An Agricultural Law Research Article

Adhesion Contracts, Bad Faith and Economically Faulty Contracts

by

J.W. Looney and Anita K. Poole

Originally published in DRAKE JOURNAL OF AGRICULTURAL LAW
4 DRAKE J. AGRIC. L. 177 (1999)

ADHESION CONTRACTS, BAD FAITH, AND ECONOMICALLY FAULTY CONTRACTS

J.W. Looney and Anita K. Poole***

I. INTRODUCTION

In his 1994 article, "Why Own the Farm if You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protection of Grain Crops,"[1] Professor Neil Hamilton explored the increasing use of contract production in agriculture particularly with respect to identity-preserved grains and specialty crops.[2] Of course, the trend toward increased use of contracts is not limited to grain production. Poultry production is largely by contract; swine production is increasingly so.[3]

In his review, Hamilton included sample provisions accompanied by a thoughtful analysis of the potential legal issues raised by the increased use of such contracts.[4] Among the provisions raising potential problems include those stating that the risk the crops may not be accepted by the purchaser is shifted totally to the producer; that price discounts for poor quality could be applied at delivery; that

---

* Wylie H. Davis Professor and Distinguished Professor of Law, University of Arkansas School of Law; Member of Arkansas, Missouri, and Virginia Bars.

** Research Assistant and LL.M. Candidate, University of Arkansas School of Law.

1. Neil D. Hamilton, *Why Own the Farm if You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Production of Grain Crops*, 73 NEB. L. REV. 48 (1994).

2. *See* Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051, 1055-56 (1995).

3. *See id.*; Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1208 (1995). For a review of the benefits of contract production from both the viewpoint of the company and of the producer, as well as some of the potential legal problems, see NEIL D. HAMILTON, A FARMER'S GUIDE TO PRODUCTION CONTRACTS (1995).

4. *See* Hamilton, *supra* note 1, at 67-76.

timing for payment could be altered; and that the contract could be terminated for reasons unrelated to production.[5] Provisions also may be included, unfamiliar to farmers, related to title to the crop, risk of loss, growing obligations, rights of third parties, choice of law or forum, integration clauses, and provisions incorporating other law by reference.[6]

While such contracts may be negotiated individually with "dickered" terms, in most cases the agreements are standard form contracts drafted by an entity with whom the farmer is dealing on something less than equal footing. The bulk of such transactions occur with the farmer "unlikely to have read the standard terms before signing the document" and "unlikely to have understood them if he has read them."[7]

Traditional contract doctrine supported the enforceability of form terms by treating the parties as if they had read and understood the document—the "duty to read" idea—reinforced by strong traditions of freedom of contract.[8] "Assent" was said to cover not just the "dickered" terms or ones discussed, but all terms in the document even if one party had not read or understood them.[9] Increasingly, however, modern courts have intervened in such contracts to soften the harshness of the traditional doctrine, to erode any presumption of enforceability. Courts have used various techniques to achieve this result including interpretative maxims favoring the non-drafting party, concluding that some terms are not part of the contract (e.g., inadequate reference to reverse side of the document) or refusing to include terms incorporated by reference.[10] Furthermore, the equitable concept of unconscionability allows courts to police contracts for fairness both in formation and in application.[11] Likewise, the willingness of courts to imply an obligation of "good faith" in the performance and enforcement of contracts specifically recognized by the Uniform Commercial Code (UCC), provides another tool by which fairness may be evaluated.[12] These concepts are the focus of the remainder of this Article. Agricultural examples are supplied, as appropriate, to illustrate the general principles.

---

5. *See id.* at 62-66.

6. *See id.* at 72-76. While the purpose of incorporating such laws by reference may be legitimate, for example, to assure compliance with federal procurement regulations, the provisions would, nonetheless, be unfamiliar to farmers. *See id.* at 76.

7. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 n.21 (1983) (citing sources accepting this "popular conception of the contract of adhesion").

8. *See id.* at 1187.

9. *See id.* at 1185.

10. For examples of these techniques, see E. ALLAN FARNSWORTH, CONTRACTS § 4.26, at 295-300 (3d ed. 1999).

11. *See id.* § 4.28, at 307-17.

12. *See id.* § 7.17, at 503-09.

II. CONTRACTS OF ADHESION

Adhesion contracts, often identified as "standard form" contracts offered on a "take it or leave it" basis, have posed special difficulties since their initial identification as something other than "ordinary" contracts. For the courts, the analysis of such contracts often involves the application of special rules. For the scholars, the difficulty has been a sixty-year effort in trying to decide whether such agreements are really contracts at all and, if so, a conceptual basis for, or refusal of, enforcement. The difficulty is both one of interpretation and one of enforceability.

The term contracts of "adhesion" may have achieved its first use in this country in a 1919 article by Edwin W. Patterson in which he referred to such agreements as standard contracts that foreclose any term-by-term bargaining, essentially a take it or leave it contract.[13] Two years previously, Nathan Isaacs had referred to standard form contracts as frequently used.[14] Subsequently, a number of prominent commentators have addressed the increased usage of such contracts, starting with Fredrich Kessler's classic article in 1943.[15] Other notable scholars who have evaluated these issues and legal consequences include Karl Llewellyn,[16] Arthur Leff,[17] and W. David Slawson.[18]

In more recent years, Professor Todd Rakoff reassessed the enforceability of such contracts.[19] He identified seven characteristics in a "model" contract of adhesion:

> 1. The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
> 2. The form has been drafted by, or on behalf of, one party to the transaction.
> 3. The drafting party participates in numerous transactions of the type represented by the form and enters into those transactions as a matter of routine.

---

13. *See* Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

14. *See* Nathan Isaacs, *The Standardization of Contracts*, 27 YALE L.J. 34, 37-39 (1917).

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

16. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); *see also* Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).

17. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

18. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

19. *See generally* Rakoff, *supra* note 7, at 1173 (discussing enforceability of adhesion contracts).

> 4. The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
> 5. After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
> 6. The adhering party enters few transactions of the type represented by the form-few, at least in comparison with the drafting party.
> 7. The principle obligation of the adhering party in the transaction considered as a whole is the payment of money.[20]

In addition, Rakoff points out that a "normal concomitant" of the use of such documents is that the adhering party is "unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them."[21]

The initial difficulty for courts was to accept the notion that "freedom to contract" was not "freedom to adhere."[22] The problem was not just one of interpretation, although judicial opinions did, and do, sometimes avoid confrontation with notions of "freedom to contract" by "interpreting a contract to mean what it does not mean."[23] The issue calls into conflict another traditional view—the objective theory of contract, giving rise to the "duty to read" concept—with a "modern" view exemplified by the Second Restatement of Contracts. Under the traditional view, a party's signature on a document which the party had an opportunity to read signifies assent regardless of whether the party actually read or understood the document.[24] Furthermore, the assent extends to all terms of the document.[25] The traditional parol evidence rule along with rules of interpretation, such as the "plain meaning" rule, are also relevant mechanisms for solidifying this view. That this view is unrealistic in modern commercial transactions is obvious

---

20. *Id.* at 1177.

21. *Id.* at 1179.

22. Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953). Professor Albert A. Ehrenzweig called for this recognition just ten years after Kessler's classic article.

23. Alfred W. Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1186 (1964). Meyer counts Llewellyn as a critic of this "back door" approach that leads to "intentional and creative misconstruction," "confusion," and "unpredictability." *Id.* at 1186 n.29 (quoting K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939)). Llewellyn is often cited for saying "[c]onvert tools are never reliable tools." K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

24. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 97, at 503 (3d. ed. 1990).

25. *See id.* Professor John Murray refers to this as the "flagellant" view, i.e., "a party who later complains that he failed to read the form is told to live with the consequences of that failure in the hope that he will never sin again." *Id.*

when confronted with the extensive use of standard forms, many of which would meet Rakoff's definition of adhesive.[26]

The Second Restatement of Contracts represents what might be termed the "modern" approach—one that at least moves beyond mere interpretative guidance and focuses on assent. Section 211, entitled "Standardized Agreements," reads as follows:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.[27]

While the comments to this section suggest that one factor to consider is whether the adhering party had an opportunity to read the term,[28] the language seems to conclude that a term should be read out of the contract if an ordinary reasonable person would not expect such a term, at least if the other party had reason to know the adhering party would not agree to such a term if he knew it was contained in the document.[29] In this case "reason to believe" may be inferred. According to the comments, it could occur if the term is "bizarre or oppressive," if it "eviscerates the non-standard terms explicitly agreed to" or if it "eliminates the dominant purpose of the transaction."[30]

Professors Calamari and Perillo refer to the Second Restatement as a "new kind" of objective approach.[31] They state that "[r]ather than seeking out true assent on a case by case basis, it places the duty on the courts to consider the essential

---

26. *See* Rakoff, *supra* note 7, at 1188-89.

27. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

28. *See id.* § 211 cmt. f.

29. *See id.* § 211.

30. *Id.* § 211 cmt. f. This is similar to an unconscionability analysis. *See* MURRAY, *supra* note 24, § 97, at 505. *See also* discussion *infra* Part III.

31. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.45, at 391 (4th ed. 1998).

fairness of the printed terms, both from the viewpoint of surprise and inherent one-sidedness."[32]

They characterize the actions of many modern courts as "subverting" the duty to read when adhesion contracts are involved by striking terms due to lack of true assent, or because they are unconscionable or contravene public policy.[33] They conclude that, aside from the actions of courts, if industries who use such forms do not police themselves for fairness, then administrative agencies or legislators will dictate the terms such as is now the case with insurance policies.[34] A plea that agricultural industries do just that was featured in a *Feedstuffs* editorial in 1994.[35]

Kansas, Minnesota, and Wisconsin have adopted significant restrictions on certain types of agricultural production contracts. [36] The Wisconsin administrative rules explicitly prohibit certain contract provisions in vegetable procurement contracts[37] and both Minnesota and Kansas require that courts read the contracts to include an implied promise of good faith.[38]

III. UNCONSCIONABILITY

As indicated above, an inquiry into enforceability of an adhesion contract may well lead to an analysis of unconscionability. The unconscionability question is not limited to adhesion contracts, although it frequently arises in the model situation—so much so that some courts suggest the presence of standard form contracts as a near prerequisite of unconscionability.[39] While a standard form contract may be one factor to consider, unconscionability can arise in other contexts as well.

Unconscionability as grounds for unenforceability dates to early equitable concepts but came to the modern forefront with Karl Llewellyn's push to include it with the UCC.[40] Not only did his ideas appear in the UCC, but they are also reflected in the Second Restatement of Contracts. Section 2-302 of the UCC sets out the basic statement:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court

---

32. *Id.* § 9.45, at 391.
33. *See id.* § 9.43, at 382-83.
34. *See id.* § 9.45, at 392.
35. *See Industry Must Develop Contract Policemen*, FEEDSTUFFS, July 18, 1994, at 8.
36. *See* Hamilton, *supra* note 2, at 1075, 1077, 1082.
37. *See id.* at 1077.
38. *See id.* at 1075, 1082 (discussing these statutes and related issues).
39. *See, e.g.*, Wille v. Southwestern Bell Tel. Co., 549 P.2d 903, 906-07 (Kan. 1976) (listing the presence of a standard form contract as first among factors to be considered).
40. *See* CALAMARI & PERILLO, *supra* note 31, § 9.38, at 369.

> may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause 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.[41]

In addition to this general authority given to courts to determine as a matter of law that a term or entire agreement is unconscionable, the analysis is specifically called for in two other important sections of the UCC.[42] Section 2-309 relates to notice of termination and requires that reasonable notification of termination by one party, except on the happening of an "agreed event."[43] Furthermore, "an agreement dispensing with notification is invalid if its operation would be unconscionable."[44]

The second area requiring the unconscionability analysis is under the contractual limitation of remedies section, UCC section 2-719, specifically dealing with consequential damages. Section 2-719 states that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the persons in the case of consumer goods is prima facie unconscionable but limitations of damages where the loss is commercial is not."[45]

The modern approach to unconscionability analysis can be traced to the influential 1967 article by Professor Arthur Leff.[46] The two-pronged analysis he suggested was utilized in the classic unconscionability case, *Williams v. Walker-Thomas Furniture Co.*,[47] in which Judge Shelly Wright characterized the two prongs as "absence of meaningful choice" and "terms unreasonably favorable" to one party.[48] These two elements have been equated to Professor Leff's procedural unconscionability and substantive unconscionability.[49] Procedural

---

41. U.C.C. § 2-302 (1989). The Second Restatement of Contracts tracks the UCC § 2-302 language. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

42. *See* U.C.C. §§ 2-309, 2-719.

43. *See id.* § 2-309(3).

44. *Id.* The official comments premise much of the justification for these sections on the obligation of good faith. *See id.* § 2-309 cmts. 5, 8.

45. *Id.* § 2-719(3).

46. *See generally* Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

47. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

48. *Id.* at 449.

49. *See* Leff, *supra* note 46, at 487.

unconscionability, under this approach, involves defects in the bargaining process; substantive unconscionability looks to fairness in the terms.[50] The two-pronged notion is also illustrated by the official comments that suggest the objective is to prevent "oppression" and "unfair surprise."[51]

While the usefulness of the two-pronged analysis and the inconsistency in its application have been criticized,[52] courts have seemingly adopted this formulation as a means of examining particular facts.[53] Often the facts involve analysis of unconscionability in the context of one of the specific provisions of the UCC where it is addressed—for example, section 2-309 notice of termination or section 2-719 contractual limitation of remedy—but not always. In some significant cases, the analysis focuses on overall enforceability under section 2-302, and, it must be stressed, the same analysis is often used in non-UCC cases.

One of the most thorough analyses comes in *Resource Management Co. v. Weston Ranch & Livestock Co.*,[54] where the defendants in an action for specific performance unsuccessfully raised unconscionability by arguing that the conveyance of certain oil and gas royalty rights by contract was unenforceable.[55] The court analyzed both substantive and procedural unconscionability and, specifically, whether there must be a linkage between the two.[56] On the one hand the court stated, "[g]ross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability."[57] On the other hand, the court suggested that procedural unconscionability, alone, without "substantive imbalance," would support a finding of unconscionability but "that would be rare."[58] In fact, the court correctly pointed out that in such cases other

---

50. *See id.*

51. U.C.C. § 2-302 cmt. 1 (1989).

52. *See, e.g.*, MURRAY, *supra* note 24, at 491-92 (criticizing the uselessness of the two-pronged analysis and the inconsistency in its application).

53. Some courts have gone beyond the two-pronged analysis and have developed a list of factors to be considered. For example, the Colorado court in *Davis v. M.L.G. Corp.* lists the following seven considerations:

> [1] a standardized agreement executed by parties of unequal bargaining strength; [2] lack of opportunity to read or become familiar with the document before signing it; [3] use of fine print in the portion of the contract containing the provision; [4] absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; [5] the terms of the contract, including substantive unfairness; [6] the relationship of the parties, including factors of assent, unfair surprise and notice; [7] and all the circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect.

Davis v. M.L.G. Corp., 712 P.2d 985, 991 (Colo. 1986) (citations omitted).

54. Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985).

55. *See id.* at 1040-49.

56. *See id.*

57. *Id.* at 1043.

58. *Id.*

doctrines, such as fraud, misrepresentation, duress, and mistake, are superior "tools" for analyzing validity.[59]

One interesting aspect of *Resource Management Co.* is that the court distinguished the facts in that case from one involving contracts of adhesion, indicating that the use of a form developed by one party, even if in small print, did not point conclusively to unconscionability.[60] The salient provisions were not hidden "in a maze of fine print" but were "displayed with equal prominence in relation to other provisions," the parties were not uneducated, nor ignorant, nor were they compelled to accept the bargain.[61] They, at one point, sought the advice of counsel.[62] The court emphasized the traditional idea that each party has the burden to understand the terms of the contract and no one party is obliged to ensure that the other has a complete and accurate understanding.[63]

Four agricultural cases add some insight in how unconscionability may be successfully litigated—assuming, of course, appropriate facts. In *John Deere Leasing Agency v. Blubaugh*,[64] the court found a lease arrangement for a combine that contained a liquidated damages provision to be unconscionable.[65] The provision was "procedurally unconscionable" because it was in fine print, barely legible, on the reverse side of the form, and in complex language in what the court termed an adhesion contract.[66] The latter conclusion was based on the fact that it was drafted by John Deere Leasing, presented to the defendant with no opportunity for negotiation, and the farmer "lacked knowledge and voluntariness" because of the inequality in bargaining power.[67] Furthermore, the court found the liquidated

---

59. *See id.* It is for this reason that some commentators suggest that the unconscionability approach has become overly abstract and that the common law doctrines are capable of dealing with bargaining problems. *See generally* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981) (discussing that the unconscionable approach must displace common law doctrines).

60. *See Resource Management Co.*, 706 P.2d at 1048-49.

61. *Id.* at 1048.

62. *See id.* at 1045.

63. *See id.* at 1047.

64. John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569 (D. Kan. 1986).

65. *See id.* at 1575.

66. *See id.* at 1574.

67. *Id.* The court described the document as follows:

> The terms in question herein are on the back of the lease, and are written in such fine, light print as to be nearly illegible. In fact, the print is so light that neither party was able to obtain a satisfactory photocopy. Consequently, the court did not read the lease until it received the original into evidence at the hearing. The court was then required to use a magnifying glass to read the reverse side. The court found the wording to be unreasonably complex. It is as if the scrivener intended to conceal the thrust of the agreement in the convoluted language and fine print. The term which provides for the addition of the option price to the lessee's liability on

damage provision to be "substantively unconscionable" because it amounted to a penalty.[68] The liquidated damages clause allowed the lessor to recoup an option to purchase price along with any rental deficiency even though the lessee never accepted the purchase option.[69]

A second case, outside the UCC, is *Bank of Indiana, National Ass'n v. Holyfield*,[70] which involved dairy cow leasing. The court described the lease as "26 paragraphs of terms and conditions, on both sides, and is part of a package of documents totaling nine pages."[71] The farmer did not read the lease, was unaware that any terms were subject to negotiation, and was not given a copy of the lease at the time it was signed.[72] In evaluating the lease provisions, the court concluded, "[i]t is hard to conceive of a 'tougher' agreement than the one Erwin drew for the Holyfields to sign."[73] The lease placed the entire risk of loss on the farmer.[74] If the cows were lost by death or otherwise, the obligation to pay the agreed lease fee fell on the lessee, and they were obligated to replace the cows.[75] As it turned out, a tornado struck the farm, killed at least thirty of the leased cows, and destroyed the farmer's facilities.[76] The court had "little difficulty" in finding the lease to be unconscionable.[77] "The tremendous return the plaintiff received on its investment, the lengthy and complex form of the lease, the disproportionate risks borne by the defendants—all combine to make this lease . . . 'too hard a bargain for a court of conscience to assist.'"[78]

The court specifically analyzed a forum selection clause in the lease.[79] It characterized the lease as an adhesion contract and concluded that had the Holyfields been aware of the clause they would not have signed it.[80] To enforce

---

> default is a term quite outside the norm. John Deere's contention that the defendant had a duty to ascertain the meaning of all terms, in the face of near concealment of this unusually harsh remedy, is inexcusably inadequate and need not be tolerated by any court. This court is surprised that a reputable company such as Deere would stoop to this.

Id. at 1571.

68. *See id.* at 1574.
69. *See id.* at 1574-75.
70. Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104 (S.D. Miss. 1979).
71. *Id.* at 106.
72. *See id.*
73. *Id.* at 111.
74. *See id.*
75. *See id.* at 106.
76. *See id.* at 107.
77. *See id.* at 108.
78. *Id.* at 111 (quoting Campbell Soup v. Wentz, 172 F.2d 80 (3d Cir. 1948)).
79. *See id.* at 108-09.
80. *See id.* at 108.

the clause would result in "substantial injustice" and in order to avoid an "unconscionable result" the court would limit the application of the clause.[81]

In another interesting finding of unconscionability, this time under UCC section 2-302, the court in *Langemeier v. National Oats Co.*[82] evaluated a provision in a contract to grow popcorn in which National Oats retained a right to reject the crop for defects, including damage due to freezing weather.[83] The lower court had found that the right to reject existed but that the paragraph was unconscionable because National Oats had represented the seed would reach maturity in ninety days but had not described to the grower that the corn needed an additional twenty days in the field to dry to prevent freeze damage.[84] The grower had never grown popcorn before, but was an agronomist and agricultural financier.[85] The court found unconscionability in that the defective disclosure unfairly distorted the bargaining process.[86] The focus appeared to be on the procedural aspects—with no real analysis of substantive unconscionability other than to emphasize that an unconscionable result should be avoided under UCC section 2-302.[87]

The fourth general unconscionability case is, perhaps, the best known. The Third Circuit case of *Campbell Soup Co. v. Wentz*,[88] is frequently cited and reference to it is included in the official comments to section 208 of the Second Restatement of Contracts. In this case, the contract was for the sale of carrots grown on fifteen acres during the 1947 season.[89] The contract contained a provision that excused the soup company from accepting carrots under certain circumstances but prevented the grower from disposing of the carrots elsewhere except with Campbell's consent.[90] The court found this provision to be "too hard a bargain and too one-sided" and refused to allow the plaintiff an equitable remedy of specific performance.[91] The only reference to the bargaining process is a description of the contract as a "printed form furnished by the buyer" that had been "drawn by skilful [sic] draftsmen with the buyer's interest in mind."[92] The court

---

81. *See id.* at 109. The court cited Mississippi Code Annotated section 75-2-302 for authority of courts to award an unconscionable result and referred to concepts of "good faith and fundamental fairness in the performance of every contract." *Id.*

82. Langemeier v. National Oats Co., 775 F.2d 975 (8th Cir. 1985).

83. *See id.* at 976.

84. *See id.*

85. *See id.* at 977.

86. *See id.*

87. *See id.* Interestingly, the court upheld the lower court's raising of the unconscionability issue *sua sponte*, suggesting that the plain language of U.C.C. § 2-302 permits it. *See id.*

88. Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

89. *See id.* at 81.

90. *See id.* at 83.

91. *Id.*

92. *Id.*

carefully emphasized that the agreement was not illegal and would not invalidate specific provisions, but instead the court said, "[a]ll we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist."[93]

One aspect of these cases bears particular mention: the time of judging unconscionability is at the making of the contract in light of circumstances existing at that time. As the *Resources Management* court said, "[u]nconscionability cannot be demonstrated by hindsight."[94] Especially, courts will refuse to intervene when the contract has become unconscionable due to subsequent events within the "reasonable contemplation" of the parties.[95] This point is illustrated by a series of cases involving forward contracts for the sale of cotton entered into in the mid-1970s. In none of these cases was there evidence of deception or disparity of knowledge. In all cases, the price set at the time of contracting was much below raw cotton prices at delivery time, and none of the courts found the contracts to be unconscionable.[96] Similarly, a contract clause allowing for the lowering of the price for potatoes for small sized products was not unconscionable.[97] The contract was negotiated by a growers association and the result was, according to the court, within the parties' expectations.[98]

One area in which the UCC specifically calls for the unconscionability analysis deals with the validity of clauses included to limit available remedies. As UCC section 2-719(3) suggests, these clauses are acceptable limitations unless they are unconscionable.[99] With regard to consequential damages, such limitations are prima facie unconscionable if related to personal injury but not so with regard to commercial loss.[100] Courts have, however, found such attempted limitations to be unconscionable in appropriate commercial settings, one of which has sometimes been when farmers deal with other business entities such as seed companies or other agricultural suppliers.[101]

---

93. *Id.* at 84. In a subsequent case involving Campbell Soup, the court found no such defect; the contract had apparently been redrafted. *See* Campbell Soup Co. v. Diehm, 111 F. Supp. 211, 215 (E.D. Pa. 1952).

94. Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985).

95. *See id.*

96. *See* Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249 (10th Cir. 1976); R. L. Kimsey Cotton Co. v. Ferguson, 214 S.E.2d 360 (Ga. 1975); J. L. McEntire & Sons, Inc. v. Hart Cotton Co., 511 S.W.2d 179 (Ark. 1974); West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154 (M.D. Ala. 1974).

97. *See* Doughty v. Idaho Frozen Foods Corp., 736 P.2d 460, 462-63 (Idaho Ct. App. 1987).

98. *See id.* at 462.

99. *See* U.C.C. § 2-719(3) (1989).

100. *See id.*

101. *See, e.g.*, A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 126 (Ct. App. 1982).

One of the more interesting situations involved a solely-owned California farming operation that contracted to purchase tomato weight-sizing equipment.[102] While the owner had been a life-long farmer, he had never grown tomatoes and was not familiar with the necessary equipment.[103] The sales agreement included a provision disclaiming consequential damages "arriving out of or in connection with this agreement . . . ."[104] There was also language within the "warranty" section that limited the remedy for breach of warranty to material and workmanship and to the repair or replacement of defective parts, with the buyer paying shipping.[105] The court applied the procedural and substantive analysis to find as unconscionable both the limitation on consequential damages and the disclaimer provisions.[106] The court noted that the contract arose in a commercial context between an "enormous diversified corporation" and a "relatively small but experienced farming company."[107] In evaluating the "unfair surprise" prong of procedural unconscionability, the court concluded that the fact that the provisions appeared on the back of a long, pre-printed form "only casually shown" to the other party, coupled with a failure to direct attention to the terms indicated "surprise," and that it was not unreasonable to conclude that it was "unfair."[108] In addition, the presence of unequal bargaining power, standard terms, and lack of negotiation over the terms provided ample evidence of procedural unconscionability.[109]

Substantive unconscionability was based on the conclusion that the disclaimer provision was commercially unreasonable.[110] This fact, coupled with an express or implied guarantee of "a performance level which the machine was unable to meet," was enough to call the provision into question.[111] As to the exclusion of consequential damages, the court felt that "a party . . . should be able to rely on their existence" unless informed to the contrary.[112] The court was also concerned about the shifting of a risk to the farmer "that *only* the other party could avoid."[113] The seller was the only party remotely able to prevent the loss and this could have

---

102. *See id.* at 116-18.
103. *See id.* at 117.
104. *Id.*
105. *See id.* at 118-19 n.3.
106. *See id.* at 121-25.
107. *Id.* at 124.
108. *Id.*
109. *See id.* at 125.
110. *See id.*
111. *Id.*
112. *Id.* at 126 (quoting Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 24 (Wash. 1975)).
113. *Id.* at 126 (quoting Jonathon A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 47 (1977)).

been done by selling a machine which was adequate to meet the explained needs of the buyer.[114]

In a set of three seed sales cases, courts in Michigan and South Dakota, using approaches similar to the California court, found limitation of remedy clauses to be unconscionable. In *Mallory v. Conida Warehouses, Inc.*[115] the buyers of light red kidney bean seed alleged that the seed was defective because of the development of a disease called "halo blight" once the seeds were planted.[116] The court, without comment, upheld a lower court finding that a clause which limited damages to the purchase price of the seed was unconscionable.[117] The following year, the Sixth Circuit in *Martin v. Joseph Harris Co.*,[118] applying Michigan law, reached the same conclusion in a case involving the sale of cabbage seed that had not been properly treated for "black leg," a seed borne disease.[119] The court found that UCC section 2-316 was not immune from policing under the unconscionability provisions,[120] and then annulled both the warranty disclaimer and the exclusion of consequential damages provisions as unconscionable.[121] The court conceded that commercial contracts are rarely unconscionable because the relationship is usually not so one-sided as to allow one party to impose the unconscionable terms on the other.[122]

The court evaluated relative bargaining power—the relative economic strength of the parties and alternative sources of supply, or lack of other suppliers because all used the same exclusionary language—along with the failure to disclose that the clauses altered significant statutory rights, to find unconscionability.[123] The defect was *latent* but also one within the seller's power to prevent.[124] The defendant had decided to discontinue hot water treatment when, for a few hundred dollars, this treatment could have been continued to detect the presence of the disease.[125] The court did not distinguish procedural and substantive unconscionability but indicated that the question of whether the challenged term was substantively reasonable was an important determination.[126]

---

114. *See id.*
115. Mallory v. Conida Warehouses, Inc., 350 N.W.2d 825 (Mich. App. 1984).
116. *See id.* at 827.
117. *See id.* at 828.
118. Martin v. Joseph Harris Co., 767 F.2d 296 (6th Cir. 1985), *overruled on other grounds by* Salve Regina College v. Russell, 499 U.S. 225 (1991).
119. *See id.* at 297.
120. *See id.* at 299.
121. *See id.* at 300.
122. *See id.*
123. *See id.* at 301.
124. *See id.* at 301-02.
125. *See id.* at 300.
126. *See id.*

The South Dakota Supreme Court in *Hanson v. Funk Seeds International*[127] likewise found both warranty disclaimers and limitation of remedy clauses to be unconscionable in a corn seed case in which the seed corn in question developed defects.[128] The delivery receipt and tags attached to the bags of seed contained warranty disclaimer and limitation of remedy language that the court found to be unconscionable, relying on a prior case in which it was stated, "[o]ne-sided agreements whereby one party is left without a remedy for another's breach are oppressive and should be declared unconscionable."[129] The farmer was in no position to bargain for more favorable contract terms nor able to test the seed.[130] Any loss in crop with return only of a purchase price would, in effect, leave the farmer without a remedy.[131]

In a subsequent South Dakota seed case[132] the court used the UCC section 2-302 test for unconscionability and again found such provisions to be unconscionable because the farmer was in no position to bargain for more favorable terms nor able to test the seeds.[133] The court cited but ignored a South Dakota legislative statement that "abrogated" the decision in the previous case.[134] These cases illustrate that the unconscionability analysis may be applied in specific instances although in the context of limitation of remedies, such clauses are generally enforceable.[135]

IV. BAD FAITH

The concept of good faith, like that of unconscionability, has arisen largely as a twentieth century reaction to the rigid nineteenth century concept of freedom to contract. It appears as a developing legal standard for what Professor Robert Summers calls "contracted morality."[136] Good faith conduct, in modern contract

---

127. Hanson v. Funk Seeds Int'l, 373 N.W.2d 30 (S.D. 1985).

128. *See id.* at 34-35.

129. *Id.* at 35 (quoting Durham v. Ciba-Geigy Corp., 315 N.W.2d 696, 700 (S.D. 1982)).

130. *See id.*

131. *See id.*

132. Schmaltz v. Nissen, 431 N.W.2d 657 (S.D. 1988).

133. *See id.* at 662-63.

134. *See id.* at 662. Actually, the court found the statute to not apply retroactively. *See id.* at 663. The legislature gave no explanation, but in 1986, it passed a simple declarative statement "abrogating" the decision in *Hanson v. Funk Seeds International*. *See* Act of Mar. 11, 1986, ch. 410, 1986 S.D. Laws, 793, 793; *see also* Hanson v. Funk Seeds Int'l, 373 N.W.2d. 30 (S.D. 1985).

135. *See, e.g.*, Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1087 (Ind. 1993).

136. *See* Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 195 (1968).

law, is an obligation in formation, performance, and discharge of contracts.[137] This notion is explicitly expressed in both the Second Restatement of Contracts and in the UCC.[138] Aside from the general statements imposing a duty of good faith in all contracts, the UCC is more specific. Thirteen of the sections in Article 2, on sales, alone refer to good faith.[139] Prominent among these are the sections on termination of agreements, surrender of invalid claims, and in output and requirements contracts.

Section 1-201(19) of the UCC provides a general definition of good faith applicable throughout the Code as "honesty in fact in the conduct or transaction concerned."[140] In Article 2, for merchants, the definition is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[141] An important contribution to understanding these rather amorphous definitions was made by Professor Summers when he referred to good faith as an "excluder," and that "it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith."[142] He then provided a catalogue of types of bad faith that have been recognized in judicial decisions. These types are summarized as: bad faith in the negotiation and

---

137. *See* Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 384 (1978).

138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); U.C.C. § 1-203 (1989). The Second Restatement of Contracts states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205. The UCC contains similar language in section 1-203. *See* U.C.C. § 1-203. There is some question as to the formation stage. Comment c to the Restatement says explicitly that it does not apply to formation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c. Concepts of fraud, duress, undue influence, and promissary estoppel should be sufficient to police conduct at this stage. *See id.*

139. *See* U.C.C. §§ 2-305(2), 2-306(1), 2-311(1), 2-323(2)(b), 2-328(4), 2-402(2), 2-403(1), 2-506(2), 2-603(3), 2-615(a), 2-702(3), 2-706(1), 2-706(5), 2-712(1). The term appears in 60 of the 400 UCC sections. *See* Summers, *supra* note 135, at 195 n.2.

140. U.C.C. § 1-201(19).

141. *Id.* § 2-103.

142. Summers, *supra* note 136, at 196.

formation of contracts,[143] bad faith in performance,[144] bad faith in raising and resolving contract disputes,[145] and bad faith in taking remedial action.[146]

One crucial aspect of the good faith obligation is that it may, substantively, be invoked to rule out a wide variety of forms of bad faith[147] but, it does not create an independent cause of action for breach; it is more of an interpretative tool. The comments to UCC section 1-203 state, "[t]his section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power."[148]

Perhaps, a more useful way to apply the concept is in context. In the context of contract performance, breach of the obligation of good faith could be treated as any ordinary breach of contract;[149] in the context of enforcement, good faith is a condition. Non-occurrence of the condition means a party cannot exercise some

---

143. *See id.* at 220-32. Bad faith in the negotiation and formation of contracts would include:

> negotiating without serious intent to contract, abusing the privilege to break off negotiations, entering into a contract without having the intent to perform, entering a deal recklessly disregarding prospective inability to perform, failing to disclose known defects in goods being sold, and taking undue advantage of superior bargaining power to strike an unconscionable bargain.

Id. at 220.

144. *See id.* at 232-43. Bad faith in performance would include: "evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of power to specify terms, abuse of power to determine compliance, and interference with or failure to cooperate in the other party's performance." *Id.* at 232-33.

145. *See id.* at 243-48. Bad faith in raising and resolving contract disputes would include: "conjuring up a dispute," "adopting an overreaching or 'weaseling' interpretations and constructions of contract language," "taking advantage of another to get a favorable readjustment or settlement of a dispute." *Id.*

146. *See id.* at 248-52. Bad faith in taking remedial action would include: "abuse of the right to adequate assurances of performance, wrongful refusal to accept delivery, willful failure to mitigate damages, and abuse of a power to terminate." *Id.* at 248.

147. *See id.* at 216.

148. U.C.C. § 1-203 (amended 1994), 3B U.L.A. app. II, cmt. 10 (Supp. 1998). The section does not "create a separate duty of fairness and reasonableness which can be independently breached." *Id.*, 3B U.L.A. app. II, cmt. 10. *See also* C. Scott Pryor, *Contractual Good Faith: Variations on the Theme of Expectations*, 72 FLA. B.J. 20, 21-22 (1998).

149. *See* Stephen J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533, 1538 (1994). For example, if one party is given discretion to determine when the party's performance is to occur, a failure to exercise that discretion in good faith would be a breach of contract.

contractual or statutory right or power but is not liable for damages, unless some other action constitutes the breach.[150]

Enforcement of substantive provisions of the contract is subject to the good faith requirements. For example, in *Baker v. Ratzlaff* a clause in a contract for the sale of popcorn provided for payment at the time of delivery and failure to pay was grounds for termination of the agreement.[151] The defendant declared a termination when payment was not made although he did not request payment at delivery.[152] The evidence suggested that it would have been "promptly handled" and that plaintiff had "ample funds" to make the payment.[153] The termination was on what the court called a "technical pretense" and was to allow the defendant to sell the corn at a higher price elsewhere.[154] The court found an absence of good faith and, furthermore, that the right to terminate was an "inseparable incident" of enforcement.[155]

Two additional agricultural cases illustrate how breach of the obligation of good faith at the performance stage can be breach of contract. In *Dorsey Bros. v. Anderson*,[156] a 1972 Maryland decision, a buyer of snap beans was given the discretion to determine when the beans were ripe and to calculate the price following harvest.[157] Due to a drought, a portion of the farmer's bean crop was damaged.[158] The buyer delayed harvest of the farmer's crop in order to harvest other less-damaged beans.[159] As a result the farmer's beans were damaged even further and the eventual price was reduced.[160] That the buyer acted in bad faith in delaying the harvest was sufficient for a determination of breach of contract.[161]

Similarly, in *Newmiller Farms, Inc. v. Cornett*,[162] the Alabama court found bad faith in a buyer's rejection of nine loads of potatoes under a contract that allowed the buyer to reject potatoes that would not "chip" satisfactorily.[163] The contract price of $4.25 was much higher than the market price of $2 at delivery and the actions of the buyer indicated that the claim of dissatisfaction was

---

150. *See id.* at 1538-39. For example, the UCC allows a buyer to recover damages for breach after "cover" by the difference between the contract price and the cover price *if* the buyer covers in good faith. *See* U.C.C. § 2-712(1)-(2) (1989).

150. *See* Baker v. Ratzlaff, 564 P.2d 153, 157 (Kan. Ct. App. 1977).

152. *See id.*

153. *Id.* at 156.

154. *See id.*

155. *See id.* at 157.

156. Dorsey Bros. v. Anderson, 287 A.2d 270 (Md. 1972).

157. *See id.* at 272.

158. *See id.*

159. *See id.* at 272-73.

160. *See id.* at 273.

161. *See id.*

162. Newmiller Farms, Inc. v. Cornett, 368 So. 2d 272, 274 (Ala. 1979).

163. *See id.* at 275.

ineffectual.[164] The evidence showed that the potatoes were tested by an expert who reported them to be suitable in all respects for chipping and the sellers even offered to supply potatoes from others to which the buyer replied, "'I'm not going to accept any more of your potatoes. If you load any more I'll see that they're turned down.' . . . 'I can buy potatoes all day for $2.00.'"[165]

The court applied the section 2-103 good faith definition for transactions of a merchant, "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," which is an objective standard, not the subjective standard the buyer had claimed.[166] This seems to be the correct approach although some commentators suggest that the UCC commercial standards of fair dealing in the trade does little to distinguish good faith from bad faith even if it is to be determined by an objective standard.[167] Obviously, "honesty in fact" does little to make the distinction since it is determined by a subjective test of good faith.

V. CONCLUSION

As contract production becomes more commonplace in agriculture, issues involving the enforceability of specific terms of provisions, as well as the validity of entire contracts, will occupy the attention of the courts. The types of provisions outlined by Professor Hamilton in his seminal article on contracting will receive closer scrutiny under the policing techniques outlined here, and the calls for state regulation of contracting will likely continue.[168]

---

164. *See id.* at 274.

165. *Id.* The buyers had substituted a load from another grower from which the company had accepted potatoes, and this produce had also been rejected as unsuitable. *See id.*

166. *Id.* at 275.

167. *See* Burton, *supra* note 148, at 1538-39. What if there are no commercial standards of fair dealing regarding a particular transaction which are reasonable? If not, what standard is substituted? *See also* Summers, *supra* note 135, at 213 (stating the definition of good faith operates only insofar as these are standards of fair dealing in a trade that was reasonable).

168. *See* Hamilton, *supra* note 1, at 48.