

**THE “CIRCLE OF ASSENT” DOCTRINE:
AN IMPORTANT INNOVATION IN CONTRACT LAW**

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Do you know the difference between education and experience?

*Education is when you read the fine print. Experience is what
you get when you don't.*

Pete Seeger

It has been a problem for decades. A business presents a customer with a standard-form contract. The customer gives the contract the same sort of quick reading that most people would give it in similar circumstances and signs it. When something goes wrong, the customer complains, only to be told that she waived whatever right she is trying to assert when she signed the form without reading the fine print.

Although scholars have written about this problem for decades,¹ the law has yet to come up with a good solution. The traditional rule was that a person was bound by what he or she signed, regardless of whether he or she read it or understood it.² This rule made sense in the days when signing a standard-form

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¹ See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

² See, e.g., *Cummings, Inc. v. H.I. Mayaguez, Inc.*, No. 01-A-01-9306-CH-00258, 1993 Tenn. App. LEXIS 643, at *7 (Tenn. Ct. App. Oct. 1, 1993) (citing numerous Tennessee cases). A classic exposition of the rule is:

It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know

contract was an unusual occurrence. Today, however, the old rule needs to be tempered with a realistic understanding that people who sign form contracts do not take the time to read them carefully, and that those who present them with the contracts do not expect them to. The doctrine of unconscionability provides relief in extreme cases, but many of the one-sided clauses in form contracts cannot reasonably be characterized as unconscionable; they are just unfair.

Standard-form contracts have once again become the most controversial issue in contract law.³ Standard-form contracts first aroused interest when the Uniform Commercial Code was new and business lawyers saw the doctrine of unconscionability as a threat to freedom of contract.⁴ But the competing concerns reached equilibrium within a few years as the courts worked out the contours of unconscionability.⁵ Outcomes became fairly predictable, and business lawyers learned how best to protect their clients. Recently, however, new ways of doing business have created new problems. Tennessee lawyers should follow the developments with particular care because Tennessee law has not followed the national trends, but has developed a unique (and, I believe, superior) way of dealing with these issues.

This new way of dealing with standard-form contracts is known as the “circle of assent” doctrine. It was created by the Tennessee courts, and although courts outside of Tennessee have yet to adopt it to any great extent, the doctrine is close to the mainstream of established contract law. It is based on well-known ideas attributed to Karl Llewellyn, the father of the Uniform Commercial Code.⁶

what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

Upton v. Tribilcock, 91 U.S. 45, 50 (1875), *quoted in* DeFord v. Nat'l Life & Acc. Ins. Co., 185 S.W.2d 617, 621 (Tenn. 1945).

³ See Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 S.M.U. L. REV. 1683, 1690 (1999) (stating that standard-form consumer contracts generated more comments than any other topic in Article 2 revision process and hampered efforts to reach consensus); *see also infra* text accompanying notes 123-91.

⁴ See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 305 (1975); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

⁵ See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28 (4th ed. 2004).

⁶ See *infra* note 18 and accompanying text.

As first articulated in *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*,⁷ the “circle of assent” doctrine holds that “the party who signs a printed form furnished by the other party will be bound by the provisions in the form over which the parties actually bargained and such other provisions that are not unreasonable in view of the circumstances surrounding the transaction.”⁸ The facts of *Parton* illustrate the way the doctrine works. The plaintiff, an automobile wholesaler, took a Cadillac to the defendant, a Cadillac dealership, for repairs.⁹ He signed the defendant’s preprinted repair order form, which provided “in small print in the upper left corner:¹⁰ I hereby authorize the repair work hereinafter set forth to be done along with the necessary material and agree that you are not responsible for loss or damage to the vehicle or articles left in the vehicle in case of fire, theft, or any other cause beyond your control....”¹¹

Thieves stole the car from an unfenced and unattended yard where the defendant’s employees had left it.¹² The Tennessee Bureau of Criminal Identification recovered the car in a damaged condition.¹³ After the plaintiff won a judgment in the trial court, the defendant appealed, arguing that the court should have given effect to the exculpatory language in the repair order.¹⁴ Although it was unclear whether the language in the form was broad enough to cover the negligence in question,¹⁵ the court did not address that issue, but instead chose to base its decision on the “circle of assent” doctrine.¹⁶

To determine whether the fine print exculpatory clause became part of the contract, the court referred to the writings of Karl Llewellyn, a founder of the Legal

⁷ 730 S.W.2d 634 (Tenn. Ct. App. 1987).

⁸ *Id.* at 637-38.

⁹ *Id.* at 635.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 636.

¹⁶ *Id.* at 638.

Realist movement and the father of the Uniform Commercial Code:¹⁷

Professor Karl Llewellyn has led the effort to arrive at a realistic determination of the terms of a writing that should bind the parties. Working in the specific area of contracts for the sale of goods as one of the principal authors of Article 2 of the Uniform Commercial Code, Professor Llewellyn fought for some general principles which we find should be applied to all contract cases. Recognizing that one of the fundamental concepts of contract law is the concept of *assent*, he said:

Instead of thinking about “assent” to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one [thing] more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.¹⁸

The court continued, quoting from a contemporary contracts scholar, John Murray, Chancellor of Duquesne University:

The parties will not be found to have agreed to an abnormal allocation of risks if the only evidence thereof is an inconspicuous provision in the boilerplate of the standard form. At a minimum, the reallocation must be physically conspicuous. Beyond that, it must have been manifested in a fashion comprehensible to the party against whom it is sought to be enforced.¹⁹

Noting specifically that it was not applying an unconscionability analysis, the

¹⁷ See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270 (1973).

¹⁸ *Parton*, 730 S.W.2d at 637 (quoting K. Llewellyn, *The Common Law Tradition: Deciding Appeals* § 370 (1960) (emphasis in original)).

¹⁹ *Id.* (quoting JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 353 (1974)).

court summed up its reasoning in a phrase that has become an important part of Tennessee contract law: “we think it is simply a matter of ascertaining the agreement of the parties in light of modern notions of fair play: a matter of finding the elusive “circle of assent” which contains the agreement of the parties.”²⁰

A year later, the court reiterated the “circle of assent” doctrine in *Harriman School District v. Southwestern Petroleum Corp.*²¹ In that case, a supplier of roofing materials attempted to rely on warranty disclaimers and limitations on remedies that were set out in “extremely small print” on the back of an order form.²² After quoting extensively from *Parton*,²³ the court concluded, “It is...clear that in light of all the circumstances surrounding the transaction, the inconspicuous, boilerplate, standard-form, reallocation of material risks was never part of the ‘circle of assent’ of the transaction.”²⁴

Southwestern Petroleum is significant for several reasons. The opinion came from the Eastern Section of Tennessee, whereas *Parton* and most of the cases following it came from the Middle Section. The Honorable E. Riley Anderson, who later became Chief Justice of the Tennessee Supreme Court, wrote the opinion. Moreover, as in *Parton*, the document in question was not signed by an unsophisticated consumer, but by a person sophisticated in business dealings, in this case the superintendent of a school district.²⁵

After these two cases, the “circle of assent” doctrine became such a part of Tennessee contract jurisprudence that courts found it necessary to discuss the doctrine even when they rejected its application. In *Taylor v. Liberty Mutual Insurance Co.*,²⁶ the Court of Appeals used the “circle of assent” doctrine to reverse a summary judgment based on a release written on the back of an insurance company settlement check.²⁷ The court again adopted the language of Chancellor Murray.²⁸ In *One Stop*

²⁰ *Id.* at 638.

²¹ 757 S.W.2d 669 (Tenn. Ct. App. 1988).

²² *Id.* at 674.

²³ *Id.* at 674-75.

²⁴ *Id.* at 675.

²⁵ *Id.* at 671.

²⁶ No. 01-A-01-9210-CV-00420, 1994 Tenn. App. LEXIS 31 (Tenn. Ct. App. Jan. 26, 1994).

²⁷ *Id.* at *14.

²⁸ *See id.*

Supply, Inc. v. Ransdell,²⁹ the Court of Appeals distinguished *Parton* because, among other things, the contract provision Mr. Ransdell was trying to avoid was written in capital letters immediately above the signature line.³⁰ Rather than merely distinguishing *Parton* on the obvious basis that the language in *Parton* was in small print and in an obscure location, the *One Stop Supply* court discussed the “circle of assent” doctrine at length, again quoting Professor Llewellyn and Chancellor Murray and explaining in some detail the factors that go into a determination of whether a contract provision is within the “circle of assent.”³¹

Federal courts applying Tennessee contract law have also adopted the “circle of assent” doctrine. In *Davis v. Connecticut Gen. Life Ins. Co.*,³² an employer argued that an inconspicuous disclaimer in its employee handbook prevented the handbook from becoming a binding contract between the employer and the employee.³³ The United States District Court for the Middle District of Tennessee held that the language did not prevent the formation of a contract because it was not within the “circle of assent.”³⁴ The court interpreted the Tennessee cases as holding that “some language within contracts will not be binding if that language is hidden, not pointed out, and that a person of ordinary intelligence and experience would not expect to find such a provision within the contract.”³⁵ In *Davis*, the language in question was located on the last page of a 52-page booklet. It was in ordinary type with nothing to highlight or otherwise distinguish it.³⁶

The United States Court of Appeals for the Ninth Circuit further extended and refined the “circle of assent” doctrine in *Curtis v. Ryder TRS Inc.*,³⁷ a case involving a contract signed in Tennessee. The Ninth Circuit held that a warranty disclaimer in a truck rental contract was not within the “circle of assent” even

²⁹ No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228 (Tenn. Ct. App. Apr. 19, 1996).

³⁰ *Id.* at *2, *11.

³¹ *Id.* at *7-10. The court’s extended discussion of *Parton* may have stemmed in part from its belief that the trial court relied on *Parton* in reaching its decision that the language in question did not become part of the contract. *Id.* at *4.

³² 743 F. Supp. 1273 (M.D. Tenn. 1990).

³³ *Id.* at 1279-80.

³⁴ *Id.* at 1280.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 43 F.App’x 103 (9th Cir. 2002).

though it met the UCC requirements for being “conspicuous.”³⁸ The Ninth Circuit pointed out that the disclaimer was in a “Rental Information Folder” separate from the rental agreement the customer had signed, and even though the signed rental agreement recited that the customer had read the Rental Information Folder, the rental agent knew the customer had not read the folder.³⁹ Moreover, although the rental agreement mentioned, by paragraph number, many of the provisions of the Rental Information Folder that the rental company apparently deemed important, the disclaimer was not one of those provisions mentioned in the signed agreement.⁴⁰

A UNIQUE DOCTRINE

At first glance, the “circle of assent” doctrine may appear to be an offshoot of the doctrine of unconscionability or of the UCC’s requirement that certain terms be conspicuous. But it is neither. It is a unique doctrine that Tennessee courts have developed to make a fair adjustment between two competing needs: a business’s need to protect itself through language in its contracts and its customers’ needs to transact business without agonizing over every line of the paperwork.

Unlike unconscionability, which focuses on the fairness of the bargain the parties have agreed to, the “circle of assent” doctrine focuses on whether the parties have actually agreed. In its classic form, unconscionability looks at whether the bargain is “such as no man in his senses...would make on the one hand, and as no honest and fair man would accept on the other.”⁴¹ In unconscionability cases, courts often look at whether one party was forced to agree to the other’s terms because of “unequal bargaining power,”⁴² and courts seldom find contract terms unconscionable where the complaining party is wealthy or sophisticated.⁴³ The result is that unconscionability is seldom a viable argument for business signers. This is not the

³⁸ *Id.* at 104.

³⁹ *Id.* at 106.

⁴⁰ *Id.*

⁴¹ *Hume v. United States*, 132 U.S. 406, 415 (1889).

⁴² *See, e.g., Mobil Oil Corp. v. Earhart Petroleum, Inc.*, No. 99-2093, 2000 U.S. App. LEXIS 8674, at *13 (4th Cir. May 3, 2000) (“Unconscionability deals primarily with a grossly unequal bargaining power at the time the contract is formed”); *United States v. Martinez*, 151 F.3d 68, 74 (2d Cir. 1998) (“unconscionability seeks to prevent sophisticated parties with ‘grossly unequal bargaining power’ from taking advantage of less sophisticated parties”).

⁴³ There are, of course, exceptions. In *Frank’s Maint. & Eng’g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403 (Ill. App. Ct. 1980), a court held a clause limiting remedies to be unconscionable in a business-to-business transaction. *Id.* at 411. Such cases, however, are relatively rare.

case with the “circle of assent” doctrine. In the first two important “circle of assent” cases, an automobile wholesaler and a school district (represented in the transaction by its superintendent) were able to show that terms in the documents they signed were outside the “circle of assent.”⁴⁴

In some ways, the “circle of assent” doctrine is more like the UCC’s requirement that certain terms be conspicuous. But rightly or wrongly, the UCC’s test for conspicuousness has degenerated into a mechanical test. To create a safe harbor and reduce litigation, the drafters of the UCC provided that type is conspicuous “if it is in larger or other contrasting type or color.”⁴⁵ The result is that under the UCC you can hide anything you want as long as you put it in capitals or italics.⁴⁶ The “circle of assent” doctrine is more nuanced. In *Curtis*, the Ninth Circuit held that a warranty disclaimer was conspicuous under the UCC but was still outside the “circle of assent.”⁴⁷

Perhaps the closest analogy is the “reasonable expectations” doctrine in insurance law. As Professor Keeton has explained that doctrine: “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.”⁴⁸ This doctrine has been adopted in at least 33 states,⁴⁹ although in practice most of the states have limited its application to situations in which there is an ambiguity, technical or obscure language, or a provision hidden in a contract.⁵⁰

⁴⁴ See *supra* text accompanying notes 8-26.

⁴⁵ U.C.C. § 1-201(10) (2005).

⁴⁶ As one treatise put it:

Although it is surprisingly extensive, the case law adds virtually nothing to the statutory language. For all practical purposes, the issue boils down to typeface and ink color.... [T]he use of a type size larger than or a color different from that used for the rest of the contract language will virtually always be sufficient to make the disclaimer or limitation conspicuous.

I THOMAS D. CRANDALL ET AL., UNIFORM COMMERCIAL CODE § 7.11.3 (1996).

⁴⁷ See *supra* text accompanying note 38.

⁴⁸ ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW 351 (1971).

⁴⁹ See *Max True Plastering Co. v. United States Fid. & Guar. Co.*, 912 P.2d 861, 866, 870 (Okla. 1996).

⁵⁰ *Id.* at 868.

A TOTALITY OF THE CIRCUMSTANCES TEST

The Ninth Circuit stated that identifying the “[c]ircle of assent...is...a totality of the circumstances inquiry.”⁵¹ This is clearly correct. Although there is language in some of the Tennessee cases indicating a rule that, where certain elements are present, a contractual provision will be found to be outside the “circle of assent,”⁵² even a casual reading of the cases shows that the courts have not applied the doctrine this way. Instead, the courts have treated the “circle of assent” as a flexible standard, allowing them to consider a wide variety of factors and to give each factor the weight the court believes it deserves under the particular circumstances of each case.⁵³ While the results in the individual cases seem, on the whole, quite sensible,

⁵¹ *Curtis v. Ryder TRS, Inc.*, 43 F. App’x 103, 106 (9th Cir. 2002).

⁵² In *Brown v. KareMor Int’l, Inc.*, No. 01-A-01-9807-CH-00368, 1999 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 19, 1999), the court said “the burden was on [the party relying on the provision] to show that the parties actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances.” *Id.* at *7-8. On its face, this seems to say that a term cannot shift a risk away from the drafter unless the term is actually bargained over. But the court goes on to discuss the fact that the provision was “buried on the reverse side,” indicating that in determining what is “a reasonable term,” a court should consider not only the substance of the provision but also whether the party against whom it is being asserted should have been aware of it. *Id.* at *8. In a similar fashion, the opinion in *Davis v. Conn. Gen. Life Ins. Co.*, 143 F. Supp. 1273 (M.D. Tenn. 1990), appeared to state a rule too narrow and too rigid to cover all of the cases in which it has been applied: “Tennessee recognizes that some language within contracts will not be binding if that language is hidden, not pointed out, and that a person of ordinary intelligence and experience would not expect to find such a provision within the contract.” *Id.* at 1280; *cf.* *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987) (referring to “circle of assent” as “principles”).

⁵³ Judge Richard Posner explained the difference between a rule and a standard like this:

The objection has to do with the difference between *rule* and *standard* as methods of legal governance. A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard. Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being *both* over- and underinclusive!). Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be. No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards. But that is psychology; the important point is that some activities are better governed by rules, others by standards.

they do not allow the reader to develop a formula for determining when a provision is within the “circle of assent.” Nor is there even a limited group of factors, the presence or absence of which will determine the result in a particular case.

There are, however, two basic considerations: 1) the extent to which the customer should have been aware of the provision; and 2) the extent to which the provision shifts to the customer a risk the customer was not expecting. The idea is a commonsense one. Two parties agree to a deal, usually goods or services in exchange for money. Normally, little more is said than the price and the basic outline of what the seller will provide. One person, most often the seller, presents a standard form, which the parties sign. (For convenience, we will call the person who presents the standard form the “seller” and the person who signs the seller’s standard form the “customer,” but it should be understood that the roles might actually be reversed, as where an employee signs her employer’s standard form or a seller of goods signs the buyer’s standard form.)

In even the simplest business transaction, a number of details and contingencies need to be addressed. The customer has to be bound by the terms in the document, even the terms in fine print.⁵⁴ But fairness requires that the drafter of the standard form should not be allowed to trick the customer by hiding important terms (“deal points”) in the fine print.

It would be possible to take a mechanical approach to applying this policy. One could require that the deal points be conspicuous and allow the so-called “housekeeping details” to be less prominent.⁵⁵ The Uniform Commercial Code has adopted a similar rule requiring certain provisions to be “conspicuous” (a term of art under the UCC)⁵⁶ and requiring others to be separately signed.⁵⁷ Wisely, courts

MindGames, Inc. v. W. Publ’g Co., 218 F.3d 652, 656-57 (7th Cir. 2000) (emphasis in original).

⁵⁴ If we were to bind people only to those terms to which they specifically agreed, we would end up with a comical situation where each paragraph in a contract is separately initialed and the customer initials without reading. For an example of such a contract see <http://www.thesmokinggun.com/graphics/art3/tristacontract1.gif> (last visited Jan. 27, 2006) (17-page contract between Trista Rehn and Syndicated Productions, Inc., governing Ms. Rehn’s appearance on the reality television series *The Bachelorette*).

⁵⁵ This would of course lead to endless litigation about which were “deal points” and which were “housekeeping details.”

⁵⁶ See, e.g., TENN. CODE ANN. § 47-2-316(2) (2001) (requiring disclaimers of warranties of merchantability and fitness for a particular purpose to be conspicuous).

⁵⁷ See, e.g., TENN. CODE ANN. § 47-2-205 (2001) (requiring firm offers to be separately signed when on form supplied by merchant offeree).

applying the “circle of assent” analysis have not taken such an approach. Instead, they have looked at a wide variety of factors and asked, in effect: Considering the importance of this term, has the customer been given sufficient opportunity to read and understand it?⁵⁸ The courts apply a sliding scale—the more important the term, the more clearly its import must be brought to the customer’s attention.⁵⁹

A key ingredient of the analysis is that the party relying on the term must prove that it is within the “circle of assent.” Unlike unconscionability analysis, where the party attempting to avoid or limit the term must show why the term is unconscionable,⁶⁰ Tennessee case law places upon the person seeking to enforce a provision “the burden of showing the parties ‘actually bargained over the . . . provision or that it was a reasonable term considering the circumstances.’”⁶¹

What follows is a discussion of factors courts have considered in determining whether a term is within the “circle of assent.” There is some overlap among the factors, and the list is by no means exclusive. Courts can and will look at any fact or circumstance relevant to the question of whether it is fair to bind a person to a particular term in the other party’s form agreement.⁶²

Size and Location of the Provision

The size and location of the provision in question is clearly a major factor in determining whether it is within the “circle of assent,” but the more recent cases make clear that it is not always determinative.⁶³

⁵⁸ See *infra* text accompanying notes 63-116.

⁵⁹ *Id.*

⁶⁰ There are limited exceptions. For instance, UCC § 2-719(3) (2003) provides that a limitation on consequential damages for injury to the person is *prima facie* unconscionable in a sale of consumer goods.

⁶¹ *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003) (quoting *Brown v. KareMor Int’l*, No. 01-A-01-9807-CH-00368, 1999 Tenn. App. LEXIS 249, at *8 (Tenn. Ct. App. April 19, 1999)). Although the *Howell* opinion does not mention the “circle of assent” doctrine by name, it clearly seems to be applying it. *Brown*, which *Howell* quotes, discusses the “circle of assent” doctrine at length.

⁶² There is nothing in the doctrine that necessarily limits it to standard-form agreements. Nevertheless, where the deal is so unique and important that one party drafts a contract especially for that deal, it would take very extraordinary circumstances to justify the other party’s not paying close attention to every term.

⁶³ See *infra* text accompanying notes 70-78.

Small print certainly increases the likelihood that a court will find that the provision is outside the “circle of assent.” In *Parton*, the provision was in “small print in the upper left corner” of the document.⁶⁴ To emphasize how inconspicuous the language was, the court included a copy of the repair order as an appendix to its opinion.⁶⁵ Similarly, in *Curtis*, the court, noting that the warranty disclaimer was in seven-point type, found that the disclaimer was outside the “circle of assent.”⁶⁶ In *Taylor*, the release written on the insurance company draft was in small print, and the size of the print undoubtedly offset, at least to some degree, the fact that it was written immediately above the line on which the plaintiff and her husband had to sign in order to endorse the draft.⁶⁷

The location of the clause in the document also plays an important role. If the clause is on the back of a form and the signature line is on the front, the chances of the clause being enforced decrease. The drafter can offset this in part by stating on the front of the document, preferably immediately above the signature line, that the signer has read and understood the provisions on the reverse side of the page. The more prominent this statement, the better, but it is still not as good as having everything on the front of the form.⁶⁸ Courts understand that people are less likely to read provisions on the back, particularly when the transaction is the kind they enter into without a great deal of thought. In *Southwestern Petroleum*, the court refused to give effect to a disclaimer and merger clause on the reverse side of an order form, noting that it was “in extremely small print.”⁶⁹ This helped overcome the fact that the signer was the superintendent of a school district, perhaps the most sophisticated signer in a “circle of assent” case.

Small print on the back of a form, however, does not necessarily exclude a provision from the “circle of assent.” In *Contour Medical Technology, Inc. v. Flexcon*

⁶⁴ *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 635 (Tenn. Ct. App. 1987).

⁶⁵ A later decision, distinguishing *Parton*, also noted that in *Parton* the provision in question was in the “corner of a form that was not designed to be read sequentially.” *One Stop Supply, Inc. v. Ransdell*, No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228, at *11 (Tenn. Ct. App. Apr. 19, 1996).

⁶⁶ *Curtis v. Ryder TRS, Inc.*, 43 F.App’x 103, 106 (9th Cir. 2002).

⁶⁷ *Taylor v. Liberty Mut. Ins. Co.*, No. 01-A-01-9210-CV-00420, 1994 Tenn. App. LEXIS 31, at *3, *8 (Tenn. Ct. App. Jan. 26, 1994).

⁶⁸ In *Brown v. KareMor Int’l, Inc.*, No. 01-A-01-9807-CH-00368, 1999 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 19, 1999), the Court of Appeals, citing *Parton*, refused to give effect to language buried in small print on the back of the form. *Id.* at *8. The front of the form contained a statement that the signer had read the back, but it, too, was in “very small print” and was not set off by itself. *Id.* at *3.

⁶⁹ *Harriman Sch. Dist. v. S.W. Petroleum*, 757 S.W.2d 669, 674-75 (Tenn. Ct. App. 1988).

Co.,⁷⁰ a company that bought adhesive strips claimed that the seller’s provisions limiting remedies fell outside the “circle of assent.”⁷¹ There were two such provisions in the documents. One was buried in twenty-four numbered “Terms and Conditions” in “fine but readable print” on the back of an acknowledgment form mailed to the buyer the same day the goods were shipped.⁷² The court noted that a provision on the front of the form, although not particularly prominent, stated that the order was subject to the terms and conditions on the reverse side.⁷³ The court gave effect to the provision, saying that “[t]he acknowledgment drew attention to the terms on the reverse side.”⁷⁴ The *Contour Medical* court did not base its holding entirely on the language on the back of the acknowledgment but relied more heavily on similar language in bold face type on an invoice that was shipped with the goods.⁷⁵ What makes it clear, however, that the language on the back of the acknowledgment would have been sufficient in itself is the way the court distinguished *Parton*: “Although there is no document signed by the plaintiff, there was a plain notice on the face of the acknowledgment that terms and conditions appeared on the reverse.”⁷⁶

Contour Medical should not be read too broadly, however. A key factor was that the court did not think the provision shifted a risk to the customer. The court felt that the provision, an exclusion of consequential damages, was a common provision that a commercial buyer should expect to find in a sales contract.⁷⁷ The court indicated that the outcome might have been different if the provision excluded “actual damages.”⁷⁸

⁷⁰ No. 01A01-9707-CH-00315, 1998 Tenn. App. LEXIS 314 (Tenn. Ct. App. May 6, 1998).

⁷¹ *Id.* at *5.

⁷² *Id.* at *3-4.

⁷³ *Id.* at *3.

⁷⁴ *Id.* at *9.

⁷⁵ *Id.*

⁷⁶ *Id.* at *14-15.

⁷⁷ *Id.* at *10.

⁷⁸ *Id.* at *15. By “actual damages,” the court means direct damages (as opposed to consequential damages). The direct damages in this case were the amount (less than \$2,000) the buyer paid for the goods (adhesive used in the manufacture of disposable electrodes for electrocardiograms). *Id.* at *2, *5. If the buyer had discovered the defect before using the adhesive in the manufacture of the electrodes and if it could have obtained another adhesive in time, it would have been made whole if it recovered the damages permitted by the contract. But if, as seems likely, the defect had been

Placing the provision in a document that the customer does not actually sign also reduces the likelihood it will be enforced.⁷⁹ This is just common sense. People are less likely to read carefully documents that they do not actually sign. While having the language in an unsigned document is not always fatal,⁸⁰ drafters should make sure the terms they really want in the agreement are in the documents that the customer signs.

Readability of the Language

The more readable the provision, the more likely it is to be found within the “circle of assent.” Conversely, where the provision is written in technical legal terminology, it may be outside the “circle of assent” if the customer is not the kind of person who would be expected to understand the language on a casual reading. Two courts interpreting Tennessee law have quoted Chancellor Murray’s statement that the provision “must have been manifested in a fashion comprehensible to the party against whom it is sought to be enforced.”⁸¹

Often the problem with making the provision comprehensible to an unsophisticated customer is not in the language itself, but in the customer’s understanding of the consequences. Unlike lawyers, who are trained to think through the consequences of a provision (and still too often fail to foresee the consequences), an unsophisticated layperson will often fail to see the potentially serious consequences of a seemingly innocuous provision. In these circumstances, an example will often help. Take, for instance, the typical anti-waiver clause in a consumer loan contract: “If lender shall fail to exercise any right granted to it under this contract, that shall not act as a waiver of any further rights of lender hereunder.” In most cases, it will be hard

discovered only after the electrodes had been shipped to the doctors and hospitals that were the end users, then the damages the buyer suffered would be many times the “actual damages” the court allowed it to recover. Still, limitations on remedies like the one in question are common, and a business buyer should expect to see such a clause in a seller’s form and should expect to have to bargain (and perhaps pay a premium price) to get it removed.

⁷⁹ See, e.g., *Curtis v. Ryder TRS, Inc.*, 43 F.App’x 103, 106 (9th Cir. 2002) (disclaimer in separate folder); *Harriman Sch. Dist. v. S.W. Petroleum*, 757 S.W.2d 669, 676 (Tenn. Ct. App. 1988) (disclaimer was on document attached to card customer signed; court emphasized that there was no disclaimer language on the card actually signed).

⁸⁰ See, e.g., *Contour Med. Tech., Inc. v. Flexcon Co., Inc.*, No. 01A01-9707-CH-00315, 1998 Tenn. App. LEXIS 314, at *9 (Tenn. Ct. App. May 6, 1998) (court relied on clause in bold type on invoices).

⁸¹ See *Curtis*, 43 F. App’x at 107; *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987); see also JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 353 (1974).

to argue that a blue-collar worker buying a truck would understand that this means if the lender accepts late payments five months in a row, it can nevertheless repossess his truck just because the sixth payment is late. But suppose the clause provides something like this: Payments must be made on time. We are not obligated to accept late payments. If we do accept a late payment, this does not give you the right to make payments late in the future. In the same way, we may from time to time fail to exercise certain of our rights under this contract (such as the right to repossess the vehicle if your payments are late). This does not prevent us from exercising those rights at any time in the future.

Such a provision may be more understandable to the average customer.

Length of the Document

The longer the document, the more likely it is that any particular provision will be outside the “circle of assent.” In *Curtis*, the disclaimer held to be outside the “circle of assent” was part of a five-page folder.⁸² In *Davis*, the employee handbook was 52 pages long, and this was certainly a factor in the court’s determination that the disclaimer of contractual liability was outside the “circle of assent.”⁸³

In considering the length of the document, a court should of course take into account the sophistication of the reader and the size of the transaction. A person buying a car should be expected to read more carefully than that same person would when renting a car for the weekend.

Headings—Warning the Reader or Misleading Her

Headings can be a useful device for making sure the reader sees the important provisions in a contract. But headings can also be misleading, and misleading headings have played a part in several cases. While most of these lapses probably resulted from drafting oversights rather than conscious efforts to mislead, it is hard to blame courts for being suspicious of the drafters’ motives, or for at least giving the customer the benefit of the doubt.

In *Southwestern Petroleum*, the court noted that the disclaimer and merger clause on which the defendant relied were in a block under the heading

⁸² *Curtis v. Ryder TRS, Inc.*, No. 98-1054-KI, 2000 U.S. Dist. LEXIS 14665, at *12 (D. Or. Oct. 4, 2000).

⁸³ *See Davis v. Conn. Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1280 (M.D. Tenn. 1990).

“Conditions.”⁸⁴ In *Curtis*, the paragraph containing the warranty disclaimer was headed “Vehicle Condition.”⁸⁵ In *Parton*, the disclaimer of liability was under the heading “Terms cash unless arrangements made.”⁸⁶

In a consumer transaction, the document’s title and headings should make it clear that the document is in fact a legal document that the customer should consider carefully. In *Curtis*, the court noted that the disclaimer was “within a folder that begins with reassuring statements, in large type, such as ‘Let Ryder Take a Load Off Your Mind’ and ‘One way we can thank you for choosing Ryder is to make your move as easy as possible.’”⁸⁷ In an analogous context, courts have been less willing to hold a contract unconscionable when it had a conspicuous provision saying it was a contract and advising the signer to seek legal advice before signing it.⁸⁸

Sophistication of the Customer

In a number of “circle of assent” cases, the courts have taken into account the customer’s sophistication or lack thereof. The more sophisticated the customer, the more likely a provision is to be within the “circle of assent.” As with all the other factors, this one is not determinative in and of itself. The first two published opinions holding a provision outside the “circle of assent” both involved apparently sophisticated signers—an automobile wholesaler⁸⁹ and a school superintendent.⁹⁰ Still, the more sophisticated the reader, the harder it is to argue that they can be excused for not having read and understood the provision. In *One Stop Supply, Inc. v. Ransdell*,⁹¹ the court rejected the customer’s contention that the clause in question “would not be clear to the average reader,” saying, “While we would be reluctant to present the disputed clause as a model of clarity, we believe that if a knowledgeable businessman like Mr. Ransdell actually read it, he would easily recognize that it purports to hold him personally responsible for the debts of his company.”⁹²

⁸⁴ *Harriman Sch. Dist. v. S.W. Petroleum*, 757 S.W.2d 669, 674 (Tenn. Ct. App. 1988).

⁸⁵ *Curtis*, 43 F. App’x at 106.

⁸⁶ *Parton*, 730 S.W.2d at 638.

⁸⁷ *Curtis*, 43 F. App’x at 106.

⁸⁸ *See, e.g., Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1377 (Mass. 1980).

⁸⁹ *See Parton*, 730 S.W.2d at 635.

⁹⁰ *See Harriman Sch. Dist. v. S.W. Petroleum*, 757 S.W.2d 669, 672 (Tenn. Ct. App. 1988).

⁹¹ No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228 (Tenn. Ct. App. Apr. 19, 1996).

⁹² *Id.* at *10.

This raises a difficult question. Is it the sophistication of the individual signer or that of some hypothetical average reader that the court should take into account in determining whether the provision is within the “circle of assent?” *Contour Medical* is in accord with *One Stop Supply* in applying a different standard where the signer is sophisticated.⁹³ Chancellor Murray seems to agree, saying that the term “must have been manifested in a fashion comprehensible to the party against whom it is sought to be enforced.”⁹⁴

On the other hand, some opinions talk about whether “a person of ordinary intelligence and experience” would expect to find the term in the document.⁹⁵ But if this standard were applied in all cases, it would be contrary to the clearly expressed reasoning in *One Stop Supply* and *Contour Medical*.⁹⁶ Perhaps the best way to deal with the issue is to say that the customer will be presumed to be a person of normal intelligence, education, and experience commensurate with the expected signers of the form. The person relying on the term in the form will be allowed to show that the customer is in fact more sophisticated than the norm and should be held to a higher standard. If the customer is less sophisticated than the norm, this should only be taken into account to the extent the seller’s agent knew (or should have known) of the customer’s situation. This requires businesses to make their contracts comprehensible to their normal customers, but does not require them to spend additional money to make them comprehensible to types of customers with whom they will not normally deal.

Conditions Under Which The Customer Assents

Whether the customer had the opportunity to review the document at her leisure also factors into the “circle of assent” calculus. What might be reasonable disclosure in a document that the customer receives at home and has the opportunity to read in a relaxed atmosphere might be inadequate where the customer has to read the document with a salesperson distracting her or while she is standing in line at a car rental counter, for instance, with a line of impatient people waiting behind her.⁹⁷

⁹³ See *Contour Med. Tech., Inc. v. Flexcon Co., Inc.*, No. 01A01-9707-CH-00315, 1998 Tenn. App. LEXIS 314, at *10 (Tenn. Ct. App. May 6, 1998) (“We are dealing with a transaction between commercial entities, sophisticated parties that buy and sell goods with regularity.”)

⁹⁴ MURRAY, *supra* note 81, *quoted in Parton*, 730 S.W.2d at 637.

⁹⁵ *Davis v. Conn. Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1280 (M.D. Tenn. 1990); *Taylor v. Liberty Mut. Ins. Co.*, No. 01-A-01-9210-CV-004220, 1994 Tenn. App. LEXIS 31, at *15 (Tenn. Ct. App. Jan. 26, 1994).

⁹⁶ See *supra* text accompanying notes 93-95.

⁹⁷ It has been noted, perhaps with some hyperbole, that “in most cases involving a written contract or

The Court of Appeals recognized this in *One Stop Supply*, pointing out that the customer took the credit application home and “had an ample opportunity to read it and study its provisions.”⁹⁸ The court contrasted *Parton*, in which there was no indication the customer had any such opportunity.⁹⁹

In *Terry v. Ober Gatlinburg, Inc.*,¹⁰⁰ the court appeared to think the fact that the exculpatory language was contained in two conspicuous places, both of which the customer had to sign, overcame the fact that “he signed the document in the hurried and congested environment of the [ski equipment] rental line and the entire process took place in less than ninety seconds.”¹⁰¹ The court cited *Parton* but then pointed out the conspicuousness of the exculpatory language.¹⁰² The court vacated a summary judgment based on the document, but it appears that the decision was based primarily on the ambiguities in the document rather than on the customer’s argument that the language was outside the “circle of assent.”¹⁰³

Substantive Fairness of the Provision

Another factor that must be considered is how fair the substantive terms of the questioned clause are in the context of the transaction as a whole. In *Parton* and several other cases, the courts have quoted Karl Llewellyn’s statement that a party who signs a standard-form contract assents not only to the “dickered terms,” but also to any “not unreasonable or indecent terms...which do not alter or eviscerate the reasonable meaning of the dickered terms.”¹⁰⁴

agreement, [consumers] are told to ‘just sign by the Xs’ and have no opportunity to read the document.” Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1597 (1994).

⁹⁸ *One Stop Supply, Inc. v. Ransdell*, No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228, at *9 (Tenn. Ct. App. Apr. 19, 1996).

⁹⁹ *Id.*; see also *Curtis v. Ryder TRS, Inc.*, 43 F.App’x 103, 106 (9th Cir. 2002) (discussing importance of this factor in *One Stop Supply*).

¹⁰⁰ No. 03A01-9701-CV-00026, 1998 Tenn. App. LEXIS 76 (Tenn. Ct. App. Feb. 3, 1998).

¹⁰¹ *Id.* at *2, *13-14.

¹⁰² *Id.* at *13-14.

¹⁰³ *Id.* at *14-16.

¹⁰⁴ *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987) (quoting KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960)); see also *One Stop Supply*, 1996 Tenn. App. LEXIS 228, at *7.

What is "reasonable" or "decent," however, is itself another standard, with its own set of factors. Chancellor Murray's statement, quoted in some of the cases, seems to offer the best guide to what is reasonable or decent:

It must be emphasized that the assent analysis is not premised upon the actual assent of the parties. Parties to a contract rarely consciously advert to any number of terms which are binding upon them. If such terms allocate the risks of the bargain in a manner which the parties should have reasonably expected, they are enforceable.... The parties will not be found to have agreed to an abnormal allocation of risks if the only evidence thereof is an inconspicuous provision in the boilerplate of the standard form.¹⁰⁵

In almost all of the cases in which a provision has been found outside the "circle of assent," one can fairly say that the provision shifted a risk from the party who wrote the form to its customer.¹⁰⁶ But the risk does not have to be a risk the parties would have considered significant if they had thought about it when they made the contract. As has often been noted, when people make contracts, they are seldom thinking about default or disaster.¹⁰⁷ So the fact that it would have cost Mr. Parton a trivial sum to insure his car against loss at the dealer's yard does not justify the dealer shifting that loss to Mr. Parton in the fine print.¹⁰⁸ This risk, however, was nowhere near as great as the risk that Ms. Taylor (the plaintiff who signed the draft containing language releasing unknown claims)¹⁰⁹ would have unknown injuries, so we should expect that courts will require much less prominence of the contract terms in a case like *Parton* than in a case like *Taylor*.¹¹⁰

¹⁰⁵ MURRAY, *supra* note 81, *quoted in Parton*, 730 S.W.2d at 637.

¹⁰⁶ In *Brown v. KareMor Int'l, Inc.*, No 01-A-01-9807-CH-00368, 1999 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 19, 1999) the provision, an arbitration clause that required a Tennessee resident to arbitrate a small claim in Carson City, Nevada, had the effect of depriving the customer of any remedy. *Id.* at *8.

¹⁰⁷ *See, e.g., Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991).

¹⁰⁸ *See supra* text accompanying notes 9-11.

¹⁰⁹ *See supra* text accompanying note 27; *infra* text accompanying notes 114-15.

¹¹⁰ Mr. Parton's presumed greater sophistication would also be a factor. *See supra* text accompanying notes 92-94.

Whether the Provision Was Expected

Even if the provision shifted to the customer a loss that the drafter of the form would have borne under the law's default rule, the provision may be within the "circle of assent" simply because the customer should have expected such a provision in the contract. In *Contour Medical*, the court stated as alternative support for its holding that, even if the terms were not specifically accepted, "they still fall within the circle of assent because they are reasonable in view of the circumstances surrounding the transaction."¹¹¹ It went on to say that "[l]imitation of damages clauses are part of the world in which [business people like the plaintiff] operate."¹¹²

Approaching the question of the parties' expectations in a different way, one court noted that in *Parton* the primary subject matter of the contract was the repair of the car, whereas the provision the *Parton* court refused to enforce—liability for theft of the car—bore "only a tangential relationship to the terms over which the parties

¹¹¹ *Contour Med. Tech., Inc. v. Flexcon Co., Inc.*, No. 01A01-9707-CH-00315, 1998 Tenn. App. LEXIS 314, at *9-*10 (Tenn. Ct. App. May 6, 1998).

¹¹² *Id.* at *10. Courts in other jurisdictions have viewed such clauses differently. The Appellate Court of Illinois held such a clause unconscionable where it was in small type on the back of an acknowledgment form, saying:

To be part of the bargain, a provision limiting the defendant's liability must, unless incorporated into the contract through prior course of dealings or trade usage, have been bargained for, brought to the purchaser's attention or be conspicuous. If not, the seller has no reasonable expectation that the remedy was being so restricted and the restriction cannot be said to be part of the agreement of the parties. Nor does the mere fact that both parties are businessmen justify the utilization of unfair surprise to the detriment of one of the parties since the [Uniform Commercial] Code specifically provides for the recovery of consequential damages and an individual should be able to rely on their existence in the absence of being informed to the contrary either directly or constructively through prior course of dealings or trade usage.

Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 410 (Ill. App. Ct. 1980) (citations omitted). The *Parton* court seems to have assumed that the customer, himself an auto wholesaler, would not have expected to find a clause absolving the repairer of liability for loss or damage to the vehicle. In fact, such clauses are the norm in vehicle repair orders, both in the forms of manufacturer-associated dealers and those of independent repair shops. See forms on file with author. An automotive professional with thirty years experience in the business informed the author that the purpose of such provisions is to shift the risk to the customer's insurer because most auto repair customers have insurance (commonly known as "comprehensive insurance") covering such risks. Interview with Bob Wolfenbarger, sales associate, Rusty Wallace Honda, in Knoxville, Tenn. (Aug. 5, 2005). Wholesalers like Mr. Parton, however, commonly self insure.

actually bargained.”¹¹³

In *Taylor*, the provision in question was a release written on the back of a draft immediately above the line on which the plaintiff and her husband signed to endorse the draft.¹¹⁴ While other courts have been reluctant to allow people to avoid provisions directly above the signature line, the *Taylor* court held that there was at least a question of fact as to whether “a person of ordinary intelligence and experience...should have expected that she would be waiving all her claims...by endorsing and cashing the draft.”¹¹⁵

The fact that the term in question was not expected is of course not decisive in itself,¹¹⁶ but it is an important factor to be weighed in the totality of the circumstances.

THE “CIRCLE OF ASSENT” AND THE DUTY TO READ

The “circle of assent” doctrine conflicts with the traditional rule that a person is bound by the documents he or she signs, regardless of whether he or she has read them or understood them.¹¹⁷ The courts have not dealt well with the apparent contradiction between the traditional rule, often expressed as an absolute, and the “circle of assent” doctrine. In *Parton*, the court quoted strong language from a 1945 Tennessee Supreme Court opinion reiterating the traditional rule and contrasted it with *Savoy Hotel Corp. v. Sparks*,¹¹⁸ a 1967 case in which the Court of Appeals held that language on a garage’s claim check form was not effective to

¹¹³ *One Stop Supply, Inc. v. Ransdell*, No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228, at *8-9; *see also* *Davis v. Conn. Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1280 (M.D. Tenn. 1990) (“Tennessee recognizes that some language within contracts will not be binding if that language is hidden, not pointed out, and that a person of ordinary intelligence and experience would not expect to find such a provision within the contract”).

¹¹⁴ *Taylor v. Liberty Mut. Ins. Co.*, No. 01-A-01-9210-CV-00420, 1994 Tenn. App. LEXIS 31, at *3-4. Although the court does not specifically say so, the opinion implies that the draft, like most insurance company drafts, looked very much like a bank check and would have normally been treated by the payee as if it were a check. *See id.* at *13.

¹¹⁵ *Id.* at *15.

¹¹⁶ A business person signing a credit application on behalf of his closely-held corporation does not expect to become personally liable, but this did not stop the court in *One Stop Supply* from holding Mr. Ransdell liable where the term was prominently displayed, he was an experienced business person, and he had ample opportunity to study the document. *See One Stop Supply*, 1996 Tenn. App. LEXIS at *10-12.

¹¹⁷ *See supra* note 2 and accompanying text.

¹¹⁸ 421 S.W.2d 98 (Tenn. Ct. App. 1967).

exculpate the garage for liability when a car parked in the garage was stolen.¹¹⁹ The *Parton* opinion then went on to quote Murray and Llewellyn on “decent terms” and the “circle of assent.”¹²⁰ It concluded by adopting the “circle of assent” doctrine as the rule when one party signs a form furnished by the other.¹²¹ This would seem to imply that the old rule of “you’re bound by what you sign” does not apply to standard forms, and it would have been best if the later cases had left it at that, saying that with standard forms, you are bound by whatever is within the “circle of assent.” But in *One-Stop Supply*, the court said that *Parton* and the other “circle of assent” cases “involved exceptional circumstances that enabled us to relieve the signatories from the normal rule that a party is bound by all the provisions of a written contract that he signs.”¹²² This language is unfortunate because it implies that the “circle of assent” doctrine applies only in exceptional circumstances. This is hardly the case because many, perhaps most, consumer contracts (as well as many business-to-business contracts) contain provisions that could be held outside the “circle of assent.”

APPLYING THE “CIRCLE OF ASSENT” TO THE CURRENT PROBLEMS IN CONTRACT LAW

While the “circle of assent” doctrine has been around a long time, it has not yet worked its way fully into Tennessee contract practice. Many of the standard forms used in Tennessee fail to account for the “circle of assent” doctrine and therefore risk having key provisions ruled unenforceable because of it. In this section I will analyze some current issues in contract law under “circle of assent” analysis.

Arbitration Clauses

Although the Federal Arbitration Act¹²³ generally preempts state laws and policies regarding arbitration,¹²⁴ state contract law controls when the question is

¹¹⁹ See *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 636-37 (Tenn. Ct. App. 1987) (quoting *DeFord v. Nat’l Life & Accident Ins. Co.*, 185 S.W.2d 617 (Tenn. 1945)).

¹²⁰ *Id.* at 637.

¹²¹ See *id.* at 637-38.

¹²² *One Stop Supply, Inc. v. Ransdell*, No. 01-A-01-9509-CV-00403, 1996 Tenn. App. LEXIS 228, at *4-5 (Tenn. Ct. App. Apr. 19, 1996).

¹²³ 9 U.S.C. §§ 1-14 (2005).

¹²⁴ See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

whether the parties actually agreed to arbitration.¹²⁵ This makes the “circle of assent” doctrine an ideal vehicle for dealing with the arbitration provisions that are becoming more common in consumer contracts, employment contracts, and the like.¹²⁶

People challenging arbitration clauses in Tennessee have had a difficult time. Courts in other jurisdictions have been willing to hold arbitration clauses unconscionable in a variety of situations.¹²⁷ Tennessee courts, however, have been willing to find that there was a contract of adhesion or an inequality in bargaining power only where the complaining party was unable to get what it was seeking from another source.¹²⁸ Where a car salesperson who had been working for a dealership for ten years was told that he had to agree to arbitrate all employment-related claims or lose his job, the Sixth Circuit, applying Tennessee law, said that in order to show that the contract was an adhesion contract, the employee had to show “that other employers would not hire him.”¹²⁹

The difficulty of prevailing on an unconscionability argument makes the “circle of assent” doctrine particularly useful. “Circle of assent” analysis allows courts to enforce agreed-to arbitration provisions while still protecting against those that are abusive. The business that really cares about arbitration can be reasonably sure its arbitration clause will be enforced if it drafts a fair arbitration clause and makes the clause prominent in the document. The clause should warn the customer that the customer is giving up its right to a jury trial and its right to bring a class action. If the drafter wants extra insurance that the arbitration clause will be

¹²⁵ See *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

¹²⁶ One article claims that the majority of consumer contracts now contain arbitration clauses. Jean R. Sternlight & Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75 (2004).

¹²⁷ See, e.g., *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1109 (9th Cir. 2003) (finding arbitration clause unconscionable in employment contract); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (holding arbitration clause unconscionable in telephone contract); *Flores v. Transamerica Homefirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001) (holding arbitration clause unconscionable in loan agreement).

¹²⁸ See *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996).

¹²⁹ *Howell v. Rivergate Toyota, Inc.*, 144 F. App’x 475, 478 (6th Cir. 2005).

One situation where courts have been willing to hold that the contract was an adhesion contract and that the customer did not have bargaining power is where the contract is for health care services. See, e.g., *Buraczynski*, 919 S.W.2d at 320. In *Buraczynski*, the court held that a patient-physician arbitration agreement was a contract of adhesion, but it enforced the contract nonetheless because it contained no oppressive provisions. See *id.* at 321.

enforced, she can put the arbitration provision in a separate document to be separately signed by the customer.¹³⁰

In many cases, the drafter will not want to go to these lengths. Often, there will be other provisions the drafter wants to highlight, such as warranty disclaimers, merger clauses, damage limitations, etc.¹³¹ Having too many provisions in bold or separately signed detracts from the impact of each.¹³² Moreover, it interferes with the process of doing business, it costs money, and in a small transaction, it may make the customer decide to take her business elsewhere to avoid all the hassle.

To some extent, the drafter who for these reasons chooses not to highlight her arbitration clause should bear an increased risk that the clause will not be enforced. Because the “circle of assent” test is a totality of the circumstances test, however, it allows a court to put things in perspective. An employee should not be held to have given up her right to a jury trial on her age discrimination or sexual harassment claims because of a clause buried in the employee handbook; however, a court may well decide that a person spending \$500 for a computer was bound to arbitration by a less-than-prominent clause in the machine’s documentation.¹³³

On the other hand, a court applying “circle of assent” analysis might also decide that the small size of the transaction means the customer has less obligation to read through the documentation to discover a provision that shifts the risk. In any event, the drafter of the form can have reasonable assurance it will get the arbitration it desires if it is willing to pay the price by making the provision fair and by making it prominent in the document.

¹³⁰ In a number of Tennessee cases, the court has noted as a factor in upholding arbitration provisions the fact that the provision was a separately-signed agreement. *See, e.g., Howell*, 144 F. App’x at 479-80; *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001). *But see Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 373 (6th Cir. 2005) (arbitration agreement was one of a packet of forms that managers routinely had employees sign without reading).

¹³¹ The UCC requires that warranty disclaimers be conspicuous. *See* TENN. CODE ANN. §§ 47-2-316(2), 47-2A-214(2) (2005).

¹³² In *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003), the court, holding an arbitration provision unenforceable, remarked on the fact that the provision was not required to be signed separately although several other provisions in the same form contract were. *Id.* at *12.

¹³³ *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148, 1151 (7th Cir. 1997). While the court in that case was not applying a “circle of assent” analysis, it seems to have been influenced by its perception that the rights the customers were giving up were not particularly important rights and that the costs of ensuring informed consent were large in relation to the size of the transaction. *Id.* at 1148-49.

Rolling Contracts

The so-called “rolling contract” is arguably the most controversial development in contract law in many decades.¹³⁴ As a leading commentator explains, “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.”¹³⁵ How a rolling contract works is best illustrated by a summary of the leading (and most controversial) case, *Hill v. Gateway 2000, Inc.*¹³⁶ Rich and Enza Hill bought a computer from Gateway by ordering it over the telephone and charging it to their credit card.¹³⁷ When the computer arrived, it was accompanied by a document that contained the terms of the sale and provided that the Hills were bound by the terms unless they returned the computer within 30 days.¹³⁸ Among the terms was one that provided for resolution of disputes by arbitration.¹³⁹ The Hills kept the computer beyond the thirty-day deadline, but at some point they became dissatisfied with it and sued Gateway in federal court.¹⁴⁰ The district court refused to enforce the arbitration clause, and Gateway appealed to the Seventh Circuit. In an opinion by Judge Frank Easterbrook, the Seventh Circuit vacated the district court decision and remanded with instructions to compel arbitration.¹⁴¹

¹³⁴ See generally Roger C. Bern, “Terms Later” Contracting: Bad Economics, Bad Morals, and A Bad Idea For A Uniform Law, *Judge Easterbrook Notwithstanding*, 12 J. L. & POL’Y 641 (2004); Mark Andrew Cerny, *A Shield Against Arbitration: U.C.C. Section 2-207’s Role in the Enforceability of Arbitration Agreements Included with Delivery of Products*, 51 ALA. L. REV. 821 (2000); Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677 (2004); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743 (2002); William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099 (2004).

¹³⁵ Lawrence, *supra* note 134, at 1099.

¹³⁶ 105 F.3d 1147 (7th Cir. 1997).

¹³⁷ *Id.* at 1148.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* The opinion does not state what steps the Hills took to obtain satisfaction from Gateway before they filed suit, but it appears they made their case for avoiding arbitration less appealing by filing it as a class action and by adding a RICO claim, something Judge Easterbrook apparently found ludicrous. See *id.* (“They filed suit in federal court arguing, among other things, that the product’s shortcomings make Gateway a racketeer”).

¹⁴¹ *Id.* at 1151.

Neither Judge Easterbrook's opinion in *Hill* nor his prior opinion in *ProCD, Inc. v. Zeidenberg*¹⁴² explains clearly the precise mechanics of the contract formation and incorporation of the written terms.¹⁴³ Commentators have said that, under the theory of the opinions, the seller's offer is contingent upon the buyer's agreement to the terms that will follow (usually accompanying the product).¹⁴⁴ Many of the same commentators have attacked this theory, saying that it is inconsistent with both the Uniform Commercial Code and the common law of contracts.¹⁴⁵ Later cases have split, with some following the Seventh Circuit's reasoning in *Hill*¹⁴⁶ and others rejecting it and following the Third Circuit's analysis in *Step-Saver Data Systems, Inc. v. Wyse Technology*,¹⁴⁷ which has emerged as the leading case against the inclusion of such terms. In the 2003 revisions to Article 2 of the Uniform Commercial Code, the drafters expressly declined to take a position on the issue, leaving it to the courts.¹⁴⁸ Recently, in a case decided under Ohio law, a divided panel of the Sixth Circuit

¹⁴² 86 F.3d 1447 (7th Cir. 1996).

¹⁴³ Judge Easterbrook's theory appears to be that no contract was formed during the initial sales transaction. Instead, the shipment of the goods constituted an offer, which the buyer accepted by failing to return the goods within the specified period. *See Hill*, 105 F.3d at 1149; *ProCD*, 86 F.3d at 1452 ("vendor, as master of the offer, may invite acceptance by conduct").

¹⁴⁴ *See, e.g.*, MURRAY, *supra* note 81, § 50 at 94; Lawrence, *supra* note 134, at 1102. As Judge Easterbrook stated, "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance." *Hill*, 105 F.3d at 1149; *ProCD*, 86 F.3d at 1452.

¹⁴⁵ *See, e.g.*, Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 344-52 (1999); Thomas J. McCarthy et al., *Survey: Uniform Commercial Code*, 53 BUS. LAW. 1461, 1465-66 (1998); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 296-99 (1999); Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, 71 FLA. B.J. 8, 10-12 (Nov. 1997).

¹⁴⁶ *See, e.g.*, *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 687 (N.D. W. Va. 2005); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 513 (M.D. La. 2003); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1100 (C.D. Cal. 2002); *Westendorf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d (Callaghan) 1110, 1110 (Del. Ch. 2000); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000).

¹⁴⁷ 939 F.2d 91 (3rd Cir. 1991). The case held that the contract was formed when the initial offer and acceptance occurred and that the additional terms became part of the contract only if they met the criteria for inclusion under U.C.C. § 2-207(2). *Id.* at 98

¹⁴⁸ *See* U.C.C. § 2-207, cmt. 5 (2003) (stating that Article 2 takes no position as to whether courts should follow *Hill* or *Step-Saver*).

followed *Hill* and *ProCD*.¹⁴⁹

While it is not the purpose of this article argue the merits of the competing positions, the "circle of assent" doctrine would allow the Tennessee courts to capture the benefits of the *Hill* and *ProCD* position while avoiding much of the unfairness that critics attribute to it.

Proponents of rolling contracts make the argument that they are a commercial necessity. As Judge Easterbrook stated in *Hill*:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.¹⁵⁰

It can be argued that customers are protected against abusive terms in standard form contracts by the doctrine of unconscionability. But unconscionability is a blunt instrument.¹⁵¹ It is designed to deal with terms so egregious that a court cannot in good conscience enforce them.¹⁵² It does not deal with the much larger universe of terms that are merely unfair.

The "circle of assent" doctrine provides a method for dealing with rolling contracts. Rather than simply saying that the term is part of the contract because it was in the document sent to the purchaser and is conscionable, the court can engage in a totality of the circumstances analysis and determine whether it really is fair to

¹⁴⁹ See *Higgs v. Automotive Warranty Corp.*, 134 F. App'x 828, 832 (6th Cir. 2005).

¹⁵⁰ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).

¹⁵¹ See Epstein, *supra* note 4, at 305.

¹⁵² See *supra* text accompanying notes 41-44.

bind the customer to this term. For example, in a case like *Hill*, a court could consider a variety of factors. The list might include such things as: (1) whether the customer should have expected there would be an arbitration clause; (2) how much time a buyer should spend reading the terms that come with a computer (presumably less time than he or she should spend with an insurance contract and more than with the terms that accompany a video game); (3) whether the arbitration clause gives the seller an unfair advantage;¹⁵³ (4) how difficult is it to get out of the deal (does it require shipping a computer back to the seller, finding new insurance—and being uninsured during the interim, or merely sending an e-mail to cancel a subscription); (5) how prominent in the documentation the arbitration clause is; and (6) how easy the language is for a person in the buyer's position to understand.

Unilateral Amendments

Academic writers have not given unilateral amendments the attention they have given rolling contracts, but the issue is at least as important. Standard form agreements governing such ongoing relationships as credit cards, bank accounts, brokerage accounts, and wireless communications now commonly have provisions giving the party drafting the agreement the right to amend the agreement unilaterally upon notice to the other party.¹⁵⁴ These provisions serve a useful purpose. They allow businesses to make minor changes in the housekeeping details of their agreements at low cost and with minimum hassle to their customers. On the other hand, there is a huge potential for abuse, and courts have countenanced some of the abuse with surprisingly little complaint from consumer advocates.

In one case, the United States Court of Appeals for the Third Circuit upheld the dismissal of a class-action Truth-In-Lending case because the bank had retroactively amended the credit card agreement to provide for binding arbitration.¹⁵⁵

¹⁵³ This analysis itself would embrace a number of factors, such as whether the customer will have to pay substantial fees to bring an arbitration, whether the arbitration panel is likely to be biased in favor of the seller, whether the arbitration clause precludes class actions and, if so, whether this is fair in the circumstances of this transaction.

¹⁵⁴ In some cases, businesses have attempted to make unilateral amendments even without such provisions in the original contract, taking the position that by continuing to accept the benefits of the contract, the other party has agreed to the change. In *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), the court noted that Gateway had attempted to change the terms of the arbitration clause in contracts already in existence by mailing all of its existing United States customers a copy of its quarterly magazine, which contained a notice of the change in its arbitration policy. *Id.* at 1332 n.1.

Similarly, *Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005), involved a large company's attempt to change its employees' conditions of employment (requiring arbitration of workplace disputes) by sending a company-wide e-mail. *Id.* at 547.

¹⁵⁵ *Lloyd v. MBNA Am. Bank, N.A.*, 27 F App'x 82, 84-85 (3d Cir. 2002).

After some of the claims of the plaintiff class had arisen, the bank made the amendment by giving the cardholders notice in the sort of mass mailing that most of us throw away with the rest of the junk mail.¹⁵⁶

In another case, the Texas Supreme Court allowed a credit union to escape liability for improperly allowing approximately \$49,800 to be transferred from a depositor's account.¹⁵⁷ The depositor's girlfriend had forged his signature to an account change card adding her as a signatory to the account and then transferred the funds to her account, in some instances making the transfers by telephone.¹⁵⁸ While financial institutions are normally liable for losses resulting when they honor forged signatures of their depositors,¹⁵⁹ the Uniform Commercial Code provides that the institution is not liable if the depositor fails to notify the institution of the forgery within one year after the institution sends a statement from which the depositor should have been able to realize the forgery had occurred.¹⁶⁰ In this case, the depositor notified the credit union approximately six months after the credit union sent the first statement showing the girlfriend's withdrawals,¹⁶¹ but the credit union had amended the account agreement to provide that it was not liable unless the depositor notified it within 60 days.¹⁶² The depositor had not expressly agreed to the amendment, and he probably was not even aware of it. When he opened his account, he signed an application that said he agreed to be bound by all rules,

¹⁵⁶ *Id.* Interestingly, a Delaware statute specifically allows such amendments of existing credit card agreements. DEL. CODE ANN. tit. 5, § 952(a) (2005) ("Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower...may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth-In-Lending Act").

This is particularly bothersome because a study by a major telecommunications provider concluded that consumers who received a new contract in the mail with a cover letter stating that the new contract would not change their rates or service "would stop reading and discard the letter" as soon as they read that statement. *See Ting v. AT&T*, 319 F.3d 1126, 1133-34 (9th Cir. 2003).

¹⁵⁷ *Am. Airlines Emp. Fed. Cred. Union v. Martin*, 29 S.W.3d 86, 90, 92 (Tex. 2000). A total of \$49,800 was transferred in fourteen improper transfers. *Id.* at 90. The court ruled that the credit union was liable for four transfers totaling \$5,300. *Id.* at 90, 99.

¹⁵⁸ *Id.* at 89-90.

¹⁵⁹ *See* U.C.C. § 4-401(a) (2004).

¹⁶⁰ U.C.C. § 4-406(f) (2004).

¹⁶¹ *See Am. Airlines*, 29 S.W.3d at 90. The depositor denied receiving the statements. *Id.* It seems likely that the girlfriend intercepted them.

¹⁶² *See id.* at 89.

regulations, bylaws, and policies of the credit union, as then in effect or as later adopted or amended.¹⁶³ Some time after this, the credit union had adopted a new account agreement reducing the time for notification to 60 days.¹⁶⁴ It had not mailed the depositor a copy of the agreement but had notified him that he could pick up a copy at one of its branches or telephone the credit union to request that a copy be mailed to him.¹⁶⁵ The court held that by continuing to maintain his account with the credit union, he had agreed to be bound by the amendment.¹⁶⁶ The dissent would have held that the depositor was not bound because the amendment was inconspicuous,¹⁶⁷ but the majority expressly rejected that argument.¹⁶⁸

The Alabama Supreme Court turned things around and allowed *the customer* to make a unilateral amendment deleting an arbitration clause.¹⁶⁹ Robert and Margo Rebar had a one year renewable contract with Cook's Pest Control.¹⁷⁰ The agreement contained a provision mandating binding arbitration.¹⁷¹ After a year of unsuccessful negotiations with Cook's over termite damage in their home,¹⁷² the Rebars were apparently contemplating litigation. The mandatory arbitration clause in the contract presented a problem, but their lawyer, Thomas Campbell, was a leader in the fight against arbitration clauses in consumer contracts.¹⁷³ The contract was coming up for renewal, and Campbell drafted an addendum to the customer service agreement providing that the parties' rights were no longer subject to mandatory

¹⁶³ *Id.* at 96.

¹⁶⁴ *See id.* at 89.

¹⁶⁵ *See id.* at 102 (dissenting opinion). The majority opinion also indicates that the credit union "sent account statements specifying the critical sixty-day time frame." *Id.* at 96.

¹⁶⁶ *Id.* at 96.

¹⁶⁷ *Id.* at 99.

¹⁶⁸ *See id.* at 96-97.

¹⁶⁹ *Cook's Pest Control, Inc. v. Rebar*, 852 So. 2d 730, 732 (Ala. 2002).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 743 (dissenting opinion); Sierra David Sterkin, Comment, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 44 GOLDEN GATE U. L. REV. 285, 286 (2004).

¹⁷³ *See* Terry Carter, *ARBITRATION PENDULUM: Mandatory Arbitration Agreements, Once An Easy Pass, Come Under More Scrutiny*, 89 A.B.A.J. 14 (May 2003).

arbitration.¹⁷⁴ The addendum tracked the typical language that businesses put in their unilateral amendment addenda, telling Cook's, "Please read this addendum to your Customer Agreement carefully as it explains changes to some of the terms shown in the Agreement. Keep this document with the original Customer Agreement." It also provided that by continuing to "honor" the Rebars' account, Cook's acknowledged its agreement to the terms of the amendment.¹⁷⁵ Rather than simply laughing at a good joke, the Alabama Supreme Court treated the case as a problem in basic contract law. It said that Cook's notice that the contract was up for renewal was an offer, and the Rebars' returning the notice with the addendum was a counteroffer.¹⁷⁶ By cashing the Rebars' check and providing services after the expiration of the initial term, Cook's accepted the counteroffer, including the provision eliminating arbitration.¹⁷⁷ While the *Rebar* decision is clever and gives the satisfaction of turning the tables on business, it is not a solution to the problem. If the case were followed, businesses would have to increase their prices to pay for the employee time spent guarding against dissatisfied customers trying to modify agreements.

The "circle of assent" doctrine provides a rational way to deal with unilateral amendments. In fact, the court can deal with the problem on two levels. The court can apply the "circle of assent" test to the clause in the original contract that allows the amendment, and it can apply it to the amendment itself. With respect to the clause allowing amendments, the court should ask whether the customer should have expected such a clause in a contract of this sort. If the customer should have expected such a clause, then the clause passes the test. If the clause is one that the customer should not have expected, then the court must determine whether the clause was so prominent that the customer should have noticed it and refused to enter into the relationship if it did not want to be bound by it. Then the same test must be applied when the contract is amended. If the amendment comes in an envelope that the customer would be justified in throwing away, thinking it to be junk mail, the customer is still bound if the change is simply a minor housekeeping detail. But if the change is something that changes the customer's substantive rights, such as the addition of an arbitration clause or a change in the interest rate on a credit card account, the court can first look at whether the change was communicated to the customer in such a way that the customer should have realized

¹⁷⁴ See *Consumers can amend mandatory arbitration clause*, CONSUMER FIN. SERVS. L. REP., vol. 6, no. 14 (Feb. 3, 2003).

¹⁷⁵ See *Cook's Pest Control*, 852 So. 2d at 733.

¹⁷⁶ *Id.* at 736.

¹⁷⁷ *Id.* at 737.

that a change was being made and understood the nature of the change. Second, the court can consider whether it is fair to require the customer to terminate the relationship if it does not agree to the change.

Merger Clauses and the “Circle of Assent”

Businesses need to have enforceable merger clauses in their forms. Sales representatives often make promises they are not authorized to make.¹⁷⁸ Other times, customers misunderstand what the sales representatives say.¹⁷⁹ Less frequently, but still often enough to be a problem, customers flat-out lie about what they were promised.¹⁸⁰ By making all of its promises in the contract documents and having an enforceable merger clause, a business should be able to protect itself against these problems.

But important as the merger clause is to the supplier, enforcing it is often unfair to the customer. If a customer lays out good money on the basis of what a salesperson tells him, it is usually grossly unfair to later tell him, “Tough luck; you should have read the fine print.” As a result, courts have often bent the law to allow consumers and small business owners to introduce parol evidence. Some courts have held that an inconspicuous merger clause does not reflect the parties’ intentions;¹⁸¹ another held a merger clause ineffective because the signer did not understand its effect;¹⁸² another held the merger clause ineffective because the document was incomplete on its face;¹⁸³ and still another held that the contract itself

¹⁷⁸ See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2.12 (4th ed. 1995) (referring to “the seller’s effusive salesperson mak[ing] unauthorized representations” as a “classic situation”).

¹⁷⁹ See Robert M. Lloyd, *Five Rules for Dealing with Guarantors*, J. COM. BANK LENDING, at 36, 37 (Dec. 1988) (stating that guarantors often misunderstand terms of guaranties).

¹⁸⁰ See *id.* (stating that many guarantors lie about promises by bank officers); Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 281-82 (2004) (lawyers need to protect clients against perjury).

¹⁸¹ See, e.g., *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668, 671 (Or. Ct. App. 1982); *cf.* *Fairfield Leasing Corp. v. Technigraphics, Inc.*, 607 A.2d 703, 706 (N.J. Super. Ct. Law Div. 1992) (giving no effect to inconspicuous jury waiver).

¹⁸² *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 656 F. Supp. 426, 428 (D. Nev. 1987) (signer “did not understand that the integration clause meant that the representations of defendant’s salespersons as to what the computer could accomplish might be nullified”).

¹⁸³ *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 569-70 (7th Cir. 1993) (document did not name specific products or their prices).

“was not a final expression of the parties’ agreement.”¹⁸⁴ And of course allegations of fraud will usually get even a sophisticated party past a summary judgment based on a merger clause.¹⁸⁵

Stretching existing doctrine to reach a result the court thinks is just presents its own problems. It increases the potential for litigation, creating more costs that will be passed on to all the customers. One academic writer has argued, “For sellers who wish to avoid incorporating statements by their sales agents into the contract, the remedy is the proper selection, training, and supervision of sales agents and the adequate informing of consumers.”¹⁸⁶ This is, of course, naive. Anyone who has been in business knows that the type of people who are attracted to (and successful in) sales careers are enthusiastic and prone to overstatement, often to outright lying.¹⁸⁷ There are few businesses in which the economics of the business permits the employer to monitor its sales personnel in such a way that it can prevent outright lies, let alone exaggerations. And even where it is feasible, it only deals with part of the problem. Although consumer advocates are often reluctant to admit it, customers are often the cause of the problem. They misunderstand and then complain when their expectations are not met.

If, as consumer advocates say they should, courts were to ignore merger clauses in standard form contracts, sales people would not become more honest and businesses would not monitor them better. The result would simply be that litigious customers would win more lawsuits and businesses would treat that as a cost of doing business, increasing prices for all their customers to cover the costs. Most customers would continue doing what they do now when they feel they have been cheated. They would take their lumps and get on with their lives. If there were any winners, it would be the small minority of litigious people who sue in these situations.¹⁸⁸

¹⁸⁴ *Morgan v. Stokely-Van Camp, Inc.*, 663 P.2d 1384, 1390 (Wash. Ct. App. 1983).

¹⁸⁵ *See, e.g., Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 568 (6th Cir. 2003) (under Tennessee law, merger clause does not defeat fraudulent inducement or promissory fraud claim).

¹⁸⁶ Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1315 (1993).

¹⁸⁷ *See* DAVID KEIRSEY, PLEASE UNDERSTAND ME II 63-66 (1998) (describing “Promoter” personality).

¹⁸⁸ And of course the big winners will be those who sue on baseless claims. Without a merger clause to dispose of the case on summary judgment, businesses will often be forced to settle even baseless claims. *See* Lloyd, *supra* note 180, at 257-60.

The “circle of assent” doctrine offers a much better alternative. Under it, whether the court will give effect to the merger clause depends on a number of factors, including the prominence and readability of the merger clause, the sophistication of the signer, and the circumstances under which the document is signed.¹⁸⁹ This gives the person drafting the form a tremendous incentive to disclose to the other party that the promises in the document are all he gets, and if he wants to have anything else included in the deal, he had better get it in writing. It allows the drafter to tailor the clause to the needs of the situation. A lawyer drafting a form that is going to be signed by unsophisticated consumers who are relatively likely to be relying on important promises that the salesperson makes (or that they think the salesperson makes) might include a clause that says, “The seller’s representatives have made no claims, promises, or warranties about this vehicle except....” There would then be a blank where the buyer would be required to write “NONE” in his own hand and initial it. Such a clause should be effective in all but the most extreme situations. It would also be an effective deterrent to over-enthusiastic sales personnel. Knowing that the customer is going to be asked to sign such a provision at the most crucial time in the deal would deter misrepresentations (fraudulent or otherwise) more effectively than could any training program.¹⁹⁰

There are of course downsides to such a clause. It would slow the transaction, some customers might find it offensive, and if, it were not signed (through oversight or otherwise), it might create a presumption that additional promises were in fact made. So in many situations, a drafter might want to use a less extreme clause, perhaps a merger clause in bold immediately above the signature line.

¹⁸⁹ See *supra* text accompanying notes 63-116.

¹⁹⁰ Such a clause should be effective even against claims of fraudulent misrepresentation. Although courts have generally allowed fraud claims to circumvent simple merger clauses, see *supra* note 186, there have been cases holding that a carefully-drafted merger clause, specifically stating that the signer was not relying on representations and that it had made its own independent investigation was effective against a sophisticated buyer. See, e.g., *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 604 (N.Y. 1959). Adding the additional step of making the signer fill in the blank in her own hand, should make the clause effective against even an unsophisticated consumer, although the “circle of assent” doctrine would allow the court to disregard the clause where justice demanded it.

CONCLUSION

The "circle of assent" doctrine is an important development in contract law. For most of the twentieth century, courts and academic commentators struggled to find a way to protect consumers and others who signed form contracts. Their solutions did little to improve the situation. Unconscionability led to frivolous litigation and unpredictability as judges varied widely in their notions of what was unconscionable and lawyers rolled the dice, hoping to hit on a judge whose conscience was easily offended. At the other end of the spectrum, the UCC's requirements for certain provisions to be "conspicuous" created a mechanical test, which, while giving predictability, did little to protect the weaker party.

The "circle of assent" doctrine provides a middle ground between these extremes. It gives the drafter of a form contract an incentive to make the contract fair and to warn the signer of what she is getting into. Tennessee courts have made an important advance in contract law, and other states would do well to adopt it.