

COMMENTS ON MODERN ADHESION CONTRACTS
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I. What are the conditions under which we would want legal intervention in standard form contracts? Are those conditions satisfied in modern adhesion contracts?

A. The underlying assumption of consumer regulation is that unregulated markets will exploit consumers. The negative implication is that if markets are working pretty well, the need for regulation diminishes.

B. Assuming that most consumers fail to read terms or misinterpret the consequences of terms, is regulation necessarily required?

C. What are the kinds of errors that buyers make, assuming that they are aware of terms?

D. To what extent, if any, does the market provide substitutes for nonreading buyers or other checks on seller exploitation of nonreading buyers, so that the interests of the latter are represented in market transactions?

II. There are conditions under which sellers might internalize the preferences of nonreading buyers, and thus not take advantages of opportunities to exploit buyer ignorance or error.

A. Will sellers be able to distinguish readers from nonreaders, either *ex ante* or *ex post*?

B. Even where sellers can't distinguish different sets of buyers, readers may fail to represent nonreaders because the same contractual clause affects each group differently.

C. In some cases, however, one set of sellers may be able to attain a competitive advantage by correcting errors made by consumers or by improving the terms that are most salient to consumers, e.g., warranties.

III. When buyers suffer from defective goods and are prevented from seeking redress as a result of a clause within a standard form contract, the salience of the event can obscure the possibility that even buyers who are disadvantaged by it *ex post* would have preferred it *ex ante*.

A. Consider the clauses that have been the basis of much of the criticism of modern standard form contracts, such as arbitration clauses or forum selection clauses. Are there conditions under which buyers as a class would prefer these terms, even if, *ex post*, a particular buyer regrets them?

1. Initially we might want to know whether the purported savings that sellers enjoy from such clauses are priced into contracts and passed on to buyers?

2. Buyers who rationally would not pursue redress against sellers might be willing to accept a reduced price in return for such a clause.

B. An alternative explanation that reduces the offensiveness of pro-seller clauses is the possibility that sellers will underenforce ostensibly pro-seller terms.

1. Underenforcement may be consistent with extralegal constraints on seller misbehavior, such as investment in reputation.

2. Sellers may be able to observe consumer misbehavior, but not verify it, and thus would prefer a self-help mechanism. A relatively harsh clause, the effect of which can be waived by the seller, provides such a mechanism.

3. Non-misbehaving consumers may themselves prefer a seller underenforcement strategy, as these buyers may anticipate easy resolution of their claims, while avoiding the costs that the seller incurs (and may seek to pass on) by mollifying misbehaving buyers.

C. It is plausible that sellers use terms to segment buyers in a less benign way than I have suggested. Sellers may use contract terms in an *in terrorem* effort to deter requests for redress,

or as a “first offer” used as an initial response to buyer complaints. This may cause many, if not most buyers to accept the contractually allocated risk. Alternatively, sellers may exploit nonsalient terms that rarely become part of the buyers’ calculus in deciding whether to purchase a good or service.

D. Even if markets do a pretty good job of allocating risks, there may be circumstances under which there are distributive reasons to prefer the nonenforcement of even fairly priced pro-seller contract terms.

IV. Of course, any mechanism that seeks to detect oppressive or exploitative terms will suffer from flaws. Thus, even though markets will certainly be unable perfectly to internalize the interests of buyers (or all sellers), it is useful to recognize the institutional limitations that courts face in attempting to determine the extent to which terms that are likely to be unread should be denied enforcement.

A. Llewellyn recognized in a cryptic statement that “the examination of the standardized contract of a particular modern line of trade . . . is not a task for which a common-law judge’s equipment has peculiarly fitted him.”

B. Courts do not have the tools to reverse engineer contracts and determine what, if anything, was traded for what appears to be a particularly harsh clause.

C. Courts are not in a very good position to balance the interests of buyers as a class against the interests of particular buyers, i.e., to make the choice between statistical buyers and identifiable buyers.

D. The result is that courts are likely to make errors that will generate both false positives and false negatives. Courts, like markets, are imperfect in their ability to allocate risks. Ideally, a first-year course in Contracts would look at the relative ability of courts, markets, and other

decision mechanisms (legislatures, administrative agencies) to allocate risks in a manner that is consistent with some overarching social objective.