Adhesion Contracts Discourage An Equitable Playingfield, creating a "Take it or Leave it Epidemic"

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Introduction

A consumer saves up for months intending to purchase a computer to complete homework and save himself the burden of going to the library each night. One fateful day he goes to the store and purchases a computer costing six hundred dollars. Excitedly the consumer gets home, begins to unravel the packaging, and sets up his new computer. After the personalized selection feature the screen acclaims, "You're almost there." But there is one last thing he must do to finally own his new computer, he must select "yes" on the terms and agreements. The license agreement consumers must sign expects consumers to select yes, otherwise the product is not functional. These agreements are not only found in computers sales, but are present in conjunction with services and products that consumers frequently use in modern society. These types of contracts are contracts of adhesion, "take it or leave it contracts," sometimes referred to as boilerplate contracts. The contracts are defined as "standardized contracts offered to consumers on a 'take it or leave it' basis without giving the consumer an opportunity to bargain for terms that are more favorable.[1] Consumers must agree to the boiler plate terms such as price and the overall logistics that do not go in depth into the effect and overall result of the policies customers sign. Under the common law, these contracts are treated as binding contracts.[2] In

[1] Legal Dictionary, https://legaldictionary.net/adhesion-contract/, (last visited March 14, 2019.)

[2] *Common Law and Uniform Commercial Code Contracts,* Lumen, https://courses.lumenlearning.com/workwithinthelaw/chapter/formation-and-types-of-contracts/, (last visited March 14, 2019.)

order to express agreement, a consumer must put their signature at the end of the document and usually select that they "agree to the terms and policies set forth by *X* company/corporation". This signature and agreement to the policies commit the consumer to being required to legally follow the policies (whether or not they read the terms).[3]

History

The concept of contracts was adopted under the British common law back in the 14th Century.[4] Under 14th century common law, contracts were defined as agreements between two capable parties in order to create a level playing field. When formulating a contract, a party must agree to all terms, there must be evidence of assent (willful acceptance), the contract must be for a legal purpose, and the contract must be signed by an individual who has capacity to understand the terms of the contract.[5] Under common law, contracts submitted to a court of law were analyzed and broken down in order to find an even playing field for both parties. It was not until 1919 when Edwin W. Patterson wrote an article on the processes of French Civil Law that was published in the Harvard Law Review that courts throughout the United States began to adopt the legal theory of adhesion contracts.[6]

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[3] Id.

[4] A.W. Brian Simpson, *A History of the Common Law of Contract: The rise of the Action of Assumpsit,* 1987, Oxford Scholarship Online, March 2012, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198255734.001.0001/acprof-9780198255734 , (last visited March 18, 2019.)

[5] *Adhesion Contracts,* Wex, Cornell Law School, https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29, (last visited March 14, 2019.)

[6] Edwin Patterson, *Historical and Evolutionary Theories of Law,* Columbia Law Review Vol51, No.6, 1951, JSTOR,

One of the biggest disputes that arose around this concept in the United States was the *Steven v. Fidelity & Casualty Co. of New York et al,*[7] where deceased George A. Steven purchased life insurance. The insurance Mr. Steven purchased ensured reparations upon his death while on an aircraft provided the policy holder had an issued Certificates of Public Convenience and Necessity or any other authorizations for air passengers.[8] Upon the death of Mr. Steven in a connecting flight that crashed, Mrs. Steven claimed the policy benefit the insurance had promised upon purchase. However, she soon discovered that because Mr. Steven was not issued Certificates of Public Convenience and Necessity or any other authorizations for air passengers in Illinois or Indiana, Casualty Co. of New York would not issue the policy benefit. Defendant Casualty Co. of New York stated that it did pay policy benefits if the air carrier issued proof of authorization before the passenger became deceased. The terms of this contract were interpreted by the Court in such a way that they found the "accident in question did not come within the coverage and insurance provided for in the policy." [9]

While this case might look rather straightforward, it served as a pioneer for adhesion contracts as the Judges in this case analyzed the case based upon the policies of the contract Mr. Steven signed and submitted to Fidelity & Casualty Co. of New York. But the Judges failed to adhere to a legal practice called *contra proferentem,* which is a term that establishes the interpretations of contracts against the drafter and

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https://www.jstor.org/stable/1119252?seq=1#page_scan_tab_contents , (last visited March 19, 2019.)

[7] *Steven v. Fidelity & Casualty Co. of New York et al* , 58 Cal.2d 862 (1962), https://scocal.stanford.edu/opinion/steven-v-fidelity-casualty-co-27180, (last visited March 14, 2019.)

[8] Id.

[9] Id.

eliminates the factor of ambiguity.[10] Based upon the *Steven v. Fidelity & Casualty Co. of New York* case, the concept was established as a precedent that courts throughout the United States began to adopt when engaging in contract analysis. Adhesion contracts began to be more and more popular tools of corporations. While analyzing the case of *Steven v. Fidelity & Casualty Co. of New York*, one is able to see that the simplicity of the case was the result of the fact that the plaintiff, Mrs. Steven, was not given enough opportunity to voice her interpretation of the contract and her knowledge of the facts that substantially affected the case resulting from the court's failure to adher to *contra proferentem*.

Analysis

Even though the plaintiff, Mrs. Steven, raised a final issue where she expressed that "the insuring clauses covered only a 'scheduled air carrier,' a phrase that had been agreed upon by all insurance carriers writing this type of insurance, was in restraint of trade and therefore, illegal,"[11] the court ruled against the plaintiff thereby disregarding this statement and surpassing *contra proferentem*, basing the Court's analysis upon stated provisions in the insurance policy as provided in the vending machine. The insurance was purchased when Mr. Steven held a ticket on a 'scheduled air carrier.' Through no fault of his own, the flight was cancelled and the only option for him and 5 other men was to take the Turner flight home. But because the Turner flight was not a scheduled air carrier, the court interpreted the provision that

[10] *Contra Proferentem Doctrine Law and Legal Definition,* USLegal.com, https://definitions.uslegal.com/c/contra-proferentem-doctrine/, (last visited March 14, 2019.)

[11] *Steven v. Fidelity & Casualty Co. of New York et al,* 58 Cal.2d 862 (1962), https://scocal.stanford.edu/opinion/steven-v-fidelity-casualty-co-27180, (last visited March 14, 2019.)

referenced the 'scheduled air carrier' as compelling. Did Mr. Steven get a chance to negotiate the terms or to even indicate his assent? The policy was purchased in a vending machine.[12] But the court chose to limit the insurer's exposure to risk by excusing their promise to pay based upon a technicality that it was highly unlikely Mr. Steven saw or understood. The question is why did the court make this ruling?

According to Judge Christopher M. Kaiser of the U.S. Patent and Trademark Office, adhesion contracts reduce transaction costs and help lubricate the gears of the market.[13] In other words, adhesion contracts are favorable to the economy as there is no room to negotiate the details of the contracts and thus there is much to gain for the companies who call the shots and format the contracts so that their exposure to liability is minimal. Companies do not need to offer reparations for incidents that mildly contradict their policies and the cases become much simpler for the court. These contracts are highly unconscionable and express the powerless nature that consumers face while going against some of the most one-sided clauses that dictate each and every transaction that consumers undertake preventing them from an equitable playing field. Judges and court of laws are able to see the unconscionability of the contract and yet the contracts are still favored because companies put forth a substantial argument for the benefits of efficiency.

[12] Id.

[13] Christopher Kaiser, *Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuit's Formalistic Approach to Contracts of Adhesion*, Chicago-Kent Law Review, Vol. 80, Dec. 2004, https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3488&context=cklawreview, (last visited March 14, 2019.)

Current Status

Today, many companies use adhesion contracts. From day to day transactions to transactions that will change the consumer's life drastically. The take it or leave it epidemic has taken over the United States. The take it or leave it epidemic refers to the idea that through every minor and major transaction, companies have adopted the tendency to employ adhesion contracts that bind consumers who either can't understand the verbage or are often assured that they don't need to read it. Because negotiations are rarely available, consumers are also left with the feeling that if this is a product or service that they need, they're just going to have to do whatever the company says. Consumers rarely have the incentive or the option to read, discuss, or refute boiler plate contracts.

These company mass-produced contracts are meant to be onerous for the consumer and intimidating. The number of pages many times challenges the consumer to read it all when they may have a limited amount of time for substantial review. For example, when in a wholesale club often cashiers will ask customers to renew memberships by simply agreeing to the terms popping on the small screen used for consumers to pay. Sometimes customers are asked to sign agreements that they cannot even preview or review prior to execution. In the midst of all the craziness and hurried pace that supermarkets or in this case wholesale clubs run, how can one expect the consumers to sit and look through all the terms and agreements which are binding, particularly when all they have to do is select 'yes'?

These adhesion contracts that consumers are subjected to are very much preferred by the companies because these types of contracts help facilitate transactions favorable for companies, not the consumers.

These contracts are meant to be signed on a, "do not read, just sign," basis under the guise of representing boiler plate standard provisions that express basic terms while expecting consumers not to object. Adhesion contracts tend to set forth their policies after the consumer spends the money on the device and then present non-negotiable policies that the consumer cannot meaningfully dispute. However, if one puts forth a hypothetical situation where all companies establish non-adhesion contracts for their products then one would see that the market would be somewhat stuck in a slower pace that would enable contract and policy review. Companies would take weeks or months to conclude a transaction and thus transactions in consumer goods and services would significantly slow down. Within this hypothetical situation one can further expect a lot of negotiation from the consumer to the companies. This would cause some disorganization within companies' policies and thus unfairness in the treatment of consumers because each consumer and contract would be treated differently.

Recommendation

After analyzing the reality of current day adhesion contracts, it seems that a solution might be to submit a two-part contract. In these two-part contracts, consumers would sign an agreement that is consistent with boilerplate terms and legally acceptable standards, perhaps based upon ethics. After the agreement consisting of the boiler plate terms are submitted, an email or text with a link would then be sent to the consumer further explaining wide-ranging concepts and requiring a final signature. What this solution boils down to is the elimination of the terms that consumers review for the first time *after* they are already fully bound by the contract. Instead, the consumer would be able to agree to the terms he or she is given on the sales floor and not have to risk the surprise clauses.

Adhesion contracts over five thousand dollars should be required to be treated with the doctrine of reasonable expectations. When applied, the doctrine of reasonable expectations states "where there is ambiguity . . . it is resolved in favor of the insured's reasonable expectations."[14] According to a Cornell Law School review applying this principle would, ". . .invalidate parts of the adhesion contract . . . the weaker party will not be held to adhere to contract terms that are beyond what the weaker party would have reasonably expected from the contract." [15] Requiring this principle for transactions over five thousand dollars would not be interfering with the free market, instead it would serve as an equitable playing field for consumers. This option would allow consumers to choose a different item if they disagree with the contract promptly after their purchase. Instead of having to open a computer, set it up and read the terms and agreements, or having the terms and agreements mailed two to three weeks after the purchase, the consumer would receive these terms instantly. This solution would help both the consumer and the merchant. Applying this principle of law would show the consumers that businesses are willing to provide better services and care for those they serve. One should not need a Juris Doctorate degree in order to accurately and consistently understand the numerous contracts they are bound to transact on a daily basis.

Conclusion

Adhesion contracts appear to be above the law. According to the Cornell Law School review, "Courts carefully scrutinize adhesion

[14] *Adhesion Contracts,* Wex, Cornell Law School, https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29, (last visited March 14, 2019.)
[15] Id.

contracts and sometimes void certain provisions because of the possibility of unequal bargaining power, unfairness, and unconscionability. Factoring into such decisions include the nature of the agreement, the possibility of unfair surprise, lack of notice, unequal bargaining power, and substantive unfairness."[16] The rule of law is a guideline and should be treated as such. If contracts require informed assent on the part of both parties, adhesion contracts should not be enforceable. And loopholes in the interpretation of facts where parties want to make a distinction between procedural issues v. substantive ones, should not be allowed.

[16] Id.