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Standard Form Contracts: A Call for Reality

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STANDARD FORM CONTRACTS: A CALL FOR REALITY

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Ideas are sometimes more effectively conveyed when placed in a unique communicative format. Sometimes pictures or poems (which are often pictures in words) make more of a lasting impression. This poem, using a type of haiku form in which verses are three lines with generally a five-seven-five syllable format, is offered as an alternative writing style on the subject of standard form contracts.

A creative style is most fitting in this volume dedicated to Professor Eileen Searls. She has, in her many years as Law Librarian, shown creativity, both in early years when she built a strong library on a "shoe string" budget through gifts and unique trades and in later years when she made Saint Louis University Law Library one of the first twenty in the nation to be part of the international enhance cataloguing program sponsored by the Online Computer Library Center.

Standard form contracts are a very important part of contract and sales law because they are so frequently used. These "haiku" verses summarize the past legal approaches, the need for a reality view, and the solution of recognizing that the contract exists only as to terms actually agreed upon, with the law filling in the rest if necessary to achieve more fair standards. The fine point standard form contract clauses are seen for what they really are; clauses dictated by one party, but never agreed upon by the other. While there have been some important law review articles on standard form contracts,[1] this

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1. *See generally* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919); Frederick Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); KARL N. LLEWELLYN, THE COMMON LAW TRADITION DECIDING APPEALS, 362 (Little, Brown & Co. 1960); Robert Dugan, *Good Faith and the Enforceability of Standardized Terms*, 22 WM. & MARY L. REV. 1 (1980); W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 HARV. L. REV. 529 (1971); John E. Murray, Jr., *The Standardized Agreement in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts by Standard Forms*, 46 U. PITT. L. REV. 21 (1984); Holmes & Thurmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L COMP. L. 323 (1987);

poem with haiku verses summarizes much of the discussion and hopefully will create more interest in this problem.

Standard form contract
disguised in contract clothes
so seen by the law

The first verse of the haiku simply points out that standard form contracts have been treated as a general part of contract law and as wearing the same "clothes" as all other types of contracts. They are subject to the same principles of contract law—formation through remedies, as are other contracts which have been discussed, negotiated, and written by both parties. This is so even though they are forged by only one party, and except for such matters as price which are filled in, they are never discussed or negotiated by the parties. One of the parties never even realizes what the terms are or agrees with them. Yet, notwithstanding, the case law and Restatements treat the negotiated and jointly agreed contract and the standard form contract basically the same.[2]

Donald B. King, *Standard Form Contracts: A New Perspective*, 1991 COM. L. ANN. 137; Donald B. King, *New Perspective on Standard Form Contracts: A Subject Revisited*, 1993 COM. L. ANN. 87.

In addition, a number of articles dealing with unconscionability also deal in part with standardized terms in relation to that concept. *See infra* note 17. For a discussion of standard form contracts in Europe, see CENTRE DE DROIT DE LA CONSOMMATION, EUROPEAN WORKSHOP ON CONSUMER LAW (Th. Bourgoignie, ed. 1982); Ewoud H. Hondius, *Regulation of Unfair Contract Terms*, *in* KING ESSAYS ON COMPARATIVE COMMERCIAL LAW 109 (Rothman Co. ed., 1992). For a discussion of the Swedish solution to unfair contracts see DONALD B. KING, CONSUMER PROTECTION EXPERIMENTS IN SWEDEN (Rothman Co. ed. 1974). *See also* ULF BERNITZ, CONSUMER PROTECTION: CLAIMS, METHODS, AND TRENDS IN SWEDISH CONSUMER LAW (Almqvist & Wiksell Int'l ed. 1976). For a view of other countries see Von Marshall, *The German Standard Contract Terms Act and Its Relevance to International Trade and Law*, INT'L AFFAIRS 37 (1984). For standard form contract, in regard to international matters, see Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439 (1988).

2. Thus, the Restatement in its sections on contract formation or other major sections does not view the standard form contract differently, even though in reality it is. In § 211 it is mentioned only in regard to parole evidence. RESTATEMENT (SECOND) OF CONTRACTS §211 (1981). Spanic, *Standard Contracts in Israel*, paper presented at Sixth Biennial Conference of the International Academy of Commercial and Consumer Law, Aug. 18-23 (1992) at pp. 9-12, Stockholm. *See also* R.M. Goode, COMMERCIAL LAW STATUTES (Sweet & Maxwell ed. 1979) (English Unfair Contracts Terms Act 1977); Mayrhofer, *Standard Contract Terms, Especially Under Austrian Law*, paper presented at Sixth Biennial Conference of the International Academy of Commercial and Consumer Law, Aug. 18-23 (1992) at 8, 9, 19-21, Stockholm.

Imposed by one party
drawn with terms one-sided
it becomes a tyrant

The second stanza reflects the fact that in the standard form contract setting, one party drafts and prints the contract and imposes it on the other. There is no negotiation or assertion to these printed terms and often the party on whom they are imposed never reads them. Indeed as one court noted:

> In fact, one suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing. This process almost inevitably results in a one-sided "contract."[3]

It also has been recognized that it is not just consumers who are subjected to the tyranny of the standard form contract, but business persons as well. It has been pointed out that:

> With increasing frequency, courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms, and that even large business entities may have relatively little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement. This recognition rests on the conviction that the social benefits associated with freedom of contract are severely skewed where it appears that had the party actually been aware of the term to which he "agreed" or had he any real choice in the matter, he would never have assented to inclusion of the term.[4]

The distinction between this type of contract and the traditional one and its danger to society has been noted:

> The traditional contract is the result of free bargaining of parties who were brought together by the play of the market, and who meet each other on a footing of approximately economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present day commercial life, the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position.[5]

The tyrannical nature of standard form contract also was well described:

> Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than

3. A & M Produce Co., v. FMC Corp., 135 Cal. App. 3d 473, 490 (1982).
4. *Id*. at 489 (citations omitted).
5. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960).

> to an individual. They are said to resemble a law rather than a meeting of the minds.[6]

Tyranny begets
form contracts now abound
in business and life

The third verse describes the rapid spread of the standard form contract. With the invention of printing and the spread of business, the standard form contract became very used. Marketing factors also made a difference. As the court in one case noted:

> [I]n recent times, the marketing process has been getting more highly organized than ever before. Business units have been expanding on a scale never before known. The standardized contract with its broad disclaimer clauses is drawn by legal advisors of sellers widely organized in trade associations. It is encountered on every hand. Extreme inequality of bargaining between buyer and seller in this respect is now often conspicuous. Many buyers no longer have any real choice in the matter.[7]

Not only are form contracts frequently used in business arrangements or deals, but also when one businessman sends his standard form "order" and receives from the seller a standard form "acknowledgement." In merchant—consumer transactions, standard form contracts are almost always used. Therefore, the consumer in most larger purchases—furniture, cars, televisions, refrigerators, etc.—is faced with a standard form contract[8]

How to treat something
that's not what it seems
Reality or fiction?

The fourth paragraph poses a question which people in the law must frequently ask themselves. Should a legal fiction or rational be used, or should the reality be viewed and then the law shaped to produce the desired result? Often, once a legal fiction is used, it hides the reality; thus for years a fictional view of a setting or problem is accepted without questioning its validity or whether it produces a desirable result. This is what happened in regard to standard form contracts.[9]

Created in fictions
the answer of the law
The "Emperor's clothes"

6. *Id.* (citing Siegelman v. Cunard White Star, 221 F.2d 189, 206 (2d Cir. 1955)).
7. *Id.* at 87.
8. Patterson v. ITT Consumer Financial Corp., 14 Cal. App. 4th 1659, 1664 (1993).
9. LLEWELLYN, *supra* note 1, at 371.

The next verse refers to an old fairy tale[10] which most of us remember, but often do not think about applying to the law. Yet it sometimes is applicable when the law is using fictions to hide reality, and the courts, lawyers, and legal scholars fail to object. As I remember the story, a King, who was surrounded by a group of "Yes" men, was approached by two scheming tailors who promised to make him the finest King's robe. As he stood undressed, they pretended to weave around him a robe; in fact they were weaving nothing and were only making weaving motions in the air out of non-existent silk. Every so often, one would step and exclaim how magnificent it looked! The King asked members of his court, who all replied "Yes, it is magnificent." The tailors said it was finished and the King held a parade showing off the new robe to his subjects. His subjects were "Yes" people too and all exclaimed how great it was. Then, a young child shouted, "He's naked, he has no clothes!" At this point everyone realized the reality and an embarrassed King made a hasty retreat. So too, when looking at the standard form contract, it is a printed piece of paper, never really agreed upon, technically imposed by courts on the weaker party and technically enforced by the courts.

Reality covered
doctrine of "blanket assent"
truth is lost

The fifth verse refers to Karl Llewellyn's path ending analysis of the standard form contracts. In his book *The Common Law Tradition Deciding Appeals*, he notes the reality: "The answer, I suggest, is this: Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is not assent at all."[11]

The obvious answer from this reality analysis has been that there was no agreement and hence, no contract as to these standard form clauses. At this point, Llewellyn breaks from a realistic view, and engages in a legal fiction:

> 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.[12]

He then finds two contracts exist, the real one and the fictional one.

10. HANS CHRISTIAN ANDERSON, *The Emperor's New Clothes*, *in* THE COMPLETE FAIRY TALES AND STORIES 9 (Doubleday & Co., Inc. 1974).

11. LLEWELLYN, *supra* note 1, at 370.

12. *Id.*

The idea is applicable here, for better reason: Any contract with boilerplate results in two separate contracts: the dickered deal and the collateral one of supplementary boilerplate.[13] Thus, with the fiction of "blanket assent", standard form contracts continue their tyrannical rule, because a reason, even though fictional, has been given to support them.

The next paragraph on "commentators fictions" emphasizes that no one was willing to recognize the reality of no agreement as to most standard form terms and therefore they should be enforceable. Llewellyn's "blanket assent" was one of these fictions.[14] Professor Slawson in his earlier Harvard article viewed enforcement of standard form contracts as administrative in nature and enforceable.[15] Professor Leff noted that most of the standard form contract clauses were never agreed upon by both parties. The standard form was simply a "thing" that accompanied the item sold, but still it was enforceable.[16]

Commentator fictions
they all cloth it well
will no one tell

The next verse refers to the call for truth, made by the "non-yes" persons watching the standard form contract parade. Some inroads have been made by the doctrine of unconscionability,[17] but this is only a small proportion of the

13. *Id.* at 371.

14. *Id.* at 370.

15. W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 HARV. L. REV. 529, 546 (1971); W. David Slawson, *Mass Contracts; Lawful Fraud in California*, 48 SO. CAL. L. REV. 1 (1974); *see also* note 18 *infra* for a recanting of these earlier views.

16. Arthur A. Leff, *Contract as a Thing*, 19 AM. U.L. REV. 131, 147-157 (1970).

17. For some articles on unconscionability, see Donald B. King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 ST. LOUIS U. L.J. 15 (1966), William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Alphanse M. Squillante, *Commercial Code Review: Summary of Leading Decisions and Articles*, 73 COM. L.J. 167, 224 (1968); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 328 (1969); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Irvin Younger. *A Judge's View of Unconscionability*, 5 UCC L.J. 348 (1973); Richard W. Duesenberg, *Practitioner's View of Contract Unconscionability*, 8 UCC L.J. 237 (1976); Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies*: *The Metaphysics of UCC §2-719(2)*, 65 CAL. L. REV. 28 (1977); Donald B. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U. L.J. 97 (1979); John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21 (1984); Clare Dalton, *An Essay in the Destruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW L.J. 1065 (1986); M.N. Kniffin, *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, 63 NOTRE DAME L. REV. 247 (1988); Kerry L.

cases where the terms are outrageous. Increasingly, this writer and others are asking for a look at reality.[18] Even the drafters of the Revised Article 2 are raising the question of whether in the context of "order" and "acknowledgement" forms, the standard form clauses should be enforceable.[19] In general, standard form clauses in all contracts should not be enforceable. People make Contracts and Commercial laws. They can be created to give the most desirable results; now it is within our power—it is our responsibility as a just society.

"it has no clothes"
the truth sets us free
we are the tailors

Clothes are clothes
agreement is agreement
Truth is Truth

Unfair form terms
replaced with law-made ones
Justice and Truth

The final verses call for what this writer thinks is the proper solution to standard form contracts. Matters such as price which are often discussed and agreed upon should be enforceable, unless they are unconscionable, under general contract theory. However, matters not discussed and agreed upon by both parties should not be enforceable under general contract theory. Standard form contract clauses imposed by one party and never agreed upon by the other should thereby be unenforceable.[20] An agreement is agreement; thus, matters not agreed upon are not enforceable, as a matter of basic contract law. The court should enforce only what was agreed upon. Gap-filling provisions of the

Macintosh, *When are Merger Clauses Unconscionable?*, 64 DENV. U. L. REV. 529 (1988); Donald B. King, *Major Problems with Article 2A, Unfairness "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869-77 (1992). *See also* SINAI DEUTCH, UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY (1977).

18. W. David Slawson, *The New Meaning of Contract: the Transformation of Contracts by Standard Forms*, 46 U. PITT. L. REV. 21 (1984); John E. Murray, *The Chaos of the Battle of the Forms: Solutions*, 39 VAND. L. REV. 1307 (1986); Donald B. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U. L.J. 97 (1979); Donald B. King, *Major Problems with Article 2A, Unfairness "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869-77 (1992).

19. *See* KING & RITTERSKAMP, JR., PURCHASING MANAGER'S DESK BOOK OF PURCHASING LAW, app. at 641-657 (Prentice Hall 2nd ed. 1993).

20. DONALD B. KING, ESSAYS ON COMPARATIVE COMMERCIAL LAW (Rothman Co. ed. 1990); DONALD B. KING, CONSUMER PROTECTION EXPERIMENTS IN SWEDEN (Rothman Co. ed. 1974).

Code govern other matters, which are based upon reasonableness and fairness[21] or trade usages of decent dealers as recognized by the Code. The contract is the true one of actual agreement, supplement by the "law made" contract of fairness mandated by the Code.[22]

SUMMARY

The best summary may be found in viewing the poem as a whole. The span of several hundred years of contracts law is contained in it. Further, there is the hope for law reform and more reality in the future in the final verses.

21. *See* William D. Hawkland, *Sales Contract Terms Under the Uniform Commercial Code*, *in* DONALD B. KING, COMMERCIAL AND CONSUMER LAW FROM AN INTERNATIONAL PERSPECTIVE 45-69 (Rothman Co. ed. 1986); *see also* E. Allan Farnsworth, *Omission in Contract*, 68 COLUM. L. REV. 860 (1968); Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785 (1982).

22. The term "law-made" is one I use to describe the non-consential part of the contract. The "law-made" part of the contract is imposed by operation of law or the courts on the parties. The "law-made" part of the contract, however, consists of not only of "gap-filling" Code provisions, but also customs, trade usage, course of dealing, and course of performance used by decent dealers as noted in Comment of UCC §1-205. *See also supra* notes 1-2. In countries such as Sweden, Israel and Austria, where governmental representatives pre-negotiate terms with trade associations or individual businesses or establish required fair standards to be used in future contracts, such consumer representative pre-negotiated standard clauses also may be recognized as the "law-made" part of the contract which supplements the consential part.

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