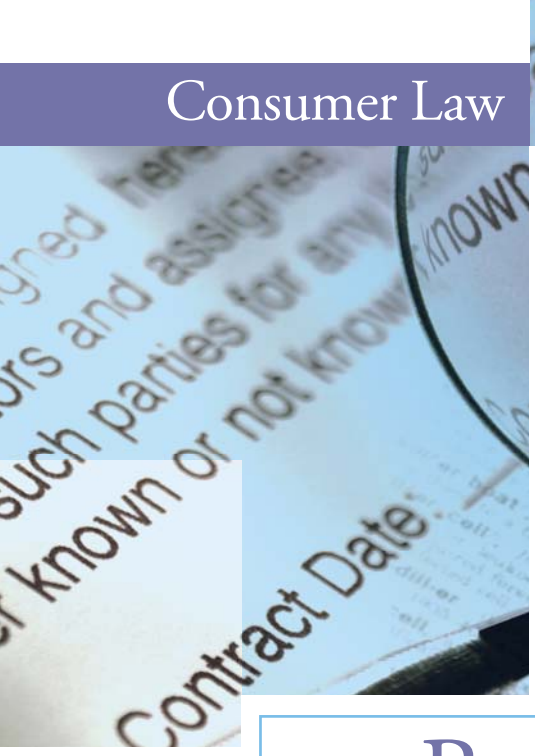


Beyond Consent and Unconscionability

By Josh Ard

SHOULD ALL TERMS IN CONSUMER CONTRACTS BE ENFORCED?

The contemporary law of consumer contracts is highly fictional, though not in the entertaining manner of a Scott Turow novel. First, courts may talk of consent and freedom to contract, but that rarely describes the situation. Consumers are typically given form contracts with boilerplate terms, often after agreeing to be contractually bound. There is rarely any type of meeting of minds or real consent. Theoretically, one may have freedom to contract, but the average consumer is not going to get anywhere by drafting contract terms and trying to negotiate with a car rental firm at an airport to see if the proposed contract will be accepted. There is no equivalent of priceline.com, where consumers can propose contract terms and see who will accept them. Second, when courts have refused to enforce some of these boilerplate terms, they have often categorized them as unconscionable, something that shakes the conscience of the court. It is highly unlikely that a judge who has just heard a horrendous child abuse or elder abuse case would find that a contract for a stereo really shakes the conscience of the court.

Courts today are more likely to be upset by the fictional nature of the second construct. Few seem to be bothered by lack of true consent, but unconscionability seems to be taken more literally, and few contracts are seen as sufficiently shocking. The end result is that, lacking any reasonable alternative, courts tend to enforce these boilerplate terms, especially in Michigan. The purpose of this article is not to justify unconscionability, but to argue that there must be some mechanisms for courts to refuse to enforce certain terms in consumer contracts—terms that the consumer, and, often the business entity, never agreed to. Sometimes, one business "borrows" terms from other contracts without investigating the implications of those terms.

Courts are increasingly likely to enforce consumer contracts as written. Perhaps the high point of this trend is *Rory v Continental Ins Co.*[1] The court held, in the words of Justice Young: "[I]nsurance contracts are subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written."[2] That, in essence, comes close to claiming that there is no consumer law of contracts, since insurance contracts are the epitome of special treatment of contract terms.

Spinach Theory of Boilerplate

In part, this attitude is justified by currently popular theories that the market is the proper determinant of contracts, not the courts. In the standard teaching of law and economics, the assumption is that the market guarantees that contracts are optimal for both parties. Many examples of arguments built on this theory are found in a recent symposium on boilerplate published in March 2006 by the *Michigan Law Review.*

If this is a scientific theory, it should be testable and allow prediction of consumer behavior. Some of its assumptions seem highly implausible. Both consumers and businesses are supposed to be able to place a dollar value on every contract term and use these calculations in weighing contracts. I doubt that most businesses are that sophisticated, and the average consumer presumably doesn't even attend to the clause, much less calculate its monetary value. The theory could be saved if sophisticated consumers made these calculations and somehow set the market.

In practice, however, as argued by Peter Alces in a paper available from the Social Science Research Network,[3] many consumer contracts, such as bank agreements, contain what he calls "guerilla terms." Hidden charges and fees are a huge source of profit. Unsophisticated consumers fall for them, while sophisticated consumers know how to choose good base prices and avoid the hidden fees. There is no motivation whatsoever for sophisticated consumers or businesses to educate the unsophisticated, according to Alces. Both are really profiting from the ignorance of the masses. The sophisticated get better deals and the businesses make more money. As a result, there is no market pressure to reject the terms that harm unsophisticated consumers.

In general, if the theory is correct, there should be many examples of the market causing contracts with bad terms for consumers to be replaced with more efficient contracts. There is no reason to assume that businesses would fail to offer one-sided terms initially. We do see market forces operating on prices on consumer items. I know of no example where the market has affected terms that courts have struck down, such as forum selection clauses, compulsory arbitration agreements, and waivers of liability. If the theory is correct, this should happen.

Rather, terms that are bad for consumers tend to proliferate. The only corrective mechanisms come from outside the market itself—court rulings, legislative changes, or a massive education effort by interest groups. For example, the State Bar has conducted seminars together with AARP, the Attorney General's Office, and the Office of Financial and Insurance Services to convince consumers that the will and trust products offered by trust mills are not as good and have less favorable terms than services provided by qualified attorneys. The hope is that this knowledge may lead to better consumer decisions.

Discretionary Waiver of Oppressive Terms

One might argue that these boilerplate terms are not really harmful to consumers because they give businesses flexibility to enforce them only against truly "bad" consumers and waive them freely in the majority of instances. A typical example is check-out times at hotels and motels. These are supposedly rigid, but managers generally waive them when the request is non-abusive; however, they would, in theory, provide a remedy for a troublesome guest who refuses to leave even though the next customers have been waiting after the scheduled check-in time. One problem with giving discretion to businesses to determine which terms they will enforce and on whom is that it opens the door to disparate treatment. Will this discretion be based on reasonable business decisions or will it depend crucially on the customer? We know which groups have typically gotten the worst deals in America. With no discretion, there is uniformity and predictability, but neither holds where discretion is available.

Discrimination in discretion opens up causes of action that are harder to prove than contract interpretations, but could have more impact on businesses who lose. If the clause in question concerns credit, there is a potential for an Equal Credit Opportunity Act (ECOA) violation, which can result in punitive damages of up to $10,000 in an individual action. Consider:

Sec. 202.4 General rule prohibiting discrimination.

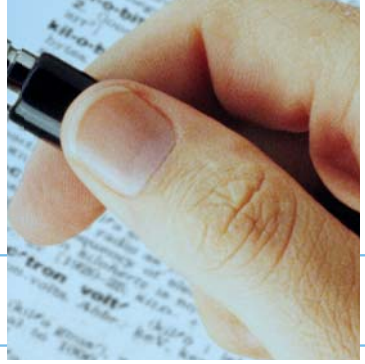
A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

Discrimination in the ECOA includes age and sex in addition to the usual categories of race, religion, color, and national origin. The Federal Reserve Board's Official Staff Commentary shows that this prohibition is quite broad:

Scope of section. The general rule stated in Sec. 202.4 covers all dealings, without exception, between an

FAST FACTS

Michigan courts are among the most vigorous in the nation in enforcing all terms in consumer contracts as written, even if the consumer never consented or the terms seems to be objectively unreasonable. This article critiques the apparent rationale for this laissez faire attitude and suggests reasons why it is better for courts to decide which terms to enforce rather than leaving everything to the discretion of businesses.



applicant and a creditor, whether or not addressed by other provisions of the regulation . . . . . The general rule covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts. Thus, whether or not specifically prohibited elsewhere in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule. Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate. Disparate treatment would be found, for example, where a creditor requires a minority applicant to provide greater documentation to obtain a loan than a similarly situated nonminority applicant. Disparate treatment also would be found where a creditor waives or relaxes credit standards for a nonminority applicant but not for a similarly situated minority applicant. Treating applicants differently on a prohibited basis is unlawful if the creditor lacks a legitimate nondiscriminatory reason for its action, or if the asserted reason is found to be a pretext for discrimination.

Discretion also opens up the possibility of a claim that the business did not act with good faith and fair dealing. Normally, Michigan courts do not impose this implied duty, but there is an exception when one party can perform at its own discretion.[4] It is difficult to predict how Michigan courts might respond to such a claim, but it is more flexible than an ECOA claim because there is no need to prove that the discrimination was based on membership in some protected class.

Of course, these remedies do not help the average consumer, who will not be able to demonstrate the pattern and practice needed to show variant treatment.

There is no reason to assume that consumer contracts will not contain terms that are oppressive to consumers and that are not otherwise in the interest of society as a whole. The fundamental question is who will decide which oppressive terms to enforce—courts or businesses? Noted libertarian Randy Barnett, no supporter of liberal judicial activism, nevertheless claimed that courts must require a threshold of reasonableness in clauses in consumer contracts.[5] Another rationale was suggested by Justice Young in footnote 84 to *Rory:* items not agreed to are not in the contract. As Barnett noted, performance in and of itself by the consumer suffices to create a contract and reflects an agreement to be bound, but not necessarily by all terms. Thus, rejecting certain terms doesn't imply a rejection of the entire contract. Nevertheless, there is definitely a tendency by courts to consider proferred terms and not simply start with a blank slate. This is possible under Barnett's approach, but not Justice Young's.

If neither of these analyses is accepted, the alternative is that given by Justice Young in *Rory:* all terms are to be enforced unless they violate law or public policy or are subject to traditional contract defenses such as fraud, waiver, and unconsionability, which are difficult to establish. Until the legislature or administrative agencies step in, consumer attorneys need to prepare arguments on these bases. ◆

Josh Ard is chair of the Consumer Law Section and the Unauthorized Practice of the Law Committee and former chair of the Elder Law and Advocacy Section and the Legal Education and Professional Standards Committee. He is a member of the Administrative Law Section council and administers several Bar e-mail lists. Josh practices with Howard & Howard, primarily in Ann Arbor, Michigan, and is vice president of the Ingham County Bar Association.

Footnotes

1. 473 Mich 457, 703 NW2d 23 (2005).
2. Id., 473 Mich at 461; 703 NW2d at ___.
3. Alces, Peter A., "Guerilla Terms" (February 28, 2006); available from the Social Science Research Network at http://ssrn.com/abstract=887346.
4. See *Burkhardt v City Nat Bank of Detroit,* 226 NW2d 678, 57 Mich App 649 (1975).
5. *Consenting to form contracts,* 71 Fordham L R 627 (2002).