

Note

Fairness, Flexibility, and the Waiver of Remedial Rights by Contract

In our society individuals are granted the right to have their private contracts enforced by public authorities. The parties to a contract agree on a particular course of performance, and the courts then fix the proper remedy should one of the parties fail to perform.¹ This pattern may be altered when the parties define some aspect of the remedy themselves; their contract may provide for devices such as cognovit notes,² warranty disclaimers,³ liquidated damage clauses,⁴ and damage limitations.⁵ The element common to these various devices is that one party agrees to forgo some remedy that he might otherwise be granted in a case of breach. These devices thus represent the waiver, or sale, of remedial rights by means of a contractual agreement.⁶

1. To quote Karl Llewellyn, "[i]t is the parties who make agreements, but it is the law which determines the legal consequences of agreements." National Conference of Commissioners on Uniform State Laws, Report on a Revised Uniform Sales Act, § 51-A, Comment A(2)(a) (2d draft 1941) [hereinafter cited as Llewellyn's Draft]. This is an early version of what ultimately became Article 2 of the Uniform Commercial Code (U.C.C.).

2. *E.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 176 (1972) (agreement on cognovit provision waives right to notice and hearing).

3. *E.g.*, *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146, 149 (3d Cir. 1974) (agreement to disclaimer of all warranties waives right to sue for damages when product malfunctions).

4. *E.g.*, *Miller Yacht Sales, Inc. v. Scott*, 311 So. 2d 762, 763 (Fla. Dist. Ct. App. 1975), *cert. denied*, 328 So. 2d 843 (Fla. 1976) (invocation of liquidated damage clause waives right to any further remedies).

5. *E.g.*, *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300, 1308-09 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971) (agreement to limitation excluding consequential damages waives right to recover lost profits resulting from malfunction of product). The U.C.C. uses the term "remedy limitation." U.C.C. § 2-719. Since the term "remedy" has a more general meaning, specific limitations on the kinds of damages that can be awarded will be referred to in this Note as "damage limitations."

6. Contractual waivers should be distinguished from the various statutory provisions that have been at issue in the much-noted line of Supreme Court cases involving seizures of property without a prior hearing. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 601-03 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 601-03 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 69-70 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338-39 (1969). These cases involved prejudgment garnishments or repossessions, rather than efforts to restructure the process by which a final disposition is achieved. More important, the cases involved provisions that were established by the legislature and operated by force of law. A waiver, on the other hand, being the intentional abandonment of a pre-

The extent to which waivers of this sort should be permitted is a problem that raises basic questions about the remedial rights involved and about the relationship between private contracts and public law. Courts have approached these questions by distinguishing between those remedial rights granted by the Constitution and those secured by statute or by common law. In the constitutional area, however, the courts have failed to articulate a clear rationale for their decisions, and in other contexts they have developed a separate rationale for assessing the validity of each specific type of waiver. The cases express no consistent principle for dealing with either constitutional or nonconstitutional waivers, and no unified approach is apparent.

This Note attempts to provide such a unified approach for the area of sales contracts.⁷ First, it surveys the various doctrines courts have used to analyze the waiver of commercial and constitutional rights. It then argues that there is a single principle that underlies these doctrines. This principle demands that whenever private parties attempt to alter the judicial remedies that would normally be available for breach of contract, they must provide the functional equivalent of the omitted rights. If they waive the right to have a court establish the damages for breach, they must provide for damages of an approximately equivalent nature in their own agreement; or, if one party waives his right to judicial notice, a hearing, or any aspect of that hearing, the functional equivalent of those procedural protections must be provided in the personal interaction between the parties.

I. Existing Doctrines Governing Waiver of Remedial Rights

In deciding whether to enforce or cancel contractual clauses that waive remedial rights, courts distinguish between constitutional and commercial remedial rights. Constitutional protection for remedial rights is derived from the due process clauses of the Fifth and Fourteenth Amendments, which require that the state provide each party with notice, a hearing, and an impartial decisionmaker prior to making a determination that affects property rights.⁸ Should one party ask a

existing right, requires a private agreement. *Compare* *Fuentes v. Shevin*, 407 U.S. 67, 69-70 (1972) (right of seller to repossess goods established by law) *with* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965) (right of seller to repossess goods established by contract).

7. Sales contracts, as used in this Note, refer to transactions in goods covered by Article 2 of the Uniform Commercial Code. *See* U.C.C. § 2-102; *cf. id.* § 2-105(1) (defining "goods").

8. For the basic elements required by due process, see *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970). *See* *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (notice);

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court or other agent of the state to enforce a contract in which one of these elements is waived, the other party may claim that such enforcement would violate the due process clause.⁹

Most waivers of remedial rights in sales contracts do not result in total elimination of notice and a hearing; instead, they usually alter the nature and extent of any hearing that ultimately takes place.¹⁰ Courts generally hold that waivers of this kind are purely commercial matters, which do not impair any of the elements of due process. The applicable rules, therefore, are derived from common law or statutory provisions.¹¹

Despite the division of remedial waiver cases into these two categories—constitutional and commercial—and despite the different standards that each category involves, judicial decisions in these two groups of cases do bear a resemblance to each other. In fact, the pattern of decisions suggests that there exists an underlying dialogue between these groups of cases, a dialogue that the language of the decisions only partially articulates. Constitutional decisions are often based, in part, on commercial law considerations, while commercial law decisions often impose limitations on remedial waivers that resemble constitutional requirements.

A. *Contractual Waiver of Constitutional Rights*

The question of when constitutional rights may be waived arises in a variety of contexts, including search and seizure, free speech, and the rights of defendants in criminal prosecutions.¹² Although the Supreme

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165-72 (1951) (Frankfurter, J., concurring) (hearing); Arnett v. Kennedy, 416 U.S. 134, 197-99 (1974) (White, J., concurring in part and dissenting in part) (impartial decisionmaker).

9. Compare Mullane v. Central Hanover Trust Co., 339 U.S. 306, 319-20 (1950) (notification by newspaper that is unlikely to be seen violates Fourteenth Amendment) with National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) (actual notification satisfies Fourteenth Amendment, despite waiver of official notice).

10. For example, a warranty disclaimer waives the right to a court hearing only on the particular issue that the warranty would otherwise have covered. See note 3 *supra* & pp. 1065-66 *infra*. In contrast, the constitutional cases involve total waiver of notice or a hearing. See pp. 1060-63 *infra*.

11. Generally, due process claims are not even raised in commercial waiver cases. See note 70 *infra* (use of unconscionability as general standard for voiding commercial law waivers). Even where cognovit notes, involving the total waiver of notice and hearing, were involved, the issue was typically litigated in commercial law terms until recent years. See, e.g., Cutler Corp. v. Latschaw, 374 Pa. 1, 97 A.2d 234 (1953) (inconspicuous cognovit voided without reference to due process); Denkin v. Sterner, 10 Pa. D. & C.2d 203 (1956) (cognovit resulting in unreasonable liquidated damages voided without reference to due process).

12. E.g., Wyman v. James, 400 U.S. 309, 344-45 (1971) (Marshall, J., dissenting) (whether acceptance of welfare waives Fourth Amendment right to refuse home visits by welfare

Court has held that courts must "indulge every reasonable presumption"¹³ against the waiver of constitutional rights,¹⁴ it has failed to articulate a general principle for such waivers. In particular, no standards have been established to govern the contractual waiver of the due process rights of notice and a hearing. In *D.H. Overmyer Co. v. Frick Co.*,¹⁵ the Supreme Court found itself confronted with this problem and explicitly refused to resolve it.¹⁶

Overmyer involved a cognovit note, the most extreme form of contractual waiver of remedial rights.¹⁷ A cognovit is a contractual provision in which one party authorizes the other party to enter judgment against him in any dispute that might arise; as such, it represents the total waiver of both notice and a hearing. The typical cognovit is part of a standard form contract and is associated with overreaching mercantile practices against consumers.¹⁸ The cognovit in *Overmyer*, however, lacked these objectionable characteristics. It was the product of extended negotiations between two large corporations and was demanded by Frick only after Overmyer became delinquent on its required payments. Moreover, the provision was carefully drawn up by lawyers representing both corporations who had a full understanding

worker); *Brady v. United States*, 397 U.S. 742, 747-48 (1970) (whether guilty plea waives right to raise coerced confession claim); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (whether acceptance of teaching position waives First Amendment right to criticize school board).

13. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (request for directed verdict does not waive right to trial).

14. See *id.*; *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 306-07 (1937) (participation in administrative proceeding that ultimately reaches decision on certain issues does not waive right to trial on those issues). Although these cases do not involve contractual waivers, the principle they articulate has been applied to all types of civil law waivers, including contractual ones. *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188-89 (1972) (Douglas, J., concurring).

15. 405 U.S. 174 (1972). Commentary on *Overmyer* includes Note, *Cognovit Revisited: Due Process and Confession of Judgment*, 24 *HASTINGS L.J.* 1045, 1064 (1973) (Court's decision permits signature alone to support cognovit judgment if debtor has subsequent opportunity to attack it); 51 *N.C.L. REV.* 554, 559 (1973) (strict criminal law standard should be used for judging cognovits); 41 *U. CIN. L. REV.* 741, 747 (1972) (Court's case-by-case approach inadequate; all cognovits should be forbidden in consumer contracts); 25 *FLA. L. REV.* 376, 380 (1973) (decision strikes balance between debtors and creditors).

16. 405 U.S. at 188 ("Our holding, of course, is not controlling precedent for other facts of other cases.")

17. See *Cutler Corp. v. Latshaw*, 374 Pa. 1, 4, 97 A.2d 234, 236 (1953) (cognovit most extreme form of contractual waiver).

18. See generally Hobson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 *U. CHI. L. REV.* 111, 124 (1961) (cognovits usually part of standard form contract); Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 *COLUM. L. REV.* 1118, 1130 (1970) (state laws evidence strong public policy against cognovits); Comment, *Confessions of Judgment: The Due Process Defects*, 43 *TEMP. L.Q.* 279, 286-87 (1970) (cognovits are contracts of adhesion, rarely understood or assented to by consumers). These and other critical comments on cognovits were cited by the *Overmyer* Court. 405 U.S. at 177 n.4.

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of its implications.¹⁹ Presented with the choice of forbidding all cognovits or finding a rationale that would permit them under certain circumstances, the Court sought refuge in *Overmyer's* unusual factual situation. It stated that even if the stringent criminal law standard of a "voluntary, knowing, and intelligently made" waiver of constitutional rights were applicable, that standard had been met in the present case.²⁰ This statement effectively dispensed with *Overmyer* but offers uncertain guidance for other situations, as the Court itself conceded.²¹

The Court's unwillingness to adopt the criminal law standard probably rested on its belief that this standard would be too exacting in commercial contexts. This objection might now appear less serious in light of subsequent decisions diluting the criminal law standard.²² But a serious problem remains: even in the carefully structured setting of a criminal trial, the requirement that a waiver be voluntary, knowing, and intelligently made has not been easy to apply.²³ Its application would be still more difficult in contractual situations, where the relevant behavior involves only private parties and can assume a large variety of forms. As Professor Gilmore, writing in another context, has stated: "the presence or absence of 'knowledge' is a subjective question of fact, difficult to prove. Unless there is an overwhelming policy argument in favor of using such a criterion, it is always wise to discard it and to make decision turn on some easily determinable objective event" ²⁴

19. 405 U.S. at 186-87.

20. *Id.* at 185-86 (citations omitted):

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, . . . or "an intentional relinquishment or abandonment of a known right or privilege," . . . and even if, as the Court has said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights," . . . that standard was fully satisfied here.

21. *Id.* at 188. *Overmyer* has been cited most frequently to support the proposition that constitutional rights may in fact be waived. *E.g.*, *Adamo Wrecking Co. v. HUD*, 414 F. Supp. 877, 879 (D.D.C. 1976); *Rogers v. Searle*, 533 S.W.2d 433, 440 (Tex. Civ. App.), *rev'd on other grounds*, 544 S.W.2d 114 (Tex. 1976). But it has been generally recognized that *Overmyer* fails to articulate a principle for determining the circumstances in which such waivers will be permitted. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-36 (1973); *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972).

22. *See, e.g.*, *Wainwright v. Sykes*, 97 S. Ct. 2497, 2506-07 (1977) (failure to object to admission of involuntary confession constitutes waiver, even if failure was not knowing and deliberate); *Estelle v. Williams*, 425 U.S. 501, 509-13 (1976) (failure to raise timely objection to being tried in prison clothes constitutes waiver, even if objection is unknowingly raised to wrong official). *See generally* Cover & Alcinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1068-86 (1977).

23. *See* Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 7-25 (1970).

24. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 34.2, at 902 (1965).

Accepting *Overmyer's* view that the criminal law standard for waiver of constitutional rights need not be met in contractual situations, the opinion appears to suggest only one additional method for dealing with remedial waivers—the controlling rule must be determined by the facts of the particular situation.²⁵ At least one lower court has found this suggestion to be “disquieting,”²⁶ since facts alone, without an interpretive principle, cannot yield a reasonably predictable judicial decision. Yet what the Court may have meant is that the facts must be considered in light of existing principles of commercial law: “where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.”²⁷ Indeed, those lower courts that have subsequently addressed the contractual waiver of constitutional rights agree that such commercial law principles must be considered in reaching a decision.²⁸

Shortly after *Overmyer*, in *Fuentes v. Shevin*,²⁹ the Supreme Court repeated its suggestion that commercial law principles could be used to analyze the waiver of constitutional rights. This did not clarify the situation, however, since the *Fuentes* decision used these principles in a somewhat different way. After articulating the due process rights of those who purchase goods under a conditional sales contract,³⁰ the

25. 405 U.S. at 187-88.

26. *Law v. United States Dep't of Agriculture*, 366 F. Supp. 1233, 1240 (N.D. Ga. 1973) (court's disquiet based on uncertainty of standard).

27. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972).

28. *United States v. Wynn*, 528 F.2d 1048 (5th Cir. 1976); *Ricker v. United States*, 417 F. Supp. 133 (N.D. Me. 1976); *Law v. United States Dep't of Agriculture*, 366 F. Supp. 1233 (N.D. Ga. 1973). All these cases involved mortgage foreclosures by the Farmers Home Administration (FmHA). The FmHA is charged with making special loans “[t]o simplify and improve credit services to farmers and promote farm ownership.” Farmers Home Administration Act of 1946, ch. 964, 60 Stat. 1062, preamble (current version codified in scattered sections of 7, 12 & 31 U.S.C.). Pursuant to this objective, the FmHA generally demands that the farmer who receives a loan waive his rights to notice and a hearing in the event of a foreclosure proceeding. When faced with due process challenges to this policy, all three courts cited *Overmyer* for the proposition that such waivers could be constitutional, but that their validity depended on commercial law principles regarding waivers. The *Ricker* court, having decided that the waiver was vulnerable because it did not meet the criminal law standard, went on to find that it violated the due process clause by virtue of being an adhesive term, 417 F. Supp. at 139. In the other two cases, further fact finding was required on the issues of relative bargaining power of the parties and clarity and comprehensibility of the waiver term, 528 F.2d at 1050; 366 F. Supp. at 1240.

29. 407 U.S. 67 (1972).

30. Specifically, the court held that two state statutes authorizing the replevin of goods purchased under conditional sales contracts violated the due process clause by denying the purchaser a prior hearing before being deprived of property. *Id.* at 88-90. For the distinction between such statutes and contractual waivers, see note 6 *supra*. *Fuentes* was a 4-3 decision, written by Justice Stewart at the time when Justices Powell and Rehnquist

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Court rejected the contention that the purchasers in *Fuentes* had waived these rights by virtue of certain provisions in the contracts. Through Justice Stewart, the Court summarized *Overmyer's* holding with evident approval and then distinguished *Fuentes*.³¹ In *Fuentes*, the Court said, there was no equality of bargaining power, the waiver was adhesive, and there was no showing that the purchasers were aware of its effects;³² in *Overmyer*, the opposite was true. But the dispositive issue for the *Fuentes* Court was clarity: "a waiver of constitutional rights," it stated, "must at the very least, be clear."³³ The Court then proceeded to analyze the alleged waiver in *Fuentes* in terms of its clarity and found it fatally ambiguous.³⁴

The *Fuentes* analysis is not unreasonable, but it is not the one suggested by *Overmyer*. The *Overmyer* Court decided that a provision met the stringent criminal law standard for waivers, since it had been fully understood by the waiving party, and was thus immune from constitutional attack. *Fuentes* ignored the entire issue of the waiving party's degree of knowledge and of whether this knowledge was sufficient to validate the waiver. Instead, it focused a critical eye on the waiver's lack of clarity—an objective determination—and accordingly held the waiver in automatic violation of the due process clause.

Thus the Court has developed no single, coherent principle for determining the validity of contractual waivers of constitutional rights. An elliptical reference to commercial law principles, as in *Overmyer*, or an unexplained selection of a single, objective standard, as in *Fuentes*, is not sufficient to define a constitutional requirement with the requisite precision.³⁵

were appointed but not yet sitting. Although apparently overruled once the court reached full size, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); see *id.* at 629-36 (Stewart, J., dissenting), it was subsequently reaffirmed in *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); see *id.* at 608 (Stewart, J., concurring).

31. 407 U.S. at 94-95.

32. *Id.* at 95.

33. *Id.* (emphasis in original).

34. *Id.* at 95-96.

35. For an attempt to define the circumstances in which a waiver term can be consistent with due process, see Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 BAYLOR L. REV. 215, 234-36 (1973) (suggesting six indicia of valid waiver: buyer must be aware of waiver term, receive full explanation of its effects, receive full explanation of creditor's remedies, have opportunity to bargain, have waiver provision printed in large type, and have waiver provision printed on separate sheet of paper in clear language). See also McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues*, 26 HARVING L.J. 383, 409-26 (1974) (suggesting that courts, in analyzing waiver terms, recognize due process right to be free of adhesive contracts).

B. *Contractual Waiver of Commercial Rights*

The contractual waiver of commercial rights is governed by statute or by common law; for the area of sales, to which this Note is limited, the basic statutory provision is Article 2 of the Uniform Commercial Code (U.C.C.).³⁶ Article 2 does not contain a general rule delineating the permissible scope of waivers of remedial rights,³⁷ but it does distinguish between these rights and the purely private rights established by the contractual agreement.³⁸ Waivers of remedial rights are governed by much more stringent standards. An official comment to one provision of Article 2 states that "it is of the very essence of a sales contract that at least minimum adequate remedies be available."³⁹ This idea is specifically adopted in the Article 2 provisions on warranty disclaimers, liquidated damages, and damage limitations, and through the more

36. Though currently enacted in 49 states and the District of Columbia, the U.C.C. is not completely uniform, since different states have varied its provisions somewhat in their individual enactments. Some of these variations are relevant to the issues being considered here. California, for example, has omitted § 2-302, the unconscionability provision, CAL. U. COM. CODE § 2-302 (West 1964), and several other states have forbidden warranty disclaimers under § 2-316 where consumer goods are involved, e.g., MD. COM. LAW CODE ANN. § 2-316.1 (1975); MASS. ANN. LAWS. ch. 106, § 2-316A (Michie/Law. Co-op 1976). Nevertheless, all but a few provisions have been enacted in all but a few states, so that the U.C.C. remains the basic source of sales law. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 3, 6 (1970).

37. Section 1-102(3) provides that "[t]he effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act." Since waivers of remedial rights are in fact governed by other provisions, this section actually indicates the absence of an Article 2 standard. Cf. U.C.C. § 9-501(3) (establishing general standard forbidding waiver of rules that "give rights to a debtor and impose duties on the secured party" and specific exceptions to standard); Llewellyn's Draft, *supra* note 1, § 51-A(1-2) (providing general rules for contractual limitation of remedies).

38. The waiver of purely private rights is governed by § 2-209(4), which adopts the common law principle that such rights can be waived unwittingly, by a course of conduct. Compare *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 403-05, 144 N.E.2d 387, 392, 165 N.Y.S.2d 498, 504-05 (1957) (party can waive right to assert anti-assignment clause in contract by course of performance) with *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 430 Pa. 550, 558-60, 244 A.2d 10, 16 (1968) (under U.C.C. party waived written conditions by oral statements and course of conduct). Courts will not permit remedial rights, created by sources of law independent of the contract, to be waived in this way. See, e.g., *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 250-51 (N.D. Ill. 1974), *aff'd on other grounds*, 522 F.2d 469 (7th Cir. 1975) (U.C.C. disfavors remedy limitations; clause requiring cancellation of supply contract as condition to suit for damages is void, even between commercial parties). U.C.C. § 2-209 is evidently restricted to purely private rights, created by the contractual agreement, since it is grouped with other provisions on contract modification, and § 2-209(5) refers explicitly to "a waiver affecting an executory portion of the contract."

39. U.C.C. § 2-719, Comment 1. See Llewellyn's Draft, *supra* note 1, § 51-A, Comment A(2)(a) ("[A] minimum remedy at law is an inherent part of a contract's being legal One aspect of the structure of the 'sale' or of the 'contract to sell' is some fair quantum of remedy; and the character of that remedy is for the law to determine.")

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general standards of unconscionability and adhesion that are embodied in the Code.⁴⁰

1. *Specific Provisions Governing Contractual Waivers*

A person who buys a product for which the seller has disclaimed all warranties has, in effect, waived his right to a judicial determination of whether the product is defective.⁴¹ U.C.C. section 2-316, which regulates these disclaimers, requires that they be precisely worded, conspicuous, and consistent with other terms in the contract.⁴² Some courts have stated that these objective standards need not be met if the disclaimer is understood by the buyer;⁴³ others have held that they are absolute.⁴⁴ It is generally agreed, however, that the underlying purpose of the requirements is to ensure that the buyer is fully aware that he is waiving

40. There are also various other devices for restructuring contractual remedies. See 9 U.S.C. §§ 1-208 (1970) (commercial arbitration); U.C.C. §§ 1-105 (forum selection clauses), 2-725 (clauses altering statute of limitations).

41. Some state laws and court decisions have forbidden such disclaimers in cases where consumer goods are involved. See *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452, 456 (Fla. Dist. Ct. App.), *cert. denied*, 267 So. 2d 833 (Fla. 1972) (dictum) (manufacturer of stock items may not disclaim warranty that item will function properly); Md. COM. LAW CODE ANN. § 2-316.1 (1975) (warranty disclaimers not permitted in consumer contracts); MASS. ANN. LAWS. ch. 106, § 2-316A (Michie/Law. Co-op 1976) (same). In other cases, disclaimers have been forbidden where the buyer suffers personal injury. *E.g.*, *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 292, 336 A.2d 62, 70-71 (1975); *Markle v. Mulholland's, Inc.*, 265 Or. 259, 272-73, 509 P.2d 529, 535 (1973). *Contra*, *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 692-94 (Tenn.), *cert. denied*, 419 U.S. 870 (1974).

42. Where a disclaimer's meaning is in conflict with an express warranty, the warranty is generally held to be the controlling factor. *E.g.*, *Berk v. Gordon Johnson Co.*, 232 F. Supp. 682, 686-88 (E.D. Mich. 1964); *Hauter v. Zogarts*, 14 Cal. 3d 104, 118-20, 534 P.2d 377, 386-87, 120 Cal. Rptr. 681, 690-91 (1975). This often applies even where the warranty is oral and the disclaimer written. *E.g.*, *Ed Fine Oldsmobile, Inc. v. Knisley*, 319 A.2d 33, 36-37 (Del. Super. Ct. 1974); *Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66, 71-72 (Mo. Ct. App. 1968). Furthermore, the wording must be explicit and precise; any variation from the statutory formula is considered fatal. *E.g.*, *S-C Indus., Inc. v. American Hydroponics Sys., Inc.*, 468 F.2d 852, 855 (5th Cir. 1972); *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585, 593 (8th Cir. 1964). Finally, the disclaimer must be conspicuous, as judged by various objective standards, such as size and style of type, position in the document, and availability of the document to the buyer at the time of purchase. *E.g.*, *American Adhesives, Inc.*, 320 F. Supp. 442, 444 (E.D. Pa. 1970); *Dorman v. International Harvester Co.*, 46 Cal. App. 3d 11, 17-20, 120 Cal. Rptr. 516, 521-23 (1975).

43. See *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 433-34, 196 S.E.2d 711, 718 (1973) (dictum) (conspicuousness not required where buyer is commercial party with equal bargaining power who is actually aware of provision); *Smith v. Sharpsteen*, 521 P.2d 394, 395-96 (Okla. 1974) (conspicuousness not required where buyer testified that he read and understood entire contract).

44. See *Mobile County Gas Dist. v. National Cash Register Co.*, 295 Ala. 188, 191, 326 So. 2d 105, 108 (1976) (conspicuousness is "an absolute requirement"); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452, 454-55 (Fla. Dist. Ct. App.), *cert. denied*, 267 So. 2d 833 (Fla. 1972) (even if buyer testified that he read contract, he would not expect "that he was waiving his right to insist that his new automobile perform properly").

certain remedial rights.⁴⁵ In addition to these requirements, courts have applied the criterion that the disclaimer be the result of a specific bargain. Where there are open negotiations, a disclaimer will usually be considered valid;⁴⁶ in their absence, it will frequently be struck from the contract.⁴⁷

A liquidated damage clause is one that fixes the specific amount that one party must pay if he breaches the contract. It thus represents the waiver, by both parties, of the right to have a court fix damages on the basis of the actual harm resulting from the breach. U.C.C. section 2-718 regulates these clauses. Unlike section 2-316, it does not focus on the objective characteristics of the clause or on the process that led to its adoption; rather, section 2-718 is concerned with the reasonableness of the result produced by the clause.⁴⁸ Liquidated damages are permis-

45. See *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 109, 437 S.W.2d 459, 463 (1969) ("The very purpose of the statutory requirement is that any limitation be brought to the attention of the buyer at the time the contract is made."); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 46, 286 N.E.2d 188, 196-97 (1972) ("basic purpose" of U.C.C. is "to protect purchasers from surprise").

The recently enacted Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Supp. V 1975), has the same goal. It establishes even more detailed requirements regarding warranties of consumer goods and reiterates the necessity of clear and conspicuous language. See *id.* §§ 2302-2303.

46. E.g., *Alan Wood Steel Co. v. Capital Equip. Enterprises, Inc.*, 39 Ill. App. 3d 48, 58, 349 N.E.2d 627, 636 (1976); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 308-09, 263 A.2d 390, 393 (1970).

47. *Berg v. Stromme*, 79 Wash. 2d 184, 193, 484 P.2d 380, 385 (1971) (referring to disclaimer of warranties printed on back of contract): "[The Court will reject a rule] which elevates these bland and substantially meaningless terms and conditions above the individually and expressly negotiated terms and conditions, and gives them controlling effect over specifically agreed upon items and conditions of the contract." See, e.g., *Hügel v. General Motors Corp.*, 544 P.2d 983, 989-90 (Colo. 1975) (even though disclaimer is physically conspicuous, it cannot be given force in consumer contract unless "clearly brought to the attention of the buyer and agreed to by him"); *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Ct. App. 1973) (clause in contract disclaiming all warranties and declaring that product is taken "as is" cannot prevail over display of sample and individual negotiation based on display of sample).

Section 2-316(3) creates certain exceptions to the general rules established for warranty disclaimers, e.g., permitting language like "as is" or "with all faults" to exclude all implied warranties. Some courts have held that these exceptions are completely independent of the other requirements, e.g., *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152, 155 (N.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1162 (5th Cir. 1975) ("as is" language need not be conspicuous). But the more common view is that the policy considerations underlying the first two clauses of § 2-316 are applicable to all disclaimers. E.g., *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 183-90, 333 A.2d 313, 315-18 (1975) ("as is" term must be conspicuous); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 396, 398-99, 268 A.2d 345, 352-54 (1970) ("It does not make sense to require conspicuous language when a warranty is disclaimed by use of the words 'merchantability' or 'fitness' and not when a term like 'as is' is used to accomplish the same result."); 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.19030301, at 77 (1964) (same).

48. Cf. *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (adopting terms "procedural" to describe formulation and characteristics of contract and "substantive" to describe contractual result).

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sible, it provides, only where they are “reasonable in the light of the anticipated or actual harm caused by the breach A term fixing unreasonably large liquidated damages is void as a penalty.”⁴⁹ Because the reasonableness of such damages will be construed by a court subsequent to the breach, a liquidated damage clause is likely to be deemed reasonable only if it produces a result similar to that which a court would have reached in the absence of the clause.⁵⁰ If the liquidated damages are significantly different in amount from what the court perceives the actual damages to be, the clause is likely to be voided either as violative of section 2-718’s rule against penalties or as unconscionable.⁵¹

A person who agrees to limit the types of damages for which he can be compensated or the time period within which he can notify the other party of a breach⁵² has waived a portion of his right to have a court fix damages once it decides that a breach has occurred. These limitations are thus similar to liquidated damage clauses. U.C.C. section 2-719 forbids such limitations when an injury to the person is at issue.⁵³ In other situations, it explicitly permits them, but with two

49. U.C.C. § 2-718(1).

50. *E.g.*, *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 689, 220 A.2d 263, 268 (1966) (“It is not the function of the court to determine by hindsight the reasonableness of the expectation of the parties at the time the contract was made, but it is the function of the court at the time of enforcement to do justice.”); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 524, 344 N.E.2d 391, 397, 381 N.Y.S.2d 459, 465 (1976) (even if liquidated damage clause is correct estimate of anticipated harm at time of contracting, it may be invalidated if it leads to unreasonably large result); *cf.* 5 CORBIN ON CONTRACTS § 1063 (1964) (“[I]n passing judgment upon the honesty and genuineness of the pre-estimate made by the parties, the court cannot help but be influenced by its knowledge of subsequent events.”) *Contra*, *Bethlehem Steel Corp. v. City of Chicago*, 350 F.2d 649, 651-52 (7th Cir. 1965) (relying on *Lochner*-era case, which analyzed problem entirely in freedom of contract terms).

51. *E.g.*, *Hungerford Constr. Co. v. Florida Citrus Exposition, Inc.*, 410 F.2d 1229, 1232 (5th Cir.), *cert. denied*, 396 U.S. 928 (1969) (liquidated damages void as penalty); *Nu Dimensions Figure Salons v. Bccerra*, 73 Misc. 2d 140, 143-44, 340 N.Y.S.2d 268, 272-73 (Civ. Ct. 1973) (liquidated damages void as penalty, and could also be voided as unconscionable).

There are some cases holding that a liquidated damages clause will be accepted if it fixes the recovery at a lower level than a court would ultimately establish. *E.g.*, *American Cast Iron Pipe Co. v. McKoy-Helgerson Co.*, 226 F. Supp. 842, 849 (W.D.S.C. 1963), *aff’d per curiam*, 329 F.2d 152 (4th Cir. 1964); *cf.* 5 CORBIN ON CONTRACTS § 1068 (1964) (parties may limit liability by means of liquidated damage clauses). U.C.C. § 2-718, Comment 1, however, takes a contrary view: “An unreasonably small amount [of liquidated damages] would be subject to similar criticism [as an unreasonably large amount would be] and might be stricken under the section on unconscionable contracts or clauses.” Alternatively, low liquidated damages could be analyzed under U.C.C. § 2-719 (remedy limitations) with similar results.

52. Under U.C.C. § 2-607(3)(a), the buyer is required to notify the seller of any breach within a “reasonable time” in order to preserve his right to damages. The length of time that will be deemed reasonable is often stated in the contract.

53. U.C.C. § 2-719(3).

restrictions: any limited remedy is void should it "fail of its essential purpose,"⁵⁴ and limits on consequential damages are void if unconscionable.⁵⁵

Judicial decisions under section 2-719 indicate that damage limitations will be given effect only if they yield results within the range of results that courts themselves would be likely to reach. Since courts frequently refuse to award consequential damages for breach of contract,⁵⁶ these damages, absent a determination of unconscionability, may always be waived.⁵⁷ On the other hand, courts view compensatory damages as an essential component of contract remedies.⁵⁸ Thus direct damages may not be waived unless provision is made for an adequate substitute such as repair, replacement, or a return of the purchase price.⁵⁹ Where repair is impossible or improperly performed, however, the substitute remedy is held to fail of its essential purpose and will not be enforced.⁶⁰ Similarly, if a substitute remedy produces a result significantly lower in value than the quantum of direct damages, the court will not accept the waiver.⁶¹ Limitations on the time within which the other party must be notified of breach may be given force if they leave an adequate period for the breach to be discovered.⁶² Where the defect in the product is latent, and thus not discoverable within the prescribed time, the limitation will be voided.⁶³

54. *Id.* § 2-719(2).

55. *Id.* § 2-719(3).

56. *See* U.C.C. § 2-715(2)(a); RESTATEMENT OF CONTRACTS §§ 330-331 (1932); 5 CORBIN ON CONTRACTS § 1007 (1964).

57. *E.g.*, Council Bros. v. Ray Burner Co., 473 F.2d 400, 406 (5th Cir. 1973); Cox Motor Co. v. Castle, 402 S.W.2d 429, 431 (Ky. 1966).

58. *See* U.C.C. § 2-714(1), (2); RESTATEMENT OF CONTRACTS § 329 (1932); 5 CORBIN ON CONTRACTS § 1002 (1964).

59. *E.g.*, V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864, 868-69 (7th Cir. 1971); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 12, 342 A.2d 181, 187 (1975).

60. *E.g.*, Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882, 890 (E.D. Mich. 1974) ("[I]t would not be equitable to allow the seller to refuse to perform the one remedy available to the buyer and then be freed of any responsibility caused by this failure."); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 403-04, 261 N.E.2d 1, 8 (1970) (limitation of remedies to repair creates implied warranty that repairs will be done properly, which survives clause excluding all implied warranties).

61. *E.g.*, Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 475-80, 540 P.2d 978, 985-88 (1975) (return of purchase price for steel plates may be inadequate where plates have been used in large construction project); Reynolds v. Preferred Mut. Ins. Co., 49 Mass. App. Dec. 97, 111 (1972) (correction of defective home improvement, without compensation of consumer for resulting damage to home, is inadequate).

62. *E.g.*, Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 34 (S.D. Iowa 1973) (one-year limit contained in warranty for complaints regarding machinery is enforceable); Willis v. West Ky. Feeder Pig Co., 132 Ill. App. 2d 266, 271, 265 N.E.2d 899, 903 (1971) (seven-day limit for return of pigs is enforceable).

63. *E.g.*, Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1217-18 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (15-day limit for complaints regarding industrial chemical with possible latent defects is inadequate); Wilson Trading Corp. v. David Ferguson, Ltd.,

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In addition to focusing on the results of damage limitations, courts often scrutinize the objective characteristics of the limitations and the process that led to inclusion of the limitations in the contract. For example, many courts and commentators support the view that damage limitations must be conspicuous in order to be enforced.⁶⁴ Other courts have held that the absence of this requirement from section 2-719, in contrast to its inclusion in section 2-316, demands that it not be inferred.⁶⁵ There is a greater degree of consensus that damage limitations should be the result of a specific bargain. Limitations that are negotiated between parties are generally given force,⁶⁶ while those included in a standard form contract or not mentioned during the transaction are often voided by the courts for not having been the subject of negotiations.⁶⁷

2. General Standards Governing Remedial Waivers

Courts also use the general doctrines of unconscionability and adhesion to void remedial waivers. Unconscionability is now the more important of the two and has been incorporated into the U.C.C. as section 2-302. As used there, the term is undefined; however, the official comment states “[t]he principle is one of the prevention of oppression and unfair surprise.”⁶⁸

Although the provision itself gives no indication that it is intended to apply specifically to waivers of remedial rights, the ten cases offered by the comment as examples of unconscionable situations all relate to

23 N.Y.2d 398, 404-06, 244 N.E.2d 685, 688-89, 297 N.Y.S.2d 108, 112-14 (1968) (10-day limit for complaints regarding yarn fails of its essential purpose when latent defect is present); *cf.* *McCLINTOCK ON EQUITY* § 105, at 281 (2d ed. 1948) (“Ordinarily, laches will not be imputed to a plaintiff until the mistake is discovered.”)

64. *E.g.*, *Orange Motors, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319, 320 (Fla. Dist. Ct. App.), *cert. denied*, 263 So. 2d 831 (Fla. 1972) (any inconspicuous language makes remedy fail of its essential purpose); *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 155-56, 324 N.E.2d 583, 587 (1974) (inconspicuous remedy limitation cannot have been part of actual agreement and would be void on that basis); *R. Nordstrom, supra* note 36, § 89, at 276 (1970); *J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code* § 12-11 (1972).

65. *E.g.*, *Checker Taxi Co. v. Checker Motor Sales Corp.*, 376 F. Supp. 997, 999-1000 (D. Mass. 1974); *Gramling v. Baltz*, 253 Ark. 361, 362-63, 485 S.W.2d 183, 189-90 (1972).

66. *E.g.*, *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013, 1015 & n.2, 1018-19 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520, 524-25 (S.D.N.Y. 1974).

67. *E.g.*, *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 861, 454 S.W.2d 307, 309 (1970) (where agreement was reached by telephone and nothing was said about limited remedy, subsequently discovered limitation of remedies printed on shipping tag is void); *Haugen v. Ford Motor Co.*, 219 N.W.2d 462, 469-70 (N.D. 1974) (terms of remedy limitation in booklet given buyer after he signed contract will not be given force without proof of actual agreement to limitation).

68. U.C.C. § 2-302, Comment 1.

damage limitations and warranty disclaimers.⁶⁹ In practice, courts have tended to use unconscionability in analyzing such contractual provisions and, in general, as a standard for the entire area of remedial waivers.⁷⁰ In contrast, they usually have refused to apply the concept to other aspects of the contractual process.⁷¹

69. Professor Leff's analysis of § 2-302 takes note of the Comment's emphasis on these two types of remedial waivers, Leff, *supra* note 48 at 516-24. But the provision could not be specifically directed to these matters, he argues, since each of them is covered by a separate and much more explicit section of the Code. This would not negate the possibility, however, that the concept was intended as a general standard for remedial waivers. Professor Leff considers this possibility but rejects it as lacking both textual support and relevant guidelines. *Id.* at 525. *But see* J. WHITE & R. SUMMERS, *supra* note 64, § 12-11, at 387-88 (unconscionability provision is general policing guideline applicable to all clauses in contract and all oppressive situations). The contention here is not that the use of unconscionability as a general guideline for remedial waivers is logical, but that such a reading represents the interpretation courts have actually used.

70. The use of unconscionability as a standard is of course found in cases involving consequential damage limitations, where unconscionability is explicitly incorporated in the applicable U.C.C. provision, § 2-719(3). *E.g.*, *Luick v. Graybar Elec. Co.*, 473 F.2d 1360, 1363 (8th Cir. 1973) (requiring determination on unconscionability where limitation of consequential damages is involved); *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 431-34, 347 A.2d 253, 262 (1975) (voiding effort to exclude liability for both personal injury and property damage as unconscionable, even as applied to property damage alone). But unconscionability is also used as a standard for judging other types of remedial waivers, such as limitations on direct damages, *e.g.*, *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 292 (Alaska 1976) (requiring determination on unconscionability where disclaimer excluding direct damages is involved); *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 10-11, 321 N.E.2d 897, 903-04 (1974) (voiding remedy limitation that fails of its essential purpose as unconscionable), limitations on the time for notification of breach, *e.g.*, *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20, 22 (M.D. Ala. 1975) (voiding time limitation as unconscionable where product has latent defect); *Willis v. West Ky. Feeder Pig Co.*, 132 Ill. App. 2d 266, 271, 265 N.E.2d 899, 903 (1971) (sustaining time limitation, but using unconscionability as standard), liquidated damages, *e.g.*, *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 575-77 (8th Cir. 1975) (sustaining liquidated damage clause that reasonably estimates risk, but using unconscionability as standard); *A-Z Servicenter, Inc. v. Segall*, 334 Mass. 672, 676-77, 138 N.E.2d 266, 269 (1956) (voiding acceleration clause as unconscionable when it results in disproportionate liquidated damages), and warranty disclaimers, *e.g.*, *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 439-40, 208 S.E.2d 321, 324-25 (1974) (cancelling warranty disclaimer as unconscionable); *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 418-19, 514 P.2d 654, 657 (1973) (sustaining warranty disclaimer, but using unconscionability as standard).

71. For example, most courts have held that an excessive price is not a basis for a finding of unconscionability. *E.g.*, *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 113-14 (D.C. 1971); *Lundstrom v. Radio Corp. of America*, 17 Utah 2d 114, 119, 405 P.2d 339, 342 (1965). *But see* *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 438-39, 201 A.2d 886, 888-89 (1964) (excessive finance charges are unconscionable); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27-28, 274 N.Y.S.2d 757, 759-60 (Dist. Ct. 1966), *rev'd as to damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967). Finance charges are a special case, however, since they create the one circumstance where the "real" price of the item is established by the contract itself, and need not be determined by the court. For a rare case in which a price term was held unconscionable in the absence of excessive finance charges, see *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1, 11, 380 N.Y.S.2d 532, 541 (Sup. Ct. 1976).

There is no compelling reason why the doctrine of unconscionability could not be extended to the price term and still be used as a specific criterion for judging remedial waivers. But most courts have refused to make this extension and have used § 2-302 only for waivers.

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The unconscionability standard relates both to the results of the waiver and to the characteristics and formation of the waiver term. The rule against unconscionable results appears to be the same as that applied to damage limitations and liquidated damage clauses: a court will enforce the waiver only if the results it prescribes are similar to those a court would reach. If the waiver leads to an economic loss outside the scope of possible court decisions, it will be declared unconscionable.⁷² As far as the characteristics and formation of the waiver term are concerned, courts again find contracts unconscionable for the same reasons that they find contracts in violation of the specific U.C.C. provisions. Thus, a court will disapprove an inconspicuous or incomprehensible waiver term as violating the unfair surprise component of unconscionability.⁷³ Similarly, a term that is not bargained for is often deemed unconscionable under section 2-302's concept of oppression.⁷⁴

The second general doctrine that has been applied to remedial waivers is the concept of adhesion. An adhesive term is one that is attached to the main agreement, usually by means of a standard form contract, and that negates the apparent meaning of other contractual terms.⁷⁵ In sales contracts, such terms are generally remedial waivers.⁷⁶

The concept of adhesion is not specifically mentioned in the U.C.C.,

72. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (provision in contract resulting in repossession of all goods purchased when payments on one item became overdue is unconscionable); *Dean v. Universal C.I.T. Credit Corp.*, 114 N.J. Super. 132, 139, 275 A.2d 154, 157-58 (1971) (repossession of vehicle along with buyer's property contained in vehicle is unconscionable).

73. *E.g.*, *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 447-48, 240 A.2d 195, 198-99 (1968) (paragraph in fine print on back of order form and second paragraph in manual that owner did not receive until after product was delivered were both unconscionable attempts to disclaim warranties and limit remedies); *Bogatz v. Case Catering Corp.*, 86 Misc. 2d 1052, 1055-56, 383 N.Y.S.2d 535, 537-38 (Civ. Ct. 1976) (clause in small print permitting retention of large deposit if contract is cancelled is unconscionable). This rule does not apply in all cases if the inconspicuous provision conforms to trade usage. If the court is satisfied that the underlying policy of the requirement is fulfilled by a pre-existing understanding between commercial parties, it may permit the requirement of conspicuousness to be eliminated. *See Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 260-61, 544 P.2d 20, 23-24 (1975); note 106 *infra*.

74. *E.g.*, *Kugler v. Romain*, 58 N.J. 522, 544-45, 279 A.2d 640, 651-62 (1971) (unreasonable terms imposed on purchaser who lacked meaningful choice are unconscionable); *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 950-52, 371 N.Y.S.2d 289, 290-92 (Civ. Ct. 1975) (contract imposed on party who does not speak English by high pressure sales tactics is unconscionable).

75. For the leading commentary on the adhesion doctrine, see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). *See generally* McCall, *supra* note 35; Oldfather, *Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking*, 16 U. KAN. L. REV. 303 (1968); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

76. *See* McCall, *supra* note 35, at 420 (courts do not void price terms, no matter how objectionable, as adhesive).

but it figured prominently in the early drafts of Article 2⁷⁷ and may now be regarded as having been incorporated into the Code as a special case of unconscionability.⁷⁸ Adhesive terms are also voided by the courts because they create the same dangers of unfair surprise or of oppression. First, terms voided as adhesive are often inconspicuous; they characteristically appear in the fine print provisions of standard form contracts, where they go unnoticed by the unwary consumer.⁷⁹ Second, these terms, even when noted by the buyer, are usually not bargained for but are part of a form that the seller is either unauthorized or unmotivated to change.⁸⁰ Considerations of convenience or necessity may leave the buyer little choice, especially where one type of contract is used throughout a given industry⁸¹ or where one company is exercising a monopoly.⁸²

II. A Unifying Principle for the Waiver of Remedial Rights

The constitutional and commercial law decisions regarding the contractual waiver of remedial rights reflect converging lines of development. In the area of constitutional law, the Supreme Court has rejected the idea of establishing obligatory rules for judging waivers of constitutionally protected remedial rights in favor of more flexible

77. Llewellyn's Draft, *supra* note 1, § 1-C. This section, entitled "Declaration of Policy, and Procedure with Regard to Displacement of Single Provisions or Groups of Provisions by Agreement," was specifically directed to situations in which "a number of points purport to be covered in bloc by a transaction, as by a form-contract, or by reference to a set of 'rules.'" *Id.* § 1-C(2)(a). Thus the major purpose of this general provision on contractual alterations of legal rights was to regulate standard form contracts.

78. In cases governed by the U.C.C., the adhesion doctrine is most often incorporated by specific reference to standard form contracts. The term "adhesion" has become increasingly less common in recent cases, probably because of its absorption into the Article 2 concept of unconscionability. *See* McCall, *supra* note 35, at 419 (adhesion significantly relied on only by courts of California, which is only state not to adopt U.C.C.'s unconscionability clause).

79. *E.g.*, Farmers Union Grain Terminal Ass'n v. Nelson, 223 N.W.2d 494, 497-98 (N.D. 1974); Baker v. Seattle, 79 Wash. 2d 198, 199-200, 484 P.2d 405, 406 (1971).

80. *E.g.*, Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 640, 171 N.W.2d 689, 693-94 (1969) (exclusion of liability in telephone company contract for listing in directory); Farmers Union Grain Terminal Ass'n v. Nelson, 223 N.W.2d 494, 497-98 (N.D. 1974) (disclaimer in form contract prepared by large grain storage company).

81. The automobile industry is a leading example. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389-90, 161 A.2d 69, 86 (1960); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 447, 240 A.2d 195, 198 (1968).

82. A familiar example is the telephone company. *See, e.g.*, Allen v. Michigan Bell Tel. Co. 18 Mich. App. 632, 171 N.W.2d 689 (1969). *Contra*, Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976) (remedy limitation in telephone company's standard form contract not void as adhesive, despite inequality of bargaining power between parties).

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standards tailored to the facts of the commercial situation.⁸³ In commercial law, most courts have adopted the view that there are issues of public policy involved—issues too important to permit remedial rights to be waived or sold unless a particular procedure is followed and a certain level of fairness is assured.⁸⁴ The result is a dialogue between these two lines of cases, in which each has become infused with the policies associated with the other. In constitutional adjudication, courts have sought the flexibility and pragmatism of commercial law in judging contractual waivers of remedial rights; in commercial law, courts have tended to impose carefully structured requirements and to employ intensive scrutiny in a manner characteristic of constitutional adjudication.

The convergence of these two areas of law suggests that courts are in fact relying on a single principle in both areas, a principle based on notions of flexibility and fairness. The meaning of fairness is derived from the due process clause, which requires notice and a hearing whenever binding determinations affecting property rights are made. This standard of fairness is imposed as a requirement of law in constitutional cases and, less rigidly, as a matter of public policy where commercial remedial rights are involved.⁸⁵ The meaning of flexibility, in contrast, stems from the idea of “freedom of contract”: the agreement between the parties should be honored whenever possible, and the rules regulating that agreement should encourage, not impede, the process of contract formation.⁸⁶

83. See pp. 1060-61 *supra*. See also Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135. Professor Dunham's article is a leading consideration of the possible applications of the due process clause to the general field of commercial law. The author analyzes possible rationales for holding various commercial law remedies subject to the requirements of the due process clause, but ultimately rejects this approach on policy grounds. He argues that a literal application of due process would cause excessive disruption of commercial law procedures. A similar argument is presented in White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 506.

84. See pp. 1064-72 *supra*.

85. It has been established by an unbroken line of cases that due process considerations must govern judicial determinations of property rights. See, e.g., *Snidach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969) (prejudgment garnishment pursuant to statute); *Wuchter v. Pizzutti*, 276 U.S. 13, 18-19 (1928) (suit against out-of-state motorist); *Windsor v. McVeigh*, 93 U.S. 274, 277-78 (1876) (forfeiture of real property pursuant to statutory provision). These cases establish a public policy of procedural fairness that can be applied to non-constitutional cases as well. It is unquestioned that the enforcement of contracts is subject to the demands of public policy. RESTATEMENT OF CONTRACTS § 512 (1932) (“A bargain is illegal . . . if either its formation or its performance is . . . opposed to public policy.”); 6A CORBIN ON CONTRACTS § 1375 (1962) (“In thousands of cases contracts have been declared to be illegal on the ground that they are contrary to public policy”)

86. It should be noted that true freedom of contract demands flexibility, not leniency; in fact, it may demand stringent oversight of the contractual process in many cases. As Professor Kessler has noted, there are circumstances in which freedom of contract can be

The combined demands of fairness and of contractual flexibility suggest a principle of "functional equivalence." To preserve contractual flexibility, parties should be permitted by mutual agreement to restructure the remedies for breach; to ensure the presence of fairness, parties should be allowed to restructure these remedies only if the interaction between the parties provides the functional equivalent of the rights that have been eliminated.⁸⁷ Two major implications emerge from the principle of functional equivalence. Its fairness component suggests that there is an irreducible minimum of remedial rights that must be provided in any contractual situation. Its element of contractual flexibility suggests that these rights need not be fixed in form; instead, they can be provided in a variety of ways, which includes the private interaction between the parties to the contract.

A. *Functional Equivalents for Constitutional Rights*

Since notice and a hearing have been held to be essential components of due process, their waiver in a sales contract can lead to a violation of the due process clause.⁸⁸ Courts will sustain such a waiver only if the precise functions of these two procedures are provided by the private interaction of the parties. In *National Equipment Rental, Ltd. v. Szukhent*,⁸⁹ a leading case on waiver of notice, the Court specifically

achieved only through flexible rules that are stringently applied. Kessler, *supra* note 75, at 641-42. The principled way in which he uses the term enables it to accommodate the basic elements of due process, just as a realistic use of due process can accommodate the idea of freedom of contract. *See id.* at 641-42 (emphasis in original):

The prevailing dogma . . . , insisting that contract is *only* a set of operative facts, helps to preserve the illusion that the "law" will protect the public against any abuse of freedom of contract. This will not be the case so long as we fail to realize that freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract.

This may be compared with the Supreme Court's statement on due process in *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961):

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation

. . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

87. In this way, the underlying purpose of the due process clause would be fulfilled without holding the parties to the formal requirements of judicial process. *Cf.* *Goss v. Lopez*, 419 U.S. 565, 581-84 (1975) (informal, minimal process fulfills Fourteenth Amendment requirements in school disciplinary setting). For other leading statements on the flexibility of due process requirements, see, *e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972).

88. *See pp.* 1058-59 *supra*.

89. 375 U.S. 311 (1964). The case involved a contractual clause in which the first party appointed a person closely connected with the second party as the first party's agent for service of process. The clause was designed to serve as a forum selection provision, but it

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held that prompt, unofficial transmittal of a summons could replace the right to receive the summons directly from the court.⁹⁰ A similar line of analysis was used in *Overmyer*. The Court indicated that Overmyer was aware of both the existence and significance of the cognovit note. Thus Overmyer could expect judgment to be entered against it as soon as it stopped making the payments required by the contract.⁹¹

In a similar way, the waiver of a person's right to a hearing will be deemed acceptable by the courts only if the functional equivalent of the hearing is provided. The Supreme Court in *Goldberg v. Kelly*⁹² held that the crucial components of a hearing are the right to make a presentation of one's position, the right to confront adverse witnesses, and the right to be represented by counsel. In a private interaction, these rights are secured by bargaining, which gives each party the opportunity to present his position, to challenge the position of his adversary, and to obtain the assistance of a lawyer or of some other skilled negotiator.

In analyzing the waiver of a hearing in *Overmyer*, the Supreme Court focused its attention on the bargaining process between the parties, and it analyzed this process in terms similar to those established for administrative hearings in *Goldberg*. The *Overmyer* Court noted that the two parties, being of equivalent size and economic power, had an opportunity to present their respective positions.⁹³ It emphasized that there had been extensive, face-to-face negotiations in which all issues, including the cognovit clause, were open for discussion.⁹⁴ Finally, the Court specifically indicated that Overmyer had been represented

also had the effect of waiving the right to receive notice. For this reason, *Szukhent* is often cited to support the proposition that constitutional rights may in fact be waived. *E.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218, 235-36, 236 n.17 (1973); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

90. 375 U.S. at 316, 318. Justices Black and Brennan, dissenting separately, each emphasized the adhesive nature of the waiver term involved. *Id.* at 332-33 (Black, J., dissenting); *id.* at 333-34 (Brennan, J., dissenting). Justice Black argued that the actual events were not the equivalent of the rights that had been waived, primarily because the waiver of notice also operated as a forum selection clause, which denied *Szukhent* the right to have a trial near his home. *Id.* at 324-26. The right to a convenient trial could be waived, Justice Black agreed, but the particular provision in this case was adhesive and thus ineffective. *Id.* at 326-27. In other words, his argument is that the result of the waiver was not the functional equivalent of the rights a court would have provided, and thus the process by which the waiver was secured must be scrutinized. This is essentially the same mode of analysis as is proposed in this Note.

91. 405 U.S. at 186-87. In fact, as soon as Overmyer ceased making payments, it initiated an action in federal court to stay all proceedings under the cognovit. *Id.* at 181.

92. 397 U.S. 254, 266-71 (1970). *Cf.* *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (reaffirming *Goldberg*, although altering its specific requirements regarding oral hearings for certain types of administrative decisions).

93. 405 U.S. at 186.

94. *Id.* at 182-83, 186.

by counsel when the cognovit was included in the contract.⁹⁵

In contrast to the agreements in *Szukhent* and *Overmyer*, the contractual waiver provision in *Fuentes* was found to be defective, mainly because the provision itself was unclear and thereby failed to provide the functional equivalent of notice.⁹⁶ Moreover, the Court suggested that even if the provision had been clear, it still would have been ineffective, because of the inequality of bargaining power between the parties and the resultant lack of actual bargaining.⁹⁷

Thus the Supreme Court cases involving contractual waivers suggest that judicial notice can be waived only if unofficial notice of an equivalent nature is provided and that a hearing can be waived only if its equivalent is supplied by the private interaction between the parties.⁹⁸

B. *Functional Equivalents for Commercial Rights*

Remedial waivers that alter only specific aspects of the ultimate remedy, thus not rising to constitutional dimensions, fall into two main categories: either they withdraw a potential breach from consideration in any hearing that might ultimately take place, or they establish a remedy for a specific breach in advance of any hearing. The waivers that withdraw a potential breach from judicial consideration are usually warranty disclaimers. These disclaimers waive the right to have a court determine whether a certain kind of breach has actually

95. *Id.* at 183. See *North Penn Consumer Discount Co. v. Shultz*, No. 74-4195-03-6 (Pa. Super. Ct. Oct. 6, 1977) (denying petition to open cognovit judgment). The Pennsylvania court began by citing *Overmyer* for the proposition that "if the waiver of procedural rights entailed in signing a confession note is to be valid, it must be intelligent and voluntary." *Id.* at 3. It then rejected the claim of the makers of the note that they had not understood the cognovit. Apparently dissatisfied with the adequacy of the "intelligent and voluntary" rule in answering a claim that the cognovit constituted a denial of due process, the court went on to specify the various procedural opportunities available to the note makers—*e.g.*, the petition to open judgment or a stay of execution. *Id.* at 6. The analysis, in effect, was that these procedural opportunities were the functional equivalent of the rights that had been waived.

96. 407 U.S. at 95.

97. *Id.* at 94-95.

98. The third major element of due process, in addition to notice and a hearing, is an impartial decisionmaker. There are no Supreme Court cases dealing directly with the waiver of one's due process right to a neutral decisionmaker, but closely related issues have been raised in several other contexts. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (clause providing that disputes arising from overseas towing contract were to be adjudicated in London High Court of Justice is valid because that court is fully competent forum); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (arbitration pursuant to contractual provision invalid because supposedly neutral third member of panel had pecuniary relationship with one party). In effect, both decisions turned on whether the substitute decisionmaking body (the London Court or the arbitration panel) was the functional equivalent of the decisionmaker who would have decided the case had there been no contrary provision in the contract.

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occurred; in effect, they represent the waiver of notice and a hearing on that particular issue. To determine whether or not such a waiver will be permitted, courts scrutinize the objective characteristics of the waiver provision and the process by which the waiver has been secured; there must be some indication that the functional equivalents of notice and a hearing have been provided for in the interaction between the parties.⁹⁹

The equivalent of judicial notice is the requirement of clarity and conspicuousness. A conspicuous provision informs the parties, particularly the one who stands to lose something, of precisely what is at stake, thereby preventing him from being deprived of his rights without a chance to contest the substance of the issue.¹⁰⁰ The equivalent of a judicial hearing is provided, once again, by bargaining.¹⁰¹ The course of bargaining that courts will accept as validating a waiver bears a close resemblance to the due process concept of a hearing. First, there must be an opportunity to present one's own position. This generally requires a process of negotiation, whether it be oral or written.¹⁰² Second, there must be an opportunity to have an effect.¹⁰³ In a bargaining situation, the opportunity to have an effect is at times frustrated by a gross disparity in bargaining power, combined with overreaching practices. When that occurs, courts will often void a waiver term by reasoning that the term was obtained by oppressive means and thus is unconscionable.¹⁰⁴

The third criterion is the right to be represented by counsel. Courts

99. See pp. 1065-66, 1071-72 *supra*.

100. See *id.*

101. Notice, of course, is the necessary antecedent of bargaining; unless the person is aware that a particular action has been taken, he has no way to contest it. But notice by itself is of no value unless the possibility exists for the person to make an appearance and obtain some advantage.

102. The point is particularly clear in those cases where other terms were negotiated but the remedial waiver was added by one party without any specific mention being made of it. See *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 861, 454 S.W.2d 307, 309 (1970) (agreement negotiated by telephone takes precedence over disclaimer printed on shipping tag); *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Ct. App. 1973) (agreement negotiated with express warranty of conformity to model display takes precedence over "as is" clause in contract).

103. Although this does not have a precise parallel in the due process requirements specified in *Goldberg*, it is derived from the same underlying principle as the right of cross-examination. The idea is that the other party must present himself and take his chances with being discredited or defeated.

104. *E.g.*, *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 App. Div. 2d 1004, 1005, 318 N.Y.S.2d 352, 353-54 (1970), *aff'd mem.*, 30 N.Y.2d 613, 282 N.E.2d 126, 331 N.Y.S.2d 40 (1972) (waiver term is unfair for lessor who cannot bargain, as it would be for consumer); *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 140-41, 302 N.Y.S.2d 390, 393-94 (Civ. Ct. 1969) (conspicuous waiver term is unfair and thus void when obtained by use of unequal bargaining power).

often cite the fact that a particular contract was negotiated by lawyers, or by experienced businessmen, as a reason for enforcing waiver terms.¹⁰⁵ Although the presence of a lawyer is not a necessary precondition to the valid waiver of remedial rights, it does suggest that informed bargaining has taken place. On the other hand, when the party who waived his rights is uneducated or does not speak English and the contract is particularly complex, courts tend to conclude that there was no real bargaining. Such contracts are frequently declared unconscionable.¹⁰⁶

The other major type of waiver in sales contracts limits the remedy for a specific breach in advance of any hearing. Liquidated damage clauses and damage limitations are the principal examples. Clauses such as these eliminate the parties' rights to have a court determine the consequences of the breach—in the typical case, to determine the amount of damages to be awarded. They thus represent the waiver of the right to an impartial decisionmaker on that issue. In determining

105. *E.g.*, *Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F.2d 696, 699 (8th Cir. 1974) (contract negotiated by commercial lawyer and experienced engineer); *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1397 (6th Cir. 1970) (party who waived his rights was a lawyer).

106. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965) (buyer's lack of education and low income were factors in deciding that contract was unconscionable); *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975) (buyer did not speak English and could not understand contract provisions).

The distinction between negotiated and unnegotiated contracts frequently parallels the distinction between mercantile and consumer transactions. Courts and commentators have noted that consumers are frequently presented with standard form contracts by salesman who have neither the desire nor the authority to alter any of the terms. *See, e.g.*, *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 389-90, 161 A.2d 69, 86 (1960); *Slawson, supra* note 75, at 552-53. The consumer-merchant distinction has frequently served as a basis for legislation, *e.g.*, *Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, 15 U.S.C. §§ 2301-2312 (Supp. V 1975); U.C.C. § 2-719(3); MASS. ANN. LAWS. ch. 106, § 2-316A (*Michie/Law. Co-op* 1976), as well as court decisions, *e.g.*, *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520, 524-25 (S.D.N.Y. 1974); *Baker v. Seattle*, 79 Wash. 2d 198, 199-200, 484 P.2d 405, 406 (1971).

Although the distinction is a useful one, it can be overdrawn. Contracts between merchants often contain unnegotiated waiver terms that will be voided by courts. *See Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 250-51 (N.D. Ill. 1974), *aff'd on other grounds*, 522 F.2d 469 (7th Cir. 1975); *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 261, 544 P.2d 20, 24 (1974). Consumer contracts, on the other hand, are often bargained for, either by comparison shopping, when small items are involved, or by negotiation, when the item is a large one, like a car. In fact, remedial waivers are viewed by courts as particularly objectionable when they are added to a contract whose other terms were specifically negotiated. *See* note 102 *supra* (citing cases). Although the consumer-merchant distinction can be a useful one, bargaining is a more exact criterion for determining whether a contract will be considered acceptable by a court. As the Supreme Court said in discussing procedurally based protections against prejudgment garnishment, "[i]t may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error." *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975).

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whether such a waiver is permissible, courts generally scrutinize the results reached. The waiver tends to be accepted if it provides the functional equivalent of the result the court itself would reach in those same circumstances.¹⁰⁷

One problem with this result-oriented policy is that the contractually limited remedy, even if apparently acceptable, is not always the precise equivalent of a judicial determination, since the opportunity for additional compensation may be lost.¹⁰⁸ Courts often turn, therefore, to an analysis of the process by which the waiver was secured. When the remedy is acceptable but still deprives one party of important rights, courts will usually demand that the waiver of these rights be secured by a fair process—one that provides the functional equivalent of the process a court would use when excluding consequential damages or direct damages of certain types. It is for this reason that the requirements of conspicuousness and bargaining, which are characteristic of warranty disclaimer cases, are often incorporated into cases involving damage limitations.¹⁰⁹

III. Implications of the Functional Equivalence Principle

This Note has derived the principle of functional equivalence from the dialogue between two lines of court decisions regarding contracts that waive remedial rights. This principle provides a single explanation, applicable to both constitutional and commercial law, for the actions courts have taken when confronted with such contracts. Nevertheless, the conscious adoption of this principle by the courts would not be without effect. Application of the principle would clarify the standards for contractual waiver within the areas of constitutional and commercial law and would clarify the relationship between the standards for contractual waivers in these two areas.

A. *Standards for Remedial Waivers*

Although the principle of functional equivalence would not lead to a different result in the *Szukhent*, *Overmyer*, or *Fuentes* cases, it would

107. See pp. 1068, 1071 *supra*.

108. This should be of little concern where liquidated damage clauses are involved. There, the accuracy of the prediction serves as testimony to its fairness, and all that the complaining party has surrendered is his chance to receive a windfall verdict from the jury. That may not be an insignificant loss, but it is not one that need trouble a court's sense of justice. On the other hand, the exclusion of consequential damages, or of direct damages beyond replacement or repair, may be unfair as well as significant. Where an economic loss has been sustained, the chance to receive compensation, even if that chance is an uncertain one, can be of considerable importance.

109. See p. 1069 & notes 64-67 *supra*.

provide a coherent principle for this line of cases. A functional equivalence analysis for constitutional waivers of remedial rights would begin where *Fuentes* did, with minimal requirements of due process.¹¹⁰ Instead of resting on a limited rule such as the clarity of the waiver term, however, it would establish a comprehensive legal framework for ensuring that the waiver is consistent with due process requirements of fairness. The principle would allow contracting parties sufficient leeway to strike a demanding but fair bargain, as Frick did in the *Overmyer* case. At the same time, it would prohibit overreaching practices of the kind that the merchants in *Fuentes* pursued.

In the area of commercial law, the applicable standards for given cases are normally well defined, since they are based on explicit statutory provisions. The principle of functional equivalence would clarify the foundations of these standards and consequently would resolve some of the specific questions that have arisen. For example, courts disagree about whether a warranty disclaimer need be conspicuous if the buyer read and understood its terms.¹¹¹ The proposed principle makes clear that the purpose of conspicuousness is to bring the disclaimer to the buyer's attention and thus to serve as a prelude to bargaining. Where actual bargaining over the disclaimer took place, the court can safely assume that the buyer was aware of the disclaimer's import and that the requirement of notice has been fulfilled. But where there was no bargaining, an inconspicuous provision must be voided.

Another question about which courts have disagreed is whether a damage limitation must be conspicuous. Section 2-719 does not explicitly demand this, but some courts have implied such a requirement.¹¹² Under the proposed principle, if the limitation were the product of careful negotiation between the parties and part of a contract written specifically for that occasion, there would be no reason to demand that it be conspicuous. On the other hand, if the limitation were part of a standard form contract, it would need to be conspicuous unless there were clear evidence of bargaining.

A third question dividing the courts is whether various waiver terms are severable. Some courts have held that terms that appear together in a contract—usually warranty disclaimers and damage limitations—must be considered separately; if one is voided, the other still can stand.¹¹³ Other courts have held that one incorrect or unconscionable attempt at

110. See p. 1063 *supra*.

111. See p. 1065 & notes 43-44 *supra*.

112. See p. 1069 & notes 64-65 *supra*.

113. *E.g.*, *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300, 1309 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *Carter v. Jackson*, 11 U.C.C. Rep. Serv. 983, 985-86 (D.C. 1972).

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waiver taints, and thus negates, the entire effort to restructure remedies.¹¹⁴ The principle of functional equivalence would reduce the significance of the severability issue by applying the same general standards to each effort to waive remedial rights. Thus courts would not need to rely on the concept of tainting to reach the proper result.

Aside from answering various questions raised by the specific provisions governing remedial waivers, the principle of functional equivalence would also serve to clarify the general doctrine of unconscionability. It would focus this doctrine on the issue of remedial waivers and help define its requirements through analogy to the more concrete concept of due process. Thus a remedial waiver would be unconscionable if it prescribed a remedy whose result was not the functional equivalent of a remedy that a court might prescribe¹¹⁵ or if it eliminated any rights to notice or a hearing without providing an equivalent.¹¹⁶

B. *Relationship between Waivers of Constitutional and Commercial Rights*

Functional equivalence would provide additional clarification by establishing a single principle from which similar standards for waivers in constitutional and commercial law could be derived.¹¹⁷ The bi-

114. *E.g.*, *Beal v. General Motors Corp.*, 354 F. Supp. 423, 426 (D. Del. 1973); *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 43-44 (N.D. Ill. 1970).

115. *See* note 72 *supra*.

116. *See* notes 73-74 *supra*.

117. The view of remedial rights that emerges from the principle of functional equivalence is thus consistent with the developing recognition of the interdependence of public and private law. The idea that these two areas of law are closely related figured in the attack on substantive due process. *See, e.g.*, Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933) (enforcement of contracts is positive action by state and therefore "a subsidiary branch of public law"). Recently, this same idea has been the basis of arguments that contractual agreements should be subject to constitutional requirements. *See, e.g.*, Thompson, *Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 22-23; Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 963 (1974). Functional equivalence would acknowledge the close relationship between public and private law in the area of contractual waivers of remedial rights. If the applicable rules for the waiver of these rights depend on whether the particular rights in question are constitutional or commercial, then the distinction between the two areas of law is critical. But if the applicable rules depend on notions of fairness and the specific facts of the transaction, the distinction becomes much less important. In its place appears a single system, relevant to all situations. *Cf.* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957) (suggesting that constitutional inquiry should focus on impact of particular action on individuals, not on question whether constitutional requirements are applicable); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 7-8 (1961) (suggesting that inquiry should balance personal interests of parties involved, impact of court inaction on these interests, and demands of local autonomy, rather than trying to determine whether constitutional requirements are applicable).

furcated conceptual approach employed at present serves neither the interests of the parties nor of the courts. From the perspective of the parties, the question whether the waiver is of constitutional or merely commercial proportions is of little import—what is crucial to them is whether the waiver will be enforced or voided. From the perspective of the judge or jury, the validity of the waiver is an identifiable issue that is best evaluated on its own terms, not by reference to a complex division between two sets of ill-defined standards. The principle of functional equivalence would focus the analysis on the nature of the waiver itself and would generate a set of standards that is more directly related to the practical realities of waiver cases.

The principle would also lead to a clearer conception of the nature and extent of the remedial rights themselves. It suggests that the prevailing notion of fair or adequate remedial rights results from the application of due process considerations to the particular transaction between parties.¹¹⁸ Although the functional equivalence principle is a flexible one, it does require that an irreducible minimum of remedial rights must be available to each party to a contract, as a requirement of law, and that this minimum cannot be sold or otherwise eliminated. At the same time, it would permit these rights to be provided in a variety of ways, including a purely private interaction.¹¹⁹ The rights are thus universal but flexible, relatively fixed in content but largely variable in form. Such a conception of remedial rights would permit courts to satisfy the demands of both fairness and flexibility in judging remedial waivers.

118. See pp. 1072-73 *supra*.

119. See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937) (private lawmaking is both widespread and desirable).