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Challenging Adhesion Contracts in California: A Consumer's Guide

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COMMENT

CHALLENGING ADHESION CONTRACTS IN CALIFORNIA:

A CONSUMER'S GUIDE

INTRODUCTION

Adhesion contracts[1] are infused into the lives of all consumers.[2] Consumers engaging in even the simplest of transactions are likely to enter into an adhesion contract before the services will be provided.[3] More complicated services such as telephone or credit services are inevitably accompanied with a lengthy set of terms and conditions.[4] These contracts are offered on a take-it-or-leave-it basis.[5] The consumer either ac-

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[1] "Adhesion contract" is defined as follows: "A standard-form contract prepared by one party, to be signed by the party in a weaker position, usu. a consumer, who has little choice about the terms. – Also termed *contract of adhesion; adhesory contract; adhesionary contract; take-it-or-leave-it contract; leonine contract.*" BLACKS LAW DICTIONARY 318-319 (7th ed. 1999).

[2] *See* Wolfgang Friedmann, *Law and Social Change in Contemporary Britain*, p. 45, *cited in* Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Cal. Dist. Ct. App. 1961) ("[T]he impact of these standardized contracts can hardly be exaggerated. 'Most contracts which govern our daily lives are of a standardised [sic] character.'").

[3] *Id.* ("'We travel under standard terms, by rail, ship, aeroplane, or tramway. We make contracts for life or accident assurances under standardised [sic] conditions. We rent houses or rooms under similarly controlled terms; authors or broadcasters, whether dealing with public or private institutions, sign standard agreements; government departments regulate the conditions of purchases by standard conditions.'").

[4] *See* Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) (telephone services contract); Bank One, N.A. v. Coates, 125 F. Supp. 2d 819 (S.D. Miss. 2001) (credit services program).

[5] Wheeler v. St. Joseph Hospital, 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976).

cepts the contract or seeks services elsewhere.[6] Often, however, the consumer is unable to seek services elsewhere.[7]

Generally, adhesion contracts create a power imbalance where the company, as the drafting party, controls all the contract terms.[8] In *Cook's Pest Control v. Rebar*,[9] however, the consumer took the upper-hand.[10] Margo Rebar and her husband Robert entered into a one-year agreement with Cook's Pest Control to ensure their home stayed termite-free.[11] After a year of poor service by Cook's, termites infested the Rebar home and little was done to fix it.[12]

The original service contract between the Rebars and Cook's contained a mandatory arbitration provision, specifying that disputes under the contract be settled through binding arbitration, denying the Rebars any right to sue Cook's in a court of law.[13] Despite this unfavorable clause in their contract, the Rebars wanted to sue Cook's in Superior Court for breach of contract.[14] This is a typical problem that commonly arises when companies use adhesion contracts to impose terms upon consumers.[15]

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[6] *See Id.*

[7] A consumer may be unable to seek services elsewhere for a variety of reasons. *See Wheeler*, 133 Cal. Rptr. 775. One common reason is lack of practicality. *Id.* A patient seeking services at a hospital, for instance, is unlikely to shop around for favorable admission terms. *Id.* Another fact which may limit a consumer's ability to shop around for a favorable contract is the lack of options in the market. *See Ting*, 319 F.3d at 1130 ("AT&T enjoyed a virtual monopoly over the nation's telephone industry."). Further, because of the predominance of adhesion contracts in the market place, most companies offer similar contracts. Interview with Janice Kosel, Professor of Law, Golden Gate University School of Law, in San Francisco, Cal. (Sept. 25, 2003). The ability to shop around is, as a result, extinguished. *Id.*

[8] *See Neal*, 10 Cal. Rptr. at 784 ("The term signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.")

[9] Cook's Pest Control v. Rebar, 852 So. 2d 730 (Ala. 2002).

[10] Robert Harris, *Ex-Terminating the Requirement to Arbitrate*, The Connecticut Law Tribune, June 16, 2003.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See* Robert Schwartz, Note, *Can Arbitration Do More For Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U.L. Rev. 809, 810 (2003) ("Businesses have become enamored of arbitration clauses. These boilerplate contractual provisions—which typically provide that any conflicts under a commercial contract will be resolved by a private dispute-resolution agency rather than a court of law—have become part of everyday commercial life.")

Companies use adhesion contracts so they can deal with their customers in a uniform manner.[16] In many situations, negotiating individual contracts with each consumer would be impractical, for both cost and time considerations.[17] Without adhesion contracts, companies would be forced to staff attorneys to oversee every transaction in which the company engages.[18] The financial burden of negotiating individual contracts with each customer makes such a practice unrealistic in many situations.[19] Having an attorney, likely in-house counsel, draft, on behalf of the company, a standardized contract to which all consumers will be bound preserves the company's legal interests in the most economic manner.[20] The problem arises when companies insert provisions unfavorable to the consumer.[21] This is a natural occurrence as companies strive to draft contracts favoring their own best interests.[22]

Many times, consumers neither understand nor read adhesion contracts.[23] Even if a consumer reads and understands an adhesion contract, there is no room for negotiation.[24] Should consumers find a term unfavorable, often, their only option is to turn elsewhere for services.[25] As a result, consumers are stuck with oppressive one-sided agreements.[26] Frequently, consumers do not even find out about oppressive clauses contained in these agreements until a dispute arises and attorneys become involved.[27] Consumers must have some way to challenge these types of contracts.

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[16] *See* Schwartz, *supra* note 16, at 810 ("[B]usinesses perceive arbitration to be a faster, cheaper, and more predictable method of resolving a dispute than the typical lawsuit in the public courts. These advantages are particularly attractive to large companies that engage in repeated uniform contracts with many customers.")

[17] *Id.*

[18] Richard Sybert, *Adhesion Theory in California: A Suggested Redefinition and its Application to Banking*, 11 Loyola L.A. L. Rev. 297, 297-298 (1978), *cited in* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 n.15 (Cal. 1981).

[19] *Id.*

[20] *Id.*

[21] *See generally Ting*, 319 F.3d at 1133 (placement of a mandatory arbitration provision into an adhesion contract).

[22] *See Neal*, 10 Cal. Rptr. at 784.

[23] Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 824 (Cal. Ct. App. 1996) (subscribing party to adhesion contract did not read provision contained therein).

[24] *Wheeler*, 133 Cal. Rptr. at 783 (hospital's admission form offered subscribing party no room to negotiate terms).

[25] *Id.*

[26] *See Id.*

[27] *Id* at 780.

After consulting with an expert on extermination law, the Rebars found a way around the terms in their adhesion contract with Cook's.[28] The original service contract which the Rebars signed contained an automatic renewal clause, wherein the contract would automatically renew after a year, so long as the Rebars paid their renewal fee.[29] When it came time to send in the yearly renewal fee, Margo Rebar sent Cook's a check with something extra.[30] Enclosed with the check was a document entitled "Addendum[31] to Consumer Agreement."[32] The addendum disavowed the duty to arbitrate "for any prior or future dealings" between the Cook's and the Rebars[33] and provided that its terms would become effective once the check was cashed.[34]

This clever legal maneuver worked.[35] The Rebars waited for the check to clear, and then brought suit against Cook's in state court.[36] Cook's argued against the enforcement of the addendum; however, the Alabama Supreme Court held the addendum validly absolved the Rebars of any duty to arbitrate.[37] Thus, despite Cook's use of an oppressive term in the original adhesion contract, the Rebars won the right to bring suit against Cook's in state court.[38]

Although the Rebars were successful in changing the terms of their contract, generally, consumers cannot rely on sneaking addenda under the radar to escape oppressive clauses in adhesion contracts.[39] Hence, consumers need judicial protection from adhesion contracts.[40] Simply outlawing adhesion con-

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[28] Harris, *supra* note 10.

[29] *Id.*

[30] *Id.*

[31] An addendum is defined as, "Something to be added, esp[ecially] to a document; a supplement." BLACKS LAW DICTIONARY 38 (7th Ed. 1999).

[32] Harris, *supra* note 10.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Harris, *supra* note 10.

[39] *See Scissor-Tail*, 623 P.2d at 171 ("While not lacking in social advantages, [adhesion contracts] bear with them the clear danger of oppression and overreaching. It is in the context of this tension—between social advantage in the light of modern conditions on the one hand, and the danger of oppression on the other—that courts and legislatures have sometimes acted to prevent perceived abuses.")

[40] *Id.*

tracts is not a plausible solution because of the business hardships it would create for companies.[41] Instead, adhesion contracts must be examined with some degree of suspicion.[42] This Comment explores the California scheme for dealing with adhesion contracts, and proposes a change to the existing legal structure. Part I describes how California courts define adhesion contracts, examines the theories California courts have adopted to allow consumers to challenge adhesion contracts, and considers how jurisdictions outside California handle adhesion contracts.[43] Part II focuses on when California courts will consider a contract adhesive and unenforceable.[44] Part III compares California's system of dealing with adhesion contracts with systems established in jurisdictions outside California in order to determine whether there is truly any substantive difference.[45] Part IV suggests changes to improve the California system.[46] Part V concludes by finding that while the California courts go a long way towards protecting consumers, there are still further steps which should be taken.[47]

I. BACKGROUND

A. DEFINING "ADHESION CONTRACTS" IN CALIFORNIA

The first step in understanding how California interprets adhesion contracts is to define "adhesion contract." An "adhesion contract" is a standardized contract,[48] imposed and drafted by a party with superior bargaining power, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it.[49] This procedure of presenting a contract to an

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[41] *Scissor-Tail*, 623 P.2d at 171 (citing certain "social advantages" of adhesion contracts).

[42] *See generally Scissor-Tail*, 623 P.2d at 171.

[43] *See infra* notes 48 to 167 and accompanying text.

[44] *See infra* notes 168 to 311 and accompanying text.

[45] *See infra* notes 312 to 351 and accompanying text.

[46] *See infra* notes 352 to 391 and accompanying text.

[47] *See infra* notes 392 to 399 and accompanying text.

[48] The mere finding of a standardized contract does not necessarily support a finding that a contract is adhesive. 13 MB, *Contracts* § 140.32[12][c]. Courts look to other criteria such as the relative bargaining power of the parties, ability of the adhering party to negotiate for alterations, and availability of the adhering party to acquire the product or services from other sources. *Id.*

[49] *Neal*, 10 Cal. Rptr. at 784, *cited in* Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000).

offeree, wherein the offeree may only accept the contract as a whole or reject it, evokes the catch phrase, "take-it-or-leave-it."[50] The adhering party may either "take" the contract by accepting it, or "leave it" by rejecting the contract.[51]

Historically, the term "adhesion contract" is based on concepts arising from French civil law.[52] Adhesion contracts were first applied in the American common law system in 1919 to describe life insurance contracts.[53] These types of contracts were dubbed "adhesion contracts" because of the unequal bargaining power between the insured and the insurance companies.[54] The more powerful insurance companies drafted the contract terms and presented them to the insured, with the insured having no realistic ability to negotiate the policy terms.[55] Therefore, the insured was stuck with the terms of the contract that the insurance company created, controlled, and dictated.[56]

Today, in California, determining whether a particular contract is an "adhesion contract" begins with the judicial guidance provided by the *Neal v. State Farm Ins. Cos.* case.[57] In *Neal*, the California District Court of Appeal provided a definition for an "adhesion contract" which is still used today: "[t]he term adhesion contract signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[58] In *Neal*, the court interpreted the terms of an agency agreement between the parties,[59] determining that the contract at issue was an adhesion contract.[60] The court then pointed out the inequities inherent

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[50] *See* 13 MB, *Contracts* Section 140.32[12][c].

[51] *See Id.*

[52] Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919), *cited in Scissor-Tail*, 623 P.2d at 171 n.10.

[53] *Id.* ("Life insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms.").

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781 (Cal. Dist. Ct. App. 1961). Justice Mathew O. Tobriner wrote this opinion for the District Court of Appeal of California in 1961. *Id.*

[58] *Neal*, 10 Cal. Rptr. at 784.

[59] *Id.* at 782.

[60] *See Id.* at 784.

in such contracts.[61] The court stated that adhesion contracts do not "issue from that freedom in bargaining and equality of bargaining which are the theoretical parents of the American law of contracts."[62]

The court deemed that adhesion contracts warranted special consideration due to the wide-reaching effect that such contracts have in our every day lives.[63] The court found that most contracts which govern our daily lives are of a standardized nature, including contracts for travel, insurance, and housing accommodations.[64] As a result, the *Neal* court closely examined the contract in light of its adhesive nature and held that "[t]he instant contract, prepared, drafted, and printed by the employer, left no room for bargaining by the individuals seeking employment."[65] Accordingly, the court determined that for adhesion contracts, any ambiguities in the drafted terms must be interpreted against the drafting party.[66]

The logic used in the *Neal* case remains the accepted rule in California.[67] For example, in *Graham v. Scissor-Tail, Inc.*, the California Supreme Court examined an entertainment contract between Bill Graham, a Bay Area musical concert promoter, and Scissor-Tail, a corporation which marketed the services of musical groups.[68] Graham contracted with Scissor-Tail to promote musical concerts by a musical group that Scissor-Tail represented.[69] The contract required arbitration for any contractual disputes.[70] When a dispute arose, Graham, seeking to avoid arbitration, argued that the contract was an unenforceable contract of adhesion.[71] In deciding the matter, the court first gave favorable deference to the *Neal* court's definition of adhesion contracts by stating that the definition has

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[61] *Id.*

[62] *Id.*

[63] Friedmann, *supra* note 2, at 45.

[64] *Id.*

[65] *Neal*, 10 Cal. Rptr. at 784.

[66] *Id.* (finding that although in contracts of adhesion ambiguities should be interpreted against the drafting party, in the case at bar no ambiguities existed in the disputed contract).

[67] *See Neal*, 10 Cal. Rptr. at 784, *cited in Scissor-Tail*, 623 P.2d at 171.

[68] *Scissor-Tail*, 623 P.2d at 167.

[69] *Id.*

[70] *Id.* at 168.

[71] *Id.* at 170.

"stood the test of time and will bear little improvement."[72] The court then commented on the public policy reasons for providing special consideration to adhesion contracts, similar to those outlined by the *Neal* court: "[s]uch contracts are, of course, a familiar part of the modern legal landscape, in which the classical model of 'free' contracting by parties of equal or near-equal bargaining strength is often found to be unresponsive to the realities brought about by increasing concentrations of economic and other power."[73]

It is noteworthy to mention that the *Scissor-Tail* court found certain advantages to adhesion contracts.[74] One distinct advantage the court cited is that of uniformity.[75] By treating all its customers with the same "standard and fixed" manner, a company can act with greater "efficiency, simplicity, and stability."[76] Such savings are substantial when adhesion contracts are widely used.[77] Further, adhesion contracts put services within the reach of mass markets of consumers.[78] If contractual relationships had to be individualized, mass distribution would be impossible.[79] Finally, the court noted that adhesion contracts benefit consumers by reducing transactional costs and thereby reducing the price of consumer goods.[80]

Despite the benefit adhesion contracts have on product price and availability, the *Scissor-Tail* court cautioned that adhesion contracts "bear with them the clear danger of oppression and overreaching."[81] The court concluded that, due to this tension between the social advantages of adhesion contracts on the one hand and the danger of oppression on the other, judicial and legislative actions were sometimes required to prevent perceived abuses.[82]

Finally, after detailing the concerns regarding adhesion contracts, the *Scissor-Tail* court turned to the facts of the case.

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[72] *Id.* at 171.
[73] *Id.*
[74] *Scissor-Tail,* 623 P.2d at 171.
[75] Sybert, *supra* note 18, at 297-298.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Scissor-Tail*, 623 P.2d at 171.
[82] *Id.*

Despite Mr. Graham's pivotal role in the music industry,[83] the court found that, for the purpose of the contract with Scissor-Tail, he was reduced to a mere "adherent" with little or no bargaining power.[84] The court thus found the contract adhesive.[85]

While adhesion contracts arise in a variety of areas, there are certain problematic clauses in adhesion contracts which are the subject of much litigation.[86] Arbitration clauses are common provisions found in adhesion contracts.[87] An arbitration clause is a provision in a contract which mandates that any disputes arising from the contract be settled through arbitration.[88] Although an arbitration clause can appear in any contract, it is typically contained in contracts drafted by businesses and presented to consumers on a take-it-or-leave-it basis.[89] This can be especially frustrating to consumers because binding arbitration eliminates the consumers' right to litigate the disputed issue in a judicial proceeding.[90] The result of forcing consumers out of a court of law eliminates consumers' right to have their claim decided by a jury, increases the costs of

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[83] Because of Graham's strong position in the music business, *Scissor-Tail* represents an atypical case. *See Scissor-Tail*, 623 P.2d at 167. This comment focuses on protecting *consumers* from overreaching adhesion contracts. *See infra* notes 1 to 47 and accompanying text. As a musical promoter, Graham cannot be labeled as a consumer in the context of his contract with Scissor-Tail. *Scissor-Tail*, 623 P.2d at 167. The case is here used to demonstrate the development of the definition of an "adhesion contract." *Scissor-Tail*, 623 P.2d at 171. It is, however, questionable whether the same consumer protections contemplated by this comment should apply to non-consumers such as Graham. *See infra* notes 352 to 391 and accompanying text.

[84] *Scissor-Tail*, 623 P.2d at 171-172.

[85] *Id.* at 172.

[86] *Id.* at 168 (placement of a binding arbitration provision into an adhesion contract).

[87] Schwartz, *supra* note 16, at 809 (examining adhesion contracts with respect to disputes arising under the Truth in Lending Act).

[88] *See Scissor-Tail*, 623 P.2d at 168. Arbitration is defined as follows: "A method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding." BLACKS LAW DICTIONARY 100 (7th Ed. 1999).

[89] *See generally Scissor-Tail*, 623 P.2d at 168; Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237, 1240 (2001), *cited in* Schwartz, *supra* note 16, at 822.

[90] Schwartz, *supra* note 16, at 809.

pursuing a claim,[91] and eliminates the possibility of a class action lawsuit.[92]

Without the ability to join forces with a multitude of similarly injured plaintiffs, many lawsuits are not pursued.[93] The reason for this is economic.[94] For example, a claimant with a $100 claim is unlikely to pursue an individual action outside of small claims court.[95] The attorney's fees and court costs required to settle such a dispute prohibit bringing the claim.[96] If, however, the same claimant joined in a class with 10,000 similarly injured parties, the suit would be feasible.[97] Consequently, taking away the right to bring a class action often lessens the likelihood that the party will bring suit.[98] As a result, companies that impose class action bars are able to continue wrongful conduct without the threat of judicial intervention.[99]

B. CHALLENGING ADHESION CONTRACTS IN CALIFORNIA

If a court determines that a contract is adhesive, the court must then decide whether to enforce the contract.[100] Some commentators argue that once a contract is found to be adhe-

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[91] Alderman, *supra* note 89, at 1240-1241 (stating that while small claims court costs may be as low as $100, arbitration costs can typically run upwards of $1,000, per day).

[92] *See Ting*, 319 F.3d at 1133; Alderman, *supra* note 89. "Class action" is defined as follows: "A lawsuit in which a single person or a small group of people represent the interests of a larger group. Federal procedure has several requirements for maintaining a class action: (1) the class must be so large that individual suits would be impracticable, (2) there must be legal or factual questions common to the class, (3) the claims or defenses of the representative parties must be typical of those of the class, and (4) the representative parties must adequately protect the interests of the class." BLACKS LAW DICTIONARY 243 (7th Ed. 1999).

[93] *See Johnson v. W. Suburban Bank,* 225 F.3d 366 (3d Cir. 2000), *cited in* Schwartz, *supra* note 16, at 814-815. Johnson sought to enforce an $88 claim against the defendant, W. Suburban Bank. *Johnson,* 225 F.3d at 369-70, *cited in* Schwartz, *supra* note 16, at 814. Johnson filed as representative in a putative class action lawsuit. *See* Schwartz, *supra* note 16, at 814-15. Suburban Bank successfully enforced a mandatory arbitration provision, taking away Johnson's right to bring a class action. *Id.* at 818. Unable to maintain his class action, Johnson's ability to pursue his claim became "bleak." *Id.*

[94] *See* Alderman, *supra* note 89, at 1242.

[95] *Id.*

[96] *Id.*

[97] *See* Schwartz, *supra* note 16, at 827.

[98] *Id.*

[99] *Id.*

[100] *Scissor-Tail*, 623 P.2d at 172.

sive, it should be considered presumptively unenforceable.[101] California courts have not adopted such an extreme approach.[102] In California, a determination that a contract is adhesive is merely the first step that courts take in deciding whether to enforce such contracts: "[t]o describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.'"[103] The *Scissor-Tail* court stated that adhesion contracts are fully enforceable "unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise."[104] California courts consider two factors in determining the enforceability of adhesion contracts: (1) whether the contract or provision falls within the "reasonable expectations" of the consumer; and (2) whether the contract or provision is considered unconscionable.[105]

1. *Challenging an Adhesion Contract as Outside a Party's Reasonable Expectations*

The California Supreme Court addressed the issue of whether a contractual term was outside a party's reasonable expectations in *Allan v. Snow Summit, Inc.*[106] In *Allan*, the plaintiff claimed that the contract he signed with the defendant contained provisions which were outside his reasonable expectations.[107] The plaintiff, Allan, sued for back injuries allegedly sustained during a ski lesson provided by the defendant, Snow Summit.[108] Allan had signed a contract containing a liability release prior to taking the ski lesson.[109] Allan argued, however, that the release was an unenforceable adhesion contract.[110] The court ruled against Allan as to his reasonable expectations

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[101] *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1176 (1983).

[102] *See Scissor-Tail, Inc.*, 623 P.2d at 172-73.

[103] *Wheeler*, 133 Cal. Rptr. at 783, *quoted in Scissor-Tail*, 623 P.2d at 172.

[104] *Scissor-Tail*, 623 P.2d at 172.

[105] *Id.*

[106] *Allan*, 59 Cal. Rptr. 2d at 824.

[107] *Id.*

[108] *Id.* at 816.

[109] *Id.*

[110] *Id.* at 824.

argument.[111] The court held that the factors that affect whether a contract is within the reasonable expectations of the adhering party include "notice and the extent to which the contract affects the public interest."[112] The court found that since the liability-release provisions were prominent and printed in large bold type, Allan had constructive notice of the provisions.[113] The court concluded that Allan looked at the contract at least long enough to write in his name and signature.[114] Accordingly, the contract determined to be within Allan's reasonable expectations.[115] The court put forth the general rule that complaining parties to a contract cannot assert that they were not given notice when they specifically chose not to read the contract.[116]

The issue of reasonable expectations was also addressed by the *Scissor-Tail* court.[117] In *Scissor-Tail*, the court concluded that the mandatory arbitration provision that appeared in Graham's contract was not outside his reasonable expectations because Graham had been a party to thousands of similar agreements, including fifteen with the defendant Scissor-Tail.[118] Therefore, the court ultimately found the challenged arbitration provision to be within Graham's reasonable expectations.[119]

Requiring that an adhesion contract fall within a party's reasonable expectations is similar to the requirement of good faith to which all contracts must adhere.[120] The Restatement of Contracts provides, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[121] The term "good faith" is somewhat vague and varies depending upon its context.[122] In the context of performance or enforcement of a contract, good faith encompasses

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[111] *Id.*

[112] *Allan*, 59 Cal. Rptr. 2d at 824.

[113] *Id.*

[114] *Id.* at 824.

[115] *Id.* at 825.

[116] *Id.* at 824 ("It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.")

[117] *Scissor-Tail,* 623 P.2d at 173.

[118] *Id.*

[119] *Id.*

[120] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[121] *Id.*

[122] RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a.

"faithfulness to an agreed common purpose" and "consistency with the justified expectations of the other party."[123] A contract in "bad faith" violates the reasonable expectations of the other party.[124]

2. *Challenging an Adhesion Contract Based on the Doctrine of Unconscionability*

Courts will also consider whether an adhesive contract is unconscionable.[125] The California Civil Code provides that courts may refuse to enforce contracts or contractual provisions found unconscionable.[126] The doctrine of unconscionability is grounded in the principals of equity.[127] The doctrine is used to strike contracts that are unduly oppressive.[128] The *Allan* court applied the unconscionability doctrine, holding that "unconscionability has generally been recognized to include 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.... Phrased another way, unconscionability has both a 'procedural' and 'substantive' element."[129] Procedural unconscionability focuses on oppression and surprise.[130] "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice....' 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms."[131] On the other hand, substantive unconscionability arises where contractual terms are "overly harsh or one-sided."[132] Thus, while procedural unconscionability is concerned with the element of unfair surprise, substantive uncon-

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[123] *Id.*

[124] *See Id.*

[125] *Scissor-Tail,* 623 P.2d at 173.

[126] CAL. CIV. CODE § 1670.5 (Deering 2004).

[127] *See Armendariz,* 6 P.3d at 689.

[128] *Id.*

[129] A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121 (1982), *cited in Allan,* 59 Cal. Rptr. 2d at 825.

[130] *Id.*

[131] *A&M Produce* Co., 186 Cal. Rptr. at 122, *cited in Allan,* 59 Cal. Rptr. 2d at 825.

[132] Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381 (Cal. Ct. App. 2001).

scionability deals with contracts or contractual provisions which are so unfair that they shock the conscience.[133]

In California, in order to prevail on an unconscionability claim, the complaining party must demonstrate that the contract is both procedurally and substantively unconscionable.[134] These elements need not, however, be present in the same degree.[135] California courts apply a "sliding scale,"[136] wherein the more substantive unconscionability that exists in a contract, the less procedural unconscionability the court will require before refusing to enforce the contract or contractual provision, and *vice versa*.[137] To prove unconscionability, a party must, however, make at least *some* showing of both procedural and substantive unconscionability.[138]

The process of determining whether a contract is unconscionable is directly linked to a determination that the contract is adhesive.[139] In California, when a contract is found to be adhesive that contract is considered procedurally unconscionable.[140] In *Ting v. AT&T*, the Ninth Circuit Court of Appeals, interpreting California law, affirmed this principal.[141] The court succinctly stated, "a contract is procedurally unconscionable if it is a contract of adhesion."[142]

The *Ting* case involved AT&T customers who challenged a mandatory arbitration provision included in a form contract that was mailed to millions of customers.[143] The court found

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[133] *See Id.*

[134] Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 146 (Cal. Ct. App. 1997), *cited in Armendariz*, 6 P.3d at 690 ("The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for the court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability."); *See also* Circuit City v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (interpreting California law).

[135] *Armendariz*, 6 P.3d at 690.

[136] *Id.; See also* Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001) (interpreting California law).

[137] *Armendariz*, 6 P.3d at 690.

[138] *See Id.*

[139] *Flores*, 113 Cal. Rptr. 2d at 382 ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability.").

[140] *See generally Flores*, 113 Cal. Rptr. 2d at 382 ("the undisputed facts indicate that the arbitration agreement was imposed upon plaintiffs on a 'take it or leave it' basis. The arbitration agreement was a contract of adhesion and thereby procedurally unconscionable."); *see also* 13 MB, *Contracts* Section 140.32[12][c].

[141] *Ting*, 319 F.3d at 1148.

[142] *Id.*

[143] *Id.* at 1134.

that few of the phone service customers were likely to have read the contract.[144] The contract provided that the customers would accept its terms by simply continuing to use the carrier's services.[145] Thus, the Ninth Circuit found that the contract had been offered on a "take-it-or-leave-it basis" and was, therefore, procedurally unconscionable.[146]

C. DEALING WITH ADHESION CONTRACTS IN JURISDICTIONS OUTSIDE OF CALIFORNIA

Not all jurisdictions agree with California's approach of equating contracts of adhesion with procedural unconscionability.[147] In *Hutcherson v. Sears Roebuck & Co*, the Illinois Court of Appeals upheld an amendment to a credit card contract against a consumer, despite the contract's adhesive nature.[148] The defendant credit card company sent the disputed amendment to its customers along with a letter stating that customers could reject the agreement by sending a notice of rejection to the company.[149] If the customers rejected the agreement, they would not be able to make additional purchases on their credit cards.[150] The *Hutcherson* court found that: (1) the plaintiffs had ample notice that their agreements were subject to amendment; (2) the company sent notice of the agreement to the plaintiffs; and (3) that the arbitration provision was placed in a conspicuous paragraph printed in capital letters.[151] The court, therefore, found no procedural unconscionability and enforced the amendment.[152]

Other courts have followed this logic of separating the determination of procedural unconscionability from the determination of whether a contract is adhesive.[153] In *Bank One, N.A. v. Coates*, the Southern District Court of Mississippi found that

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 1149.

[147] *See Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 893 (Ill. App. Ct. 2003).

[148] *Id.* at 900.

[149] *Id.* at 888.

[150] *Id.*

[151] *Id.* at 894.

[152] *Id.* It should be noted, however, that the court made no explicit finding as to whether the contract was adhesive. *Id.*

[153] *See* Bank One, N.A. v. Coates, 125 F. Supp. 2d 819 (S.D. Miss. 2001).

an amendment to a credit card contract that required disputes to be settled through mandatory arbitration was not procedurally unconscionable.[154] The court found that a mandatory arbitration provision in the amended contract was both clear and free from "legalese."[155] Though the *Bank One* court did not specifically address the issue of whether the contract was adhesive, the Bank had offered the contract to consumers with no room for negotiations.[156] The *Bank One* consumers could either accept the contract through performance, or reject the agreement.[157] Nevertheless, the court determined the contract was not procedurally unconscionable.[158]

The United States District Court for the Middle District of Alabama faced a similar fact pattern in *Stiles v. Home Cable Concepts, Inc.*[159] In *Stiles*, a credit company sought to arbitrate against a debtor based on a mandatory arbitration provision in an amended version of the debtor's contract.[160] Again, similar to *Bank One*, the amendment was presented on a take-it-or-leave-it basis, with no opportunity to negotiate the terms.[161] The *Stiles* court did not make an explicit finding as to whether the amendment was an adhesion contract.[162] The court, however, implied that the contract was adhesive by stating, "Stiles was given a clear choice in this case; he could take the arbitration provision or leave it."[163] Despite this language, the court ruled that the amendment was not unconscionable.[164]

The courts in *Hutcherson, Bank One*, and *Stiles* dealt with contracts offered on a take-it-or-leave-it basis;[165] nevertheless, these courts found no procedural unconscionability in the contracts.[166] Thus, the California approach of automatically con-

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[154] *Id.* at 831.

[155] *Id.* at 833.

[156] *Id.* at 831.

[157] *Id.*

[158] *Id.* at 833-834.

[159] Stiles v. Home Cable Concepts, Inc., 994 F.Supp. 1410 (M.D. Ala. 1998).

[160] *Id.* at 1412-13.

[161] *Id.*

[162] *Id.* at 1417 (examining whether the contract was unconscionable, outside the context of an adhesion contract).

[163] *Id.* at 1418.

[164] *Id.*

[165] *Hutcherson*, 793 N.E.2d at 894; *Bank One*, 125 F. Supp. 2d at 833-834; *Stiles*, 994 F.Supp. at 1418.

[166] *Id.*

sidering adhesive contracts procedurally unconscionable is not practiced by all jurisdictions.[167]

II. A PRACTICAL EXAMINATION OF THE CALIFORNIA SYSTEM FOR DEALING WITH ADHESION CONTRACTS: WHAT FACTORS WILL COURTS CONSIDER

California attorneys and consumers must know exactly what it takes to challenge an adhesion contract in California. The case law demonstrates that there are two ways to attack an adhesion contract: (1) show that the contractual term is outside the adherent's reasonable expectations;[168] or (2) show that the contract provision is unconscionable.[169] Thus, the first question is: What showing is required before courts will consider a contract adhesive? Second, what showing is required before the courts will determine that a contract provision is either outside a party's reasonable expectations or unconscionable? The best way to discern when these standards are deemed satisfied is to examine cases dealing with these issues.

A. WHAT CALIFORNIA COURTS REQUIRE IN ORDER TO FIND A CONTRACT ADHESIVE

While practitioners may understand the definition of an adhesion contract in theory, the actual practice of identifying adhesion contracts may not be so simple. Courts consider such factors as: the relative bargaining powers of the parties, whether the adhering party was free to negotiate for alteration of the printed terms of the agreement, and the availability of the product or services from other sources.[170] Often, adhesion contracts present situations where the weaker party not only lacks bargaining power, but also lacks a realistic opportunity to seek services elsewhere.[171] Hospital admission forms present a classic example of such contracts.[172]

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[167] *Id.*, *contra Flores*, 113 Cal. Rptr. 2d at 382.

[168] *Allan*, 59 Cal. Rptr. 2d at 824.

[169] *Id.*

[170] 13 MB, *Contracts* Section 140.32[12][c].

[171] Madden v. Kaiser Foundation Hospitals, 552 P.2d at 1185-186 (Cal. 1976).

[172] Powers v. Dickson, Carlson & Campillo, 63 Cal. Rptr. 2d 261, 266 (Cal. Ct. App. 1997).

In *Wheeler v. St. Joseph Hospital*, the California Court of Appeals examined a contract contained in a form presented to a patient upon admission to a hospital.[173] David Wheeler was admitted to St. Joseph Hospital so that tests could be run on his heart.[174] After the tests were performed, Wheeler suffered a brain injury that rendered him a total quadriplegic.[175] He could not speak and could only communicate by moving his eyes.[176] Wheeler and his wife filed suit against St. Joseph seeking damages for malpractice.[177]

In response to the complaint, St. Joseph filed a petition to compel arbitration.[178] St. Joseph's petition alleged that on the evening he was admitted to the hospital, Wheeler signed a form entitled, "Conditions of Admission."[179] This "Conditions of Admission" form comprised several numbered paragraphs contained on the bottom half of the admission form used by the hospital.[180] The top half of the form was used for the insertion of statistical information concerning the patient.[181] Included in the "Conditions of Admission" was a paragraph entitled "Arbitration Option."[182] The "Arbitration Option" paragraph mandated that any claims against the hospital or its doctors were to be settled by arbitration at the option of any of the contracting parties.[183] The "Conditions of Admission" form provided that if the patient did not agree with the "Arbitration Option," he could place his initials in a space provided on the form or,

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[173] *Wheeler*, 133 Cal. Rptr. at 778.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Wheeler*, 133 Cal. Rptr. at 778-79.
[180] *Id.* at 779 n.2.
[181] *Id.* at 778-79
[182] *Id.* at 779 n.2.
[183] *Id.* The arbitration provision provided in full:

> Arbitration Option: Any legal claim or civil action in connection with this hospitalization, by or against hospital or its employees or any doctor of medicine agreeing in writing to be bound by this provision, shall be settled by arbitration at the option of any party bound by this document in accordance with the Commercial Arbitration Rules of the American Arbitration Association and with the Hospital Arbitration Regulations of the California Hospital Association (copies available on request at the hospital admission office), unless patient or undersigned initials below or sends a written communication to the contrary to the hospital within thirty (30) days of the date of patient discharge. *Id.*

alternatively, notify the hospital of his disagreement with the "Arbitration Option" within thirty days of his discharge.[184] Wheeler did neither.[185]

Wheeler's wife, suing on Wheeler's behalf, claimed the agreement to arbitrate was unenforceable.[186] Wheeler's wife claimed that: (1) her husband signed the admission form without reading it; (2) that no one at the hospital called their attention to the "Arbitration Option;" (3) that neither she nor her husband were aware of the existence of the "Arbitration Option;" (4) that a copy of the form was never provided; and (5) that she did not learn of the existence of the "Arbitration Option" until St. Joseph moved to compel arbitration.[187] The court ruled that the St. Joseph hospital admission form possessed "all the characteristics of a contract of adhesion."[188]

> [The] would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract.[189]

Subsequently, the court found the "Conditions of Admission" used by St. Joseph's hospital to be an unenforceable contract of adhesion.[190]

Conversely, in *Powers v. Dickson, Carlson & Campillo*, the California Court of Appeals examined an attorney-retainer agreement and found the contract was not adhesive.[191] In this case, Mr. and Mrs. Powers had purchased a $2 million luxury home in Pacific Palisades and were represented in the purchase by their original attorney, Roy Glickman.[192] Soon after moving in to their home, the Powerses become aware of struc-

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[184] *Wheeler*, 133 Cal. Rptr. at 779.
[185] *Id.*
[186] *Id.* at 780.
[187] *Id.*
[188] *Id.* at 783.
[189] Tunkl v. Regents of University of California, 383 P.2d 441, 447 (Cal. 1963), *cited in Wheeler*, 133 Cal. Rptr. at 783.
[190] *Wheeler*, 63 Cal. App. 3d at 783, 793-94.
[191] *Powers*, 63 Cal. Rptr. 2d at 266.
[192] *Id.* at 263.

tural defects in the home.[193] The Powerses retained Glickman to settle the ensuing arbitration with the seller/developer of the home.[194] The Powerses thereafter became dissatisfied with Glickman's performance.[195] The Powerses then contacted Nicholas Toghia and retained him for representation in the construction defects arbitration.[196] The retainer agreement contained 12 numbered paragraphs.[197] Paragraph Ten provided that any disputes related to attorney's fees, the retainer contract, or the attorney's professional services were to be submitted to binding arbitration.[198] A little more than a year into the contract, the Powerses became concerned over the amount of money Toghia's services were costing.[199] The Powerses subsequently amended their contract from an hourly rate to a flat fee.[200] This amendment contained seven numbered paragraphs.[201] Paragraph Six again provided that disputes relating to the agreement were to be resolved through binding arbitration.[202]

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[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Powers*, 63 Cal. Rptr. 2d at 263.

[198] *Id.* The provision provided in full:

> 10. Binding Arbitration. The parties hereto agree that any dispute relating to Attorney's fees under this Contract shall be submitted to binding arbitration before the Los Angeles County Bar Association pursuant to *California Business and Professions Code* Section 6200, et seq., or, should that organization decline to arbitrate the dispute, before the State Bar of California pursuant to *California Business and Professions Code* Section 6200, et seq. Any other dispute (other than Attorney's fees) between the parties hereto arising out of or relating to this Contract or Attorney's professional services rendered to or for Client, shall be resolved by binding arbitration before the American Arbitration Association in Los Angeles, California, in accordance with the Commercial Rules of the American Arbitration Association prevailing at the time of the arbitration. *Id.*

[199] *Powers*, 63 Cal. Rptr. 2d at 263.

[200] *Id.*

[201] *Id.*

[202] *Id.* This provision provided in full:

> 6. Arbitration. If any dispute arises out of, or related to, a claimed breach of this agreement, the professional services rendered by Toghia, or Clients' failure to pay fees for professional services and other expenses specified, or any other disagreement of any nature, type or description regardless of the facts or the legal theories which may be involved, such dispute shall be resolved by arbitration before the American Arbitration Association by a single arbitrator in accordance with the Commercial Rules of the American Arbitration [Association] in effect [at] the time the proceeding is initiated. The hearings shall be held in the Los Angeles offices of

The original arbitration with the seller/developer, for which the Powerses had retained Toghia, was later suspended because the parties failed to initial the purchase agreement's general arbitration provision.[203] After the breakdown of the arbitration with the seller/developer, the Powerses sued Toghia for legal malpractice, alleging negligence in pursuing arbitration against the seller/developer when the arbitration provision in the purchase agreement was invalid.[204] Further, the Powerses alleged that Toghia had caused them to incur unnecessary attorneys' fees.[205]

Toghia petitioned the trial court to compel arbitration of the Powerses' legal malpractice claim.[206] The trial court denied the petition to compel arbitration.[207] The California Court of Appeals reversed the ruling of the trial court, finding the arbitration provision valid and enforceable.[208] In its ruling, the California Court of Appeals considered the enforceability of mandatory arbitration provisions contained within adhesion contracts.[209] The court pointed out that, "[a]n arbitration provision in an adhesion contract is legally enforceable unless the provision (1) does not fall within the reasonable expectations of the weaker party, or (2) is unduly oppressive or unconscionable."[210]

> Where an arbitration provision is included in a contract of adhesion, '[t]he law ought not to decree a forfeiture of such a valuable right where the [weaker party] has not been made aware of the existence of an arbitration provision or its implications. Absent notification and at least some explanation,

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the American Arbitration Association and each side shall bear his/their own costs and attorney fees. *Id.* at 264.

[203] *Powers*, 63 Cal. Rptr. 2d at 264.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* The trial court found that the arbitration clauses in both the original and amended agreements were not printed in bold type, that the provisions were contained at the end of the document, that the Powerses were not encouraged to seek the advice of independent counsel, and that Toghia did not specifically inform them that, by signing, they were waiving important rights; namely, the right to a jury trial. Id. Accordingly, the trial court ruled that a lack of informed consent to the arbitration provisions existed. Id.

[208] *Powers*, 63 Cal. Rptr. 2d at 269.

[209] *Id.* at 265-66.

[210] *Id.* at 265.

> the [weaker party] cannot be said to have exercised a 'real choice' in selecting arbitration over litigation ...."[211] [C]ourts will not enforce provisions in adhesion contracts which limit the duties or liability of the stronger party unless such provisions are 'conspicuous, plain and clear' and will not operate to defeat the reasonable expectations of the parties.[212]

The court went on to consider whether the agreement between the Powerses and Toghia was an adhesion contract.[213] The *Powers* court defined the term "adhesion contract" with the now familiar definition adopted by the *Neal* court.[214] The court pointed to the hospital admission form used in *Wheeler* as a prime example of an adhesion contract because "a patient being admitted to a hospital is in no position to debate his or her terms of admission."[215] The court stated that without any realistic bargaining power, a patient is forced to either accept the terms of a hospital admission form, or forego the needed service.[216] The court, however, found that the retainer agreement and subsequent amendment that the Powerses entered into with Toghia differed from the hospital admission form signed by Wheeler.[217]

The court found that the contract and the amendment entered into by the Powerses and Toghia were not contracts of adhesion.[218] The agreements were not standardized contracts presented on a take-it-or-leave-it basis.[219] The contract and the amendment were "negotiated and individualized agreements. The Powerses possessed the freedom to employ the attorney of their choice and bargain for the terms of their choice."[220] Finally, the court stated that, "[t]he Powers' decision to change legal counsel and their successful renegotiation of the terms of

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[211] *Wheeler*, 133 Cal. Rptr. at 786, *cited in Powers*, 63 Cal. Rptr. 2d at 265.

[212] *Madden*, 552 P.2d at 1185, *cited in Powers*, 63 Cal. Rptr. 2d at 265.

[213] *Powers*, 63 Cal. Rptr. 2d at 266.

[214] *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 318 (1986), *cited in Powers*, 63 Cal. Rptr. 2d at 265. ("A contract of adhesion has been defined as a 'standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.")

[215] *Powers*, 63 Cal. Rptr. 2d at 265.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

their fee arrangement with Attorney Toghia demonstrate that they possessed substantial bargaining strength."[221]

Much insight can be gained by comparing the case of *Wheeler*, where the court found a contract of adhesion existed, and the case of *Powers*, where the court found no contract of adhesion existed. The contrast of these two cases demonstrates the relevant factors which a court considers when deciding whether a contract is adhesive:[222] namely, the relative bargaining powers of the parties, whether the adhering party was free to negotiate for alteration of the printed terms of the agreement, and the availability of the product or services from other sources.[223]

1. *Examining the Relative Bargaining Powers of the Parties in Order to Determine Whether a Contract is Adhesive*

The bargaining power of the contracting parties in *Wheeler* differed greatly from the bargaining power between the parties in *Powers*.[224] Wheeler had no bargaining power whatsoever.[225] He was a patient with a failing heart entering a hospital.[226] He was in no position to haggle over terms and conditions.[227] On the other hand, the Powerses entered the bargaining table with Toghia on relatively equal footing.[228] Unhappy over the performance of one attorney, the Powerses sought another attorney.[229] Toghia may have been more familiar with the terms of his contract, as he had likely entered into similar contracts with previous clients.[230] Further, Toghia may have been in a better position to understand the terms and conditions of the contract because he was an attorney.[231] Nevertheless, these factors did not remove bargaining power from the Powerses.[232] As potential legal clients, the Powerses were in a position to

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[221] *Powers*, 63 Cal. Rptr. 2d at 265.
[222] *See Wheeler*, 133 Cal. Rptr. at 783-85; *Powers*, 63 Cal. Rptr. 2d at 265-66.
[223] 13 MB, *Contracts* Section 140.32[12][c].
[224] *See Wheeler*, 63 Cal. App. 3d 784; *Powers*, 63 Cal. Rptr. 2d at 266.
[225] *Wheeler*, 63 Cal. App. 3d at 784.
[226] *Id.* at 778.
[227] *Id.* at 783.
[228] *Powers*, 63 Cal. Rptr. 2d at 266.
[229] *Id.* at 263.
[230] *See Id.*
[231] *Id.*
[232] *Id.* at 266.

negotiate the terms of the contract with Toghia.[233] This power of negotiation can be seen by the later amendment to the original agreement: once the Powerses became dissatisfied with their hourly fee arrangement with Toghia, they reentered the bargaining process and renegotiated their contract.[234] This demonstrated the Powerses' ability to contract on equal footing with Toghia.[235] In *Wheeler*, where there was a great imbalance of bargaining power, the court determined the contract to be adhesive.[236] In *Powers*, where the parties entered the negotiation process on equal footing, the court declined to find the contract adhesive.[237]

2. *Examining the Freedom to Negotiate Terms in Order to Determine Whether a Contract is Adhesive*

The next factor to consider is whether the parties challenging the contract were free to negotiate the terms of their agreement.[238] The hospital presented a contract to Wheeler on a take-it-or-leave-it basis.[239] While Wheeler could have opted out of the "Arbitration Option" by initialing the contract in the proper place or by sending timely notice after discharge, the contract, as a whole, was not open for negotiation.[240] Had Wheeler objected to certain terms or sought to alter the contract, it was unlikely that St. Joseph would have complied.[241] Further, it is doubtful that St. Joseph had qualified persons on hand to negotiate a contract.[242] Had Wheeler objected to the contract as presented, it is unlikely he would have been provided medical services.[243] Wheeler's inability to negotiate the terms of his contract led to a determination that the contract was adhesive.[244]

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[233] *Id.*
[234] *Powers*, 63 Cal. Rptr. 2d at 266.
[235] *Id.*
[236] *Wheeler*, 63 Cal. App. 3d at 784.
[237] *Powers*, 63 Cal. Rptr. 2d at 266.
[238] 13 MB, *Contracts* Section 140.32[12][c].
[239] *See Wheeler*, 63 Cal. App. 3d at 783-84.
[240] *Wheeler*, 63 Cal. App. 3d at 778-779.
[241] *See Id.*
[242] *See Id.*
[243] *See Id.*
[244] *See Id.*

On the other hand, the Powerses were fully capable of negotiating terms with Toghia when they contracted with him.[245] The court specifically found that the Powerses' agreement was "negotiated and individualized."[246] Toghia likely entered many retainer agreements with similar terms.[247] As an attorney, he was fully capable of altering the agreement had the Powerses wanted specific changes.[248] The ability of the Powerses to negotiate their deal with Toghia negated any claim that the contract was adhesive.[249]

3. *Examining the Availability of the Product or Service from Other Sources*

The final factor to consider is whether the product or service sought in the contract was available from other sources.[250] The *Wheeler* court found that a patient who is dissatisfied with an admission contract is in no position to search for another hospital which admits patients under more favorable terms.[251] While it is possible that Wheeler could have sought medical services elsewhere, it is unreasonable to require sick or dying patients to shop around for hospitals based on terms of admission.[252] Patients choose hospitals based on a wide variety of factors, including medical specialties, location, and reputation—not contractual terms on admission forms.[253] On the contrary, persons entering into an attorney/client relationship are more likely to shop around for a favorable retainer agreement.[254] Further, should potential clients spot a provision in a retainer agreement that is unfavorable, they are in a much better position to walk out of the attorney's office and seek representation elsewhere, as was the case in *Powers*.[255] The Powerses sought Toghia's assistance only after becoming dissatis-

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[245] *Powers*, 63 Cal. Rptr. 2d at 266.
[246] *Id.*
[247] *Id.* at 263.
[248] *Id.*
[249] *Id.* at 266.
[250] 13 MB, *Contracts* Section 140.32[12][c].
[251] *Wheeler*, 63 Cal. App. 3d at 783.
[252] *Id.*
[253] *See Id.*
[254] *Powers*, 63 Cal. Rptr. 2d at 263.
[255] *Id.*

fied with the performance of Glickman, their first attorney.[256] Powerses had the ability to obtain services elsewhere;[257] Wheeler did not.[258] This difference further demonstrates why Wheeler's contract was ruled adhesive, and the Powerses' contract was not.[259]

These two cases, *Wheeler* and *Powers*, demonstrate the factors that a party must prove before a contract will be determined to be adhesive.[260] It is not enough merely to show that an agreement is presented in a standardized form.[261] For a contract to be declared adhesive, a party must demonstrate that there was no real ability to negotiate and that the drafting party imposed its predetermined terms upon the adherent.[262] Where a party is in a position to bargain, or can easily seek the product or services elsewhere, or not contract at all, it is unlikely that a court will find a contract adhesive.[263]

B. PRACTICAL METHODS FOR CHALLENGING ADHESION CONTRACTS IN CALIFORNIA

There are two ways to challenge a contract of adhesion or the provisions therein.[264] Challengers may either argue that a contract or contractual provision is outside their reasonable expectations, or that the contract or its provisions are unconscionable.[265] The question becomes: What must challengers show in order to do this?

1. Showing Necessary in Order for California Courts to Determine that a Contract or Contractual Term is Outside a Party's Reasonable Expectations

In *Allan*, the California Supreme Court considered whether a release of liability provision was outside a party's

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[256] *Id.*
[257] *Id.*
[258] *Wheeler*, 63 Cal. App. 3d at 783.
[259] *Id.; Powers*, 63 Cal. Rptr. 2d at 266.
[260] *See Wheeler*, 133 Cal. Rptr. at 783-85; *Powers*, 63 Cal. Rptr. 2d at 265-66.
[261] 13 MB, *Contracts* Section 140.32[12][c].
[262] *Wheeler*, 133 Cal. Rptr. at 783.
[263] *Powers*, 63 Cal. Rptr. 2d at 266.
[264] *Allan*, 59 Cal. Rptr. 2d at 824.
[265] *Id.*

reasonable expectations.[266] In making its determination, the court considered notice and the extent to which the contract affects the public interest.[267] In finding the provision within the plaintiff's reasonable expectations, the *Allan* court noted that that provision was prominently displayed in large bold type.[268] The court was not persuaded by the argument that Allan had not actually read the provision.[269] The *Allan* court enforced the provision based on constructive notice, due to the conspicuous placement of the provision in the contract.[270] There are, however, some types of contracts for which the courts require actual notice.[271]

When dealing with adhesive insurance polices, courts exhibit no tolerance for lack of notice.[272] In *Jones v. Crown Life Ins. Co.*, a father was issued a life insurance policy through his employer.[273] The father named his minor child, Jones, as the beneficiary on the policy.[274] Subsequently, the father was killed in an auto accident.[275] The insurance company claimed the accident resulted from the father's own intoxication while driving.[276] Language in the policy excluded recovery based on accidental death if the death was caused by the insured's criminal offense.[277] In seeking recovery, Jones sought to have the exclusionary language declared an unenforceable provision in an adhesion contract.[278]

The *Jones* court found the contract to be adhesive because it was presented to Jones's father without the opportunity to negotiate.[279] The court went on to hold that in adhesive insurance contracts, a party's notice of exclusionary language must be explicit.[280] The court held that where a party to an adhesive

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[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *See Id.*
[271] *See* Jones v. Crown Life Ins. Co., 150 Cal. Rptr. 375 (Cal. Ct. App. 1978).
[272] *Id.* at 379.
[273] *Id.* at 376.
[274] *Id.*
[275] *Id.* at 377.
[276] *Id.*
[277] *Jones*, 150 Cal. Rptr. at 376.
[278] *See Id.* at 379.
[279] *Id.* at 378-79.
[280] *Id.* at 379. This rule is further evidenced by the court's approval of the following jury instruction: "The insurance company . . . must call to the insured's attention

insurance contract is unaware of exclusionary language contained in the contract, that language will not be enforced.[281] Further, the court found that, in such contracts, all doubts as to the reasonable expectations of the insured are to be resolved against the insurance company.[282]

For most contracts, conspicuous type will be enough for a court to impose constructive notice.[283] When dealing with adhesive insurance contracts, however, the bar is set somewhat higher.[284] For adhesive insurance contracts, any exclusionary language must be called to the insured's attention and clearly explained,[285] or it will not be enforced.[286] For exclusionary provisions in adhesive insurance contracts, constructive notice does not suffice.[287]

2. *Showing Necessary in Order for California Courts to Determine a Contractual Term Unenforceable Due to Unconscionability*

Another method of challenging adhesion contracts is to have the contract or contractual provision declared unconscionable.[288] In California, once a contract is declared adhesive, it is considered procedurally unconscionable.[289] For a contract or its provision to be declared unenforceable, however, there must be a showing of both procedural and substantive unconscionability.[290] While these elements need not be present in the same degree, both must be present.[291] Courts have adopted what is referred to as a "sliding scale."[292] Based on this system,

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any exclusions from coverage; if this is not done, then the exclusion cannot be given effect so as to limit the reasonable expectations of coverage of the insured." *Id.*

[281] *Jones*, 150 Cal. Rptr. at 379.

[282] *Id.*

[283] *See Allan*, 59 Cal. Rptr. 2d at 824.

[284] *Jones*, 150 Cal. Rptr. at 379.

[285] Logan v. John Hancock Mut. Life Ins. Co., 41 Cal. App. 988, 995 (Cal. Ct. App. 1919), cited in *Jones*, 150 Cal. Rptr. at 379.

[286] *Jones*, 150 Cal. Rptr. at 379.

[287] *Id.*

[288] *Allan*, 59 Cal. Rptr. 2d at 824; *See* Cal. Civ. Code Section 1670.5 (Deering 2004).

[289] *Flores*, 113 Cal. Rptr. 2d at 382.

[290] *Armendariz*, 6 P.3d at 690.

[291] *Id.*

[292] *Id.* A strong showing of one aspect of unconscionability may cause a court to rule a contract unenforceable, despite a weaker showing of the other aspect of unconscionability. *Id.*

the question becomes: Once a contract is determined to be adhesive, and therefore procedurally unconscionable, how much substantive unconscionability must be shown in order for the contract to be declared unenforceable?

In *Soltani v. Western & Southern Life Ins. Co.*, the Ninth Circuit Court of Appeals interpreted, based on California law, two provisions in an employment contract.[293] One provision shortened the statute of limitations upon which suits could be brought against the employer.[294] The other provision required that ten days' written notice be provided to the employer before any suit could be filed.[295] Based on the posture of the case, the court presumed the adhesive nature of the employment contract.[296] The court then considered whether the provisions contained elements of substantive unconscionability.[297]

The *Soltani* court found that the provision which shortened the statute of limitations was not unconscionable.[298] The court based its finding on the fact that a number of courts had upheld provisions in contracts which shortened the statute of limitations time period, including the United States Supreme Court, California courts, and courts in other jurisdictions.[299] The general thrust of these cases was that the stipulated statute of limitations must be reasonable.[300] Thus, despite its willingness to interpret the contract as adhesive, and therefore procedurally unconscionable, the *Soltani* court enforced the shortened statute of limitations based on a lack of substantive unconscionability.[301]

As to the ten day notice provision, the *Soltani* court found no California case law addressing the issue of whether such a notice provision is substantively unconscionable.[302] Conse-

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[293] Soltani v. Western & Southern Life Ins. Co., 258 F.3d 1038, 1040 (9th Cir. 2001).

[294] *Id.* at 1041.

[295] *Id.*

[296] *Id. at* 1043.

[297] *Id.* ("even if the contracts were adhesive, the court applies a sliding scale and must also examine the substantive prong"). The court cites, in its definition of substantive unconscionability, such factors as whether there is as "lack of mutuality" and whether the contractual provision is so "one-sided as to 'shock the conscience.'" *Id.*

[298] *Soltani*, 258 F.3d at 1043.

[299] *Id.* at 1043-44.

[300] *Id.*

[301] *Id.* at 1044.

[302] *Id.* at 1045.

quently, the court compared the provision to cases of substantive unconscionability that the California Supreme Court *had* previously addressed.[303] Based on this assessment, the *Soltani* court found little justification for the notice provision.[304] The court found that the provision would not afford the employer enough time to investigate suits, nor would it prevent state claims or further judicial economy.[305] In fact, the court found the only purpose of the provision was to "maximize employer advantage" and to "bar any suits relating to the employer's agreement."[306] As a result of the one-sided nature of this provision, the notice provision was found to be substantively unconscionable and unenforceable.[307]

This one case provides two excellent examples of how courts deal with substantive unconscionability.[308] It is not enough for a party to an adhesion contract to show that a provision is unfavorable; provisions which courts typically enforce do not receive special consideration just because they are contained in an adhesion contract.[309] But, where a provision is one-sided and placed in the contract by the drafter for no other purpose than to gain an unfair advantage, the courts will consider such provisions substantively unconscionable.[310] When these substantively unconscionable provisions appear in adhesion contracts, courts will not enforce the provisions.[311]

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[303] *Id.* at 1046.

[304] *Soltani*, 258 F.3d at 1046.

[305] *Id.* "Judicial economy" is defined as follows: "Efficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." BLACKS LAW DICTIONARY 851 (7th Ed. 1999).

[306] *Soltani*, 258 F.3d at 1047.

[307] *Id.*

[308] *See Id.* (enforcing the six month limitation period provision, but not the ten day written notice provision).

[309] *Id.* at 1044.

[310] *Id.* at 1047.

[311] *Id.*

III. COMPARING CALIFORNIA'S ADHESION CONTRACTS LAW WITH THE LAWS IN JURISDICTIONS OUTSIDE CALIFORNIA: DIFFERING TESTS, SAME RESULTS

Several courts in jurisdictions outside California have enforced contracts which seem clearly adhesive.[312] In looking at these cases, it is necessary to (A) examine what laws the courts outside California apply when faced with contracts that bear the characteristics of adhesion contracts; (B) determine if, under these laws, there is any advantage to consumers in having oppressive contracts declared adhesive; (C) determine if there is a difference between an adhesion contract and one which is procedurally unconscionable; and (D) examine the effect of California's presumption that adhesion contracts are procedurally unconscionable.

A. EXAMINATION OF A SYSTEM FOR DEALING WITH ADHESION CONTRACTS DIFFERING FROM THAT OF CALIFORNIA

In *Hutcherson v. Sears Roebuck & Co.*, the Appellate Court of Illinois applied Arizona law to uphold a mandatory arbitration provision in an amended credit card contract.[313] The credit card holders cited California law, arguing that the amended credit card contract was a contract of adhesion and, therefore, procedurally unconscionable *per se*.[314] The *Hutcherson* court cited a rule remarkably similar to the analysis found in California.[315] The court stated that finding a contract adhesive does not determine its enforceability.[316] Enforceability is determined by examining the reasonable expectations of the adhering party, and deciding whether the contract is unconscionable.[317]

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[312] *Stiles*, 994 F.Supp. at 1418 (finding that the contract was not unconscionable despite being offered on a take-it-or-leave-it basis); *Bank One*, 125 F. Supp. 2d at 834 (enforcing a contractual provision despite its small print).

[313] *Hutcherson*, 793 N.E.2d at 888, 890, 894 (finding a lack of procedural unconscionability under Arizona law).

[314] *Hutcherson*, 793 N.E.2d at 893. Plaintiffs argue that, according to *Flores*, 113 Cal. Rptr. 2d at 382, and *Ting*, 319 F.3d at 1148, their contract, is procedurally unconscionable *per se*, as it is a contract of adhesion. *Hutcherson*, 793 N.E.2d at 893. *"Per se"* is defined as follows: "Of, in, or by itself, standing alone, without reference to additional facts; .... As a matter of law." BLACKS LAW DICTIONARY 1162 (7th ed. 1999).

[315] *Hutcherson*, 793 N.E.2d at 893-94.

[316] *Id.*

[317] *Id.*

This statement of law is a close replica of the California analysis.[318] There is, however, one difference.[319] Nowhere in *Hutcherson* does the court adopt the California approach of equating adhesion contracts with procedurally unconscionability.[320] Instead, while making no *explicit* determination as to whether the contract is adhesive, the court finds that the contract is not procedurally unconscionable.[321] In finding a lack of procedural unconscionability, the court notes that there was ample notice of the amendment, that the arbitration provision was contained in a conspicuous paragraph, and the card holders had the option of opting out of the amendment without causing their balances to become due.[322] After further finding a total lack of substantive unconscionability, the court enforced the contract.[323]

B. LITTLE ADVANTAGE TO CONSUMERS IN HAVING A CONTRACT DECLARED ADHESIVE

In *Hutcherson*, the court, in enforcing the contract, made no explicit finding that the contract was adhesive.[324] The lack of determination as to whether the contract was adhesive may have, however, been immaterial in deciding whether to enforce the contract.[325] All contracts must contain elements of good faith.[326] Similarly, courts do not enforce contracts found to be unconscionable.[327] This is the case with all contracts, not just adhesion contracts.[328] These are the same elements which California courts say should be considered when dealing with adhesion contracts:[329] i.e., provisions should be in good faith—or

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[318] *Compare Id.* (stating Arizona law) *with Scissor-Tail*, 623 P.2d at 172-173 (stating California law).

[319] *Id.*

[320] *Compare Hutcherson*, 793 N.E.2d at 893-94 *with Flores*, 113 Cal. Rptr. 2d at 382 (stating California law).

[321] *Id.* at 894.

[322] *Id.*

[323] *Id. at* 898, 900.

[324] *Id.* at 893-94.

[325] *Id.*

[326] RESTATEMENT (SECOND) OF CONTRACTS § 205. This theory of good faith encompasses the same concepts as whether a contract is within a party's reasonable expectations. *See Allan*, 59 Cal. Rptr. 2d at 824.

[327] *Scissor-Tail*, 623 P.2d at 173.

[328] *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 205.

[329] *Scissor-Tail*, 623 P.2d at 172-73.

within a party's reasonable expectations—and be free from unconscionability.[330]

As a result, in jurisdictions following the *Hutcherson* approach there may be little use in showing that a contract is adhesive.[331] As the same limitations which are used to reign in adhesion contracts apply to all contracts, the only advantage which may be gained by proving that a contract is adhesive is that, under California law, adhesive contracts are considered procedurally unconscionable.[332] This, too, however, may be an advantage immaterial to consumers.

C. NO REAL DIFFERENCE BETWEEN PROCEDURALLY UNCONSCIONABLE CONTRACTS AND CONTRACTS OF ADHESION

The only identified advantage to having a contract declared adhesive is that California considers adhesion contracts procedurally unconscionable.[333] But even without this *explicit* presumption, in practice, there is little difference between an adhesion contract and one which is procedurally unconscionable. The concern with both procedural unconscionable contracts and contracts of adhesion is that there is an absence of a meaningful choice.[334] Both doctrines seek to give relief to parties who are "excusably ignorant;" both doctrines seek to avoid contracts which are designed to be traps for the unwary; both doctrines avoid enforcing terms which contain unfair surprise.[335] While the doctrine of procedural unconscionability deals explicitly with concerns of "unfair surprise,"[336] and the concept of adhesion focuses on unequal bargaining power,[337] the similarities between these two doctrines is, nevertheless, striking. California combines these two doctrines by equating adhesion contracts with procedural unconscionability.[338] While the

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[330] *Id.*

[331] *Hutcherson*, 793 N.E.2d at 893-94.

[332] *Flores*, 113 Cal. Rptr. 2d at 382.

[333] *Compare Id. with Hutcherson*, 793 N.E.2d at 893 (failing to find contract procedurally unconscionable).

[334] *Compare Allan*, 59 Cal. Rptr. 2d at 825 (describing doctrine of unconscionability) *with Id.* at 824 (describing adhesion contracts).

[335] *Id.*; Kosel, *supra* note 7.

[336] *Allan*, 59 Cal. Rptr. 2d at 825.

[337] *Id.* at 824.

[338] *Flores*, 113 Cal. Rptr. 2d at 382.

Hutcherson court does not explicitly state that it equates procedural unconscionability with adhesiveness,[339] any distinction between the two doctrines is immaterial.[340]

D. IMMATERIAL WHETHER COURTS FOLLOW CALIFORNIA'S RULE THAT ADHESION CONTRACTS ARE PROCEDURALLY UNCONSCIONABLE

The outcome in *Hutcherson* would have been the same even if the court applied California law. The *Hutcherson* court enforced the disputed contract, finding a lack of procedural and substantive unconscionability.[341] As the court found no substantive unconscionability, the contract would not have been enforced under California law.[342] California requires *both* procedural and substantive unconscionability before a contract may be successfully challenged.[343] Without a finding of some degree of substantive unconscionability, even the most adhesive contracts will be enforced under California law.[344]

Even if the *Hutcherson* court *had* found some form of substantive unconscionability, however, application of the California presumption that adhesion contracts are procedurally unconscionable would not likely have altered the *Hutcherson* court's holding. As stated above, the *Hutcherson* court did not explicitly rule on whether the contract at bar was an adhesion contract.[345] By the court's judgment, though, the contract was procedurally sound.[346] Subjectively, the contract in *Hutcherson* may be considered adhesive as it was offered on a take-it-or-leave-it basis.[347] The *Hutcherson* court points out, however, that "[t]he plaintiff was given a clear choice—he could accept or reject the arbitration provision."[348] A more consumer-friendly

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[339] *Hutcherson*, 793 N.E.2d at 893-94.

[340] *See infra* notes 341-351 and accompanying text.

[341] *Hutcherson*, 793 N.E.2d at 893-94, 900.

[342] *Compare Id.* at 894 (finding a lack of substantive unconscionability) *with Armendariz*, 6 P.3d at 690 (stating that, under California law, for a contract to be void due to unconscionability, there must be *both* substantive and procedural unconscionability).

[343] *Armendariz*, 6 P.3d at 690.

[344] *Id.*

[345] *Hutcherson*, 793 N.E.2d at 893-94.

[346] *Id.* at 894 (finding a lack of procedural unconscionability).

[347] *Id.* at 888-89 (discussing terms of contract which was unilaterally offered to consumer).

[348] *Id.* at 892.

court may have arrived at a different determination as to whether the contract was either adhesive or procedurally unconscionable; however, the mere application of California law would have little effect on the court's ruling.[349] The *Hutcherson* court's determination that the contract is enforceable is not dependant on which test the court uses, but, rather, dependant upon judicial interpretation.[350] The ruling, in the end, comes down to the subjective perspective of the court.[351]

IV. MAKING CALIFORNIA ADHESION CONTRACT LAW MORE CONSUMER FRIENDLY

As previously stated, adhesion contracts are a necessary part of the way companies deal with consumers.[352] The effects of these contracts, however, can be devastating to consumers.[353] Some commentators suggest that adhesion contracts should be unenforceable *per se*.[354] The California courts have not adopted this extreme approach.[355] Instead, California refuses to enforce these contracts when they contain provisions which are outside the consumer's reasonable expectations or when they contain provisions that are unconscionable.[356] These theories—the doctrine of unconscionability and reasonable expectations—purport to protect consumers from adhesion contracts.[357] Yet, adhesion contracts often take advantage of the consumer by imposing terms which the consumer is either not aware of or would not agree to if given a choice.[358]

California law goes a long way towards protecting the consumer from overreaching contracts.[359] By definition, adhesion contracts are not true bargains.[360] They do not represent the will of both contracting parties.[361] Adhesion contracts represent

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[349] *See Id.*
[350] *See Id.*
[351] *Hutcherson*, 793 N.E.2d at 892.
[352] Sybert, *supra* note 18, at 297-298.
[353] *Scissor-Tail,* 623 P.2d at 171.
[354] Rakoff, *supra* note 101, at 1176.
[355] *Armendariz*, 6 P.3d at 689.
[356] *Id.*
[357] *Id.*
[358] *Wheeler*, 133 Cal. Rptr. at 780.
[359] *Armendariz*, 6 P.3d at 689.
[360] *Id.*
[361] *Id.*

the will of only the drafting party.[362] Accordingly, California should improve its laws for dealing with adhesion contracts. The following suggestions would greatly benefit consumers while maintaining, for companies, all the benefits which the use of adhesion contracts currently allows.

A. COURTS SHOULD REQUIRE ACTUAL NOTICE

The first safeguard that California currently imposes is that a contract be within a party's reasonable expectations.[363] A party, however, need not be specifically aware of a contract's provisions in order for California courts to enforce the contract.[364] For most contracts, it is enough that the provisions be clearly worded and prominently displayed.[365] The courts, however, treat adhesive insurance contracts with more suspicion, and require exclusionary language be called to the attention of the insured.[366]

The system which the courts currently use for insurance contracts should be applied to all adhesion contracts.[367] It is not enough that a drafter displays a contractual provision in bold letters.[368] The reality is that most people enter into scores of adhesion contracts every year.[369] People enter into adhesion contracts for basic utility services,[370] travel, housing accommodations, insurance,[371] and financial services.[372] Adhesion contracts are sent to parties through the mail[373] and given to patients who seek admission to hospitals.[374] Most people neither understand nor even read these contracts.[375] It is not enough that provisions in these contracts are prominently displayed.[376] The courts should require actual notice.

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[362] *Id.*
[363] *Id.*
[364] *Allan*, 59 Cal. Rptr. 2d at 824.
[365] *Id.*
[366] *Jones*, 150 Cal. Rptr. at 379.
[367] *Id.*
[368] *See Allan*, 59 Cal. Rptr. 2d at 824.
[369] Friedmann, *supra* note 2, at 45.
[370] *See Ting*, 319 F.3d at 1133.
[371] Friedmann, *supra* note 2, at 45.
[372] *See Bank One*, 125 F. Supp. 2d at 821.
[373] *See Ting*, 319 F.3d at 1134.
[374] *See Wheeler*, 133 Cal. Rptr. at 779.
[375] *Id.*
[376] *See, e.g., Allan*, 59 Cal. Rptr. 2d at 824.

The court in *Jones* held that, in adhesive insurance contracts, the insurer should explain exclusionary language to the insured.[377] The same rule should apply to all adhesion contracts. It is cost prohibitive for companies to negotiate separate contracts with each of their customers.[378] Adhesion contracts are, therefore, economically necessary. [379] At no great cost, however, adhesion contracts could be accompanied by a brief, plain language explanation of their terms and conditions. This notice should take the form of a plainly worded letter (for mailed contracts) or a simple verbal explanation (for contracts entered into on a face-to-face basis).

Requiring actual notice would greatly assist consumers. Contracting consumers would know exactly what types of bargains they were entering. With the element of unfair surprise removed, consumers would be far less likely to bring costly litigation to dispute the terms of their contracts. Additionally, requiring actual notice would limit the detrimental effect that adhesion contracts have on consumers. If companies were required to explicitly spell out the contents of their contracts, these companies would be less likely to impose oppressive clauses upon consumers.[380] Companies could still enjoy the economic benefits of offering their contracts on a take-it-or-leave-it basis.[381] With actual notice, however, consumers would enjoy the benefit of a true bargain. Upon receiving notice of the contractual terms, consumers could make well informed decisions to either enter the bargain or, where possible, withdraw and take their business elsewhere.

B. LOWERING THE BAR FOR PROCEDURAL UNCONSCIONABILITY

Certain problematic, and typically oppressive, provisions show up in adhesion contracts repeatedly.[382] As previously stated, because adhesive contracts are considered procedurally

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[377] *Jones*, 150 Cal. Rptr. at 379.

[378] Sybert, *supra* note 18, at 297-298.

[379] *Id.*

[380] *See Jones*, 150 Cal. Rptr. at 379.

[381] Sybert, *supra* note 18, at 297-298.

[382] *See* Schwartz, *supra* note 16, at 809 (stating that businesses frequently use arbitration clauses); *Ting*, 319 F.3d at 381 (arbitration clause placed into adhesion contract).

unconscionable, courts are unlikely to enforce *any* substantively unconscionable provision in an adhesion contract.[383] In order for courts to throw out a provision in an adhesion contract, however, courts must find *some* degree of substantive unconscionability.[384]

The bar for determining whether a contractual provision is substantively unconscionable should be very low when dealing with adhesion contracts. Substantive unconscionability encompasses the notion that contractual terms are "one-sided" or "overly harsh."[385] An adhesion contract is, by its very nature, a one-sided endeavor.[386] Adhesion contracts are drafted by a party with superior bargaining power and presented to the adhering party to be either accepted as a whole or rejected.[387] The fact that these contracts are drafted exclusively by one party, with no opportunity for the adhering party to negotiate, should create greater suspicion in the courts than is currently exhibited.[388]

Terms which may otherwise be enforced should be looked upon with a high level of suspicion when contained in adhesion contracts. In determining whether a term in an adhesion contract is substantively unconscionable, and thereby unenforceable, the courts should ask whether the term was in the adherent's best interest at the time the party entered into the agreement. It is not enough to show that the adherent agreed to the contract. Parties seeking to enforce adhesion contracts should have to demonstrate that the provisions would have been accepted had the adhering party had an opportunity to negotiate.

Courts recognize the necessity of adhesion contracts.[389] There is, however, no justification in allowing companies to force-feed oppressive terms to consumers.[390] If a company cannot draft a fair and reasonable adhesion contract, the contract should not be enforced. Adhesion contracts reduce business costs and allow the company to deal with countless customers

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[383] *Armendariz*, 6 P.3d at 690.
[384] *Id.*
[385] *Stirlen*, 60 Cal. Rptr. at 145.
[386] *Armendariz*, 6 P.3d at 689.
[387] *Id.*
[388] *Id.*
[389] Sybert, *supra* note 18, at 297-298.
[390] *See Scissor-Tail*, 623 P.2d at 171.

on equal footing.[391] This goal can easily be achieved while protecting the basic interests and rights of consumers.

Once a court determines that a contract is adhesive, all provisions in that contract should become highly suspicious. The court should assume that the consumer has been placed at a disadvantage and that the consumer had no power to participate in any sort of negotiation of the contract. As a result, the court should carefully examine the contract and enforce only those provisions which may have been contained in a negotiated agreement. Only then will consumers receive a fair deal in an adhesive context.

V. CONCLUSION

Consumers need judicial protection from oppressive contractual terms. Consumers cannot rely on inserting an addendum to their contracts, as did the Rebars.[392] There need to be solid rules governing adhesion contracts which will protect all consumers. In constructing such rules, courts must consider both the necessity of adhesion contracts, and their possible dangers. Currently, California courts go a long way towards protecting consumers.[393] California courts will not enforce provisions in adhesion contracts found to be outside the parties' reasonable expectations.[394] Once a contract is deemed adhesive, California courts consider the contract procedurally unconscionable.[395] If an adhesion contract also contains elements of substantively unconscionability, California courts will refuse to enforce the contract.[396]

These efforts by the California courts to shield consumers from oppressive terms in adhesion contracts are helpful, but not perfect. Many consumers are still stuck with unfavorable provisions to which they would never have agreed to if given the chance.[397] For greater consumer protection, the courts should go beyond the concepts of reasonable expectations and unconscionability. Before binding consumers to a provision in

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[391] Sybert, *supra* note 18, at 297-298.
[392] Harris, *supra* note 10.
[393] *Armendariz*, 6 P.3d at 689.
[394] *Id.*
[395] *Flores*, 113 Cal. Rptr. 2d at 382.
[396] *Armendariz*, 6 P.3d at 690.
[397] See *Allan*, 59 Cal. Rptr. 2d at 824.

an adhesion contract, the courts should require a showing of *actual*, not constructive notice.[398] Further, the courts should lower the bar which determines whether a provision in an adhesion contract is substantively unconscionable. Courts should examine provisions in adhesion contracts with great scrutiny, enforcing only those provisions to which a consumer with full bargaining power would have agreed. Adhesion contracts are a necessity;[399] consumer injustice is not. These adjustments to the California system will rebalance the scales and place parties of unequal bargaining power back on equal footing.

SIERRA DAVID STERKIN*

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[398] *See Jones*, 150 Cal. Rptr. at 379.

[399] Sybert, *supra* note 18, at 297-298, *cited in Scissor-Tail*, 623 P.2d at 171.

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