise binding arbitration clauses, to exclude class actions, to extract early termination fees and

⁴²⁸⁹ See generally Leon E. Trakman, From the Medieval Law Merchant to E-Merchant Law, supra note 111.
⁴²⁹⁰ On WIPO, see http://www.wipo.int/amc/en/domains/
to apply these conditions to their customers *en masse*. They also have the means to engage in hard selling tactics to cajole customers into one-sided EULAs.\(^{291}\)

Our post-modern blend of mercantilism and consumerism also diverges from its industrial predecessor a century ago.\(^{292}\) Consumers today engage in a greater range of transactions than in the past. They display wider bands of informed assent to contract than predecessor consumers. In place of the stark division between one-sided and two-sided transactions are multi-dimensional agreements that are dominated, not by all knowing sellers and unknowing buyers, but by an uneven balance of power between them. Software purchasers and online users vary from having infinite and detailed knowledge of adhesive conditions in contracts to having little knowledge and being easy prey to misleading information. End user agreements reflect the realignment in competition among suppliers that often favor consumers.\(^{293}\) On their face, shrink-wrap, box-wrap, box-wrap,

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\(^{291}\) Inferred here is that suppliers, by combining hard sell tactics, fine print clauses and the expectation that consumers will believe what they are told, consumers will “agree” to terms they might not have believed had they fully comprehended the significance of the special conditions. See generally, Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002); Peter J. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOCIAL PSYCHOL. REV. 346 (1997); Annette C. Baier, *Trust and Its Vulnerabilities*, in 13 TANNER LECTURES ON HUMAN VALUES 109, 112 (Grethe B. Peterson ed., 1992); Peter Vallentyne, *The Rationality of Keeping Agreements*, in CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER’S MORALS BY AGREEMENT 177 (Peter Vallentyne ed., 1991); ARTHUR A. LEFF, SWINDLING AND SELLING 84–87 (1976).


\(^{293}\) On the extent to which competitive awareness among mass suppliers leads suppliers to mimic each other’s contract practices, including to the benefit of customers, see W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971); Meyerson, *Efficient Consumer*, supra note 43, at 605.
click-wrap and browse-wrap contracts are profoundly adhesive in nature, not arms length agreements concluded between equal bargaining parties. In practice, they also reflect a reordered balance of power between mercantilism and consumerism that often favors the latter.\[^{294}\]

The law has also changed perceptibly to accommodate this new order. Today’s legislatures are called upon to reconcile the often tense interface between mercantilism and consumerism. Courts are relied upon to balance protecting business from the forays of new classes of repeat business and merchant-consumers against shielding vulnerable consumers from dominant suppliers. Tomorrow’s courts will be required to weigh adhesive conditions in mass contracts against the risk of stifling ecommerce. They will be expected to avoid extremes, not to become captive to fixed agendas and to recognize that the market needs of tomorrow, like the needs of yesterday, may be different to the needs of today.