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DUTY TO READ—A CHANGING CONCEPT

JOHN D. CALAMARI*

I. INTRODUCTION

EVERY lawyer learned early in the course on contracts that a party may be bound by an instrument which he has not read. This concept has been considered in a variety of contexts including freedom of contract, mutuality of assent, fraud, mistake, unconscionability, illegality, and public policy.¹ One purpose of this Article is to assemble these diverse matters. In addition, the Article seeks to analyze recent changes in the doctrine, to examine how the *Restatement Second* has dealt with these changes, and to underscore the state of flux which presently exists.

II. THE TRADITIONAL RULE

If A sends an offer to B who, without opening it and without suspecting that it is an offer, decides to confuse A by sending a letter which states "I accept," there is a contract because A reasonably believed that B assented to the deal.² It is not important to decide whether B has acted intentionally or negligently, because under the objective theory of contracts a party is bound by the impression he reasonably creates.³ The same principle supplies the basic rule relating to questions of duty to read:⁴ a party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents.⁵ A leading

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1. Although duty to read may be involved in the question of an account stated, this topic will not be discussed here.

2. J. Calamari & J. Perillo, *Contracts* § 25 (1970) [hereinafter cited as Calamari & Perillo]; *Restatement (Second) of Contracts* § 23, comment b (Tent. Drafts Nos. 1-7, rev. ed. 1973) [hereinafter cited as *Restatement (Second) of Contracts*].

3. *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760 (2d Cir. 1946) (L. Hand, J.); *Restatement (Second) of Contracts* § 21A, comment d; 1 S. Williston, *Contracts* § 35 (3d ed. 1957) [hereinafter cited as Williston]; see Whittier, *The Restatement of Contracts and Mutual Assent*, 17 Calif. L. Rev. 441 (1929).

4. Strictly speaking, the duty to read is not a duty owed to another party. The party owes the duty to himself because he may be bound by what he fails to read. The theory of the recording acts is based on analogous reasoning. But see *Fli-Back Co. v. Philadelphia Mfrs. Mut. Ins. Co.*, 502 F.2d 214, 217 (4th Cir. 1974) which indicates that a failure to read may, in certain contexts, support claims of contributory negligence and failure to mitigate damages.

5. *Colburn v. Mid-State Homes, Inc.*, 289 Ala. 255, 260, 266 So. 2d 865, 868 (1972); *Smith v. Standard Oil Co.*, 227 Ga. 268, 272-73, 180 S.E.2d 691, 693-94 (1971); *Prudential Ins. Co. of America v. Holliday*, 191 Neb. 144, 214 N.W.2d 273, 275 (1974); *National Bank v. Equity*

case has stated that "one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature."⁶ The feeling is that no one could rely on a signed document if the other party could avoid the transaction by saying that he had not read or did not understand the writing.⁷

The same rule applies even without a signature if the acceptance of a document which purports to be a contract implies assent to its terms.⁸ Thus, for example, the acceptance of documents such as bills of lading, passenger tickets, insurance policies, bank books and warehouse receipts may give rise to contracts based upon the provisions contained therein.⁹

III. TRADITIONAL EXCEPTIONS TO THE TRADITIONAL RULE

There has been a wide variety of qualifications to the traditional duty to read rule. Most of the qualifications are not truly exceptions because they are based upon the conclusion that there was in fact no intentional or apparent manifestation of assent to the document or the term or terms in question.¹⁰ These exceptions will now be discussed.

Investors, 81 Wash. 2d 886, 912-13, 506 P.2d 20, 36 (1973); *Lien v. Pitts*, 46 Wis. 2d 35, 46, 174 N.W.2d 462, 468 (1970); Restatement of Contracts § 70 (1932) [hereinafter cited as Restatement of Contracts]; see *Belew v. Griffis*, 249 Ark. 589, 591, 460 S.W.2d 80, 82 (1970). At times, the rule is stated in terms of estoppel. 1 Williston § 35, at 99.

6. *Rossi v. Douglas*, 203 Md. 190, 192, 100 A.2d 3, 7 (1953).

7. For a detailed discussion of the policy considerations behind the rule see Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine*, the Law of Contracts and Credit Cards, 19 Vand. L. Rev. 1051 (1966).

8. *Regan v. Customcraft Homes, Inc.*, 170 Colo. 562, 565, 463 P.2d 463, 464 (1970).

9. 1 Williston §§ 90A-B. The word "may" is used because the cases are far from harmonious. Compare *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 205 P.2d 1037 (1949) and *D'Aloisio v. Morton's, Inc.*, 342 Mass. 231, 234, 172 N.E.2d 819, 821 (1961) with *Voyt v. Bekins Moving & Storage Co.*, 169 Ore. 30, 127 P.2d 360 (1942) (all warehouse receipt cases). See Uniform Commercial Code §§ 7-203, -204 [hereinafter cited as UCC]; *Ruud, Warehouse Receipts, Bills of Lading, and Other Documents of Title: Article VII*, 16 Ark. L. Rev. 81 (1961-62).

The rule stated generally applies to bills of lading. 1 Williston § 90B. Bills of lading and receipts are often covered by statute and involve questions of filing schedules. 1 Williston § 90BB; UCC § 7-309. Although bank depositors generally are held bound by conditions stated on signature cards and passbooks, *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 299-300, 59 A. 37, 39 (1904), it has been held that this does not apply to unusual conditions. *Los Angeles Inv. Co. v. Home Sav. Bank*, 180 Cal. 601, 182 P. 293, 298 (1919). See Annot., 5 A.L.R. Fed. 394 (1970) (passenger tickets); 30 Texas L. Rev. 634 (1952) (insurance policies). Obviously, no attempt is being made to be exhaustive.

10. Cf. note 9 supra.

A. Document or Provision Not Legible

If the document is not legible it is easy to conclude that there was no assent.¹¹ Thus the cases generally agree that a party is not bound by fine print¹² or by other conditions which would make the document or clause in question illegible.¹³ Describing such a document, one court stated: "The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. . . . [I]t was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious."¹⁴ Frequently, statutes make provision with respect to the size of the type to be used in certain clauses of common contracts.¹⁵

B. Provisions Not Sufficiently Called to the Attention of One Party

Even when the provision in question is legible it may be placed in such a way that it is not likely to come to the attention of the other party. When this occurs a party should not be bound by such a provision.¹⁶ This situation occurs frequently in cases involving printed notices on letterheads, catalogues, or tags,¹⁷ and on the merchandise itself.¹⁸ In a similar vein a number of recent cases have suggested that

11. Compare this statement with the rules relating to blind and illiterate persons discussed *infra* at text accompanying notes 41-43.

12. *Lisi v. Alitalia—Linee Aeree Italiane*, S.p.A., 370 F.2d 508, 513-14 (2d Cir. 1966), *aff'd* by an equally divided Court, 390 U.S. 455 (1968) (per curiam); *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 861, 454 S.W.2d 307, 309 (1970); *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971); Note, *Contract Clauses in Fine Print*, 63 Harv. L. Rev. 494 (1950).

13. 1 Williston § 90C; see, e.g., *Silvestri v. Italia Societa per Azioni di Navigazione*, 388 F.2d 11 (2d Cir. 1968), noted in 30 Ohio St. L.J. 609 (1969).

14. *DeLancey v. Insurance Co.*, 52 N.H. 581, 588 (1873). As a result of decisions such as this, standardized drafts of certain insurance policies have become common. See W. Vance, *Insurance* 56-62 (3d ed. B. Anderson ed. 1951); Kimball & Pfennigstorf, *Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice*, 39 Ind. L.J. 675 (1964).

15. See, e.g., Md. Ann. Code art. 83, §§ 129(c), 131(b) (repl. vol. 1969); Mich. Stat. Ann. § 24-10310 (Cum. Supp. 1969); N.Y. Pers. Prop. Law §§ 46-c(a), 402(1)-(2), 402A(5)(a), 403(3)(a) (McKinney 1962); see UCC §§ 2-316(2), 1-201(10). See also Note, *Contract Clauses in Fine Print*, 63 Harv. L. Rev. 494, 497 (1950).

16. *Egan v. Kollsman Instrument Corp.*, 21 N.Y. 2d 160, 168-69, 234 N.E.2d 199, 202-03, 287 N.Y.S.2d 14, 19 (1967), cert. denied, 390 U.S. 1039 (1968) (a passenger ticket case).

17. 1 Williston § 90D. However, here again, the cases are not harmonious.

18. Even here, if the provision is plainly stamped, it may be binding on the buyer. 1 Williston § 90E. But see *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 16 App. Div. 2d 366, 369-70, 228 N.Y.S.2d 330, 334-35 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963) (print of film package limiting liability held not binding on buyer).

a party is not bound by clauses printed on the reverse side of a document which he signs unless they are called to his attention.¹⁹ Similar problems arise when the document attempts to incorporate other provisions by reference.²⁰

Closely related are cases in which a purported contractual provision is posted on a desk or wall. For example, in one case, a sign containing such a provision was posted at the reception desk of a garage. The court held the provision not binding on the customer unless, prior to contracting, the customer had actually observed the sign, or the sign was posted so prominently that the customer must have known of its existence and assented to its terms.²¹ *Lachs v. Fidelity & Casualty Co.*²² went even further. In *Lachs* an air traveler purchased from a vending machine an insurance policy which limited coverage to flights on "scheduled airlines." A large sign posted in the area listed the names of non-scheduled airlines. The passenger bought a ticket on a non-scheduled flight and was killed when it crashed. In the subsequent action by the beneficiary of the policy, the majority of the court held that it was a question of fact for the jury whether the passenger had been given sufficient notice of the limitation,²³ but that the sign was of little or no significance in making this determination.²⁴

Another fact pattern in which the question of whether the contractual provisions are sufficiently called to the attention of a party occurs where a person accepts an instrument in which he would not reasonably expect to find contractual provisions.²⁵ The most common illustration is a parcel room check which contains a limitation of liability. The majority of courts have held that the average person would consider such a check merely as evidence of the right to a return of goods and would not expect it to contain contractual provisions.²⁶ This result is

19. *Allstate Ins. Co. v. La Perta*, 42 App. Div. 2d 104, 108, 345 N.Y.S.2d 138, 141-42 (2d Dep't 1973); *Tri-City Rent-a-Car and Leasing Corp. v. Vaillancourt*, 33 App. Div. 2d 613, 304 N.Y.S.2d 682 (3d Dep't 1969); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953). The notion that a particular clause must be brought to the attention of the other party is gaining currency and is consistent with the cases discussed in Part V *infra*. See, e.g., *Birmingham Television Corp. v. Water Works*, — Ala. —, 290 So. 2d 636 (1974) (warehouse receipt); *Kushner v. McGinnis*, 289 Mass. 326, 194 N.E. 106 (1935) (amusement park ticket).

20. Compare *In re Level Export Corp.*, 305 N.Y. 82, 86-87, 111 N.E.2d 218, 220 (1953) (incorporation by reference held enforceable) with *In re Riverdale Fabrics Corp.*, 306 N.Y. 288, 118 N.E.2d 104 (1954) (incorporation by reference held unenforceable).

21. *Mendelssohn v. Mormand, Ltd.*, [1969] 3 W.L.R. 139 (C.A.); accord, *Brummett v. City of Jackson*, 211 Miss. 116, 51 So. 2d 52 (1951).

22. 306 N.Y. 357, 118 N.E.2d 555 (1954).

23. *Id.* at 365, 118 N.E.2d at 558-59.

24. *Id.* at 364, 118 N.E.2d at 558.

25. 1 Williston § 90B, at 301-02.

26. *Kergald v. Armstrong Transfer Express Co.*, 330 Mass. 254, 113 N.E.2d 53 (1953); *Klar*

actually a corollary of the more fundamental rule that if a person, without fault on his part, assents to a document believing that it is something other than what it is, the instrument is void.²⁷ Obviously no attempt has been made to state a rule which would determine when consent is deemed to be present. No such rule can be stated. All that can be said is that whether a contractual provision is sufficiently called to the attention of a party depends upon whether a reasonable man, considering all circumstances of the case, would know that the terms in question were intended to be part of the proposed agreement.²⁸ As one court noted, "failure to read an instrument is not negligence per se but must be considered in light of all surrounding facts and circumstances."²⁹

C. *Fraud and Mistake*

There is a relationship between the duty to read and fraud or mistake, and the related issue of assent.³⁰ For example, if a party misrepresents the terms of a writing and the other party, relying on the misrepresentation, signs without having read the document, what is the result?³¹ Some courts have bound the deceived party on the theory that, given the facts of the particular case, he had no right to rely on the misrepresentation.³² Other courts have taken the position either

v. H. & M. Parcel Room, Inc., 270 App. Div. 538, 542-43, 61 N.Y.S.2d 285, 289 (1st Dep't 1946), aff'd, 296 N.Y. 1044, 73 N.E.2d 912 (1947) (mem.). Tickets issued by a parking lot often are treated the same way. Parkrite Auto Park, Inc. v. Badgett, 242 S.W.2d 630 (Ky. 1951), noted in 44 Ky. L.J. 233 (1956); cf. Elish v. Airport Parking Co. of America, 42 App. Div. 2d 174, 345 N.Y.S.2d 650 (2d Dep't 1973), aff'd, 34 N.Y.2d 882, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974) (mem.). The cases are divided on the issue of whether contract provisions on an ordinary baggage check are binding. 1 Williston § 90B, at 301. On questions of limiting liability by filing tariffs, see Annot., 68 A.L.R.2d 1350, 1359-63 (1959); Shirazi v. Greyhound Corp., 145 Mont. 421, 401 P.2d 559 (1965).

27. 1 Williston § 95A.

28. Mellinkoff, *How to Make Contracts Illegible*, 5 Stan. L. Rev. 418, 430-31 (1953).

29. *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 136 (4th Cir. 1967) (bill of lading).

30. Duress, which also relates to the issue of assent, seems irrelevant in a discussion of the duty to read. As to undue influence, see Dauer, *Contracts of Adhesion in Light of the Bargaining Hypothesis: An Introduction*, 5 Akron L. Rev. 1, 29-30 (1972).

31. The discussion here is without reference to the parol evidence rule which is considered *infra* at notes 44-47.

32. *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 481 (Mo. 1972). The rule generally has been condemned. In the words of one court: "Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice." *Western Mfg. Co. v. Cotton & Long*, 126 Ky. 749, 754, 104 S.W. 758, 760 (1907); see Comment, *Contracts—Misunderstanding—Misrepresentation of the Contents of a Written Offer*, 34 Mich. L. Rev. 705 (1936).

that there is a lack of mutual assent or that the party who misrepresents is guilty of fraud.³³ Those courts which follow the fraud theory have allowed the defrauded party to avoid the contract or, at times, on a theory of estoppel or reformation, to claim that there is a contract based upon the terms as they were represented to the innocent party.³⁴ The *Restatement Second* adopts the latter view, although it does so in a section completely unrelated to any question of duty to read.³⁵ Both *Restatements* give this illustration: "A says to B, 'I offer to sell you my horse for \$100.' B, knowing that A intends to offer to sell his cow, not his horse for that price, and that the use of the word 'horse' is a slip of the tongue, replies, 'I accept.'" ³⁶ The first *Restatement* concludes that "[t]here is no contract for the sale of either the horse or the cow."³⁷ The *Restatement Second* concludes "[t]here is a contract for the sale of the cow and not of the horse."³⁸

What explanation can be offered for the different results? The *Restatement Second* expresses the view that B's conduct is fraudulent and that, even if A is negligent, a fraudulent party is more guilty than a negligent party; consequently, there should be a contract based upon the understanding of the more innocent party.³⁹ The original *Restatement*, however, either refuses to weigh one fault (negligence) against the other (fraud), or relies upon the rule: "If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance."⁴⁰

A good and recurring illustration of the problem involves a person who is blind, illiterate or unfamiliar with the language in which the contract is written and who has signed a document which was not read to him.⁴¹ There is all but unanimous agreement that he is bound by

33. E.g., *Quillen v. Twin City Bank*, 253 Ark. 169, 485 S.W.2d 181 (1972); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (Super. Ct. 1968), aff'd, 108 N.J. Super. 129, 260 A.2d 244 (Super. Ct. App. Div. 1970); see *Phillips Petroleum Co. v. Roth*, 186 Minn. 173, 242 N.W. 629 (1932), noted in 31 Mich. L. Rev. 568 (1933); *Whipple v. Brown Bros. Co.*, 225 N.Y. 237, 121 N.E. 748 (1919). See also *Bixler v. Wright*, 116 Me. 133, 100 A. 467 (1917); *Cameron v. Estabrooks*, 73 Vt. 73, 50 A. 638 (1901).

34. See note 33 supra.

35. *Restatement (Second) of Contracts* § 21A.

36. *Restatement of Contracts* § 71, illus. 2; *Restatement (Second) of Contracts* § 21A, illus. 5.

37. *Restatement of Contracts* § 71, illus. 2.

38. *Restatement (Second) of Contracts* § 21A, illus. 5.

39. See id. § 21A, comment d. There is also a suggestion that A may avoid the contract if he so desires.

40. *Restatement of Contracts* § 71(c) & comment a; see *Calamari & Perillo* § 47.

41. *Roberd v. First Fed. Sav. & Loan Ass'n*, 490 S.W.2d 243 (Tex. Civ. App. 1973); *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971); see *Gesualdi v. Miranda*, 110 R.I. 694, 296 A.2d 676 (1972). See also Comment, "No Hablo Ingles," 11 *San Diego L. Rev.* 415 (1974).

the general rule previously stated. Therefore, except possibly in the case of an emergency, he must protect himself by procuring someone to read it for him. However, if the other party deceives him as to its contents, the problem is the one discussed above—the effect of fraud on a failure to read. Most of the cases have held that such a contract may at least be avoided.⁴² Under the theory of the *Restatement Second*,⁴³ the defrauded party also would have the option to sue on the contract as it was described to him.

The problem of a party misrepresenting the contents of the writing to one who has failed to read is more complicated when one takes into account the parol evidence rule. For example, if a party signs a document which contains a merger clause to the effect that no representations have been made other than those stated in the writing (so that the instrument is presumably integrated) may the party who has failed to read show that the prior oral agreement: (1) contained a misrepresentation upon which he relied and which was intended to be included in the writing; and (2) that the other party fraudulently represented that the writing contained said representation?⁴⁴ There are cases which, in effect, state that a failure to read the integration precludes a party from introducing a representation made to him despite an allegation of fraud in the execution of the instrument.⁴⁵ A better view, however, is repeated in a recent Arkansas case⁴⁶ as follows:

“There is a well-recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon, when, in fact, it does not, and where the party signing relies on the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induced another to execute by false representations as to its contents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract, by the fact that he failed to read it before attaching his signature.”⁴⁷

42. *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 170 N.E. 530 (1930); 3 A. Corbin, *Corbin on Contracts* § 607 (rev. ed. 1960) [hereinafter cited as Corbin]; 1 Williston § 35.

43. See text accompanying notes 38 & 39 supra.

44. It has been said that when a party presents a document for signature he represents that its contents conform to the terms of the agreement previously reached. See, e.g., *Bixler v. Wright*, 116 Me. 133, 136, 100 A. 467, 469 (1917).

45. *Knight & Bostwick v. Moore*, 203 Wis. 540, 234 N.W. 902 (1931).

46. *Belew v. Griffis*, 249 Ark. 589, 460 S.W.2d 80 (1970); *Estes v. Republic Nat'l Bank*, 462 S.W.2d 273 (Tex. 1970).

47. 249 Ark. at 591-92, 460 S.W.2d at 82, quoting *Massachusetts Mut. Life Ins. Co. v. Brun*, 187 Ark. 790, 794, 62 S.W.2d 961, 963 (1933), quoting *Tanton v. Martin*, 80 Kan. 22, 24, 101 P. 461, 462 (1909). The discussion here relates primarily to fraud in the execution of the contract rather than to fraud in the inducement of the contract. The general rule is that proof of fraud in the inducement may be shown, even if it contradicts an integration. See 3 Corbin § 580;

When a party signs an instrument without reading it, it is clear that in a loose (but not legal) sense he is operating under a mistake as to the contents of the document.⁴⁸ Under the rules previously stated, however, he is not ordinarily allowed to avoid the contract.⁴⁹ Nonetheless, the situation is different if the writing does not reflect the agreement previously made and the term was not omitted by agreement. In such a situation most courts have granted reformation for mutual mistake despite the negligence involved in failing to read the document,⁵⁰ the parol evidence rule,⁵¹ and the Statute of Frauds.⁵²

Assuming a case where there is no mistake or wrongdoing on the part of the other party,⁵³ a claim of mistake of fact might still exist in favor of the party who signs an instrument thinking that he knows its

Restatement (Second) of Contracts § 240(d). Where, as in the textual illustration, the fraudulently misrepresented term is a factual misrepresentation, the doctrine of fraud in the execution is important only in those courts which do not accept the general rule that the parol evidence rule does not bar proof of fraud in the inducement. Where this general rule is accepted, fraud in the execution ought to be immaterial because the misrepresentation that should have been contained in the writing constitutes fraud in the inducement. In other words, courts which regard fraud in the execution as significant are saying that where there is an integration, fraudulent misrepresentations not contained in the writing which induced the contract may not be used to contradict the integration in the absence of fraud in the execution. See *Reorganized Church of Jesus Christ v. Universal Sur. Co.*, 177 Neb. 60, 128 N.W.2d 361 (1964).

Some courts have created another exception to the general rule when they refuse to permit a representation which contradicts a specific merger clause to be shown to defeat the agreement on the basis of fraud. See *Danaan Realty v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959), noted in many law reviews with unanimous disapproval. For citations see 47 Cornell L.Q. 655 n.7 (1962).

Other courts have taken the position that a promise which contradicts the integration may not be shown upon a theory of promissory fraud, i.e., a promise made without an intent to perform which could be considered the equivalent of a fraudulent misrepresentation. See *Sweet, Promissory Fraud and the Parol Evidence Rule*, 49 Calif. L. Rev. 877 (1961) and cases cited therein. The rule relating to promissory fraud has probably found its most frequent application in sales cases where a party is prevented from showing as promissory fraud an express warranty which contradicts the integration. See *Nettles v. Imperial Distributions, Inc.*, 152 W. Va. 9, 15, 159 S.E.2d 206, 210 (1968).

It has been suggested that by virtue of UCC §§ 2-202 and 2-316, an express warranty which contradicts an integration may be shown. *Broude, The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 Duke L.J. 881. See also *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966).

Both law review articles cited in this note make it clear that it is often difficult to distinguish among representations, warranties and promises.

48. 3 Corbin § 607.

49. *Id.*

50. *Id.* Annot., 81 A.L.R.2d 7, 37-39 (1962).

51. Restatement (Second) of Contracts § 240(d).

52. See generally *Palmer, Reformation and the Statute of Frauds*, 65 Mich. L. Rev. 421 (1967).

53. If one party is mistaken as to the contents of the document and the other has actual knowledge of this fact, the mistaken party may avoid the contract. 3 Corbin § 607, at 663.

contents when in fact he does not. In such a case, however, rescission for unilateral mistake ordinarily would be denied.⁵⁴ Today, rescission will be allowed in some jurisdictions, even though the mistake is unilateral, if two conditions concur: (1) enforcement of the contract against the mistaken party would be oppressive (or at least result in an unconscionably unequal exchange of values); and (2) rescission would impose no substantial hardship on the other.⁵⁵ Some courts have refused to grant a decree of specific performance against a party who has failed to read.⁵⁶

IV. DUTY TO READ AND THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code (UCC) has no specific provision with respect to duty to read and so the common law applies.⁵⁷ However a number of rules announced in the Code are based, at least in part, on a duty to read.⁵⁸

Section 2-207(2) announces that between merchants, additional terms contained in an acceptance of an offer become part of the contract unless: "(c) notification of objection to them has already been given or is given within a reasonable time after notice . . ." Thus a failure to read which results in a failure to give notice may cause certain terms to become part of the contract.⁵⁹ Under the same section, where a contract has not been established by the communications, conduct may give rise to a contract, with terms supplied by the Code replacing the terms on which the parties disagree.⁶⁰ Thus, for example, if a seller fails to read and recognize that a warranty clause in the buyer's purchase order is different from that contained in the seller's acceptance, and he proceeds to deliver the goods ordered, he is bound by the provisions of the Code which afford "much broader warranty

54. See *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 481 (Mo. 1972) (mutual mistake distinguished from unilateral failure to read); *Hampshire v. Hampshire*, 485 S.W.2d 314, 316 (Tex. Ct. Civ. App. 1972) (failure to read sales contract held not to justify rescission, absent fraud). See generally Restatement of Contracts § 503.

55. *Gethsemane Lutheran Church v. Zacho*, 258 Minn. 438, 443, 104 N.W.2d 645, 649 (1960); cf. *Beatty v. Depue*, 78 S.D. 395, 103 N.W.2d 187 (1966); Annot., 1 A.L.R.3d 531 (1960). See generally 13 Williston §§ 1577-78; 3 Corbin § 607.

56. 13 Williston § 1577.

57. UCC § 1-103; see *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970).

58. Note should also be made of the Code requirements that particular provisions be separately signed. E.g., UCC §§ 2-205, -209(2). This requirement obviously was designed to protect a party who has failed to read.

59. Of course, this provision cannot be entirely understood without reference to the other provisions of UCC § 2-207. See *Calamari & Perillo* § 32.

60. UCC § 2-207(3).

protection to the buyer than almost any industrial seller will ever offer."⁶¹

An interesting case relating to the duty to read which arose under the UCC is *Gateway Co. v. Charlotte Theatres, Inc.*⁶² There, the parties (Gateway and Valley) entered into an oral arrangement on June 4. Valley prepared a writing, signed two copies and asked Gateway to sign and return one. Gateway complied, but added a provision, which appeared both in the form returned and in the letter of transmittal, that the work had to be completed by June 22. Valley did not reply but began the work. Faced with the question whether the June 22 date was binding on Valley, the court recognized that there were many ways of approaching the problem. Conceivably a binding oral agreement had been made on June 4 with the writing considered as a convenient memorial.⁶³ Alternatively, the parties might not have intended to be bound unless and until they both executed the formal document.⁶⁴ If an oral contract did not exist, the new term could be considered as a counteroffer at common law, and section 2-207 of the Code would apply.⁶⁵ The court also considered the possibility that there was a contract when Gateway signed and returned the document together with the letter of transmittal. If there were a contract, the June 22 date would be looked to as an offer to modify the existing contract that was accepted by the subsequent conduct of Valley, even though the modifying offer was not in fact read by anyone in authority at Valley. Stating that the "test is whether there was reason for Valley to suppose that such addition might have been made,"⁶⁶ the court concluded that although no one in authority read the document which was returned, Valley was bound by the contents of the covering letter.⁶⁷ It is obvious that as a common law proposition there was no

61. Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine*, the *Law of Contracts and Credit Cards*, 19 *Vand. L. Rev.* 1051, 1055 (1966).

62. 297 F.2d 483 (1st Cir. 1961).

63. Calamari & Perillo § 21; 1 Corbin § 30; 1 Williston §§ 28, 28A. Whether UCC § 2-207 would apply to this situation is an interesting question. The section does not apply where an oral contract has been made except if a letter or letters of "confirmation" have been sent. The question becomes whether a writing intended as a "convenient memorial" can be considered a "confirmation" within the meaning of § 2-207.

64. See Calamari & Perillo § 21.

65. *Id.* § 32. UCC § 2-207(3) is not relevant unless it be assumed, as here, that the exchange of correspondence did not create a contract, but that the contract arose by conduct. Then the June 22nd date would not become part of the contract because the Code supplies as an implied term a reasonable time for delivery. See *id.* § 2-309(1). In any event the court was not obliged to decide all of these matters because it remanded the case for further proceedings.

66. 297 F.2d at 486.

67. *Id.* The court suggests that the situation might have been different if there had been no

consideration to support Valley's implied promise to complete performance by June 22. However, consideration was not necessary because the case arose under the UCC which permits even an oral modification without consideration.⁶⁸

One of the Statute of Frauds provisions of the Code, section 2-201(2), states:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Thus, under the Code, contrary to common law, a memo sent by one party may be sufficient to satisfy the requirements of the Statute of Frauds against the recipient if he does not read it and thereby fails to object to it.⁶⁹ However, under this Code provision, the duty to read concept produces quite limited consequences because the recipient is still free to show that the memorandum is not in conformity with the oral agreement, except if the memorandum is deemed to be a total integration.⁷⁰ Under the Code, if the memorandum is in error as to any term other than the quantity term, extrinsic evidence is admissible to correct the error.⁷¹

Perhaps the section of the Code that most affects the question of duty to read is the section on unconscionability.⁷² The problem of unconscionability as it relates to duty to read is discussed immediately below.⁷³

V. THE MODERN VIEW—CONTRACTS OF ADHESION

There has been a tendency, particularly in recent years, to treat contracts of adhesion or standard form contracts differently from other

covering letter, noting: "The advice of Wm. Randolph Hearst, 'Throw [it] in the wastebasket. Every letter answers itself in a couple of weeks,' Koenigsberg, *King News*, 273 (1941), is not a safe legal principle." *Id.*

68. UCC § 2-209(1).

69. See Calamari & Perillo §§ 313, 311; see note 70 *infra*.

70. Calamari & Perillo §§ 314, 308; 2 Corbin § 507. UCC § 2-202 makes it clear (contrary to the common law) that a letter of confirmation does not ordinarily act as an integration but that an exchange of memoranda does. See Calamari & Perillo § 40, at 78 n.21. Thus it would appear that under the Code a confirmatory memorandum is not an integration at least in the absence of conduct upon the part of the recipient that indicates that he assents to the memorandum as a complete and accurate integration of the contract.

71. 2 Corbin § 531. "If the quantity term is not accurately stated, recovery is limited to the amount stated, presumably unless the other party is able to get reformation." Calamari & Perillo § 313, at 486.

72. See UCC § 2-302.

73. See note 81 *infra* and accompanying text.

contracts.⁷⁴ This is particularly true with respect to the duty to read.⁷⁵ There is a growing body of case law which subverts the traditional duty to read concept either upon a theory that there was not true assent to a particular term, or that, even if there was assent, the term is to be excised from the contract because it contravenes public policy or is unconscionable.⁷⁶ At times, the same decision may employ all three rationales. This modern approach to the problem and the meaning of true assent may be shown best by a brief examination of three of the leading cases on the subject.

Perhaps the most significant case is *Weaver v. American Oil Co.*,⁷⁷ which considered a lease by an oil company to an individual. The lessee signed without reading the lease under which he agreed, *inter alia*, to indemnify the lessor as a result of damages caused by the lessor's negligence. The majority opinion first stated that the duty to read rule had no application to the case because "*the clause was in fine print and contained no title heading . . .*"⁷⁸ This conclusion would have ended the matter under the rules discussed above, but the court seemed anxious to break new ground for it hastened to add:

When a party show[s] that the contract, which is . . . to be enforced, was . . . an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and *came to his knowledge* and there was in fact a *real and voluntary meeting of the minds and not merely an objective meeting*.⁷⁹

Although the above quotation combines three different concepts

74. Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943). See also Patterson, The Delivery of a Life-Insurance Policy, 33 Harv. L. Rev. 198, 222 (1919) (origin of the term "adhesion contract"). In the Kessler article, as here, the terms contract of adhesion and standardized contract are used interchangeably. But the two concepts are not always treated as coextensive. See Sheldon, Consumer Protection and Standard Contracts: The Swedish Experiment in Administration Control, 22 Am. J. Comp. L. 17, 18 (1974).

75. Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072 (1953); Note, Contract Clauses in Fine Print, 63 Harv. L. Rev. 494 (1950); see Wilson, Freedom of Contract and Adhesion Contracts, 14 Int'l & Comp. L.Q. 172 (1965).

76. The notion of condemning clauses as illegal or contrary to public policy is hardly new. However, it is being used today more often and in a wider variety of circumstances. See, e.g., von Hippel, The Control of Exemption Clauses—A Comparative Study, 16 Int'l & Comp. L.Q. 591 (1967). Unconscionability is discussed in note 81 *infra*.

77. 257 Ind. 458, 276 N.E.2d 144 (1971); Annot., 49 A.L.R.3d 306 (1973). See also *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1st Dist. 1971).

78. 257 Ind. at 462, 276 N.E.2d at 147.

79. *Id.* at 464, 276 N.E.2d at 148.

(unconscionability, violation of public policy, and lack of true assent),⁸⁰ the court's ultimate approach appears to be that the contract is unconscionable because an objective assent which flows from a duty to read is not sufficient (despite the objective theory of contracts) to bind a party to clauses which are unusual or unfair unless the clauses are at least brought to his attention and explained.⁸¹ The theory is that since such clauses impose a great hardship or risk on the weaker party, who is otherwise unable to protect himself, an informed and voluntary consent should be required.⁸²

The same approach was employed by the court in the well known case of *Henningsen v. Bloomfield Motors, Inc.*⁸³ which arose under the Uniform Sales Act rather than the Uniform Commercial Code.⁸⁴ In

80. The Weaver opinion also proceeded upon a warranty analogy when it stated: "The burden should be on the party submitting such 'a package' in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. The principle should be the same as that applicable to implied warranties, namely, that a package of goods sold to a purchaser is fit for the purposes intended and contains no harmful materials other than that represented." *Id.*, 276 N.E.2d at 147-48.

81. The relationship of unconscionability to true assent and violation of public policy is interesting. Professor Leff, in his article, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967), distinguishes between substantive and procedural unconscionability. Procedural unconscionability exists where there is unfair surprise—which may be another way of saying that there was not a true, informed and voluntary mutual assent. Substantive unconscionability exists where a particular clause is unfair and oppressive. This is akin to a clause which is contrary to public policy. In the latter situation (theoretically at least) questions of true assent are unimportant. Very often, the two categories overlap. Professor Murray prefers to restrict the notion of unconscionability to questions of mutual assent. See Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1 (1969). Although unconscionability clearly is related to the duty to read concept, it has other aspects, and so is treated here only incidentally. The literature on the subject is voluminous. In addition to the articles cited above see, e.g., Braucher, *The Unconscionable Contract or Term*, 31 U. Pitt. L. Rev. 337 (1970); Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 757 (1969); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. Pitt. L. Rev. 349 (1970); Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969); Spidel, *Unconscionability, Assent and Consumer Protection*, 31 U. Pitt. L. Rev. 359 (1970).

82. A party might be considered to be otherwise able to protect himself if he has a bargaining power relatively equal to that of the other party, or if he were able to obtain insurance at a reasonable rate to protect against a known risk being imposed upon him. See, e.g., *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799-800 (3d Cir. 1967); Johnston, *the Control of Exemption Clauses: A Comment*, 17 Int'l & Comp. L.Q. 232 (1968).

83. 32 N.J. 358, 161 A.2d 69 (1960), *Annot.*, 75 A.L.R.2d 39 (1961).

84. If the case had arisen under the UCC, the court could have noted the Code provision that, in the case of a disclaimer of the warranty of merchantability, the word merchantability must be used and the disclaimer must be conspicuous. UCC § 2-316(2). The term "conspicuous" is defined in *id.* § 1-201(10). What is or is not conspicuous still appears to be a matter of controversy. A disclaimer in the smallest type preceded by the word "NOTE" printed in the largest type was held to be conspicuous in *Velez v. Craine & Clark Lumber Corp.*, 41 App. Div. 2d 747, 341 N.Y.S.2d 248 (2d Dep't), *rev'd on other grounds*, 33 N.Y.2d 117, 305 N.E.2d 750,

Henningsen, a consumer brought an action for personal injuries against both the vendor and manufacturer of his automobile. Relying upon a provision in the contract of sale that an express warranty contained therein was in lieu of all other warranties express or implied, the defendants argued that the plaintiff's action should be limited to a claim for defective parts. The heart of the *Henningsen* decision appears in a paragraph near the end of the opinion:

True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.⁸⁵

Although there was some discussion about mutual assent, the ultimate holding was based upon the conclusion that such a clause, under the circumstances of the case (clause on reverse side, small print, disparity of bargaining power, clause on a take-it-or-leave-it basis and included by all major car manufacturers), was invalid as being contrary to public policy. This was made clear when the court further stated that it was not required to consider whether a particular charge which related to mutual assent was correct because "the disclaimer is void as a matter of law."⁸⁶

350 N.Y.S.2d 617 (1973). But see *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973). Even more to the point is UCC § 2-719(3) which provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." See also UCC §§ 2-316(1), -718, -719(1) & (2).

Professor Murray takes the position that even if the disclaimer is conspicuous it must, in addition, be negotiated, and comprehensible to the buyer. See Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1, 48-49 (1969). Contra, Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 523-24 (1967). There are, as usual, cases which support each position. Compare *Belden-Stark Brick Corp. v. Morris Rosen & Sons, Inc.*, 39 App. Div. 2d 534, 331 N.Y.S.2d 59 (1st Dep't), aff'd, 31 N.Y.2d 884, 292 N.E.2d 321, 340 N.Y.S.2d 185 (1972) (mem.) with *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (3d Div. 1971). Professor Broude suggests that under §§ 2-202 and 2-316 printed form disclaimers of warranties, even though they are contained in an integration, should not be considered to be part of the agreement because they are not truly assented to. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 Duke L.J. 881.

85. 32 N.J. at 404, 161 A.2d at 95.

86. *Id.* at 405, 161 A.2d at 95.

Another leading case illustrating the same approach is *Williams v. Walker-Thomas Furniture Co.*⁸⁷ There, an installment sales agreement had a provision which resulted in "a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated."⁸⁸ As a result, in the event of a default on any one item, all items could be repossessed. The court in concluding that the fairness of the clause needed to be tested at trial stated:

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.⁸⁹

The three cases discussed above do not expunge the duty to read rule, but create an exception thereto if the terms (or a term) of the contract are unfair under the circumstances. In such a case, the ordinary manifestation of assent implicit in a signature or acceptance of a document is insufficient because the assent is not reasoned and knowing. Such consent involves an understanding of the clause in question⁹⁰ and a reasonable opportunity to accept or decline.⁹¹ Even then, if the clause is sufficiently odious, it will be struck down as unconscionable or contrary to public policy.

Having established the nature of the new approach the question becomes how it has been applied. A discussion of cases relating to promises to indemnify a person against the consequences of his own negligence, and to exculpate another for his own negligence, serve as excellent illustrations.

While *Weaver*⁹² holds that a promise to indemnify was not binding under the circumstances of the case it can hardly be said that there is a

87. 350 F.2d 445 (D.C. Cir. 1965), noted in 79 Harv. L. Rev. 1299 (1966).

88. 350 F.2d at 447. See also Uniform Consumer Credit Code § 3.302; UCC § 9-204.

89. 350 F.2d at 449-50 (footnotes omitted).

90. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 399-400, 161 A.2d 69, 92 (1960).

91. *Id.* at 390, 161 A.2d at 87. But what is the choice being discussed? In the *Henningsen* case it was clear that a person could not buy a new car from a major manufacturer without submitting to the clause in question. But in *Weaver* there was no evidence that the lessee could not have obtained a similar lease from another oil company without the offending clause. How important should this be on the issue of true assent?

By now it should be clear that the assent discussed in Parts II and III hereof is not the same type of assent being discussed here under the label "true assent."

92. See notes 77-79 *supra* and accompanying text.

general rule that promises to indemnify are objectionable.⁹³ On a similar set of facts, a recent New York case, *Levine v. Shell Oil Co.*,⁹⁴ seems to have reached a conclusion directly opposite to that of *Weaver*.⁹⁵ The court paid lip service to the rules announced in the cases discussed above when it stated:

Lastly, there has been no showing that the agreement involved herein is either a contract of adhesion or an unconscionable agreement and we need not now pass upon the question whether an indemnification clause in a contract of that nature would be void for those reasons. . . . In this arm's length transaction the indemnification provision was a part of business [sic] relationship between the parties. If Visconti [the lessee] had reservations as to the scope of the agreement, he should have insisted on a different indemnification clause or refused to give his assent to the contract Since he apparently elected not to do so and has not demonstrated to this court that Shell was guilty of fraud or overreaching conduct, he is bound by the expression of intent in the lease.⁹⁶

Notice, however, that while the *Levine* court emphasized that it was not dealing with a contract of adhesion, the dissenting opinion in *Weaver* criticized the majority for incorrectly relying upon cases involving adhesion contracts instead of following the more traditional rule.⁹⁷ One has the feeling that the facts in *Weaver* and *Levine* are not dissimilar but an opposite result is being reached.

93. *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921), Annot., 19 A.L.R. 879 (1921); Calamari & Perillo § 366; Corbin §§ 1471, 1472; Restatement of Contracts § 572.

94. 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971).

95. A reading of the briefs tends to reinforce this conclusion.

96. 28 N.Y.2d at 213, 269 N.E.2d at 803, 321 N.Y.S.2d at 86-87 (citation omitted).

97. This raises the problem of what is a contract of adhesion. A standardized agreement has been described as one which is dictated by a predominant party to cover transactions with many people rather than with an individual, and which resembles an ultimatum or law rather than a mutually negotiated contract. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 206 (2d Cir. 1955). It is characterized by a lack of negotiation. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 588-90 (1933); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale L.J. 704, 731-34 (1931); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 Va. L. Rev. 1178, 1179-86 (1964); Oldfather, *Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking*, 16 U. Kan. L. Rev. 303, 305-07 (1968); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 531 (1971); Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. Pa. L. Rev. 1197, 1205-06 (1963). See also *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 308-09, 263 A.2d 390, 393 (1970).

The New York court in *Levine* assumed that the lessee had a choice and could bargain with respect to the clause. Would the *Weaver* court agree? See note 91 *supra*. It should also be noted that the plaintiffs in the Henningsen and Williams cases are consumers in the accepted sense of the word while the lessee in *Weaver* probably is not. See, e.g., 15 U.S.C. §§ 1602(a)-(h) (1970); Uniform Consumer Credit Code § 1.301(11); Model Consumer Credit Act § 1.410. How important this factor should be is still unclear. Certainly as a matter of fact, it may usually be assumed that a consumer has little or no bargaining power. In any event, there are other cases which have taken the *Weaver* approach even though consumers were not involved. See, e.g.,

The intermediate appellate court in *Weaver* held that a provision in a contract by which one party agreed not to hold the other liable for his negligence is contrary to public policy in the absence of an understanding of the provision and true assent to it.⁹⁸ Although, this cannot be considered to be the traditional view,⁹⁹ that view does recognize an exception in the case of public servants involved in the performance of their public duties for compensation.¹⁰⁰ The primary illustration of such public servants is a common carrier.¹⁰¹

Cases involving private voluntary transactions, however, are not harmonious. While the lower court in the *Weaver* case held an exculpation clause invalid,¹⁰² a number of recent cases have indicated the contrary.¹⁰³ Here again, the problem is discussed not only from the perspective of public policy, but also from the point of view of

Chandler v. Aero Mayflower, 374 F.2d 129 (4th Cir. 1967); *Standard Oil Co. v. Perkins*, 347 F.2d 379 (9th Cir. 1965).

98. *Weaver v. American Oil Co.*, 261 N.E.2d 99, 104, modified, 262 N.E.2d 663 (Ind. App. 1970), modified, 257 Ind. 458, 276 N.E.2d 144 (1971).

Exculpatory clauses are often circumvented by a process of interpretation. See Calamari & Perillo § 367, at 552.

99. Calamari & Perillo § 367, at 550; Johnston, *The Control of Exemption Clauses: A Comment*, 17 Int'l & Comp. L.Q. 232 (1968); von Hippel, *The Control of Exemption Clauses: A Comparative Study*, 16 Int'l & Comp. L.Q. 591 (1967); 42 Chi.-Kent L. Rev. 82 (1965). However there is a different rule for willful, wanton, reckless, gross or intentional negligence. *Winterstein v. Wilcom*, 16 Md. App. 130, 136, 293 A.2d 821, 824 (1972). It might be observed that the courts have shown a greater hostility to exculpatory clauses than to indemnification agreements. See *Jamison v. Ellwood Consol. Water Co.*, 420 F.2d 787, 789 (3d Cir. 1970); *Diamond Crystal Salt Co. v. Thielman*, 395 F.2d 62, 65 (5th Cir. 1968); *Haynes v. County of Missoula*, — Mont. —, 517 P.2d 370, 377 (1973).

100. Calamari & Perillo § 367, at 550.

101. *Id.* There also have been a number of statutes dealing with the topic of exculpation. See, e.g., Del. Code Ann. tit. 6, § 2704 (Supp. 1970); Ill. Ann. Stat. ch. 80, § 91 (Smith-Hurd Supp. 1974); N.Y. Gen. Oblig. Law §§ 5-321 to -325 (McKinney 1964 & Supp. 1974) (concerning leases; caterers; building service and maintenance contracts; architects; engineers; surveyors; garages and parking lots).

102. See 261 N.E.2d at 101; accord, *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Kansas City Power & Light Co. v. United Tel. Co.*, 458 F.2d 177, 179 (10th Cir. 1972); *Fitzgerald v. Newark Morning Ledger Co.*, 111 N.J. Super. 104, 267 A.2d 557 (Super. Ct. 1970) (such a clause not favored but question is one of public policy and answer depends upon position of the parties). See also *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 30 (1973).

103. *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019 (S.D.N.Y. 1972), *aff'd*, 483 F.2d 645 (1973); *Cree Coaches, Inc. v. Panel Suppliers, Inc.*, 384 Mich. 646, 186 N.W.2d 335 (1971); *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 291 Minn. 97, 189 N.W.2d 404 (1971); *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 177 S.E.2d 146 (1970). See also Restatement of Contracts § 574. These authorities do not necessarily conflict with the cases cited in note 102 *supra*, since the underlying rationale of all these cases is that the question is one of assent and public policy.

mutual assent.¹⁰⁴ For example, in *Ciofalo v. Vic Tanny Gyms, Inc.*,¹⁰⁵ a patron of a gymnasium operated by the defendant agreed in a membership contract to assume the risk of injuries arising out of the defendant's negligence. The court did not find the clause in opposition to public policy, adding: "Here there is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffectual."¹⁰⁶ Although the court stated that the plaintiff had voluntarily assented, the facts here were not sufficiently delineated to allow a determination of whether there was the true, voluntary, understanding assent required by *Weaver* and a number of other cases.¹⁰⁷

The indemnity and exculpation cases are in a process of development. A gradual but perceptible change is occurring.¹⁰⁸ Freedom of contract, laissez-faire, and black letter law are giving way to notions of what is fair under the particular circumstances of the case, even if the result is not strictly in compliance with the objective theory of contract.¹⁰⁹ These cases also illustrate the modern attack on the duty to read rule—(1) a finding of a lack of true mutual assent; or (2) a conclusion that even if there were true assent, the challenged clause should be stricken as unconscionable or contrary to a rule of public policy that a party should not be permitted to shift the burden of his wrongdoing to a weaker party or to deprive the injured party of his right to recover for the wrong done to him.¹¹⁰

VI. DUTY TO READ AND THE RESTATEMENT SECOND

Somewhat curiously the *Restatement Second* does not state a general rule with respect to the duty to read as did the original Restatement.¹¹¹

104. The leading case is probably *Tunkl v. Regents of Univ.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

105. 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961). See also *Empress Health & Beauty Spa, Inc. v. Turner*, — Tenn. —, 503 S.W.2d 188 (1973).

106. 10 N.Y.2d at 297-98, 177 N.E.2d at 927, 220 N.Y.S.2d at 965. There has been much discussion concerning the language required for an exculpatory clause to be effective irrespective of any question of public policy. See *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971); *Cason v. Geis Co.*, 211 Kan. 406, 507 P.2d 295 (1973).

107. *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821 (1972); *Van Noy Interstate Co. v. Tucker*, 125 Miss. 260, 87 So. 643 (1921); *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 77 S.E.2d 583, Annot., 40 A.L.R.2d 760 (1953); *Dodge v. Nashville C. & St. L.R.R.*, 142 Tenn. 20, 215 S.W. 274 (1919).

108. See, e.g., *Smith v. Kennedy*, 43 Ala. App. 554, 195 So. 2d 820 (1966), cert. denied, 280 Ala. 718, 195 So. 2d 829 (1967), which according to the casenote in 19 Ala. L. Rev. 484, 486 (1967) makes a substantial change in the law of Alabama. See also 4 *Duquesne U.L. Rev.* 475 (1966).

109. W. Friedmann, *Law in a Changing Society* 93-94 (1959).

110. See notes 81 & 99 *supra* and accompanying text.

111. The rule of the original Restatement is set forth in § 70 which is mentioned in note 5

Rather is sets forth a rule only for standardized agreements and announces it in the chapter on interpretation.¹¹²

Section 237 provides as follows:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

The rule obviously has a dual thrust. First, it recognizes that standardized agreements serve a useful purpose because most contracts are concluded between a party who bargains, if at all, only with respect to certain limited terms, and by an agent of a business who has limited understanding of the terms and limited authority to vary them.¹¹³ Secondly, it follows the lead of cases such as *Weaver v. American Oil Co.*¹¹⁴ by stating that customers "are not bound to unknown terms which are beyond the range of reasonable expectation."¹¹⁵ The rationale is that if the drafter of the form knows or has reason to know that "the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term" then the adhering party should not be deemed to assent."¹¹⁶

Although the *Restatement Second* speaks of assent it seems that it is not using the word assent in its ordinary connotation for it indicates that all persons who sign a standardized agreement should be treated alike, even though a more sophisticated individual customer might give the type of informed assent required by some of the cases discussed above. Thus what the *Restatement* appears to be saying is that if the ordinary reasonable man would not expect such a clause it should be read out of the contract.¹¹⁷ The *Restatement* in essence in talking about unconscionability based upon "unfair surprise."¹¹⁸ It

supra. Section 70 is in basic conformity with the general rule discussed in Parts II & III supra. However, the *Restatement (Second) of Contracts* § 237, comment b, at 538-39, suggests some recognition of the general rule and comment d covers to some extent the same ground as Part III hereof.

112. There is no definition of standardized agreement. See note 97 supra.

113. *Restatement (Second) of Contracts* § 237, comments a & b, at 538-39.

114. 257 Ind. 458, 276 N.E.2d 144 (1971); see notes 77-79 supra and accompanying text.

115. *Restatement (Second) of Contracts* § 237, comment f, at 540.

116. *Id.* at 541.

117. *Id.* at § 237(2). However, in comment f it is stated that one of the factors to be considered is whether the adhering party ever had an opportunity to read the term.

118. UCC § 2-302, comment 1. Professor Leff treats unfair surprise as procedural unconscionability. See note 81 supra; cf. G. Clark, *Equity* 247 (1954).

recognizes this when it states that the rule set forth in section 237 "is closely related to the policy against unconscionable terms."¹¹⁹

Two of the factors to be considered in determining whether a reasonable man would expect a particular provision in the agreement are: (1) whether "the term is bizarre or oppressive,"¹²⁰ and (2) whether "it eviscerates the non-standard terms explicitly agreed to, or . . . eliminates the dominant purpose of the transaction."¹²¹

The *Restatement Second* thus recognizes the utility of standard agreements but refuses to allow them to be used unfairly. This seems a reasonable resolution of the problem and in general accord with the rule of some of the cases discussed above that even an objective manifestation of assent stemming from a failure to read should not preclude consideration of whether there is true assent to unfair or unexpected terms.

VII. CONCLUSION

The underlying philosophy of the objective theory of contracts is to enshrine a writing as sacrosanct and inviolate. This result is achieved by rules that exclude or minimize the true subjective intention of the parties. The policy is that a party to a written agreement may safely rely upon the written document.¹²² These results are achieved, for example, under the traditional parole evidence rule and traditional rules of interpretation including the plain meaning rule. It might be noted that all of these rules are presently under serious attack.¹²³

The duty to read rule is yet another fortification thrown up by the objective theory of contracts to make a writing impregnable.¹²⁴ It is

119. Restatement (Second) of Contracts § 237, comment f; see note 118 supra.

120. Restatement (Second) of Contracts § 237, comment f.

121. *Id.*; see Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 Va. L. Rev. 1178 (1964). See also *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817 (3d Cir. 1951); *Weisz v. Parke-Bernet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y.C. Civ. Ct. 1971), rev'd, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (App. T. 1974); *Karsales (Harrow), Ltd. v. Wallis*, [1956] 2 All. E.R. 866 (C.A).

122. D. Hume, *A Treatise of Human Nature* 523-26 (Silby-Bigge ed. 1888); Whittier, *The Restatement of Contracts and Mutual Assent*, 17 Calif. L. Rev. 441 (1929); cf. 1 Williston §§ 21 & 35.

123. See, e.g., Restatement (Second) of Contracts ch. 9.

124. The Weaver case recognized the relationship between the objective theory of contracts and the duty to read when it stated: "The parole evidence rule states that an agreement or contract, signed by the parties, is conclusively presumed to represent an integration or meeting of the minds of the parties. This is an archaic rule from the old common law. The objectivity of the rule has as its only merit its simplicity of application which is far outweighed by its failure in many cases to represent the actual agreement, particularly where a printed form prepared by one party contains [sic] hidden clauses unknown to the other party is submitted and signed. The law should seek the truth or the subjective understanding of the parties in this more enlightened age. The burden should be on the party submitting such 'a package' in printed form to show that the

based on the realities of the bargaining practices of the past, when the self-reliance ethic was strong and standardized agreements were rare. Under such circumstances, it may have been realistic to expect each party to read and understand his agreement. However, in the current era of mass marketing, a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did. In such circumstances an imputation that he assents to all of the terms in the document is dubious law. An assertion that he is bound by them would place a premium upon an artful draftsman who is able to put asunder what the salesman and the customer have joined together.¹²⁵

Thus some of the more modern cases search for apparent objective assent and also for a true assent. Under this view true assent does not exist unless there is a genuine opportunity to read the clause in question and its impact is explained by the dominant party and understood by the other party who has a reasonable choice, under the circumstances, of accepting or rejecting the clause.¹²⁶ Thus the printed form which implicitly suggests that it should not be challenged or even read loses some of its apparent authority.¹²⁷ The *Restatement Second* goes one step further when it indicates that what is important, at least in contracts of adhesion, is whether a reasonable man would have expected to find such a clause in the contract. If not, the clause is considered to be oppressive, unfair or indecent.¹²⁸ This, of course, carries one into the doctrine of substantive unconscionability which in turn is related to the question of whether a particular clause should be struck down as contrary to public policy.¹²⁹ The *Restatement Second* seems to be suggesting a new kind of objective approach to standardized agreements. Rather than seeking out true assent on a case by case basis it places the duty upon the courts to consider the essential fairness of the printed terms, both from the viewpoint of surprise and inherent one-sidedness.

other party had knowledge of any unusual or unconscionable terms contained therein." 257 Ind. at 461, 276 N.E.2d at 147 (emphasis deleted).

It also has been suggested that the party who prepared the standardized form should shoulder the burden of proving that an opportunity for bargaining existed. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 *Int'l & Comp. L.Q.* 172, 186 (1965).

125. See generally Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 *Akron L. Rev.* 1 (1972); Mellinkoff, *How to Make Contracts Illegible*, 5 *Stan. L. Rev.* 418 (1953); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 *Harv. L. Rev.* 529 (1971).

126. See Part V *supra*.

127. Shuchman, *Consumer Credit by Adhesion Contracts*, 35 *Temp. L.Q.* 125 (1962).

128. K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960).

129. See Part V and particularly note 81 *supra*.

Not only is there inconsistency in the authorities regarding which theory should be applied, but apparently opposite results are being reached in cases with substantially similar fact patterns.¹³⁰ This should not come as a surprise to any student of the law. The plain fact is that new law is evolving in this area and it will be many years, if ever, before any semblance of uniformity will be achieved.¹³¹

The ultimate result may be a radically different set of rules for transactions in which all major aspects of the agreement are negotiated and those in which standard forms are used. If the industries that employ standard forms do not police themselves so as to insure inherent fairness of forms, it is likely that the courts will increasingly refuse legal effect to non-negotiated terms of a contract and that standardized forms, as in the case of insurance policies, will be dictated by legislatures or administrative agencies.

130. See Part V *supra*.

131. Perhaps what is called for is an administrative approach to the problem. See, e.g., Sales, *Standard Form Contracts*, 16 *Modern L. Rev.* 318, 337-38 (1953); Sheldon, *Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control*, 22 *Am. J. Comp. L.* 17 (1974); Comment, *Administrative Regulation of Adhesion Contracts in Israel*, 66 *Colum. L. Rev.* 1340 (1966). See also Speidel, *supra* note 81.