A NEW AND OLD THEORY FOR ADJUDICATING STANDARDIZED CONTRACTS

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INTRODUCTION

The pervasive standard form contract is as American as Mom, apple pie and Mitsubishi. Notwithstanding the considerable print devoted to these contracts in legal literature,¹ a systematic, compre-

hensive American theory of standard form contracts\(^2\) is inchoate and in some disarray. The rub lies with American courts, which are egregiously mired in a Serbonian bog of 19th Century classical contract theory with its notions of free-will, presumed assent, duty to read, and bound-by-what-you-sign judicial nonintervention, and amoral, formal, external rules. This persistent retreat to the fold of classical contract formalism denies the modern reality\(^3\) and discrete significance of standard form contracts which typically do not conform to the classical bargained-for exchange model. Simply dragging up the strawman of monolithic classical contract law and giving it a good intellectual whipping does not, however, necessarily engender a new comprehensive theory for standard form contracts.

Indeed, for the past half century, courts and scholars alike have subjected classical contract theory to a considerable and unrelenting attack. A circumspect review of this eclectic scholarship demonstrates that no consistent thread or common core of ideas exists. Although these amorphous analyses, explications, criticisms, and auguries cannot be pigeonholed into any useful rubric or classificatory scheme, it is possible to discern some consistent order, that is, a spectrum

\(^2\) Regarding terminology, this article interchangingly uses standard form contracts, standard (form) terms, and standardized terms. What is meant are pre-formulated terms, mostly but not necessarily printed, which are drafted by a party who normally enters into numerous contracts of this kind. The terms are drafted to be used in numerous or at least several contracts. Though there may be some negotiating in a few cases, the terms are regularly offered on a take-it-or-leave-it basis and not made subject to bargaining. Compare Rakoff, supra note 1, at 1177, with Dugan, supra note 1, at 1316, who use almost the same elements for a definition. Some authors speak of contracts of adhesion rather than standard form contracts. See, e.g., Rakoff, supra note 1, at 1177. This term emphasizes not so much the standardized nature of the terms but the way of introducing them into a contractual relationship. As the term contracts of adhesion has led to inquiries into the circumstances of contract formation, respective market position of the parties, and other choices available to the adherent party, the term is not used here for reasons of clarity. This article will inter alia show that the law has to develop rules for standard form contracts without depending on such factual circumstances at the time of contracting. Factual inquiries necessarily breed unpredictability.

\(^3\) One American scholar has estimated that more than 99% of all contracts today are standard form contracts. Slawson, Democratic Control, supra note 1, at 529. However, that number may be exaggerated if one counts workday cash sales. See Rakoff, supra note 1, at 1189 n.57. Certainly the major part of credit sales and higher-value transactions are made on the basis of standard form contracts. The same is true in Germany. Compare also KAUFMANN, CORBIN SUPPLEMENT, supra note 1, at 566. In their worst appearance, standard fine print terms were described quite impressively in the last century. See DeLancey v. Inc. Co., 52 H.H. Reports (Shirley Vo: IV) 581, 587-88 (Rockingham, June 1873).
of ideas. This spectrum might be illustrated graphically by drawing a straight line with ideas from the deontological right on one end and the deontological left on the other. Movement on this contract-theory spectrum would be from private to public law, from contractual freedom to status to statism, from fault to no-fault liability, from the discrete to the relational, and from the rugged individual utilitarian to the altruistic community of shared values.

More specifically, this spectrum would consist of the following theories or models of contract law commencing with the deontological right: (1) wealth-maximization efficiency model; (2) Pareto efficiency model; (3) rugged individual assent model; (4) promissory model; (5) doctrinal classical bargain model; (6) formal contract construction

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4 This model equates efficiency with wealth maximization, that is, the efficient rule of contract law maximizes the dollar value of goods and services traded in the market. See, e.g., Shavell, Damages for Breach of Contract, 11 BELL J. ECON. 466 (1980).

5 Under a Pareto efficient contract model, neither party can be made (subjectively) better off without consequently making the other contracting party (subjectively) worse off. See, e.g., R. Posner, Economic Analysis of Law 65-100 (2d ed. 1977). This and the previous model substitute efficiency for promise as the basis of contractual liability. For a general discussion on the difficulties and ambiguities in these two models, see Kornhauser, A Guide to the Perplexed Claims of Efficiency in the Law, 8 HOFFSTRA L. REV. 591 (1980).


7 See, e.g., C. Fried, Contract as Promise (1981). Fried’s basic thesis is that “the moral principles embodied in promise underlay, and continue to underlie, contract.” Additionally, he advances that doctrines and lacunae of contract law are consistent with the promise principle. For a proposal that consent is the justification for enforcing contracts, see Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269 (1986).

8 Another rubric for this model might be the Harvard model. The classical theory of contract was initially molded by Langdell in the first American casebook (contracts) which together with a summary was published in 1871. The theory was further elaborated by O. W. Holmes in broad jurisprudential strokes in his lectures on contracts in The Common Law (1881), in meticulous detail by Williston in 1920 in the first major American legal treatise (contracts), and enshrined in our law by the first Restatement of Contracts in 1933. See generally Holmes, Education for Competent Lawyering — Case Method in a Functional Context, 76 COLUM. L. REV. 535, 540-60 (1976).
model;9 (7) realist neoclassical model;10 (8) adherence model;11 (9) no-fault tort model;12 (10) "contort," "torttract," "conequitort" model;13 (11) socialization of law, secular functional model;14 (12) relational

9 This model simply builds upon the classical model by advocating the solving of all contractual disputes through rules of contract interpretation and construction. See generally Part III A of this article.

10 This model emerged through the literary efforts of Karl Llewellyn, Edwin Patterson, Lon Fuller, Arthur Corbin, and Grant Gilmore, culminating in Article 2 of the Uniform Commercial Code and the second Restatement of Contracts (completed in 1979). See generally Symposium: The Restatement (Second) of Contracts, 67 CORNELL L. REV. 631-899 (1982).


12 This model has nearly, but not quite, been seriously proposed. See e.g. J. O'CONNELL & R. C. HENDERSON, TORT LAW, NO-FAULT AND BEYOND ch. 1 (1976); O'Connell, A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898 (1985).

13 It was perhaps Grant Gilmore who first showed that the boundaries between contract and tort were eroding, the result of which Gilmore (in his usual irreverent style) suggested would be a first-year course called "Contorts." G. GILMORE, THE DEATH OF CONTRACT 87-96 (1974). See also Speidel, The New Spirit of Contract, 2 J. L. & COMMERCE 193, 194-02 (1982); Speidel, The Borderland of Contract, 10 N. KY. L. REV. 163 (1983). Tort may be abandoning its great flywheel of fault for strict liability, compensation systems, and no-fault; fault, in turn however, is being absorbed into contract. Contract, using fault notions, seems to be embracing equitable principles such as the exciser concept of unconscionability and the additur concept of good faith. The result of this mix is three varieties of contract breach: (1) the amoral classical contract breach with Hadley-limited damages; (2) the bad-faith breach for which not only compensatory but all nonpunitive damages proximately caused by the breach are recoverable; and (3) the fraudulent or oppressive breach for which punitive damages are allowed. The proper label for this remedial expansion would be "conequitort." See generally Holmes, Is There Life After Gilmore's Death of Contract, 65 CORNELL L. REV. 332 (1980); Holmes, A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation, 39 U. Pitt. L. REV. 381 (1978). On the amoral nature of classical contract remedies, see Linzer, On the Amorality of Contract Remedies — Efficiency, Equity and the Second Restatement, 81 COLUM. L. REV. 111 (1981).

14 The 20th Century philosophical struggle of the sociological jurisprudes, legal pragmatists, and American legal realists to replace "transcendental nonsense" with a functional approach to law has met with some success. In the process of greatly influencing the general conception of contract law, O. W. Holmes, Pound, Jerome Frank, Llewellyn, Felix Cohen, Lasswell, and McDougal, among others, have perhaps reduced that conception to an expression of societal preferences. The process of secularizing law has killed Langdell's idea that law is an exact science, a system of logically discovered, scientifically deducible principles. See generally Berman, The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries, 27 J. LEGAL ED. 382 (1975); Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Trubek & Plager, The Place of Law and Social Science in the Structure of Legal Education, 35 J. LEGAL ED. 483 (1985); Woodward, The Limits of Legal Realism: An Historical Perspective, 54 VA. L. REV. 689 (1968).
social contract model;¹⁵ (13) altruistic community (Crits) model;¹⁶ (14) administrative-regulatory (Leviathan) model;¹⁷ and (15) nihilist deconstructionist model.¹⁸ This spectrum may be overly simplistic as

¹⁵ The primary proponent is Ian Macneil, who distinguishes the one-shot, discrete transaction model of the classical theory from the relational transaction model. The latter recognizes that many contract transactions involve long-term dealings between parties in which the parties' needs will change over time due to changed circumstances. He proposes a "relational approach" which permits the parties' rights and duties to be overtly adjusted during the relationship. "By contract I mean no more and no less than the relations among parties to the process of projecting exchange into the future." I. MACNEIL, THE NEW SOCIAL CONTRACT 4 (1980). Perhaps the most accessible explanation is Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 NW. U.L. Rev. 854 (1978). See also Macneil, Relational Contract: What We Do and Do Not Know, 1985 WIS. L. Rev. 483 (1985); Whitford, Ian Macneil's Contribution to Contracts Scholarship, 1985 WIS. L. Rev. 545 (1985). For the application of some of Macneil's relational ideas, see Lightsey, A Critique of the Promise Model of Contract, 26 WM. & MARY L. Rev. 45, 73 (1984) (applying Macneil's ideas to build an "exchange-relationship" model of contract that "seeks to heighten the interaction between contract and community."); Linzer, The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory, 20 GA. L. Rev. 323, 390-97 (1986); Speidel, Court-Imposed Price Adjustments under Long-Term Supply Contracts, 76 NW. L. Rev. 369, 400-04 (1981). See infra text accompanying note 362.


¹⁷ See, e.g., Leff, Unconscionability and the Crowd — Consumers and the Common Law Tradition, 31 U. PITT. L. Rev. 349 (1970) [hereinafter Leff, Unconscionability and the Crowd]; infra notes 33 and 50; and infra Part III(B)(i).

¹⁸ Perhaps the reductio ad absurdum of the Crits-crowd is "deconstruction" (a critique of formalism), that is, all legal principles, doctrines and rules are indeterminate. As such they do not and cannot decide legal controversies, even the most simplistic. For the contract model, see Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997 (1985). Deconstruction and a blitz on liberal political thought are said to be the two main themes in Critical Legal Studies literature. Tushnet, Introduction, Perspectives on Critical Legal Studies, 52 Geo. Wash. L. Rev. 239 (1984). Others have seen the Critskrieg as Puff (a "paper dragon, presently confined, as it were, to the law reviews"). See Hegland, Goodbye to Deconstruction, 58 S. CAL. L. Rev. 1203, 1205 (1985).
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other models, such as the ethical model,\textsuperscript{19} historical model,\textsuperscript{20} skills model,\textsuperscript{21} and even the storytelling model\textsuperscript{22} do exist.

Given such a spectrum of diverse, often internecine models, one must approach this polemic with a grain of salt. One can hardly blame the courts for rushing to the sure, firm ground of the tautological classical contract model when handling standard form contracts. But let us be honest: as we move along the spectrum there are bits-and-pieces worth saving and others which need to be discarded. To paraphrase Milton,\textsuperscript{23} truth has been torn into a thousand pieces; ever since Christopher Columbus Langdell set sail in 1870 to discover a new theory of contract,\textsuperscript{24} contract scholars have been continuously picking up bits and pieces. That process continues here.

The purpose of this article is rather simple, extracting a new theory of standard form contracts from the good bits of the spectrum of "old" ideas and combining them with some fresh rethinking. For something fresh, the authors choose to examine the German law on standard form contracts. The authors have tried to remain neutral observers but in extracting the best from the spectrum of ideas one necessarily states a view—in this instance, one of pragmatic compromise. Thus, this article will cull and identify elements from the spectrum specifically concerning standard form contracts and compare them with the German approach. This process is undertaken with a

\textsuperscript{19} Perhaps all contract models would lay claim to being the ethical one. Even efficiency is said to be an ethical goal. Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980). For an excellent discussion of the moral and ethical basis of selected contract models, see Kornhauser, The Resurrection of Contract, 82 Colum. L. Rev. 184, 185-90 (1982).


\textsuperscript{21} Contracts can be perceived and taught in terms of component lawyering skills, such as legal perspective, legal information, legal dialectics, legal operations, and fact management. See generally Holmes, Education for Competent Lawyering — Case Method in a Functional Context, 76 Colum. L. Rev. 535, 560-80 (1976).

\textsuperscript{22} For an account of the lawyer as storyteller, see Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984).

\textsuperscript{23} J. Milton, Areopagitica.

\textsuperscript{24} The story of Langdell's quest has been told by many. For one account see Holmes, Education for Competent Lawyering — Case Method in a Functional Context, 76 Colum. L. Rev. 535, 540-60 (1976).
perspicuous and pragmatic eye to formulating a new systematic, comprehensive theory of standard form contracts.

Considering the German and the American legal systems, German law is an appropriate choice. The economic background of the two societies is comparable, and use of standard form contracts in both countries widespread. As a result, courts in both countries developed rules for standard form contracts from traditional contract law. The two contract laws have their differences, but they share the basic notion of freedom of contract. In both countries, this notion is restricted only by requirements of securing conditions of contract formation which allow the assumption of equivalence of the bargain (absence of incapacity, duress, fraud, mistake, and the like). Substantive control, through concepts like illegality or violation of public policy, exists in both systems as a tool which is rarely used regarding classic bargained-for contracts. The result of this practice is that the courts enforce classically formed contracts without any investigation as to the adequacy of the exchange involved.

Traditionally, observers view American law as common law (judge-made law) and German law as codified law. There are, however, similarities in the way American and German law approach the issue of standard form contracts. In dealing with standard form contracts, courts in both legal systems necessarily assume the responsibility of making law. To venture beyond the limited scope of judicial control that is applied to classic contracts, courts in both countries employ the same basic concepts of interpretation and construction of contract language, assent, and direct substantive control.

In contrast to Germany's codified law tradition, the German law on standard form contracts contains elements of judge-made law. The German Civil Code, Burgerliches Gesetzbuch [BGB], does not address standard form contract terms at all. The courts thus developed a distinct body of rules for standard terms based upon three principles: the concept of assent, the invalidity of legal transactions which exploit one party to give the other a disproportionate advantage or which violate public policy, and the general requirement of good faith in contract performance.

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25 BURGERLICHES GESETZBUCH [BGB], January 1, 1900 (German Civil Statutes).
26 BGB § 138 states:
(1) A transaction that offends good morals (die guten Sitten) is void.
(2) Void in particular is a transaction whereby one person, with exploitation of the necessity, thoughtlessness or inexperience of another, is promised or
The advent of the German consumer protection movement brought about the codification of this judge-made law with the enactment of the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [AGBG]\textsuperscript{28} [Standard Contract Terms Act] in 1977. As far as it contains contract law, the AGBG mainly restates the earlier court rules.\textsuperscript{29} There is, nonetheless, an innovation in AGBG § 13 which gives consumer protection and trade organizations the right to seek injunctions against unfair standard form contract clauses.\textsuperscript{30} If successful, the challenged contract clause can no longer be used.

Traditional (classical) contract law in both the United States and Germany justified the enforcement of contractual obligations without evaluating the material fairness of the exchange, relying on a formal guaranty of fairness. This guaranty presumed that since the parties are free to bargain and assent to their contract, they have made their own decisions about the adequacy of the exchange. Based on notions acquires, for himself or for a third party, economic advantages whose value exceeds the value of his own performance to such a degree that, under the circumstances, there is a striking disproportion between them.

\textsuperscript{27} BGB § 242 states:
Obligations shall be performed in the manner required by good faith, with regard to commercial usage.

\textsuperscript{28} Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act Concerning the Regulation of the Law of Standard Contract Terms) [AGBG], December 9, 1976 (BGBl I 3317), modified through Act of March 29, 1983 (BGBl I 377).


\textsuperscript{30} Sec. 13 provides:
Action to cease and desist and to repeal
(1) Persons using, in standard contract terms, provisions that are invalid according to Sec. 9 to 11 of this law, or recommending their use for contractual relations, are subject to an action to cease and desist and, in the case of recommendation, also to an action to repeal.
(2) Actions to cease and desist and to repeal may be brought only:
1. by incorporated associations whose purpose as specified in their articles of incorporation include acting in behalf of the interest of consumers through education and advice, if they have as members [other] associations active in this range of goals or at least seventy-five natural persons;
2. by incorporated associations promoting trade interests; or
3. by industry and trade boards or craft boards.
(3) The associations specified in paragraph 2 no. 1 may not bring actions to cease and desist and to repeal if standard contract terms are used against a merchant and if the contract is made in the context of his business, or if standard contract terms are recommended for use exclusively among merchants.
of free will and judicial nonintervention courts did not second-guess the parties decisions. When standard form contracts transformed the character of contract formation from bargain to adhesion, however, the courts of the two countries reacted to this change in similar fashion.\footnote{They did so quite independently of each other. The court decisions are usually not at all affected by foreign law, but notice the exceptions. Lenhoff reports a decision by the United States District Court for the Southern District of New York which was influenced by German law in his article _Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law_, 36 _Tulsa L. Rev._ 481, 489 (1962). In scholarly writing, there were some contacts mainly through American authors who knew European law. See, e.g., Dawson, _supra_ note 29 at 1041; Ehrenzweig, _Adhesion Contracts in the Conflict of Laws_, 53 _Columbia L. Rev._ 1072, 1082-88 (1953) (dealing with choice-of-law provisions in adhesion contracts); Rotkin, _supra_ note 1, at 615-20 (describing the Swedish regulation). One German writer familiar with Anglo-American law is Kotz, who wrote a commentary on the German Statute dealing with standard form contracts for the Munchener Kommentar. It does not appear to have had much of an influence on his annotations, though; _see also_ Gottfried Raiser, _Die gerichtliche Kontrolle von Formularbedingungen im amerikanischen und deutschen Recht_ (1966).} The only difference is that German courts went a step further in acknowledging that they were adjudicating something different from traditional bargained-for contracts. This article, _inter alia_, will compare the American and German experiences in developing a body of standard form contract law and will evaluate what possible law American courts might fashion prospectively.

Section One of this article commences with some basic assumptions or premises which underlie the subsequent analyses. These assumptions clarify and restrict the scope of this study. For example, no inquiry is made into the existence and importance of standard form contracts or whether they are different from bargained-for contracts. Neither does this article address any need for a different legal treatment of standard form terms. The question is not if there should be a different body of rules for standard form terms, but how the rules should differ. The second and third sections, on German and American law respectively, provide the requisite information from which to draw conclusions concerning the possible development of a new American theory. The fourth section culls and describes those conclusions.

More specifically, the second section begins with an introduction to German contract law, showing the status of standard form contract law in the German legal system. Thereafter, any discussion of German law basically follows the order of the AGBG in addressing the rules concerning standardized contracts. Section Two goes back in time to
outline how German courts approached the problems currently addressed by AGBG provisions. This historical discussion is useful since the American law of standard form contracts will, as this article demonstrates, have to be developed by the courts. In addition, the historical discussion is necessary because the AGBG does not resolve all questions of how to treat standardized contract terms. Although the Act contains several provisions invalidating certain standard form terms, there are questions of how these different provisions interrelate. The historic roots of these provisions are important since the rules now found in the AGBG have been developed from prior judge-made law which applied different rules independently of each other. These once independent rules are now, however, incorporated into one Act and must be adjusted to each other.

Section Three examines the American rules of contract construction as applied to standard terms. Regarding assent and substantive control, the section first presents some scholarly viewpoints, then addresses American cases and the Restatement (Second) of Contracts. Such a task is undertaken with an eye toward forming some proposals for a comprehensive theory of standard form contract law.

The fourth section proposes a new theory for adjudicating standard form contracts under American law. These proposals are reached by taking elements and pieces of structure found in Section Three and rearranging them in a way influenced by the German law presented in Section Two. The result is a proposal for a simplified and manageable theory for standard form contracts with the goal of encouraging fair drafting. Though the proposal ventures outside American legal terra firma, it is not meant as a wholesale transplantation of foreign law but rather as a synergistic attempt to combine the best elements found in American scholarship and case law with the best from Germany.

I. UNDERLYING ASSUMPTIONS

To clarify subsequent analyses, this section states why standard form contracts require a treatment different from traditional contracts. Each statement here could be subject to scrutiny and analysis per se. However, since it has been often suggested that standardized terms need special rules, the emphasis now should be placed on the form and content of these rules.

32 This is discussed in a number of articles; see, e.g. K. LLEWELLYN, COMMON LAW
ASSUMPTION ONE: Standard form contracts are a necessary part of today’s business life.\textsuperscript{33}

Standard form contracts are the consequence of mass production and the hierarchical structures of the businesses which distribute services and products.\textsuperscript{34} They assure that numerous, relatively detailed contracts can be formed every day in a swift and efficient manner. Additionally, standard form contracts assure uniformity and quality since sales persons and customers are not allowed to formulate contract terms and conditions.\textsuperscript{35} Some argue, however, that the body of auxiliary contract provisions provided by the fine print of standard form contracts could also be provided by legislative or judge-made law. It is suggested the benefit of such mandated law might be a guarantee of greater fairness in mass contract provisions since the drafting party may not formulate terms in his own self-interest.\textsuperscript{36} While this view may hold some merit, standard form contracts are used in Germany even though there exists a legislated body of dis-
positive contract law provisions to step in where the parties did not supply their own terms. The German practice indicates that special standardized terms have value notwithstanding a dispositive contract law which gap-fills missing terms.

The benefit of standard form contracts lies in the fact that often-times standard terms provide the opportunity for rules better adapted to the special needs of particular bargains. Standard terms typically become relevant only after contract formation. In such instances, it is often easier for the non-drafting party to understand terms specially formulated for the bargain when he later examines his contract rights and duties (at least where the terms are properly drafted). In addition, the average contracting party finds the rules of law difficult to understand, and hard to transfer from general and abstract legal formulations to specific and sometimes unique circumstances. For example, many issues have more than one reasonable solution, and a contract term that deviates from dispositive law is therefore not necessarily wrong or worse than what the law would imply without such a contract term. Finally, standard terms can develop new types of contracts not yet recognized by any mandated law, thus providing contrasting flexibility. Standard terms, therefore, are justified even if dispositive rules of law are available to fill the gaps of the parties' agreement.\(^{37}\)

ASSUMPTION TWO: *In order to serve their function of making transactions more expedient, standard form contract terms, as a rule, are not subject to bargaining and are not read by the submitting party.*\(^{38}\)

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37 Rakoff takes the position that the implied rules of law serve the same purposes as standard terms in a fairer manner. It appears that he needs this thesis to justify his basic assumption of unenforceability of standard terms. But this is certainly not realistic. The average consumer would have difficulty in finding the law and transforming the necessarily general and abstract formulation of a legal rule into a concrete one for his particular business. See Kaufmann, Corbin Supplement, supra note 1, at 582. What would be sufficient, in turn, are standard terms which are felicitous in their substance to the implied rules of law but are in their formulation adapted to the particular deal. If Rakoff restricts his theory to the notion that modern distribution and business do not depend on the enforceability of every standard term, he may be correct because instead of invalid terms the law can substitute enforceable terms. But if his theory that modern distribution does not depend on the standard form terms has a connotation that standard terms are unnecessary, he is wrong. More important than the line of reasoning leading to the principle of unenforceability of standard terms, however, are other parts of Rakoff's theory. For more details see infra Part III (B)(3).

38 This assumption is stated quite clearly by Leff, Unconscionability, supra note 1, at 504.
This assumption addresses economic reality, as opposed to what the law traditionally requires. The Supreme Court addressed this point when it stated:

It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written.\(^4\)

American law persists in support of a "duty to read," the result of this duty being that a party is bound by what he or she signed even if he or she did not read the contract document. While German law also puts the risk of not reading the contract on the signing party, an exception exists where a standard form contract is involved.\(^4\)

\(^3\) See Kornhauser, supra note 1, for the relation between different economic models and contract theory.

\(^4\) Upton v. Tribilcock, 91 U.S. 45, 50 (1875).


\(^4\) See generally 1 Münchener Kommentar zum Bürgerlichen Gesetzbuch, Allgemeiner Teil, Kramer § 119 annot. 36-42 (2d ed. 1984) [hereinafter MÜKO Commentator]. Where no standard form terms are concerned, the risk is on the party who does not read the contract document, although he may avoid the contract for mistake if he had wrong assumptions about what terms are contained in the document. This may be hard to prove, though, and may in case of negligence lead to liability for breach of contract. When the document completely differs from what was planned, there may not even be a contract because mutual assent is lacking.
The American rule needs to be reconsidered as its underlying rationale is invalid for standard form contracts. A duty to read implies a possibility to read; where, however, standard form contracts are concerned this possibility may not exist.\(^4\) Even if the contract is formed by signing the document that contains the standard terms, reading the terms and trying to negotiate them would normally (a) exceed the time that both parties can reasonably spare for the business, and (b) exceed the competence and authority of the agent who represents the drafting party.\(^4\)

**ASSUMPTION THREE:** When standard form terms are not controlled by the process of bargaining, the law has to step in and exercise control. In stronger words, contract law using presumed assent should not grant a license to bully (to hold a legal gun to) another through the imposition of substantively unfair standard terms.\(^5\)

American decisions often quote the principle that the courts will not re-write a contract for the parties.\(^6\) The idea behind such a principle is that the parties know their needs best. Contract law

\(^{4}\) See Dugan, Systematic Approach, supra note 1, at 78-81. Sometimes, it may even be physically impossible to read the terms before formation of the contract. For instance, insurance policies are usually tendered only after the contract has been formed. See Patterson, supra note 11, at 192-02; Holmes, supra note 1, at 791-92; Slawson, Democratic Control, supra note 1 at 540; see also Steven v. Fidelity & Cas. Co. of N.Y., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962); Lachs v. Fidelity & Cas. Co., 306 N.Y. 357, 118 N.E.2d 555 (1954) (both cases involve airline passenger insurance purchased from vending machines; policy terms not upheld where it was unlikely that insured was able to read and understand policy); Robinson v. United States Benevolent Soc'y, 132 Mich. 695, 94 N.W. 211 (1903) (where application and policy differed, insured had right to rely on application); see also Rakoff, supra note 1, at 1185. According to Rakoff, traditional law is based on the opportunity to read; however, not even that is true. The traditional law works sometimes with the fiction of being able to read the contract terms.

\(^{5}\) See supra note 34.

\(^{6}\) The stronger language might be attributed to a Criteskrieger. See supra note 16 and the article by Kennedy cited therein; Leff, Unconscionability and the Crowd, supra note 17, at 351, emphasizing legislative regulation; in accord with Leff is Rotkin, supra note 1, at 613-15.

\(^{46}\) Continental Copper & Steel Indus. v. Bloom, 139 Conn. 700, 96 A.2d 758 (1953); Zaleski v. Clark, 44 Conn. 218, 26 A. 446 (1876) (Carpenter, J.); J.R. Simplot Co. v. Chambers, 82 Idaho 96, 350 P.2d 211 (1960); In re Cohen's Estate, 23 Ill. App. 2d 411, 163 N.E. 2d 533 (1960); cf. 3 A. CORBIN, CORBIN ON CONTRACTS, 95-95 (1960). But see J. MURRAY, MURRAY ON CONTRACTS, 743 (1974) who calls it a poorly kept secret that courts nevertheless make contract terms; Murray, Unconscionability, supra note 1, at 6.
secures the freedom and profit of the contracting parties by allowing
the parties to control their contractual rights and duties; no one is
presumed to be another's keeper. Where the ability of control through
a self-determined decision is absent due to incompetence (incapacity),
coercion (duress), 47 or a misrepresentation impairing the basis for the
autonomous decision (fraud), even traditional contract law does not
enforce the contract. The same must be true where standard terms
of a contract are provided in a manner that denies the submitting
party control over the content of the terms. Such is true because in
the modern business setting in which standard form contracts are
employed, it is not "the parties" who write the contract, but rather
it is one party writing the contract and the other party giving blanket
assent thereto. Courts cannot rewind the clock by insisting on applying
anachronistic rules adapted to a different process of contract for-
mation. When the assumption of equal bargaining power tied to free-
will assent can no longer be made, the rules derived from that
assumption have to be changed. 48

Such judicial control of standard form terms does not impose an
undue or uneconomical burden on the conduct of business because
it is up to the drafter to formulate clauses which will be approved. 49

47 For this concoction of the concept of duress, see Epstein, Unconscionability: A
48 Indeed, there is never equal bargaining power. Concepts like that are a stan-
dardization or typification and therefore always over and/or underinclusive.
49 Judicial control is not the only possible way to deal with standard terms. It would
be possible to subject them to nothing but traditional contract rules and let market
forces secure a way to make the clauses subject to bargaining and to limit the drafters'
choice of formulating terms in favor of the user. Competition among various manu-
facturers that invokes contract provisions could be one way. An example are car
manufacturers' warranties which become a factor in sales techniques from time to time. See Slawson, Democratic Control, supra note 1, at 548. Another way could be pressure
from consumer protection organizations. However, this paper opts for judicial control
which is tailored especially for standard form contracts for several reasons. Epstein,
supra note 47, at 293-94 points to two reasons for the traditional rule of enforcing
contracts as they are: a utilitarian and a libertarian. Similarly, there is a utilitarian and
a democratic reason to subject standard terms to a particular judicial control instead
of relying on market forces of the type just mentioned. One thing is that they are not
likely to work. Competition on one side of the market is not the same as control
through bargaining force by the side of the market opponents. It is the choice of the
drafting entities if they want to make terms subject to competition or not. They may
as well choose uniform trade association terms as in Henningsen v. Bloomfield Motors
Co., 32 N.J. 358, 161 A.2d 69 (1960). Consumer protection organizations have even
in their high times not been able to serve as a counter-weight. Their reach was not
far enough to represent sufficient bargaining power without invoking administrative or
legislative action. Furthermore, it is doubtful if they have a legitimate mandate to
ASSUMPTION FOUR: To do justice in individual cases by enforcing a standard term is not the most important court function in handling standard form contracts terms. The process of review should encourage the drafting of non-objectionable clauses which comport ab initio with basic notions of fairness.\(^5\)

It is costly and ineffective to control standard form terms by adjudicating them *ex ante* in every individual case. When dealing with mass standardized contract terms, the law should serve more than an enforcement function. In such instances, the law should encourage performance of contracts through the understanding that enforcement of contracts is to be expected from the courts. To accomplish this goal, the law has to give guidance on which clauses will pass the courts' review. After a clearance process, it should be predictable which terms will and will not be enforced. Such predictability gives the drafter the ability to formulate terms which can be expected to be enforced. A predictable law thus insures that standard form contracts can serve their function of furthering fast and effective contract formation.\(^5\) Without this predictability, the review of standard form contract terms does more harm than good,

impose their control on the submitting party. They are self-imposed representatives. The courts, on the other hand, have at least the legitimation of the democratic structure to exercise power when they apply substantive control of contract terms, though for judicial power, this democratic legitimation is weaker than for other branches of power. Perhaps the best argument for judicial control lies in the fact that one contracting party has asked the court to be a neutral arbiter by invoking the court's jurisdiction. \(^5\) Leff sees danger in a case-by-case solution of dealing with standard terms and votes for a more detailed legislative solution. It appears, however, that a lot depends on how courts deal with standard terms. Leff, *Unconscionability and the Crowd*, supra note 17, at 354-57.

\(^5\) See Spanogle, *supra* note 1, at 936, who surmises that predictability of an unfairness control increases the stability of contracts. Testifying in support of the UCC's unconscionability provision (Section 2-302), Llewellyn noted how courts without any predictable law twist harsh contract clauses to achieve justice:

Case No. 1 comes up. The clause is perfectly clear and the court said, 'Had it been desired to provide such an unbelievable thing, surely language could have been made clearer.' The counsel redrafts, and they not only say it twice as well, but they wind up saying, 'and we mean it,' and the court looks at it a second time and says, 'Had this been the kind of thing really intended to go into an agreement, surely language could have been found,' and so on down the line.

by obstructing the very purpose of standardizing contracts to avoid the burden of deciding upon appropriate terms in every single business deal.

ASSUMPTION FIVE: *To adjudicate standard form contracts in an appropriate manner, the law's answer must also be standardized.*

It exceeds the capability of the courts to subject every contract incorporating standard form terms to an individual inquiry into the particular circumstances of the formation and operation of the contracts terms. It has been said that it is easier to find one attorney who can skillfully draft a form for a million contracts than to find a million persons who can draft one satisfactory contract each. It is likewise easier to find one court that can make a good decision guiding the formulation of a million standardized contracts than to find a million judges who can appropriately adjudicate as many contracts by giving consideration to the particular circumstances of contract formation and performance of each contract.

ASSUMPTION SIX: *It is the law's, and therefore the courts', role to offer a suggested dispositive law for those standard parts of agreements which are not important enough to be subject to specific bargaining and individualistic formulation.*

Traditional contract law left it to the parties to formulate all the terms of their bargain. In a time of relatively few and relatively simple business deals, the possibility of such self-restraint of the law existed. Today, most contracting parties do not have the time and skills to formulate an agreement that provides for all possible problems. Given the complexity of modern products, manufacturing processes, and distribution systems, a complication of adequate contract provisions naturally follows. This complication makes it harder for the parties to provide appropriate provisions on their own without

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52 Holmes, *supra* note 1, at 795.

53 How far the courts' influence really reaches will be affected by factors other than the predictability of the law. It may be more costly to change a standard form than to lose a few cases. Those factors depend on how the submitting parties and the public behave. Additional remedies like the claim that can be brought under AGBG § 13 in Germany (*see supra* note 30) may increase the costs of not complying with the law and thus give an additional incentive to do so. But the first step has to be to make a clear decision on what are properly drafted terms.

54 Murray, *Unconscionability*, *supra* note 1, at 6.
investing unreasonable amounts of time and effort. To meet this need, the law should assume a service function in addition to its enforcement function. A body of dispositive law should supply additional provisions where the parties did not agree on their own terms. Even where one party provided the additional terms in the form of standardized clauses, this service function of the law is needed. In such cases, the law should decide whether the standard terms comply with basic notions of fairness. Such a decision, however, is not possible without a notion of what the proper terms are. If standard terms are found inadequate, the law should provide suitable terms; under modern conditions it is illusory and against the interests of both parties to invalidate the whole contract because of the failure of individual standard terms.

Common law courts have always been active lawmakers, either covertly or avowedly, subject only to accountability of the appeals process. These courts do more than declare and enforce immutable principles and rules of law or standard contract terms. In fashioning the dispositive law to evaluate fairness of standard terms, courts should follow a "community-sense" of shared values, that is, a large-scale communal sense of fairness. This communal or societal sense of appropriate standard terms seeks an intellectual and pragmatic mean between rampant individualism and a gravid legislative (or bureaucratic) "Leviathan." As Professor Peter Linzer explains:

Judges represent the state, but they are somewhere between a faceless bureaucracy and the individual. If they admit that they are lawmakers, if they face the need to change basic concepts of private law when times call for change, if they attempt to decide the issues in light of an ideal of community in a sense of rejecting an every-man-for-himself approach, they offer a partial solution to the collision between statism and rampant individualism. In a societal-sense of fairness, common law courts are another's keeper and the race is not necessarily to the swift regarding the use of mass-standardized contract terms.

II. German Law on Standard Form Terms

A. Status of the Standard Contract Terms Act (AGBG) in German Law

The Standard Contract Terms Act (AGBG) is the special source of standard form contract law in Germany. It is not, however, the

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exclusive source. In addition to the provisions of the AGBG, other rules of private law, such as fraud, incapacity, illegality, and mistake apply to standard form contracts. Moreover, the AGBG itself refers to other statutory provisions to determine the fairness or unfairness of contract terms.\(^56\)

The status of the AGBG can only be understood in the broader context of German private law as a whole. German law is typically classified as codified law, as opposed to the English/American common law. While this codification has never been perfectly systematic and comprehensive, subsequent developments have further undermined this posture.\(^57\)

The German Civil Code, the BGB, is the core of codified German private law,\(^58\) but it is not the exclusive source. The “Handelsgesetzbuch” which came into force together with the BGB in 1900, serves as the Code of German Commercial law. These two major Codes have been supplemented by a growing number of statutes (e.g., Abzahlungsgesetz (Installment Sales Act); Versicherungsvertragsgesetz (Insurance Contracts Act)). As the need appeared for more detailed regulation certain subjects were taken out of the Codes and addressed in more specific statutes. For instance, important legal forms of companies are dealt with in the Aktiengesetz (Stock Companies Act) and GmbH-Gesetz (Limited Liability Corporation Act). Many new developments, however, have never been incorporated into the Codes. Instead, specialized statutes like the “Strassenverkehrsgesetz,” dealing with strict liability for car accidents, have been enacted. The AGBG

\(^{56}\) See, e.g., AGBG § 9(2)(1).

\(^{57}\) The German codification is of relatively recent origin. The idea of codification as a general program of systematic and comprehensive enactment of law is a result of “The Enlightenment” and the adherent school of “Natural Law” in the 17th and 18th centuries. See K. Zweigert & H. Kotz, An Introduction to Comparative Law, 136-37 (1977). In Germany, however, the idea was not put into effect until the late 19th century, a fact due mainly to the delayed national unification of the numerous German feudal states. F. Baur, Bibliography of German Law 1 (German Association of Comparative Law ed. 1964). Prior to this nationwide codification of law, only some of the German states had enacted their own codes (e.g.; Prussia in 1794). Of predominant influence on the codification was the ius commune, the continental common law, which was applied in the majority of the states and was systematized by legal scholars. This law was based on the Roman Law as contained in Justinian’s Digests and received in medieval Italy. Thus, the codification has a recent basis in case and scholarly-made law.

\(^{58}\) For a general overview of German private law as contained mainly in the BGB, see N. Horn, H. Kotz & G. Leser, German Private and Commercial Law: An Introduction 71-169 (1982); see also G. Weick, Comparative Contract Law, University of Wisconsin Lecture Materials, 21, 23-24 (1985).
is thus only one of many specific statutes concerning legal subjects which developed simultaneously with changes in modern life.

The growth of case law proved an even more important segment in the process of undermining the ideal of codification. Almost immediately after the codes entered into force, the Courts began the practice of judicially filling loopholes and omissions which existed in the Codes. The courts eventually went even further and modified the very provisions of the Codes in order to keep up with perceived changes in modern society. Court decisions are not official sources of law in Germany, nor do they serve as binding precedents as in England or the United States. The *de facto* importance of rules established by the courts should, nevertheless, not be underestimated. For example, certain areas of law, such as labor and products liability law, are based mainly on court decisions. Until the enactment of the AGBG in 1977, the law of standard form contracts served as another example of predominantly judge-made law. The AGBG itself is primarily a codification of rules developed earlier by the courts. The BGB in its construction and application by the courts remains, however, the core of German private law. It contains a highly abstract introductory section which applies pervasively throughout the private law, even though this law is contained in specific statutes.

The BGB reasons in terms of obligations rather than in terms of bargains and torts. The sources of obligations are manifold: the contractual promise, torts, and what the American lawyer would call quasi-contract (unjust enrichment). Basic rules apply in general to all obligations, and additional specific rules apply to certain specified types of obligations such as sales and rent contracts.

Not content with merely enforcing obligations, the codified law seeks to structure such obligations. Freedom of contract is still the quintessential principle, but the law assumes a service function for the contracting parties by gap-filling a body of rules covering contractual circumstances for which the parties themselves failed to provide. This service function includes the shaping of contract types, the offering of dispositive rules, and even the imposition of coercive provisions which add auxiliary duties after contract formation. While American law in principle does the same, American law tends to

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59 To what extent this is the case is questionable. Compare Rakoff, *supra* note 1, at 1258 (who sees American law already providing background rules in many situations), with Llewellyn, *Common Law Tradition*, *supra* note 1, at 368-69 (who advances the development of transactional contract models and the specification of rules for them).
emphasize the distinction between freely incurred contractual duties, which the law must enforce without further consideration, and tort duties imposed by the law. In Germany, the presence of a comprehensive code furthers recognition of the fact that the parties exercise their freedom of contract against the backdrop and within the framework of the law. The idea of judicial control of standard terms is more acceptable to German courts because in Germany contracts are understood as an interaction between law and individual autonomy.

Some have proposed that standard terms have the quality of regulatory (administrative) law, and in fact, German law once treated them as such. Presently, this notion is unanimously rejected and German law views standard terms as a special species of contractual terms. These terms are subjected to specific control triggered by the very nature of a clause being classified as a standard term. The test that triggers the application of the AGBG is thus formalized.

B. Characterization of Standard Form Contract Clauses: Regulatory Versus Consensual Contract Law

Although once described as administrative or regulatory law, the AGBG treats standardized terms as contractual provisions. Today, this notion is unanimously rejected. The drafter or supplier of standardized terms has no authority to impose regulatory law on the

60 For an example of the importance given to this distinction (by talking about its destruction), see G. Gilmore, THE DEATH OF CONTRACT 87 (1974).
61 Dawson, supra note 29, at 1104 mentions another possible reason that led to the early concern of German courts with standard forms: their importance in the first half of this century throughout business activities, resulting from the structure of economic life in Germany during these years. There was a remarkable influence of industrial, commercial and occupational groups, one of whose functions was to draft standard forms for general use throughout industries (German antitrust law is of relatively recent origin).
63 PALANDT, supra note 29, AGBG § 1 Annot. 1; Judgment of Feb. 3, 1953, BGH, 9 BGHZ 3; Judgment of March 8, 1955, BGH, 17 BGHZ 2.
other party. Standard terms can become part of the contract only by agreement of both parties. Granting the drafter authority to impose rules of law would contradict any notion of personal autonomy and democratic control of the legislative process. Thus the drafter has no legitimacy, through elections or otherwise, to impose rules on the non-drafting party so long as this party does not consent.

The idea that standard terms can be characterized as regulatory law, however, is not without merit. Such a characterization furthers an understanding that standard terms are inherently different from bargained-for contract terms. By analogizing standardized terms to regulatory law, it is apparent that the consent of the non-drafting party to standard contract terms is defective in relation to consent to bargained-for terms.

This defectiveness has two aspects. First, the consent to standard terms is defective since it is not based on a true choice. It can be assumed that the party submitting to a standard form does not have a choice concerning the content of the clauses. Standardized terms are regularly offered on a take-it-or-leave-it basis, thus the only existing alternative is not entering into the contract at all.

The fact that most parties to a contract are not able to formulate reasonable alternatives to the supplied contract terms serves as another limit upon the parties' choice. This limit affects not only the non-drafting party, but also most representatives of the supplying party. The fact that the law provides dispositive rules which can be substituted for standard form terms does not rectify this lack of choice. Under German law, there is always the possibility of replacing the standard terms with the dispositive provisions of the BGB. The party

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64 Helm, supra note 62, at 124.

65 One of the useful aspects of perceiving standard terms as privately made law, and probably the reason that the language of a "prepared legal order" originated in the first place, concerned the problem of legitimacy of review by the highest court. The Bundesgerichtshof is, as the Reichsgericht was, restricted to reviewing questions of law, not of fact. Interpretation of contract language is considered to be a question of fact and the process of contract formation. By declaring standard form terms to be "general norms," the Reichsgericht succeeded in making itself competent to decide on the meaning of standard terms and to insure coherent and uniform law pertaining to those terms. See Dawson, supra note 29, at 1104-05; see also Staudinger, Kommentar zum Burgerlichen Gesetzbuch, Einleitung zu §§ 241-42, AGBG; Schlosser, AGBG § 5 annot. 18 (12th ed. 1983). Today, the competence of reviewing terms which are used in the district of more than one Oberlandesgericht (Higher District Court) is contained in Zivilprozessordnung (ZPO) §§ 549-50 (Code of Civil Procedure).

66 For an explanation of dispositive law as opposed to compulsory law, see Lenhoff, supra note 31, at 486.
faced with standard form terms can expect to get fairly balanced contract terms by substituting the standard terms with an agreement to use the BGB. Some commentators believe that American law also gap-fills rules for all fields of contract where standard terms play a role. One example of this gap-filling by American courts is found in contracts regarding the sale of goods, to which Article Two of the UCC applies. However, American common law as a rule expects more of the parties in fashioning their own terms, though the requirements of definiteness are declining. Even where the law provides terms which could be chosen by the parties instead of standard terms, the non-drafting party is still impaired in making an active choice by formulating different terms, especially for highly technical contracts like insurance.

The second defective aspect concerns the act of consent to standard terms themselves. The defect arises since the non-drafting party normally does not even know to what he has assented. In the formation of most standard contracts, there is not ample time to read, understand, and check the standardized terms and predict their consequences. These time constraints prohibit any substantive review, with any consideration generally being limited to the basic terms of the deal, such as subject matter, price, and the like. As Karl Llewellyn put it:

What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

Given these two aspects of defective assent, it is not surprising that some perceive standard terms as a form of regulatory law rather than agreed-upon contract provisions. Even if the characterization as regulatory law cannot be accepted, the mere recognition that standard form terms are different from normal contract terms is important.

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67 Rakoff, supra note 1, at 1181-83.
68 See, e.g., Llewellyn's second presupposition of American general law in LLEWELLYN, Book Review, supra note 1, at 700 (''Any particular or specialized terms in which the parties are interested, they will bargain about.''); compare Rakoff, supra note 1, at 1181-83 (50 years later). See also RESTATEMENT (SECOND) OF CONTRACTS §§ 33 and 204 (1981).
69 LLEWELLYN, THE COMMON LAW TRADITION, supra note 1, at 370.
It is this regulatory-law characterization which helped the German law to make a basic distinction between individualized contract terms and standard terms.

This distinction made by the AGBG is one of the most important achievements of modern German contract law. The use of standard terms is a structural change that will continue. By adjusting the law to that change, German courts and the legislature have created a body of rules governing the courts' treatment of particular standardized terms concerning how the courts will evaluate particular clauses. While there are standard terms which have never been tested in the light of the AGBG and need this review in order to be reformulated by the drafter, the appearance of standard form contracts has changed based on consistent decisions. The law can account for this success.

C. General Structure of the Standard Contract Terms Act

The AGBG applies only to standard form contract terms, thereby limiting the scope of its application. There are, however, areas of law which are exempted from the application of the AGBG: labor law, law of succession, law of domestic relations, and corporation law are examples. One important basic principle of the AGBG provides that the mere characterization of contract provisions as

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70 Bunte, Erfahrungen mit dem AGB-Gesetz - Eine Zwischenbilanz nach 4 Jahren, 181 ARCHIV FUR DEE CIVILISTISCHE PRAXIS [AcP] 31, 34-35 (1981). There remains, without doubt, a certain degree of vagueness and uncertainty that can never be avoided when the ex post control through courts is involved. But Rakoff notes that much of the resulting danger could be avoided by not trying to push standard terms to the outer limits of what is acceptable under the law. In addition, the provider has to run the risk of losing something if standard terms favor him too much. Otherwise, it would be an invitation to overdraft the clauses, which must be avoided even if the subjecting party may from time to time get a windfall. For the same reason, German law refuses to adopt partly invalid terms by striking out entirely the invalid parts in the form rather than reformulating the terms. Instead, the BGB provisions are invoked for the whole term. Otherwise, it is argued, standard form terms would be overdrafted because the risk would be no more than to be pushed back into the limits of what is possible and most favorable for the drafter. The drafters then could let the courts rewrite the most favorable terms for them.

71 AGBG § 23(1). The reasons for this exemption vary with the concerned fields. In labor law, unions make up for the missing power of individual employees. Collective bargaining agreements govern de facto even the contracts of non-union members. Furthermore, the courts of labor exercise a rigid control of employment contract terms. In the law of domestic relations and the law of successions, standard terms are not really used. Furthermore, family relations are more important in these cases than the business aspect.
standard form terms is sufficient to trigger the Act’s mechanisms of control. This initial test is a formal one, with no inquiry into the respective bargaining power, availability of substitute suppliers or different contract terms, intellectual ability of the non-drafting party, and the like.\(^7\) The purely formal character of the initial test makes the application of the AGBG predictable and easy to handle. Once the AGBG is found to be applicable, it addresses three questions:
1) How standard terms become part of a contract (AGBG §§ 2 and 3);
2) How those standard terms are construed (AGBG §§ 4 and 5); and
3) Which clauses are substantively objectionable and therefore invalid (AGBG § 9 states the general rule; §§ 10 and 11 name specific clauses which are always invalid).

**D. The Provisions of the Standard Contract Terms Act**

1. What Are Standard Form Terms?

Section One of the AGBG limits its application to standard form contracts. The AGBG’s definition goes beyond prior judge-made law, by fashioning a reliable and uniform definition of standard form terms.\(^7\) Furthermore, prior judicial law had a more restricted understanding of standard form contracts. Master form contracts treated as standard form contracts only when inconspicuously arranged and containing numerous terms.\(^7\)

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\(^7\) The same principle (there will be no inquiry into the degree to which the particular signer’s assent was impaired) was already emphasized by Dawson, *supra* note 29, at 1113, for the law prior to the AGBG.

\(^7\) See id., at 1116-17, for an account of some of the questions relating to what was held to be a standard term and subject to special control prior to the AGBG.

\(^7\) Master form contracts differ from contracts with standard form terms because the standardized parts are not added to the contract. The contract is formed by completing a form that provides the categories for parties, subject matter, price, etc., and may contain additional clauses. The contract document itself is standardized; it is individualized only by filling in blanks. To what extent a master form contract is standardized may differ profoundly from contract to contract. See as examples of denial of special control for master form contracts, Judgment of May 18, 1973, BGH, 61 BGHZ 17, 21; Judgment of Sept. 25, 1970, BGH, 1970 BETRIEBSBERATER [BB] 1504; Judgment of Oct. 29, 1975, BGH, 1976 WERTPAPIERMITTEILUNGEN [WM] 31, 32; cf. J. SCHMIDT-SALZER, ALLGEMEINE GESCHÄFTSBEDINGUNGEN 24 (2d ed. 1977); STAUDINGER, *supra* note 65, AGBG § 1 annot. 17.
Under AGBG § 1, all preformulated contract clauses which are intended to be incorporated into numerous contracts are subject to the AGBG. Thus, even the first time a standard form term is incorporated into a contract, the term is controlled by the AGBG. The intent to use the term as a standard one in numerous contracts is sufficient. Also, any single standardized term apart from the bargained-for terms is subject to the provisions of the AGBG.

It is not important who drafted the provision, whether it be the supplying party, a trade association, or even a commission representing the interests of persons usually confronted with standard terms of that kind. What is important is that the terms have been introduced into the contract by one party. Exactly how standard terms are supplied also does not matter. They may be put in the form of “fine print” and supplement the contract document, a fine-print part may be incorporated into the contract document, or a master form contract (Formularvertrag) may be used (a prepared form with blanks to complete to form the specific contract).

The AGBG, however, distinguishes between standard form and non-standard parts of a contract; the AGBG provisions apply only to the standardized parts. If prepared form parts have been subject to bargaining, the AGBG does not apply, even if the terms have not been changed in the bargaining process. The non-drafting party, however, must have had a real chance to influence the substance of the prepared clause(s).

AGBG § 1 distinguishes between provisions which can be considered as contractually agreed upon (in the sense of traditional bargained-for contracts) and provisions which have been supplied by one party and submitted to the other. To the bargained-for parts, traditional

72 Palandt, supra note 29, AGBG § 1 annot. 2(c).
76 Palandt, supra note 29, AGBG § 1 annot. 2(c); Staudinger-Schlosser, supra note 65, AGBG § 1 annot. 15.
77 Staudinger-Schlosser, supra note 65, AGBG § 1 annot. 20; cf. First Nat'l Bank of Decatur v. Ins. Co. of N. Am., 424 F.2d 312, 317 (7th Cir. 1970), cert. denied, 398 U.S. 939 (1970) (Ill. law) (terms of banker's blanket bond were drafted under consultation of American Bankers Association is insufficient reason for not applying the contra proferentem rule).
78 AGBG § 1(2).
79 Staudinger-Schlosser, supra note 65, AGBG § 1 annot. 31; left open in Judgment of Oct. 20, 1976, BGH, 1977 BB 59 (concerning brokerage contract granting the broker exclusivity and containing a damage provision if the real estate sale was completed without letting the broker participate). But see Koch-Stübing, AGBG, AGBG § 1 annots. 32-42 (1977); Dittman-Stahl, AGBG, AGBG § 1 annot. 49 (1977).
80 Palandt-Heinrichs, supra note 29, AGBG § 1 annot. 4(c).
contract law applies. Judicial control is restricted to reviewing the formal conditions under which the agreement was reached, together with a very limited substantive control, much like in American contract law. The control mechanisms of the AGBG apply to the unbargained-for parts.

2. Construction of Standard Form Contract Terms

AGBG § 5 contains the German version of the American contra proferentem rule that ambiguous terms are construed against the drafter. The rationale for the German rule is the same as the American rationale. It is in the hands of the drafter to formulate clear terms. He should not profit therefore from ambiguity in his own poor drafting. This reasoning implies that terms, at least those which go to court, are favorable to the drafting party.

Like all other substantive parts of the AGBG, § 5 (contra proferentem) does not apply to clauses which have been specifically negotiated. Apart from that limitation, § 5 applies to all standard form clauses, even those used between merchants, including big companies with bargaining power and sophisticated knowledge of contract law. Regarding such parties, the applicability of the rule has sometimes been questioned by American courts. Limiting the applicability of contra proferentem to cases of an unsophisticated party submitting

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81 Concepts like fraud, duress, incompetency, and mistake apply. The substantive control concerns illegality (BGB § 134), and violation of public policy and overreaching in combination with defects in the contract formation (BGB § 138). See supra note 26. How far the concept of violation of public policy reaches is described in Dawson, supra note 29.

82 The German contra proferentem rule is not contained in the BGB. The Reichsgerichtshof [RG] in Zivilsachen developed the rule for standard form terms early in this century. For the character of the rule as specifically applicable to standard terms see Staudinger, supra note 65, Annot. 1 to AGBG § 5; J. Schmidt-Salzer, supra note 74, at 158; Judgment of March 11, 1927, RG, 116 RGZ 274, 276 (ambiguous insurance contract terms are construed in the sense in which the insured could understand them in good faith, with regard to commercial custom); Judgment of Jan. 10, 1928, RG, 92 RGZ 60, 64 (insurance contract); Judgment of Jan. 18, 1918, RG, 120 RGZ 18, 10.


84 See supra Part II C.

85 Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) (dictum); Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976) (no need for contra proferentem rule when insured is a large corporation managed by sophisticated businessmen).
to standard terms, however, creates problems in identifying proper criteria to draw the line. In addition to that difficulty, there is another reason to make negotiation or non-negotiation rather than the bargaining power or sophistication of the non-drafting party the decisive element. The use of standard form terms is often dictated by the character and situation of the intended business. Time and effort going into a business deal may have to be limited to make a bargain profitable. This limiting condition can properly be seen as more determinative of the character of the agreement than the abstract power of the parties. It is therefore justified to subject non-bargained-for standard form clauses to the rule of contra proferentem even if the non-drafting party is not powerless, uneducated, or the like. The only concession German law makes is to take into account specific experience and capability of typical offerees of standard terms when deciding on the ambiguity of a term.

Reducing one-sidedness of standard form contract clauses through construction has been a popular means in the early adjudication by German courts of standard form contracts. The reason for the courts’ attitude appears to be that “construing” is the easiest way to reach a fair result with the least deviation from traditional contract law. Since construction of contract language typically concerns a single clause and a single contract, the decision can be based on specific factual circumstances and language. It does not require new or changed rules of law, or a general shift of doctrine.

The need to exceed the limits of traditional contract doctrine came with the rising number and quality of standardized clauses being called into question. In many cases it was difficult to find any ambiguity for the court to construe. Similarly, with the increasing number of cases, the decisions based on individual circumstances become more and more disparate. When the issue of predictability of the decisions was raised, the search for an underlying principle

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86 See supra text accompanying note 44.
87 There is the possibility that both sides try to impose their standard forms onto each other, which often occurs when two sophisticated companies deal with one another. The problem is then to decide which of the two conflicting standard term documents governs the contract. The U.C.C. solution is in U.C.C. § 2-207 (“Battle of Forms”). As to German law, the problem is dealt with by the general law of contractual obligations. The AGBG does not consider this question. The solution is in principle that non-contradictory terms become part of the contract. Where the terms conflict with each other, the dispositive law applies instead (majority view).
89 STAUDINGER, supra note 65, AGBG § 8 annot. 3; AGBG § 5 annot. 1.
issued. In the case of standard form contracts, the search led to substantive control of fairness and the use of the concept of assent, a path America law might well follow.

In addition to the more recent doctrines of substantive control and sufficiency of assent, the contra proferentem rule has survived in the AGBG. Construction, however, has substantially declined in importance. A review of the commentaries to the AGBG shows more decisions involving substantive control and lack of proper assent than decisions construing contract language. One can conclude that recent decisions are indeed rarely based on construction of standard terms against the drafter. In the area of insurance contracts, virtually no decision of the Bundesgerichtshof (BGHZ) (German Supreme Court in Civil Matters) since the enactment of the AGBG has been based on AGBG § 5. In contrast, the American contra proferentem remains bedrock insurance law, which is surprising given the formal, complicated, standardized language of insurance policies. One reason construction of contract terms has been discredited in Germany is the covert use for control in times when the legitimacy of substantive control was not yet generally recognized. After the AGBG expressly put substantive control into the hands of the courts, they concentrated on using these rules instead of reverting to construction. After substantive control becomes well established, courts can again look at the language of the contract terms.

A current controversy concerning AGBG § 5 involves using "objective" versus "individual" standards of construction to decide the issue of ambiguity. Individual construction takes into account the specific circumstances of the bargain, such as knowledge of the non-drafting party, representations at the time of contract formation, and the like. According to the objective theory, standardized clauses have to be construed without regard to the individual circumstances

90 See some of the standard commentaries, at e.g., Palandt, supra note 29, or Staudinger, supra note 65.


92 Staudinger, supra note 65, AGBG § 5 annot. 22; Brandner, Die Umstände des einzelnen Falles bei der Auslegung und Beurteilung von allgemeinen Geschäftsbedingungen, 162 ACP 237, 258-61 (1963); Wolf, Horn & Lindacher, supra note 88, AGBG § 5 annot. 6.
of the case\textsuperscript{93} because the terms are standardized and in general use. It has even been said that standard form contracts have to be construed like statutory provisions;\textsuperscript{94} such an objectionable proposition resurrects the idea that standard form terms are a type of (administrative) regulatory law.\textsuperscript{95} More recently, it has increasingly been suggested that the difference between the objective and the subjective theory of construction is not important, as relevant individual circumstances are just not present in most cases.\textsuperscript{96} This statement would no longer be true, however, if the individual theory were extended one step further. As AGBG § 5 applies \textit{contra proferentem} to cases where there are doubts \textit{in} the construction of the standard term, not doubts \textit{after} the construction, it has been suggested that the application of the rule has to be extended.\textsuperscript{97} The criticism is that under the label of an objective construction the courts can entirely avoid AGBG § 5 by simply finding one meaning of the standard contract term. Rather than this kind of effort, AGBG § 5 would require a favorable decision for the submitting party whenever in the course of construction more than one meaning appears reasonable.

The controversy has a parallel in American law, as illustrated by the conflicting versions of \textit{contra proferentem} in New York expressed in \textit{Champion International Corporation v. Continental Casualty Com-}

\textsuperscript{90} \textsc{Palandt, supra} note 29, AGBG § 5 annot. 3; \textsc{Ulmr, Brandner \& Hensen, AGBG, AGBG § 5 annot. 13, 16-20 (5th ed. 1987); 2 Münchener Kommentar zum Bürgerlichen Gesetzbuch, Kotz, AGBG § 5 annot. 4 (2d ed. 1984) [hereinafter MÜko-Kotz]; Judgment of Dec. 10, 1980, BGH, 79 BGHZ 117, 119 (concerning a special warranty clause); Judgment of May 12, 1980, BGH, 77 BGHZ 116, 118 (concerning liability clause). This is still the majority view. For formulations to the same end from the time prior to the AGBG, see Dawson, \textit{supra} note 29 at 1106-07; Judgment of Oct. 18, 1935, RG, 149 RGZ 96, 100 (extended reservation of proprietary rights); Judgment of April 6, 1937, RG, 155 RGZ 26, 28 (extended reservation of proprietary rights); Judgment of Dec. 31, 1938, RG, 1939 Juristische Wochenschrift [JW] 563; Judgment of Oct. 25, 1952, BGH, 7 BGHZ 365, 369 (extended reservation of proprietary rights); Judgment of Aug. 22, 1958, OLG Stuttgart, 1958 NJW 1875 (invalidity of seller’s terms because of no provision against having over-secured the transaction, complete invalidity of the terms based on BGB §§ 138, 139).

\textsuperscript{91} Judgment of Oct. 13, 1942, RG, 170 RGZ 233, 240-41; Judgment of Oct. 21, 1958, BGH, 1959 \textit{Neue Juristische Wochenschrift} [NJW] 38 (standard terms in electricity supply contract have the character of general rules of law (allgemeine Rechtsnormen) similar to a Rechtsverordnung [regulatory administrative statute]).

\textsuperscript{92} \textsc{Staudinger, supra} note 65, AGBG § 5 annot. 21.

\textsuperscript{93} \textsc{Staudinger, supra} note 65, AGBG § 5 annot. 18 and 20; Brandner, \textit{supra} note 92, at 254-55.

\textsuperscript{94} Bernstein, 1984 VW, \textit{supra} note 91, at 853.
pany, while the New York rule looks for any reasonable meaning favoring the non-drafting party, the opposing position is that *contra proferentem* is only the last resort after everything else has been tried to give the standard term a reasonable, clear meaning. Part Four of this article will reconsider the question of how to apply the *contra proferentem* rule.

3. The Role of General Assent in Controlling Standard Form Contracts

Two provisions of the AGBG, sections 2 and 3, use the concept of assent to control standard form contract terms. AGBG § 2 concerns assent to the incorporation of standard form terms into contracts in general. AGBG § 3 involves the invalidity of particular clauses which are so unusual that they are not presumed to fall within the general assent. Applying either section results in a contract between parties who agreed on the essential terms like price and subject matter, but all or part of the additional contract terms are invalid. While the remainder of the contract is valid, the invalid standard terms are expunged, and the rules of law are substituted. Only where it would be an undue hardship to one party to enforce the remainder of the contract is the entire contract void, which is a very rare case. According to general contract law (BGB § 139), the whole contract is void if it cannot be assumed that the contracting parties would have formed the contract without the invalid part. Though the written

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99 712 F.2d 4 (2d Cir. 1983).

100 Champion Int’l Corp., 400 F.Supp. at 980.

101 Schering, 712 F.2d at 10 n.2.

102 The “*contra proferentem*” rule in AGBG § 5 is supplemented by AGBG § 4 which grants the parties’ negotiated understanding priority over standard terms. Section 4 also contains an explicit rejection of any type of parol evidence rule because the priority of negotiated terms is not restricted to written individual understandings. See Sandrock, supra note 29, at 561. But cf. Black v. Evergreen Land Developers, Inc., 75 Wash. 2d 241, 450 P.2d 470 (1969) (invalidating adhesion contract integration clause).

103 PALANDT, supra note 29, AGBG § 6 annot. 4.
law is rather strict in its presumption of invalidity, in case of doubt judicial construction has favored upholding contracts, especially where standard terms are concerned.\textsuperscript{104} BGB § 139, if strictly applied to standard form contract terms, could in many cases cause the invalidity of the whole contract. AGBG § 6 changes BGB § 139 by enforcing the remainder of the contract except in specific cases.\textsuperscript{105} The provision thus continues what the courts had already done.\textsuperscript{106} The underlying reason for upholding the contract is that usually the parties presumably want to go through with their bargain even if auxiliary standard terms are invalid.

With these foregoing general remarks, the specific requirements of AGBG § 2 will be considered first and AGBG § 3 thereafter in connection with the provisions on substantive control. Since the relation between rules on defective assent to contract terms and rules invalidating contract terms for reasons of their substantive unfairness is an issue in German as well as in American law, it is useful to look at these two aspects together.

AGBG § 2 states three requirements for the incorporation of standard terms into the contract:

1) notice of the application of standard terms;
2) reasonable opportunity for the non-drafting party to obtain knowledge of the terms; and
3) assent of the submitting party.\textsuperscript{107}

These requirements have two effects: the non-drafting party cannot avoid the application of standard terms by simply not reading them, and the drafter cannot impose standard terms without obtaining the other party’s assent and without giving him a chance to read the terms. AGBG § 2 is, however, restricted in its application in two regards. The provision does not apply to agreements between merchants,\textsuperscript{108} and it applies in a modified manner to standard terms which

\textsuperscript{104} See Sandrock, supra note 29, at 561.

\textsuperscript{105} Judgment of Aug. 22, 1958, OLG Stuttgart, 1958 NJW 1875, 1876 (example from the time before the AGBG). There is no example cited in the leading commentaries for the time after the enactment of the AGBG.

\textsuperscript{106} The courts have done it generally when invalid standard form terms were concerned. See Judgment of Oct. 29, 1956, BGH, 22 BGHZ 92; Judgment of May 16, 1974, BGH, 62 BGHZ 327 (limitation of warranty clause; BGB § 139 is not applicable to standard form terms); Judgment of March 8, 1955, BGH, 17 BGHZ 1; Judgment of April 5, 1962, BGH, 37 BGHZ 94; Judgment of Feb. 17, 1964, BGH, 41 BGHZ 151.


\textsuperscript{108} AGBG § 24(1).
have to be approved by an administrative agency before they can be used.\textsuperscript{109}

The notice of the application of standard terms must be expressly stated, either orally or in writing.\textsuperscript{110} The notice also must be comprehensible.\textsuperscript{111} AGBG § 2 provides for the possibility of posting a conspicuous notice at the place the contract is made in cases where the giving of notice in a different manner is too burdensome. In these cases, compliance with the second requirement of AGBG § 2 (the chance to obtain knowledge of the terms) can be made in the same manner, by posting the terms conspicuously.\textsuperscript{112} An example where posting of the terms is sufficient is a transportation contract.\textsuperscript{113} Normally, however, the chance to obtain knowledge is properly given only by tendering an exemplar of the terms that can be kept by the non-drafting party.\textsuperscript{114}

AGBG § 2 rejects the concept that standard form terms become part of the contract if the non-drafting party "should have known" that they are incorporated, a view (merchants excepted) sometimes taken by courts before the AGBG was enacted.\textsuperscript{115} A position similar to this older view is taken by the AGBG only for standard form terms which have to be approved by an administrative agency and for agreements between merchants.\textsuperscript{116} Regarding administrative terms, notice and chance to obtain knowledge are not prerequisites to their incorporation, though general assent to the incorporation of the standard terms into the contract is still necessary. This special treatment concerns, most notably, insurance policies.\textsuperscript{117}

\textsuperscript{109} See infra note 116 and accompanying text.
\textsuperscript{110} STAUDINGER, supra note 65, AGBG § 2 annot. 4.
\textsuperscript{111} See MÜKO-KOTZ, AGBG § 2 annot. 9.
\textsuperscript{112} STAUDINGER, supra note 65, AGBG § 2, annot. 18-25, 34.
\textsuperscript{113} See PAlANDT, supra note 29, AGBG § 2 annot. 2(b) and 3(a).
\textsuperscript{115} See STAUDINGER, supra note 65, AGBG § 2 annot. 1; Judgment of Feb. 3, 1953, 9 BGHZ 1, 2; Judgment of Jan. 22, 1954, 12 BGHZ 136, 142; Judgment of July 8, 1955, 19 BGHZ 98, 99. The concept differs from Restatement (Second) of Contracts, § 211(1) as well. The Restatement requires the manifestation of assent but does not require the possibility of obtaining knowledge. Instead, it is sufficient that the submitting party has reason to believe that like writings with like terms are regularly used, and has manifested assent to the applicability of the terms.
\textsuperscript{116} See AGBG § 23(3).
\textsuperscript{117} Insurance policies must have been approved by the Versicherungsaufsichtsammt (Insurance Control Agency, an equivalent to the Insurance Commissioners in the United States) before they can be used, see Versicherungsaufsichtsgesetz [VAG] § 5(III)(2) (Insurance Control Act).
The tightened requirements for the incorporation of standard form terms brought by AGBG § 2 are an improvement. They cannot be expected to change fundamentally the process of agreeing on standard terms. The non-drafting party will in most cases still not read the terms, but the requirements give the non-drafting party the chance to rely on the knowledge of the terms once a problem involving them arises. In this sense, AGBG § 2 serves as a "subsequent party autonomy." The price for pursuing this kind of autonomy is reasonable because the drafting party normally can easily tender the text of the standard terms.

4. Control of Specific Terms: Defective Assent and Substantive Control

Under the AGBG, a specific standard term may be unenforceable for two different reasons. First, the term may be so unusual that a non-drafting party could not reasonably expect it (AGBG § 3). The term's unusual character excludes it from the assent given to the general application of the standard terms. Alternatively, the term may violate the notion of good faith and therefore be invalid (AGBG § 9).

AGBG § 3 emphasizes the formal defect. The consent of the submitting party is defective because the drafting party could have perceived that under traditional circumstances, with actual knowledge of the terms and the ability to choose, the other party would not have accepted the terms. If it is conceded that in the course of modern business relations it is in both parties' interest that standard terms are accepted without reading and negotiating them, the resulting power of the drafter to impose whatever he likes must be reduced. This power to impose results from the traditional duty-to-read rule which holds the non-drafting party to whatever terms the drafter included. Once the duty to read has been limited, AGBG § 3 expresses nothing but the objective theory of contractual agreements. The non-drafting party's assent is construed as a reasonable user-drafter of standard terms would understand it. The non-drafting party cannot be deemed to have given a blanket assent to what could not be expected and understood.118

This formal control through the concept of assent has its separate justification and significance even if substantive control of standard

118 See Staudinger, supra note 65, AGBG § 3 annot. 4. Section 3 is only a specification of general principles of the doctrine of contractual assent.
form terms has been broadly accepted. Limiting the assent to conspicuous, foreseeable terms permits the presumption of comprehension of the standard terms when contractual provisions become important in a situation of actual conflict. Moreover, the legitimacy of enforcing standard terms is addressed. The only basis to enforce standard terms is the presumed assent of the submitting party. When the court tells a non-drafting party that he assented to a confused or exotic term, the credibility of the law is at stake. The issue should not be whether party autonomy is exercised the moment the contract was formed but whether the law can enforce a clause predicated on the submitting party's assent. The question is what a reasonable party's attitude would be the moment a judge enforces a standard term that the party never read: is it, "O.K., I should have read it," or is it, "What a loophole! The court has given me a boat to cross the River Styx."

The second control of standard terms is AGBG § 9, which concentrates on the substantive defects of standard terms. The provision is supplemented by a catalogue of invalid clauses in AGBG §§ 10 and 11. The technique which the AGBG uses in Sections 9, 10, and 11 is a compromise between predictability and flexibility. Sections 10 and 11 address specific clauses which by experience are often included in standard terms. Merely to forbid certain clauses, however, is never sufficient against the ingenuity of contract drafters who will divine new ways to unfairly favor their own interests. Therefore, section 9 contains a general clause invalidating standard form terms which violate the notion of good faith. The specific clauses preempted by Sections 10 and 11 shall be disregarded here, for they belong to the specific context of German law and society; American law has to make its own decision about which clauses offend American notions of good faith and fairness.

What should be addressed, though, is the technique AGBG § 9 uses for substantive control of standard terms. The general gauge is

120 The sections do not apply to contracts between merchants. See AGBG § 24. But the general clause in AGBG § 9 does apply to contracts between merchants. The consequence has been that courts have applied generally the same rules as stated in sections 10 and 11 but under the different rationale of section 9. See Wolf, Horn, & Lindacher, supra note 88, AGBG § 24 annot. 17, 18.
121 See Dugan, supra note 1, at 1333 (citing the difficulties of deciding between detailed interference and a generalized standard).
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the standard of good faith. In the case of doubt about the fairness of a standard term, section 9 uses two presumptions to determine when terms prejudice the non-drafting party in a manner that violates the command of good faith. One is the deviation from fundamental principles which underlie the legal rules which would govern the contractual relationship without the standard terms. The legal rules have the presumption of fairness in their favor. If standard terms deviate from what would otherwise be the applicable law, a valid reason has to be shown to convince the neutral observer that the terms still comply with fundamental notions of fairness. If the deviation is material and there are doubts about its appropriateness, the standard terms are invalid.¹²²

The second presumption concerns standard terms which contradict the rights and duties inherent in the nature of the contract.¹²³ This presumption applies to the situations where standard terms eviscerate terms which are material to the contract. A case like Williams v. Walker-Thomas Furniture Co.¹²⁴ could be discussed under this provision. In Williams, the dragnet security clause had the effect that, as long as any item purchased from the furniture store was not yet completely paid, all the other goods bought from the store served as security for the open balance and could be repossessed upon default of any payment. This extended possibility of repossession, because it made it difficult to obtain unrestricted possession of the purchased goods, could be invalidated by a German court under the second presumption of AGBG § 9.¹²⁵

For purposes of fashioning a new American theory, the important aspect of AGBG § 9 is its first presumption; that standard form contract terms are invalid if they deviate unreasonably from the legal rules which otherwise would govern; the availability of a body of

¹²² This reasoning has its predecessors in earlier court decisions. See, e.g., Judgment of Nov. 4, 1964, BGH, 1965 NJW 246 (concerning term in brokerage contract that entitled broker to the agreed commission by merely finding a lender, whether or not the loan was actually made); cf. BGB § 652(1), (the broker earns the commission only if a contract is actually made); Dawson, supra note 29, at 1111.


¹²⁴ 350 F.2d 445 (D.C. Cir. 1965).

¹²⁵ That does not mean that the clause would be invalidated. The specific needs of a business would be taken into account when deciding on the validity of a term. For further consideration of Williams v. Walker-Thomas Furniture, Inc., see text at note 306 infra.
rules to govern contracts without standard terms has certainly made the step towards substantive control easier in Germany. Standard terms can be compared to legal provisions when the fairness of the terms is in question. Substantive control thus frees itself from the anathema that the courts "wrote the contract for the parties." What made the courts invalidate standard terms was not that the judges had their own ad hoc notion of what should be fairly included in a bargain. American courts could point to legislation, administrative rulings, and standing judicial construction to show what is deemed to be fair and adequate for a contractual relation. German courts have principles to refer to because the BGB assumes a service function beyond enforcing properly formed contracts as the parties made them. It provides the supplementary (dispositive) rules for agreements of the parties to the extent that the parties omitted terms in their agreements.126

Because of historical reasons, both lines for the control of standard terms (defective assent and substantive defect) are incorporated into the AGBG. The two approaches originated in the earlier judge-made law; though substantive control started early in this century,127 courts made only limited use of it, relying instead on BGB § 138.128 Substantive harshness and facts surrounding contract formation, like the drafter having a monopoly, were taken together to invalidate terms.129 Only recently has the German Supreme Court in Civil Matters (BGHZ) based a frank substantive control of standard terms on the good faith requirement of BGB § 242.130 At first, however, many decisions

126 That this is the case may have its reasons in the BGB thinking in terms of obligations rather than of bargains where contracts are concerned. The idea of obligation involves the law to a greater extent and requires that it be structured. Cf. supra note 59 and accompanying text.

127 STAUDINGER, supra note 65, AGBG § 3 annot. 1; see Judgment of March 31, 1941, RG, 1941 DR 1726; Judgment of Feb. 17, 1964, BGH, 41 BGH 151 at 153, 154; Judgment of May 8, 1973, BGH, 60 BGHZ 377, 380 (concerning provision in brokerage contract with exclusivity clause that commission has to be paid in full if the seller executes a contract without help of any broker).

128 Used in Judgment of Nov. 11, 1968, BGH, 51 BGHZ 255, to invalidate the whole contract (confusing installation contract for an automatic vending machine).

129 Judgment of Feb. 11, 1888, RG, 20 RGZ 115, 117 (no violation of BGB § 138 seen; case involved carrier disclaiming liability for damages to goods for transport); Judgment of Dec. 15, 1933, RG, 143 RGZ 24, 28 (electricity supply contract; misuse of a monopoly position); Judgment of Aug. 14, 1941, RG, 168 RGZ 321, 329 (BGB §§ 138 and 242 used as gauge); see L. RAISER, DAS RECHT DER ALLGEMEINEN GESCHÄFTSBEDINGUNGEN 116 (1st ed. 1971) on the consideration of misuse of a monopoly position when adjudicating disclaimers of liability.

130 Judgment of June 4, 1970, BGH, 54 BGHZ 109; Judgment of March 8, 1955,
were based on double-reasoning, mentioning the defectiveness of assent as well as substantive unfairness.\textsuperscript{131} The reluctance to exercise openly a substantive control is thus not confined to the United States. German courts have over a long period of time preferred to avoid an open exercise of substantive control by stretching contract construction and concentrating on the lack of assent to standard terms.\textsuperscript{132}

Because both lines of reasoning, defectiveness of assent and substantive unfairness, were incorporated into the AGBG, questions arose concerning the relationship of each to the other. Neither operates independently of the other: assent to unusual and unexpected terms is defective because the terms are unfavorable to the non-drafting party; no one, obviously, would complain about favorable clauses. Equally, harsh terms imposed in the form of standard terms make the substance of such terms objectionable under AGBG § 9. The terms which section 9 invalidates would be validated if contained in a bargained-for agreement.

AGBG §§ 3 and 9 thus start at different points to deal with the same phenomenon,\textsuperscript{133} and overlap in part. Under section 3, standard terms may be unusual because of their uncommon and harsh substance, but the two provisions are not congruent. A term that could pass the standards of section 9 may be invalidated via section 3 because it was hidden in fine print or inconspicuously formulated. A perfectly clear and conspicuous term may be invalid because of its substance.

The relation between AGBG §§ 3 and 9 has recently been subjected to discussion because German courts continue to avoid difficult ques-


\textsuperscript{132} See id. at 1111-13. The author shows how courts prior to the AGBG have dealt with the same principles now contained in section 9 under the heading of unfair surprise.

\textsuperscript{133} See Judgment of May 8, 1973, BGH 60 BGHZ 377; Judgment of Feb. 28, 1973, BGH, 60 BGHZ 243; \textsc{Staudinger, supra} note 65, AGBG § 3 annot.; cf. Dawson, \textit{supra} note 29, at 1110.
tions of substantive unfairness by using the unusual character and the resulting lack of proper consent to invalidate a term. One proposal seeks to limit the scope of section 3 to questions of physical inconspicuousness because of the type of print or the placement of the term. Historically, the two-fold line of argument shows that questions of surprise and unfairness are closely related. Although substantive unfairness does not in every case have to affect the assent (and vice versa), inconspicuousness and the surprise factor both affect assent and thus assist the unfairness inquiry. A fair clause is less likely to be surprising. On the other hand, the substantive unfairness of a clause makes it harder to find the assent genuine. The two aspects of analysis thus do not concern completely separate issues which can be properly distinguished and put into two different categories. Rather, in every case of objectionable terms one must explore both procedural conspicuousness and substantive fairness in varying degrees. Courts in every case must evaluate where the emphasis of objectionability lies: on the method of securing the formal manifestation of assent or on the very substance of the clause. It will be the task of legal scholarship dealing with the AGBG in the next decade to find principles for this evaluation.

134 German law does not require easy-to-read provisions like some provisions of American insurance and consumer contracts. The rise in the 1970's of anti-jargon legislation has proven to be a failure. The painfully obvious question is: To what extent can plain language improve individual comprehension of contracts? See Davis, Protecting Consumers from Overdisclosure and Gobbleygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 VA. L. REV. 841 (1977). Several tests (Flesch and the Dale-Chall) have been divined by social scientists to ascertain the reading level of a document and have been legislated to specify a desired level of readability. See, e.g., W. YOUNG & E. HOLMES, CASES AND MATERIALS ON INSURANCE LAW 237-48 (1985). Comprehension is the rub, not readability of words. Simply put, concepts are less difficult and more comprehensible the more one is familiar with the subject matter. Who is familiar with insurance policies? For an amusing example, see Skariat, Readable Policies, 21 FOR THE DEFENSE 17, 20 (1980) where the following was Fleschingly readable: "Theorem: Let S be a set. Let it be bounded. Let it be infinite. Then there is at least one point of accumulation of S. PROOF: S lies in a closed interval. Call it 1.1?. Divide 1.1? into two parts . . ." In contrast, the following was adjudged unreadable: "Crackle, crackle came the interference over the citizens band radio in Hernando's eighteen-wheeler. Suddenly a sultry voice purred, 'Hello, eighteen-wheeler jockeys. This here's Cynthia at Leroy's Trucker Haven. How about some you eighteen-wheeler jockeys pulling into Leroy's for some exotic relaxation.' Familiarity breeds comprehension? For this article, these stimulating issues are rejected in favor of a pure objective approach. See infra note 350.

135 Werber, Die Bedeutung des AGBG fur die Versicherungswirtschaft, 1986 VERSR 1, 6.
E. Presumption of Enforceability or Unenforceability of Standard Terms?

Does the AGBG base its control of standard form terms on the presumption of enforceability or unenforceability of standard terms? This question is not raised by German law, but is mentioned here because the theory of presumed unenforceability of standard terms will be addressed in connection with American law. For example, Rakoff’s article on contracts of adhesion (discussed subsequently) uses this presumption.136

The proper formulation for the AGBG position is that “standard terms are enforceable but only if...” One may call the AGBG position a diluted presumption of enforceability. The word presumption may be inappropriate, for once the non-drafting party has made a *prima facie* case that the contract terms were standardized, their substantive fairness is reviewed as a matter of law. The judge must review on his own initiative. One cannot speak of a presumption of enforceability in the sense of rules of evidence, as in drawing a conclusion regarding causation from certain facts, nor in the sense of U.C.C. § 2-719 (3) (limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable). By contrast, German law goes further in AGBG §§ 10 and 11. The clauses mentioned by those sections are always invalid. In the case of AGBG § 9, however, validity depends on the court’s analysis. No specific burden of proof of invalidity is made since a question of law is involved. The term “presumption” can thus be used in a non-technical sense only, expressing a general attitude whether standard terms deviating from dispositive law tend to be enforceable or not. There is no easy answer in this non-technical sense as to whether section 9 is based on a presumption of enforceability or non-enforceability of standard terms. The tendency to strike terms has grown constantly after the instrument of AGBG § 9 was entrusted to the judges. The control of insurance policy terms, for instance, has only recently begun in earnest, and insurance policy terms will certainly come out differently in this process. Confronted with this rising exorcism by the courts, drafters are asked to diminish through modifications of the standard terms the gap between what the court by law would state and what the standard terms state. On the other hand, courts have to consider what standard terms provide

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when they develop principles of law for new businesses and commercial innovations. Thus, the content of standard terms can become an element of creation of law. As a general impression, one may note that the courts have increased the requirements for valid standard form contract clauses during the last decade. In Rakoff's terminology that may indicate a trend towards presumptive unenforceability. That observation, however, seems rather overdrawn. One should instead describe the German process as a tightening of the strings between dispositive law and standard terms.

III. DEVELOPMENT OF AMERICAN LAW OF STANDARD FORM CONTRACTS

The elements in the American effort to develop a doctrinal approach to standard form contracts will now be elaborated upon so that the following Section Four can reorganize those elements with a synthesis of the best from German law to formulate a new American theory. This theory will primarily use the elements of American law but systematize them in a manner influenced by German law.

Like German law, American law has used three basic concepts (construction, assent, and substantive control) when dealing with standard terms. The use of contract construction shall be addressed first, as it is easily separated from the other two. The general law regarding assent and substantive control shall then be presented, followed by an evaluation of the scholastic attempt to develop a coherent doctrine. Thereafter, the case law will be reviewed to discern if the structural elements advanced by scholars are in fact used by courts. Finally, U.C.C. § 2-302 shall be considered with special attention paid to the problem of controlling contract terms through the courts, a point of interest which has produced a lively discussion about the doctrine of unconscionability.137

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137 Braucher, supra note 1; Davenport, supra note 1; Eisenberg, The Bargain Principle and its Limits, 95 Harv. L. Rev. 241 (1982); Ellinghaus, Defense of Unconscionability, supra note 1; Note, Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts, 35 Hastings L.J. 161 (1983); Hillman, supra note 1; Note, Unconscionability -The Code, the Courts and the Consumer, 9 B.C. Indus. & Com. L. Rev. 367 (1968); Note, Unconscionable Contracts: the Uniform Commercial Code, 45 Iowa L. Rev. 843 (1960); Johnson, supra note 1; Kornhauser, supra note 1; Left, Unconscionability, supra note 1; Left, Unconscionability and the Crowd, supra note 33; Murray, Unconscionability, supra note 1; Speidel, supra note 1; Vener, Unconscionable Terms and Penalty Clauses: A Review of Cases Under Article 2 of the Uniform Commercial Code, 89 Com. L. J. 403 (1984).
A. Contract Construction: Contra Proferentem and the Doctrine of Reasonable Expectations

The traditional common law rule of construction, contra proferentem, supplements the equally traditional "plain meaning rule." According to the plain meaning rule, contract language is given the plain and ordinary meaning of the words.\(^{138}\) The rule is still often cited by the courts,\(^{139}\) although it has been criticized because words never have one "correct" meaning.\(^{140}\) The contra proferentem rule adds that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the understanding that is less favorable for the drafter or supplier of the words is preferred.\(^{141}\)

Two underlying rationales for the contra proferentem rule are usually advanced: the drafter is in the business of using this kind of form and he could do better by writing better forms or explaining them to the other party;\(^{142}\) and the drafter wrote a contract which

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\(^{140}\) A. CORBIN, supra note 46, at 16; Hurst v. Lake & Co., 141 Or. 306, 16 P.2d 627 (1932) (explaining that the word "thousand" may mean different things according to custom, codes, local dialects, etc).


\(^{142}\) Estrin Constr. Co. v. Aetna Casualty & Sur. Co., 612 S.W.2d 413, 418 n.3, 421, 425 (Mo. App. 1981); KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 561 (pointing out that this is an application of the general rule that the law will place losses on the party who can better avoid them); Holiday Homes of St. John, Inc. v. Lockhart, 678 F.2d 1176, 1186 (3d Cir. 1982); see also Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947), cert. denied, 331 U.S. 849 (1947).
was unfair. If the second rationale envisions unfairness in giving the non-drafting party the expectation of a favorable meaning but then asserting a different meaning, it is little more than a different aspect of the first rationale, and is acceptable. However, if the second rationale means that the *contra proferentem* rule is a way to secure substantially fair terms in general, it must be questioned. Where rules of construction are applied to control the substance of a term, the danger of hidden rationales becomes acute, for what is in reality substantive control may be covertly called construction. As courts can differ about what language is ambiguous, this danger is very real. The relation between *contra proferentem* and substantive control will be addressed later in this part. For the moment, the two rationales may stand side-by-side with the acceptable understanding of the fairness rationale.

American courts employed the *contra proferentem* rule as a specific rule of construction for contracts drafted by one party long before

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143 *Kaufman, Corbin Supplement*, supra note 1, at 561.

144 Apparently that is what it means to Kaufman. *Id.*

145 Spanogle, supra note 1, at 34-35 explicates the vicious circle of hidden substantive control through "construction." As the drafter faces misconstruction by the courts, he tries again to find clear language. Thus contract language becomes longer, more complicated, more technical and impairs rather than helps the layman in understanding it. Concerning the complications in administering the law through the use of construction (or the concept of mutuality of obligation), see K. Llewellyn, *Common Law Tradition*, supra note 1, at 364-65; Hillman, supra note 1, at 17.


147 *See infra* notes 159-64 and accompanying text. Compare also the German law which has used construction over a long period of time to exercise substantive control, and the complaint that the relation between construction and substantive constraints is almost unexplored in U.S. law in Dugan, *Standardized Form Contracts*, supra note 1, at 1327.

148 For what is not necessarily a standard form contract, because a contract may be drafted for one particular bargain, *cf. infra* note 152 and accompanying text.
theories of substantive control of standard form contracts were applied. This section explains how the contra proferentem rule is used today and what the rule means, especially for standard form contracts. The question of whether the rule will still be necessary after a new American doctrine of substantive control of standardized terms has developed is addressed at the end of this part. The answer to this question, however, can only be given after reviewing the theoretical efforts concerning substantive control. The relation between substantive control and contra proferentem will thus be a subject for Section Four.

It has often been said that the contra proferentem rule does not apply exclusively to contracts of adhesion. Certainly, contra proferentem is not restricted to situations where a party with superior bargaining power offered terms on a take-it-or-leave-it basis. One may doubt, however, that the rule applies to other than standardized contracts. Very few situations can be envisioned where non-standard terms are drafted by one party alone. Certainly, cases where a party formulates and offers a contract document for only one particular bargain are feasible. This article is not concerned with the question of whether contra proferentem should apply to these contracts. Even if specific rules for standard form contracts are advocated by this article, that does not mean that one of these rules could not apply to other situations as well. Therefore, the question of how far the

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149 Overt substantive control of standard form terms is a product of the last twenty to thirty years, as far as it is exercised at all. The landmark decision, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), dates from the late fifties. The contra proferentem rule has been around throughout the century; see American Lithographic Co. v. Commercial Cas. Ins. Co., 81 N.J.L. 271, 80 A. 25 (1911); Drainage Dist. No. 1. v. Rude, 21 F.2d 257, 261 (8th Cir. 1927); Star-Chronicle Pub. Co. v. New York Evening Post, Inc. 256 F. 435, 441 (2nd Cir. 1919); Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 A. 866 (1924); Keefer Coal Co. of Ill. v. United Elec. Coal Co., 291 Ill. App. 477, 10 N.E.2d 210 (1937); Winne v. Niagara Fire Ins. Co., 91 N.Y. 185 (1883) (doubtful term in insurance company's instructions to its agent); Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947), cert. denied, 331 U.S. 849 (1947); Ransom v. Pennsylvania Mut. Life Ins. Co., 43 Cal. 2d 420, 425, 274 P.2d 633, 636 (1954) (en banc); see also Rakoff, supra note 1, at 1268 n.285; for more references see Corbin, supra note 46, at 262-65.

150 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 561 ("the rule of contra proferentem is occasionally applied to non-adhesion contracts.")

151 E. FARNSWORTH supra note 141, at 499.

152 The example is in KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 561 (nearly illiterate drafter contracting with a powerful corporation represented by able counsel who could easily point out to the drafter the problems with his contract) but seems somewhat unrealistic.
application of contraproferentem should extend beyond the scope of standard terms will not be addressed.

More important for this article are any limitations of the contraproferentem rule which make it inapplicable to certain types of standard form contracts. One possible limitation is the requirement of superior bargaining power of the drafting party as a prerequisite for the application of contraproferentem. Courts have sometimes asked if the rule is still applicable where the non-drafting party is a large corporation with sophisticated management and counsel;\(^{153}\) the tendency, however, is to apply the rule.\(^{154}\) Nevertheless, if one sees the benefit of standardized contracts as accelerating contract formation required by business needs,\(^{155}\) it is sound to apply contraproferentem even between equally sophisticated parties.

Another limitation concerns relatively important and singular dealings.\(^{156}\) Arguably the non-drafting party has sufficient reason and opportunity to avoid ambiguities in a major outstanding business deal and can make the contract read as it should have read, but determining what is a major deal is troublesome and unpredictable.

In most cases of singular dealings, the terms have in fact been subject to negotiations though they were drafted by one party. Under such


\(^{155}\) See supra text accompanying note 44.

\(^{156}\) See Chemetron Corp. v. McLouth Steel Corp., 522 F.2d 469, 474-75 (7th Cir. 1975) (contraproferentem does not relieve court from first seeking to determine the intent of the parties); Blount Bros. Constr. Co. v. United States, 346 F.2d 962 (Ct. Cl. 1965) (dictum: the obligation to seek clarification as to a patent ambiguity is inherent); cf. County Asphalt, Inc. v. Lewis Welding & Eng’g Corp., 323 F. Supp. 1300, 1309 (S.D.N.Y. 1970) (rejecting the claim of unfair surprise as to terms of a large contract involving experienced firm).
circumstances, it is convincing that both parties assume the responsibility for the language of the terms. Thus, the rule should be inapplicable to negotiated standard terms.\textsuperscript{157} To draw the line for the applicability of the \textit{contra proferentem} between negotiated and imposed terms promises to be an easier distinction than the sophistication of the non-drafting party or the importance of the transaction. The problem with the latter lies in finding predictable criteria for the necessary degree of sophistication or importance, which is too troublesome to make those criteria workable.

Another possible limitation occurs when a third party drafts the terms. As long as the third party is some kind of trade organization for the supplier of the terms, the \textit{contra proferentem} rule should apply.\textsuperscript{158} Trade associations draft terms in the interest of the user, and the supplying party chooses to use those terms. Questions may arise where the terms have been formulated by an organization representing the interests of the submitting party\textsuperscript{159} or under control of an administrative agency.\textsuperscript{160} Administrative agencies have a tendency to become dominated by the interests of the people with whom they usually have to deal.\textsuperscript{161} And as far as other organizations’ participation in the drafting process is concerned, the “representation” of non-drafting parties lacks regular authority and control\textsuperscript{162} (with the exception of unions in collective bargaining agreements). The participation of organizations or administrative agencies in the drafting process is no basis for holding the non-drafting party equally re-


\textsuperscript{158} \textit{See} KAUFMAN, \textit{Corbin Supplement}, \textit{supra} note 1, at 563.


\textsuperscript{161} KAUFMAN, \textit{Corbin Supplement}, \textit{supra} note 1, at 574.

\textsuperscript{162} \textit{See} \textit{supra} note 49 and accompanying text.
sponsible for the terms used. The better view is to apply *contra proferentem* even where third parties took part in the drafting process, with the exception of collective bargaining agreements.

Finally, the negotiation of some of the contract terms is not a valid reason for refusing to apply *contra proferentem* to the other terms of the contract. Otherwise, *contra proferentem* would be meaningless because there are always terms in a transaction subject to conscious choice, for example, the subject matter and perhaps the price. Negotiation of some terms does not alter the character of the rest of the terms.

Apart from the issue of limits on the applicability of the *contra proferentem* rule, there is the question of how the rule applies.

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164 See supra note 71 for the exemption of labor law from the AGBG in German law. The case is even stronger in American law because in Germany collective bargaining agreements usually are applied to non-union members as well. But these agreements differ in the way equal bargaining power is achieved. As the union is in the collective bargaining business, the substantive reasons for special rules for standard terms do not apply. There is no presumption that the content of the agreement can be prescribed by one side.

165 Rakoff, supra note 1, at 1254-55. For an example of a decision treating a standard form contract like a negotiated one because one term (the price) was altered, see Lamoille Grain Co., Inc. v. St. Johnsbury & L.C.R.R., 135 Vt. 5, 9, 369 A.2d 1389, 1391 (1976); see also Clinic Masters, Inc. v. District Court, 192 Colo. 120, 124, 456 P.2d 473, 475-76 (1976).

166 One more problem is proclaimed by insurers: that the rule cannot be applied where terms are prescribed by regulation; *see* RESTATEMENT (SECOND) OF CONTRACTS § 206 comment b (1981); CORBIN, supra note 46, at 267; Rosenthal v. Ins. Co. of N. Am., 158 Wis. 550, 149 N.W. 155 (1914). The problem seems to be over estimated. If there is a choice regarding the actual language, the reasons to apply *contra proferentem* are still valid. If there is no choice at all, the insurance industry has easier access to institutions able to change the wording of insurance contracts so that often prior insurer language has been enacted as a regulation; therefore, the *contra proferentem* rule can also apply in this case. *See* CORBIN, supra note 46, at 267; RESTATEMENT (SECOND) OF CONTRACTS § 206 comment b (1981). This, however, is not a convincing rationale to apply a construction against the drafter and to consider insurers as the drafters. If the language of the regulation is taken from prior customs and formulations, the construction that was given to this prior language may be seen as integrated into the regulation. Apart from that, there is no draft by one side any longer and the regulation should be considered to be enacted for the benefit of both parties by a public institution to secure the public interest and the fairness of terms. The underlying reason for *contra proferentem* is no longer valid. It is a strange proposition to construe regulations against the party lobbying for them. It may be responsive to the reality of democratic institutions but it is difficult to incorporate into a theory. The distinction in applying *contra proferentem* should thus simply be: was there any choice at all for the drafter or was the language prescribed word-by-word?
The manner of application may make an important difference in how strongly *contra proferentem* works for the non-drafting party and against the drafter. Two extant positions are epitomized by Corbin's theory and the New York rule.

Corbin advocates *contra proferentem* as a last resort, to be applied only after all the other instruments of interpretation and construction have failed. In contrast, the New York rule provides that if there is a reasonable construction of the contract terms which favors the non-drafting side, this reasonable construction should be applied. While Corbin's theory primarily seeks a reasonable, clear meaning of the contract language, the New York rule primarily searches for the best reasonable meaning for the non-drafting party. The difference between the two theories affects how often the *contra proferentem* rule is invoked as well as the degree to which it works in favor of the non-drafting party.

Critics assert that the *contra proferentem* rule is a matter of public policy rather than a rule of construction because it does not actually attempt to find the meaning of the parties' agreement. Whenever contract construction is based on the objective theory of contracts, however, construction involves an objective element that can be related to public policy. One does not look for the true intent of the parties but instead for a meaning that the law, taking the position of a reasonable person, can give to the contract language. The *contra proferentem* rule, like other rules of construction, presupposes that to make business transactions predictable and reliable contract language must be given a meaning that the parties can reasonably connect

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167 For an explanation of the differences between interpretation and construction, see CORBIN, supra note 46, at § 534.


170 CORBIN, supra note 46, at 270.

171 See FARNSWORTH, supra note 141, at 113-16.
with their communication. That *contra proferentem* takes into account the consequences of adjudicating different meanings of doubtful language does not take it out of the rules of construction. Other rules, such as construing doubtful terms in a manner giving a reasonable, lawful, and effective meaning to all the terms, evaluate the consequences of construction.

There is, however, some truth in singling out *contra proferentem* from other rules of contract construction, not because it is inherently different, but because it is used in a different manner. Corbin’s treatise on contract law illustrates this difference by considering the courts’ control of fairness of adhesion contracts in the chapter on *contra proferentem*. This way of treating the *contra proferentem* rule is even more significant in Kaufman’s 1984 supplement to Corbin’s *Contract Law* because of the extent of the growth of substantive control. Kaufman indicates that courts have used the technique of finding an “ambiguity” and construing the contract against the drafter as a back door to invalidate unfair adhesion terms. A theory that gives a good example of how the line between construing a contract against the drafter and exercising substantive control can become blurred is the doctrine of reasonable expectations (DRE) used in insurance law. The DRE, originated in 1970 by Professor (now

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172 Restatement (Second) of Contracts § 203 (a) (1981).
173 Corbin, supra note 46, at 262-71, especially 270-71.
174 Kaufman, Corbin Supplement, supra note 1, at 565-68.
175 Id. at 567. For a clear, outspoken criticism of using ambiguity as a hidden rationale, see Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 389, 682 P.2d 388, 394 (1984). An earlier, now historical, example is given by Kessler, supra note 1, at 633, with the reinterpretation of warranties in life insurance policies into representations; see as an example Moulor v. American Life Ins. Co., 111 U.S. 335 (1884); Ehrenzweig & Kessler, Misrepresentation and False Warranty in the Insurance Code, 9 U. Chi. L. Rev. 209, 210 (1942). For another example, see Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962). For a criticism of strained construction, see also Siegelman v. Cunard White Star, 221 F.2d 189, 204-05 (2d Cir. 1955) (J. Frank, dissenting).
Judge Robert Keeton is a formulation that indicates all its ambiguity and the broad scope of possible application:

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.\(^7\)

This formulation grants an option to use the DRE as a manner of construction or a way of substantive control. Most courts will apply the DRE only after finding contract language ambiguous.\(^7\)

With the ambiguity prerequisite, the doctrine is little more than a substitute for the contra proferentem rule. The DRE can be extended, though, depending on how courts handle the ambiguity requirement.\(^7\)

The reasonable expectations of an insured or beneficiary may be drawn from the contract as a whole and may concern what a term should say rather than its actual wording.\(^8\) Such reasoning opens broader possibilities than construction of the contract language. For example, burglary insurance policies provide that the fact of a burglary has to be proven by visible marks on the outside of a building which show violent entry. If that evidentiary provision is deemed clear and unambiguous, the policy cannot cover a case where there are no outside visible marks even if other evidence clearly indicates a theft occurred and was not an inside job. Courts applying the DRE in such case\(^8\) give coverage by determining what a proper burglary insurance policy should say. These courts thus cross the borderline


\(^8\) Compare Note, 13 U. MICH. J.L. REF., supra note 176, at 613-16.


The transgression of mere construction is even more apparent when no ambiguity is required before application of DRE.183

The possibility of departing into substantive control is indicated by Keeton's formulation. The phrase "even though painstaking study of the policy provisions would have negated those expectations" suggests that the DRE may exceed the scope of possible meanings of the words. Keeton's language, however, is cautious. He says only that the reasonable expectations should be enforced although a "painstaking" study of the language would reveal otherwise. He thereby indicates that only a limited deviation from the contract language should be permitted, or perhaps that only the efforts to resolve ambiguities should be limited. If Keeton's formulation is understood to mean that not every effort must be made to find an objective, clear meaning of the contract language, it is similar to the New York contra proferentem rule.

The DRE is thus an example of how the step from construing ambiguous language to substantive control can be taken without openly admitting that substantive control is exercised. That the line between construing ambiguous language and substantive control may be blurred does not mean, however, that there is no difference between the two. Construing ambiguous language always involves substantive issues because it requires a choice between different substantive possibilities. Construction is still concerned with a possible meaning that


can be taken from the words. Substantive control, however, goes further if the meaning of the wording is not decisive. A standard taken from outside the contractual relationship is used as a gauge: how the contract should read. Because there is a difference between substantive control and construction of contract language, both may have a legitimate right to exist. Section Four will return to this issue.

To summarize: the contra proferentem rule has a proper but limited place in any theory of law for standard terms. The rule, however, can sometimes wrongfully serve as an instrument for hidden substantive control. This covert tendency of courts to cross the border from construction to control shows that the rule, taken alone, is not sufficient to provide the legal answer for the phenomenon of standard terms. Therefore, what will be addressed next are alternative means of control of standard terms: the requirements of a valid, non-defective assent to standard terms and their substantive control.

B. Scholarly Concepts of Standard Form Contract Law

Several American scholars have attempted to develop a comprehensive approach to standard terms. Before evaluating the less systematic approaches of courts, it may be beneficial to explore the most important of these scholarly efforts which can help structure the American law encountered in court decisions. Although rooted in the common law of contracts, these scholars attempt to formulate special principles for dealing with standardized contracts.

1. Slawson's Parallel to Administrative Law

Slawson seeks to treat standard form contracts systematically differently from negotiated contracts. Standard form terms, according

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184 Slawson also perceives this difference. See Slawson, Democratic Control, supra note 1, at 562-63.

185 Before these attempts are described and evaluated, it should be mentioned that there is still the position that the market (through elite buyer groups) can take care of imbalances in standard terms. Therefore, traditional contract law should be applied. See Schwartz & Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. PA. L. REV. 630, 638-39 (1979). The problem is not that the model is wrong but that the demands of certain buyer groups are often more economically ignored or specially served instead of taken as an incentive to change contract clauses generally. The level of intervention is thus changed through such an approach to the problem. See also Baird & Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of Sec. 2-207, 68 VA. L. REV. 1217, 1254-57 (1982) (arguing in favor of the mirror-image rule and against U.C.C. § 2-207 by reasoning that since the seller must be aware that at least some buyers will read his form he has an incentive not to overdraft the form.) The answer to the elite-buyer theory is provided by Slawson, New Meaning, supra note 1, at 42-46.

186 Slawson, Democratic Control, supra note 1, at 529-66; Slawson, New Meaning,
to Slawson, should be subject to judicial review regarding their compliance with general standards of the common law or generally recognized principles.\textsuperscript{187} Slawson justifies this kind of judicial control with a parallel to administrative law.\textsuperscript{188}

Slawson views contracting as a form of private lawmaking. The parties make the rules which should govern the enforcement of their agreement. As legislative lawmaking has changed, private lawmaking has done likewise. The legislator today makes only a portion of the law and delegates to members of the administration the responsibility for filling in the gaps. Contract law has reached the same stage. Instead of agreeing on all the terms, the parties concentrate in their negotiations on a small part of the terms and delegate to one party the power to provide the rest.\textsuperscript{189}

Administrative law keeps the delegated lawmaking of agencies consistent with legislative intent and otherwise in the public interest.\textsuperscript{190} The courts review agency lawmaking not only in the light of authoritative standards like constitutional or statutory law but also in conformity to non-authoritative, commonly recognized standards in the public interest.\textsuperscript{191} In traditional contract law, the consent of the parties authorizes their control over law applied against them. Traditional contract law is thus needed to review the contract only in the light of authoritative standards. For standard terms, however, Slawson claims that the same extent of review as for delegated administrative lawmaking is necessary:

A law made by one private person for another, without the other's consent — a standard form sought to be enforced against a person who had no reasonable opportunity to read it, for example — should

\textsuperscript{187} Slawson, Democratic Control, supra note 1, at 34-35. Similarly, Leff has denied the contractual nature of adhesion terms and has seen them as "things" to be regulated like products. See Leff, \textit{Contract as Thing}, 19 AM. U.L. REV. 131, 144-45 (1970); the same idea is expressed in Slawson, \textit{Mass Contracts: Lawful Fraud in California}, 48 S. CAL. L. REV. 1, 12-20 (1974).

\textsuperscript{188} A similar idea is expressed by Kaufman, as underlying support for control of the fairness of standard form terms. See KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at § 559E. Slawson has renounced his parallel to administrative law in the meantime. See Slawson, \textit{New Meaning}, supra note 1, at 41. It is nevertheless included here because the parallel marks an original step in the development of American standard form contract theory and is illustrative of Slawson's position. The criticism that, without speaking of the adhering party's assent, the enforcement of standard terms cannot be justified is still valid without any parallel to administrative law.

\textsuperscript{189} Slawson, Democratic Control, supra note 1, at 532-33.

\textsuperscript{190} Id. at 533.

\textsuperscript{191} Id. at 534-35.
be subjected to judicial review by virtue of the same authority as a court has for enforcing it in the first place.\textsuperscript{192}

Slawson distinguishes two basic situations regarding standard form terms. One situation occurs when the submitting party gives some kind of assent to the terms of the contract. The whole standard form is rarely a manifestation of assent, however, because it contains terms of which the recipient is usually ignorant. If some kind of assent is given, the private lawmaker could assume that his lawmaking was valid unless the other party raised an appropriate challenge. Then the private lawmaker would have to show conformity of the challenged terms to non-authoritative standards.

The second situation arises when the recipient’s agreement is adhesive. Such an agreement does not express the adherent party’s consent. Therefore, the drafter has to show as part of his \textit{prima facie} case that the terms are in conformity with non-authoritative standards.\textsuperscript{193} Adhesive terms are those which the recipient had no reasonable way to avoid.\textsuperscript{194} Where the legitimacy of contract terms is not derived from the act of bargaining, their legitimacy has to be reviewed vis-a-vis generally accepted non-authoritative standards.\textsuperscript{195} Examples of contracts of adhesion are contracts with monopolistic utilities\textsuperscript{196} and “contracts by imposition” where adhesive terms are connected with ordinary contractual activity, such as liability disclaimers or remedy limitations used in theatres, parking lots, dry cleaners, or restaurants.\textsuperscript{197}

There are two major problems with Slawson’s theory. Since he does not develop the particulars to which standard terms must conform, his theory demands an inquiry into the market situation every time a standard form term goes to court. His theory depends on the adhesive or non-adhesive nature of the contract and, therefore, on the market situation in determining who has the burden of proof regarding compliance with general standards. This burdensome inquiry makes it difficult for the drafter to predict how his standard terms

\begin{itemize}
  \item \textsuperscript{192} \textit{Id.} at 538.
  \item \textsuperscript{193} \textit{Id.} at 538-39.
  \item \textsuperscript{194} \textit{Id.} at 549-50. “The party resisting enforcement [on grounds of adhesion] must have had no reasonable choice but to make the contract, and the party seeking enforcement must have narrowed the choices of the first party by illegitimate means.” \textit{Id.} at 550.
  \item \textsuperscript{195} \textit{Id.} at 552-53.
  \item \textsuperscript{196} \textit{Id.} at 554.
  \item \textsuperscript{197} \textit{Id.} at 555-56.
\end{itemize}
will be reviewed because, depending on the particular time and place of formation, the contract may or may not be found adhesive.

The second problem concerns the theoretical justification Slawson gives for judicial review. He refuses to see standard terms as part of the contractual agreement because the recipient cannot assent to something that he did not even read. Slawson’s theory of private lawmaking, however, is based on the assumption that the non-drafting party leaves the lawmaking to the other,¹⁹⁸ which means that the adherent party consents to the other party’s lawmaking. If there is no basis to assume assent to the boilerplate terms (a general or blanket assent to one party’s supplying the terms as advanced by Llewellyn¹⁹⁹), there is likewise little basis for assuming consent to the drafter’s lawmaking activity.²⁰⁰

The non-drafting party arguably does not grant the power of lawmaking. If anything, the law, that is the courts, give the drafting party the power of lawmaking. The question is whether the law can and should do so. The answer is clearly “no” because conveying such power comports with neither private nor public law. Private entities have no public, democratic legitimation to make rules for other people beyond the limits of their voluntary subjection. Thus, the foundations for the lawmaking of standard form drafters could only be commercial power and business needs. Neither are sufficient under contract law to justify enforcement. What justifies the enforcement of standard terms is rather private toleration of such terms, coupled with the advantage for both sides of stating the applicable law for the particular contract. Therefore, it seems more realistic and theoretically more appropriate to approach the phenomenon of standard terms with a modified theory of assent than with concepts of general lawmaking power. For example, Slawson recently renounced his parallel to administrative law and pronounced the contract to be what the parties reasonably expected. Their reasonable expectations are fulfilled by enforcing the stated contract terms or by using the rules of law when their contract terms are unreasonable.²⁰¹ Such an approach is as indistinct and indiscrete as unconscionability, and similarly does not resolve the problem of justification of standard

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¹⁹⁸ Id. at 533 (“[the parties] now agree to only a part. . . . and delgate to one of them. . . .the power to make the rest.”)
¹⁹⁹ See supra note 48 and accompanying text.
²⁰⁰ For the same criticism in Rakoff, see supra note 1, at 1213-14.
²⁰¹ Slawson, New Meaning, supra note 1, at 26-28 and 71-72.
term enforcement. Justification must, at least in part, originate in
the non-drafting party's assent.

2. The Concept of Limited Assent: Llewellyn, Murray, Et
Aliter

A different approach to standard form contracts is taken by a
number of scholars adapting ideas first advanced by Karl Llew-
ellyn. Their starting point is generally not the problem of standard
form contracts in particular, but instead the concept of unconscio-
nability. Excepting price unconscionability, the issues these scho-
olars discuss primarily concern standard form terms even though
unconscionability is not so restricted. Their approach is contractual
in nature and concentrates on the difference between the assent to
bargained-for contract terms and to adhesive terms (including stan-
dardized terms). Their theory justifies enforcement of standard terms
through the assent of the non-drafting party, but advocates, given
any changed circumstances in obtaining the assent, the review of the
validity and extent of the assent. Llewellyn distinguished the assent
to the broad type of transaction and the few dickered terms subjected
to a conscious decision from the "assent" to boilerplate language.
In so doing Llewellyn saw specific assent only in the first instance.

Murray, On Contracts, supra note 46, at 747-49; Murray, Unconscionability,
supra note 1; Spanogle, supra note 1; Holmes, supra note 1, at 789-91; Ellinghaus,
supra note 1.

K. Llewellyn, Common Law Tradition, supra note 1, at 362-71; Llewellyn, On
Warranty of Quality, and Society (pt. 2), 37 Colum. L. Rev. 341, 393-94 (1937)
[hereinafter Llewellyn, Warranty]; Llewellyn, Book Review, supra note 1; Llewellyn,
863, 869-71 (1941) [hereinafter Llewellyn, Common-Law Reform]; Llewellyn, What
Price, supra note 34, at 731-34 (not convinced that special control for mass contracts
is necessary).

- With the exception of Llewellyn, who formulated his thoughts especially for
standard form contracts.

F. N. Roberts Pest Control Co. v. McDonald, 132 Ga. App. 257, 260, 208 S.E.2d
13, 15 (1974) (contract between home improvement business and 87-year-old woman);
American Home Improvement, Inc. v. Maclver, 105 N.H. 435, 201 A.2d 886 (1964);
Jones v. Star Credit Corp., 59 Misc.2d 189, 298 N.Y.S.2d 264 (N.Y. App. Term 1969);
Frostifresh Corp. v. Reynoso, 52 Misc.2d 26, 274 N.Y.S.2d 757 (N.Y. Sup. Ct. 1966),

The similarity of this aspect of the theory with the English theory of fundamental
breach is often pointed out. See Spanogle, supra note 1, at 945; Meyer, Contracts of
Adhesion and the Doctrine of Fundamental Breach, 50 Va. L. Rev. 1178, 1187-99
(1964); Murray, Unconscionability, supra note 1, at 72-79; Note, Unconscionability and
the Fundamental Breach Doctrine in Computer Contracts, 57 Notre Dame L. Rev.
547 (1982). This is not pursued further because it is not particularly helpful.
Regarding boilerplate language, he spoke of a blanket assent since the fine-print boilerplate is normally not read and understood. This blanket assent concerns any "not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms and are neither in the particular nor in the net manifestedly unreasonable or unfair." In this passage, Llewellyn concentrated on the defects in the assent to boilerplate language. On other occasions, he emphasized the question of control of unfairness and oppressiveness of standard terms.

In principle, Llewellyn favored the enforcement of standard terms. He saw them as having the advantage of allowing businesspersons to adapt the law to their business needs and to develop new types of transactions. He also understood, however, that the very nature of standard terms affects the non-drafting party's assent to incorporation of such terms into the contract and that standard terms can be strongly one-sided in favor of the drafting party. Llewellyn's theory permits commerce to create new contractual transactions and adapt traditional law to business needs by using standard forms, while at the same time encourages courts to review standardized clauses in the light of basic principles of reasonableness and fairness.

In Llewellyn's theory two aspects of standard form contracts work together to justify the exorcism of objectionable clauses: the character of assent to standard terms (which is weaker in nature than the assent to bargained-for terms), and the substantive evaluation of standard terms in the light of the entire transaction. These two aspects are not further elaborated or distinguished. Llewellyn did not develop a systematic approach to decide what is unreasonable and too unfair. He did indicate, however, that legal authority and trade practice may serve as guidelines.

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207 K. LLEWELLYN, COMMON LAW TRADITION, supra note 1, at 370; cf. Oldfather, Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking, 16 U. KAN. L. REV. 303, 305-06 (1968); compare also Spanogle, supra note 1, at 340-42.

208 K. LLEWELLYN, COMMON LAW TRADITION, supra note 1, at 366, 371; see also Spanogle, supra note 1, at 942-43, who perceives that Llewellyn's theory has these two aspects of defective assent and unfair substance.


210 See K. LLEWELLYN, COMMON LAW TRADITION, supra note 1, at 362.

211 Llewellyn, Book Review, supra note 1, at 704.
It is at this point that Murray elaborates and refines Llewellyn’s theory.\(^{212}\) Other authors have joined in shaping its contours and boundaries.\(^{213}\) Murray differentiates between the contract as expressed in the written document and the actual contract formed by the parties, the “true circle of assent.” Concepts like mistake or the doctrine of constructive conditions are always used to go beyond the written document and arrive at the real contract (or circle of assent).\(^{214}\) Murray wants to apply the doctrine of unconscionability in the same manner to find the contract as the parties concluded it behind the expressions of the written document.\(^{215}\)

This theory poses no problem where the written document and the “circle of assent” are identical. This occurs when all terms are subject to bargaining or are at least explained and voluntarily agreed upon. The allocation of legal risks is expected for both sides.\(^{216}\) Again, there is no problem with boilerplate terms when they allocate the legal risks in a way that is expected or at least not unexpected, which means basically that the standard terms are in accordance with what reasonable parties under normal circumstances would assume to regulate their contractual relation.\(^{217}\)

The problematic case is an unexpected risk allocation.\(^{218}\) Such occurs where it is questionable if the written document expresses the agreement of the parties. Murray proposes a closer analysis of the non-drafting party’s assent to determine whether it is defective regarding the unexpected written term(s).\(^{219}\)
Similar to Llewellyn's distinction between blanket and specific assent, Murray distinguishes apparent and genuine assent. Apparent assent concerns essentially standardized contract terms. Since those terms are usually not subject to bargaining and are not even read, the question is to what extent the signing party is bound by standard terms. To put it differently, the question is how far the duty to read is extended. Murray would hold a signing party bound only to those terms the party had the opportunity to read and understand. Thus, Murray places the risk of not reading the contract document on the signing party only where this party had a chance to know what he signed.

To analyze whether apparent assent to any boilerplate terms exists, Murray inquires whether the terms have been specially agreed upon and, in the absence of such special agreement, whether the assent of the non-drafting party is impaired because the terms were inconspicuous. A term can be inconspicuous in two ways: the term can be hidden (put in fine print or the like) so that it cannot reasonably be found or, even if a term is physically conspicuous, it may be formulated in a way that the signing party cannot understand. These two categories of inconspicuousness are labelled by other scholars "procedural unconscionability," with two sub-categories of physical and substantive inconspicuousness. The landmark case of Henningsen v. Bloomfield Motors, Inc. illustrates these categories. In Henningsen, the court found a limitation of liability in the fine print on the back of a car sales contract insufficiently conspicuous to be discovered by the buyer. The court thus acknowledged a lack of physical conspicuousness. In addition, the decision posited whether an ordinary layman could be expected to realize what he was being granted in the contract's "limited warranty" and what he was relin-

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material for the bargain. The question is put this way: "If the risk is allocated to the disfavored party according to the clause, will such party still receive the substantial benefit which he could have reasonably anticipated?" Id. This question seems unnecessary for a practical analysis. What one party thought important enough to mention in a form and the other party thinks important enough to attack in court should usually be material. This part is consequently left out when considering Murray's theory here.

Id. at 29-31, 40-43.

Id. at 14-21, see especially at 18.

Murray speaks only of a clear wording. Id. at 20-21. For the distinction between physical and substantive inconspicuousness, see Holmes, supra note 1, at 792-94; compare also the definition "conspicuous" in U.C.C. § 1-201(10).

quishing in return. What was in fact a limitation of liability the contract labeled a "limited warranty" purporting to give the buyer something by granting replacement of defective parts. For an ordinary buyer it may not be clear that through such a formulation, when combined with the exclusion of other remedies, he gives up the right to recover for personal injuries. This ambiguity is the concern of substantive inconspicuousness.

For the issue of apparent assent, Murray does not consider factors such as inequality of bargaining power, the subject matter of the contract being a necessity or a frill, or the availability of different provisions in other suppliers' standard forms. The buyer "signed without a reasonable opportunity to know of the clause; therefore, at least the choice of signing or not signing with knowledge of the clause was precluded." For the issues of choice, it makes no difference whether the subject matter was necessary, or whether a choice existed.

A term lacking apparent assent is void. If there is apparent assent, the next question is one of genuine assent: did the non-drafting party have a genuine choice to avoid the term? For the issue of genuine assent, it is important whether the subject matter is a necessity or a frill. Murray argues that because a frill is unnecessary a no-choice situation does not exist. The buyer can avoid the clause by not signing. Other factors considered are the respective bargaining power of the parties, whether the customer can procure the same item or service from other suppliers without similar standard terms, and the determination and circumstances of the relevant market where the buyer is able to look for an alternative.

Other attempts to systematize the unconscionability analysis have considered the situation of the "stuck" party having no choice to avoid the harsh clause. One may label this aspect of finding a

225 Murray, Unconscionability, supra note 1, at 30.
226 Id. at 28.
227 Id. at 21. The issue of considering whether the subject matter of the contract is a necessity or a frill shall not be further elaborated here. It is disqualified by being neglected in subsequent legal scholarship, a fate Braucher predicted. Braucher, supra note 1, at 346. Leff, Unconscionability, supra note 1, at 555, is correct in criticising Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), for using the same considerations as Murray proposed. It is not for the courts to tell the poor what is superfluous for them.
228 Murray, Unconscionability, supra note 1, at 32.
229 Holmes, supra note 1, at 794-96; see also KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at § 559C.
contract term unconscionable as either "substantive unconscionability" or "no-choice unconscionability."\textsuperscript{230} Leff and Ellinghaus distinguish \textit{procedural unconscionability} (defects in the bargaining process) from \textit{substantive unconscionability} (the unfairness of terms).\textsuperscript{231} This distinction is useful in identifying the concepts of defective (impaired) assent and unfairness control. This theory of unconscionability, which uses impaired assent as a starting point, can be summarized as follows: bargained-for (expected) terms and standard terms which do not shift to the non-drafting party risks not assumed under normal circumstances in a reasonable bargain (not unexpected terms) are subject to traditional contract law. Unexpected terms are first tested with regard to apparent assent and must be procedurally and substantively conspicuous. If unexpected terms are not conspicuous in either manner, they are not part of the bargain. Inconspicuous terms are void without regard to the availability of other contract terms in the market. Conspicuous terms are then subjected to the question of genuine assent. If the adherent party had no choice but to accept the unexpected conspicuous term it is, again, not part of the real contract and therefore invalid. The impaired party does not have to make an inquiry into the availability of choices, since a party is not required to do something that is useless.

To develop a theory of standard form contract law, a number of aspects of Murray's theory need scrutiny. Murray formulated his theory specifically for unconscionable contracts, therefore, some adjustments must be made. The first striking characteristic of Murray's theory is that it does not openly concede that invalid standard terms are replaced by terms imposed by the law. Instead, the theory tries to legitimate the imposed terms with the intent of the parties. Murray opposes the contractual agreement as written in favor of the true agreement. The purpose of an unconscionability analysis is to reform the written agreement and make it comply with the true agreement. The true agreement is not what the parties subjectively intended but what the law perceives as agreed-upon on the basis of the objective theory of contract. The question is what the parties, as reasonable persons, can be said to have agreed upon, notwithstanding contra-

\textsuperscript{230} For the terminology, see Holmes, \textit{supra} note 1, at 794-97; Murray, \textit{Unconscionability}, \textit{supra} note 1, at 21 (illustrates the distinction between procedural and substantive unconscionability in equity).

\textsuperscript{231} Ellinghaus, \textit{supra} note 1, at 762-63; Leff, \textit{Unconscionability}, \textit{supra} note 1, at 489-528.
dicting expressions in the contract document. The contract document may not be taken at face value because the awareness creating a standardized contract document impairs the non-drafting party's ability to control the drafter and thus influences the contract's formulation. Although the law plays an important role in determining which provisions will be enforced, the legitimation of enforcement rules via the legal standard of the reasonable person instead of the written contract terms is "personalized": the true agreement of the parties is enforced.\(^2\) The same attitude of justifying the invalidation of standard terms with the parties' intent pierces through Llewellyn's formulation, albeit vaguely.\(^3\) The reason given for substituting terms provided by law is that the parties in their true bargain agreed to those terms. Unlike traditional contract law, the bargain is not taken at face value as expressed in the contract document. A more perspicuous analysis is needed to determine the extent of the bargain.

The German lawyer would look at this reasoning with amazement. Once again it is not expressly stated that the law provides rules in a situation where the parties want to go through with a deal, but the circumstances of contract formation enable one party to impose a burden to which the "stuck" party does not assent in a legally enforceable manner. It is not true that the parties actually agreed to something different from what the writing expresses. The drafting party wants his overreaching terms. The other party wants the transaction but not the unexpected and unnoticed clauses. The law could take the formal position that, upon signing, the non-drafting party is bound by unknown terms because of his signature, notwithstanding the form and content of those terms. If the law does not extend the objective theory of contract beyond this simplistic rule, only one alternative exists: there is no valid mutual assent to the harsh or unexpected terms at all. One party wanted only these terms, and the other party cannot be said to have agreed to those terms. If the parties completed their bargain without mutual assent,\(^4\) the only way to supply valid terms is to replace by dispositive law all those standard terms on which the parties did not successfully agree.

Arguably, the background justification for substituting standard terms by legal provisions is not important as long as the rules derived

\(^{232}\) See Murray, \textit{Unconscionability, supra} note 1, at 13, 20, 42-43.

\(^{233}\) See K. \textsc{Llewellyn}, \textit{Common Law Tradition, supra} note 1, at 370 (basing the limitation of enforcement of harsh standard terms on the concept of assent); see also \textit{supra} note 51.

\(^{234}\) Usually problems appear after the parties perform, at least in part, their contract.
from the background theory are workable. One account of the available structure using an unconscionability analysis shows that the theory of unconscionability provides a method of analysis without referring to Murray's background justification. This theory can be shaped more specifically for standard form contracts than done by Murray. This theory elaborates the system of unconscionability analysis for insurance contracts, distinguishing procedural and substantive unconscionability. Procedural unconscionability deals with the two aspects of physical and substantive inconspicuousness as previously mentioned. An alternative analysis, "unconscionability per se," is the substantive control of oppressive terms under public policy aspects set against the backdrop of a contracting process impairing free choice concerning contract terms.

Since any unconscionability analysis can be formulated in a manner that gives law the role of substituting invalid standard terms, one may say that only the analytical structure counts, no matter how the application of this structure is justified. Given, however, the courts' tendency not to interfere with contracts made by the parties, Murray's reasoning apparently is one more device to avoid a clear statement of what is necessary in dealing with standard form contracts. To justify replacement of standard terms by legal provisions allows the courts to continue pretending that they do nothing but what they have always done: enforce the agreement of the parties. Such a justification avoids the clear statement that standard form contracts regulate business transactions in a manner different from negotiated contracts and that the role assumed by the law regarding standard terms is therefore different. Murray's background theory holds that the law intervenes at certain points because it will not lend its enforcement power to overly one-sided deals not reached on the basis of true bargaining. The efforts to formulate background legitimation with its roots in the true assent of the parties should be abandoned.

Another important characteristic of Murray's theory is his failure to distinguish standard form contracts from bargained-for contracts. Murray develops a theory of unconscionability rather than a theory of standard form contracts. The modern concept of unconscionability, as expressed in U.C.C. § 2-302, addresses unconscionable contracts as a whole as well as single unconscionable clauses, and can thus be used to deal with standardized contract terms as well as with bar-

235 Holmes, supra note 1, at 789-801.
236 Id. at 796-97.
gained-for contracts. The first point of Murray’s unconscionability test, the idea of apparent assent, is specially adapted to standard form terms. A review of the conspicuousness of untypical terms makes sense only where those terms have not been negotiated. Murray eliminates negotiated terms because negotiated terms are not unexpected. He also eliminates explained terms as not belonging within the scope of the apparent assent analysis because they are not unexpected. Murray’s test could be revised to determine: whether a standard form term is concerned; whether a term, though included in a standard form, is subject to negotiation and could therefore be treated as a bargained-for term; whether the remaining standard form terms are unexpected in their risk allocation; and finally, whether the unexpected terms are conspicuous. Such a test would have the same basic effect as Murray’s test with the advantage of clearly showing that a special doctrine for standard terms is applicable, making the initial test for entering into the analysis easy and predictable. One objection to this test is that it does not include form contracts drafted for a single bargain. Such form contracts are rare, however, and traditional contract law should be sufficient to deal with them. Even if special form contracts are not subjected to traditional contract analysis, there is still the possibility of applying the rules for standard form contracts by analogy.

The second part of Murray’s theory, the issue of genuine assent, is broader in scope than the first issue of apparent assent. Genuine assent concerns traditional as well as standard form contracts. The inquiry into the circumstances of contracting makes this part of Murray’s theory too burdensome for practical, substantive control of standard terms. Murray’s test of genuine assent is apt to control cases of extreme inadequacy in the overall exchange of any type of contract, standardized or not. Compared with German law, the issue of genuine assent is similar to the controlling of unequivalence through BGB § 138 rather than the substantive control of standard form terms in AGBG § 9.

237 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 579 (an example of this portion of the test can be found here).
238 See KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 572 (proposing the application of traditional contract law).
239 See supra note 26 and text at notes 128 and 129; Dawson, supra note 29, at 1046, 1068-71, and 1103-10 (especially concerning the significance of BGB § 138 for the law of standard form contracts).
240 See supra notes 120-126 and accompanying text.
The issue of genuine assent as used by Murray is not a special, particularized device for substantive control of standard form terms, but such a special control is necessary. Courts (and scholars) have openly used substantive control of unfair or oppressive terms to invalidate standard terms. Substantive control is a more candid invalidating device where the criticism concerns not the formulation of a term or its placement in a contract form but rather the very substance of a standardized clause. Murray's test (whether the adherent party had a choice of alternative contracts and can be said to have assented genuinely to the contract terms) applies the same standards to bargained-for and to standardized contracts. Once the contract form is understandable, in principle, the "duty to read" fully applies simply because the fact that standard form contracts are usually not read and are not supposed to be read is not considered.

Murray's theory of genuine assent extends the duty to read too far in light of the realities of contract formation. It restricts direct substantive control of standard terms to cases of gross unfairness sufficient to invalidate a non-standard form contract. There is, therefore, a missing link between the test for procedural unconscionability (especially for standard form contracts) and the general concept of no-choice or overall unconscionability (which can concern any type of contract, and consists of a combination of impaired choice and harsh clauses). The missing link is a test for substantive unconscionability, specifically of standard form terms. To formulate such a manageable test for routine control of standard form terms, it must be less complicated and time-consuming to apply than no-choice unconscionability. Such a test would be more severe than the no-choice unconscionability test because standard form terms do not enjoy the presumption of a fair exchange. This presumption must be overcome before the typical non-standardized contract is invalidated for reasons of one party's impaired choice.

This additional test could be called unconscionability per se or substantive unconscionability. What was previously labelled "substantive unconscionability" or "violation of public policy" usually invoked the factual question of choice. Even Kaufman, who views

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241 This is basically Speidel's criticism of Murray's theory as well. Speidel, supra note 1, at 362-64.
more recent court decisions as applying an unfairness test for standard form contracts, includes in his examples decisions which return to the question of choice at the time of contracting. Kaufman’s formulation of what is required of standard form clauses in terms of substantive fairness, however, promises the possibility of a test that does not invoke questions of choice and market evaluation. He asserts the necessity that adhesive contract terms have: (1) a legitimate purpose, and (2) do not impose a greater burden on the “stuck” party than is justified by the fair purpose of the standard terms.

At this juncture, one could conclude that the solution lies in some modification of the unconscionability doctrine as developed by Llewellyn, Murray, and others. Before deciding whether, with the elements of apparent assent and substantive control, a workable test for validating form terms can be formulated, the whole theory of assent should be compared to a recent theoretical concept by Rakoff that goes much further in implementing substantive control of standard form terms. Rakoff refuses to base the enforcement of standard terms on the idea of the non-drafting party’s consent and advocates a substantive control of standard terms by comparing standard terms with the implied rules of law otherwise applicable to the contract.

3. Rakoff’s Presumption of Unenforceability of Standard Terms

Rakoff contests the current justification for the enforceability of standard form terms, as he perceives no legitimacy in the assumption of lawmaking power by private business entities which draft standard form terms. Furthermore, the adhering party’s consent is also inadequate to obtain a legitimate lawmaking power. Since standard terms are generally not read and understood, and the drafting party is aware of this fact, there is no basis to assume assent. Rakoff stops short of declaring standard form terms entirely void. As it may promote democratic notions in allowing decentralized rulemak-

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244 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 565-66.
246 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 576-81.
247 Id. at 579.
248 Rakoff, supra note 1, at 1230-83.
249 Id. at 1213-14.
250 Id. at 1200-01.
251 Id. at 1230-43.
ing, Rakoff accepts the enforcement of at least some standard terms and develops a theory that enforces them only when the drafter demonstrates a reason for doing so.

A prerequisite for applying Rakoff's special rules for standard form contracts (instead of traditional contract law) is that a contract of adhesion be found. Rakoff has seven criteria for adhesion contracts. These criteria are descriptive of an ideal type rather than a classificationary one, and not all seven criteria must be present to make a contract adhesive. The criteria essentially describe a written document that purports to be a contract consisting of terms prepared by one party likely to make numerous contracts of that kind and is imposed on a party likely to make fewer contracts of this type. The contract terms are offered on a take-it-or-leave-it basis while only a few essential terms (like subject matter and perhaps price) are subject to bargaining. Rakoff's description approximates what here is called a standard form contract.

Once an adhesion contract is found, Rakoff distinguishes visible and invisible contract terms. Visible terms are (a) those subject to negotiation, and (b) those which a "customary shopper" can be deemed to have shopped for, including the determination of the "broad type of the transaction." The visible terms of an adhesion

252 Rakoff's seven criteria include:

(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract. (2) The form has been drafted by, or on behalf of, one party to the transaction. (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent. (6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party. (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.

Id. at 1177.

253 Rakoff, supra note 1, at 1248-50.

254 See supra note 2.

255 Rakoff, supra note 1, at 1250-58.

256 One part of differentiating the boundaries between visible and invisible terms consists of determining the broad type of transaction. See also K. Llewellyn, Common Law Tradition, supra note 1, at 370. The fleshing out of the visible terms involves
contract are "most often those that would constitute the entire explicit contents of a very simple ordinary contract, with the price term being the paradigmatic example." 257 The invisible terms are the rest of the terms in the contract, and are presumptively unenforceable.258 If nothing further is asserted, the terms which the law for the particular type of transaction would imply in the absence of a contractual agreement should apply—the so-called background law. To show that an invisible term should be upheld, the party supplying the term has to show the degree of deviation from the background law as well as the reasons supporting both the background law and the deviation.259 This practice would force courts to make clearer statements about the background law as well as about the adjudicated standard term.260

Rakoff's theory has two advantages. The first advantage is the elimination of any consideration of market situations and the possible choice of other suppliers offering different terms. He presents a theory of substantive control of standard terms with the initial test limited to whether a contract is a standard form contract,261 thereby fulfilling

the categorization of the contract, adapting the more general rules of law not to every contract but to a more general type of contract. Judges can make a point-by-point comparison between the drafter’s terms and the legally implied characteristics of this type of contract. The question is how many specialized contract categories one recognizes. Rakoff primarily addresses the issue of the drafter choosing to flesh out a contract with terms of a transaction type that the non-drafting party could not expect. If, according to the visible terms, the contract is at the borderline between two transaction types, Rakoff will recognize the drafter’s choice. The choice is an invisible one, however, if the drafter’s choice goes beyond the anticipation of the adherent. See Rakoff, supra note 1, at 1256-57. The idea is not especially surprising for the German lawyer who is familiar with the categorization of contracts in the BGB as well as with courts handling new types of business transactions for which a general background law (Rakoff’s term) is created by the courts, but not for every single contract. It seems doubtful, however, that this is very often a problem of invisible terms. Generally, the adherent party may expect the type of transaction set forth in the standard form because the supplier of the form can be deemed to use a form adapted to the transaction he wants to conduct. There may, however, occasionally be the problem of using a wrong form. Where particular clauses do not fit into the bargain for the adherent, the idea of transaction type helps to elaborate the contradiction. But, in essence, it is a problem of substantive inadequacy of the term.

257 Rakoff, supra note 1, at 1251; cf. AGBG § 8.
258 Id. at 1243, 1251, 1258.
259 Id. at 1242, 1247, 1280-82.
260 Id. at 1259-60.
261 The same is true for Dugan’s theory. Dugan, supra note 1, at 1307 n.2; Dugan, Systematic Approach, supra note 1, at 84-86. Dugan proposes a five prong test, asking if: 1) a standard form is involved, 2) it deviates from statutory or common law, and 3) the displaced rules import balance into the otherwise dispositive regulation of the transaction. If a clause survives one of these three questions, it is immune from further
the need for an easily applicable and predictable test to determine whether ordinary contract law or special rules for standard form contracts should apply. The second advantage is that Rakoff appreciates the role the implied rules of law play in the substantive control of standard form terms. Substantive control is exercised by comparing the standard terms with what the law would imply without standard terms. This comparison is involved in every theory of substantive control, even if the formulation is different; finding terms "deviating from what a reasonable man would expect" or "driving to a hard bargain" means nothing more than that the risk allocation which the law would undertake absent standard form terms is materially different from what the terms state.

The difficulty with Rakoff's theory, however, is his presumption of the unenforceability of standard form terms. This presumption goes so far that critical attention can be expected to concentrate on this point at the expense of the advantages previously mentioned, which amount to a salutary step toward a manageable and predictable doctrine of standard form contracts.

The presumption of unenforceability, however, does not seem vital to Rakoff's theory. For the present time, while courts may still resort too easily to the principle of a duty to read, thus avoiding a careful questioning. If not, the two other tests come into play. If: 4) the standardized contract provides the non-drafter with a legal benefit not otherwise available under the existing law, and 5) this benefit is a fair equivalent for the displaced right, the deviating standard term is valid. If either 4 or 5 are answered in the negative, the deviating standard term is unconscionable. The theory could work and has the advantage of excluding unnecessary factual questions. It ignores, however, what the law has achieved up to now in dealing with standard form clauses under the heading of construction, unconscionability, and the doctrine of reasonable expectations. Instead, it requires a new start together with abandoning prior approaches, and it does not take into account useful formal aspects of unconscionability like inconspicuousness. It is for these reasons not further pursued here.

262 The same is true for Dugan, Systematic Approach, supra note 1, at 87-92.
263 Compare similar formulations in Murray, Unconscionability, supra note 1, at 14.
264 Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948).
265 See, e.g. KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 582-84.
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analysis of standard form terms and the changes in the process of contract formation, Rakoff's presumption may be a useful provocation to open new ways of thinking. In the long run, however, the presumption of unenforceability does not seem to be a necessary ingredient of a test that efficiently controls standard terms. Substantive control of standard form terms is a question of law. Control is often seen as a part of the unconscionability doctrine, which in turn is derived from the equitable principle of unconscionability, and thus has a tradition of being decided by the judge, rather than by the jury. U.C.C. § 2-302 makes the question of unconscionability of contracts or single contract term(s) a question of law. It is not only consequent but desirable to use the same issue of unconscionability where common law contracts are concerned. Thus, a uniform structure of the law under the U.C.C. and common law is insured. Additionally, questions of substantive control of unfair or unconscionable standard form terms are appealable if unconscionability is seen as an issue of law. The possibility of appeal could further uniformity and certainty in the decisions on unconscionability.

If substantive control of standard form terms is a question of law, a presumption of unenforceability of standard form terms is not necessary. The courts, once having taken the step to a reasonable and adequate control of standard form contracts, can set their limits without following presumptions. As fact questions are not decisive when adjudicating standard terms, presumptions are not needed to decide a particular issue. The courts can therefore set their standards for determining when a boilerplate term must be invalidated.

The presumption of unenforceability is thus neither a prerequisite for applying Rakoff's theory, nor is it necessary for its theoretical foundation. One can speak of the non-drafting party's assent that

267 Murray, Unconscionability, supra note 1, at 3-11; Braucher, supra note 1, at 343; E. Farnsworth, supra note 141, at §§ 4.26-4.27; Holmes, supra note 1, at 792-97.
268 See Braucher, supra note 1, at 339; Davenport, supra note 1, at 123; Hillman, supra note 1, at 35.41; see also the criticism of claiming the history of equity for the UCC concept of unconscionability in Leff, Unconscionability, supra note 1, at 528-33.
270 See generally infra Section IV dealing more specifically with the problem.
271 Kaufman, Corbin Supplement, supra note 1, at 581 (once courts hold certain terms invalid because of their unfairness, there is a presumption of fairness. Thus, in later cases involving similar clauses, the drafter will have to show that in his case the term is justified).
makes the standard terms enforceable and nevertheless controls the terms in the manner Rakoff proposes. Assent is a legal concept within the scope of the objective theory of contract:\textsuperscript{272} the internal intent or consent of the parties is not at issue. The question is what consequences the law connects with the parties' communicated manifestations. The law can, for example, take the signing of a document as a sufficient expression of assent. Concerning standard form terms, however, it is desirable to require more than the signing the contract document; if not, the drafting party has too much leeway to impose harsh terms upon the other party. When deciding to what extent the law will draw consequences from the mere act of signing, a balancing of business interests in the reliability of contractual obligations and societal interests in fair transactional dealings to uphold trust in the institution of contract is required. Some significance should be given to the signing of the contract form, since a party submitting to the standard form has taken the risk that the drafter provided terms favorable for himself. As long as standard terms are proper, both parties have the advantage of having a custom-made law for the specific agreement without being forced to negotiate. One can thus justify enforcing standard terms at least when such terms are controlled by the courts. Judicial control allows extant standard terms by forcing the substance of those terms into reasonable limits as far as shifting contractual risks to the non-drafting party is concerned. The law sets the margins, but the enforcement of standard terms can still be initially premised on assent.

The apt question is whether the advantage of having a document containing second-range provisions tailored for the particular type of transaction is sufficient to hold the non-drafting party signing a standard form contract to his signature. The disadvantage of one-sided terms and the eventual necessity of judicial control (which will never reach all cases) may be seen as outweighing that advantage, but presumably it is more likely for an average reader to understand a contract than to understand contract law. If standard form terms are carefully controlled and fairly drafted, the law can force the drafter to adapt general rules to specific types of transactions. Standard form contracts are sufficiently accepted in commercial life to recognize the non-drafting party's signature as general assent to the inclusion of standard terms into the contract. Though the traps in

\textsuperscript{272} Regarding the objective theory of contract, see E. Farnsworth, supra note 141, at 113-16.
the fine print are resented and one might wish to eliminate them entirely, there is a general feeling that we cannot realistically eschew their use, and indeed, a workable alternative has not been presented as yet.

To summarize, the essential and progressive parts of Rakoff's theory are: (a) an initial test for the application of specific rules for standard form contracts which disregards the market situation, the non-drafting party's possible alternatives and all other factual questions and simply inquires if standard form terms are used, and (b) the recognition of the role which implied rules of law play in judging the substantive fairness of standard form terms. Rakoff does not consider issues of defective assent, because assent in his theory is not the proper basis for enforcing standard form terms.

When looking for a predictable way of adjudicating the validity of standard form contract terms and considering the danger of uncontrolled one-sidedness arising from the formation of standard form contracts, the concept of control through a theory of assent and Rakoff's theory have their useful points. The two theories supplement each other. As a logical consequence of his theoretical foundation, Rakoff ignores questions of defective assent to standard form terms. The assent-based theory, on the other hand, neglects the question of direct substantive control. Both theories can help provide a workable common-law theory. Before synthesizing the two theories into one, however, a brief consideration of court decisions, the Restatement (Second) of Contracts, and the U.C.C. shall be undertaken to probe them for assistance in developing a new theory for form contracts.

C. **The Courts, Restatement, and U.C.C. on Standard Form Terms**

American court decisions concerning standard form contracts demonstrate little common structure. A great variety of factors are invoked to justify invalidating clauses where necessary. Underlying principles for evaluating these factors supporting invalidity are often difficult to decipher, resulting in unpredictability. Since the purpose of this article is to develop a systematic theory for standard form terms, it seems appropriate to use predictability as the guiding principle when looking at court decisions. The five decisions to be discussed were chosen because they have attracted attention and are remarkable in

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273 For an account of the deficiencies of the case law, see Dugan, *supra* note 1; see also Oldfather, *supra* note 208, at 304.
their efforts to find a sound approach to unfair standard form terms. The extent to which these decisions adopt any of the ideas explicated by scholars previously discussed will be evaluated.

Many decisions deal with standard form contracts under the heading of unconscionability.274 Others refer to the contra proferentem rule275 or the doctrine of reasonable expectations.276 The Restatement (Second) of Contracts Section 206 contains the contra proferentem rule, and Section 207 on unconscionability and Section 211(1) and (3) involving the problem of impaired assent to standardized contracts stress the reasonable belief of the adherent party. The structure in the unconscionability analysis will be considered first. The Restatement section on unconscionability will only be briefly mentioned, as it is similar to U.C.C. § 2-302 and can be treated together later with the U.C.C. provision. Furthermore, decisions using public policy to invalidate standard form terms instead of,277 or in addition to,278 unconscionability will be considered.

The least useful decisions are those simply stating that a term is or is not unconscionable without offering any reasons for the particular determination.279 Decisions purporting to give "reasoning"


without any assembly of factors to be evaluated in deciding the question of unconscionability are perhaps the most dangerous precedents. A paradigmatic example of this type is \textit{Hawes v. Kansas Farm Bureau}.\footnote{280} In \textit{Hawes}, plaintiff alleged the unconscionability of a clause in a life insurance policy requiring that death occur within ninety days after the accidental injury before entitling the beneficiary to double indemnity. The court commenced its analysis by stating ten evaluative factors to determine unconscionability:

(1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position (Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), Campbell Soup Co. v. Wentz, 172 F.2d 80); (2) a significant cost-price disparity or excessive price; (3) a denial of basic rights and remedies to a buyer of consumer goods (Williams v. Walker-Thomas Furniture Company, 350 F.2d 445; 18 ALR3d 1305); (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect (In re Elkins-Dell Manufacturing Company, 253 F.Supp. 864, (E.D. Pa.)); (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract (Henningsen v. Bloomfield Motors, Inc., \textit{supra}); (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate (Williams v. Walker-Thomas Furniture Company, \textit{supra}); and (10) inequality of bargaining or economic power. (Citations omitted)\footnote{281}

The court's conclusion following these factors is indeed laconic:

Plaintiff does not cite nor has our research disclosed a single case from any jurisdiction where a time limitation requirement in a double indemnity rider has been invalidated on the basic of unconscionability. We conclude the concept of unconscionability is inapplicable to the issue before us.\footnote{282}

\footnote{280} 238 Kan. 404, 710 P.2d 1312 (1985).
\footnote{282} \textit{Hawes}, 235 Kan. at 406, 710 P.2d at 1315.
The rationale seems to be that no other court ever held this clause unconscionable. The factors, stated so extensively, are reduced to mere decoration. Such a decision does not help to make results predictable nor to structure the unconscionability analysis.\(^{283}\)

The factors of unconscionability which the court mentions include as points (6) and (7) the questions previously considered as procedural and substantive inconspicuousness. *Hawes v. Kansas Farm Bureau* is thus one of the decisions which have in some manner touched on these categories.\(^{284}\) Apparently, defective assent has been accepted by other courts; however, the idea of defective assent is often used in connection with a finding of unequal bargaining power, or an impairment of free choice on the part of the non-drafting party, or by considerations of both.\(^{285}\) Additionally, whether or not the contract has been read is evaluated.\(^{286}\)

The *Hawes* decision illustrates insufficient reasoning which provides no assured guidance for the unconscionability analysis. On the other hand, there are decisions which try to distinguish the aspects of no-choice, defective assent and violation of public policy or substantive unconscionability.\(^{287}\) They may use these aspects together\(^{288}\) or as alternative reasons to invalidate standard form terms.\(^{289}\) Some decisions concentrate on one of the aspects,\(^{290}\) while other courts have

\(^{283}\) The conclusion is what the court deemed appropriate, or “the oatmeal theory or what the court ate for breakfast.” The danger of such proceeding was seen by Hillman, *supra* note 1, at 19.

\(^{284}\) Other decisions include A & M Produce Co. v. FMC Corp. 135 Cal. App.3d 473, 484, 492, 186 Cal. Rptr. 114, 121, 126 (1982); Chemical Bank v. Rinden Professional Ass’n, 498 A.2d 706, 714 (N.H. 1985) (no unconscionability found); Henningssen v. Bloomfield Motors, Inc. 32 N.J. 358, 161 A.2d 69 (1960).

\(^{285}\) Melso v. Texaco, Inc., 532 F. Supp. 1280, 1295-97 (E.D. Pa. 1982); Jones v. Dressel, 623 P.2d 370 (Colo. 1981) (not sufficient for an adhesion contract that a standard form is offered on a take-it-or-leave-it basis; showing of great disparity of bargaining power, no opportunity to negotiate or to obtain the item elsewhere necessary); Weaver v. American Oil Co., 257 Ind. 458, 460, 276 N.E.2d 144, 145 (1971).


\(^{287}\) Henningssen, 32 N.J. at 358, 161 A.2d at 69; *C. & J. Fertilizer, Inc.*, 227 N.W.2d at 169 (dealing with the assent questions under the heading of reasonable expectations and also unconscionability).

\(^{288}\) Henningssen, 32 N.J. at 358, 161 A.2d at 69.

\(^{289}\) C. & J. Fertilizer, Inc., 227 N.W.2d at 169.

\(^{290}\) Burne v. Franklin Life Ins. Co., 451 Pa. 218, 301 A.2d 799 (1973) (public policy with an additional reasoning of *contra proferentem*).

Unconscionability not only is used by the courts, but also is incorporated in the Restatement (Second) of Contracts Section 208. The Restatement adopted the U.C.C. provision on unconscionability which, like U.C.C. § 2-302, does not distinguish between the invalidation of standard form terms for reasons of unconscionability and overall unconscionability that may concern any contract. Likewise, the Restatement does not limit the contra proferentem rule to standard form contracts (Section 206).

Section 211 of the Restatement, however, contains rules which are especially shaped for standardized terms.\footnote{See Slawson, New Meaning, supra note 1, at 60-64 (discussion of Restatement Section 211).} Section 211(1), dealing with the assent to standard form terms, approximates the traditional understanding of the duty to read, the only qualification being the signing party must have had reason to believe that similar writings, embodying terms of the agreement, are usual. Section 211(3) provides the objective theory of contract. Standard terms are not part of the agreement if the supplying party had reason to believe that he would not have been able to obtain assent if the other party had known the term.

Even when dealing with defective assent, however, the Restatement is relatively vague. It does not take the step to differentiate the procedural and substantive aspects of defective assent. The wording of Section 211(3) itself gives no guidance for determining when the drafter had reason to believe that he would not be able to obtain knowing assent. Moreover, the Restatement does not sufficiently aid in formulating categories for controlling standardized terms under either defective assent or considerations of unfairness.\footnote{For the same conclusion, see Murray, Restatement, supra note 293, at 779.}

Five of the better court decisions have done more for developing a theory of control of standard form contracts than has the Restatement. The most impressive decision concerning a standard form contract term is probably the 1960 landmark case of *Henningsen v.*
Ten days after buying a new car, Mrs. Henningsen heard a loud noise under the hood of her car while driving. The steering wheel spun in her hand, and the car crashed into a wall, injuring Mrs. Henningsen. The evidence indicated a mechanical defect or failure. The case went to the jury solely on the basis of breach of the implied warranty of merchantability.

When purchasing the car Mr. Henningsen signed a standardized purchase order form. On the front, the contract form contained two paragraphs indicating that the front and back of the form comprised the entire agreement. Furthermore, the text stated that the purchaser had read the print on the back of the form, had agreed to it, and had the capacity to contract. The limitation of liability clause at issue in the case was printed on the back of the form, in somewhat larger print than the rest of the text, about two-thirds down the page. The clause granted replacement of defective parts in lieu of all other expressed or implied warranties and bore the heading "limited warranty."

The decision commences with general observations about the legal nature of implied warranties and the degenerated nature of the particular warranty which gave an illusory, conditional right of replacement of defective parts and barred any claim for personal injury. The court then turns its attention to the "[e]ffect of the [d]isclaimer and [l]imitation of [l]iability [c]lause on the [i]mplied [w]arranty of [m]erchantability." The court starts with the "duty to read," immediately declaring that "in the framework of modern . . . business practice . . . such rules cannot be applied on a strict, doctrinal basis. The conflicting interest of the buyer and seller must be evaluated realistically."296 The decision addresses the mass standardized character of the car purchase form and the impairment of choice caused by lack of power to bargain over the clause, especially since most car manufacturers used the same clause. The court questions whether the signing of the clause under those circumstances indicated assent by the purchaser.297 Justifying this doubt, the court points to the form and arrangement of the contract and the method of expressing the nature of the obligation, which "could have been different to

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296 Id. at 386, 161 A.2d at 84.
297 Id. at 387, 399-400, 161 A.2d at 85, 92 ("the buyer is said to have accepted the exclusion of the maker's liability"); cf. Murray Unconscionability, supra note 1, at 52.
make the purchaser aware of the purported implications of the agree-
ment.”

The court additionally posits an argument based on public policy. It again notes the overwhelming bargaining power of car manufac-
turers and declares that the implied warranty is "a child of the law." The court concludes:

The lawmaker did not authorize the automobile manufacturer to
use its grossly disproportionate bargaining power to relieve itself
from liability and to impose on the ordinary buyer, who in effect
has no real freedom of choice, the grave danger of injury to himself
and others that attends the sale of such a dangerous instrumentality
as a defectively made automobile. In the framework of this case,
illuminated as it is by the facts and the many decisions noted, we
are of the opinion that Chrysler's attempted disclaimer of an implied
warranty of merchantability and of the obligation arising there from
is so inimical to the public good as to compel an adjudication of
its invalidity.

*Henningsen* is a relatively early decision which in the absence of
U.C.C. § 2-302 had to devise an unconscionability analysis of its
own. The analysis addresses each of the elements which today appear
in all unconscionability analyses: the procedural inconspicuousness
(fine print) and substantive inconspicuousness (possibility of a clearer
wording of the limitation clause), as well as substantive unconscio-
nability for reasons of violation of public policy. The decision distin-
guishes these elements, though it premises the procedural as well as
the substantive analysis very much on the lack of choice. It is certainly
a decision that has opened the way to a differentiated and compre-
hensive analysis of unconscionability, but it still relies on elements
of a traditional understanding of unconscionability (which concern
not only standard form contracts) such as lack of bargaining power,
choice, similar terms throughout an industry, and the basic necessity
of the item bought.

A second famous case, *Williams v. Walker-Thomas Furniture*, has never received the unanimous approval that the *Henningsen* de-

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298 *Henningsen*, 32 N.J. at 399, 400, 161 A.2d at 92, 93 (concerning the issue of noncomprehension of the term).
299 *Id.* at 404, 161 A.2d at 95.
300 *Id.*
301 350 F.2d 445 (D.C. Cir. 1965).
cision enjoys. Though criticism of the decision primarily concerns the outcome of the case, the reasoning also falls short of the quality of Henningsen. The case concerned an “add-on” clause in a printed standard form furniture sales contract. Under this clause, the company credited installment payments pro rata on all outstanding accounts due at the time of payment. The effect of the clause, which the court described as “rather obscure,” was to keep open the customer’s balance on all items whenever purchased from the furniture store. The clause enabled the store to repossess all items bought from the store on credit upon failure to pay any installment.

The court analyzed the case under an unconscionability rationale describing unconscionability as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” The court uses what legal scholars have called no-choice unconscionability. When explaining the doctrine in more detail, however, the court refers to the problem of terms being hidden or incomprehensible which may impair assent. Since fact questions concerning the circumstances of contracting are decisive for this approach, the court sent the case back to the trial court for findings on this point.

The case helps little to structure an unconscionability analysis, to distinguish categories, or to make a predictable outcome. Though involving a standard form term, the case applies a general concept of unconscionability in which the fact of standardization is only one element. Even though it is a case that deals with “overall” unconscionability, Williams v. Walker-Thomas is not particularly helpful. The case stands for the notion that, where an indistinct finding of overall unconscionability is used, the discussion degenerates into a social-value debate about the result. Such reasoning does not serve predictability nor help to develop a rationally-controlled analysis.

302 For the criticism, see Epstein, supra note 47, at 306; Leff, Unconscionability, supra note 1, at 551-56; Leff, Unconscionability - the Code, the Courts and the Consumer, 9 B.C. IND. & COMM. L. REV. 367 (1968). For a comprehensive description of the Walker-Thomas sales technique, see Greenberg, Easy Terms, Hard Times: Complaint Handling in the Ghetto, in No Access to Law, 379-91 (R. Nader ed. 1980).
303 350 F.2d at 449.
304 Holmes, supra note 1, at 794-96.
305 Compare the criticism in Leff, Unconscionability, supra note 1, at 554-55, questioning what exactly is unconscionable about the contract between Mrs. Williams and Walker-Thomas Furniture, given the purpose of this article it is the rationale rather than the result of Williams v. Walker-Thomas Furniture which is of interest.
Another case garnering considerable attention is *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.* Its guiding quality has been compared to *Henningsen* and it is remarkable in at least two regards: it clearly states that special rules apply to standardized contracts, and it expresses the court's awareness of the "revolution in formation of contractual relationship."  

Plaintiff, C & J Fertilizer, bought both a "Broad Form Storekeepers Policy" and a "Mercantile Burglary and Robbery Policy" to insure its premises. The policies contained a clause with a definition for "burglary" which, to trigger coverage, required "entry . . . by actual force or violence, of which force and violence there are visible marks by tools, explosives, electricity or chemicals upon, or physical damage to the exterior of the premises at the place of such entry."  

When the premises were robbed one weekend, the burglar left no exterior marks on the door through which he entered. An inside door, however, was physically damaged and there were tire tracks in the driveway. The insurer denied coverage because visible marks at the exterior entry door did not exist. 

In its decision on the claim of coverage, the court reviews three theories: the doctrine of reasonable expectations, implied warranty, and unconscionability. The court starts by describing the modern process of contract formation and concludes that:  

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[\text{t]he inevitable result of enforcing all provisions of the adhesive contract. . .would be an abdication of judicial responsibility in face of basic unfairness and recognition that persons' rights shall be controlled by private lawmakers without the consent, express or implied, of those affected. A question is also raised whether a court may constitutionally allow that power to exist in private hands except when appropriate safeguards are present, including a right to meaningful judicial review.}\]

This passage is impressive in its recognition that the lawmaking power in private hands is a factual problem needing a response in the form of judicial review but is not an element of a theory of  

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306 227 N.W.2d 169 (Iowa 1975).  
307 *Kaufman, Corbin Supplement, supra* note 1, at 556.  
308 *C. & J. Fertilizer, Inc.*, 227 N.W.2d at 173. One more important aspect is that the court makes it clear that the insurance commissioner's statutorily required approval does not change the need for judicial control. Id. at 175.  
309 Id. at 171.  
310 Id. at 174 (citations omitted).
democratic lawmaking. Against the backdrop of this awareness that the unbargained-for contract allows one party to legislate terms in contract formation, the court reviews the three theories of control.

Regarding the first theory, the doctrine of reasonable expectations (DRE), the rationale centers around two ideas: the burglary definition in the two policies deviates from the usual understanding of the term by requiring outside visible marks of entry, and that this definition literally would deny coverage even though the clause's sole purpose, to make sure that no "inside job" would be covered, could be fulfilled through other evidence. As the plaintiff purchased burglary coverage and claimed coverage for a burglary, the court viewed the term denying coverage as one not reasonably to be expected.

The court applies the doctrine of reasonable expectations clearly as a means of substantive control, not as a means of construction.\(^1\) The definition of burglary expunges what, according to the understanding of an average person, one bought when purchasing burglary insurance. The rationale behind the decision is one of lack of assent rather than unfairness per se. The court expressly states that, according to the record, the plaintiff had no knowledge of the clause. This passage indicates that the plaintiff's signing with knowledge could have made a difference under the reasonable expectations rationale.

The court next addresses the issue of implied warranty of fitness, referring to Llewellyn's formulation that when read alone standard terms must not alter or impair the fair meaning of what is bargained for and must not be manifestly unreasonable or unfair.\(^2\) The court advocates an extension of the implied warranty of fitness for chattels to the purchase of "protection," hoping to "encourage insurers to make known to insurance buyers those provisions which would limit the implied warranty inherent in the situation."\(^3\)

The implied warranty reasoning addresses the same contradiction between consciously bought protection and a limitation of such protection via a standardized term as does the doctrine of reasonable expectations. The difference is that the implied warranty expresses even more clearly what has been violated; it is a legal requirement concerning fairness and expectability of a boilerplate term. The war-

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\(^1\) Cf. supra text accompanying notes 170-184.

\(^2\) 227 N.W.2d at 178; see K. LLEWELLYN, COMMON LAW TRADITION, supra note 1, at 371.

\(^3\) 227 N.W.2d at 179.
ranty is implied by law. In contrast to the implied warranty notion
the reasonable expectation, though defined by the law, looks through
the eyes of the adherent party to ascertain the substance of the term.

The implied warranty reasoning in C & J Fertilizer was experimental
and barely has support in other decisions. It is appealing in its parallel
to the sale of goods provisions, but even the U.C.C. provisions on
implied warranties and the possibility of limitations and disclaimers
cannot stand. Such provisions must be incorporated into a broader
theory of standard form terms and unconscionability. The contro-
versies about the applicability of U.C.C. § 2-302 to the disclaimer
of an implied warranty mentioned in U.C.C. § 2-316 show that
the Code provisions, to be coordinated, must be understood against
the backdrop of an underlying theory. When further pursued, how-
ever, the implied-warranty reasoning does not yield that helpful a
theory.

Finally, the court in C & J Fertilizer addresses unconscionability
and mentions the fine print of the clause and its unusual placing,
not among the exclusions, but in a definition of burglary. Without
using the specific term, the court thus addresses aspects of (physical)
inconspicuousness as a prerequisite to the invocation of unconscion-
ability, then broadly applies the unconscionability doctrine. This un-
conscionability analysis itself lacks precision:

Commentators suggest a court considering a claim of uncon-
scionability should examine the factors of assent, unfair surprise,
notice, disparity of bargaining power and substantive unfairness.
(Citations omitted). We have already touched on those considerations
in the factual discussion, above. . . In the case sub judice, plain-
tiff’s evidence demonstrated the definitional provision was uncon-
scionable.

Indeed, the court previously discussed the factual aspects of the
insured’s lack of knowledge concerning the clause, his being con-
fronted with the standard insurance contract delivered only after
contracting, and the unexpected nature of the provision at stake.
These general references, however, do not help to elaborate an un-
conscionability analysis. In this regard one recalls the Kansas case

314 Leff, Unconscionability, supra note 1, at 516-528; Murray, Unconscionability,
supra note 1, at 45-49; Comment, Unconscionable Contracts: The Uniform Commercial
Code, 45 Iow. L. Rev. 843, 854-59 (1960); Ellinghaus, supra note 1, at 794-03; Dugan,
Systematic Approach, supra note 1, at 100-01.
315 227 N.W.2d at 181.
of *Hawes v. Kansas Farm Bureau.* The factors affecting the application of unconscionability are mentioned, and the result is stated; however, the deductive reasoning structure is missing.

Another omission is the relation between the doctrine of reasonable expectations and unconscionability. Both doctrines stand unrelated side-by-side, though the concepts have elements in common. *C & J Fertilizer* is thus an example of a very comprehensive presentation of the elements influencing a theory of standard form contracts, but it does not arrive at a systematic structure. The decision is useful, however, because it causes one to wonder how the doctrine of reasonable expectations might be fitted into a comprehensive theory of standard form contracts.

The next decision deserving mention is not as well-known and is somewhat different because its holding is not confined to standard form contracts. In *Ellsworth Dobbs, Inc. v. Johnson,* a real estate broker claimed the seller owed a broker's commission even though the sale did not close due to the prospective buyer's failure to obtain financing. The brokerage agreement stipulated that the commission was due upon sale. The New Jersey court, considering what the law ought to be, overruled prior decisions and concluded that "absent default by the owner, the contract of sale must be performed by the buyer before liability for commission is imposed upon the owner." The court then asked to what extent an agreement between owner and broker can change this rule. The Court, employing a public policy analysis, noted the legislature's expression of public interest in brokerage contracts when it subjected broker's activities to regulation, resulting in the creation of fiduciary obligations on the broker. The court strove to protect the public from undue harm where "persons with whom they deal who through experience, specialization, licensure, economic strength opposition, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage." The court held unenforceable those contractual obligations which are at odds with common understanding and which result from the undue

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[^316]: 238 Kan. 404, 710 P.2d 1312 (1985); see supra notes 281-83 and accompanying text.
[^317]: 50 N.J. 528, 236 A.2d 843 (1967).
[^318]: Id. at 540, 236 A.2d at 855.
[^319]: Id. at 541, 236 A.2d at 856.
advantage of the drafter. Basing its finding of unenforceability on public policy, the court stated:

whenever the substantial inequality of bargaining power, position or advantage to which we have adverted appears, a provision to the contrary [of what has been stated as the law in New Jersey] in an agreement prepared or presented or negotiated or procured by the broker shall be deemed inconsistent with public policy and unenforceable.320

Ellsworth Dobbs is remarkable in the way it proceeds from finding and stating the law to questioning whether or not contract terms can deviate from that law. The court clearly exercises substantive control, but does not limit this control to standard form terms. It uses the situation of unequal bargaining power as the trigger for invalidating clauses which deviate from the rule of law. Under the court's reasoning, not only standard form terms but also negotiated terms could be invalidated. The commission clause, however, is not declared invalid in every case. The decision would have provided assured guidance if it had drawn the line for invalidating commission clauses between standard form terms and negotiated terms without reference to the somewhat amorphous category of unequal bargaining power. Alternatively, one could draw the line between merchant contracts and consumer contracts.

The last decision is the California case of A & M Produce Co. v. FMC Corp.321 Alex Abatti, owner of A & M Produce, a farming company, decided to start producing tomatoes and needed a weightsizing machine for the packing. Abatti had no experience with such equipment. He talked first to a competitor of FMC and then, finding the quoted price too high, spoke with two FMC sales representatives. In the negotiations, the parties discussed the capacity of the weightsizing equipment. The FMC representatives recommended a machine without a hydrocooler, the item making the competitor's bid so expensive.
Abatti signed a standard form order and eventually received a copy of the form contract in the mail. The form contained a paragraph 4, "Warranty" with a disclaimer of warranties in bold print, and a paragraph 5, "Disclaimer of Consequential Damages" in somewhat smaller print, which stated that "seller in no event shall be liable for consequential damages arising out of or in connection with the agreement." Abatti made two down payments on the contract price but never paid the balance of $21,361.20 due on delivery.

The weight-sizer malfunctioned, resulting in the loss of most of A & M's tomato crop. A & M offered to return the weight-sizer for a refund of the down payments and the freight charges. FMC, however, demanded full payment of the balance due. A & M then filed a damage action for breach of express and implied warranties for a particular use and misrepresentation. The trial court (in the third trial) found the disclaimers of warranties and of consequential damages unconscionable and FMC appealed from the verdict.

The decision of California Court of Appeals turns upon the unconscionability of the disclaimer of warranty and limitation of consequential damages clauses of the sales contract. The court, considering whether a valid U.C.C. § 2-316 warranty disclaimer may be unconscionable under U.C.C. § 2-302, favored the applicability of U.C.C. § 2-302 because "oppression and unfair surprise, the principal targets of the unconscionability doctrine, may result from other types of questionable commercial practices," in addition to inconspicuousness dealt with in U.C.C. § 2-316.

The court next turns to unconscionability in general. It repeats the formula that unconscionability includes the absence of meaningful choice by one of the contracting parties together with contract terms which are unreasonably favorable to the other party, and recognizes therein the two elements of procedural and substantive unconscionability. In addressing procedural unconscionability the court focuses on the factors of "oppression" and "surprise;" oppression dealing with the problem of inequality in bargaining power, and surprise addressing the supposedly consented-to terms being hidden in a prolix printed standard form.

In its analysis, the court refuses to include in the "circle of assent" only bargained-for terms. When dealing with unbargained-for terms, however, such terms must be both substantively unreasonable and procedurally defective to make them invalid. Defining substantive unconscionability, the court refers to Murray's formulation that a term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. Additionally,
the court reasoned that the more objectionable the terms are procedurally, the less unreasonable the risk allocation must be, to invalidate a term.

The court does not address identification of an unreasonable risk allocation. Instead, the court justifies the use of procedural and substantive unconscionability with a parallel to the 1981 case of *Graham v. Scissor-Tail, Inc.*, where the lack of choice for one party together with the absence of a “minimum level of integrity” regarding an arbitration clause proved sufficient for invalidation of the offensive clause.

Applying the general considerations to the facts of the case, the court affirms the trial court’s finding of unconscionability. Addressing the question of procedural unconscionability, the court emphasized the disparity in the market power between parties. In this case the court found that even though A & M was an experienced and relatively big farming company, FMC was of a different class. In addition, since the attention of the buyer was not directed to the disclaimer of warranty and limitation of damages clauses, the court found that incorporation of those terms within the long pre-printed contract may have caused unfair surprise.

The court also found the contract to be substantively unconscionable because the disputed clauses negated any enforceable performance standards of the contract. The court relied upon the inexperience of A & M as a buyer of the particular type of machinery and FMC's knowledge of this inexperience. Under these circumstances, the court found substantive unconscionability if the seller prevents the buyer from reasonably relying on performance representations through the use of liability disclaimers. As to the limitation of damages, the court adds that the risk involved (of the tomatoes rotting if not processed properly and expediently) was obvious from the outset and reasonably avoidable only by the seller, FMC.

The decision is thoughtful and comprehensive. It tries to use scholarly concepts (citing Leff and Murray) and prior case law to approach the issue of unconscionability in a systematic analysis. By invoking the no-choice situation to determine procedural unconscionability, however, the court gets lost in a wilderness of factual considerations, including the relative bargaining power of the parties and the question of whether the terms were read. Because mere differences in bar-

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gaining power are sufficient for procedural unconscionability, the court must require both procedural and substantive unconscionability to invalidate a term. The test is vague, though, because a "sliding scale" approach is taken, meaning that more of one type of unconscionability takes less of the other in order to find unconscionability in the whole.

Comparing *A & M Produce Co.* to *Henningsen*, one realizes that in substance there has been no progress. The same considerations and categories previously addressed in *Henningsen* are used in *A & M Produce*. The only change is that by now the steps of reasoning have labels such as procedural and substantive unconscionability. There is still no basic distinction between an unconscionability analysis for negotiated contracts on the one hand and standard form terms on the other. The complicated factual questions of bargaining power and choice are still of major importance. Twenty-two years after *Henningsen*, *A & M Produce* shows that the judicial progress is limited to and mired in terminology.

This review of selected decisions and some patterns which can be found repeatedly in other cases illustrates two things. First, courts have used, in various forms and constellations, the same elements of analysis for the control of standard form terms which appear in scholarly articles. Second, the courts achieved no more structure or predictability than did the scholars, particularly in attempting to develop a clear distinction between a theory of standard form terms and a general doctrine of unconscionable contracts.

**D. U.C.C. § 2-302 Unconscionability**

In Section 2-302, the U.C.C. gives courts the possibility of directly invalidating (or modifying) entire contracts or single contract clauses for reasons of unconscionability. The provision itself, which reappears in the Restatement (Second) of Contracts § 208, does not define or structure unconscionability, but simply lists available remedies.\(^3\)\(^2\)\(^3\)\(^2\)\(^3\)\(^2\)\(^4\) Although the comments note the underlying principle of prevention of oppression and unfair surprise, they give further guidance about the general idea behind the provision or what kind of clauses courts could find unconscionable.\(^3\)\(^2\)\(^4\)

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\(^3\)\(^2\)\(^3\)\(^2\)\(^3\)\(^2\)\(^4\) Restatement (Second) of Contracts § 208 comment g (1981); cf. Spanogle, *supra* note 1, at 937.

\(^3\)\(^2\)\(^4\) See also Spanogle, *supra* note 1, at 942-43. Spanogle nevertheless tries to draw an analytic structure of unconscionability from the difference of oppression and unfair surprise. *Id.*
There has been a lot written on the way U.C.C. § 2-302 is drafted. Leff criticized the provision because of its lack of definiteness, implying that it gives the courts the possibility of replacing insufficient reasoning by no reasoning at all. Some courts have, indeed, yielded to this temptation. Others, however, have tried to use ideas from scholars or the key words in the comments to U.C.C. § 2-302—"unfair and oppressive" terms and "no choice,"—to explain their decisions. Leff has been severely criticize as being unwilling to understand U.C.C. § 2-302, to recognize the intent of the "father" of the provision, Karl Llewellyn, and to comprehend the difficulties faced by a legislator when implanting into the Code a concept that uncontestedly needs elaboration and structuring. Murray explained that presumably Llewellyn knew about the difficulties in developing a doctrine of unconscionability and thought that in a common law system the courts are the proper entity to flesh it out. Thus, U.C.C. § 2-302 can be explained as an intended catalyst to encourage and accelerate the creation of a doctrine of unconscionability by forcing the courts to assume the task. Unhappily, the courts have not gotten very far in their efforts to elaborate the possible elements of

325 Leff, Unconscionability, supra note 1, at 489-546; Braucher, supra note 1, at 773-75; Note, Unconscionability - The Code, the Court and the Consumer, 9 B.C. IND. & COMM. L. REV. 367 (1968); Speidel, supra note 1; Leff, Unconscionability and the Crowd, supra note 33; Murray, Unconscionability, supra note 1, at 34; Note, Unconscionable Contracts: The Uniform Commercial Code, 45 IOWA L. REV. 843, 847-50 (1960).


329 Dawson, supra note 29, at 1041 n.1.

330 See Murray, Unconscionability, supra note 1, at 38. For the history of U.C.C. § 2-302, see Spanogle, supra note 1, at 938; see also Ellinghaus, supra note 1, at 761; Note, Unconscionable Contracts: The Uniform Commercial Code, 45 IOWA L. REV. 843, 847 (1960).

331 Ellinghaus, supra note 1, at 761; Murray, Unconscionability, supra note 1, at 37-38 (skeptical about the effect); see Davenport, supra note 1, at 149-50.
an unconscionability doctrine. In legal scholarship, on the other hand, one notes some advances; it is possible to complete the fleshing out of U.C.C. § 2-302.

Keeping the development of the German law of standard form terms in mind, it sounds reasonable to leave it to the courts to create a theory and systematic doctrine for standard form contracts if the courts are given the tool of a generally formulated provision with which to work. In Germany, courts developed the theory of standard form terms out of a general clause in the BGB. The general clause is an effective tool because courts must deal with contract drafters’ never-ending ingenuity in finding new wordings. Courts thus need a flexible instrument to adjudicate standard terms. It does not make sense merely to suppress certain clauses which are known at the time the statute is enacted. In addition to the German experience, another reason exists to leave the development of a theory of standard form contracts to American courts. It is a painful process to give up highly esteemed ideals of freedom of contract and judicial nonintervention, ideals which have shaped the society which produced them and which are deeply rooted in society’s perception of freedom. Thus, while a changed reality demands some modification, this difficult task is probably better left to the courts because they proceed more slowly in the creation and adaption of law than do legislators.

In any case, U.C.C. § 2-302 does not provide a solution to the problem. It rather requires a solution which the courts have not provided in applying U.C.C. § 2-302. We thus revert to the efforts of legal scholarship to integrate the traditions of common law, the modern case law, and the changed reality of contract formation to divine an American theory of standard form contract law. What can be taken from U.C.C. § 2-302 is that any theory for standard form contracts has to explain its relation to the concept of unconscionability. U.C.C. § 2-302 permits invalidation or modification of single

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332 Ellinghaus, supra note 1, at 761; Slawson, New Meaning, supra note 1, at 52; J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code 112-33 (2d ed. 1980); see also Leff, Unconscionability and the Crowd, supra note 33, at 349; Dugan, supra note 1, at 1329; Dugan, Good Faith, supra note 1, at 2 n.4, with a vivid criticism of the tendency to consider factual circumstances of contract formation when adjudicating standard terms.

333 A general clause may be described as something like a standard in the sense Ellinghaus, supra note 1, at 759-60, and Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 645-46 (1923) understand it, that is, as a “residual” category to keep the system open for changes and flexible application of firm rules.

334 See Linzer, supra note 55.
contract terms without affecting the entire agreement. The illustrations to U.C.C. § 2-302 show that the drafter's intended the section to address standard form terms.335 One issue that will have to be faced is whether the common law should also deal with standard terms within the scope of unconscionability or if it should distinguish the two concepts. With these remarks on U.C.C. § 2-302 in mind, the theories developed by German and American scholars and the elements supplied by case law shall be rearranged into a new theory of standard form contracts.

IV. A NEW AMERICAN THEORY OF STANDARD FORM CONTRACT LAW

The first decision concerning an American theory of standard form contracts involves a choice: one can perceive the doctrine as part of the concept of unconscionability or as a distinct body of rules. The fact that the U.C.C. considers standard form terms within the scope of unconscionability is an argument for doing the same regarding contracts governed by common law. Although the doctrines are similar, the concept of unconscionability and the control of unfair standard form terms are asserted to be different.336 Kaufman understands unconscionability as applicable to negotiated as well as to standardized contracts. On the other hand, he sees the concept of unconscionability restricted to grossly unfair contracts on the whole, while the analysis of standard form terms strikes down individual terms as unfair per se.337

Looking at the history of unconscionability, Kaufman may have a point. Unconscionability has been an extraordinary remedy used to invalidate outrageous contractual terms or agreements in cases where harsh clauses came together with inequality of bargaining power at the outset and resulted in overreaching by a superior contracting party using an advantage of power or knowledge or both.338 Standard form contracts do not necessarily fall into this category of extremely

335 All the illustrations concern standardized terms. See also Dugan, Systematic Approach, supra note 1, at 81.

336 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 568-70.

337 Id.

338 See Bracher, supra note 1, at 339; Hume v. United States, 132 U.S. 406, 411 (1889), quoting Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750) (a bargain is unconscionable if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.")
unbalanced, outrageous contracts. As a routine control, standard-form contract control must intervene at a lower level, though outrageous situations may appear occasionally. The question is whether the traditional understanding of unconscionability should be broadened or whether a new category of unfairness control should be created. It is mainly a question of terminology. Kaufman is right that control of outrageous contracts and the doctrine of control of standard form terms have similarities but require different rules.339 This article perceives the theory of standard form contracts as a distinct part of the unconscionability doctrine because the law has developed the theoretical elements for the control of standard terms mainly by reference to unconscionability. It seems easier to proceed in the same terminology rather than to solicit acceptance for a new terminology. In addition, perceiving the control of standard form contracts as part of the unconscionability doctrine makes it possible to keep the connection to U.C.C. § 2-302, which already addresses invalid contract clauses. This perception of the control, however, makes it paramount to distinguish the control of standard form contracts from the traditional concepts of invalidating extremely one-sided contracts procured through the use of improper means.340

The traditional concept of unconscionability can be described as gross inequality in the bargaining position of the parties together with harsh and grossly one-sided contract terms. The concept applies to all contracts, not only to standard form contracts. Finding unconscionability in the traditional sense affects the whole contract which in toto is considered improper, even though U.C.C. § 2-302 authorizes the judge to invalidate single parts of the contract for reasons of unconscionability. In exceptional cases, it may be possible to rebalance the agreement through the deletion or modification of some terms. Basically, the first step toward developing a specific doctrine of standard form contract law out of U.C.C. § 2-302 and the similar Section 208 of the Restatement (Second) of Contracts is to distinguish between provisions which apply to all contracts and those which especially concern standard form contracts. Invalidating or modifying single terms of a contract primarily concerns standard form contracts,

339 Kaufman, Corbin Supplement, supra note 1, at 568-70. One very clearly demanding special rules for standardized contracts is Dugan, supra note 1, at 1307 n.2, 1322, 1325, and 1331.

340 Leff sees a difference between "the pathology of bargaining and the pathology of non-bargaining." He tries, however, to reduce the U.C.C. to the latter, as a rule for mass transactions only. Leff, Unconscionability, supra note 1, at 537.
while overall unconscionability normally calls for invalidating or modifying the entire contract.

The factual circumstances of contract formation play a decisive role in reviewing the agreement under the concept of traditional overall unconscionability. Consideration of the formative circumstances makes the adjudication process complicated and time consuming, causing a certain unavoidable unpredictability of the result. As a result of this unpredictability the concept of overall unconscionability should not be a readily-used device. Epstein reminds us that the roots of the theory of unconscionability require an unbalanced agreement reaching a level comparable to fraud or duress. The use of a standard form does not justify setting in motion such a costly and time consuming analysis. Unconscionability, according to traditional understanding, is a concept that must overcome the presumption of adequacy in the contractual exchange secured by the bargaining process. It must show that the bargaining process did not work and resulted in an unacceptably one-sided contract. Overall unconscionability is an extreme tool for extreme cases; it should be used reluctantly because its very character prevents it from being a predictable and economic tool. It is basically an equitable remedy and has the somewhat wobbly contours which are a consequence of exercising equity.

The cooperation of drafters is needed to reach the overwhelming number of standardized contracts which are formed every day. Thus, unlike the extreme tool of overall unconscionability, the test for unconscionability of standard form terms must be a routine test, easy to administer and predictable in the outcome. Only an accessible doctrine can provide an adequate answer to the widespread use of standard form terms and the skills of the drafters. Such a routine test gives drafters the carrot of assurance that form terms will be enforced and the stick of deterrence that over drafted terms will be brought into court and invalidated in a fast and efficient procedure. Control of standard form terms in such a manner should encourage fair drafting.

The simplest and most effective test to trigger a special analysis is to determine whether standard form terms are involved. Rakoff and Kaufman favor this test. The mere fact that standard form terms

341 Epstein, supra note 47.
342 Cf. Bracher, supra note 1, at 339; see also supra note 269.
343 Rakoff, supra note 1, at 1177-79 and 1248-49; KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 565; Dugan, supra note 1, at 1316-19 (equal requiring only a standardized contract without further factual findings concerning formation process); Dugan, Systematic Approach, supra note 1, at 85.
are used leads to the application of special rules, which is also the German test. To define standard form terms for the purpose of activating the special test, one may use Rakoff's seven points of identification or one could as well use something similar to the German provision: prepared terms which are intended to be used in several contractual agreements. Whether the party drafted the form or uses one drafted for him, and whether the standard terms are used industry-wide or used only by the supplying party, is not important. Under this analysis, who makes the contract provisions and who applies them does not change their character. Assuming the initial test has triggered the application of special rules, it is necessary to separate terms which have been subject to negotiation even though they appear as part of the standard form. If this step is not taken the test would be overinclusive. It is unquestionably possible to distinguish between bargained-for and non-bargained for contract terms and to accord each different treatment. As to the negotiated terms, traditional contract law rules apply. The same is true for terms which basically characterize the agreement, independent of their appearance. By entering into an agreement, the adherent party minimally made an active choice of a certain overall type of transaction to engage in. To the remaining terms, specific rules for standard form contracts apply.

The traditional contract inquiry of whether the non-drafting party read some or all of the contract terms or otherwise had actual knowledge of them should be eschewed. Such a procedure would create a lot of fact questions to trigger the specific rules. Furthermore, standard form contracts differ from the traditional process of contract formation not only because the terms are normally not read but also because they are usually offered on a take-it-or-leave-it basis. The simple fact that somebody reads a contract term does not make the agreement match with the traditional understanding of contract formation. Only when the take-it-or-leave-it basis of acceptance is not present does the contract fit the category of bargained-for agreements.

In order to maintain orderly contractual relations in some sectors of society, courts should next consider exempting certain types of

344 See supra notes 72 and 75 and accompanying text.
345 See supra note 253 for Rakoff's definition. For the German version see supra note 75; see also Dugan, supra note 262, with a similar definition.
346 KAUFMAN, CORBIN SUPPLEMENT, supra note 1, at 575-76; see also Dugan, Systematic Approach, supra note 1, at 85.
standardized contracts from application of the specific rules. Collective bargaining agreements in the sector of labor law, for example, should probably follow different rules because there is a specific bargaining process involved. Additionally, the incorporation of businesses should deserve separate treatment, since the incorporation procedure is usually not a matter of drafting by one side prepared for mass adherent consumers.

Once a standard form contract is found and is not exempted, the next step is to ask if the standardized terms become a part of the agreement. American law considered this question especially in connection with parcel and parking tickets which contained contractual clauses like limitations of liability. Under the Restatement rule, it is sufficient that, by signing or otherwise, assent to standard form terms is manifested and that similar writings can be expected in agreements of the same type. Actual knowledge of the content of the standard terms is not necessary. For merchants, the manifestation of assent without knowledge of the content of the terms may be sufficient, as businessmen can be expected to know what terms may be in such an agreement. For consumer transactions, however, there should be a notice requirement of the content of the terms given in a manner so that the non-drafting party has the possibility of obtaining actual knowledge. Since the notice requirement makes transactional terms more transparent, it assures the consumer that he can read the terms if he so desires. Making terms known is the first step in making them subject to discussion, criticism, and control. Notice should be given in the manner that is practicable for both sides. In most instances, it is possible to hand over an exemplar of the included terms when the contract is concluded. Where this is not possible, however, a notice with the text of the terms must be given at some point.

An example of one industry which in most instances does not disclose contract terms at the point of contract completion is the insurance industry. It does not, however, seem necessary to exempt the insurance business from the requirement of handing over the terms at the time of contracting. In most cases it is possible to hand

347 See E. Farnsworth, supra note 141, at 296-98 (for the incorporation of standard terms into the contract); see also Dugan, supra note 1, at 1319-23.
349 This notice requirement rejects any consideration of readability and comprehension. See supra note 134.
out the text of policy provisions at the time of application for the insurance contract. Even where life insurance policies are sold from vending machines, the provisions can be posted at the machine. It should not, however, be a prerequisite for incorporating the printed policy terms into an insurance contract that the provisions had been handed over prior to the contract completion. This is true since the insurance business is based on standardization of risks to make the appropriate premium calculable and to make possible a fair risk-distribution between insureds. There is thus the need to apply uniform conditions in order to treat different insureds equally.\textsuperscript{350} It would lead to unequal treatment if failure to give notice of the policy terms made them inapplicable.

Upon notice of the standard terms (the terms are handed over or the non-drafting party may otherwise have reasonable opportunity to read them), and acceptance by the non-drafting party occurs (the non-drafting party accepted by signing or by otherwise manifesting assent to them), the formed contract includes the standard form terms.

The next step involves the issue of control of the terms incorporated into the agreement. Regarding control, American legal doctrine has pursued two lines: (1) holding the assent to unfair or unexpected terms defective, and (2) exercising direct substantive control of unfair terms, under various headings like substantive unfairness, unconscionability per se, or violation of public policy.\textsuperscript{351} Before using either line of reasoning, the potentially objectionable terms have to be isolated and evaluated. Terms are not objectionable simply because they are part of a standard form. They become objectionable only where they are unfavorable to the non-drafting party in a form and to an extent which the law cannot accept. Courts therefore should isolate the unfavorable terms so they may be properly analyzed. In order to do so, the standard terms must be compared with something serving as a gauge; it is no defense that the non-drafting party incurs obligations, since obligations are one characteristic of a contract. One could call the backdrop against which any standard form term is measured the reasonable allocation of risk. The problem with labeling in this manner is that reasonableness invokes a notion that any deviation in risk is unreasonable and therefore objectionable. This,

\textsuperscript{350} Compare the German law that does basically the same, see supra note 117 and accompanying text.

\textsuperscript{351} See supra Part III(B)(2) and text at notes 288-293.
however, is not necessarily the case as there must be a certain leeway to allocate the legal burdens. The reasonable allocation of risks is usually nothing more than what the law would imply if the parties had not agreed on the specific point. The standard to which form terms are compared should be what the law would normally gap-fill as terms, absent an agreement of the parties. Thus, the court in adjudicating the objectionable nature of a standard form term ascertains if the term deviates from what the law would imply as a usual, appropriate risk allocation; or to use Rakoff's term, the court asks if the standard form term deviates from the background rule of law. Such a procedure may sometimes cause the court first to create or state the implied law, as Ellsworth Dobbs v. Johnson illustrates. Once this risk allocation step is done in a sufficient number of cases, the drafter will have a predictable indication of where he must restrain himself to have his standard form terms validated.

The law thereby supplies a general rule of general acceptability of standard terms for the average case. Even if there is a deviation, the standard form clause is not yet voided. There may be acceptable reasons to put greater burdens on the non-drafting party than the law would normally imply. Moreover, to invalidate terms it is necessary to find the deviation unfair, unexpected or otherwise objectionable. At this juncture, the two lines of reasoning (defective assent and direct substantive control) must be considered. The category of defective consent has been adequately sub-categorized into physical and substantive inconspicuousness. American law in this regard has developed clear and applicable categories.

Physical inconspicuousness concerns the method of presentation, such as: extremely fine print; print in colors; letter types which are not readable; undetectable organization of the terms in the document; terms hidden in places where they do not belong and cannot be expected; terms hidden under wrong headings; or a few clauses in an overwhelming amount of insignificant printed text which buries important provisions. These examples are merely illustrative and not complete.

Substantive inconspicuousness concerns the way a term is formulated. Even if the term can physically be found, it may be drafted in legal terms or obscure language, may use exotic or foreign terms, or use extremely complicated grammatical construction. An objec-

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352 See supra notes 259 and 260.
tionable term procured in a procedurally or substantively inconspicuous manner should be held invalid.

The next step concerns direct control of unfairness, emphasizing the improper substance of a clause rather than the defective assent to it. Arguably, the concept of defective assent may be outcome-determinative so that the additional category of substantive unfairness is unnecessary. Standard terms would not necessarily be restricted to the issue of inconspicuousness. The assent to terms which are in their substance unfair could be deemed invalid because the terms are objectively unexpected. Llewellyn’s blanket assent notion concerns terms which could reasonably be expected. Regarding unexpected terms, the drafter could not reasonably expect general blanket assent to standard terms as including them.

Omitting direct control of unfairness is supported in Section 211(3) of the Restatement (Second) of Contracts. Referring to the reasonable expectations (or the reasonable belief) of the non-drafting party and invalidating his assent, however, creates difficulties when a term was made known to that party without having been subject to negotiation. Such reasoning also creates difficulties when a term was stated clearly and somewhat distinctly from others so that knowledge would have been easily obtainable. In those situations, it is hard to speak any longer of the adherent party's belief or expectation that such a term would not be part of the transaction, no matter how unfair the term is. This way of reasoning may dangerously lead the courts into the escape device of overstretched construction or into an overall unconscionability reasoning that creates fact questions and lowers the necessary level of unfairness for this exceptional remedy. In the alternative, an equally undesirable consequence would be to not validate unfair terms if they are simply made known. Omitting an unfairness-control step would mean that the law does not adequately respond to the problem of contracts offered on a take-it-or-leave-it basis.

For these reasons, it seems preferable as a final step to exercise an open and direct unfairness control regarding the substance of standard terms. That does not mean, however, that the unfair content of a term has nothing to do with the assent of the non-drafting party. To invalidate unfair terms means that the non-drafting party is not held to the general, expressed assent because the law will not lend its power to enforce such unfair terms. Using an unfairness control in the final step is not a question of exclusiveness but one of emphasis. The issue is where the thrust of the defectiveness is located. When the substance of terms is not agreed upon, emphasis should be placed
on the unfairness of the terms and not on the improper presentation
to procure the appearance of assent to it. To center the reasoning
around the defectiveness of the assent when the concern is the sub-
stantive unfairness of terms sounds too much as if the form itself
and not the particular unfairness is the anathema. If one accepts
standard form contracts as inevitable and potentially useful even if
properly drafted, basic substantive fairness is ignored. As the final
step, an open substantive control is thus preferable. It has the further
advantage of inducing courts to state clearly their opinions on par-
ticular clauses, thereby giving standard-form drafters clear guidelines
of what will and will not work.

If one still favors a concept of substantively defective assent instead
of substantive control consider the German experience. The trouble
German law has with the relation between direct substantive control
in AGBG § 9 and invalid assent because of the unusual character
of a standard term (AGBG § 3) should be a warning. As both
provisions are part of the AGBG, the German law now must find
a way to make them both useful with each having a separate sig-
ificance. Perhaps efforts to analyze the relation between the two
provisions will lead to new insights about the basic structure of a
law of standard form contracts. Right now, however, it seems a
rather useless complication to have to deal with both lines of rea-
soning. As long as American law is not forced to confront the same
burden, it does better to concentrate on direct substantive control
and to give up using an additional line of reasoning involving sub-
stantive defectiveness of assent.

For direct substantive control it does not suffice to say simply that
terms which are unfair are not enforced against the non-drafting
party. Factors used in applying the fairness standard must be de-
veloped. One factor mentioned in American law is eviscerating the
main purpose of the transaction through standard form terms. This
important type of unfairness has been recognized by German law as
well. It applies where standard form terms give the party supplying
the terms the right to deprive the other party of the subject matter
of the contract, of the qualities or possible uses of the subject matter,
or of certain incidental circumstances or possibilities which are ma-
terial for the type of transaction. A standard term depriving the
adhering party of the subject matter of the contract can be seen in
a repossession clause as used in Williams v. Walker-Thomas or in
exemptions or exclusions in an insurance contract which eliminate
the most likely way of realization of the insured risk. The quality
of the subject matter may be found in warranty disclaimers or lim-
itations like those in *Henningsen*. An example of incidental characteristics could be a far-reaching due-upon-failure-to-pay-clause in an installment sale contract.

The category of unfair terms which eviscerate the core of the transaction is an important one. It cannot, however, stand alone. This category determines the unfairness of a term in relation to the transaction as a whole. A term may, however, in and of itself be so unfair that it is unconscionable per se. This category of isolated or individual unfairness is more vague and harder to systematize in a predictable way. Addressing this problem will require carefully reasoned court decisions in order to properly shape and guide the law in this area. Generally, a term is invalid for reasons of unfairness when it deviates to the disadvantage of the non-drafting party from what the law would otherwise imply, without a valid reason for deviation in the nature or the particular circumstances of the transaction. How much of a burden for the non-drafting party the term contains, how far it deviates from the otherwise applicable law, and how strong are the reasons for the deviation are important factors to determine unfairness. Another factor may be whether the term covertly intrudes upon an area normally regulated by the law in the public interest. “Evidentiary conditions” purporting to be a part of the description of the risk in an insurance policy but which in fact impose conditions on how the insured risk must be proven are an example.

Clauses may be invalidated for reasons of public policy in the spirit of unconscionability per se. A provision may be deemed absolutely invalid, whether particularly agreed upon or contained in a standard form. Apart from that, when standard form terms in particular are invalidated the public policy aspect is implied in the unfairness control. Inherently, unfairness control has an aspect of public policy. It is a matter of public concern that standard terms are, for example, used in a proper way so that the business device “contract” can be trusted and relied on. Thus, a court could use public policy as one of the standards for determining fairness.

Eventually, a list of invalid clauses will develop case-by-case and types of invalid clauses will be discernable. Some clauses, it can already be said, are invalid because of their isolated unfairness or violation of public policy: warrants of attorney in a repair contract

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333 *See generally* Holmes, *supra* note 1.
(and in consumer sales contracts as well), for example, are always unfair. The warrant of attorney is such a sharp weapon that it should not appear in standard terms. Choice-of-law or choice-of-forum clauses in standard terms are dubious, too, at least when used in a consumer contract. They alter the entire background situation for the agreement and can result in substantial difficulties to enforce contractual rights at all. Standard form integration clauses or acknowledgments of notice of certain circumstances are other examples of unfair standard terms. Such terms take away important rights to secure the proper performance of the contract, rights meant to be exercised consciously and not limited to a formality. Other examples are unreasonably high liquidated damages or limitations on a debtor's right to redeem collateral.  

The singular unfairness of standard terms is a concept that will always have to tolerate a certain amount of unpredictability because every clause invokes somewhat different considerations and standard form terms concern a broad scope of different issues. Because of that inbuilt unpredictability, it is important to limit the unpredictability by separating this kind of substantive control from other concepts of substantive unfairness and from the concept of defective assent. A proper distinction makes sure that one must deal only with the inherent vagueness and not with an additional one that derives from the mixing of different categories.

If the control of unfairness with its categories of per se unfair clauses and terms that eviscerate the main purpose of the transaction is exercised, there is no more need to misuse the contra proferentem rule for covert substantive control. As a true rule of construction, however, it is not objectionable and can survive. Its significance, though, will most probably be limited to truly ambiguous language. Furthermore, contra proferentem must be applied as a last resort where a meaning of a standard term cannot be determined. If the New York rule of contra proferentem is used, it would actively influence the substance of standard form contracts in favor of the non-drafting party. Such use, however, would interfere with the overt, direct substantive control of the terms.

If the contra proferentem rule is used as a supplement to direct substantive control, one must ask whether the rule should take into consideration specific oral agreements and circumstances of contract

354 See Braucher, supra note 1, at 343.
355 See supra note 169.
formation or be used in a strictly objective manner considering only the standardized wording of the contract. What is suggested here is a conceptual distinction between those parts of a contractual agreement which are specifically agreed upon and its standardized parts. When the construction of standardized language is concerned, however, the specific circumstances should be taken into account. The agreement is still one comprehensive contract. Different rules for different parts should be applied only when it is necessary. Concerning construction of standard terms such a piecemeal approach could lead to difficulties rather than help the analysis.

Even if the *contra proferentem* rule were restricted to the standardized wording of terms, specific oral agreements could not be ignored. It would be necessary to develop a doctrine of how the ambiguous standard terms as construed against the drafter and the conflicting oral agreements relate. One can avoid this complication by evaluating specific agreements and circumstances in the first place. Doing so, however, could lead to conflicting construction of terms when used in different contracts. If construction against the drafter is limited to cases of true ambiguity, the possible conflicting construction should not be too much of a problem because the number of cases invoking the *contra proferentem* rule would shrink remarkably. It is important to realize, however, that consideration of specific circumstances of the contracting process does not mean that an ambiguity is created if an oral agreement and a standard form term conflict. In this case, the oral agreement expresses the parties' agreement and prevails. There is no room for the parol evidence rule where standard form terms are concerned.

In contrast to the *contra proferentem* rule, the doctrine of reasonable expectations (the DRE) has no right and no purpose to exist once a comprehensive doctrine of substantive control of standard form terms has developed. Where the DRE does nothing more than resolve ambiguities in favor of the non-drafting party, the *contra* 

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356 That does not mean that Slawson, *New Meaning, supra* note 1, at 23, 29, could not describe the new meaning of contract appropriately as what the parties reasonably expected. This may be the description of the overall theory; for the application and shaping, however, more detailed standards and rules are necessary.

357 In applying the DRE, most courts require an ambiguity in contract language and then test it to determine whether a construction favoring the insured is reasonable. Regarding insurance contracts, an insured's reasonable expectations thus turn on whether the policy language is so ambiguous that the average insured could reasonably expect
The *contra proferentem* rule can take care of these cases. Where the DRE changes the content of clauses, defective assent and the doctrine of substantive control (notably in invalidating terms eviscerating the main purpose of the contract) should govern the field. There is, therefore, no further justification for a doctrine of reasonable expectations.

A few accessorial questions remain. One is whether different rules should apply for business and consumer contracts. As far as the *contra proferentem* rule and questions of inconspicuousness are concerned, there is no reason for treating merchants differently from consumers. Both concepts concern primarily formal aspects of defectiveness. The non-drafting party is left in darkness as far as the possibility of understanding, determining, and evaluating the content of the standard form terms is concerned. Since darkness is darkness, it makes no difference whether the party is a merchant or not. The only provision is that more, different, or fewer options of how the wording can be understood may be considered for merchants because commercial customs or usages presumably influence the understanding of a contract term. The position of the adhering party as a merchant may thus influence how the *contra proferentem* rule is applied.

As to substantive control, it may make a difference in a merchant-to-merchant transaction. The background rules may already differentiate between commercial and consumer transactions because commercial transactions have special needs. Business needs as well as special needs may justify deviations from the implied rules of law. Therefore, substantive control should take judicial notice if it is a commercial or a consumer transaction. Commercial transactions, however, are not generally excluded from substantive control or always subjected to different standards of control. Judicial recognition of a difference in the evaluation of standard terms in a commercial transaction must be decided in relation to the particular term whose validity must be adjudicated.

Another consideration in evaluating a term's substantive fairness is to take a more concerted, sophisticated application of the reasonable-allocation-of-risk test (suggested earlier in determining a term's first-instance objectionability). The inquiry now can be as narrow or broad-based as the court deems necessary and proper. The court

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coverage other than what is given by the insurance policy. See generally supra note 176. For the minority of jurisdictions that do not require ambiguity as a prerequisite to using the DRE, see supra note 183 and cases cited therein.
could draw upon one or more of the theories or models from the spectrum described in the introduction to this article. A court, for example, might adopt some economic inquiry into efficiency of the term;\textsuperscript{358} or draw upon notions from noncontract law such as tort or equity;\textsuperscript{359} or undertake an empirical investigation;\textsuperscript{360} or consider the relational (if applicable) needs of the parties as Ian Macneil would;\textsuperscript{361} or apply general societal notions of fairness like altruism;\textsuperscript{362} and so on. Here, much would depend on a court's jurisprudence in undertaking the step of direct substantive control of contract terms in the first instance.

The determination of unfairness as well as defective assent may involve fact issues. In principle, though, the control of standard form terms should be considered a question of law to be decided by the judge, just like the question of unconscionability in U.C.C. § 2-302. Control of standard terms is a question of law necessary for practical reasons as well. A uniform and predictable law to serve as guidance for standard-form drafters can be achieved only when the questions of control are appealable.

Finally, if the assent to a standard term is found defective or a term found unfair, the remedy should regularly be invalidation of the term, but only the term with application of an implied (substituted) rule of law. If necessary, this implied rule must be developed in the same decision. The consequence of invalidating a standard term should not be that the entire contract is invalidated. Standard form terms concern mostly secondary questions of contract performance. In some instances, however, the characteristic parts of a transaction may formally appear as standardized, as in insurance policies. Regarding what kind of policy is chosen and what subject matter is insured there is nevertheless an individualized decision so that in regard to those characteristic factors one cannot speak of standard terms. Considering the secondary standard provisions, it can normally be assumed that the parties wanted to go through with the transaction even if isolated terms are invalid and have to be replaced. It should be the extreme exception that the contract is deemed invalid \textit{in toto}. Total invalidation may occasionally be necessary where the assent to all

\textsuperscript{358} See supra notes 4 and 5.
\textsuperscript{359} See supra note 13.
\textsuperscript{360} See supra note 14.
\textsuperscript{361} See supra note 15.
\textsuperscript{362} See supra note 16.
standard terms is invalid, e.g., for reasons of lack of notice with no possibility to determine sufficiently what the remainder of the agreement should be.

V. SUMMARY OF THEORY AND CONCLUSION

Any summary of a complex theory can be a bit misleading and thus must be used with caution and with purposive interpretation and application. The purposes, reasons, and underlying assumptions of this new theory for adjudicating standard form contract terms have been detailed in this article. With those matters in mind, a summary of this new theory consists of the following ten progressive steps.

1. Courts must recognize that control of standard terms is a part of the unconscionability doctrine and that the doctrine must be particularized in rules and considerations applicable only to standard form contracts. Overall unconscionability of the entire contract is irrelevant as the proper inquiry focuses on invalidating or modifying particular, isolated contract terms under a special, routine and efficient test.

2. To trigger the special test, a court must first ascertain if standard form terms are involved. This threshold inquiry might adopt the formal German approach (prepared terms to be used in several contract transactions) or Rakoff's seven points of identification.

3. The court should next consider whether, given the nature of the contract or transaction, that contract or transaction should be exempted from the special test. For example, labor collective bargaining agreements and incorporation of businesses should be exempted.

4. If the special test is activated and the contract not exempted, the negotiated terms (even if standard) and terms characterizing the transaction are deemed *prima facie* valid but subject to traditional contract law. The remaining standard terms are then subject to the following special rules.

5. The court next ascertains if the standard terms are part of the contract form. For merchants, all the terms are presumed part of the contract. For non-merchants, the same presumption is entertained but only if notice of the standard terms was provided to the non-merchant. Whether the terms were actually read or comprehended or whether the consumer had actual knowledge is irrelevant. If the consumer is given adequate means, by notice or otherwise, to read the standard terms and accepts them by signing or other manifestation of assent, the contract is presumed to include the standard terms.
This presumption (for merchants and consumers) may be rebutted under the following rules.

6. The standard terms are next isolated and evaluated by using a reasonable-allocation-of-risk approach to determine if they are objectionable in any respect. A term is acceptable as a reasonable risk allocation as long as it is a term the law would imply if the term were not present, or (to use Rakoff) if the term does not deviate from the background rule of law. If, however, the standard term deviates from what the law would normally imply as an appropriate risk allocation, the term is presumably objectionable. The implied law (background rule) serves as the gauge of the general acceptability of standard terms.

7. For a deviating term that is presumably objectionable to remain part of the contract, it must pass the tests of imputed (blanket) assent and substantive fairness, that is, tests of defective assent and direct substantive control.

8. To determine if the non-drafting party’s assent is held imputed or alternatively defective, the court inquires into the procedural and substantive conspicuousness of the standard term. An objectionable term procured in a procedurally or substantively inconspicuous manner is held invalid as a matter of law.

9. If assent is held imputed and not defective, then the term is directly probed for substantive fairness. Although omitting this step of direct substantive control has some support, the problems and dangers (as discussed) caused by its omission strongly underwrite its inclusion. Factors or considerations to be used in applying substantive control are to be developed by the courts on a case-by-case basis. Several factors have nonetheless been identified. One factor is the core purpose test: Does the standard term eviscerate the main or core purpose of the transaction? Another factor is to isolate the term apart from the overall contract and to test the singular term for fairness under the notion of unconscionability per se. In that inquiry, a subsidiary factor is the public interest. If the term violates public policy then it is unconscionable per se and invalid.

Another consideration is a more sophisticated application of the reasonable-allocation-of-risk approach of step 6. In that step the term was found objectionable because it was not a term the law would normally imply. Now the inquiry proceeds further, drawing upon theories or models in the spectrum suggested in the introduction such as: an economic efficiency inquiry; relational versus discrete considerations; empirical (social science) evaluation; compliance with the fairness standard of the altruistic; and the like. The choice to accept
or reject any of these theories or models of fairness is for the courts. In general there is no reason merchants and consumers should be treated differently. But in a merchant-to-merchant transaction there may be a business or customary justification for using a different standard of fairness.

A final factor is to be applied as the last resort, limited use of *contra proferentem* when the term is truly ambiguous. The doctrine of reasonable expectations (the DRE) should be overruled (where applicable) or at least not used.

10. If a standard term is held invalid due to defective assent or substantive unfairness, the remainder of the contract terms should be enforced except in the rare case where the assent to all terms is defective or there is overall unconscionability.

Current American law of standard form contracts demonstrates a tortuous and tortured legal jujitsu of sundry attempts to find a doctrine and a structure. These disparate attempts identified in this article are somewhat useful and usable. What is attempted here is to put these sometimes palliative efforts in a unified and workable theory. Perhaps American law may prospectively proceed in a completely different direction. Nonetheless, some rethinking about the effectiveness of how courts adjudicate standard form contracts with the concomitant effect on the drafting process seems inevitable. To awaken courts from the intellectual catatonia of rubberstamping classical contract rules of another century to the modern reality of standardized contracts is imperative. Understanding how American legal scholarship over the years has progressed closer to ideas reminiscent of German law indicates an inherent need for an effective, efficient, just, and predictable control of standard form terms.

The time is ripe for us to candidly cut the legal cord tied to the doctrinaire nineteenth-century contract law which was carved in stone without knowledge of the standard form contract of today. If we do, we can start afresh with a renewed spirit to fashion a fair, predictable, and economical theory for adjudicating the terms of the mass, standardized contract.