

## ADHESION CONTRACTS DON'T STICK IN MICHIGAN: WHY *RORY* GOT IT RIGHT

*Margaret M. Smith*<sup>†</sup>

### INTRODUCTION

It is every insured's nightmare: your insurance company rejects your claim due to your policy exclusions. Immediately, you feel anxious, angry, and scared. Why did you not read the policy provisions? Why did the insurance company fail to explain the terms better? Why did you not ask them for a better explanation? You likely never realized the full implications of entering into a legally binding contract when you wrote that first check to the insurance company.

Most Americans do not realize how often they enter into contracts in their daily lives. Anytime a consumer makes a purchase, the law of contracts enters into play. Contracts of adhesion—those dealings that manifest unequal bargaining power on a take-it-or-leave-it basis—are conceivably present in most of our daily dealings. For example, a simple vending machine transaction for a candy bar could be characterized as an adhesion contract. After all, there is no meaningful choice, no room to negotiate, and, given the circumstances, the consumer may not have another option in sight besides that particular machine. Should this transaction be subject to close judicial scrutiny?

Williston defines a contract of adhesion as “a contract entered without any meaningful negotiation by a party with inferior bargaining power.”<sup>1</sup> There are several elements of an adhesion contract.<sup>2</sup> Among

---

<sup>†</sup> Juris Doctor, Ave Maria School of Law, 2007. I would like to thank my husband Alex and my three children who have been extremely patient and supportive throughout my educational process.

1. 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12, at 476–79 (4th ed. 1999); *see also* 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.4 (rev. ed. 1993) (describing the history and giving examples of adhesion contracts); 7 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 900, at 29–30 (3d ed. 1963) (discussing adhesion contracts).

2. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983). Other factors include whether the contract was drafted by, or on behalf

these, several stand prominent. First, the document purports to be a contract.<sup>3</sup> Second, the agreement contains few, if any, elements that are open to negotiation.<sup>4</sup> Or, put more simply, one party is presented the agreement on a take-it-or-leave-it basis.<sup>5</sup> Third, the weaker party likely has not read all the terms of the contract due to complicated or convoluted language.<sup>6</sup> Consumers may seek relief from the court based on the fact that the agreement in dispute satisfied these elements. Because of this, the agreement often receives different interpretations by the presiding judge. Thus, the court enjoys the power of being the sole arbiter of the contract's fairness.

The U.S. Constitution recognizes and protects contractual promises.<sup>7</sup> Article I, Section 10 states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."<sup>8</sup> Moreover, in the case *Hale v. Henkel*,<sup>9</sup> the U.S. Supreme Court held: "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited."<sup>10</sup> The interpretation of an adhesion contract remains unpredictable. The notions of unequal bargaining power and take-it-or-leave-it agreements have led courts to dismiss standard contract law principles in part or in their entirety in favor of differing approaches.<sup>11</sup> Parties who disagree about the terms of their agreements need only

---

of, one of the contracting parties; whether the contract drafter frequently participates in such transactions; whether the adhering party regularly enters into such transactions; and whether the principal obligation in the transaction is the payment of money. *Id.*

3. *Id.*

4. *See id.*

5. *See id.*

6. *See id.* at 1179.

7. It is true that the notion of "freedom to contract" found its roots in *Lochner v. New York*, 198 U.S. 45, 57-59 (1905), a case whose main theory and judicial progeny have been abandoned. *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)). This Note focuses on the interpretation of a contract after its formation.

8. U.S. CONST. art. I, § 10, cl. 1.

9. 201 U.S. 43 (1906), *overruled in part by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

10. *Hale*, 201 U.S. at 74.

11. *See, e.g., Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135 & n.11 (4th Cir. 1967) ("[T]here is a difference between contracts negotiated between coequals and standard printed form contracts offered the public by industries so powerful, by reason of franchise or otherwise, to effectively impose terms (called an 'adhesion contract') . . ."). In certain cases, "relevant circumstances and policies call for a not so strict application of pertinent principles of contract law to afford reasonable protection to the [consumer]." *Id.* at 135.

assert that they entered into an adhesion contract.<sup>12</sup> Judicial determination of this special type of contract changes the rules. The courts apply reasonable expectations or equitable principles, which are not necessarily applicable to standard contract provisions, in order to dispense fairness to the contracting party.<sup>13</sup> The result of this activism is apparent. Inconsistency and unpredictability create confusion and chaos for those, such as insurance companies, who routinely draft boilerplate contracts.<sup>14</sup>

Friedrich Kessler once inquired: “[C]an the unity of the law of contracts be maintained in the face of the increasing use of contracts of adhesion?”<sup>15</sup> Michigan answered the question in the negative. In *Rory v. Continental Insurance Co.*,<sup>16</sup> the claimants brought suit due to their insurance company’s denial of their uninsured motorists claim. The case hinged on an automobile insurance policy, which included optional coverage for uninsured motorists, that the plaintiffs held with the defendant, Continental Insurance Company.<sup>17</sup> The plaintiffs were involved in an accident on May 15, 1998.<sup>18</sup> Although the police arrived at the scene, the report lacked any information regarding insurance coverage of either driver.<sup>19</sup> Perhaps as a result of this omission, the plaintiffs failed to file any suit against the driver of the other vehicle until September 21, 1999.<sup>20</sup> During the discovery stage of the first suit, the plaintiffs learned that the defendant driver lacked insurance coverage.<sup>21</sup> It was not until March 14, 2000, that the

---

12. See Kenneth E. Dzien & Keith Jonathan Turner, *Not All Insurance Policies Are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 TORT TRIAL & INS. PRAC. L.J. 1123, 1143 (1998).

13. See *Graham v. Scissor-Tail Inc.*, 623 P.2d 165, 172–73 (Cal. 1981) (observing that an adhesion contract that does not fall within the reasonable expectations of the weaker party or that is unduly oppressive will not be enforced against the weaker party); *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237, 241 (Mont. 2005) (same); *Taylor v. Butler*, 142 S.W.3d 277, 286 (Tenn. 2004) (same).

14. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 257–58 (2002).

15. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 636 (1943).

16. 703 N.W.2d 23, 27 (Mich. 2005).

17. *Id.* Uninsured motorist insurance allows recovery for an accident victim when the person at fault is without insurance. BLACK’S LAW DICTIONARY 1568 (8th ed. 2004).

18. *Rory*, 703 N.W.2d at 27.

19. *Id.*

20. *Rory v. Cont’l Ins. Co.*, 687 N.W.2d 304, 305 (Mich. Ct. App. 2004), *rev’d*, 703 N.W.2d 23 (Mich. 2005).

21. *Rory*, 703 N.W.2d at 27.

plaintiffs submitted a claim for uninsured motorist benefits to their insurance company, Continental Insurance.<sup>22</sup> The state statute of limitations for such claims stood at six years,<sup>23</sup> but the plaintiffs' insurance policy contractually limited that time to one year.<sup>24</sup> As a result, Continental denied the plaintiffs' claim. In August, 2000, the plaintiffs filed a suit against Continental, contesting the denial of benefits.<sup>25</sup> They argued that because the insurance policy could be characterized as a contract of adhesion, the one-year limitation should be struck down as unreasonable.<sup>26</sup> The trial court denied defendant Continental's motion for summary judgment, citing the principles of adhesion contracts and holding the shortened period of limitations unenforceable.<sup>27</sup> The trial court stated that to enforce the provision would be "totally and patently unfair."<sup>28</sup> The Court of Appeals agreed and affirmed the trial court's denial of summary disposition; however, the panel based its holding on notions of reasonableness,<sup>29</sup> stating that the contract should receive "close judicial scrutiny."<sup>30</sup> The Michigan Supreme Court reversed, holding, *inter alia*, that an adhesion contract must be enforced according to its plain terms unless traditional contract defenses apply.<sup>31</sup> The language in the contract was clearly unambiguous, and the notion of "close judicial scrutiny" was not a part of Michigan jurisprudence.<sup>32</sup> In other words, Michigan now refuses to recognize different applications of contract interpretation based on the defining characteristics of the contract. Michigan appears to be the first jurisdiction to state that the descriptor "adhesion" bears no relevance to the interpretation of the agreement.

---

22. *Id.*

23. *Id.* at 28–29.

24. *Id.* at 27.

25. *Id.*

26. It should be noted that in *Wilkie v. Auto-Owners Insurance Co.*, 664 N.W.2d 776, 786 (Mich. 2003), the Michigan Supreme Court declared that "[t]he rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged 'reasonable expectations' cannot supersede the clear language of a contract."

27. *Rory*, 703 N.W.2d at 27.

28. *Id.*

29. *Rory v. Cont'l Ins. Co.*, 687 N.W.2d 304, 309 (Mich. Ct. App. 2004), *rev'd*, 703 N.W.2d 23 (Mich. 2005).

30. *Id.* at 309.

31. *Rory*, 703 N.W.2d at 41–42.

32. *Id.* at 41.

This Note argues that the *Rory* principles should be applied in all jurisdictions, and that the concept of adhesion contracts should be eliminated in favor of a return to traditional contract principles that have been a part of American jurisprudence since the formation of the country.<sup>33</sup> To this end, Part I summarizes the doctrine in a historical context. Part II explores the application of this concept in case law and its effect on Michigan's jurisprudence. Part III argues for the elimination of adhesion contracts from a public policy perspective. Finally, Part IV answers the counterargument centered on notions of unequal bargaining power and the "big guy vs. little guy" disparity; and it predicts how the *Rory* decision will affect Michigan law and how it might affect other jurisdictions.

## I. ADHESION CONTRACTS AS A JUDICIALLY CREATED CONCEPT

Contracts of adhesion evolved in the judiciary.<sup>34</sup> What began as unconscionable agreements slowly took the name "adhesion" in the courts to signify the particular aspects of the contract.<sup>35</sup> Over a period of years, the judiciary created specific guidelines for interpreting these new types of agreements, which led to the inconsistencies that prompted this Note.

### A. *The History of the Adhesion Contract: Unconscionable Agreements*

In order to fully understand the development of the adhesion contract, it is helpful to review briefly traditional contract doctrine in American jurisprudence. The basic format of a contract consists of three elements: offer, acceptance, and consideration. If all three elements are met, a contract is formed, and each party is responsible for the discharge of their agreement. In *Lewis v. Great Western Railway Co.*,<sup>36</sup> the Court of Exchequer summarized the accountability of entering into a contract: "It would be absurd to say that this document, which is partly in writing and partly in print, and which

---

33. This, of course, does not mean that this author argues for an end to standardized contracts. Rather, the argument focuses on returning to traditional contract interpretation principles so that judges will no longer hold the power to rewrite an unambiguous contractual term.

34. *Infra* Part I.A.

35. *Id.*

36. 5 H & N 867, 157 Eng. Rep. 1427 (Ex. 1860).

was filled up, signed, and made sensible by the plaintiff, was not binding upon him."<sup>37</sup> This nineteenth-century presumption favored the exercise of autonomy for private decision makers.<sup>38</sup> Early American case law suggests the appropriateness of this theory.<sup>39</sup> The Supreme Court aptly relied on English courts when it stated:

[I]f there is one thing more than any other which public policy required, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice.<sup>40</sup>

Thus, "by the general rule . . . , absent such gross inadequacy of consideration as to evidence fraud, mistake, or duress, the courts would not make the existence of a contract turn on the judges' appraisal of the worth of the exchange."<sup>41</sup>

Traditional contract law cited two factors underscoring the freedom of contract: parties may avoid oppressive bargains by careful consideration of alternatives, and the agreement manifests mutual assent.<sup>42</sup> The operative issue for the judiciary regarding contract interpretation included whether there was a "true mutual assent" to the agreement.<sup>43</sup> Historically, a signature on a document, for all intents and purposes, manifested that assent.<sup>44</sup> Contract law in the United States, then, held citizens to a high standard of accountability for their actions. Traditionally, the only method by which a party

---

37. *Id.* at 874, 157 Eng. Rep. at 1430.

38. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 12 (1956).

39. See *id.*; *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 131, 134, 136–37 (1810).

40. *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 355 (1896) (White, J., dissenting) (quotations omitted); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

41. HURST, *supra* note 38, at 12.

42. WILLIAM M. SHERNOFF ET AL., *INSURANCE BAD FAITH LITIGATION* § 1.03, at 1–9 (1984).

43. Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 *CARDOZO L. REV.* 319, 327 (1999).

44. See *Nat'l Union Fire Ins. Co. v. Frasch*, 751 F. Supp. 1075, 1078 (S.D.N.Y. 1990) (applying the legal presumption that a person who has signed a written agreement has read and understood its terms and manifested consent to those terms by its signature); see also David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 *Wis. L. REV.* 33, 108 (1997) ("Courts that apply a presumption of enforceability to adhesive form terms . . . assume that the adherent's signature on the form document shows 'consent' to all form terms unless there is specific evidence to vitiate consent.").

could effectively void a contract involved a demonstration of fraud, duress, or unconscionability. Courts appeared hesitant to let a party off the proverbial hook. Judges displayed little sympathy for defenses such as illiteracy, negligence in reading the agreement, lack of education, or even failure to understand the language.<sup>45</sup>

Traditionally, equity courts recognized the defense of unconscionability when denying relief to claimants who were guilty of unconscionable conduct.<sup>46</sup> Because refusing relief fell within the chancellor's discretion, "equity never developed a clear set of rules" for analyzing claims of unconscionability.<sup>47</sup> Also, in equity courts, unconscionability served as a remedial doctrine, limiting a party's remedies without truly affecting substantive legal rights.<sup>48</sup> Today, many consumer-based statutes render the rule largely substantive, working primarily as a defense in both law and equity and applying to claims for damages as well as for specific performance.<sup>49</sup> For example, in *Clark v. Rosario Mining & Milling Co.*, the court held unenforceable a mining agreement that purported to give the plaintiff all the benefit of the contract.<sup>50</sup> The court stated: "It is difficult to conceive of a much more one-sided contract. It is one that we do not think any court of equity should decree the specific performance of."<sup>51</sup> The court then borrowed language from an earlier Supreme Court decision, *Pope Manufacturing Co. v. Gormully*:

To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to

---

45. See, e.g., *St. Landry Loan Co. v. Avie*, 147 So. 2d 725, 727 (La. Ct. App. 1962) (holding an illiterate French-speaker bound to a promissory note by an "X" mark even though he made "a showing that he had not read it, or that he had not had it read and explained to him, or that he did not understand its provisions"); *Gingell v. Backus*, 227 A.2d 349, 354 (Md. 1967) (holding a 61-year-old laborer with a fourth-grade education bound by a form release he signed without reading since "the untutored, but literate, litigant did not make reasonable use of his intellectual attainments, meager though they might have been"); *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965) ("It was incumbent upon [bus passenger], who knew of his own inability to read the English language, to acquaint himself with the contents of the ticket.").

46. See 2 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 10.7, at 703 (2d ed. 1993).

47. *Id.*

48. *Id.* at 704.

49. *Id.*

50. 176 F. 180 (9th Cir. 1910).

51. *Id.* at 188.

exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts . . . .<sup>52</sup>

It appears, then, that early American jurisprudence focused unconscionability analysis in courts of equity, and further refined the analysis as one of one-sidedness or oppression.<sup>53</sup> Importantly, courts of equity and law did not simply characterize an agreement as a certain type that would receive differing treatment. However, early case law demonstrates the judge's power to determine unconscionability.<sup>54</sup> As one court noted:

People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.<sup>55</sup>

Reasons of public policy remained the basis for voiding unconscionable contracts. The term "public policy" escapes a simple definition. One court aptly observed that "public policy" means:

the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like; it is that general and well-settled public opinion relating to man's plain, palpable

---

52. *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1891), *quoted in* *Clark*, 176 F. at 188.

53. *See, e.g., Deweese v. Reinhard*, 165 U.S. 386, 390-93 (1897); *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979); *Shear v. Helm*, 403 P.2d 941, 946-47 (Kan. 1965); *Banaghan v. Malaney*, 85 N.E. 839, 839-40 (Mass. 1908); *Bartley v. Lindabury*, 104 A. 333, 335 (N.J. Ch. 1918); *In re Byrne's Estate*, 186 A. 187, 189 (Pa. Super. Ct. 1936).

54. *See* 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:1, at 5-6 (4th ed. 1998) ("[W]hile freedom of contract has been regarded as part of the common law heritage so that absent mistake, fraud or duress, parties who have made a contract are bound although it may be unwise and even foolish, equity has often refused to enforce some agreements when, in its sound discretion, these have been deemed unconscionable.").

55. *Carlson v. Hamilton*, 332 P.2d 989, 990-91 (Utah 1958) (footnotes omitted).

duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.<sup>56</sup>

This made sense in the context of unconscionable agreements. Certainly no one would argue that a completely one-sided deal that reeked of oppression comported with man's duty to another. Not surprisingly, though, notions of "public policy" began to broaden in the context of protecting the consumer.<sup>57</sup> For example, the Kentucky Supreme Court in 1996 noted that public policy is "dynamic, flexible and fully capable of adapting to new situations . . . to permit our institutions to better serve the needs of our citizens."<sup>58</sup>

In the mid-to-late 1960s, standardized contracts became commonplace among American businesses. Perhaps due to changing societal notions of justness and fairness, or the evolution of business and industry, courts began to declare that certain "standardized" agreements may not be subject to traditional contract interpretation at all.<sup>59</sup> By the time the *Second Restatement of Contracts* was published, adhesion contracts received their own section under the title "standardized agreements."<sup>60</sup> Scholars have commented on this shifting approach in the judiciary, noting: "The judicial system's struggle to balance fairness with the commercial necessity of adhesion contracts in a society based on the mass distribution of consumer goods is evident in the indeterminate body of law that has been created."<sup>61</sup>

The term "oppressive"—as used in early unconscionability analysis—meant the unjust or cruel exercise of authority or power.<sup>62</sup> The term "fairness"—as used in the new adhesion contract analysis—

---

56. Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916).

57. Compare *Zeigler v. Ill. Trust & Sav. Bank*, 91 N.E. 1041, 1046 (Ill. 1910) ("The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions—not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public."), with *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971) ("When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party . . . the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy." (emphasis added)).

58. *Lewis v. W. Am. Ins. Co.*, 927 S.W.2d 829, 835 (Ky. 1996).

59. See, e.g., *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1180 (Cal. 1976).

60. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

61. Goodman, *supra* note 43, at 331 (footnotes omitted).

62. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 998 (David B. Guralnik ed., 2d coll. ed. 1984).

means marked by impartiality and honesty.<sup>63</sup> Simply stated, the development of the interpretation of contracts in the courtroom appears to have shifted from striking out deals that are “cruel exercises of power” to declaring those agreements void that appear to be lacking in “impartiality.” Clearly, the liberty to contract applied to only those bargains that appeared to the court to be “fair.” Most importantly, the judge appeared to act as the sole arbiter of “fairness.”

One of the landmark cases reflecting a developmental shift in the unconscionability analysis was *Williams v. Walker-Thomas Furniture Co.*<sup>64</sup> The case involved a furniture company’s consumer contracts in which certain provisions kept a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated.<sup>65</sup> As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.<sup>66</sup> The court held:

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.<sup>67</sup>

The birth of the term “adhesion” arose in a scholarly article by Edwin W. Patterson simply as a descriptive label for a common contract practice in the insurance industry.<sup>68</sup> This original designation described a type of agreement but did not suggest that such a

---

63. *Id.* at 502.

64. 350 F.2d 445 (D.C. Cir. 1965).

65. *Id.* at 447.

66. *Id.*

67. *Id.* at 449–50 (footnotes omitted).

68. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 & n.106 (1919).

description rendered the contract or its provisions unenforceable.<sup>69</sup> Kessler expanded on this approach, arguing that courts should rewrite unfair provisions of “contracts of adhesion.”<sup>70</sup> Kessler advocated nonenforcement of clauses by the judiciary in standardized contracts, but only when the type of contract was of sufficient “social importance” and when the drafter enjoyed a monopoly over the socially important good or service.<sup>71</sup> As the doctrine evolved in academia, American judges picked up on the argument, applied it to cases, and expanded it over time.

### B. *The Development of the Adhesion Contract Doctrine*

Today, standard form contracts likely account for more than ninety-nine percent of all contracts.<sup>72</sup> There is no uniform approach to adhesion contract interpretation.<sup>73</sup> In short, different jurisdictions apply differing approaches for unconscionability through an analysis of whether the agreement constitutes an adhesion contract, followed by a specific examination based on that finding. In other words, if the contract is adhesive, a different analysis applies.<sup>74</sup> The inconsistency between the jurisdictions and within the same jurisdiction appears unlike any other type of judicial analysis.

Some jurisdictions employ a two-prong analysis for unconscionability that involves adhesion contracts. That is, the agreement must be both procedurally and substantively unconscionable.<sup>75</sup> Each element, however, need not necessarily be met to the same degree.<sup>76</sup> Substantive unconscionability refers to the

---

69. *Id.* at 222.

70. Kessler, *supra* note 15, at 636–37.

71. *Id.* at 632, 638, 640–42.

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

73. It should be noted that, even with the publication of the Uniform Commercial Code (“U.C.C.”), consumers obtained little relief. The reason for this is that the U.C.C. gives the courts broad latitude to determine unconscionability as a matter of law. 8 WILLISTON & LORD, *supra* note 54, § 18:8, at 47. A thorough discussion of the U.C.C. and its implications to the adhesion contract analysis are beyond the scope of this Note.

74. In fact, many cases explicitly state that the same substantive term the court refuses to enforce might have been enforced if it appeared to be a negotiated term. *See, e.g.*, *Coll. Mobile Home Park & Sales, Inc. v. Hoffmann*, 241 N.W.2d 174, 177 (Wis. 1976).

75. 8 WILLISTON & LORD, *supra* note 54, § 18:10, at 59–62.

76. *Id.* In fact, in some jurisdictions, only one element is needed. *See, e.g.*, *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001).

element of unfair surprise, such as fine print or unreasonably harsh terms.<sup>77</sup> Procedural unconscionability refers to deficiencies in the contract formation process, such as deception or refusal to bargain over contract terms.<sup>78</sup> Notably, in some jurisdictions, if the contract is deemed to be one of adhesion, the court may automatically deem it procedurally unconscionable.<sup>79</sup>

Some jurisdictions employ a “reasonable expectations” approach to adhesion contracts.<sup>80</sup> Often applied to insurance contracts, the approach requires courts to examine the document to see if the contents include those that the subscriber reasonably thought would be included.<sup>81</sup> Even contracts that are unambiguous on their face may be deemed unreasonable by virtue of this expectations doctrine.<sup>82</sup> The approach is justified because proponents claim there is no true “assent” between the parties if they fail to understand or read the boilerplate language.<sup>83</sup>

Michigan rejected the reasonable expectations doctrine in 2003. In *Wilkie v. Auto-Owners Insurance Co.*,<sup>84</sup> the Michigan Supreme Court concluded that the doctrine seeped into its jurisprudence through misapplied case law and, thus, the Court essentially overruled all cases that applied the doctrine.<sup>85</sup> Justice Taylor, who authored the opinion, cited Robert E. Keeton’s article, entitled *Insurance Law Rights at Variance with Policy Provisions*,<sup>86</sup> in which Keeton stated that “the objectively reasonable expectations of applicants . . . will be honored even though painstaking study of the policy provisions would have negated those expectations.”<sup>87</sup> Justice Taylor astutely recognized that “[w]hether Professor Keeton intended this analysis to spawn a frontal assault on the ability of our citizens to manage, by contract, their own affairs, it had that effect because numerous courts,

---

77. 8 WILLISTON & LORD, *supra* note 54, § 18:10, at 62.

78. *Id.* at 57.

79. *See* Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995); *see also* State v. Wolowitz, 468 N.Y.S.2d 131, 146 (N.Y. App. Div. 1983).

80. *See generally* 20 AM. JUR. 2D *Proof of Facts* § 3 (1979) (Supp.).

81. *See, e.g.*, Hazen Paper Co. v. U.S. Fid. & Guar. Co., 555 N.E.2d 576, 583 (Mass. 1990).

82. *See, e.g.*, Werner Indus., Inc. v. First State Ins. Co., 548 A.2d 188, 191 (N.J. 1988).

83. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

84. 664 N.W.2d 776 (Mich. 2003).

85. *Id.* at 786.

86. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

87. *Id.*

to one degree or another, adopted some form of the rule.”<sup>88</sup> He also discussed how judges apparently extended this theory in *Powers v. Detroit Automobile Inter-Insurance Exchange*.<sup>89</sup> The plurality in that case stated that the rule of reasonable expectations did not even require an ambiguity in the agreement.<sup>90</sup> Essentially, the past thirty years of case law that “ignored precedent, silently acquiesced to plurality opinions *and dicta*, all of which with little scrutiny, have been piled on each other to establish authority” were put to rest.<sup>91</sup>

Other courts utilize a combination of reasonable expectations, along with procedural and substantive unconscionability, to seek out “fairness” principles for the adhering party.<sup>92</sup> For example, some courts developed a three-sided attack on all of the drafted provisions, definitions, exclusions, and conditions contained in the standard form but not actually brought to the insured’s attention before contracting.<sup>93</sup> Side one examines reasonable expectations. Side two pursues the implied warranty concept, reasoning that the insurance business is more the sale of a product than the negotiation of a commercial contract.<sup>94</sup> Side three reviews the agreement for unconscionability, which allows the court to strike out provisions that the insured has read and is aware of, so long as, in the opinion of the court, the language upsets the reasonable expectations of the majority of the insureds.<sup>95</sup> In another example, a court might strike down a contractual term if it is found to be “unconscionable or contrary to a rule of public policy that a party should not be permitted to shift the burden of his wrongdoing to a weaker party or to deprive the injured party of his right to recover for the wrong done to him.”<sup>96</sup> In California, the analysis of unconscionability begins with determining whether the contract is adhesive.<sup>97</sup> Montana employs a similar approach.<sup>98</sup>

---

88. *Wilkie*, 664 N.W.2d at 783.

89. 398 N.W.2d 411 (Mich. 1986).

90. *Wilkie*, 664 N.W.2d at 785.

91. *Id.* at 786 (emphasis added).

92. *See, e.g.*, *Neil v. Allstate Ins. Co.*, 549 A.2d 1304, 1310 n.4 (Pa. Super. Ct. 1988).

93. *See* JOHN F. DOBBYN, *INSURANCE LAW IN A NUTSHELL* 135 (3d ed. 1996).

94. *Id.*

95. *Id.* at 135–36.

96. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-44, at 424 (3d ed. 1987).

97. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

98. *See, e.g.*, *Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250, 263 (Mont. 2003).

The basis for voiding adhesion contracts also finds roots in notions of public policy.<sup>99</sup> One of the first cases to highlight this “new” doctrine was *Henningsen v. Bloomfield Motors, Inc.*,<sup>100</sup> where a consumer brought an action for personal injuries against the vendor and the manufacturer of his automobile. The court held that a disclaimer of the implied warranty of merchantability, located in small print on the reverse side of the contract, was invalid as contrary to public policy.<sup>101</sup> Thus, the invalidation of a mass-produced contract imposed on a take-it-or-leave-it basis comported with public policy interests.<sup>102</sup>

It is important to note that not all contracts of adhesion are automatically unenforceable.<sup>103</sup> The key factor comes into play when there are “arguably” ambiguous terms, or that the terms unreasonably favor one party.<sup>104</sup> Most jurisdictions hold that even if a contract is adhesive, it will stand unless it is shown that the terms of the agreement are deemed unconscionable by judicial authority.<sup>105</sup> The party seeking to establish unconscionability must prove “not only that one of the parties lacked a meaningful choice but also that the

---

99. The adhesion contract emerged in response to warranty clauses. The courts held that public policy required recognition of a warranty, in certain situations, for the consumer. *See, e.g., Welter v. Bowman Dairy Co.*, 47 N.E.2d 739 (Ill. App. Ct. 1943); *Bahlman v. Hudson Motor Car Co.*, 288 N.W. 309 (Mich. 1939); *Worley v. Procter & Gamble Mfg. Co.*, 253 S.W.2d 532 (Mo. Ct. App. 1953); *Markovich v. McKesson & Robbins, Inc.*, 149 N.E.2d 181 (Ohio Ct. App. 1958).

100. 161 A.2d 69 (N.J. 1960).

101. *Id.* at 96–97.

102. *Id.* at 97. *See also, e.g., Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971) (“When a party can show that the contract . . . [is] an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party . . . the contract provision, or the contract as a whole, if the provision is not separable, should not be enforced on the grounds that the provision is contrary to public policy.”).

103. *See* 8 WILLISTON & LORD, *supra* note 54, § 18:13; *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571 (Tex. 1991).

104. James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 998 (1992). Fischer notes:

Ambiguity is less a legal doctrine than a state of mind. Ambiguity is often a function of context. The drafter lacked sufficient foresight in prescribing terms that provide necessary, accurate guidance to resolve a current dispute. Thus, the text which contains the “terms” may be ambiguous if it is intrinsically imprecise or uncertain, but an ambiguity also arises because external factors have rendered the language chosen inadequate to resolve the problem at hand.

*Id.*

105. *See* *Smith, Bucklin & Assocs. v. Sonntag*, 83 F.3d 476, 480 (D.C. Cir. 1996).

terms of the contract are unreasonably favorable to the other party.”<sup>106</sup> The fact that adhesion contracts are interpreted through a different lens than a normal contract distinguishes them from other types of agreements. Additionally, the determination of ambiguous terms lies within the power of the judge reviewing the contract.

Today, the law is a “jumble of different lines of analysis, contradictory outcomes, and convoluted expression.”<sup>107</sup> Michigan enjoyed a short relationship with adhesion contracts. The *Rory* court insisted that its prior references to reasonable expectations and its progeny consisted of mere dicta. Further, to the extent that those prior cases contributed to conflicting opinions and misunderstood holdings, the *Rory* court overruled them.<sup>108</sup> Certainly, the *Rory* court thought it prudent to put an end to the confusion with the simple holding that:

it is of no legal relevance that a contract is or is not described as “adhesive” . . . [T]he contract is to be enforced according to its plain language. Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable.<sup>109</sup>

### C. *The Main Application of the Adhesion Contract Doctrine*

The primary application of adhesion contracts is in the insurance industry.<sup>110</sup> Because of the economic and social policies inherent in the business of insurance, courts continually “underscore the special relationship between the parties in reviewing the character of the

---

106. *Id.*

107. Rakoff, *supra* note 2, at 1197.

108. *Rory v. Continental Insurance Co.*, 703 N.W.2d 23, 31 (Mich. 2005), overruled three major contract cases: *Camelot Excavating Co. v. St. Paul Fire & Marine Insurance Co.*, 301 N.W.2d 275 (Mich. 1981); *Tom Thomas Organization, Inc. v. Reliance Insurance Co.*, 242 N.W.2d 396 (Mich. 1976); and *Herweyer v. Clark Highway Services, Inc.*, 564 N.W.2d 857 (Mich. 1997).

109. *Rory*, 703 N.W.2d at 42.

110. See Fischer, *supra* note 104, at 995–96. It should be noted that, as early as 1910, rules that were biased in favor of the insured began to emerge. See, e.g., *Raulet v. Northwestern Ins. Co.*, 107 P. 292, 298 (Cal. 1910) (observing that the presumption of knowledge of terms in a written contract should not be strictly applied to insurance policies). While this argument is equally applicable to all adhesion contracts, this Note limits the example to insurance contracts due to their unique treatment by the courts. A thorough analysis of every type of adhesion contract is beyond the scope of this Note.

insurance contract.”<sup>111</sup> A cursory inspection into any auto or homeowner’s insurance policy reveals confusing language, unclear terms, and an overall complex document.<sup>112</sup> Insurance contracts represent perhaps the strongest example of contracts of adhesion. In response, the judiciary has expanded even the basic adhesion contract analysis to confer more benefits to the consumer. The judiciary created a profound bias in favor of the insured by utilizing a number of insurance-specific and court-made rules, such as the rule of *contra proferentum*, the doctrine of reasonable expectations, and the policy of compensation.<sup>113</sup>

Arguably, *contra proferentum* parallels basic contract law.<sup>114</sup> It states that terms of a contract, when unambiguous, must be interpreted according to their plain meaning.<sup>115</sup> If ambiguities exist, however, then the meaning of those terms must be construed against the drafter.<sup>116</sup> But courts and commentators note that the ambiguity-based variation of the reasonable expectations doctrine is, in reality, *contra proferentum* by another name.<sup>117</sup> But the need for the *contra proferentum* rule diminished with the new adhesion contract analysis.<sup>118</sup> Perhaps this explains why the two doctrines appeared to merge into each other. In other words, over time, even the rules of

---

111. See 1 SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION § 1.02 (2006).

112. This is certainly not the case with all insurance policies. They may share the characteristics of length, but many contracts are clear in scope and language. It would be unfair to categorize all insurance policies in the same light.

113. Fischer, *supra* note 104, at 996–97.

114. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 60, § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

115. See PETER J. KALIS ET AL., POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE § 20.02 (Supp. 2006).

116. *Id.*

117. See, e.g., Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 807 (Utah 1992) (“It is doubtful whether application of [the ambiguity-based] version of the reasonable expectations doctrine can be distinguished from, or adds anything to, the application of the canon of construction resolving ambiguities against the drafter and reforming the contract accordingly.”).

118. See generally David S. Steuer, *A Litigator’s Perspective on the Drafting of Commercial Contracts*, in DRAFTING CORPORATE AGREEMENTS 533 (PLI Corp. Law & Practice, Course Handbook Series No. B-1524, 2006).

*contra proferentum* became blurred with other adhesion rules to create even more inconsistent and confusing rules.<sup>119</sup>

These rules were traditionally supposed to be applied only to ambiguous language.<sup>120</sup> This, of course, begs the question: who determines whether a term is “ambiguous”?<sup>121</sup> When the disputes arise in court, the insurer must show not only that the policy is capable of the interpretation he or she favors, but also that the interpretation is the *only* fair interpretation of the language.<sup>122</sup> An insurance law commentator summarized that “the rules of insurance contract interpretation express, in their application, a profound pro-insured bias—one so great that courts will rely on it to reach results that are unimaginable elsewhere in the law of contracts.”<sup>123</sup> An example of bias in favor of the insured is the traditional rule that states that a contract must be viewed as a whole.<sup>124</sup> The insurance rule adds that “where two interpretations equally fair may be made, that which affords the greatest measure of protection to the insured will prevail.”<sup>125</sup> Also, specific provisions in a contract, such as an endorsement, control over general provisions.<sup>126</sup> Specific terms that expand coverage control over general terms, but specific terms that restrict coverage do not.<sup>127</sup>

---

119. The *Rory* court points out that, in Michigan, *contra proferentum* was also absorbed into reasonable expectations over the years. See *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 36–40 (Mich. 2005).

120. However, this is not always the case, as will be demonstrated. The reasonable expectations doctrine applies to more than just allegedly ambiguous terms. See *infra* Part IV.C.

121. The answer is, of course, the court. See *Clark v. State Farm Mut. Auto. Ins. Co.*, 725 So. 2d 779, 781 (Miss. 1998); *Lamb Constr. Co. v. Town of Renova*, 573 So. 2d 1378, 1383 (Miss. 1990); *Whittington v. Whittington*, 608 So. 2d 1274, 1278 (Miss. 1992).

122. See *KALIS ET AL.*, *supra* note 115, § 20.02 (citing *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838, 840 (2d Cir. 1981) (construing New York law to hold that the insurer bears the heavy burden of proving insured's interpretation is unreasonable, the policy is susceptible to the insurer's interpretation, and the insurer's interpretation is the only one that could fairly be placed on the policy); *Shepard v. CalFarm Life Ins. Co.*, 7 Cal. Rptr. 2d 428, 433 (Cal. Ct. App. 1992) (same under California law); *Goldstein v. Occidental Life Ins. Co.*, 273 A.2d 318, 321 (R.I. 1971) (same under Rhode Island law)).

123. Fischer, *supra* note 104, at 1007.

124. See *Keller v. Bones*, 615 N.W.2d 883, 888 (Neb. 2000).

125. *Maxon v. Sec. Ins. Co.*, 29 Cal. Rptr. 586, 590 (Cal. Ct. App. 1963).

126. *Certain Underwriters at Lloyds v. Eng's Motor Truck Co.*, 185 Cal. Rptr. 613, 614 (Cal. Ct. App. 1982).

127. See *Hofeld v. Nationwide Life Ins. Co.*, 322 N.E.2d 454, 457 (Ill. 1975).

As discussed earlier, the doctrine of reasonable expectations applies with particular force to insurance contracts.<sup>128</sup> Courts generally follow a two-prong approach. First, the judge must interpret the contract “in light of the parties’ reasonable and normal expectations as to the extent of the coverage.”<sup>129</sup> Second, in situations in which “the public may reasonably expect coverage, the notice of policy non-coverage must be conspicuous, plain, and clear.”<sup>130</sup> Some jurisdictions require that this conspicuousness be accomplished through bold type, larger font styles, and writing on the front of the document.<sup>131</sup> These are well-established rules that are applied to insurance contracts even before determining whether the contract is adhesive.<sup>132</sup>

The policy of compensation is another judicial rule applying specifically to adhesion contracts in the insurance industry. This policy states that the insurance coverage should be enforced to effectuate the public policy favoring compensation to the insured unless the insured displays a “calculating intent” to engage in discrimination.<sup>133</sup> This policy, along with the rules of *contra proferentum* and reasonable expectations, fits in the category of practices biased in favor of the insured. As one commentator stated: “If semantically possible, the contract will be construed so as to achieve its objective of securing indemnity to the insured for the losses to which the insurance relates.”<sup>134</sup>

As demonstrated, the notion of interpreting adhesion contracts in a manner that differs from other types of agreements first arose in academia. The judiciary picked up on the concept and applied these new rules, citing the principles of “fairness” and “public policy.” However, as will be argued, notions of fairness and public policy are not persuasive enough to support the conclusion that different

---

128. The landmark decision is *Gray v. Zurich Insurance Co.*, 419 P.2d 168 (Cal. 1966), which held that the court is to “test the alleged limitation in the light of the insured’s reasonable expectation of coverage.” *Id.* at 179.

129. Fischer, *supra* note 104, at 1010.

130. *Id.*

131. *E.g.*, *Ponder v. Blue Cross*, 193 Cal. Rptr. 632, 639–40 (Cal. Ct. App. 1983).

132. *E.g.*, *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1182 n.43 (3d Cir. 1991) (“[S]tandard form insurance contracts . . . are construed against the insurer as a matter of law.”).

133. Steven L. Willborn, *Insurance, Public Policy, and Employment Discrimination*, 66 MINN. L. REV. 1003, 1027–30 (1982).

134. Fisher, *supra* note 104, at 1004–05.

principles should govern different contracts. Regardless of the characteristics of the agreement, insurance policies and other types of adhesion contracts are still *contracts*.

## II. THE EFFECTS OF THE ADHESION CONTRACT

Standardized contracts provide society with an efficient manner to do business.<sup>135</sup> Adhesion contracts serve to simplify operations and reduce costs for all involved in the bargaining process.<sup>136</sup> Standardized contracts fulfill a particular need because “[i]n today’s age of mass production of standardized goods and services, the movement of such items on the scale and speed with which they are produced or rendered requires that transactions not be encumbered by prolonged negotiations regarding ancillary terms.”<sup>137</sup> Supporters of adhesion contracts accordingly argue that these contracts are essential to the functioning of today’s economy.<sup>138</sup> However, this Note does not attempt to argue for an elimination of adhesion contracts *per se*. It would be an insurmountable task to require every business to draft custom contracts for essentially identical products. Rather, it is the way judges craft special rules based on the characterization of a document that appears troublesome.<sup>139</sup> While supporters of the adhesion contract doctrine seek fairness, this Note argues that the fairness principle is one-sided.<sup>140</sup> Moreover, judicial decisions interpreting contract provisions should be based on the law, not on a particular judge’s interpretation of fairness.<sup>141</sup>

---

135. Goodman, *supra* note 43, at 325.

136. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 588 (1933) (stating that standardization helps make risks calculable and “increases that real security which is the necessary basis of initiative and the assumption of tolerable risks”).

137. Goodman, *supra* note 43, at 325.

138. See 1 CORBIN & PERILLO, *supra* note 1, § 1.4, at 15; see also *Estrin Constr. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 422 (Mo. Ct. App. 1981) (“The legitimacy of an adhesion contract derives, not from the social value of a transaction freely negotiated, but from the social value of goods produced more abundantly and cheaper from the reduced cost of legal and other distribution services.”).

139. See, e.g., *Beidler & Bookmyer, Inc. v. Universal Ins. Co.*, 134 F.2d 828, 830 (2d Cir. 1943); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 990–91 (2d Cir. 1942).

140. This author is hard pressed to find a case that sought to import fairness principles on behalf of an insurance company.

141. It is true that, traditionally, courts of equity made judgments based on fairness. However, it is important to note that in the context of this Note, judges are expressing “fairness” principles when interpreting *unambiguous* contract language. For a thorough examination of

### A. *Demonstrating a Pattern of Unpredictability*

If public policy is predicated on the welfare of the people, it follows, then, that the rules regarding adhesion contracts should benefit the people. However, on closer examination, the opposite may ring true in many circumstances. Because the interpretation of “ambiguous” language is subject to the whims of the courts, those companies that produce standardized contracts are faced with substantial difficulty and uncertainty. This is especially true in the insurance industry. Those drafters “must walk that fine line between being specific enough to be understandable” to the court, but brief enough to hold the reader’s attention.<sup>142</sup> “Added to this tension is uncertainty regarding whether a particular rule of insurance contract interpretation will be applied in a fashion that reflects bias towards one of the parties or neutrality toward both.”<sup>143</sup>

Perhaps the strongest example of a failed application of the adhesion contract analysis lies within the reasonable expectations doctrine.<sup>144</sup> This approach places the judiciary in “the paternalistic role of rewriting the contract for the insured and overriding the insured’s apparent judgment that the [agreement] was worthwhile as written.”<sup>145</sup> Keeton himself recognized the inevitable problem with the doctrine: “The conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then resolv[ed] the invented ambiguity contrary to the plainly expressed terms of the

---

judicial activism, see generally Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 1441 (2004).

142. Fischer, *supra* note 104, at 999.

143. *Id.* (footnote omitted).

144. See generally Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425 (1998) (examining the history of the reasonable expectations doctrine and characterizing it as unpredictable, unprincipled, uncertain, and unnecessary).

145. *Id.* at 428. For example, in *Hamilton v. Allstate Insurance Co.*, 789 S.W.2d 751, 753 (Ky. 1990), the court invalidated a prominently placed and unambiguous provision, stating that “[u]nder the doctrine of reasonable expectations, we have held that when one has bought and paid for an item of insurance coverage, he may reasonably expect it to be provided.” See also *Reg'l Bank v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 497–98 (10th Cir. 1994) (“[R]egardless of the ambiguity, or lack thereof . . . the public has a right to expect that they will receive something of comparable value in return for the premium paid.” (quoting *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346, 1353 (Pa. 1978))).

contract document."<sup>146</sup> Even within the same jurisdiction, insurance contracts receive differing rules.<sup>147</sup>

In turn, the insurance companies bear the brunt of this judicial activism.<sup>148</sup> This plays out in the insurance company through risk calculations. In their most basic form, premiums are calculated using a risk-spreading mechanism by which "many people pay a relatively small amount of money so that a smaller number of people will receive a larger amount of money in the event of certain defined contingencies."<sup>149</sup> This mechanism cannot accurately exist unless the insurer can accurately calculate anticipated losses and set premiums at a level low enough to be affordable to many, but high enough to ensure that sufficient funds will be available to cover those losses when they occur.<sup>150</sup> To be able to achieve either of these goals, "insurers must be able to predict *in advance and with reasonable certainty* how the policy terms will be interpreted."<sup>151</sup>

The only real alternative for insurance companies is to "hedge their bets by increasing premiums or restricting coverage."<sup>152</sup> As the

---

146. Keeton, *supra* note 86, at 972.

147. Compare *Gyler v. Mission Ins. Co.*, 514 P.2d 1219, 1220 (Cal. 1973) ("claims-made" policy ambiguous), with *Slater v. Lawyers' Mut. Ins. Co.*, 278 Cal. Rptr. 479, 482 (Cal. Ct. App. 1991) ("claims-made" policy not ambiguous), and *Merrill & Seeley, Inc. v. Admiral Ins. Co.*, 275 Cal. Rptr. 280, 284 (Cal. Ct. App. 1990) (same).

148. When the courts strain to find ambiguity, it "not only causes confusion and uncertainty about the effective scope of judicial regulation of [insurance] contract terms but also creates an impression of unprincipled judicial prejudice against insurers." Keeton, *supra* note 86, at 972.

149. See *Popik & Quackenbos*, *supra* note 144, at 431.

150. *Id.*

151. *Id.* One commentator noted: "No principles are more deeply ingrained in the minds of underwriters than the selection of risk and the determination of premium. Insurers must know with certainty that contract language will be judicially respected. Absent such certainty, only the most cavalier insurer would attempt to write business." Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 390-91 (1985).

152. *Popik & Quackenbos*, *supra* note 144, at 432. *Popik and Quackenbos* provide extensive citations in support of their claim. A significant excerpt of these notations follows:

If we were to extend the coverage of the Hartford policies in this case, by some strained interpretation, to find potential coverage for the situation presented by this [loss] . . . we would be doing no favors to the consumers of homeowners and excess insurance policies. Ordinary insureds would have to bear the expense of the increased premiums necessitated by the expansion of their insurers' potential liabilities.

*Hartford Fire Ins. Co. v. Superior Court*, 191 Cal. Rptr. 37, 44 (Cal. Ct. App. 1983); accord *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989); see also *Nation v. State Farm Ins. Co.*, 880 P.2d 877, 891 (Okla. 1994) (Opala, J., concurring) (observing that the majority's invalidation

Michigan Supreme Court noted: “[I]t would seem that the uncertainty associated with subjecting insurers and insureds to the whims of individual judges and their various conceptions of ‘equity’ would *increase* overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk.”<sup>153</sup> Ironically, because of the absence of any real doctrinal standards and the growing inconsistency and unpredictability in the courts, the ultimate effect of adhesion contract analysis is that insurers are forced to “increase premiums or restrict coverage, all to the detriment of the very people the doctrine was intended to protect.”<sup>154</sup>

### B. *Undermining the Parties’ Freedom to Contract*

The basic principle underlying contract law is that each individual possesses the liberty to enter into the bargaining process.<sup>155</sup> This principle has withstood over one hundred years of American jurisprudence.<sup>156</sup> It is difficult to reconcile the ability of judges to rewrite contracts with an individual’s freedom to contract.<sup>157</sup> In a previous decision, the Michigan Supreme Court stated:

---

of household exclusion in automobile liability policy is no “victory for consumers” because expanded coverage “would doubtless be passed on to all affected consumers in the form of higher premiums”); *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 808 (Utah 1992) (Hall, C.J., concurring) (enforcing household exclusion in homeowner’s policy and noting “[i]f an insurer provided bodily injury coverage in a homeowner’s policy for those living on the insured premises, the likelihood of covered injuries would substantially increase and the insurer would assess a higher premium based on that increased risk”); *Safeco Ins. Co. v. Hirschmann*, 773 P.2d 413, 420 (Wash. 1989) (Callow, J., dissenting) (criticizing the majority for invalidating unambiguous language in an “all-risk” homeowner’s policy and observing “[t]he insurance industry’s ability to segregate and manage risk will be severely impaired. Insurance purchasers may be required to choose between high premiums or [forgoing] ‘all-risk coverage’ entirely”).

153. *Devillers v. Auto Club Ins. Ass’n*, 702 N.W.2d 539, 555 n.62 (Mich. 2005); see also Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 203 (1995) (“Uncertainty about how judges will interpret insurance contracts may significantly increase the costs of insurance.”).

154. Popik & Quackenbos, *supra* note 144, at 427.

155. See *Hale v. Henkel*, 201 U.S. 43, 74 (1905).

156. Indeed, “freedom to contract,” while not explicitly stated in the Constitution, is still considered a fundamental right under the Fifth and Fourteenth Amendments. 16B AM. JUR. 2D *Constitutional Law* § 594 (1998).

157. See *Urian v. Scranton Life Ins. Co.*, 165 A. 21, 23 (Pa. 1933) (“Where language is clear and unambiguous [it] cannot be construed to mean otherwise than what it says. We have often said this, and trust we shall continue to adhere to it, so long as our judicial system provides for

This approach, where judges...rewrite the contract...is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.... The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens.... It is, in short, an unmistakable and ineradicable part of the legal fabric of our society.<sup>158</sup>

Despite recognition of the fundamental right of two parties to contract with one another, “[c]ourts often ignore or down-play evidence indicating that the insured was capable of bargaining for coverage but failed to do so.”<sup>159</sup> Amazingly, in some cases, the assumption was so strong that the court allowed for pro-insured rules of interpretation even though the portion of the insurance contract to be construed was authored by the insured.<sup>160</sup> As Corbin aptly stated: “One does not have ‘freedom of contract’ unless society both forbears to penalize the contractor for making the bargain and enforces it after it is made.”<sup>161</sup> This still holds true today.

Part of the basic fabric of American society is the freedom to contract with others.<sup>162</sup> The judicially created rules of interpretation based solely on the nature of the document presented to the court does not allow for this liberty. In fact, by eliminating provisions that

---

an interpretation of contracts made by the litigants, and not to the making of contracts for them.” (alteration in original) (citations and internal quotation marks omitted)).

158. *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003) (citation and footnotes omitted).

159. *Fischer*, *supra* note 104, at 1013. *See, e.g.*, *A.I.U. Ins. Co. v. Superior Court*, 799 P.2d 1253, 1265 (Cal. 1990); *Hannon Eng’g, Inc. v. Strom Indus., Inc.*, 179 Cal. Rptr. 78, 84–85 (Cal. Ct. App. 1981).

160. *E.g.*, *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 715 (D.C. Cir. 1986) (stating that authorship is not a precondition of application of *contra proferentum* and construing against insurer rule applied to language drafted by insured).

161. 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 79.4, at 21 (Joseph M. Perillo ed., rev. ed. 2003).

162. *See Coast Fisheries Co. v. Linen Thread Co.*, 269 F. 841, 844 (D. Mass. 1921) (“[I]t is clear that in private affairs everybody has the right to choose with whom he will contract or will not contract . . .”); *see also supra* text accompanying note 7.

the parties mutually assented to via signature and consideration, the court effectively restricts the individual's liberty to contract. Public policy is not served by this kind of activism in the courts. It is certainly not in the public's best interests to allow a judge to add or remove terms that are clearly unambiguous or are simply nonexistent in an agreed-upon contract.<sup>163</sup>

### C. *The Problem with Judicial Activism*

One of the main problems with the adhesion contract doctrine is that it gives wide latitude to judges to interpret contracts in light of their own vision of "rightness" and "fairness."<sup>164</sup> The idea of judicial activism—"changing law by court decision rather than deferring to the legislative process as the vehicle for change"—received widespread criticism in recent years.<sup>165</sup> The test for determining whether a clause or contract constitutes adhesion is placed squarely in the hands of the judge hearing the case. Judicial activism "'encourages legislators to be lazy and leave a bad statute they ought to repeal.' But more importantly, it gives judges arbitrary power to do away with standards they no longer recognize because of whatever ideas are currently fashionable."<sup>166</sup>

---

163. Again, a bigger issue remaining below the surface is whether to allow judges to determine if a term is ambiguous or not. *See, e.g.,* Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563 (7th Cir. 1997) (finding the term "discrimination" ambiguous and reconstructing coverage against drafter because of reasonable expectations, even though the term was clearly unambiguous in the context of the document). This approach is especially troublesome when a court declares contract language ambiguous not because the exclusion is unclear in the context of the specific circumstances of the case before it, but instead because the court can imagine other scenarios in which applying the literal language of the exclusion might lead to absurd results. *See, e.g.,* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 78–79 (Ill. 1977) (declining to enforce absolute pollution exclusion because definition of pollutant as "any solid, liquid, gaseous . . . irritant or contaminant" was overbroad and could apply to any normally harmless substance to which someone had an allergic reaction); *accord* Reg'l Bank v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994); *see also* Popik & Quackenbos, *supra* note 144, at 429–30, 433–37.

164. *See, e.g.,* Lewis v. W. Am. Ins. Co., 927 S.W.2d 829, 833 (Ky. 1996) (ordering coverage based on conclusion that, despite what their insurance policies may say, insureds expect that "their family members [will] receive comparable protection to that afforded to unknown third persons").

165. *E.g.,* Nathan Hershey & Christine M. Jarzab, *Looking at Accountability 40 Years After Darling*, 14 ANNALS HEALTH L. 437, 437 (2005).

166. Dale Ahlquist, *G.K. Chesterton's Uncommonly Sensible Views on the Law*, 3 AVE MARIA L. REV. 685, 696 (2005) (quoting G.K. CHESTERTON, *The Lawlessness of Lawyers, in THE USES OF DIVERSITY* 79, 86 (1921)).

Application of adhesion contract doctrine contributes to judicial activism in several ways. First, judges may be asked to determine if a contract can be fairly characterized as one of adhesion. Second, judges who apply any sort of test must determine whether a provision is “fair” or assess the “reasonable expectations” of the party seeking relief. Third, judges have the sole authority to cross out provisions they regard as “unjust” or “wrong” and add in provisions they regard as “just” or “right.” In fact, some courts, as a matter of policy, “attach to contracts many obligations of which the contracting parties never thought.”<sup>167</sup>

Standardized contracts contain valuable and beneficial features that may be lost or undermined by a facile characterization of the bargain as “one-sided.” As one scholar noted:

The issue is not ambiguity or reasonable expectations of the insured. These are mere artificial constructs. An insured is not prejudiced by an “ambiguous” term in a contract that he has not read. Nor can insureds have “reasonable” expectations of coverage when most insureds are profoundly misinformed about the structure and content of the insurance policy. The problem actually presented to the court is how to define the bundle of rights that the insured *should* be deemed to have obtained from the insurer in a setting where one party to the transaction, the insured, is, as a practical matter, unable to knowledgeably determine his own needs because of the nature and complexity of the transaction.<sup>168</sup>

Allowing judges to operate as sole arbiters of the contract interpretation process can lead to unpredictable and chaotic results.<sup>169</sup> For example, any judge who harbors resentment or ill-will toward insurance companies may feel inclined to side with the insured. With no clear guidelines, judges are free to express their beliefs through rulings on fairness. As a result, one problem with the adhesion contract doctrine is that an identical contract in different cases can be

---

167. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 309 (coll. ed., Atheneum 1971) (1949).

168. Fischer, *supra* note 104, at 1018.

169. See Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 802 (Utah 1992) (“[A] number of states have struggled with the doctrine’s scope, leaving a trail of inconsistent decisions and creating an obviously uncertain future for the doctrine in those states.”); see also Sierra David Sterkin, Note, *Challenging Adhesion Contracts in California: A Consumer’s Guide*, 34 GOLDEN GATE U. L. REV. 285, 299–301 (2004) (discussing how different jurisdictions apply adhesion contract analysis).

subject to divergent interpretations based on the different judges involved. Courts rarely “attempt to determine whether the insured paid fair value for the coverage the insurer admits it provided.”<sup>170</sup> Further, “[c]ourts consistently ignore the fact that the scope of coverage and the premium paid are directly proportional.”<sup>171</sup> Rather, they engage in “corrective justice,” assuming facts and determining fairness to the party with the lesser bargaining power.<sup>172</sup>

Michigan jurisprudence repeatedly warns of overarching judicial activism.<sup>173</sup> In fact, the Michigan Supreme Court clearly states: “[P]olicy decisions are properly left for the people’s elected representatives in the Legislature, not the judiciary.”<sup>174</sup> Further, “[s]tatutory—or contractual—language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.”<sup>175</sup> Not surprisingly, the *Rory* decision acknowledged past runaway courts in the contract interpretation arena and sought to end further debate.<sup>176</sup>

### III. AGAINST THE ADHESION CONTRACT DOCTRINE: THE PUBLIC POLICY ARGUMENT

The arguments that support traditional contract principles, predictability in the marketplace and public policy, weigh in favor of the *Rory* principles. While adhesion contracts may be a relatively novel concept, there was never a need to break from traditional contractual interpretations. Public policy dictates that judicial intervention is unwise and unnecessary for contract interpretation.

---

170. Fischer, *supra* note 104, at 1022.

171. *Id.*

172. *Id.*

173. See, e.g., Terrien v. Zwit, 648 N.W.2d 602, 610 (Mich. 2002) (“[C]ourts cannot disregard private contracts and covenants in order to advance a particular social good.”); Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 782 (Mich. 2003) (“[T]his approach, where judges divine the parties’ reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law . . .”).

174. Devillers v. Auto Club Ins. Ass’n, 702 N.W.2d 539, 555 (Mich. 2005).

175. *Id.* at 552.

176. Rory v. Cont’l Ins. Co., 703 N.W.2d 23, 41 (Mich. 2005).

### A. *Traditional Contract Philosophy*

The unity of the law of contracts *can* be maintained in the face of the increasing use of contracts of adhesion.<sup>177</sup> In fact, public policy dictates that it should. The *Rory* decision mandated that the state of Michigan return to traditional contract principles.<sup>178</sup> Absent traditional contract defenses, an unambiguous contract must be enforced as written.<sup>179</sup> This not only respects the parties' rights and abilities to contract,<sup>180</sup> but also presents a uniform approach to contract interpretation.<sup>181</sup> As discussed above, traditional contract philosophy is rooted in the mutual assent of both parties.<sup>182</sup>

The first argument for maintaining the adhesion contract doctrine is that traditional contract principles are inapplicable when the bargaining power is clearly unequal.<sup>183</sup> This argument is without merit. First, anytime one enters into a contract, there is *always* an imbalance of power. For example, if A possesses something that B seeks to possess, A is in a better position to negotiate the sale by virtue of not desiring the item. The idea that both parties are on unequal footing stems from their relationship: one party lacks sophistication, financial savvy, or resources to negotiate the contract in a fully competent way.<sup>184</sup>

It is true that in the insurance industry, for example, the insurance company will hold a superior financial position. As such, there is a disparity in bargaining power, as the consumer likely cannot afford to hire an attorney to read all the convoluted language in the agreement, and the insurance company may not be willing to negotiate terms.

---

177. See generally Kessler, *supra* note 15.

178. *Rory*, 703 N.W.2d at 41.

179. *Id.* at 35, 41–42.

180. *Id.* at 41.

181. Cf. *supra* text accompanying note 73 (noting the lack of uniformity—even under the U.C.C.—that exists today).

182. See, e.g., SHERNOFF ET AL., *supra* note 42, § 1.03.

183. See, e.g., *Freedlander, Inc. v. N.C.N.B. Nat'l Bank*, 706 F. Supp. 1211, 1221 (E.D. Va. 1988) (“[T]here is an increasing recognition of the law’s role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.”).

184. See *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (noting that part of the analysis includes a focus “on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity of bargaining power” (citation omitted)).

However, simply because there is an inequality in financial status between the parties, it does not follow that there are grounds for interpreting unambiguous contract terms against the richer party. There is no other area in American jurisprudence that creates rules of interpretation based in part on the financial status and sophistication of one party.<sup>185</sup> But courts have crafted a broad category that strikes a division between big industry and individual consumer.<sup>186</sup> As noted, courts routinely fail to analyze whether the party paid a fair price for the coverage received, whether the party actually bargained for specific provisions, or even whether the company offers the type of coverage sought in the courtroom. If regulation of the insurance industry is what the court is attempting to do, then the state legislatures provide the proper forums.<sup>187</sup>

The second argument against traditional contract doctrine is that adhesion contracts are often standardized documents with confusing language and long provisions, making it difficult or impossible for persons to give mutual assent to the agreement because they do not understand the terms.<sup>188</sup> This assertion fails as well. The fact that a document is standardized does not automatically make it adhesive in nature.<sup>189</sup> For example, in today's world, many documents are printed on a computer or word processor.<sup>190</sup> Similarly, a handwritten document could be ruled as adhesive if the terms in the contract were construed as such by the court. Confusing language and long provisions also do not invalidate, *per se*, a contract.<sup>191</sup> As will be

---

185. For example, suppose a man who has less than a high school education struck with his automobile a billionaire who has a Ph.D. Certainly no one would argue that the traditional tort principles governing the billionaire's argument should be subject to different standards in the courtroom simply because he is richer and more sophisticated than the other party.

186. *See generally* Fischer, *supra* note 104 (examining special rules courts use to interpret insurance contracts).

187. *See infra* Part IV.C.

188. Karl Llewellyn argued that there can be no conscious assent to such terms. Conscious assent can be given only to "dickered" terms, the terms reasonable parties normally and consciously negotiate. As to the boilerplate, "blanket assent" may be presumed as to any decent terms; but such blanket assent will not be presumed as to "indecent" terms, LLEWELLYN, *supra* note 83, at 362-71, or, in the language of the *Restatement*, to "bizarre or oppressive" boilerplate provisions. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 60, § 211 cmt. f.

189. For example, many documents are standardized, and parties "fill in the blanks" or edit the provisions themselves. *See, e.g.*, Lawrence A. Cunningham, *Language, Deal, and Standards: The Future of XML Contracts*, 84 WASH. U. L. REV. 313, 314-15, 341-42 (2006).

190. There remain few, if any, professional documents written without some sort of computerized template to aid in the drafting process. *See id.* at 315.

191. *See* *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 & n.16 (Cal. 1981).

discussed, insurance companies often have to include lengthy provisions and complex language because of the nature of the business.

The third argument against traditional contract doctrine is that adhesion contracts leave little to negotiate, thus presenting the consumer a take-it-or-leave-it deal. When the consumer has no other options, he or she is effectively forced into the adhesion contract. This argument does not hold water. The modern consumer has a myriad of choices from insurance companies to software retailers to doctors and hospitals. Another facet of this argument mimics the equality of the bargaining process argument. If A seeks to possess something that B owns, B enjoys a constitutional freedom to create any terms that B wishes. In fact, B is well within the right to say to A, "I will sell you this item for \$1,000. Take it or leave it."

The unity of the law of contracts should be maintained. If the public at large determines that standardized contracts present a burden for consumers, the appropriate route is to seek legislative change. *Rory* correctly determined that judicial intervention in contract interpretations was simply inappropriate.

### B. *The Importance of Predictability*

One of the strongest reasons for eliminating the adhesion contract doctrine is predictability. When judges are free to interpret contracts through the lenses of fairness and reasonableness, persons in the market place are unable to predict how their contracts will be interpreted by the court.<sup>192</sup> For example, insurance companies are faced with the real possibility that parts or all of their provisions are subject to judicial scrutiny.<sup>193</sup> Many large companies operate in every state. With different state courts using different tests and rules of interpretation, it is extremely difficult to predict how a given document will hold up in court.<sup>194</sup>

In response to this unpredictability, companies may resort to the creation of complex documents with lengthy provisions. These contracts are not designed to confuse the reader, but rather, the contracts are drafted to protect the insurer from results that are

---

192. See Popik & Quackenbos, *supra* note 144, at 444–45.

193. See *id.* at 441.

194. See *id.* at 443–45.

extremely difficult to predict.<sup>195</sup> In turn, insurance companies are forced to charge higher premiums in an attempt to cover the liabilities that they themselves cannot foresee.<sup>196</sup> This vicious cycle creates unsettling feelings toward big companies; they are viewed as “bullies” in and out of the courtroom.<sup>197</sup>

In sum, the current adhesion contract analyses in courtrooms across the country fail the consumer. Insurance companies in particular must weigh their risks in order to determine what coverage is available as well as what prices to charge the consumer. If these businesses cannot make accurate predictions, the risk analysis becomes skewed. In turn, the consumer pays the price for judicial activism through increased premiums and reduced coverage.

### C. *The Purpose of Public Policy*

While public policy initially was the justification for dismissing unconscionable contracts, the idea of unconscionability evolved into a notion involving unfairness and unreasonableness on behalf of the adhering party. In turn, courts relied on the public policy argument to defend revisions of standardized contracts.<sup>198</sup> However, to provide judges with the power to rewrite contracts fails the public policy argument on several levels.

Public policy decisions are of a peculiar nature.<sup>199</sup> On the one hand, judges are expected to uphold the law. On the other, they are expected to rule with the interests of the general welfare of the people in mind. As Lord Radcliffe noted:

[T]he ordinary citizen would be both surprised and dismayed to have it brought home to him that his legal system was, theoretically, at the mercy of such an assembly [of judges] and could be radically remodeled by it, as it were, overnight. Similarly, he feels in his bones that the law which the learned judge interprets to him from

---

195. *Id.* at 431–32.

196. *Id.*

197. *See generally* Fischer, *supra* note 104, at 1008–30 (explaining why courts often view insurance contracts as unfair to the consumer).

198. *See supra* text accompanying note 57.

199. “Public policy” is defined as “principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is ‘contrary to public policy.’” BLACK’S LAW DICTIONARY 1267 (8th ed. 2004).

the bench is the voice of something more stable and more fundamental than the aspirations or convictions either of himself or the judge.<sup>200</sup>

In other words, citizens expect judges to apply the law as it relates to the good of society. This is what public policy is all about. But there is a fine line between decisions of public policy that reflect the changing norms of society and the processes of the decomposition of the law.<sup>201</sup> Once a systematic decomposition of sanctions takes place in important areas of social life, a condition termed “Anomia” takes over.<sup>202</sup> “Anomia ‘brings disorder, doubt and uncertainty over all.’”<sup>203</sup> This concept directly applies to the current status of contract law in the United States. It is through the judicial decisions and court-made tests in the interest of public policy that consumers as well as insurers experience disorder, doubt, and uncertainty. Disorder exists in how different courts apply different standards; there is doubt and uncertainty as to how the unambiguous agreements will be characterized, and how they will be interpreted by a judge.

Public policy interests often interlace with judicial activism, creating an even more blurred vision of decision making under the guise of general welfare. Ongoing debates regarding the dangers of legal positivism abound.<sup>204</sup> Without delving deeply into philosophical theory, it is safe to argue that a variety of judges hold differing beliefs about the general welfare of the people. The danger in allowing courts to circumvent precedent in well-established areas of law (such as contract law) is obvious.

Traditional contract doctrine upholds public policy. It mandates that, absent any real ambiguities, the terms of agreements are to be enforced as written.<sup>205</sup> This not only prevents the parties from escaping their duties, but it also respects the liberty to contract that has been upheld as a fundamental, constitutional right since the dawn

---

200. RADCLIFFE, *THE LAW & ITS COMPASS* 11 (1960).

201. RALF DAHRENDORF, *LAW AND ORDER* 28 (Westview Press, Hamlyn Lectures Series No. 37, 1985).

202. *Id.* at 24.

203. *Id.* at 27 (quoting WILLIAM LAMBARDE, *ARCHEION* 67 (Charles H. McIlwain & Paul L. Ward eds., Harv. Univ. Press 1957) (1635)).

204. *See, e.g.*, OFER RABAN, *MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY* (2003) (discussing the debate on legal positivism between H.L.A. Hart and Ronald Dworkin).

205. *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 26 (Mich. 2005).

of the country's existence.<sup>206</sup> The general welfare of the people is protected by allowing them to make their own decisions and by holding them accountable for their actions. To do otherwise—by providing for a way out of a facially legal contract via the reasonable expectations of the majority of the people, and by making the judge the sole arbiter of those expectations—rubs against the very fabric of not only well-established precedent, but explicit constitutional provisions as well.

#### IV. THE COUNTERARGUMENT: BIG BAD INDUSTRY VERSUS "THE LITTLE GUY"

Perhaps the strongest argument put forth against the *Rory* principles lies in the "big business versus ordinary citizen" debate. The argument goes like this: because the consumer holds fewer resources than big business, he should not be held to the same level of accountability. This assertion fails on the merits. Certainly, a large insurance company holds more resources, stronger bargaining power, and definitely more access to attorneys or other skilled professionals. But insurance companies and other large industries existed before the emergence of adhesion contract analysis.

##### A. *The Duty of Contracting*

Liberty of contract is not without duties. Any person entering into a contract is responsible to read, understand, and know what type of bargain he or she is entering into.<sup>207</sup> The parties have a duty to inform themselves of any provisions they might not understand. This is not to say, however, that one party can take full advantage of another. On the contrary, parties also have a duty to act in good faith and to disclose all aspects of the agreement.<sup>208</sup>

In the context of adhesive agreements, such as insurance policies, advocates for reasonable interpretations claim that no one ever reads their policies. This argument should not hold up in a court of law. First, just because "no one" takes action does not make the lack of

---

206. See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

207. See, e.g., *Hollywood Credit Clothing Co. v. Gibson*, 188 A.2d 348, 349 (D.C. 1963); see also RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 60, § 211 cmt. b.

208. See *Market St. Assocs. v. Frey*, 21 F.3d 782, 787 (7th Cir. 1994).

action acceptable in the eyes of the law.<sup>209</sup> Second, it is simply illogical to conclude that because the vast majority of consumers fail to read their agreements, the judiciary should dictate a blanket public policy approach. While it is true that the language in some standardized contracts, particularly insurance contracts, may be difficult to navigate, the duty to read still attaches. There are many examples of difficult reading material—state statutes, prescription drug pamphlets, federal tax forms—but no one can file a claim for relief from any of these based on the fact that “no one ever reads them” or that the language is complicated.

Another valid point is that contracts are, by their nature, voluntary agreements.<sup>210</sup> This means that a party is not *required* to enter into the agreement. For example, in Michigan, automobile owners must insure their vehicles.<sup>211</sup> However, the law does not mandate with whom the driver must insure that vehicle. Consumers have choice.<sup>212</sup> This type of reasoning applies to all types of contracts. Patients have the option to seek out doctors who will not force binding arbitration as a stipulation for treatment. Consumers who purchase software have the option to either not purchase the items online, or only purchase those items with a return policy. It is irrelevant that the person entering into the agreement fails to read the terms. This only shifts the blame to the retailer, insurance company, or doctor. The bottom line is that consumers enjoy the freedom to choose whether or not they wish to enter into the bargaining process.

### B. *Traditional Defenses and Remedies in Contract Law*

Traditional contract law provides a myriad of defenses to protect the parties. For example, agreements may be deemed unlawful if

---

209. In the context of criminal law, every person is considered to be “on notice” of relevant criminal statutes, regardless of whether they have actually read the statutes. *See, e.g.,* *People v. Marrero*, 507 N.W.2d 1068, 1070 (N.Y. 1987).

210. While proponents of adhesion contract analysis argue that the terms of an adhesion contract are not voluntary, *see, e.g.,* Goodman, *supra* note 43, at 327–28, this author suggests here that entering into contract *as a whole* is not a mandatory activity. Thus, one may choose to enter into a contract with strict terms, or one may choose not to enter into such an agreement.

211. *See* MICH. COMP. LAWS ANN. §§ 257.517–.518(b) (West 2001).

212. For example, there are over sixty-two insurance companies licensed to do business in the state of Michigan. *See* Michigan Office of Financial and Insurance Services, OFIS Buyer’s Guide to Auto Insurance Selection Criteria, [http://www.cis.state.mi.us/fis/pubs/guides/auto/auto\\_buyer\\_criteria.asp](http://www.cis.state.mi.us/fis/pubs/guides/auto/auto_buyer_criteria.asp) (last visited Mar. 3, 2007).

they are contrary to the law, if there is lack of consideration, or if certain mistakes negate the mutual assent of the parties.<sup>213</sup> These safeguards provided contracting parties protection from bad bargains long before adhesion contracts.

Moreover, traditional contract defenses of fraud, duress, and unconscionability shield consumers from oppressive terms.<sup>214</sup> For example, if an insurance company misrepresented the character or essential terms of the proposed contract, and that misrepresentation then induced conduct by the consumer that appeared to be a manifestation of assent, then a court will find that the consumer's agreement is not an effective manifestation of assent.<sup>215</sup> This type of fraudulent inducement applies equally to adhesion contracts as well as other types of agreements. Unconscionability, as discussed previously, also applies to protect consumers against illegal or unprincipled bargains.

### C. *Implications Going Forward*

Michigan already regulates insurance through the Office of Financial and Insurance Services.<sup>216</sup> The agency regulates insurance and other industries pursuant to the federal Financial Services Modernization Act of 1999.<sup>217</sup> Other states rely on similar models of regulation.<sup>218</sup> In the area of insurance regulation, then, the state already places an importance on fairness to the consumer. Furthermore, now that Michigan has returned to traditional contract interpretation, the Insurance Commissioner will likely serve a larger

---

213. See generally SIR FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 373–516, 561–880 (Fred B. Rothman & Co. 1988) (1906) (examining traditional forms of unlawful contracts).

214. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 60, §§ 162, 175.

215. *Id.* § 163.

216. See MICH. COMP. LAWS ANN. § 445.2003 (West 2002); see also Michigan Office of Financial and Insurance Services, Who We Are, <http://www.michigan.gov/cis/0,1607,7-154-10555-40268—,00.html> (last visited Feb. 20, 2007) (“The Office of Financial and Insurance Services (OFIS) is responsible for the regulation of Blue Cross Blue Shield, [thirty] HMOs, . . . 169 domestic insurance companies, [and] 1,303 foreign insurance companies . . .”).

217. Michigan Office of Financial and Insurance Services, *supra* note 216 (“Michigan is the first state to coordinate regulation of financial institutions, insurance, and securities industries under the federal Financial Services Modernization Act of 1999.”).

218. See C.R. McCorkle, Annotation, *Public Regulation or Control of Insurance Agents or Brokers*, 10 A.L.R.2D 950, 952–53 (1950).

role in protecting the consumer.<sup>219</sup> More importantly, this regulatory regime is already in place and recognized by state law. Therefore, no novel models of regulation need be invented; there need only be a more stepped-up presence in the life of the ordinary consumer.<sup>220</sup> If other jurisdictions applied the *Rory* principles, the consequences would likely be more state regulation of the insurance industry.<sup>221</sup>

The state legislature may also regulate industry by passing laws that would curtail any questionable actions by insurance companies and other big businesses who deal with standardized contracts and fine print documents.<sup>222</sup> In many instances, the legislature has stepped in to pass laws about statute of limitations issues, arbitration agreements, and other important public policy issues arising out of contracts.<sup>223</sup> It is precisely this avenue that protects the individual from big business. The legislature represents the people and those representatives are elected solely to represent the will of the people. Therefore, it makes sense that the legislative branch—not the judiciary—is the correct vehicle to enact changes that offer more protection to consumers.

The full effect of *Rory* has yet to be seen.<sup>224</sup> The *Rory* court insists in its holding that traditional contract principles must apply in every

---

219. See *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 26 (Mich. 2005). The *Rory* court declared:

[I]n this case involving an insurance contract, the Legislature has enacted a statute that permits insurance contract provisions to be evaluated and rejected on the basis of “reasonableness.” The Legislature has explicitly assigned this task to the Commissioner of the Office of Financial and Insurance Services . . . rather than the judiciary.

*Id.* See also MICH. COMP. LAWS ANN. § 500.2236(5) (West 2002) (stating that the Commissioner may disapprove, withdraw approval, or prohibit the issuance of objectionable policy forms).

220. These agencies, such as the Office of Financial and Insurance Services, are governmental organizations that work with the legislature to draft and pass laws in the interest of the consumer. Thus, these agencies could certainly draft statutes that would curtail activity they viewed as “adhesive.”

221. In the context of other adhesion contracts, such as software shrink-wrap licenses or arbitration agreements, state and federal consumer protection statutes and agencies would take on the same roles as the Insurance Commissioner in Michigan.

222. See 73 C.J.S. *Public Administrative Law and Procedure* § 43 (1983). It should be noted that the Insurance Commissioner in Michigan also works with the state legislature. *Rory*, 703 N.W.2d at 26.

223. See, e.g., *Allstate Ins. Co. v. Kim*, 829 A.2d 611, 613 (Md. 2003); *Osborn v. U.S.*, 567 S.E.2d 677, 681–82 (W.Va. 2002).

224. The Michigan Court of Appeals recently applied the *Rory* principles to an employment agreement in *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 473 (Mich. Ct. App. 2005), *appeal denied*, 713 N.W.2d 779 (Mich. 2006).

case—including insurance contracts. The legislature, along with the Insurance Commissioner, will likely address the specific statute of limitations issue presented in *Rory* by creating a law that would not allow a contractual limitation period to be reduced to only one year. It is yet to be seen if the *Rory* principles will gain acceptance in other jurisdictions. In recent years, there appears to be a push in many jurisdictions to limit the use of judicial discretion, especially the use of reasonable expectations in unambiguous adhesion contracts, though not to the extent seen in Michigan.<sup>225</sup> Given that the *Rory* principles apply in Michigan only, it would hardly be surprising to see a number of cases involving the interpretation of interstate contracts.<sup>226</sup>

### CONCLUSION

Returning to traditional contract jurisprudence benefits everyone in the marketplace. Businesses will achieve more stability and predictability in their contracting activities; legislative avenues and traditional defenses protect consumers; and judges would be relieved of the burden of playing interpreter and crafting their own statements

---

225. See Peter Nash Swisher, *Insurance Binders Revisited*, 39 TORT TRIAL & INS. PRAC. L.J. 1011, 1036 (2004) (“[E]xcept for a handful of states, the current judicial trend is to restrict, reject, or basically ignore Professor Keeton’s ‘rights at variance’ reasonable expectations doctrine.” (footnote omitted)); see also Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 193–95 (1998). Stempel observes that:

[T]he number of jurisdictions that has adopted this “pure” version of the Keeton doctrine [of reasonable expectations] is relatively small, numbering approximately a half-dozen. It includes states generally regarded as more progressive and favorable to consumers and claimants: California[,] New Jersey, Pennsylvania, and the District of Columbia. Also appearing at least at one time to endorse the full dress form of the reasonable expectations doctrine are Hawaii, Idaho, Iowa, Minnesota, and Nevada. Today, however, Idaho, Iowa, and Pennsylvania have since disapproved the pure reasonable expectations doctrine and instead appear to use expectations analysis only when contested policy language is ambiguous or otherwise problematic. Minnesota does not require ambiguous language as a trigger for expectations analysis but does require that the exclusionary language at issue be in some way hidden or surprising to the policyholder. New Jersey is seen by some commentators as similarly having moved from pure reasonable expectations analysis to expectations as a tool for resolving ambiguous language and then back again.

*Id.* (footnotes omitted).

226. A thorough analysis of interstate contract law is beyond the scope of this Note.

of fairness and reasonableness.<sup>227</sup> This Note argued for eliminating the use of the adhesion contract doctrine and returning to traditional contract principles for all agreements. This Note characterized the erosion of traditional contract principles once found in standardized contracts by exploring the development of the adhesion doctrine, from its roots in unconscionability to its recent application in reasonable expectations in insurance contracts. The effects of the adhesion contract doctrine on business and industry, as well as how the doctrine has been detrimental to a party's freedom to contract through the use of judicial activism, are evident. Public policy is served by eliminating the adhesion contract analysis and returning to the traditional contract interpretation standards. In fact, the "little guy" is actually suffering as a result of courts liberally construing contract provisions. This Note also examined the implications of its argument. If every jurisdiction adopted the *Rory* principles, state legislatures would probably take on a larger role in the regulation of insurance industry and other big business. Thus, the interest of the public is better served by abiding by time-honored, traditional contract law in the courtroom, and by handling issues of regulation through the will of the people—where they belong.

---

227. As the Michigan Supreme Court aptly noted, "[When a court] contravenes the unambiguous text . . . [it] represents an unconstitutional usurpation of legislative authority." *Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539, 558 (Mich. 2005).