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Got Wheels - Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering

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GOT WHEELS? ARTICLE 2A, STANDARDIZED RENTAL CAR TERMS, RATIONAL INACTION, AND UNILATERAL PRIVATE ORDERING

*Irma S. Russell**

I. RENTING A CAR: SIGN HERE

The standard form contract in consumer deals is one of the most controversial issues of modern contract law.¹ Standardized contracts, or form contracts, are sometimes referred to by the pejorative name “contracts of adhesion.”² Nevertheless, mass-produced contracts are as much a fixed reality in the modern market as mass production and mass marketing,³ and the law affords standardized contracts the same deference accorded bargained-for-exchanges. Thus, absent a finding of unconscionability, deals constructed by the dominant party are enforced without bargaining and without judicial scrutiny.⁴ The rationale for use of the unconscionability standard and the deference it creates is a concept of utility that considers some cumulative cost savings to consumers as a group while ignoring other costs—such as aggregate losses to consumers.⁵ The result is a presumption of free

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2. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 627–28 (2002) (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943)); see *Black’s Law Dictionary* (8th ed. 2004).

3. See *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt. a (1981).

4. See *infra* Part II.

5. See 21 *C.J.S. Consumer Protection* § 24 (2006).

bargaining that endorses a system of contracts dictated by the dominant party in consumer transactions.⁶

Few people actually read the terms and conditions of the form contracts they enter. Indeed, it would be a waste of time to read contract terms when it is clearly not possible to change them. Thus, a consumer's decision not to read a form contract is rational inaction or efficient inertia since bargaining is not a real possibility and the transaction is dictated by the dominant party. These transactions are bilateral only in the sense that they are supported by consideration; otherwise, they amount to unilateral private ordering of terms imposed by the dominant party. In general, Article 2A of the Uniform Commercial Code (UCC)⁷ and modern contract law accept such unilateral private ordering by drafters of form contracts.⁸ Judicial oversight of standardized contracts is limited to a patchwork of specific consumer statutes⁹ and the amorphous test of unconscionability.¹⁰ The presumption that form contracts present the same social utility associated with mass production—the standard justification for such arrangements—accepts the process as a cumulative good and eschews scrutiny of the terms of any given deal.¹¹ Explaining the merits of standardization, the Restatement (Second) of Contracts section 211 notes that legal rules “which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision.”¹² Section 211 concludes that the net result of such mass contracting is that “[o]perations are simplified and costs reduced, to the advantage of all concerned.”¹³

6. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 & 1284 (2003) (arguing that standard forms favor drafters and that mandatory contract terms and modification of the unconscionability doctrine could reduce inefficiencies resulting from form contracting).

7. U.C.C. art. 2A (2003).

8. See Korobkin, *supra* note 5.

9. See *infra* Part III.A.

10. See U.C.C. § 2A-108 (2003).

11. Section 211 of the Restatement articulates the conventional justification for form contracting and asserts that standardization of agreements has utility for society and that, like standardization of goods and services, it is “essential to a system of mass production and distribution.” RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

12. *Id.*

13. *Id.*

Article 2 of the UCC facilitates unilateral private ordering by endorsing a policing standard of unconscionability rather than applying a reasonableness standard.¹⁴ None of the protections of Article 2A alters the central fact that courts do not consider bargaining power when assessing unconscionability.¹⁵ Ignoring the issue of bargaining power in most situations, Article 2A thus provides scant protection for consumers in the context of leasing personal property.¹⁶

This Article considers the system of unilateral private ordering by form contracts: the presumptions of a free market and free bargaining. It questions whether the system of constrained judicial oversight that serves to insulate bargaining from governmental control, should extend to standardized consumer contracts that emphatically dispense with bilateral ordering. It also questions whether the unilateral private ordering presented by standardized contracts effects a cost savings for society, a construct with apparently universal acceptance today.¹⁷ This Article considers the application of Article 2A to standard form contracts in the most common consumer leasing transaction—renting a car.¹⁸ Part II discusses the importance of default rules and presumptions in the law and focuses on contract law as an example. Part III examines rental car agreements and provisions of Article 2A that apply to consumer leasing. Part IV discusses the treatment of form contracts by the common law and the UCC. Part V explores the doctrine of unconscionability as it applies to form contracting. Part VI examines

14. See U.C.C. § 2-302 cmt. 1 (2003) (“Courts have been particularly vigilant when the contract at issue is set forth in a standard form.”). The UCC also makes clear that bargaining power is not the issue: “The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” *Id.*

15. No UCC provision that provides protection to lessees references differences in bargaining power as a relevant consideration. See, e.g., U.C.C. §§ 2A-106, 2A-108(2), 2A-108(4), 2A-109(2), 2A-221, 2A-309, 2A-406, 2A-407, 2A-504(3)(b), 2A-516(3)(b).

16. Article 2A does not use the terms “bargaining power” or “bargaining leverage.” See generally U.C.C. art. 2A. In defining consumer leases, UCC Section 2A-101 states: “Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those laws this Article is subject to them to the extent provided in (Section 2A-104(1)(c) and (2)). Further, certain consumer protections have been incorporated in the Article.” *Id.* § 2A-101 cmt.

17. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (asserting that form contracting reduces costs “to the advantage of all concerned”).

18. See Ralph J. Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 CONN. L. REV. 647, 649 (2003) (“The great bulk of goods leased to consumers are motor vehicles.”).

the historical basis for a lenient standard for contract formation and questions whether extension of the lenient or “hands-off” approach is justified for standardized contracts that amount to unilateral private ordering. Part VII concludes that form contracts for the lease of goods give substantial leeway to lessors, which strengthens the economic power of corporate entities without a corollary social benefit.

II. DEFAULT TERMS IN CONTRACTING

Legal principles present a structure of law that is most beneficial for serving the public interest.¹⁹ The law sets general rules cabined by exceptions, which allows the judiciary to reach different results in different cases.²⁰ For example, a well-known contract law doctrine provides expectation damages to make the plaintiff whole. In the ordinary case, however, substitutional relief rather than specific performance is granted, in effect, setting a hurdle for the party that seeks specific performance.²¹ Legal norms set a framework of burdens of proof and burdens of going forward with evidence in the event of a dispute.²² The plaintiff who seeks specific performance must establish not only the breach and injury but also the inadequacy of damages in his case.²³ Thus, general rules express a preference for a certain outcome absent extraordinary circumstances. The plaintiff must establish that the status quo should be changed. After all, the the essence of every plaintiff’s claim asks the court to use the force of government to change the status quo.²⁴

Default standards permeate every area of contracting. For instance, the UCC limits economic consequential damages a buyer may recover to losses “resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”²⁵ In this way, the UCC sets the default rule that

19. See Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J., 389, 398 (1993) (describing a function of contract law as protecting parties from exploitation).

20. *Id.* (“Contract law . . . contains a number of rules that parties are free to change.”).

21. See RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c.

22. See *id.* § 360 cmt. b.

23. *Id.*

24. See *id.* cmts. b, c.

25. U.C.C. § 2-715(2)(a) (2003).

the only recoverable consequential damages are those that could not have been prevented by cover or some other measure. While the principle of consequential damages presents a judgment regarding a reasonable measure in the ordinary case, it may be changed by the parties.²⁶ Nothing in this standard suggests that unilateral change of a default has social utility. To the contrary, the existence of the default as a rule suggests that it presents a reasonable balance in the ordinary case and should be retained absent specific justifying circumstances, such as true negotiation between the parties.

In form contracting, the party who drafts the form can unilaterally change the default set by the law without giving up anything in exchange.²⁷ Restatement drafters and scholars recognize that parties do not read form contracts and as a result, are not likely to secure a change in terms.²⁸ While the practice of failing to read form contracts is attributed to consumer reliance on the good will of the corporate drafters of the terms, it is also a good example of efficient inertia. One may as well rely on good will when one is powerless to change the terms of the contract.²⁹ Nevertheless, the asserted utility of form contracts is the ability to transpose any and all non-mandatory default rules, limited only by the lenient test of unconscionability.³⁰ Section 211 of the Restatement presumes that reshaping contract rules is a social good.³¹ In its discussion of the usefulness of form contracts, the Restatement states: "Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction."³² Many of the form contracts reviewed exclude economic consequential damages entirely, thus "reshaping the legal rules" in the terms of the Restatement 211. In this way, the standard form contract is a free rider on the broad presumption of a free bargain. Without the presumption of a free bargain, courts would apply a reasonableness or fairness test to the

26. See *id.* § 2-715(2)(a) cmt. ("Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.")

27. See generally Barnett, *supra* note 2.

28. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b.

29. See Barnett, *supra* note 2.

30. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c.

31. *Id.* § 211 cmt. a.

32. *Id.* See discussion *infra* Part IV.B for further treatment on this part of the comments to Restatement § 211.

asserted promise.³³ Whether such reshaping of rules results in a social good depends on the substance of the modification.

Contract law employs an intentionally lenient standard regarding the question of whether parties have entered an enforceable contract.³⁴ The test of consideration allows courts to give effect to commitments without assessing the value of the commitments.³⁵ In other words, consideration tests the fact of agreement rather than the content of the agreement. Contract law recognizes that resource maximization stimulates a robust market in promises for future performance and, accordingly, serves the public good. The doctrine of consideration makes it unnecessary for courts to judge the value of an exchange. The doctrine of consideration achieves this goal by ignoring the content of a contract and enforcing the deal when parties intended to enter an enforceable agreement. Thus, it protects contracting as an activity rather than judging the value of performances.³⁶

This general default is set forth in Restatement section 71, entitled "Requirement of Exchange; Types of Exchange."³⁷ It states: "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."³⁸

Restatement section 71 indicates that courts should not judge a disputed obligation by a standard of fairness or reasonableness.³⁹ Rather, courts should enforce an obligation when the proponent convinces the court that the contract is a bargained-for-exchange supported by consideration.⁴⁰ The standard of consideration endorses a free market because it refrains from valuing the performance or promise that constitutes the consideration.⁴¹ It emphasizes the

33. See *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt. c.

34. See *id.* § 71.

35. See *id.* § 71 cmt. c ("Ordinarily . . . courts do not inquire into the adequacy of consideration, particularly where one or both of the values exchanged are difficult to measure.").

36. See *id.*

37. *Id.*

38. *Id.*

39. See *id.*

40. *Id.*

41. See *id.*

bargain of the parties by defining a bargain as the exchange that occurs when the performance or promise “is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”⁴² Under this standard, a court does not judge the value of the bargain or the components of performance.⁴³ Rather, the court judges the existence of a bargain.⁴⁴ Section 71 clarifies the broad reach of the concept of consideration by noting the types of exchanges that serve as consideration: “(3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.”⁴⁵ The section also makes clear that the consideration does not need to be provided solely to the party to the contract, but rather “may be given to the promisor or to some other person.”⁴⁶ This mechanism broadens the universe of performances that meet the requirement of consideration.

The comment to Restatement section 71 emphasizes the point of the broad nature of the requirement created by the objective standard of assent: “[T]he law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other’s response and to be induced by it and that the other responds in accordance with the inducement.”⁴⁷ A free market means that parties are free to choose a deal that the court—or individual judges who make up the court—would see as valueless. The test for enforceability of a deal in the ordinary case is not fairness or reasonableness; it is whether the deal is supported by consideration.⁴⁸

Any judging or valuing of the content of the agreement compromises the freedom of the contracting parties.⁴⁹ If the parties

42. *Id.*

43. *See id.*

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.* § 71 cmt. b (“[A] mere pretense of bargain does not suffice.”).

48. *See, e.g.,* Thomas M. Hogan, Note, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?*, 80 ST. JOHN’S L. REV. 429, 431 (2006) (explaining that some believe employee restrictive covenants are not needed because they can restrict free-market competition).

49. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (“[Social functions of bargains] would be impaired by judicial review of the values so fixed.”).

freely bargain for a contract, the contract is enforceable—even if the judge sees the subject matter of the contract as silly or entirely without value.⁵⁰ For example, consider the purchase of a paper cup for a significant sum of money because Elvis allegedly drank from the cup. A court might regard this contract as ridiculous; nevertheless, parties are free to accord this item value and to bargain for it in a free market. Thus, contract law accepts the adage that one man's trash is another's treasure. The presumption of a free bargain insures that courts minimally police contracts, limiting the end product only when the result is so extreme that it is unconscionable.⁵¹

The importance of the law's choice to reject an approach that evaluates contract fairness can hardly be overstated. Scholars note that such regulation would be contrary to the principles of free competition that underlie the capitalist economy of the United States.⁵² A system in which the state actively monitors contracting through its courts is indicative of a state-controlled or state-planned market. Thus the test of consideration perfects the design for a free market economy.⁵³

III. RENTING A CAR

Renting a car is the most common lease of personal property for consumers as a group.⁵⁴ The experience cuts across all economic sectors of the public. The car rental business is more national in nature than other types of leasing of personal property, and use of form contracts in car rental transactions is wide-spread.⁵⁵ A survey of the rental car industry indicates that the car rental market is

50. *Id.*

51. The meaning of unconscionability itself has undergone dramatic changes in recent years, considering that courts have upheld arbitration agreements that impose substantially unequal terms on consumers. For example, in *Hill v. Gateway 2000, Inc.*, Judge Easterbrook upheld an arbitration clause although it required the consumer to arbitrate a dispute with the Gateway computer company in Chicago. 105 F.3d 1147 (7th Cir. 1997). The consumer in that case had not had an opportunity to read the terms of the contract prior to obtaining the product. *Id.* at 1148.

52. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8 introductory note ("The common law policy against restraint of trade is one of its oldest and best established.").

53. See RESTATEMENT *id.* § 71 cmt. c ("[T]he social functions of bargains include the provision of opportunity for free individual action.").

55. Currently, the top ten rental car companies all use form contracts. See Table 1 for a list of these companies and their respective websites.

controlled by national firms. Each company employs a set form of terms and conditions for all of that company's transactions on a nation-wide basis.⁵⁶ While renting a car is discretionary for people in some situations, others are without options, particularly when public transportation is not available. In the day-to-day reality of the work world, the use of a car, like a computer, is far from a luxury and is a necessity for many people. Determining the content of various form agreements presented by car rental companies involves significant time and effort for a consumer. Moreover, many consumers cannot afford to spend the time to read these car rental form contracts. This context also provides a case study of the relationship of consumers to repeat players in the market. Car rental contracts are a good example of the form contracting that is subject to Article 2A of the UCC.

A. Application of Article 2A to the Car Rental Context

Article 2A is the law regarding the leasing of personal property in all states except Louisiana.⁵⁷ It applies to consumer leases.⁵⁸ Although Article 2A is not designed as consumer-protection legislation, some of its provisions restrict the types of clauses a dominant party can include.⁵⁹ Article 2A defines a consumer lease as "a lease that a lessor regularly engaged in the business of leasing or selling makes to a consumer."⁶⁰ States have the option of including a dollar cap in their definition of a consumer lease.⁶¹ While a state may make any changes it chooses, accepting or rejecting any part of the uniform law, Article 2A drafters expressly encourage states to set a cap on consumer leases that is high enough to include car rentals within the provision. Clearly, rental car contracts should come within the ambit of Article 2A.⁶² In a legislative note, the UCC's drafters made this point expressly:

56. For information on fleet numbers and rental revenue for the listed car rental companies, see *2005 U.S. Car Rental Market: Fleet, Locations, and Revenue by Market Segments*, AUTO RENTAL NEWS, Jan.-Feb. 2006, at 40, available at http://www.fleet-central.com/arm/t_pop_pdf.cfm?action=stat&link=http://www.fleet-central.com/arm/stats/2005/U.S._Car_Rental_Market.pdf.

57. 21 C.J.S. *Consumer Protection* § 24 (Supp. 2006).

58. U.C.C. § 2A-101 cmt. (2003).

59. *Id.* ("[C]ertain consumer protections have been incorporated in the Article.").

60. *Id.* § 2A-103(1)(f).

61. *Id.* § 2A-103 legislative note.

62. *Id.*

Present Article 2A has a bracketed provision allowing States to insert a dollar cap on leases designated as consumer leases, amended Article 2 defines “consumer contract” and does not include a dollar cap in the definition. Some States have not included a dollar cap in present Article 2A and States which have adopted a dollar cap have stated varying amounts. If a State wishes to include a dollar cap, the cap should be inserted here. Any cap probably should be set high enough to bring within the definition most automobile leasing transactions for personal, family, or household use.⁶³

The drafters of the Uniform Commercial Code used Article 2 rather than Article 9 as the “appropriate statutory analogue” for Article 2A. The comment to the first section of Article 2A notes the drafters’ recognition that Article 2 and Article 9 of the UCC are predicated upon “very different assumptions.” The assumptions of Article 9 include one of great interest to this particular inquiry: that “obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.” This assessment includes the clear implication that leases of personal property should not ordinarily be regarded as deals that are “essentially unilateral.” Comment 1 to the section gives additional evidence of this judgment:

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract.⁶⁴

The drafters assume that leases of personal property are not unilateral.⁶⁵ Despite this reasoning and the stated goal of preserving freedom of contract in Article 2A, the statute accepts unilateral action by drafters of form contracts.⁶⁶

Official Comment (e) of section 2A-103 lists the rules that apply

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*

only to consumer leases.⁶⁷ It expressly notes that Article 2A “regulates the transactional elements of a lease, including a consumer lease; consumer protection statutes, present and future, and existing consumer protection decisions are unaffected by this Article.”⁶⁸ Nevertheless, although Article 2A applies to consumer leases and encourages states to include car rental agreements within its scope by statement of a jurisdictional dollar amount, it is clear that the thrust of Article 2A is not to serve as a consumer protection statute.⁶⁹ The comment notes that “[c]onsumer protection in lease transactions is primarily left to other law.”⁷⁰

Section 2A also makes clear that federal and state consumer protection statutes and past decisional law trump the default rules set by Article 2A, meaning that consumer legislation will control in conflicts of law.⁷¹ To emphasize the point, the comment specifically references some examples of federal and state law that trump Article 2A, including the Consumer Leasing Act, and the Uniform Consumer Credit Code.⁷² Additionally, the comment to section 2A-101 indicates that other laws relating to consumer leases take precedence over Article 2A.⁷³ UCC section 2A-104 notes that the statute does little to protect consumers, while also explaining the vulnerability of consumers in lease transactions to one-sided lease agreements.⁷⁴ Despite this hands-off approach, the section does include some “special rules that may not be varied by agreement in the case of a consumer lease.”⁷⁵ For example, Section 2A-214 requires that specific language is used in order to exclude or modify

67. *Id.* § 2A-103 cmt. e.

68. *Id.*

69. *Id.*

70. *Id.* § 2A-104 cmt. 4.

71. *Id.* § 2A-104. Section 2A-104 states: “A lease subject to this Article is also subject to any applicable . . . rule of law that establishes a different rule for consumers.” *Id.* The comment to this section specifically refers to the wide swath of laws that may trump Article 2A, including “state statutes existing prior to enactment of Article 2A or passed afterward” and “pre-existing consumer protection decision[s].” *Id.* § 2A-104 cmt. 2. Similarly, the comment notes that federal law “controls without any statement in this Article under applicable principles of preemption.” *Id.*

72. U.C.C. § 2A-104 cmt. 2 (“Consumer Leasing Act, 15 U.S.C. §§ 1667–1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. § 213 (1986)”).

73. *Id.* § 2A-101 cmt.

74. *Id.* § 2A-104 cmt. 4.

75. *Id.*

warranties in consumer leases.⁷⁶ Section 2A-530 prohibits a lessor from recovering consequential damages from a consumer in a consumer lease contract.⁷⁷ Numerous other provisions refer to consumer leases which include limitations on choice of law, relief for unconscionable terms, and a prohibition against options to accelerate at will.⁷⁸

The comment to Restatement section 211 notes that consumers are vulnerable to overreaching by the dominant party.⁷⁹ Section 2A-106 limits the ability of the parties to change the applicable law and judicial forum in a consumer lease.⁸⁰ It states:

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.⁸¹

The comment to this section notes the “real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation.”⁸² Thus, the section invalidates a choice of law or forum clause that does not choose the “state of the consumer’s residence or where the goods will be kept, or the forum . . . that otherwise would have jurisdiction over the lessee.”⁸³ The comment also notes the “potentially abusive choice of law clauses in consumer leases,” such as choosing a forum with little consumer protection laws or one that is inconvenient for the

76. *Id.* § 2A-214(2) (quoting the language necessary to disclaim warranties including “merchantability” and the implied warranty of fitness).

77. *Id.* § 2A-530(3).

78. *See, e.g., id.* §§ 2A-106, 2A-108, and 2A-109.

79. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1981).

80. U.C.C. § 2A-106.

81. *Id.*

82. *Id.*

83. *Id.*

consumer in the event of litigation.⁸⁴ Interestingly, the provision does not prohibit use of arbitration rather than judicial resolution of disputes. It expressly states that the section “does not limit selection of a non-judicial forum, such as arbitration.”⁸⁵

Section 2A-108 on unconscionability singles out consumer leases for special treatment.⁸⁶ Subsection (2) states:

With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.⁸⁷

This section establishes the standards for setting aside a provision of a contract as a basis for relief.⁸⁸ The unconscionability standard is a demanding standard for the plaintiff.⁸⁹ The use of the standard in section 2A-108 is enhanced further by the need for a showing of unconscionability as a “matter of law.”⁹⁰ Thus, only *clear* cases of unconscionability will pass the test.⁹¹

Section 2A-109, on options to accelerate payments, also deals separately with consumer leases.⁹² It construes the effect of at-will acceleration clauses by limiting the operation of clauses “accelerat[ing] payment[s] or performance or requir[ing] collateral or additional collateral ‘at will’ or ‘when the party deems itself insecure’” only when the party has a good faith belief “that the prospect of payment or performance is impaired.”⁹³ In other words, a party’s determination to accelerate is effective only when it is based on an honest belief of insecurity. This provision also has a separate

84. *Id.*

85. *Id.*

86. *Id.* § 2A-108(2).

87. *Id.*

88. *Id.*

89. *See, e.g.,* Larry A. DiMatteo, *A Theory of Efficient Penalties: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 719 (2001) (arguing that the unconscionability standard is a “more difficult threshold”). The unconscionability standard is closely related to the standard of outrageousness required to award punitive damages in tort law. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

90. U.C.C. § 2A-108.

91. *Id.*

92. *Id.* § 2A-109.

93. *Id.*

subsection dealing with the consumer lease setting. In a dispute regarding a consumer lease, “the burden of establishing good faith under subsection (1) is on the party that has exercised the power; otherwise the burden of establishing lack of good faith is on the party against which the power has been exercised.”⁹⁴

Subsection (4) to Article 2A-108 expressly authorizes the award of attorneys’ fees to a consumer lessee who proves unconscionability in a consumer lease.⁹⁵ The provision provides the possibility of attorneys’ fees to either the lessee or the lessor in a consumer lease. It states that when a court finds unconscionability the court “shall award reasonable attorney’s fees to the lessee.”⁹⁶ It also provides for an award of attorney’s fees to the lessor in some circumstances: “If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action the lessee knew to be groundless, the court shall award reasonable attorney’s fees to the party against which the claim is made.” Thus, a consumer who knows that the claim he is bringing is without merit may face a verdict of attorney’s fees for the lessor if the court finds the conduct unconscionable.⁹⁷ The official comment states that Subsection (4) (b) “is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney’s fees.”⁹⁸ Accordingly, the parties may allow for attorney’s fees in circumstances not covered by the provision. Some of the terms and conditions in the documents reviewed did provide for attorney’s fees as a matter separate from Article 2A.⁹⁹

B. Framework of the Study

The ordinary consumer leases goods infrequently. The most likely area of consumer involvement in a lease of goods occurs when a consumer rents a car.¹⁰⁰ Consumer leasing exists in other areas such as the lease of furniture, tools for home repair, and rent-to-own

94. *Id.*

95. *Id.* § 2A-108(4).

96. *Id.*

97. *Id.* § 2A-108(4)(b) (“If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action the lessee knew to be groundless, the court shall award reasonable attorney’s fees to the party against which the claim is made.”).

98. *Id.* § 2A-108 cmt.

99. *See infra* Part III.B.

100. *See* Table 1.

arrangements, but rental of cars seems the area of leasing of personal property most widely used by people at all economic levels. People who lack the resources to own a car may rent a car to make a necessary trip. Affluent business people rent cars after flying to business meetings in locations distant from their offices. Compared with other consumer leases, the rental car lease affects more consumers of all economic segments and, thus, presents an area of widespread interest. Additionally, the rental car industry presents a nationwide market, providing standardized terms across the country with respect to the contractual relations of the parties, while setting individual pricing on a city-by-city or region-by-region basis. A few independent car rental companies exist but the market is dominated by ten players, each of which provides a system that is national in nature.

The author and research assistants gathered information relating to renting a car from the following dealers: Advantage Rent-A-Car, Alamo, Avis, Budget, Dollar, Enterprise, Hertz, National, Thrifty, and Payless. The study compared the terms and conditions of rental agreements and pricing information, which consumers could obtain before leasing a car. The study included on-site visits to the rental car locations, telephone calls, and a review of the company websites and printed materials. Some employees at the rental sites declined to give a form contract. A Budget employee provided me with a printed brochure entitled "Terms and Conditions." This employee and others did not recognize the word "contract" as a reference to the "Terms and Conditions" document. These employees distinguished between the "contract" and the "terms and conditions" of the lease by indicating that the term "contract" referred to only the lease itself. The telephone representatives answering the toll-free calls also did not recognize that the "Terms and Conditions" document constituted a part of the contract. Without exception, the representatives referred to the dickered terms as the "contract" and identified the "terms and conditions" documents as something separate and apart from the contract between the parties.

Comparison of the websites revealed that although the contracts or terms and conditions varied considerably from company to company, each rental used a standard contract form for the entire country rather than varying it by locale. This is not surprising since savings due to standardization would be lost if forms varied by

region. However, a consumer visiting Hertz's website might conclude that Hertz's terms vary from one locale to another: the website provided a pull-down menu for each Hertz location with the terms and conditions of that city.¹⁰¹ Nevertheless, a sampling of ten other websites revealed that all the terms under the links for different cities were identical despite the separate pull-down windows for each city. Copying the text of ten locales and running a "compare docs" function for the ten sites revealed identical terms and conditions in all the sites.¹⁰² The pull-down document containing basic terms of the agreement, entitled "VEHICLE RENTAL RATE QUOTES, RESERVATIONS AND PREPAYMENTS,"¹⁰³ lists definitions and explains terms such as "Rate Quotes," "Reservations," "Rental Qualifications and Requirements," "Rates Quoted in connection with Reservations," "Types of Rental Transactions and Reservations, Definition of Reserving and Renting Companies," "Prepaid Rental Transactions," "Guaranteed Reservations," and "Standby Reservations."¹⁰⁴ The correspondence address is the same no matter which location the consumer accessed.¹⁰⁵ The website could have achieved the same informational purpose by having one set of terms and conditions available without designation of the rental location.¹⁰⁶

In order to assess those terms, the author visited the car rental agencies in person, talked with rental car agents, and compared the form contracts provided on the Internet or in hard copy. Many of the hardcopy forms were on flimsy paper and printed in a font size smaller than 8-point. All of the companies had sites on the internet though some of them did not provide full information on the terms of the rentals available. In some cases the companies provided information in the form of brochures.

The author called all the major car rental companies and a few local companies to ask whether it would be possible to rent a car

101. HERTZ, VEHICLE RENTAL RATE QUOTES, RESERVATIONS, AND PREPAYMENTS (2005), <http://www.hertz.com> (click on "Locations, Cars, and More;" set a location; then click on "Qualifications & Requirements;" find "Making Reservations—Legal" and click "Go").

102. See Table 1. Copying the text of ten locales and running a "compare docs" function revealed identical terms and conditions. See *id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. The locations included are: Chicago, Colorado Springs, Dallas-Fort Worth, Green Bay, Los Angeles, Memphis, New Orleans, New York City JFK, Orlando, and Savannah. *Id.*

without entering into the standard form agreement. In substance, all representatives gave the expected answer: No. One representative stated: "If you want to rent a car, you accept the terms." Some phone representatives refused to answer the question or gave equivocal answers such as: "Maybe you could talk with a local office in your hometown about that." The tenor of the comments received ranged from laughter to contemplative responses such as: "In ten years in this job no one has ever asked me that."

The company websites vary in terms of the length of the information (often referred to as "terms and conditions") provided to the public. The longest is 63 pages (from Avis).¹⁰⁷ The shortest is five pages (from Advantage Rent a Car).¹⁰⁸ Initially, the author searched for the following terms on the sites: arbitration, attorney's fees, choice of law, consequential, forum selection, integration, liquidated, loss, merger, modification, penalty, reservation, return, resolution of disputes, and unilateral. Many of the websites gave general information, such as the minimum age for renters, but did not deal with contract default rules. Some provided a Frequently Asked Questions list but did not provide the terms of the rental policy.

C. Omissions and Alterations of the Legal Default Rules

The terms and conditions posted on the Internet did not include provisions found commonly in other industries such as banking, technology, and the credit card industry. Thus, the standard forms reviewed omitted several types of terms that would give significant advantage to the lessor. For example, the online documents do not include forum selection clauses, acceleration clauses, or arbitration clauses.¹⁰⁹ The omission of forum selection clauses and acceleration clauses is attributable to Article 2A.¹¹⁰ Although the main purpose of Article 2A is not consumer protection, it provides a certain level of protection to consumers by disfavoring the use of certain clauses.¹¹¹ For example, section 2A-106 prohibits the use of standard forum

107. Avis Rent A Car, Avis Preferred Service Rental Transaction, United States/Canada Terms and Conditions (Aug. 1, 2006), <http://www.avis.com/AvisWeb/JSP/global/en/programs/consumer/PrefMbrGlobalTermsMiddle.jsp#Canada/United%20States>.

108. See Advantage Rent A Car, Rental Policies and Special Services, <http://arac.com/terms.htm> (last visited Sept. 17, 2006).

109. See Table 1.

110. See U.C.C. § 2A-106 (2003).

111. *Id.*

selection clauses that select a forum that is not the lessee's jurisdiction,¹¹² and section 2A-109 limits the effect of acceleration clauses.¹¹³ However, the absence of arbitration clauses in the documents reviewed is surprising because Article 2A does not prohibit the use of arbitration clauses in rental car agreements.¹¹⁴ Consumer advocacy groups warn consumers to watch the fine print for binding mandatory arbitration clauses.¹¹⁵

The author's review of online rental car agreements found no arbitration clauses.¹¹⁶ Although the contracts reviewed do not include arbitration clauses or forum selection clauses, they do alter the UCC and common law default rules in significant respects.

In a few cases, a rental agreement provided consumer protections. For example, the Avis agreement set forth specific channels for consumer appeals of company decisions regarding

112. *Id.*

113. *Id.* § 2A-109.

114. For example, the Alltel agreement provides:

ARBITRATION. ANY DISPUTE ARISING OUT OF THIS AGREEMENT OR RELATING TO THE SERVICES AND EQUIPMENT MUST BE SETTLED BY ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION, USING THE WIRELESS INDUSTRY ARBITRATION RULES. INFORMATION REGARDING THIS PROCEDURE MAY BE FOUND AT www.adr.org. EACH PARTY WILL BEAR THE COST OF PREPARING AND PROSECUTING ITS CASE. WE WILL REIMBURSE YOU FOR ANY FILING OR HEARING FEES TO THE EXTENT THEY EXCEED WHAT YOUR COURT COSTS WOULD HAVE BEEN IF YOUR CLAIM HAD BEEN RESOLVED IN A STATE COURT HAVING JURISDICTION. THE ARBITRATOR HAS NO POWER OR AUTHORITY TO ALTER OR MODIFY THE AGREEMENT OR THESE TERMS AND CONDITIONS, INCLUDING THE FOREGOING LIMITATION OF LIABILITY SECTION. ALL CLAIMS MUST BE ARBITRATED INDIVIDUALLY, AND THERE WILL BE NO CONSOLIDATION OR CLASS TREATMENT OF ANY CLAIMS. THIS PROVISION IS SUBJECT TO THE FEDERAL ARBITRATION ACT. YOU UNDERSTAND AND ACKNOWLEDGE THAT BY AGREEING TO THIS ARBITRATION CLAUSE, YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL.

Alltel Wireless, Terms and Conditions for Communication Services, <http://www.alltel.com/terms.html> (last visited Sept. 7, 2006).

115. For example, the National Association of Consumer Advocates (NACA) website warns that binding mandatory arbitration clauses may be "buried in the fine print of a car rental contract or an HMO enrollment form." Nat'l Ass'n of Consumer Advocates, Binding Mandatory Arbitration (BMA) Frequently Asked Questions, <http://www.naca.net/images/05Agenda/Congress%20BMA%20FAQ.pdf> (last visited August 28, 2006).

116. On arbitration and the larger issue of dominance in contracting, see Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 762-766 (2002) (arguing that mandatory arbitration moves society towards privatization of contract disputes, marginalizes court involvement, and increases the risk of economic influence in dispute resolution).

disputes.¹¹⁷ No statement indicated the remedy a consumer has if the internal appeal is not resolved to the satisfaction of the consumer.¹¹⁸

As Restatement section 211 predicts, changes to the default terms are generally beneficial to the dominant party that drafted the form, which in this case is the rental car company.¹¹⁹ For example, Budget's printed brochure entitled "Additional Terms and Conditions of Agreement" required that the renter pay damages for total loss when the damage makes the car "commercially unacceptable," a term that sounds imminently reasonable.¹²⁰

9. LOSS OF OR DAMAGE TO THE VEHICLE . . .

C. THEFT OR TOTAL LOSS OF THE VEHICLE: IN the event of theft or damage to the vehicle which renders it commercially unacceptable, Renter will pay Buyer its depreciated cost of the Vehicle less any salvage value as liquidated damages. Renter agrees that any Vehicle sustaining over \$2,500 of damages will be deemed commercially unacceptable for purposes of this paragraph. Any Vehicle stolen for a period in excess of 60 days will be deemed a total loss.

This provision requires that the renter pay damages for total loss when the damage makes the car "commercially unacceptable," a term that sounds imminently reasonable.

The formula for the payment of damages to Budget also seems reasonable: "depreciated cost of the Vehicle less any salvage value."¹²¹ The parties agree that the car is "commercially unacceptable" when the car receives damage at a certain level.¹²² The terms include an agreement about the term "commercially unacceptable," invoking the complete cash-out when the loss is over \$2,500. This clause is not related to the value of the car. Moreover,

117. See *Avis Rent A Car*, *supra* note 107 ("If you are not satisfied with the way in which we handle your inquiry, you can contact any of the following: [providing titles, addresses and contact information for Avis Privacy Officers].")

118. *Id.*

119. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1981) (warning of the danger of overreaching by the dominant party).

120. THE MEMPHIS LANDSMEN, L.L.C. D/B/A BUDGET RENT A CAR OF MEMPHIS / TUPELO, ADDITIONAL TERMS AND CONDITIONS OF AGREEMENT (2006) [hereinafter BUDGET, ADDITIONAL TERMS].

121. *Id.*

122. *Id.*

this clause obligates the renter to pay the full value of a car, which has sustained minor damage. For example, even a \$50,000 car is treated as totaled if it sustains \$2,501 in damage, an amount that could result from a fender-bender. While the rental company might waive the provision, there is nothing in the agreement that requires a waiver based on the full value of the car.¹²³ Although renters and insurers are unlikely to regard this level of loss as a total loss of the car, that is the effect of the contractual provision.

A court applying Article 2A could properly overturn this provision only if it found the clause to be unconscionable.¹²⁴ The fact that car rental companies offer insurance mitigates the harshness of this provision, as does the fact that those companies that include rigorous terms may provide cheaper rates than other companies.¹²⁵ The number and variety of factors that affect pricing and the range of terms and conditions offered by different companies make any connection between rigorous terms and pricing problematic. The larger question is whether some minimum standard of reasonableness would provide greater utility for society, considering both the widespread benefit of low pricing and the specific burden of rigorous terms on the individuals impacted by those terms.

In the same terms and conditions document, Budget included the following clause relating to return of the car:

18. VEHICLE RETURN: Renter is responsible for returning the Vehicle in the same condition as when received, to the location and on the date specified , or sooner if requested by Budget. FAILURE TO RETURN THE VEHICLE TO THE SPECIFIED LOCATION ON THE DUE DATE MAY RESULT IN A RATE CHANGE AND WILL RESULT IN A DROP CHARGE EQUAL TO \$.75 PER MILE DRIVEN. ANY UNAUTHROIZED DROP FEE SHOULD NOT EXCEED \$1500 REGARDLESS OF MILEAGE.¹²⁶

123. *Id.*

124. See U.C.C. § 2A-108(2) (2003).

125. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (“Buyer could probably obtain the same protection less expensively by purchasing insurance to cover the risks which would be covered by an expanded warranty.”).

126. BUDGET, ADDITIONAL TERMS, *supra* note 120.

Again, on a quick reading, this provision does not seem onerous. It requires that the renter return the vehicle in the “same condition as when received,”¹²⁷ surely a reasonable requirement. The unusual part of this clause is the additional requirement that the renter return the car “sooner if requested by Budget.”¹²⁸ Similarly, the Avis website states “You agree to return the car to us in the same condition you received it. . . You must return it sooner on our demand.”¹²⁹ These provisions alter the dickered terms of the agreement and appear to trump the return date by granting the lessor a unilateral right to change the agreed return date provided in the contract.¹³⁰ Moreover, the renter who ignores this provision faces a significant risk of damages as set forth in the all-capitalized statement of rate change: “FAILURE TO RETURN THE VEHICLE TO THE SPECIFIED LOCATION ON THE DUE DATE MAY RESULT IN A RATE CHANGE AND WILL RESULT IN A DROP CHARGE EQUAL TO \$.75 PER MILE DRIVEN. ANY UNAUTHORIZED DROP FEE SHOULD NOT EXCEED \$1500 REGARDLESS OF MILEAGE.”¹³¹ It is unclear from the terms and conditions whether this penalty applies only to the due date as set in the contract or also to the new date established when Budget requests an early return of the car.¹³² One reasonable reading of the terms is that the penalty in all-caps applies only when the original “due date” is breached by consumer. The alternative reading is also plausible, however: that the penalty clause applies whenever the car is due, regardless of whether the timing is set by the contract or by the request for a sooner return by the lessor.

Another provision waives special damages that might otherwise apply to the car lessor: “21. MISCELLANEOUS: Budget shall have no liability for any indirect special or consequential damages arising in connection with the furnishing, performance, or use of the Vehicle or for any claim based upon the failure to honor a Vehicle reservation requested by Buyer.”¹³³ Most form contracts waive

127. *Id.*

128. *Id.*

129. Avis Rent A Car, *supra* note 107.

130. *Id.*

131. BUDGET, ADDITIONAL TERMS, *supra* note 120.

132. *Id.*

133. *Id.*

incidental and consequential damages.¹³⁴ The interesting alteration of ordinary contract principles appears in the alteration of the obligation that arises from a “reservation.”¹³⁵ Consumers are likely to believe that if they have a reservation for a car, the rental company is contractually bound to provide a vehicle on the reservation date. Budget’s terms and conditions statement alters this default.¹³⁶ The proximity of the exclusion of liability for indirect or consequential damages may seem to suggest that the clause excludes only remote damages from a failure to honor a reservation, such as incidental or consequential damages. A literal reading of this provision, indicates that the exclusion of damages relates to *any* damages arising from a failure to honor a reservation: “Budget shall have no liability for . . . for any claim based upon the failure to honor a Vehicle reservation requested by Buyer.”¹³⁷

Of course the fact that a rental company has expansive rights stated in the contract—such as a right to demand return of the vehicle earlier than the contract date without a particular showing of need—does not mean that companies will exercise them. Considerations of customer goodwill and company reputation militate against unreasonable tactics. Companies are unlikely to enforce such clauses except in extreme circumstances such as a recall of a particular car model for safety reasons. Nevertheless, as a matter of private ordering, it is such interests rather than contract law that motivates reasonableness. As section 211 of the Restatement notes, consumers essentially “trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated.”¹³⁸ No substantial evidence demonstrates that car rental companies are applying provisions such as these in onerous ways. Often, a rental company that fails to have

134. See, e.g., John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 321 (2000) (describing consequential damages exclusion as a common term in standard form contracts).

135. BUDGET, ADDITIONAL TERMS, *supra* note 120 (providing a disclaimer for reservations).

136. *Id.*

137. *Id.* This provision presents a scenario from a Seinfeld episode in which a rental company admits that Jerry has a reservation but is untroubled by the fact that it has no car reserved for him. Jerry insists that the representative does not know the meaning of the term “reservation.” *Seinfeld: The Alternate Side* (NBC Television broadcast Dec. 4, 1991).

138. RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. b (1981) (calling to mind the hope and trust in the “kindness of strangers”).

the car reserved in stock will offer the consumer a car of equal value or an upgrade at no additional charge.¹³⁹ In some circumstances, they will help the consumer arrange for a rental from another company.¹⁴⁰ Thus, while some contract terms as written present the possibility of onerous results from the consumer's point of view, rental companies often do not enforce onerous provisions. The power of reputation and goodwill are significant forces in the market.¹⁴¹ It may be that with such powerful forces contract law is not necessary to police these transactions. What is clear is that the current structure of the law treats the transactions as contracts despite the absence of bargaining over the structure of the deal.

IV. STANDARDIZATION OF CONTRACT TERMS

Some consumer legislation addresses standard form contracts that involve consumers, but none purports to regulate form contracting generally in the consumer context.¹⁴² For example, laws relating to fraud and deception in advertising and bait and switch tactics apply to standard form contracts.¹⁴³ Antitrust laws also apply to standard form contracts, at least in theory.¹⁴⁴ However, consumer statutes do not mediate the relationship of consumers and corporations in a comprehensive or methodical manner.¹⁴⁵ Focusing on the presumption of the bargain, some free market scholars would argue that such regulation offends underlying principles of the free market system.¹⁴⁶ For instance, in the arena of leasing of personal

139. Dave Downing, *6 Steps to Cheaper Car Rentals*, FODOR'S TRAVEL, http://www.fodors.com/features/nfdisplay1.cfm?name=stt/010813_stt_carrental.cfm (last visited Oct. 2, 2006).

140. Ed Perkins, *When Hotels and Car Rental Agencies Oversell*, SMARTER TRAVEL, May 11, 2006, <http://www.smartertravel.com/travel-advice/hotels-car-rental-agencies.html?id=124872>.

141. See, e.g., Erin S. Dufek, *The Same Uniform, a Different Team: Copycats Suit up for Competition*, 60 ALB. L. REV. 1317, 1317 (1997) ("market vultures . . . have swooped in and gained a competitive edge by cashing in on the goodwill and reputation of well-known brand name products").

142. See Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393 (2003) (arguing for a more inclusive mass-market concept and for narrow, targeted statutes); see, e.g., Consumer Leasing Act, 15 U.S.C. § 1667 (2001) (defining consumer leases).

143. See, e.g., 46 U.S.C. § 3504(b) (2005) (regulating advertising for ocean voyages).

144. See Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1611-13 (1995) (arguing that form contracts allow industries to exercise "private legislation").

145. See *supra* Part II.

146. *Id.*

property, the Uniform Consumer Leases Act (UCLA) provides protections to consumer lessees of personal property whether or not the contract is established by a form contract.¹⁴⁷ It does not apply to short term rental car contracts.¹⁴⁸ While some states have legislation regulating car rental companies, the protections are specific to particular abuses that have received attention in the press such as the abuse of global positioning systems to gather information about the use of the car.¹⁴⁹

*A. The Common Law of Unconscionability
and the Presumption of a Bargain*

The presumption of the free bargain continues despite dramatic changes in the context of bargaining and the legal rules selected by one of the parties. Individual bargaining regarding the choice of legal rules is now infrequent in consumer transactions, even when those transactions involve significant expenditures.¹⁵⁰ The measured cadence of the bargaining process that students read about in a contracts class rarely appears in the real world of contracts today—at least in consumer contracts. Standardized contracts dominate to a large extent in a variety of contexts.¹⁵¹ Standardization of terms makes it possible to provide goods and services to a broader audience than would be possible if contracts were negotiated individually.¹⁵² Though hints of the past customs of the clearly denominated offer, followed by a clear counter-offer or acceptance persist in modern real estate transactions and highly financed transactions, these areas also present a continuing arch of development that tends toward uniformity, inclusion of inapplicable clauses,

147. See UNIF. CONSUMER LEASES ACT § 105 (Supp. 2006).

148. See 21 C.J.S. *Consumer Protection* § 24 (2006).

149. See Elizabeth C. Yen, *Rent a Car, Rent a Spy: Governments React to New Uses for GPS*, 14 BUS. L. TODAY 59 (July–Aug. 2005) (noting legislative responses to control the use of GPS devices to enforce speeds and the ability to “kill” the ignition remotely).

150. See Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG L. REV. 265, 319 (1999) (“Inequality of bargaining power has removed the illusion of free bargaining”); see, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (holding that the arbitration clause contained in terms sent to the buyer in the box in which computer was shipped was binding on the buyer).

151. See Slawson, *supra* note 125, at 529 (“[S]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made.”).

152. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (“standardization . . . [is] essential to a system of mass production and distribution”).

and the convenient cookie-cutter approach that benefits the time and options of the dominant party.¹⁵³

In short, real bargaining—in the sense of a demand for exclusion or modification of a term—is nonexistent in modern consumer transactions. This point is far from new—others have noted that the consumer transaction of the twenty-first century is essentially legislation by the dominant party.¹⁵⁴ While the situation of the ordinary consumer is sometimes portrayed as a matter of choosing to pay more or finding a different provider, the range of choice is significantly restrained in today's market. Moreover, the modern approach to standardized contracts dispenses entirely with the assumption that society's default rules apply to a transaction except insofar as those rules are mandatory, i.e., when alteration of the rules renders a deal or aspect of the deal unconscionable.¹⁵⁵ The orientation of courts in this area may well be affected by the presumption or fiction of a bargain.

The most dramatic alteration of the legal landscape by form contracts is allowing the dominant party to modify the default rules without a need to bargain.¹⁵⁶ The analysis often presumes a protective legal baseline for consumers, even while allowing modification of default rules.¹⁵⁷ At times, this presumption lacks substance.¹⁵⁸ This protective baseline no longer exists vis-a-vis reasonableness¹⁵⁹ because the interest of the law in policing the deal extends only to unconscionability, which involves a significant burden of proof.¹⁶⁰ The norms of today's market mean that if you do not like a clause, you need to do without the product or service.

153. See *infra* Part VI.

154. Colloquy, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 700 (2005) (calling form contracting "private bureaucratic legislation").

155. See U.C.C. § 2A-108 (2003).

156. See Barnett, *supra* note 2.

157. See Stephen M. Bainbridge, *Contractarianism in the Business Associations Classroom: Kovacik v. Reed and the Allocation of Capital Losses in Service Partnerships*, 34 GA. L. REV. 631, 646-47 (2000).

158. See, e.g., *supra* Part III.A (applying Article 2A to the rental car context). Nevertheless, the existence of other proscriptive law is noted frequently in website information as well as in Article 2A itself. *Id.*

159. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

160. See *supra* note 14 and accompanying text.

*B. The Restatement Treatment of
Standardized Contracts and the Presumption of Social Utility*

Section 211 of the Restatement (Second) of Contracts articulates the conventional justification for form contracts.¹⁶¹ It asserts that standardization of agreements has utility for society and that, like standardization of goods and services, it is “essential to a system of mass production and distribution.”¹⁶² The section notes that the realities of the modern marketplace result in efficiencies and savings.¹⁶³ Recognition that contemporary circumstances and norms should be taken into account for the purpose of judging the use of standardized clauses also suggests, however, that contemporary circumstances should be considered in relation to all parties to the contract, including the individual consumers involved in the deal.¹⁶⁴ Items that may seem nonessential from one point of view or even a luxury from a certain perspective may be critical to a person’s job and survival. Indeed, many consumer items are necessities of modern existence. For example, computers and automobiles, whether owned or rented by the consumer, are substantial purchases and often essential to a person’s ability to earn a living in today’s market.¹⁶⁵

Corporations experience utility from the persistence of this legal fiction. It should be no surprise that when dealing with consumers as a group, they constrain consumer choices in ways that maximize the benefit to the dominant party, the repeat player.¹⁶⁶ In this context a repeat player is a synonym for “dominant party.” It is true that in a literal sense, consumers may be repeat players: they rent cars repeatedly, and some become knowledgeable about frequent flyer points and other promotional bonuses. However, while consumers are repeat players in the sense that they engage in the transaction repeatedly, this status is meaningless in the context of bargaining or private ordering. Mere repetition is not equivalent to that of the

161. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a.

162. *Id.*

163. *Id.*

164. Special rules on the standards for modification apply in the area of third party beneficiary doctrine and assignments. *See id.* §§ 336–338.

165. *See, e.g.,* Johann Tasker, *Have You Tamed the Technology?*, FARMERS WEEKLY, April 21, 2006 (noting the importance of computers for farmers).

166. *See* Korobkin, *supra* note 6, at 1234.

corporate lessors because the lessors are repeat players in a game whose rules they control. The consumer is a repeat player in the same sense that a person would be a repeat player in a game of checkers with someone else who held all the pieces and could change the rules of the game at any time.

Restatement section 211 adverts to this reality, noting the “obvious danger of overreaching” in form contracts.¹⁶⁷ The evolving world of the consumer market can be seen as the gradual change of the conceptual framework of contracting. But the evolution of legal doctrine can include mismatched concepts and persistence of a standard that no longer comports with reality. For example, the presumption of free bargaining in the market justifies a hands-off approach to policing the formation of contracts, which is governed by the doctrine of consideration.¹⁶⁸ However, when the presumption of a bargained-for-exchange is not justified in a particular context, continued use of a hands-off approach may result in an injustice to the weaker party.¹⁶⁹ With consumer contracts, freedom of contract relates almost exclusively to the dickered terms such as price and delivery date.¹⁷⁰ The contract is thus supported by consideration and, as to those terms, represents a bilateral arrangement of consent. All other terms and conditions, however, are unilaterally drafted by the dominant party.

The comment to Restatement section 211 gives some basis for requiring reasonableness in form contracting.¹⁷¹ It notes that despite the general rule that parties are bound by terms in a standardized contract even when they do not know the terms, they are not bound by “unknown terms which are beyond the range of reasonable expectation.”¹⁷² The comment also establishes a standard of the reasonable expectations of the average member of society, suggesting that reasonableness has some bearing on the inquiry: “Apart from government regulation, courts in construing and

167. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c.

168. *See id.* § 71.

169. *See infra* Part VI.

170. In the rental car context, even some dickered terms may not be the subject of meaningful choice. For example, some rental car agreements alter the dickered term of the timing of the lease by requiring that the renter return the car upon the request of the rental company, despite the reference in the contract to a different date for return. *See supra* Part III.C.

171. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

172. *Id.*

applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it.”¹⁷³ However, these signals of a reasonableness standard are only part of the picture.¹⁷⁴ While the comment affords some room for consideration of reasonableness, it does not consider the inequality of bargaining power or the absence of meaningful choice for consumers.¹⁷⁵ The primary message of section 211 is that enforcement of form contracts is the general rule: “Apart from such regulation, standard terms imposed by one party are enforced.”¹⁷⁶

The Restatement also endorses an oft-used justification that standardization of contracts “serves many of the same functions as standardization of goods and services.”¹⁷⁷ It analogizes the process of contracting by forms with the process of mass production and distribution.¹⁷⁸ Indeed, the phenomenon of dealing with people en masse reaches every aspect of modern life.¹⁷⁹ However, standard form contracts may even dispense with the default rules that establish a foundation of minimal fairness.¹⁸⁰ The Restatement asserts that the power to jettison default legal rules is one of the benefits of standardization.¹⁸¹ Even in cases in which the standard form contract leaves default rules of contract law in place, the dominant party has the power to change those rules in the future without triggering judicial scrutiny at any higher level than the test of unconscionability.¹⁸²

173. *Id.* § 211 cmt. e.

174. *Id.* § 211 cmt. c.

175. *Id.*

176. *Id.*

177. *Id.* § 211 cmt. a

178. *Id.* (noting that like other forms of standardization in the modern world, form contracts “are essential to a system of mass production and distribution.”).

179. Even the law of due process dealing with government action that deprives individuals of life, liberty or property has been profoundly affected by the perceived need to make decisions in broad categories of people. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976) (holding that an evidentiary hearing was not required prior to terminating disability benefits when sufficient administrative procedures existed to comport with due process). Scholars have called this new approach to due process “mass justice.” *See, e.g., Charles H. Koch, Jr., Judicial Dialogue for Legal Multiculturalism*, 25 MICH. J. INT’L L. 879, 888 (2004) (noting the evolution of mass justice in welfare).

180. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a.

181. *Id.*

182. *See* U.C.C. § 2A-108 (2003) (stating that an unconscionable portion of a contract is unenforceable); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (noting that standard terms are subject to the power of the court to refuse to enforce an unconscionable contract or

The comment to Restatement section 211 discusses the reasons for the law's acceptance of standardization of contracts, the societal risks associated with this acceptance, and the choice of an unconscionability standard as the policing mechanism for constraining the dominant party from violating the fairness norm that underlies contract law.¹⁸³ Comment (a) explains the utility of standardization, as articulated above.¹⁸⁴ Comment (b) recognizes the reality of the relative bargaining power of each party.¹⁸⁵ It notes that the non-dominant party to a form contract assents to unknown terms, relying on the good faith of the dominant party and that the purpose of standardization is "to eliminate bargaining over details."¹⁸⁶ Comment (b) also considers that the consumer relies on "the tacit representation that like terms are being accepted regularly by others similarly situated" and assures that the agreement is subject to limitations imposed by law.¹⁸⁷

Comment (c) justifies the reconfiguration of what constitutes an enforceable deal in the modern marketplace.¹⁸⁸ It notes the "obvious danger of overreaching" in some contexts, suggesting an understanding that the dominant party may draft terms that largely favor that party—even to an unreasonable extent.¹⁸⁹ Indeed, given the economic acknowledgement that rational actors will act to maximize their own interest, one would be surprised to find form contracts drafted to preserve a reasonable balance of power when the law does not police the arrangement for reasonableness. The protection of reasonableness is the general default rule set aside in section 211 and justified in comment (a) as the (presumably beneficial) reshaping of "legal rules which would apply in the absence of agreement," combined with that bonus of being able to use copies of the form "for purposes such as record-keeping, coordination and supervision."¹⁹⁰ Without question, this approach

term).

183. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmts. b, c.

184. *Id.* § 211 cmt. a.

185. *Id.* § 211 cmt. b.

186. *Id.*

187. *Id.*

188. *Id.* § 211 cmt. c.

189. *Id.*

190. *Id.* § 211 cmt. a.

presents a bonanza of efficiency from the point of view of the dominant party. A significant question remains, however, regarding whether the choice of rejection of a reasonableness standard in favor of the far less vigilant standard of unconscionability as the sole method of policing the form contract sufficiently protects the good faith bargain for the non-dominant party.

The appeal of utility rings hollow when we consider that the only benefit to the non-dominant party is merely the ability to bargain over terms relating to the subject matter of the contract, such as the date of the lease, pricing, and whether the consumer can get a sun roof.¹⁹¹ Under this regime, the defaults of the legal principles are part of the details delegated for decision by the dominant party, constrained only by the broad and lenient standard of unconscionability.¹⁹²

The net effect strips the consumer of any protection against unreasonable terms save the notably minimal protection of unconscionability.¹⁹³ The dominant party will likely draft a contract to maximize its interests, even to a level of unreasonableness if it can do so without stepping over the line into unconscionability. Indeed, from an economic approach, the drafter will indulge in unconscionable provisions unless the consequence is strong enough to cancel out the benefits of unconscionability in cases in which the consumer is likely to go to court.¹⁹⁴ This line of economic analysis is the basis for treble damages in consumer protection statutes.¹⁹⁵

The Restatement notes the existence of other law, such as government regulation in some areas such as “insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts.”¹⁹⁶ The Restatement also expressly declares the exceptional nature of government regulation as a departure from and exclusive respite from the general rule it

191. See *supra* Part IV.A.

192. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c.

193. *Id.*

194. See, e.g., Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1080 (1998) (arguing that it is extremely difficult for a party to a contract to persuade a court that an arbitration clause is unconscionable).

195. See, e.g., 15 U.S.C. § 1601 (2000) (describing congressional findings that various consumer leases have been offered without adequate cost disclosures).

196. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c.

announces: “Apart from such regulation, standard terms imposed by one party are enforced.”¹⁹⁷ It acknowledges the possibility of other moderating doctrines and the possible (though unlikely) tact of separately negotiated terms.¹⁹⁸

Section 211 justifies the loss of bargaining by focusing on meaningful details, such as the dickered terms.¹⁹⁹

Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.²⁰⁰

Certainly the use of standard form contracts saves time, at least for the dominant player in this scenario. In a sense, it saves time for the consumer in the scenario as well. Because negotiation is not possible, the consumer saves the time that might otherwise be spent in seeking concessions or changes in the free market model. Such time savings do not necessarily represent a benefit, however, since the market model creates the possibility that one or more of the changes or concessions might be successful. On the other hand, the consumer is likely to spend considerable time in the current form-based approach comparing different contracts provided by different vendors to see whether one or another offers more in terms of consumer protection or less in the way of relinquishing reasonably

197. *Id.*

198. *Id.*

199. *Id.* § 211 cmt. a.

200. *Id.* Comment (c) notes that “standard terms may be superseded by separately negotiated or added terms (§ 203), they are construed against the draftsman (§ 206), and they are subject to the overriding obligation of good faith (§ 205) and to the power of the court to refuse to enforce an unconscionable contract or term (§ 208). Moreover, various contracts and terms are against public policy and unenforceable.” *Id.* § 211 cmt. c.

expected rights.²⁰¹

Real tensions exist between the perspectives and preferences of people as individuals and as group members. One overlooked perspective is found in the fact that the individual side of the quotient also has a cumulative attribute that is often ignored.²⁰² Similar tension is found in the interest of consumers in keeping insurance costs low for the sake of securing low premiums.²⁰³ It also appears in the debate on tort reform and even in the constitutional liberty and property interests referred to as the “utilitarian approach”—also a mass justice issue.²⁰⁴ With respect to tort or insurance reform, consumers may like the aspect of constrained payments to injured parties from the view of lower premiums (or cost of goods), but a necessary downside and less-discussed side of the quotient exists. The relationship of benefits to individuals and benefits to society is multi-dimensional. Consumers as insured parties may be pleased to see limitations on awards to individuals who have suffered loss because the effect on the consumer is (theoretically) a reduction in the premium that consumers pay on insurance. Nevertheless, this benefit has a correlative cost associated with it because their own insurance coverage that consumers purchase no longer covers the full loss insured. When the individual consumer suffers a loss and makes a claim, his claim will be treated with the same limitations that saved him money on the premium. The insurance may cost less, but it is also worth less. The original reason for insurance (spreading the loss) is compromised to the extent that insurance does not cover the true loss to the individual. Similarly, tort reformers claim that consumers in the market receive the benefit of a cost reduction for products and services by virtue of reduction of awards to individuals harmed by those goods and services. Consumers suffer a correlative cost, however, because the cost of the product will not bear their own loss if they are harmed by the product. Even people who suffer no injury and make no claim absorb this cost because they carry a

201. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U.L. REV. 700, 717 (1992).

202. See *id.* at 715–16.

203. See Slawson, *supra* note 125, at 530.

204. Carol I. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development under Arkansas Law*, 59 ARK. L. REV. 43, 58–59 (2006).

higher uninsured risk by virtue of the compromised tort system. Tort reform that seeks to gain value for the consumer by denying in part or in whole the claims of injured parties compromises two functions of tort law: compensating the injured party and, additionally, reducing negligence in the world. To the extent that tort law incentivizes non-negligent conduct, reduction of compensation reduces the effectiveness of that incentive. No one knows whether the cost of negligence in the marketplace will fall on them personally. Thus, through both tort liability principles and insurance, members of society collectively share potential costs and benefits. Reducing the benefit to the individual who has suffered actual harm also reduces that potential benefit to each of us. These benefits are the part of the original purpose of tort law and the insurance mechanism and thus should be accorded some weight.²⁰⁵

The same considerations suggest that the preferences of consumers are not entirely described by the Restatement. The comment to Restatement § 211 also addresses default legal rules, stating “[l]egal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction.”²⁰⁶ This construct presents the opportunity for change of the otherwise applicable legal rules as an unmitigated benefit to standard form contracts. It certainly makes sense to assume that this change is regarded as a benefit by one party to the contract, i.e., the party who makes the change. It does not, however, make sense to assume that supplanting legal default rules will have overriding social utility. After all, the dominant party or repeat player drafts the forms and can be expected to make changes in the default rules that favor its side of the transaction. Whether such changes represent a social benefit depends on the content of the rules prior to and after the change. However, the comment takes the stance that social value inheres in changing the default rules of contract law by the form without regard to the content of the change. The likelihood of consistent and pervasive change in favor of the dominant party, then, seems clear.

In fact, the Restatement comment notes the likelihood of sharp

205. *See, e.g.*, *Clougherty Packing Co. v. C.I.R.*, 811 F.2d 1297, 1300 (9th Cir. 1987) (“If the insured has shifted its risk to the insurer, then a loss by or a claim against the insured does not affect it because the loss is offset by the proceeds of an insurance payment.”).

206. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

practices or overreaching by the dominant party. The point is stated as a bland and non-controversial truism:

The customer assents to a few terms, typically inserted in blanks on the printed form, and gives blanket assent to the type of transaction embodied in the standard form. He is commonly not represented in the drafting, and the draftsman may be tempted to overdraw in the interest of his employer. The obvious danger of overreaching has resulted in government regulation of insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts.²⁰⁷

The justification for such a broad assertion is that change shapes the original default of the legal rule "to fit the particular type of transaction."²⁰⁸ The assumption is that the legal rules of contract law are inappropriate for the specific type of contract that is subject to standardization, which suggests that the applicable common law and statutory law are too broad or simply wrong for the contract at hand.²⁰⁹ This line of reasoning runs contrary to traditional decisional law, especially in light of the fact that the presumption of utility in this Restatement comment flows merely from change by the party who drafts a form.²¹⁰ Thus, the statement accords deference and presumes social utility based on utility to the drafter (generally the dominant party).²¹¹ In this way, the Restatement's general justification of change based on the needs of a "particular type of transaction" overlooks the detailed evolution of the common law and the specific considerations that have gone into the formation of default rules.²¹² Contract law represents the long-term development of judicial and legislative determinations regarding fairness and efficiency in various contexts.²¹³ Changing these defaults should only be done if the current default rules are somehow detrimental, not because there is a generalized belief that the party drafting the forms will choose a better rule.

207. *Id.*

208. *Id.* § 211 cmt. a.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.*

213. *See supra* Part II.

The comment also argues in favor of form contracts based on trivial and one-sided considerations.²¹⁴ “Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment.”²¹⁵ Thus, the American Law Institute suggests that the benefit of having “extra copies of the form” for “record-keeping, coordination and supervision” carries sufficient weight to justify allowing the drafter to rewrite generations of law regarding the appropriate balance of interests at issue.²¹⁶ Additionally, the comment points out the benefit of “meaningful choice”: “Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.”²¹⁷ Savings of time and money are significant to both the overall market and individuals, but whether such savings are achieved by “all concerned” is far from clear.²¹⁸ The rationale that the cost savings benefit everyone relies on a type of group assessment of advantage rather than the loss incurred by individuals signing the form. This analytical construct ignores costs incurred by individuals, focusing instead on cumulative savings of individuals who make up the group.²¹⁹

C. Form Contracts under the UCC

The discussion above applying Article 2A to the context of renting a car makes clear that Article 2A adopted the approach of Article 2 to form contracts.²²⁰ Although the UCC recognizes that the “obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract,” it

214. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. The analytical move is similar to that of supporters of tort reform. *See generally* “Common Sense” Legislation: The Birth of Neoclassical Tort Reform, 109 HARV. L. REV. 1765, 1769–70 (1996) (discussing “common sense” tort reforms to cap or eliminate awards). The argument that society will save money if it can foreclose costly tort claims overlooks the cumulative losses to those who suffer injuries as a result of torts without full compensation. *See id.* at 1780.

220. *See supra* Part III.A.

accepts the unilateral nature of the terms and conditions of form contracts.²²¹ It relies on the fact that leases subject to Article 2A are also “subject to any applicable . . . rule of law that establishes a different rule for consumers.”²²² Although Article 2A leaves consumer protection in lease transactions to other law, it imposes some provisions that establish minimum standards of fairness and reasonableness.²²³ It rejects, however, any default rule of reasonableness, opting instead for the amorphous and lenient standard of unconscionability as the only general policing mechanism.²²⁴

V. THE DOCTRINE OF UNCONSCIONABILITY

The doctrine of unconscionability comes into play as the outer limit on the presumption of free bargaining.²²⁵ Parties are free to enter uneven, unwise, or foolish bargains.²²⁶ But there is a tipping point at which the courts refuse to enforce a promise. Contracts that are unconscionable are over the line in terms of unfair advantage to one party.²²⁷

A. *The Restatement Approach to Unconscionability*

Section 208 of the Restatement articulates the limit provided by the doctrine of unconscionability:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.²²⁸

Thus, the free market ideal has a limit. The system of contracting adopted in the United States presumes fair bargaining in the absence

221. U.C.C. § 2A-101 (2003).

222. *Id.* § 2A-104.

223. *Id.* § 2A-108.

224. *Id.*

225. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *see also* U.C.C. §§ 2A-108, 2-302.

226. *See, e.g.,* *Morris v. Capital Furniture & Appliance Co., Inc.*, 280 A.2d 775, 777 (D.C. 1971) (upholding a conditional sale contract for household items even though the buyer was obligated to pay \$832.00 for goods that cost the seller only \$234.35).

227. *See* U.C.C. § 2A-108.

228. RESTATEMENT (SECOND) OF CONTRACTS § 208.

of fraud or unconscionability.²²⁹ It leaves the policing of contract formation to the more limited standard of bad faith in negotiation.²³⁰ The effect of this default rule is to provide judicial enforcement of contracts unless the party opposing enforcement can meet the burden of showing bad faith on the part of the other.²³¹

Restatement section 208 takes a position of compromise on the issue of unequal bargaining power as a factor in unconscionability.²³² Comment (d) notes that a showing of inequality of bargaining power does not establish that a contract is unconscionable.²³³ The comment also indicates that extreme situations of “gross inequality of bargaining power” may be a factor in determining that a contract provision is unconscionable, since the non-dominant party has neither a viable alternative nor an opportunity to negotiate unfair terms.²³⁴

Likewise, in the context of standardized contracts, courts often enforce a term even though it is the result of unequal bargaining, except when the court regards the term as unconscionable or against public policy.²³⁵ On the topic of “Standardized Agreements,” Restatement section 211 recognizes that parties do not read or bargain over the terms because they know that the deal offered is a take-it-or-leave-it proposition.²³⁶ The terms offered are not subject to change.²³⁷ As section 211 states, “[o]ne of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms.”²³⁸

229. *See id.*

230. *See* U.C.C. § 2-607.

231. *See id.*

232. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d.

233. *See id.* (“A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.”).

234. *Id.*

235. *See, e.g.,* *Ilan v. Shearson/Am. Express Inc.*, 632 F.Supp. 886, 891 (D.N.Y. 1985) (“Even a contract that is the result of unequal bargaining power will be enforced unless its terms are unduly oppressive, unconscionable, or against public policy.”).

236. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b.

237. *Id.*

238. *Id.*

B. Unconscionability under the UCC

The common law doctrine of unconscionability is codified under the UCC.²³⁹ UCC sections 2A-108 and 2-302 echo the common law doctrine of unconscionability set forth in Restatement section 208.²⁴⁰ The UCC section 2-302 makes clear that the doctrine of unconscionability exists to provide a limit on the freedom of parties to alter the legal principles that apply to contracts.²⁴¹

The comment notes the frequent need to consider unconscionability in the context of standard form contracts.²⁴² Interestingly, the comment sets the scope of the issue to exclude the question of leverage or market power of the dominant party:

The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.²⁴³

Thus, the UCC isolates the question of unconscionability from the issue of leverage, leaving the consumer in an untenable position in many cases.²⁴⁴

C. Unconscionability in UCC Article 2

UCC section 2-302 explains policing the sale of goods and adopts the common law approach in a fairly brief and straightforward manner:

(1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or

239. See U.C.C. §§ 2A-108, 2-302 (2003).

240. See *id.*; RESTATEMENT (SECOND) OF CONTRACTS § 208.

241. U.C.C. § 2-302 cmt. 1. The comment notes that the section “makes it possible for a court to police explicitly against the contracts or terms which the court finds to be unconscionable instead of attempting to achieve the result by an adverse construction of language, by manipulation of the rules of offer and acceptance, or by a determination that the term is contrary to public policy or to the dominant purpose of the contract.” *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.²⁴⁵

Thus, Article 2 endorses considerable flexibility with regard to policing against unconscionable outcomes.

D. Unconscionability in UCC Article 2A

UCC section 2A-108 carries forward the same principles and tests of section 2-302 to the leasing of goods.²⁴⁶ It constructs a rule of unconscionability substantially similar to UCC 2-302 although it presents a more cautious approach to the issue in some settings.²⁴⁷ In its totality, UCC section 2A-108 states as follows:

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to

245. *Id.* § 2-302.

246. *See id.* § 2A-108

247. *Id.*

present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

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

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action the lessee knew to be groundless, the court shall award reasonable attorney's fees to the party against which the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.²⁴⁸

Both sections 2-302 and 2A-108 authorize courts to refuse to enforce contracts in whole or in part based on unconscionability.²⁴⁹ The first subsections of the two provisions are substantially identical in content.²⁵⁰ The provisions both require a finding of unconscionability "as a matter of law," setting a high standard for judicial interference with contract terms.²⁵¹ Both sections allow a court to refuse enforcement when the unconscionability existed "at the time" the contract was made.²⁵² In the first section of each provision, the court may also "limit" the application of the unconscionable part of the contract ("term" or "clause") to "avoid any unconscionable result."²⁵³

The scope of the inquiry set by each provision is substantially similar.²⁵⁴ The two provisions each require that the court afford parties an opportunity "to present evidence" relating to the putative unconscionability of the agreement.²⁵⁵ Subsection (3) of 2A-108 sets

248. *Id.*

249. *See id.* §§ 2A-108, 2-302.

250. *See id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

a standard substantially similar to that of subsection (2) of 2-302.²⁵⁶ Subsection (2) states: “If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.”²⁵⁷ This provision provides the standard of a “reasonable opportunity to present evidence.”²⁵⁸ Likewise, subsection (3) of UCC 2A-108 sets a standard of reasonable opportunity to present evidence relating to the bargain.²⁵⁹ It states: “Before making a finding of unconscionability . . . the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.”²⁶⁰ Although the formulation of this language is different than that of subsection 2-302, it presents the same test of a reasonable opportunity to present evidence.²⁶¹ In addition to the reasonable opportunity standard, each section defines the inquiry as relating to “setting, purpose, and effect” of the lease contract or clause.²⁶² Subsection 2-302 uses the formulation of “commercial setting, purpose, and effect” to describe the scope of the evidence to be considered by the court.²⁶³ Subsection 2A-108 omits the term “commercial” from the list of “setting, purpose, and effect,” giving the same description of relevant evidence that the party must have a reasonable opportunity to present.²⁶⁴ Thus, the description of the scope of the evidence to be considered by the court is identical in subsections 2-302 and 2A-108.²⁶⁵ The official comment to section 2A-108 notes that subsection (1) of 2A-108 is “taken almost verbatim from the provisions of section 2-302(1).”²⁶⁶ Additionally, it notes that subsection (3) of 2A-108 is “taken from the provisions of

256. *Id.*

257. *Id.* § 2-302(2).

258. *Id.*

259. *Id.* § 2A-108(3).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* § 2-302(2).

264. *Id.* § 2A-108(3).

265. *See id.* §§ 2A-108, 2-302.

266. *Id.* § 2A-108 cmt.

section 2-302(2),” and that subsection (3) “has been expanded to cover unconscionable conduct.”²⁶⁷

Although the language and basic purpose of the provisions on unconscionability in Article 2 and Article 2A are similar, the provisions include some significant differences. UCC 2-302 in its entirety provides essentially the same language and test as subsections (1) and (3) of 2A-108.²⁶⁸ An important difference between the sections is that 2A-108 sets forth two additional subsections, providing more detail and context than is present in UCC 2-302.²⁶⁹ Subsection (2) of UCC 2-108 focuses on the issue of unfair process in the specific setting of consumer leases.²⁷⁰ It states:

With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.²⁷¹

This subsection authorizes a court to “grant appropriate relief” when it finds a lease contract or clause was “induced by unconscionable conduct.”²⁷² The subsection also provides general language authorizing such relief when “unconscionable conduct has occurred in the collection of a claim.”²⁷³ Subsection (4) to UCC 2A-108 provides for attorney’s fees when a court finds a lessor acted unconscionably in a consumer lease.²⁷⁴ The subsection also requires attorney’s fees in favor of a lessor charged with unconscionability when the court “does not find unconscionability” and finds that the lessee claiming unconscionability “brought or maintained an action the lessee knew to be groundless.”²⁷⁵ Subsection (4) expressly notes that attorney’s fees are not controlled by “the amount of the recovery

267. *Id.*

268. *See id.* §§ 2A-108, 2-302.

269. *Id.*

270. *Id.* § 2A-108(2).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* § 2A-108(4).

275. *Id.*

on behalf of the claimant.”²⁷⁶

E. Exclusion of the Factor of Bargaining Leverage

UCC section 2-302 limits the scope of the issue to exclude leverage or market power of the dominant party and notes that the principle “is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”²⁷⁷ Considering the exclusion, the predictable next step in the evolution of form contracts may be a move toward greater clarity. In the past, courts have rejected the effect of a standard form based on the theory that the lessee had no reason to know its purported effect.²⁷⁸ Giving the consumer more information about the terms in a clear and straightforward manner may dispense with the argument that the consumer was unaware of a provision that would have been a deal breaker. The Internet seems to provide the optimal forum to foreclose an argument by a consumer that he did not know or understand a term. In the terms of 2A-108, it is less likely that a court will find “as a matter of law” that a lease was “induced by unconscionable conduct” when the term is available on the Internet for anyone diligent enough to read the online posting.²⁷⁹ This reasoning fails to note the reality that consumers are not motivated to read provisions when they have no power to bargain for an alteration of the term.²⁸⁰ One might argue that the consumer could reject the arrangement with the offending party and enter a contract with another car rental company. The problem with this argument is that it is unlikely that the consumer will find a company that presents a form without the same term or other terms that are equally onerous from the consumer’s point of view.²⁸¹

Some of the forms present provisions in clear language that tell the consumer the effect of the contract, effectively preventing an argument under UCC 2A-108(2). Arguably, the renter should know

276. *Id.*

277. *Id.* § 2-302 cmt. 1.

278. *See, e.g.,* Magliozzi v. P & T Container Service Co., Inc., 614 N.E.2d 690, 692 (Mass. App. Ct. 1993) (noting lessee had no reason to know ticket purported to be a contract).

279. *See* U.C.C. § 2A-108.

280. *See, e.g.,* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

281. *See supra* Part III.B (explaining the similarity among the terms available for various car rental companies).

the effect of the agreement because it is so plainly communicated to him on the Internet site or in the printed terms and conditions. In the language of Restatement section 211, the dominant party would not have “reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term”²⁸² since the renter has full access to the provisions so clearly stated that he should understand them fully. Thus, the disputed term should be included as part of the agreement.

VI. THE TEST OF REASONABLENESS

Although the test of consideration plays a role in preventing state domination of contracting, even traditional contract doctrine recognizes that the hands-off approach represented by the doctrine of consideration is not appropriate in all contexts. In some contexts, such as modification and covenants not to compete, contract law employs a more demanding standard to scrutinize the deal. Not all promises are judged by the test of consideration alone. For example, courts judge modified contracts by a reasonableness standard or a good faith standard.²⁸³ Similarly, under both Article 2 and 2A, the basis for considering that a party’s expectation of receiving due performance may be impaired is judged by a reasonableness standard.²⁸⁴ Likewise, the party seeking to enforce a covenant not to compete must establish that the covenant is fair and reasonable, making these contracts subject to a higher standard of proof. In these and other contexts, the law judges whether a contract is fair and reasonable.²⁸⁵ The difference between these areas and the typical question of whether the deal is supported by consideration arises from recognition that the market does not operate freely in these areas.²⁸⁶ For example, in the modification context, the baseline of the

282. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

283. The text of UCC Section 2-209(1) dispenses with consideration as a requirement for modified sales contracts but the official comments to the section impose a requirement that modifications be in good faith to be enforceable. *See* U.C.C. § 2-209(1) & cmt. 2. Section 89 of the Second Restatement of Contracts sets forth alternative grounds for enforcement of a modification. RESTATEMENT (SECOND) OF CONTRACTS § 89. The thrust of the requirements is that to be enforceable, modifications must pass a test more rigorous than consideration. *Id.* For example, it provides that a modification is enforceable if it is “fair and equitable in view of circumstances not anticipated by the parties when the contract was made.” *Id.*

284. *See* U.C.C. §§ 2-609 and 2A-401.

285. *Id.*

286. For example, adequate assurance of performance may be required when the normal

contract already establishes each party's original assessment of the deal.²⁸⁷ Changes to the contract are not viewed on a par with the original deal because the parties have generally invested in the deal, want to hold the deal together, and are not able to revive other bids without undue cost.²⁸⁸

If the parties lack freedom to bargain, however, refusing to judge the content of the bargain can operate to hold parties to bargains that are far from fair or reasonable. The presumption of fairness that has attached to the bargained-for-exchange as a check on government power is far less defensible in a context in which the attribute of a bargain is absent. The consumer, as the non-dominant party, may have no realistic choice in the matter since other rental agreements on the market may include the same or other, equally undesirable terms. Likewise, determining the content of various form agreements presented by other corporate lessors involves significant time and effort on the part of the consumer. Additionally, the concept of unconscionability has a comparative aspect, making it difficult for a party who agrees to a term as part of an agreement to argue effectively that the term is unconscionable, especially if that term is standard in the industry.²⁸⁹

Comparison of these points of reality from the consumer's perspective argues for moderation of the system of mass contracting. The pace of a mass production market may render individual contracting impossible.²⁹⁰ However, the needs of a mass production market do not necessarily mean that a standard of reasonableness for judging such contracts would be impossible in the current system. The need to facilitate a mass production market means that contracting must be streamlined.²⁹¹ It does not suggest, however, that the more rigorous test of reasonableness is impossible or that the

relationship between contracting parties begins to break down such as if buyer is late on payments or if seller fails to deliver the goods on time. See U.C.C. § 2-609 cmt. (noting that neither party is free to stop performance without being in breach).

287. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a ("like offers and guarantees, such adjustments are ancillary to exchanges").

288. See generally, DiMatteo, *supra* note 150, at 303-07.

289. See U.C.C. § 2-302 cmt. ("The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable.").

290. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a.

291. *Id.*

presumption of a fair bargain of today's contract law strikes the best balance that mass contracting can achieve. Despite clear indications that Article 2A is not primarily a consumer protection statute, it includes some rules that provide policing of contracts in the area because the statutory terms "may not be varied by agreement in the case of a consumer lease."²⁹² Such terms relate to warranties in consumer leases,²⁹³ limitations on recovery of consequential damages from a consumer in a consumer lease contract,²⁹⁴ limits on choice of law,²⁹⁵ and the prohibition against acceleration at will.²⁹⁶ Extension of the philosophy supporting these controls would provide efficient policing without significant burden on the judiciary. Moreover, the use of such limits are not subject to the criticism that may apply to a broad test of reasonableness, that is, that inclusion of a reasonableness standard would undermine certainty for lessors, and, thus, would impose costs and inefficiencies on the system.

VII. CONCLUSION

Article 2A and modern contract law endorse unilateral private ordering by form contracts, accepting the presumption of free bargaining to justify a hands-off approach and minimal judicial scrutiny of such transactions. Although form contracts are bilateral in the sense of consideration, they present unilateral private ordering with regard to contract terms. Thus, consumers who wish to retain the standard default rules of contract law—such as the recovery of consequential damages or judicial resolution of disputes—have no choice but to forego the deal.

The presumption that form contracts present the same social utility associated with mass production—the standard justification for such arrangements—accepts the process as a cumulative good.²⁹⁷ Arguably, the fact-intensive and time-consuming enterprise of reviewing form transactions in a meaningful way militates against serious judicial scrutiny of form contracts except by the most porous

292. U.C.C. § 2A-104 cmt. 4 (1987) (amended 2003).

293. *Id.* § 2A-214 (quoting the language necessary to disclaim warranties including "merchantability" and "the implied warranty of fitness" in a consumer lease).

294. *Id.* § 2A-530.

295. *Id.* § 2A-106.

296. *Id.* § 2A-109.

297. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

test such as the test of unconscionability. Thus, the dominant party's choice of legal rules is seen as a reduction in costs that is an "advantage of all concerned."²⁹⁸ It may be that consumers are the beneficiaries of lower costs of products and services because of the efficiency of form contracting. The presumption that consumers willingly trade reasonable terms for lower prices fails to take into account the loss to individual consumers and the aggregate loss of consumers' ability to seek an alteration in a term or to enjoy knowing that dictated terms are subject to a reasonableness test. While the use of forms by corporations provides empirical evidence of their preference on the issue, little information is available on the preference of consumers.

Standardized contracting is inevitable in today's fast paced, world-wide markets. Individual negotiation of contract terms is as much a thing of the past as physician house calls or looking for the union label. Nevertheless, the current standard for judging such contracts is not necessarily inevitable or the best for balancing the competing needs of consumers and businesses. Article 2A limits the ability of parties to agree to some significant terms such as acceleration clauses and forum selection clauses. An expansion of the technique of limiting the scope of choice in other areas such as arbitration could level the playing field and provide protection against the clear possibility of overreaching by the party drafting the forms. Given the power of subtle changes in legal mechanisms, it is worthwhile to consider whether moderation of the legal test for enforceability could achieve a better balance than is possible under an approach of unilateral private ordering.

298. *See id.*

TABLE 1. CAR RENTAL COMPANIES

COMPANY NAME	URL/ PHONE #	ACCESS TO CLAUSES
Thrifty	http://www.thrifty.com/about/generalpolicies.aspx (general policies) Customer Service: 1-800-847-4389	Online
Budget	https://www.budget.com/budgetWeb/html/en/customer/rentalpolicies/rentalpolicies.html Customer service: 1-800-214-6094	Online
Enterprise	http://www.enterprise.com/car_rental/home.do Internet Tech Line: 1-877-858-3884	Pick up at Location
Hertz	http://www.hertz.com Web Assistance: 1-877-826-8782	Reserve vehicle
Avis	http://www.avis.com/AvisWeb/JSP/global/en/programs/consumer/PrefMbrGlobalTermsMiddle.jsp (preferred terms) Customer Service: 1-800-352-7900	Online (63 pages)
NationalCar (only online)	www.nationalcar.com Webmaster: 1-888-501-9010	Reserve vehicle
Alamo	www.alamo.com > rental policies > select Customer Service Customer Service: 1-800-462-5266	Online

TABLE 1. CAR RENTAL COMPANIES (CONT.)

COMPANY NAME	URL/ PHONE #	ACCESS TO CLAUSES
Dollar	http://www.dollar.com/about/general_policies.aspx?r=f8ac4ad5aad642c0876b1c21ecc62d97 (general policies) Reservation Center: 1-800-800-3665	Online
Advantage Rent-A-Car (ARAC)	http://www.arac.com/terms.htm (terms) Customer Service: 1-800-777-5524	Online
Payless (only online)	www.paylesscarrental.com Customer Service: 727-321-6352	Reserve vehicle

