AN ANALYSIS OF CHANGE-OF-TERMS PROVISIONS AS USED IN CONSUMER SERVICE CONTRACTS OF ADHESION

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I. INTRODUCTION

Imagine entering into a year-long contract for cable service with an advertised monthly fee of fifty dollars. Then, after just a few months into the contract, the cable company sends out a notice that the new rate is sixty dollars a month for the remainder of the contract. To add insult to injury, they are also reducing the channel lineup. According to the cable company, the subscriber agreement contains a provision stating: "We reserve the right to change the terms of the contract at any time, including the price and extent of service, as long as we send out notice of the change." In the event you do not agree to the change, you must cancel the contract, which in turn

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triggers an early termination fee. Does this change-of-terms[1] provision effectively allow the cable company to modify the monthly rate under a contract of fixed length?

At first blush, it may seem that the answer is in fact yes. By consenting to the contract, which reserved this right to the cable company, it would appear that the increased price complied with the terms. Then again, just how valid is a promise to be bound to unknown terms? Do consumer protection laws prevent or allow such questionable business practices? What about the common law concepts of unconscionability and reasonable expectations? Does it matter that cancellation fees apply in the event that the consumer does not agree to the new terms? Clearly, it seems that numerous questions exist with respect to the determination of an answer. Of course, it should be assumed throughout this article that any changes would be unfavorable to the consumer.

This article explores the application of change-of-terms provisions to various types of adhesive service contracts. For instance, a contract with a definite duration poses different problems than a contract at-will. Even though these change-of-terms provisions mainly appear in leases and service contracts, since they deal with an on-going relationship as opposed to a one-time sale of goods,[2] analogies can be drawn from rolling contracts. This article aims to explore the current state of the law regarding these provisions and why they should not be enforced. Whether or not the consumer may opt out of a contract mistakes the point. Rather, this article points out that the modified terms should not incorporate themselves into the contract in the first place. Also, as the title states, this analysis refers to consumer contracts of adhesion.[3]

Part II of this article will lay the foundation for later analysis by first examining the basics of common law contract formation and how change-of-terms provisions affect the formation process. Part III looks to state and federal legislatures and regulatory agencies for guidance in this area of contract law. Part IV of the paper will explore how the common law defends against these provisions in contracts; namely, the doctrines of reasonable

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[1] This can also be referred to a change-in-terms provision, but the former phrase will be used throughout this article.

[2] This on-going nature resembles an "executory" contract insomuch as the parties' promises have not been fully performed from the outset. *See* 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:19 (4th ed. 1991).

[3] "A standard-form contract prepared by one party, to be signed by the party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 342 (8th ed. 2004).

expectations, unconscionability and the implied covenant of good faith and fair dealing. Part V concludes with a summary of the findings.

II. COMMON LAW CONTRACT FORMATION

Before one can analyze the scope of a change-of-terms provision, one must first determine if a contract exists and if so, the duration of the parties' obligations. Going back to the basics, a contract exists when two or more parties form a bargain consisting of "mutual assent . . . and a consideration."[4] Mutual assent typically refers to one party's acceptance of another party's offer.[5] Consideration refers to the substantive nature of the offer, which requires an exchange of promises, performances, or a promise for a performance.[6] "A promise is a manifestation of intention to act or refrain from acting in a specified way . . . ."[7] Performance refers to the inevitable action or the refraining from action pursuant to the promise. The promisor refers to the person that would perform - act or refrain from acting—pursuant to the promise, while the promisee refers to the person that would be required to give mutual consideration in return for this performance.[8] The typical way to give mutual consideration for a promisor's eventual performance would be to give a return promise or performance which would constitute "a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee."[9] Of course, a promisor's eventual performance, vis-à-vis the promisee, must also satisfy the requirements of consideration.

A. *Indefinite Performance and the Rolling Contract*

In adhesive consumer contracts, the adhesive form constitutes the offer and the consumer's signature manifests acceptance. However, acceptance requires that the terms of the offer be ascertainable. "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."[10] In order for mutual assent to exist, the consumer must

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4 RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

5 *See* § 22(1).

6 *See* § 3. An exchange of promises would create a bilateral contract. *See* 1 RICHARD A. LORD, WILLISTON ON CONTRACTS §1:17 (4th ed. 1991). For the most part, consumer service contracts will fall under this classification.

7 RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).

8 § 2(2)-(3).

9 § 79(a).

10 § 33(1).

theoretically be able to determine the extent of his promise as well as that of the drafter, even if the average consumer would be unable to understand the boilerplate terms. In the event that the terms are subject to change, no one could ever understand the actual extent of the offer. Nonetheless, one can always attempt to define the boundaries of the offer by taking into account the part of the offer explicitly defined. The Restatement (Second) of Contracts summarizes the general consensus of the common law with respect to this concept:

> It is sometimes said that the agreement must be capable of being given an exact meaning and that all the performances to be rendered must be certain. Such statements may be appropriate in determining whether a manifestation of intention is intended to be understood as an offer. But the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.[11]

Essentially, indefinite terms imply a lack of mutual assent, premised on the consumer's inability to ascertain the exact scope of the offer in the first place. Any conclusion that a consumer "assented" to an indefinite offer would contradict itself. While it may be true that the consumer intended to enter into an enforceable agreement, such intent would surely only relate to the currently expressed terms as encompassing the entire scope of the agreement, notwithstanding the change-of-terms provision. The existence of a change-of-terms provision makes it impossible for a consumer to ascertain, at the time of entering the contract, the exact consideration to be exchanged over the course of the contract. As the Restatement suggests, however, a court will strive to cure the indefiniteness and find a valid contract. The easiest, and arguably the fairest, way to achieve this result would be to simply strike the change-of-terms provision from the offer. Indeed, an examination of the analogous concept of "rolling contracts" demonstrates that some courts will follow this line of reasoning.

"A rolling contract is a deal in which the contract either is not formed until, or is modified when, the last terms are presented for assent."[12] This issue commonly arises in the context of the shrinkwrap license.[13] Although

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[11] § 33 cmt. a.

[12] William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1099 (2004).

[13] Software vendors enclose their product in shrinkwrap to prevent usage until the consumer has

shrinkwrap licenses do not involve an on-going contractual relationship, analogies can be drawn to the policy considerations employed by courts and commentators alike. The relevant similarity crucial to drawing any sort of analogy to rolling contracts and a change-of-terms provision is the notice that additional, undisclosed terms apply to the offer, thereby making it impossible for the consumer to know what acceptance entails. In the case of software, the transaction normally alerts consumers to additional terms inside the box,[14] which by definition cannot be read until after the time of the sale. In the case of change-of-terms provisions, the contract alerts consumers to additional terms currently undisclosed at the time of the contracting as well, which by definition cannot be read until after the drafting party decides to impose new terms.[15] The issues of conditional acceptance and contract modification arise in the analysis of rolling contracts as competing legal theories.[16]

The case of *ProCD, Inc. v. Zeidenberg*[17] lends considerable support to the idea that one cannot and should not be allowed to assent to terms that one has not been given the opportunity to read. The facts are simple. Matthew Zeidenberg bought a retail software package in order to use for his business.[18] The software manufacturer, ProCD, Inc., claimed that his usage of the software violated their terms and conditions.[19] However, these terms and conditions were not viewable by Zeidenberg until after he bought and opened the software box: "The sole reference to the user agreement was a disclosure in small print at the bottom of the package, stating that defendants were subject to the terms and conditions of the enclosed license agreement."[20]

The rationale underlying the district court's opinion in *ProCD* ultimately hinged on the scope of the offer. Did this notice incorporate the terms by reference into the offer itself or did the notice merely alert the consumer that

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read and assented to the terms. *See* Robert J. Morrill, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc. v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 515-16 (1998); *see also* Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5TH 309 (West 2005).

[14] Morrill, *supra* note 13, at 516-17.

[15] The difference, albeit minor, is that a change-of-terms provision does not *always* present additional terms during the life of the contract.

[16] One theory involves the formation of the original contract, in which the notice of additional terms affects the manner in which the consumer can accept the offer. The other theory presumes that a contract forms at the time of sale, and the additional terms merely constitute proposals for modification. *See* Robert A. Hillman, *Symposium: A Tribute to Professor Joseph M. Perillo: Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002).

[17] 908 F. Supp. 640 (W.D. Wis. 1996), *overruled by* 86 F.3d 1447 (7th Cir. 1996).

[18] *Id.* at 645.

[19] *Id.* at 644.

[20] *Id.* at 654.

the box contained modification proposals to create an optional and more elaborate contractual relationship?[21] The district court viewed the box of software as the full manifestation of the terms of the contract, treating the "subject to terms and conditions" language as invalid under the circumstances. Without the purchaser being able to view the terms prior to acceptance, incorporation by reference into the offer would render assent impossible.[22] As explained earlier in this article, acceptance requires an opportunity to understand the offer. Therefore, the additional terms were incorporated not into the initial offer, but rather into the proposals for modifications.[23]

In the case of an adhesive service contract, a change-of-terms provision seems to serve the same function as a notice on a software package that additional terms exist. Applying the logic of the district court with respect to unviewable terms at the time of acceptance, any future changes could not be retroactively incorporated into the scope of the initial offer. All that a change-of-terms provision does is allow for the drafter to unilaterally alter the terms of the contract; this function does not serve to fill any gaps or cure indefiniteness. Quite the contrary, the provision creates indefiniteness, as the seemingly fixed terms potentially lose their definiteness. In order to cure this defect, a court should follow the district court's logic in the *ProCD* case and view such a provision as merely incorporating any future changes into modification proposals. Since the Uniform Commercial Code does not apply to service contracts, the normal common law principles of contract modification would apply in its stead. As such, any acceptance of a change would not bind the consumer since it would be not be supported by any consideration.[24] Even the doctrine of acceptance by silence would not work

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[21] *See id.* at 653.

[22] *Id.* at 654 ("Mere reference to the terms at the time of initial contract formation does not present buyers an adequate opportunity to decide whether they are acceptable. They must be able to read and consider the terms in their entirety.").

[23] ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 645 (W.D. Wis. 1996) ("The potential incorporation of the terms can occur only after the purchaser opens the package and has a reasonable opportunity to inspect the user agreement."). According to the district court, these additional terms could be treated as modification proposals under § 2-209 of the Uniform Commercial Code *or* as a battle-of-the forms problem under § 2-207. *See id.* at 655. Since the district court reasoned that the terms would not incorporate into the contract under either section, the specific classification was left undecided. *See id.* However, based on the district court's earlier determination that the display of the software on the shelf constituted the offer, *id.* at 651-52, the idea of a battle-of-the forms problem does not seem to work, since the consumer would be simply accepting the offer by purchasing the software.

[24] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). Indeed, the drafter of the contract would have a pre-existing duty to perform the original contract notwithstanding the consumer's refusal to accept the new terms. *See* § 73.

in this circumstance, as consideration for the acceptance of the modification would still be lacking nonetheless.

Unfortunately for Zeidenberg, Judge Easterbrook subsequently overturned the lower court's ruling.[25] Easterbrook initially accepted the district court's logic insomuch as the placement of the software constituted an offer and that one cannot agree to hidden terms.[26] However, Easterbrook further reasoned that "one of the terms to which Zeidenberg *agreed by purchasing* the software is that the transaction was subject to a license."[27] This conclusive sentence requires scrutiny, for it implicitly recognized the fact that Zeidenberg had "agreed" to the offer, pursuant to his purchase of the software, and that a contract has indeed formed. This line of reasoning contradicts itself, for Easterbrook first agreed with the district court on the one hand that "[o]ne cannot agree to hidden terms" but immediately thereafter reasoned that Zeidenberg had in fact "agreed" to be bound to terms that were hidden from view prior to the purchase of the software.[28]

Giving Easterbrook the benefit of the doubt, it seems quite possible that he used the term "agreed" in a general sense, as opposed to a legal sense, insomuch as Zeidenberg "agreed" that the software manufacturer required acceptance to be conditioned on review of the license after purchasing the software. This interpretation finds reinforcement by Easterbrook's subsequent reasoning:

> A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure.[29]

Essentially, Easterbrook reasoned that although the software on the shelf constituted the offer, the notice of additional terms informed the consumer that acceptance could only occur by first purchasing the software *and then*

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[25] 86 F.3d 1447, 1455 (7th Cir. 1996).

[26] *Id.* at 1450.

[27] *Id.* (emphasis added).

[28] *Id.* ("In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the [district court] concluded. So far, so good--but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract--except for printed terms that refer to or incorporate other terms.").

[29] *Id.* at 1452.

using the software. Therefore, prior to a contract forming, the terms would no longer be hidden from view, as the consumer could read them prior to using the software.

A lengthy discussion about the correctness of this logic would confuse the point of this paper.[30] Easterbrook's reasoning was only explained because it represented an alternative view of the shrinkwrap license with respect to contract formation. For purposes of drawing an analogy to a change-of-terms provision, Easterbrook's reasoning would not work. Unlike a sale of goods, the additional terms pursuant to a change-of-terms provision in a service contract could only occur *after* performance had begun by both parties. To hold otherwise, that the drafter conditioned acceptance on viewing the additional terms as they were introduced, would create the absurd result that acceptance could never occur. Since there would be a potentially indefinite amount of changes that could be introduced throughout the life of the relationship pursuant to the change-of-terms provision, Easterbrook's reasoning would make contract formation conditioned on the acceptance of the last of these changes. Since there would be no way to ascertain what the "last" change would be, there would be no way to ascertain when acceptance occurred. Therefore, the idea of conditional acceptance would not apply to change-of-terms provisions in service contracts, leaving only the district court's reasoning in *ProCD* applicable to the question of contract formation.

B. *Indefinite Duration and the Periodic Contract*

The duration of a contract also plays a very important part in determining the effect of a change-of-terms provision. When a contract does not have any sort of maximum duration but rather exists on a periodic basis, the drafter may have the power to terminate the contract at-will, at least with respect to preventing a renewal.

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[30] As an aside, Easterbrook's understanding of prior precedent and indeed his own reasoning is quite troublesome. For instance, examine his example of airline tickets: "[C]onsider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous." *Id.* at 1451 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)). Aside from the obvious problem that his example of the airline ticket did not mention that the passenger was alerted to a conditional acceptance procedure, which would seem to be crucial to his decision in the case, the Supreme Court case he relies upon never decided the issue. *Shute*, 499 U.S. at 590 ("[W]e do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision.").

The hallmark feature of an at-will contract is the ability of either party to terminate the contract at any time and for any reason.[31] With respect to periodic contracts, the relevant concept of "at-will" refers to ending the contract by preventing a renewal. Assuming a drafter could prevent a renewal at-will, any unilateral change of the terms would merely indicate a revocation of the old offer to continue the periodic contract in lieu of a new offer. For a concrete example, consider the case of *Bass v. Prime Cable of Chicago, Inc.*[32] In its subscriber agreement, the cable television company had the provision: "prices subject to change."[33] After providing notice, the company stopped providing the customer's previously free cable guide until the customer agreed to pay the new charge.[34] Citing applicable case law, the court reasoned that a "contract without a specified duration is terminable at will by either party . . . [which] may be unilaterally modified."[35] In consideration of acceptance of such changes, the cable provider agreed to provide future service that it was "under no duty to provide . . . after the end of each billing period."[36]

The explicit reference to billing periods highlights the periodic nature of the relationship; the contract was terminable at-will with respect to preventing a renewal.[37] Any future provision of service, after the drafter's existing obligation for the remainder of the current period ended, would constitute consideration for an acceptance of such a change, as the cable provider could prevent a future renewal at any time and for any reason, or none at all. Essentially, a change-of-terms provision of a periodic contract of this sort does nothing more than state the inherent properties of such a periodic relationship. Being as such, one can simply discount the provision as mere surplusage. For instance, a drafter could terminate the contract at-will by explicitly preventing the renewal, which would subsequently require an affirmative acceptance of the new offer. A faster and easier method, which

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31 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:39 (4th ed. 1991). Although this specific citation refers to an employment contract, employment is merely a *type* of contract and therefore the same principles apply to contracts in general. The same reasoning holds for property leases as well, be it real or personal property. *See* BLACK'S LAW DICTIONARY 907 (8th ed. 2004). Therefore, principles of leases and employment contracts carry over to consumer contracts as well for purposes of drawing analogies.

32 674 N.E.2d 43 (Ill. App. Ct. 1996).

33 Brief and Argument for Appellant, Bass v. Prime Cable of Chicago, Inc., 1995 WL 17168460, at *46 (Ill. App. Ct. Mar. 20, 1995).

34 *Bass*, 674 N.E.2d at 46.

35 *Id.* at 50.

36 *Id.* at 51.

37 To hold that the contract could be terminated at-will during a period, after the customer had paid for the period, would be a misreading of the case. Indeed, the language indicating that the cable provider was under no duty to provide service *after* the current period necessarily implies that the cable provider was under a duty to provide service *during* the current period.

would accomplish the same result but differ somewhat in form, would be to place the burden on the consumer to affirmatively reject the new terms. Since the drafter could prevent the renewal in the first place, it only makes sense that the drafter could also set the procedure by which renewal would *not* be prevented. Assuming the drafter shifted the burden to the consumer, acceptance by silence would most likely be the way of accepting the new terms. In consideration of the acceptance of the modification, the drafter would not exercise his right to terminate the contract by preventing the renewal.

However, the drafter may not be able to prevent a renewal in the first place, in which case the at-will logic does *not* apply with respect to periodic contracts. For instance, consider the case of *Morris v. Healy Lumber Co.*[38] The lease in question provided that the lessor could terminate the contract upon non-payment of rent; no other termination condition was listed with respect to the lessor.[39] Since the agreement would persist until the lessee gave one month's notice to quit or failed to pay the rent, the periodic relationship persisted indefinitely and could not be terminated at the will of the lessor.[40] This renewal provision "bound the lessor as long as the lessee paid the rent, and bound the lessee until he gave the calendar month's notice in writing."[41]

As was the case here, when a renewal provision gives the consumer the *option* to renew the current offer, such a provision must be completely unambiguous.[42] In order to exercise the option to renew the contract, the lessee was required to refrain from giving notice one month in advance. Assuming notice was not given, and the contract was thus renewed, the failure to pay rent would merely be a breach, which has nothing to do with the power of the lessor to prevent the periodic renewal of the contract in the first place. Regardless of whether an option requires affirmative conduct or an abstention of conduct to exercise said option, the drafter would still be unable to terminate the current offer at-will with respect to preventing a renewal. Thus, in the context of a periodic service contract that gives the consumer the option to renew the contract at the end of a period, a change-of-terms provision could *not* be discounted as surplusage because the drafter would be powerless to prevent the renewal in the first place.

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38 46 Wash. 686 (1907).

39 The lease stated: "Failure to pay said rent when the same falls due may be treated as a forfeiture of this lease by the parties of the first part." *Id.* at 688.

40 *See id.* at 690.

41 *Id.*

42 *See* Jay M. Zitter, Annotation, *Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal*, 29 A.L.R. 4TH 172 § 2 (1984); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 25 (1981) (explaining option contracts).

III. STATUTORY AND REGULATORY AUTHORITY

Assuming that a change-of-terms provision does not work violence upon the common law requirement of definiteness, administrative and legislative bodies are quite capable of forbidding such practices. On the other hand, these same bodies are quite capable of allowing such practices regardless of indefiniteness. However, an examination of state and federal statutes and regulations reveals very little with respect to change-of-terms provisions either way. The statutes and regulations, for the most part, deal entirely with credit practices. However, the general prohibitions against unfair and deceptive trade practices arguably encompass and forbid these provisions in other types of contracts as well.

A. *Credit Practices*

The lending of consumer credit has received significant statutory attention on both the federal and state level. For the most part, it appears that change-of-terms provisions pass legislative muster.

1. FEDERAL LAW

On the federal front, the Truth in Lending Act strives "to protect the consumer against inaccurate and unfair credit billing and credit card practices."[43] In order to help effectuate this goal, the "Board [of Governors of the Federal Reserve System] shall prescribe regulations to carry out the purposes of this [Act]."[44] Accordingly, the Board promulgated Regulation Z in an effort to specify the disclosure requirements of consumer lending by national banks.[45] As this regulates the *disclosures* of the finance charges, such as the annual percentage rate ("APR"),[46] the relevance of a change-of-terms provision must be narrowly examined in the context of changing the economic terms.[47]

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[43] 15 U.S.C.A. § 1601(a) (West 2006).

[44] § 1604(a). "The term 'Board' refers to the Board of Governors of the Federal Reserve System." § 1602(b).

[45] *See* 12 C.F.R. § 226.1 (2006).

[46] *See id.*

[47] In other words, terms such as arbitration requirements or forum-selection clauses would not be covered under the Truth in Lending Act even though they would be covered under a change-of-terms analysis generally.

With respect to open-end home equity plans, Regulation Z for the most part indirectly prohibits unilateral changes by the creditor. As a consequence of this, a creditor cannot arbitrarily change the APR.[48] Support for this assertion comes from the official staff interpretation of Regulation Z.[49] This necessarily means that a fixed-rate APR cannot change from the rate initially disclosed. However, a "contract could contain a stepped-rate or stepped-fee schedule providing for specified changes in the rate or the fees on certain dates or after a specified period of time."[50] Alternatively, a creditor could employ a variable-rate APR, but only if the formula used an index that was completely outside the creditor's control and viewable by the general public.[51] However, the creditor must still impose and disclose a ceiling interest rate for the life of the credit plan.[52] In either case, the consumer still has some understanding as to the *scope* of the possible changes, as opposed to simply knowing the rates can change at the will of the bank.

With respect to other open-end credit plans, Regulation Z does not actually restrict change-of-terms provisions from the outset of the contract. In fact, the regulation actually accounts for changes made pursuant to these provisions. Whenever a creditor desires to change a term initially required to be disclosed, the creditor must send written notice fifteen days prior to the date the change takes effect.[53] Of course, the regulation also states that a prior "agreement" relative to the change removes the notice requirement.[54] The staff interpretation notes that a "consumer's general acceptance of the creditor's contract reservation of the right to change terms" does not constitute an "agreement" for purposes of the disclosure requirement.[55] By explicitly referring to a creditor's "right to change the terms," so long as the creditor complies with subsequent notice requirements, the staff interpretation implicitly recognizes the validity of change-of-terms provisions under Regulation Z. This simply leaves the states free to legislate around the underlying issue of what can be changed pursuant to the provision; Regulation Z merely governs the disclosures of such changes.

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48 § 226.5b(f)(1).

49 12 C.F.R. § 226.5b(f)(3)(i) cmt. 2 (Supp. I 2006) ("A creditor may not include a general provision in its agreement permitting changes to any or all of the terms of the plan. For example, creditors may not include 'boilerplate' language in the agreement stating that they reserve the right to change the fees imposed under the plan.").

50 § 226.5b(f)(3)(i) cmt. 1.

51 12 C.F.R. § 226.5b(f)(1) (2006).

52 § 226.30.

53 § 226.9(c)(1).

54 *Id.*

55 12 C.F.R. § 226.9(c)(1) cmt. 3 (Supp. I 2006).

For the most part, this federal law allows for credit agreements to simply disclose that the scope of the contract is indefinite. However, creditors cannot unexpectedly change the terms of home equity plans, since the contract must disclose from the outset the scope of the potential changes pursuant to the change-of-terms provision. Apparently the risk of losing one's home poses a greater danger than does uncontrolled debt in general. This distinction at least demonstrates that the Board of Governors recognizes the dangerous nature of a change-of-terms provision. As ironic as it seems, Regulation Z purports to protect consumers when in actuality it gives unsecured creditors carte blanche to mislead consumers. Merely requiring a subsequent disclosure prior to the effective date of a change does not address the underlying problem prompting the Truth in Lending Act in the first place. A consumer needs to know in definite terms what the credit agreement potentially entails *prior* to borrowing the money in order to make an informed decision.[56] An unscrupulous lender's use of a change-of-terms provision would render an initial disclosure statement meaningless since the disclosed terms can be changed at any time and for any reason. Truth in lending indeed![57]

2. STATE LAW

Because the Truth in Lending Act only addresses the disclosure requirements of a credit plan, and thus only indirectly constrains the use of change-of-terms provisions, states remain free to regulate the underlying substance of these contracts. Of course, statutes allowing for unilateral changes would necessarily trump the common law with respect to contract formation, as the underlying theory of an indefinite offer would not apply. Moreover, it would appear that consideration would not be required for the

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[56] While perusing the Federal Trade Commission's website for material related to change-of-terms provisions, I stumbled across a citizen's comment addressing the same concerns I share about these provisions. The comment reads, in relevant part:

> If I agree to borrow on credit at a rate that is comfortable for me and I do not falter on my responsibility in repaying the loan as was agreed when I accepted the offer, and have not faltered on any of my debt, then I am hard put to understand how the lender can change the terms. I borrowed the money based on those terms and would not have done so had I known that the terms would change on me after I consumed the debt. If this is not unfair lending practices I don't know what is.

Letter from Elizabeth J. Galindo, *Re: FACT Act Scores Study; Matter No. P044804 - Comments* (2004), http://www.ftc.gov/os/comments/creditscoresstudy/510559-0015.pdf.

[57] As an aside, I find it quite telling that the "unfair credit contract provisions" of Regulation AA (which deals with unfair and deceptive practices) lacks a prohibition against change-of-terms provisions. *See* 12 C.F.R. § 227.13 (2006).

change. However, other common law issues would most likely apply, short of an explicit legislative exemption.

Ever the friend of the corporations, Delaware grants the banks incredible power to change the terms of an agreement:

> Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. [58]

In the event that the consumer does not agree to an amendment that increases finance charges, he must furnish written notice within the fifteen-day limit (or longer if allowed by the bank) and cease using the plan.[59] Since the consumer can continue to repay the outstanding balance pursuant to the unamended agreement,[60] this law does not seem too hazardous to the consumer. However, two concerns still exist. First, the provision allows for notice to be included in "materials sent to the borrower."[61] In the event that the notice comes with a periodic statement, the risk of missing the proposed amendment does not appear too great. However, a bank could attempt to bundle the amendment in promotional materials that would likely get discarded without a second thought. Second, any term not requiring initial disclosure by the Truth in Lending Act "may become effective as determined by the bank" without the consumer ever knowing about it.[62] This allows for

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[58] DEL. CODE ANN. tit. 5, § 952(a) (West 2005). It seems that New Hampshire has adopted identical language. *See* N.H. REV. STAT. ANN. § 384-G:12 (2005).

[59] tit. 5, § 952(b)(2). If a consumer furnishes notice and then continues to use the plan after the effective date of the amendment, the law assumes acceptance of the amendment. *Id.*

[60] § 952(b)(4).

[61] § 952(a).

[62] *See id.*

arbitration agreements, forum selection clauses and other terms not directly related to the cost of lending to become effective at any time and without prior notice. While the validity of such a statute lies outside the scope of this, it appears grossly unbalanced and very questionable on its face.

On the same end of the spectrum with respect to change-of-terms provisions, but less obvious in tone, lies the Uniform Consumer Credit Code. Most recently amended in 1974 by the Conference of Commissioners on Uniform State Laws, this uniform code attempts to balance the rights of consumers with the needs of creditors.[63] According to the model version of the Code, "a creditor may change the terms of an open-end credit account applying to any balance incurred before or after the effective date of the change" regardless if prior authorization exists or not.[64] By removing the requirement of prior authorization, a change-of-terms provision need not even exist. Therefore, the existence of one certainly passes muster under this code. Like the Delaware law, which operates in conjunction with the Truth in Lending Act, this Code requires prior disclosures for changes which increase finance charges.[65] Of course, this suffers from the same two problems found in the Delaware law - the potential for subterfuge with respect to changing finance charges and the blanket allowance for non-economic provisions.

Although the Code's comment states that the "provision is designed to allow creditors to change the terms of their open-end accounts in a manner which is feasible from their standpoint but which safeguards the interests of their customers,"[66] other "feasible" alternatives exist. For instance, there could easily be a requirement that any proposed amendments must come in specifically labeled envelopes immediately alerting the consumer. This prevents the attempts of bundling promotional literature with the subsequent disclosure requirements. As for other non-economic terms, the disclosure requirements should apply in the same manner as the economic terms. Arbitration provisions, for example, may not directly influence how much one has to pay, but in the event of an economic dispute, it can certainly prove to be outcome determinative.

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[63] *See* 17 AM. JUR. 2D *Consumer Protection* § 289 (2005). *See also* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 125 n.193 (1993) (explaining that only eleven states adopted this code and in a non-uniform fashion).

[64] Unif. Consumer Credit Code § 3.205(1) (1974).

[65] *Id.* This language substantially retains the scope of the 1968 version, which did not require notice if "the change involve[d] no significant cost to the debtor." Unif. Consumer Credit Code § 3.408(3)(c) (1968).

[66] Unif. Consumer Credit Code § 3.205 cmt. 1 (1974).

B. *Bait and Switch*

1. FEDERAL LAW

Congress granted regulatory power to the Federal Trade Commission ("FTC") to "prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce."[67] Pursuant to that authority, the FTC promulgated the following guide[68] defining bait and switch practices:

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.[69]

Essentially, this practice attempts to bait a customer into general dialogue with the advertiser, on false pretenses, and then exploit this relationship in the hopes of selling different merchandise.

Before exploring this guide further, it should be noted that the use of the word "merchandise" after differentiating between "product" and "service" seems to indicate that the term "merchandise" encompasses both terms.[70] However, the subsequent general prohibition states: "No advertisement containing an offer to sell a *product* should be published when the offer is not a bona fide effort to sell the advertised *product*."[71] This appears to merely reflect clumsy drafting. For instance, one section of the guide states: "No act or practice should be engaged in by an advertiser to discourage the purchase of the *advertised merchandise* as part of a bait scheme to sell *other merchandise*."[72] In one of the ensuing examples in that same section, the word "merchandise" seems to get interchanged with the word "product." Specifically, the example highlights "the failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised *product* to meet reasonably

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67 15 U.S.C.A. § 45(a)(2) (West 2005) (exempting banks and certain other entities).

68 A guide essentially summarizes specific applications of the law based on actual rulings by the Federal Trade Commission. *See* 16 C.F.R. pt. 17 (2006).

69 16 C.F.R. § 238.0 (2006).

70 *Id.*

71 § 238.1 (emphasis added).

72 § 238.3 (emphasis added).

anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the *merchandise* is available only at designated outlets[.]"[73] Based on this apparent discrepancy, it seems reasonable to assume that every prohibition in the guide refers to products and services equally. Moreover, there should not be any logical distinction between using an advertised product as the bait as opposed to using an advertised service as the bait. The deception remains the same.[74]

With that in mind, one example of a bait and switch tactic is to misrepresent the merchandise in the advertisement and then procure the sale of other merchandise upon disclosure of the true facts.[75] Another example deals with the refusal to sell or the disparagement of the advertised merchandise in the hopes of discouraging its sale and encouraging an alternative sale.[76] The final strategy addressed by the guide involves the tactic of actually selling the advertised merchandise, but subsequently coercing the voiding of the transaction and procuring alternative merchandise instead.[77] The guide notes: "Sales of the advertised merchandise do not preclude the existence of a bait and switch scheme. It has been determined that, on occasions, this is a mere incidental byproduct of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation."[78]

For purposes of a change-of-terms provision, this third strategy fits best in the analogy. Although the examples given do not deal with a change-of-

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[73] § 238.3(c) (emphasis added).

[74] Once again, it should be noted that this "guide" is a summarization of the decisions by the Federal Trade Commission as they relate to bait and switch. Going to an actual opinion by the Federal Trade Commission concerning bait and switch, the language clearly indicated that services could be switched in addition to products:

> In order to prevent recurrence of the above bait and switch scenario, the administrative law judge entered order provisions which would prohibit respondents from:
>
> (1) Making representations purporting to offer products, installations or services for sale when the purpose of such representations is not to sell the offered products, installations or services, but to obtain leads or prospects for the sale of other products, installations or services at higher prices;
>
> (2) discouraging the purchase of any product, installation or service by failing to deliver or perform as obligated to;
>
> (3) representing, directly or by implication, that any product, installation or service is offered for sale by respondents when in fact such offer is not a bona fide offer to sell such product, installation or service;
>
> (4) * * * misrepresenting in any manner the efficacy, durability, efficiency, composition or quality of any of respondents' products or services.

In re Southern States Distributing Co., 83 F.T.C. 1126 (1973), 1973 WL 165073 (F.T.C.).

[75] *See* § 238.2.

[76] *See* § 238.3.

[77] *See* § 238.4.

[78] *Id.*

terms provision,[79] the result is the same. When a specific service plan is advertised, the resulting contract creates the general relationship with the offeror.[80] Everything seems legitimate at this point, as the consumer gets the advertised service, subject only to a change-of-terms provision. So far, so good. However, suppose the change purports to change the drafter's performance under the contract, pursuant to the change-of-terms provision. For instance, suppose a cellular phone company decided that it was no longer offering phone service on Wednesdays. In the event that the entire plan was to bait the customer into the original contract and then change the nature of the service at some time in the future, then surely this constitutes a bait and switch practice. Clearly the offeror had no intention of selling the advertised service, but rather intended to sell the modified service instead. This holds true even if the contract allowed the offeror to terminate at-will. Even though the offeror could technically terminate the contract at-will,[81] the subsequent offering of a new contract with the changed terms would also constitute an "unselling"[82] of the original service. In either case, switching the terms under the color of a terminable-at-will provision or a change-of-terms provision accomplishes the same illegitimate goal. Indeed, the test for bait and switch looks to the substance of the transaction, not its form.

Admittedly, a technical distinction exists between the offeror's prior intention to switch the terms at some future time and the offeror's intention not to be bound to the terms when they create a financial hardship. In the event that an unexpected condition arises, a termination coupled with a new offer most likely does not constitute a bait and switch tactic. Instead, the use of the change-of-terms provision merely allows for the contract to terminate based on legitimately changed circumstances. Nonetheless, this distinction lacks merit when the offeror intends to mislead the consumer.[83] When an advertised service strives to bait the consumer under the pretext of unchangeable terms, the existence of a change-of-terms provision constitutes an impermissible mechanism by which the offeror can switch the service whenever it proves advantageous. Moreover, it would be probative to examine the terms of newly advertised services and the terms of current customers that had entered into contracts some time ago. In the event the

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[79] *See id.*

[80] In this section about bait and switch, I use the term "offeror" to refer to the drafter of the contract of adhesion.

[81] *See supra* Part II.B.

[82] 16 C.F.R. § 238.4 (2006).

[83] For other prohibitions against misleading advertisements, see Robert Michael Ey, *Cause of Action Under § 43(a) of Lanham Act [15 USC § 1125] for Misrepresentation in Commercial Advertising or Promotion*, 22 CAUSES OF ACTION 365 (2005).

offeror later utilizes the change-of-terms provision to conform the newly acquired contracts to the terms of the older contracts currently in force with prior customers, then surely this would indicate a desire to bait and switch. Of course, if the changes applied to both new customers and old customers alike pursuant to change-of-terms provisions, this sweeping change would tend to demonstrate a legitimate changed circumstance.

2. STATE LAW

The 1966 Uniform Deceptive Trade Practices Act also deals with bait advertising. According to this Act, a deceptive trade practice occurs when a person "advertises goods or services with intent not to sell them as advertised[.]"[84] Although the National Conference of Commissioners on Uniform State Laws decided to withdraw this act in the year 2000,[85] twenty-two states share the language of this particular prohibition.[86] Moreover, at least nine other states have similarly broad prohibitions against bait and switch transactions.[87]

A search for cases in which a plaintiff asserted bait and switch activity pursuant to a change-of-terms provision yielded very little. However, one case reported does in fact discuss this subject. In *Grasso v. First USA Bank*,[88]

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[84] Unif. Deceptive Trade Practices Act § 2(a)(9) (1996) (repealed 2000), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/rudtpa66.pdf (last visited Oct. 25, 2006).

[85] Unif. Deceptive Trade Practices Act, Refs. & Annos. (West 2005).

[86] The states are as follows: Alabama, ALA. CODE § 8-19-5(9) (1975); Alaska, ALASKA STAT. § 45.50.471(b)(8) (West 2005); California, CAL. CIV. CODE § 1770(a)(9) (West 2006); Colorado, COLO. REV. STAT. ANN. § 6-1-105(1)(i) (West 2005); Delaware, DEL.CODE ANN. tit. 6, § 2532(a)(9) (West 2005); Georgia, GA. CODE ANN. § 10-1-372(a)(9) (West 2005) ; Hawaii, HAW. REV. STAT. ANN. § 481A-3(a)(9) (West 2005); Idaho, IDAHO CODE ANN. § 48-603(9) (West 2005); Illinois, 815 ILL. COMP. STAT. ANN. 510/2-2(a)(9) (West 2005); Maine, ME. REV. STAT. ANN. tit. 10, § 1212(1)(I) (2005); Minnesota, MINN. STAT. ANN. § 325D.44, subdiv. 1(9) (West 2005); Mississippi, MISS. CODE ANN. § 75-24-5(2)(i) (West 2005); Nebraska, NEB. REV. STAT. ANN. § 87-302(a)(9) (West 2005); New Hampshire, N.H. REV. STAT. ANN. § 358-A:2(IX) (2005); Ohio, OHIO REV. CODE ANN. § 4165.02(A)(11) (West 2005); Pennsylvania, 73 PA. CONS. STAT. ANN. § 201-2(4)(ix) (West 2005); Rhode Island, R.I. GEN. LAWS § 6-13.1-1(5)(ix); Tennessee, TENN. CODE ANN. § 47-18-104(b)(9) (West 2005); Texas, TEX. BUS. & COM. CODE ANN. § 17.46(b)(9) (2005); Utah, UTAH CODE ANN. § 13-11a-3(1)(i) (West 2005); Virginia, VA. CODE ANN. § 59.1-200(A)(8) (West 2005); and West Virginia, W. VA. CODE ANN. § 46A-6-102(7)(I) (West 2005).

[87] The states are as follows: Arkansas, *see* ARK. CODE ANN. § 4-88-107(a)(5) (West 2005); Kansas, *see* KAN. STAT. ANN. § 50-626(b)(5) (West 2005); Kentucky, *see* KY. REV. STAT. ANN. § 517.040 (West 2005); Maryland, *see* MD. CODE ANN., COM. LAW § 14-2903 (West 2005); Missouri, *see* MO. ANN. STAT. § 570.170 (West 2005); Nevada, *see* NEV. REV. STAT. ANN. § 598.0917 (West 2005); New Mexico, *see* N.M. STAT. ANN. § 57-12-2(D)(12) (West 2005); Oklahoma, *see* OKLA. STAT. ANN. tit. 15, § 753(12) (West 2005); and Wyoming, *see* WYO. STAT. ANN. § 40-12-105(a)(xiv) (West 2005).

[88] 713 A.2d 304 (Del. Super. Ct. 1998).

a credit card holder brought a breach of contract action on the basis of an APR increase.[89] This increase occurred approximately two years after the formation of the contract.[90] When summary judgment was entered in favor of the defendant, the plaintiff requested an opportunity for further discovery pursuant to the decision to increase the rate, which the court denied.[91] Noting in dicta that the request *implied* that the plaintiff would subsequently bring a bait and switch action, the court preemptively declared that a period of two years, coupled with the volatility of the marketplace, suggested no bait and switch activity took place.[92] The exact language of the court was as follows:

> Grasso also argues that she should be allowed further discovery about First USA's decision to offer a fixed rate, then terminate it. The Court does not see how this request is relevant. It is based on her theory that the solicitation is the contract, ignoring the clear and express provisions in the Agreement. It also ignores that the fixed rate was in effect for over two years. The implication of Grasso's request is that there was a bait and switch. The length of time of the fixed rate and the realities of the market place do not support the need for this request.[93]

The fact that the court looked to the "clear and express" right pursuant to the change-of-terms provision as a factor in its bait and switch analysis, however, mistakes the point. While I agree with the relevance of the other two factors—the length of time and the possibility of changed circumstances —I do not agree with the implicit bootstrapping argument that the language of the contract provides a legitimate mechanism by which a switch could occur. This amounts to nothing more than mere *ipse dixit* on the part of the offeror.

C. *Miscellaneous*

In light of this article's attempt to encompass the scope of the law with respect to change-of-terms provisions, a brief look at two miscellaneous state statutes should help.

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89 *See id.*

90 *Id.* at 306.

91 *Id.* at 311.

92 *Id.*

93 *Id.*

Under the law of Minnesota, a wireless telecommunications provider cannot change the terms of a fixed-length contract unless the customer affirmatively assents orally or in writing.[94] In defining what constitutes a change, the statute broadly refers to potential charges pursuant to the contract or increased durations.[95] Specifically, the statute deals with any change that "means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract."[96] After giving written notice sixty days before the effective date of the change, "[t]he change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization . . . ."[97] The only potential ambiguity in this procedural requirement is whether a change-of-terms provision constitutes a prior affirmative acceptance to all future changes. Indeed, this would technically satisfy the letter of the law, as this would be an acceptance "prior to the proposed effective date" of the change. If the statute had stated that affirmative acceptance must occur subsequent to the notice and prior to the effective date, then the ambiguity would not exist. However, since this can be readily inferred by the prior notice requirement, a change-of-terms provision should not constitute a prior affirmative acceptance within the spirit of this law.

Aside from wireless contracts, residential leases typically allow for the landlord to subsequently promulgate rules and regulations that have the effect of changing the terms of the contract. For instance, my lease agreement states: "Tenant agrees to comply with all occupancy Rules and Regulations governing the Property whether now in effect *or hereinafter promulgated* and delivered to Tenant."[98] While not technically a change-of-terms provision, this provision does still allow for the landlord to change the terms by which the tenant abides by the lease. Since these leases incorporate the rules and regulations into the terms that govern the contractual duties of the tenant, these provisions are logically analogous to a change-of-terms provision.

As for the validity of this sort of provision, the Uniform Residential Landlord and Tenant Act of 1972 explicitly allows it, albeit in a limited

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[94] *See* MINN. STAT. ANN. § 325F.695 (West 2005); 47 C.F.R. § 20.3 (2005) (defining "commercial mobile radio services" as incorporated by the Minnesota statute).

[95] *See* MINN. STAT. ANN. § 325F.695, subdiv. 1(d) (West 2005).

[96] *Id.*

[97] § 325F.695, subdiv. 3.

[98] Dadeland Vista Apartments, *Lease Agreement* (2004) (emphasis added) (on file with author).

fashion. As of now, twenty states have substantially adopted the Act.[99] The relevant provision in the model Act states:

> A landlord, from time to time, may adopt a rule or regulation, however described, concerning the tenant's use and occupancy of the premises. It is enforceable against the tenant only if (1) its purpose is to promote the convenience, safety, or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally; (2) it is reasonably related to the purpose of which it is adopted; (3) it applies to all tenants in the premises in a fair manner; (4) it is sufficiently explicit in its prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply; (5) it is not for the purpose of evading the obligations of the landlord; and (6) the tenant has notice of it at the time he enters into the rental agreement, or when it is adopted.[100]

Essentially, the rules must be reasonable and made in good faith to benefit the tenants or to prevent abusive use of the landlord's property.

That seems well and good, except for the potential applications. What constitutes a benefit to the tenants? Would a rule requiring monetary contributions, for purposes of the installation of a security gate around the premises, promote the "safety" of the tenants? Does it matter that the lease originally allowed pets, but then a new regulation forbid pets on the basis of "preserving" the landlord's property? According to the next part of the provision, if the change "works a substantial modification of [the tenant's] bargain it is not valid unless the tenant consents to it in writing."[101] Therefore, under this particular Act, a landlord cannot unilaterally impose rules and regulations purporting to substantially alter the terms of a residential lease agreement. However, the landlord reserves the right to promulgate reasonable and *de minimis* terms, so long as the changes benefit the tenants as a whole or protect the landlord's property from abuse.

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[99] *See* Unif. Residential Landlord & Tenant Act, Refs. & Annos. (West 2006). The states are: Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington. *Id.* I have not verified whether each state has adopted this particular provision. However, I discovered that Nevada has also substantially adopted this particular provision. *See* NEV. REV. STAT. ANN. § 118A.320(1) (West 2006).

[100] Unif. Residential Landlord & Tenant Act § 3.102(a) (1972).

[101] § 3.102(b).

IV. COMMON LAW DEFENSES

When a change-of-terms provision relates to fixed-length contractual term, the analysis of an at-will relationship breaks down. In at-will contracts, any changed terms would relate to future performance that the drafter did not have a duty to perform. In this part, the analysis will shift from the ability to terminate the relationship at-will to the ability to change the extent of the drafter's performance prior to the fulfillment of a contract. Accordingly, the analysis will look to the doctrines of reasonable expectations and unconscionability. Assuming that the drafter can unilaterally modify both parties' executory performance, the final part of the analysis will look to the requirement of good faith and how it applies to exercising the right to change the terms.

A. *Reasonable Expectations*

In 1970, Professor Robert Keeton wrote a pivotal article detailing the concept of reasonable expectations as applied to insurance contracts.[102] Keeton summarized the doctrine in the following manner: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[103] Even if an insurance policy explicitly excludes coverage, it cannot defeat the reasonable expectations of the insured.[104] This rationale incorporated the realities of standard contracts of adhesion, noting that the average person would not read the terms anyway and that insurance companies have attempted to take advantage of this fact.[105] Essentially, this doctrine serves to prevent sophisticated insurance companies from taking advantage of unsophisticated insureds.

This doctrine has not yet evolved to fully encapsulate adhesion contracts other than ones in the insurance industry.[106] However, the Restatement (Second) of Contracts encourages just such an expansion. Specifically,

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[102] Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1980).

[103] *Id.* at 967.

[104] *Id.* at 968.

[105] *Id.*

[106] *See* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 844-846 (1990). *See also* Alan M. White & Cathy L. Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 245-251 (2002).

section 211 provides: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[107] In order to aid such a finding, one can infer that any term that "eviscerates the non-standard terms *explicitly* agreed to" materially conflicts with the reasonable expectation of the contract.[108] In accordance with the nature of a change-of-terms provision, "[t]he inference is reinforced if the adhering party never had an opportunity to read the term . . . [or it was] hidden from view."[109] Indeed, any new terms imposed after the formation of the contract are by definition "hidden from view." Even though a consumer rarely reads or understands most of the terms of an adhesive contract, this comment from the Restatement implies that a consumer reasonably expects that the original terms in the contract represent the entirety of the agreement, notwithstanding the change-of-terms provision. Although this concept of definiteness is not "explicit" in the sense that the consumer explicitly agreed upon the definiteness of the contract, it is certainly arguable that such an understanding is so engrained into the concept of a contract that it rises to the level of reasonable expectations. As such, any use of a change-of-terms provision would conflict with a consumer's expectations of definiteness.

To better understand the application of this doctrine, as it applies to terms explicitly in the scope of the non-drafting party's reasonable expectations,[110] consider the following two cases. In *Lauvetz v. Alaska Sales and Service,* a rental car policy provided for an optional collision damage waiver.[111] The face of the agreement merely said "See Terms and Conditions;" the terms clearly excluded damage caused as a result of drunk driving.[112] Nonetheless, the court held that a person would reasonably assume that a collision waiver did exactly what it sounded like it did; namely, a person would not be held responsible for collision damage to the car because the rental company would waive such liability.[113] Even sophisticated customers

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[107] RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981). This appears to constitute the deception leading to surprise in the procedural unconscionability analysis. *See infra* note 131 and accompanying text.

[108] § 211cmt. f (emphasis added).

[109] *Id.*

[110] This is in reference to the basic terms of the contract that the non-drafting party has surely noticed and considered. Other boilerplate language, such as choice-of-law and the like, is implicitly in the scope insomuch as a consumer expects the terms, *whatever they may be*, to represent the final agreement. As I reasoned earlier, this expectation is so fundamental that it logically parallels an explicit understanding.

[111] 828 P.2d 162, 162 (Alaska 1991).

[112] *Id.* at 163.

[113] *Id.* The driver "merely had the choice between a damage waiver and no waiver, protection against damaging the car or no protection. In deciding today that a consumer would reasonably expect that

enjoy the protections of this doctrine. In *UPMC Health System v. Metropolitan Life Insurance Company*, UPMC negotiated an insurance policy for its employees.[114] When Metropolitan issued the policy, it included a change-of-terms provision and it had reduced the two-year duration to only one-year, all by means of an integration provision.[115] When Metropolitan later attempted to utilize the change-of-terms provision, UPMC sought a declaratory judgment that the prior agreement superseded the modified language of the policy, thereby rendering the change-of-terms provision invalid.[116] The court held that the prior agreement created a reasonable expectation of the terms of the policy and that any subsequent changes cannot override the expectations.[117]

Based on the foregoing discussion, the application of a change-of-terms provision cannot reasonably be expected by an ordinary consumer when it conflicts with the primary and explicit terms of the contract. For example, when a person signs up for a one-year contract for cable service over the phone at a designated price and with a designated channel lineup, one surely expects that neither would change. If one were to carefully read the subsequent Comcast Subscriber Agreement, one would find a change-of-terms provision that clearly allowed for adjustments to the price and the channel lineup.[118] The relevant provision states: "[W]e have the right to change our Service and Equipment and our prices or fees, at any time. We also may rearrange, delete, add to or otherwise change the Service provided on our Basic Service or other levels of Service."[119] The doctrine of reasonable expectations would most likely protect consumers from these changes, even though they are clearly referenced in the change-of-terms provision. Otherwise, the change-of-terms provision would allow for Comcast to "eviscerate" the most fundamental terms of the contract in the eyes of the consumer, making the bargain illusory.

This next example should also help highlight the expectations of definiteness as it relates to all of the terms, explicitly in the consumer's scope

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the rental company's waiver is complete, we join the large number of courts who have refused to enforce damage waiver exclusions under a variety of circumstances. *Id.* at 166. This reasoning seems to hinge on the absence of any immediate notice on the face of the agreement that exclusions applied. A phrase simply directing one to refer to the complete terms seems not to raise a presumption of exclusions.

114 391 F.3d 497, 499 (3rd Cir. 2004).

115 *Id.* at 500.

116 *Id.* at 501.

117 *Id.* at 503-04. This meshes with the logic against shrinkwrap licenses, in which the future terms attempt to modify an apparently completed contract at the time of sale.

118 http://www.comcast.com/images/ImageLibrary/FAQ/PDF/Subscriber_agreement.pdf (last visited Oct. 25, 2006).

119 *Id.*

or otherwise. Upon visiting my local mall, I ventured to a Sprint® kiosk and asked for a copy of a wireless phone contract. The contract allows either for a one-year or two-year agreement.[120] The right hand column of the contract contains blank spaces in which the individual charges per month are entered by the salesperson; the final monthly charge is calculated at the bottom.[121] On its face, this contract creates the pretense of a definite and unchangeable monthly charge. However, this pretense cannot be accidental. Indeed, it clearly and purposefully creates the reasonable, but incorrect, expectation that the monthly charge will not change during the length of the agreement. The contract then conveniently incorporates a change-of-terms provision by reference into the contract.[122] In lieu of this change-of-terms provision, the monthly rate language deceptively creates the reasonable expectation that the rate would stay the same for the length of the contract. As for implicit matters, of which the consumer did not read or understand, the change-of-terms provision would be invalid simply because the consumer reasonably expects all terms, implicit or explicit with respect to the scope of the consumer's understanding, to maintain definiteness.

B. *Unconscionability*

Another legal defense to the unfairness of a change-of-terms provision is the doctrine of unconscionability. Unlike the doctrine of reasonable expectations, this defense clearly applies to a wide variety of contracts, especially contracts of adhesion.[123] In finding unconscionability, a court looks to any "'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'"[124] Essentially, the "absence of meaningful choice" factor describes the procedural aspect of unconscionability, while the "unreasonably favorable" factor describes the substantive aspects.[125] Although both aspects must be present in order for a court to find a contract unconscionable, a substantial

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120 Sprint, *Welcome to Sprint*, JU5606-7205, at 1, § 8 (2005) (on file with author).

121 *See id.*

122 *See id.*; Sprint, *TERMS & CONDITIONS OF SERVICE* § 1.2 (2006), *available at* http://www.sprint.com/ratesandconditions/residential/documents/sprinttermsandconditions.pdf (last visited on Oct. 25, 2006).

123 *See* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a (1981).

124 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:9 (4th ed. 1991) (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). This analysis applies to a contract as a whole or to specific provisions. *See id.* Since this article looks only to the validity of a change-of-terms provision, this defense should apply only to the provision or the changed terms pursuant to the provision.

125 *See* § 18:10.

showing of one aspect can supplement a much more moderate degree of the other aspect.[126]

However, a change-of-terms provision creates an unusual problem with respect to unconscionability. Because these provisions enable additional terms, they should be tested for unconscionability both on their face and as they are applied. An analysis on the face of such a provision would have the effect of preventing any changes. In order to satisfy this, the usual tests of procedural and substantive unconscionability would apply to the provision itself. Assuming the provision does not qualify as being unconscionable, an as-applied change must undergo a separate analysis. In this event, this *particular* term could only be declared unconscionable if the term failed both the procedural and substantive tests. Even though this as-applied analysis stands apart from the analysis of the underlying change-of-terms provision, the particular term need not be independently examined in a vacuum. Since the change-of-terms provision serves as the mechanism by which changes occur, one must examine the change along with the underlying provision as part of the overall circumstances of the contract.

1. PROCEDURAL UNCONSCIONABILITY

Not every state considers the adhesiveness of a contract as relevant to a finding of unconscionability.[127] Others, however, fully equate adhesiveness with procedural unconscionability.[128] This latter view more accurately takes into account the factors that go into the procedural analysis. The Supreme Court of Mississippi, for example, articulated these factors as "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of an opportunity to study the contract and inquire about the contract terms."[129] The courts of California condense this list of factors into: "(1) oppression, arising from inequality of bargaining power and the absence of real negotiation or a meaningful choice, and (2) surprise, *resulting from* hiding the disputed term in a prolix document."[130] The use of the word "surprise" seems to be more of a substantive test, as explained shortly. The phrase "resulting from" receives emphasis because this implies that the

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126 *See id.*

127 *See, e.g.*, Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 474-75 (Mich. Ct. App. 2005).

128 *See, e.g.*, Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 853 ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability.").

129 MS Credit Center, Inc. v. Horton, 926 So. 2d 167, 177 (Miss. 2006).

130 Vance v. Villa Park Mobilehome Estates, 36 Cal. App. 4th 698, 709 (1995) (emphasis added).

behavior causing the later surprise is the procedural element of concern and not the surprise itself.

Applying this test, a contract of adhesion, as it relates to mere consumers, precludes negotiation by its very definition. This aspect, coupled with the obvious inequality between corporations and individual consumers, necessarily means that a contract of adhesion satisfies the "oppression" factor of procedural unconscionability. The "surprise" factor implies procedural naughtiness by means other than hiding an important clause in the myriad of fine print. Even though the standard contract of adhesion normally will satisfy the California test of surprise merely due to its length and the presence of inconspicuous terms, I posit that the spirit of surprise strongly incorporates the doctrine of reasonable expectations.[131]

This idea finds support from Samuel Williston. He incorporates reasonable expectations into one variation of the *substantive* test of unconscionability by referring to the *negation* of reasonable expectations.[132] However, this implies that the drafter intended to mislead the consumer into forming these expectations in the first place, thus requiring a procedural analysis of that conduct.[133] The substantive surprise stems from the later awareness of deception in which such reasonable expectations were procured by the drafter. Indeed, the court in *Carey v. Lincoln Loan Co.* observed that "[u]nconscionability may involve deception . . . ."[134] Deception occurs when the drafter *purposefully* misleads the consumer into believing that certain terms cannot change. This type of analysis more accurately reflects the factors dealing with a consumer's level of understanding and choice found in the unconscionability calculus. As Justice O'Connor sees it, "a determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract."[135]

In the likely event that the underlying change-of-terms provision turns out to be procedurally unconscionable, the drafter would be hard pressed to explain how any resulting changes were not also procedurally unconscionable. These changes would of course be procedurally unconscionable and

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131 *See supra* note 107 and accompanying text.

132 *See* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1991). If this doctrine truly does play a sufficient, albeit not necessary, part of unconscionability, this lends additional credibility to the Restatement's position that this doctrine should not be explicitly confined to insurance contracts.

133 Although the doctrine of reasonable expectations does not require a showing of deceit, this corollary can be fairly implied. Indeed, a contract of adhesion reflects very careful and deliberate drafting, as well as placement of the terms. In the unlikely event that the reasonable expectations were carelessly created by an ambiguity, then the procedural element may be lacking.

134 125 P.3d 814, 828 (Or. Ct. App. 2005).

135 American Airlines, Inc. v. Wolens, 513 U.S. 219, 249 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part).

this conclusion must be so. If procedural unconscionability looks to a lack of meaningful choice, then anything stemming from this original sin would share the same taint. Built upon such unconscionable premises, any application of the provision would still fail for want of meaningful choice. To consider a change being procedurally conscionable, simply because it properly conformed to the underlying change-of-terms provision, would constitute an illogical bootstrapping argument.[136] This would be analogous to sending a man to jail pursuant to an unconstitutional statute, simply on the belief that due process cured the otherwise underlying, and quite significant, defect.

In the unlikely event that a change-of-terms provision appears procedurally conscionable or the original sin logic fails, a completely separate and independent analysis must be made for any particular changes. Grounded on similar circumstances, it stands to reason that an examination of case law involving a wireless phone contract sufficiently addresses the topic of procedural unconscionability as it applies to other types of large-scale consumer contracts. With that in mind, consider the case of *Powertel, Inc. v. Bexley*.[137] The relevant issue in that case concerned the addition of an arbitration provision pursuant to the underlying change-of-terms provision.[138] Because the new provision did not allow for negotiation, but rather required acceptance or termination of the service, the court found it adhesive in nature.[139] Moreover, the resulting economic loss from choosing to cancel the service actually elevated the "lack of meaningful choice" analysis.[140] Finally, the drafter's inconspicuous bundling of the new term with the bill, without bringing attention to the specific change in any reasonable manner, doomed the arbitration provision as being procedurally unconscionable.[141]

2. SUBSTANTIVE UNCONSCIONABILITY

Substantive unconscionability looks to the reasonableness of the terms. As the topic of negating reasonable expectations has already been addressed,

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136 *See, e.g., supra* Part III.B.2.

137 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).

138 *See id.* at 572.

139 *Id.* at 575.

140 *See id.* ("[S]witching providers would result in a loss of the investment the customers have in the agreements they made with Powertel. They purchased equipment that works only with the Powertel service and they have obtained telephone numbers that cannot be transferred to a new provider.").

141 *See id.* ("The pamphlet containing the clause appears at first glance to be little more than a restatement of the original terms and conditions of service. Apart from the effective date printed in small print below the title 'Terms and Conditions of Service,' there is nothing to indicate that the pamphlet contains anything new.").

the remainder of the discussion will focus on other types of analysis. Examples include "terms that impair the integrity of the bargaining process or . . . unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.[142] Another aspect of substantive unconscionability involves the "'one-sidedness of the contractual provision in question.'"[143]

The first example speaks of impairing the bargaining process. A change-of-terms provision does more than simply "impair" the bargaining process. By definition, it completely destroys the bargaining process. Once the consumer agrees to be bound to future terms, the consumer's ability to bargain over modifications evaporates. As for unreasonably harsh terms, being bound to the will of the drafter clearly satisfies this test. Even if the consumer has the ability to terminate the contract instead of accepting the new terms, early termination fees usually apply.[144] In that respect, the change-of-terms provision allows for a potential situation in which the consumer finds himself unreasonably stuck between a rock and a hard place. In the event that termination fees do not apply, these provisions still deprive consumers of the benefit of the bargain, be it through a reluctant termination or the imposition of an unexpected change. As for one-sidedness, this seems too plain for argument. Any contract that gives one party the sole and unilateral ability to change the contract as that party sees fit unconscionably favors that party.

Based on the foregoing discussion, a change-of-terms provision reflects the unreasonableness prompting the unconscionability defense. However, others could argue that the provision does nothing unreasonable by itself. In

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142 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1991).

143 Strand v. U.S. Bank Nat. Ass'n ND, 693 N.W.2d 918, 922 (N.D. 2005) (quoting Construction Assocs., Inc. v. Fargo Water Equip., 446 N.W.2d 237, 241 (N.D. 1989)).

144 For example, look at this provision in the Verizon Wireless agreement, which requires the early termination fee unless the change causes an undefined "material adverse effect":

> Your service is subject to our business policies, practices, and procedures, which we can change without notice. UNLESS OTHERWISE PROHIBITED BY LAW, WE CAN ALSO CHANGE PRICES AND ANY OTHER CONDITIONS IN THIS AGREEMENT AT ANY TIME BY SENDING YOU WRITTEN NOTICE PRIOR TO THE BILLING PERIOD IN WHICH THE CHANGES WOULD GO INTO EFFECT. IF YOU CHOOSE TO USE YOUR SERVICE AFTER THAT POINT, YOU'RE ACCEPTING THE CHANGES. IF THE CHANGES HAVE A MATERIAL ADVERSE EFFECT ON YOU, HOWEVER, YOU CAN END THE AFFECTED SERVICE, WITHOUT ANY EARLY TERMINATION FEE, JUST BY CALLING US WITHIN 60 DAYS AFTER WE SEND NOTICE OF THE CHANGE.

Verizon Wireless, *Customer Agreement*, http://www.verizonwireless.com/b2c/footer/customerAgreement.jsp (click on the "View Customer Agreement" link, enter "33143" in the zipcode box, and then click the "Submit" button) (last visited Oct. 25, 2006).

fact, the provision standing alone does nothing at all. The only time the consumer could be harmed by the change-of-terms provision would be when changes were actually made. Of course, any change unfavorable to the consumer could fail by default if it negated the reasonable expectation of definitiveness or eviscerated an explicitly agreed upon term. If one were to reject my earlier argument that the doctrine of reasonable expectations necessarily includes the expectation of definitiveness,[145] and the particular change did not eviscerate an explicitly agreed upon term, then an as-applied analysis would be made.

The only problem at this point would be that most changes made pursuant to the provision probably would not be substantively unconscionable standing alone. For instance, an arbitration provision would not seem overly harsh by itself.[146] The only counter would be that the consumer's inability to receive the benefit of the prior bargain, regardless if the consumer understood the benefit in the first place, makes the change unreasonably unfair relative to this backdrop. This argument parallels the procedural unconscionability logic presented in this article, in which the underlying taint of unconscionability spreads to all of the changes.[147] While distinguishable in that the underlying provision initially passes the substantive unconscionability test on its face, this logic would still cause every change to be substantively unconscionable by reference. By "reference" I mean the contextual reference to the potential unconscionability created by the underlying provision in the first place, only now transformed from a potential unconscionability to a kinetic one. Therefore, it would not make sense to say that the underlying provision does not fail the unconscionability test but all of the changes fail the test by default for depriving the consumer the benefit of the bargain. It would make more sense to condense the logic into an understanding that the underlying provision must be substantively unconscionable. By doing as such, the same result would be attained, as the analysis would still focus on the source of the changes from a substantive standpoint.

C. *Implied Covenant of Good Faith and Fair Dealing*

Assuming that the change-of-terms provision survives scrutiny, there exists one final doctrine to protect the consumer from the drafter's overreaching. Without this doctrine of good faith and fair dealing, a change-

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145 *See* discussion *supra* Part IV.A.

146 *See, e.g.*, Hubbert v. Dell Corp., 835 N.E.2d 113 (Ill. App. Ct. 2005) (reversing the lower court's determination that a basic arbitration provision fails the unconscionability test).

147 *See supra* text accompanying note 136.

of-terms provision might otherwise render the entire contract illusory. "[T]he fact that one of the parties reserves the power of fixing or varying the price or other performance is not fatal if the exercise of this power is subject to prescribed or implied limitations, as that the variation must be in proportion to some objectively determined base or must be reasonable."[148] According to the Restatement, this doctrine "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[149] The Restatement subsequently highlights the "abuse of a power to specify terms" as one example of bad faith.[150] Since a change-of-terms provision grants the drafter such a power, it must be analyzed in this light.

The California court deciding *Badie v. Bank of America* reasoned that the drafter's power to change the terms must be initially limited in scope to "the universe of terms included in the original agreements."[151] In other words, the court did not look first to whether an arbitration provision by itself exceeded the scope of good faith, but whether the change-of-terms provision reasonably allowed for this term in the first place.[152] The exact language of the provision did not particularly matter; explicitly reserving the ability to "add" or "delete" terms did not change the analysis.[153] The issue of fundamental importance is the scope of the provision as it relates to the original bargain. In order to ascertain the scope, the court applied standard contract interpretation principles.[154] Based on the absence of any terms concerning potential legal disputes, the court reasoned that this area was not part of the scope of the contract and therefore not within the scope of the change-of-terms provision.[155]

Based on this logic, a change-of-terms provision cannot be used to add completely new terms to the contract. If anything, the provision allows for modifications of terms explicitly included or reasonably alluded to in the original contract. The court referred to a law review article by Steven J.

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148 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 98, at 438-39 (1963).

149 RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

150 § 205 cmt. d.

151 79 Cal. Rptr. 2d 273, 285 (Cal. Ct. App. 1998).

152 *Id.* at 284.

153 *Id.* at 285.

154 *Id.* at 285-86.

155 *Id.* at 287 ("[T]here is nothing about the original terms that would have alerted a customer to the possibility that the Bank might one day in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer.").

Burton,[156] in which Burton argued that "[b]ad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting . . . . Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation . . . ."[157] Burton subsequently indicated two factors to be taken into account with respect to an analysis of good faith. In the context of consumer contracts of adhesion, the first test looked to the subjective motivation of the drafter for implementing a change.[158] The second test looked to the objective scope of the consumer's expectations.[159]

The *Badie* court essentially applied this second test for purposes of determining what types of changes were initially permissible.[160] The first test, however, seems to analyze a term's reasonableness in the context of whether or not the change reflects a legitimate motive. Burton analyzed the issue of good faith in the context of sophisticated entities, and as such, the reasonable scope assumes that each party knew the potential risks for each other and would understand how changed circumstances could affect the relationship.[161] However, there does not appear to be any reason why his analysis cannot be adapted to adhesive consumer contracts as well. The only difference would be that the consumer would not take the circumstances of the drafter's economics into account, but would simply rely on the wording on the form contract.

The drafter, however, would still have been under a duty to set the terms based on a good faith analysis of the possible risks involved. Those risks, in turn, would of course be related to the cost of doing business. If the motive for utilizing a change-of-terms provision pertains to *increasing* profit simply on the basis of trying to recapture a foregone opportunity, then clearly this amounts to bad faith. However, in the event the drafter attempts to utilize the provision in an attempt to *preserve* profit in the event of a foreseeable changed circumstance, then the analysis puts the burden on the drafter to have factored this possible circumstance into the original contract. Therefore,

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156 *Id.* at 284.

157 Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980). Once again, the reference to "reasonable contemplation" seems to incorporate the doctrine of reasonable expectations, except more broadly.

158 *Id.* at 386.

159 *Id.*

160 Adopting similar logic, the court in *Sears Roebuck & Co. v. Avery* stated that: "A customer would not expect that a major corporation could choose to disregard potential contractual opportunities and then later, if it changed its mind, impose them on the customer unilaterally." 593 S.E.2d 424, 432 (N.C. Ct. App. 2004).

161 "Good faith performance cases typically involve arm's-length transactions, often between sophisticated business persons." Burton, *supra* note 157, at 383.

the drafter must still have a reasonable motive—protecting its profit as opposed to exploiting it—and it must have factored such potential circumstances into the original terms. At very least, the drafter should set a range of values as they relate to terms that have an adjustable character, such as costs. This way, a consumer receives protection from his inability to understand the realities of the market, but can nonetheless still be able to make a decision that implicitly takes these realities into account.

V. CONCLUSION

The primary reason for writing this article was to generate discourse on the prevalent usage of change-of-terms provisions in adhesive consumer service contracts. Since most of these form contracts contain arbitration provisions, it is very difficult to find case law explicitly dealing with the subject. Another possible explanation for the lack of material would be the lack of recorded trial court opinions. While a change-of-terms provision will rarely give way to outrageous terms, the principle of consumer protection still demands that attention be given to the inherent unfairness of such terms. Each individual change may be negligible to any particular consumer, but the aggregate of these changes definitely adds up. The increase of one dollar a month, when applied to one million consumers, amounts to an increase of twelve million dollars a year. When such a windfall results from the unsavory business practice of exploiting the consumer, one cannot help but be concerned.

To summarize this article, one must determine if the provision constitutes part of the contract before one can go about analyzing a change-of-terms provision.[162] Because such provisions make offers indefinite, which is in stark contrast with the common law requirement that offers contain definite terms, a court might sever the provision from the offer.[163] This conclusion derives itself by analogy to the concept of rolling contracts.[164] These contracts involve terms that appear indefinite, insomuch as they keep changing throughout the formation process.[165] Shrinkwrap licenses, the typical rolling contracts, provide for two opposing analyses.[166] Based on one theory, a provision alerting a consumer to additional hidden terms cannot retroactively incorporate those terms into the offer.[167] As a result, any

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162 *See* discussion *supra* Part II.

163 *See* discussion *supra* Part II.A.

164 *See* discussion *supra* Part II.A.

165 *See* discussion *supra* Part II.A.

166 *See* discussion *supra* Part II.A.

167 *See* discussion *supra* Part II.A.

additional terms cannot contradict the otherwise definite and complete contract, making any such changes mere modifications proposals that would have to be supported by consideration.[168] The other theory, which posits that the notice of additional terms defers the power of acceptance until one views the terms, implies that the offer cannot be complete until one views the terms.[169] Analogizing this view to a change-of-terms provision, acceptance would never be possible, as the drafter would retain the unlimited right to constantly modify the offer.[170] As a result, this logic would not be applicable to change-of-terms provisions, requiring instead the former modification analysis.[171]

In the case of periodic contracts, a unilateral change-of-terms does not violate the contract.[172] Rather, the provision apparently granting this power amounts to nothing more than mere surplusage.[173] Since the drafting party has no obligation to continue to provide service under the terms of the current offer at the end of a period, a change really refers to the drafter's inherent ability to revoke the current offer and present a changed offer.[174] However, characterizing a periodic contract at-will, with respect to the ability to prevent renewal, requires one to examine the length of the contract and the way it is terminated.[175] When a periodic contract renews by default, the drafter might be able to affirmatively prevent the renewal and thereby change the terms pursuant to a new offer.[176] When a periodic contract ends by default, but still gives the consumer the option to renew the contract, the drafter cannot revoke the offer at-will.[177]

From a statutory perspective, change-of-terms provisions appear to have legislative approval.[178] The federal Truth in Lending Act, which regulates the disclosure requirements of a lending agreement, limits a national bank's ability to change the financial terms only in open-end home equity plans.[179] For the other types of open-end credit plans, including unsecured loans, the disclosure requirements merely restrict immediate changes of the terms.[180]

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168 *See* discussion *supra* Part II.A.
169 *See* discussion *supra* Part II.A.
170 *See* discussion *supra* Part II.A.
171 *See* discussion *supra* Part II.A.
172 *See* discussion *supra* Part II.B.
173 *See* discussion *supra* Part II.B.
174 *See* discussion *supra* Part II.B.
175 *See* discussion *supra* Part II.B.
176 *See* discussion *supra* Part II.B.
177 *See* discussion *supra* Part II.B.
178 *See* discussion *supra* Part III.
179 *See* discussion *supra* Part III.A.1.
180 *See* discussion *supra* Part III.A.1.

Instead, the changes need to be disclosed prior to their effective date.[181] On a state level, at least twelve states, of which Delaware is one, explicitly authorize banks to change the terms at-will, including the non-financial terms.[182]

Another statutory area of law involves bait and switch prohibitions. This activity occurs when a consumer unwittingly forms the initial business relationship with the service provider under false pretenses.[183] Typically, a consumer responds to an insincere advertisement, only to be tricked into purchasing something that is more advantageous to the offeror.[184] However, a bait and switch can occur subsequent to the formation of a contract when the contract terminates in lieu of another transaction.[185] While not explicitly forbidding change-of-terms provision, the spirit of bait and switch prohibitions should encompass this application.[186] For instance, the use of a change-of-terms provision to essentially terminate the existing contract, either explicitly or implicitly, and subsequently foist upon the consumer a contract with terms more advantageous to the drafter, surely constitutes a bait and switch.[187]

Aside from lending practices and bait and switch prohibitions, state statutory prohibitions regulate other miscellaneous types of contracts.[188] For instance, the state of Minnesota requires affirmative acceptance by wireless phone consumers in the case of changed charges or durations.[189] While a change-of-terms provision may arguably constitute an initial affirmative acceptance that applies to all such changes, this interpretation of the law seems doubtful.[190] Moreover, various other states have adopted provisions of the Uniform Residential Landlord and Tenant Act.[191] One of the provisions of that uniform act limits a landlord's ability to change the terms of the lease agreement as they relate to the rules and regulations.[192] Specifically, the promulgated rules and regulations cannot be material and they must either

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181 *See* discussion *supra* Part III.A.1.

182 *See* discussion *supra* Part III.A.2.

183 *See* discussion *supra* Part III.B.

184 *See* discussion *supra* Part III.B.

185 *See* discussion *supra* Part III.B.

186 *See* discussion *supra* Part III.B.

187 *See* discussion *supra* Part III.B.

188 *See* discussion *supra* Part III.C.

189 *See* discussion *supra* Part III.C.

190 *See* discussion *supra* Part III.C.

191 *See* discussion *supra* Part III.C.

192 *See* discussion *supra* Part III.C.

benefit the tenants as a whole or protect the landlord's property from damage.[193]

Assuming that the change-of-terms provision becomes part of the contract, one must look to the common law concepts of reasonable expectations, unconscionability, and the implied covenant of good faith and fair dealing.[194] The doctrine of reasonable expectations attempts to establish an objectively reasonable assumption that the consumer has about the terms of the agreement.[195] Indeed, the doctrine assumes that the drafter of the contract intentionally tries to create such assumptions in the mind of the consumer in order to consummate the deal.[196] However, if the terms of the contract act to modify the assumption, the terms are invalid, even if the consumer has the ability to read them.[197] By analogy, a change-of-terms provision is invalid as it grants the drafter the power to change the apparently settled terms of the contract as well.[198] This doctrine arguably also includes the expectation of definiteness as it relates to the entirety of the terms in general, whatever they may be.[199]

Another defense to the imposition of a change-of-terms provision lies in the doctrine of unconscionability.[200] The doctrine can apply to the face of the provision or it can apply to the particular changes promulgated pursuant to the provision.[201] This doctrine has a procedural and substantive component, in which the procedural component looks to a lack of meaningful choice on the part of the consumer and the substantive component looks to the reasonableness of the terms.[202] For the most part, a contract of adhesion will fail the procedural analysis by default, which implies that any changes pursuant to such a provision should also fail the procedural analysis as well.[203] As for the substantive component of such a provision, its ability to negate the reasonable expectations of the primary terms as well as the expectation of definiteness should render it substantively unconscionable on its face.[204] As almost any change will deprive the consumer of the benefit of his bargain by

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193 *See* discussion *supra* Part III.C.

194 *See* discussion *supra* Part IV.

195 *See* discussion *supra* Part IV.A.

196 *See* discussion *supra* Part IV.A.

197 *See* discussion *supra* Part IV.A.

198 *See* discussion *supra* Part IV.A.

199 *See* discussion *supra* Part IV.A.

200 *See* discussion *supra* Part IV.B.

201 *See* discussion *supra* Part IV.B.

202 *See* discussion *supra* Part IV.B.

203 *See* discussion *supra* Part IV.B.

204 *See* discussion *supra* Part IV.B.

default, the provision should be declared substantively unconscionable by default as well.[205]

Finally, assuming that a change-of-terms provision can exist, the drafter must still comply with the requirements of good faith and fair dealing.[206] For the most part, the change-of-terms provision cannot attempt to add completely new subject areas that were neither anticipated nor dealt with in the original contract.[207] This limitation stems from the prohibition on the drafter's attempt to use the provision to recapture foregone opportunities.[208] In the same general vein of reasoning, the provision cannot be employed when the drafter attempts to deal with circumstances that the drafter should have anticipated and incorporated into the original terms of the contract.[209]

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205 *See* discussion *supra* Part IV.B.

206 *See* discussion *supra* Part IV.C.

207 *See* discussion *supra* Part IV.C.

208 *See* discussion *supra* Part IV.C.

209 *See* discussion *supra* Part IV.C.