

TERMS SUBJECT TO CHANGE: ASSENT AND UNCONSCIONABILITY IN CONTRACTS THAT CONTEMPLATE AMENDMENT

*Daniel Watkins**

INTRODUCTION

Let's form a contract. I promise to do something. You promise to do something. Understand? Oh, by the way, I can change the terms of our agreement in the future. Perhaps I can unilaterally alter the terms whenever I feel like it. Or maybe "we" can "bilaterally" modify the contract through a specific procedure we agree on now. Got it? Great. We have a deal.¹

What just happened? What sort of contract do we have? What kinds of terms can I (or perhaps "we") add, change, or abrogate under the terms of our agreement? Different courts give different answers.² One thing is clear, though: "change of terms" provisions are ubiquitous in contracts today.³ Sometimes these clauses purport to allow one party

* Managing Editor, *Cardozo Law Review*. J.D. Candidate (2010), Benjamin N. Cardozo School of Law; B.A., University of Northern Colorado. Thanks to Professor Daniel Crane for his helpful comments, Caroline Boulanger for her thoughtful editing, and my colleagues on the *Law Review* for their friendship and dedication. A special thanks to my wife Amilee—your good humor enabled me to write this Note.

¹ This characterization is somewhat unfair; the offeror comes across as a bit slimy. But the description of a typical agreement proposed by parties who wish to create a non-mutual right to change the terms of that agreement in the future is accurate. Consider the change of terms provision in a retail banking contract used by Bank of America:

[The Bank] may change this Agreement at any time. For example: we may add new terms and conditions and we may delete or amend existing terms and conditions. We generally send you advance notice of the change. If a proposed change is favorable to you, however, we may make the change at any time without advance notice. If you do not agree with the proposed change, you may close your account. However, you indicate your agreement to the change if you continue to use your account or keep it open.

Pertierra v. Bank of Am., No. B197964, 2008 WL 3974068, at *2 (Cal. Ct. App. Aug. 28, 2008).

² See, e.g., *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 285 (Cal. Ct. App. 1998) (arbitration provision purportedly added to a contract via a change of terms clause deemed invalid because it was outside the "universe" of terms eligible for addition). *But see Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899-900 (Ill. App. Ct. 2003) (arbitration provision added pursuant to a change of terms clause held valid because it was within the "universe" of terms eligible for addition).

³ See, e.g., David Lazarus, *Read That Fine Print Carefully*, S.F. CHRON., Sept. 28, 2005, at

to alter the terms of the contract whenever it likes.⁴ Other times the provisions identify actions that the parties agree will suffice as assent to modifications proposed in the future.⁵ Particularly in the consumer context, contracting parties seem determined to create provisions that allow for the easy amendment of their agreements via alteration or modification.⁶

Transaction costs are largely responsible for this desire to ease the burdens of amendment.⁷ An agreement that is easy to change reduces transaction costs when a situation arises in which an adjustment of the terms of the deal is advantageous to at least one party.⁸ But change of terms provisions can also be construed as unfair end-runs around settled contract law.⁹ Some courts have even questioned whether certain change of terms provisions render a contract illusory and, as such, completely unenforceable.¹⁰

C1 (reporting frequent use of change of terms provisions in credit card agreements).

⁴ See, e.g., *Perry v. FleetBoston Fin. Corp.*, Civ. A. No. 04-507, 2004 WL 1508518, at *4 (E.D. Pa. July 6, 2004) (change of terms provision found to confer some power to make unilateral alterations to the agreement). For the purposes of this Note, an “alteration” is the unilateral amendment of a contract. See *infra* Part I.A.

⁵ See e.g., *Pertierra*, 2008 WL 3974068 at *2. For the purposes of this Note, the term “modification” means a change in the contract accomplished through bilateral agreement. See *infra* Part I.A.

⁶ See *infra* Part II for a discussion of two consumer credit cases involving change of terms provisions.

⁷ Transaction costs seem to be to commercial law what the Man Behind the Curtain was to the Land of Oz. See generally R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988); cf. *THE WIZARD OF OZ* (MGM 1939). Just as the Great Oz was controlled by that little man, contract alteration and modification is another area of commercial law arising out of and controlled by transaction costs. See also Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1218-19 (1991) (expounding on Coase’s insight that transaction costs are just like any other cost in the market). A more sinister reason for the desire to easily modify or alter an agreement might be an attempt to avoid a duty of good faith by accumulating discretionary power to later “recapture opportunities foregone.” See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373, 387 (1980); *Badie*, 79 Cal. Rptr. 2d at 284.

⁸ Economists label this situation as an opportunity for a “Pareto Superior” reallocation. See RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* 12 (3d ed. 1986) (explaining that a “Pareto Superior” transaction is “one that makes at least one person in the world better off and no one worse off”). The alternative to a contractual modification or alteration in this situation is to terminate the agreement and form a new one. This procedure is often much more costly than modification or alteration because it involves forming a new, full-fledged contract. See RESTATEMENT (SECOND) OF CONTRACTS § 283 (1981) (defining contract rescission).

⁹ For example, some interpretations of change of terms provisions, if enforced, might constitute a private abrogation of the covenant of good faith and fair dealing. *Badie*, 79 Cal. Rptr. 2d at 284 (“The Bank’s interpretation of [its change of terms provision to permit any substantive changes to the contract as long as it notifies the other party] virtually eliminates the good faith and fair dealing requirement”); see also Eric Andrew Horwitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75, 105-06 (2006) (arguing that parties with the right to change the terms of a contract are still bound by the duty of good faith and fair dealing).

¹⁰ See, e.g., *Badie*, 79 Cal. Rptr. 2d at 284-85 (“[P]ermitt[ing] the Bank to exercise its unilateral rights under the change of terms provision, without any limitation on the substantive nature of the

Courts generally divide into two camps when deciding change of terms cases. Some courts focus almost exclusively on assent. That is, when considering unilateral alterations, these courts seek to identify the specific expectations of the parties regarding the scope of the change of terms provision at the time of formation.¹¹ If faced with bilateral modifications, these courts look exclusively to the parties' actions or non-actions to determine whether there was assent.¹²

Other courts focus on the policing doctrine of unconscionability.¹³ They begin their inquiry by evaluating the change of terms provision in the underlying agreement through the lens of procedural unconscionability.¹⁴ If they find procedural "naughtiness,"¹⁵ they then look to the terms of the alteration or modification itself to determine whether substantive unconscionability exists.¹⁶ When the new term favors one party in an extremely lopsided way, the alteration or modification is unenforceable.¹⁷

The result is polarization. Assent-based courts do not conduct robust unconscionability inquiries;¹⁸ unconscionability-based courts

change permitted, would open the door to a claim that the agreements are illusory . . .").

¹¹ See, e.g., *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 197-98 (E.D.N.Y. 2004) (looking to the other terms of the contract to determine what the parties understood the scope of the change of terms provision to be at the time of formation); *Lamb v. Emhart Corp.*, 47 F.3d 551, 559 (2d Cir. 1995) (recognizing that there must be some "ascertainable standard" present at the time of formation that defines the scope of the power conferred by the change of terms provision when unilateral alteration is permitted); *Badie*, 79 Cal. Rptr. 2d at 285 (determining whether and to what extent the "universe" of terms included in the original agreement can be altered by construing the parties' intent at the time of formation regarding the word "terms").

¹² See, e.g., *SouthTrust Bank v. Williams*, 775 So. 2d 184, 189 (Ala. 2000) (deeming parties to a contract with a change of terms provision to assent to a modification because they "took no action that could be considered inconsistent with an assent"); see also *Perry v. FleetBoston Fin. Corp.*, Civ. A. No. 04-507, 2004 WL 1508518, at *4 n.4 (E.D. Pa. July 6, 2004) (noting that if cardholder used card after receiving notice of a change to a contract with a change of terms clause, that use would constitute assent to the proposed change).

¹³ See, e.g., *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 827-35 (S.D. Miss. 2001) (see *infra* Part II.C for an in-depth discussion); see also 8 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2008) (setting forth the two-pronged structure of the unconscionability inquiry and discussing the history of the doctrine).

¹⁴ See 8 WILLISTON & LORD, *supra* note 13, § 18:10. Because assent is a threshold issue, unconscionability-focused courts still begin with an assent inquiry, however sparse or conclusory. See *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 900 (Ill. App. Ct. 2003) (determining swiftly, based on an application of Arizona law, that the cardholder assented to an alteration under the change of terms provision before conducting an unconscionability analysis).

¹⁵ This term for procedural unconscionability first appeared in Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

¹⁶ 8 WILLISTON & LORD, *supra* note 13, § 18:10.

¹⁷ *Id.*

¹⁸ See, e.g., *In re Am. Express Merchs. Litig.*, No. 03 Civ. 9592, 2006 WL 662341, at *8 (S.D.N.Y. Mar. 16, 2006) (no unconscionability analysis performed after finding that assent to change of terms provision gave American Express the power to add an arbitration provision). Admittedly, much of the reason that assent-based courts fail to conduct unconscionability

make conclusory assent findings.¹⁹ This is problematic because courts impair some basic tenets of contract law when they fail to conduct both assent and unconscionability inquiries in dealing with change of terms provisions.

Hearty assent inquiries are necessary to vindicate the consensual nature of contract law.²⁰ Assent determinations are particularly important for disputes involving change of terms provisions because, in these cases, the parties contract away part of their common law right to avoid unilaterally-imposed obligations.²¹ Courts must determine how much of that right the parties contracted away when they assented to the change of terms provision.²² But when a court focuses exclusively on assent, it creates opportunities for clever drafters to generate the appearance of broad assent through minor adjustments in the language of a contract with a change of terms provision.²³

Robust unconscionability analyses are therefore necessary to avoid unfair surprise and the enforcement of oppressive terms.²⁴ Unconscionability evaluations are especially essential in change of terms litigation because the bargaining process, which normally protects against exploitative terms, occurs before the implementation of the potentially onerous provision. But when a court focuses only on unconscionability in deciding a change of terms case, it enforces provisions because they are “fair,” not because they were adopted via mutual assent.²⁵ This degradation of assent offends the consensual foundation of contract law.²⁶

inquiries can be attributed to the fact that the term most often added under the change of terms clause is an arbitration provision. These arbitration provisions are evaluated under the broad preference for arbitration expressed in the Federal Arbitration Act (FAA) and therefore do not seem susceptible to serious challenge on unconscionability grounds. *See generally* The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000). *See also* *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (interpreting the FAA as creating a “national policy favoring arbitration”). Nevertheless, see *infra* Part I.C.2, which discusses why courts should evaluate not just the term added pursuant to the change of terms provision for unconscionability, but the change of terms provision itself.

¹⁹ *See, e.g.*, *SouthTrust Bank v. Williams*, 775 So. 2d 184, 189 (Ala. 2000); *Hutcherson*, 793 N.E.2d at 889-900; *Barille v. Sears Roebuck and Co.*, 682 N.E.2d 118, 122 (Ill. App. Ct. 1997).

²⁰ *See* 8 WILLISTON & LORD, *supra* note 13, § 4:1 (discussing mutual assent as a foundational aspect of Anglo-American contract law).

²¹ *See id.*

²² *See, e.g.*, *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 285 (Cal. Ct. App. 1998) (framing the essential inquiry as “[w]hat did the Bank’s customers consent to when they agreed that the Bank could unilaterally change the terms of their account agreements?”).

²³ *See infra* Part II.B for a discussion on the inherent weaknesses of the assent-based approach to change of terms provisions.

²⁴ *See* 8 WILLISTON & LORD, *supra* note 13, § 18:10.

²⁵ *See* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 764 (2004) (describing the pervasive reluctance of modern courts to use unconscionability analysis when determining whether to enforce arbitration provisions).

²⁶ *See, e.g.*, *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 830-32 (S.D. Miss. 2001); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899-900 (Ill. App. Ct. 2003) (applying

The dichotomy between assent and unconscionability analyses in change of terms jurisprudence stems from opposing theories of contract.²⁷ Unfortunately, this means that the division cannot be resolved merely by encouraging assent-based courts to take unconscionability more seriously or by urging unconscionability-based judges to conduct thorough assent inquiries.²⁸

Assent-based courts are motivated by a classical understanding of contract law: a contract is a discrete exchange in which all future events are contemplated at the time of formation.²⁹ This exclusive emphasis on the time of formation naturally leads these courts to focus on assent. Modern unconscionability-based courts typically apply a more relational theory of contract law: Each contract is a unique relationship with its own peculiar norms.³⁰ This less formal view leads these courts to rely heavily on unconscionability analyses in dealing with change of terms provisions. The result is an impasse between assent and unconscionability analyses in change of terms cases that is actually a proxy for the ongoing tension between classical and relational contract theory. Because of its deep theoretical roots, it is unlikely that this conflict between assent and unconscionability will be settled by common law evolution.

This Note suggests a “heightened assent” rule to resolve the division between assent-based and unconscionability-based approaches to change of terms provisions.³¹ A heightened assent rule requires that, in order to add, change, or abrogate terms pursuant to a change of terms provision, each party must receive heightened notice of, and therefore provide heightened assent to, the clause that conferred the right to add, change, or abrogate the terms of the agreement.³² This rule respects the classical values of discreteness³³ and presentation,³⁴ which motivate the

Arizona law). See *infra* Part II.D for a discussion of the problems inherent in enforcing terms that are fair but for which there is no assent.

²⁷ See *infra* Part II.C for a discussion on the theoretical roots of the assent/unconscionability dichotomy in change of terms jurisprudence.

²⁸ The recent federal Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009), significantly restricts the ability of credit card companies to introduce new terms via change of terms provisions. But because this legislation regulates only contracts involving credit cards and so-called stored value cards, the broader problem inherent in change of terms jurisprudence remains unsolved. See *e.g.*, *In re Am. Express Merchs. Litig.*, No. 03 Civ. 9592, 2006 WL 662341, at *7-8 (S.D.N.Y. Mar. 16, 2006) (dealing with change of terms dispute between non-consumers).

²⁹ Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 862-64 (1978) [hereinafter Macneil, *Adjustment of Long-Term Economic Relations*].

³⁰ See *id.* at 886-99; Steven R. Salbu, *The Decline of Contract as a Relationship Management Form*, 47 RUTGERS L. REV. 1271, 1293-97 (1995).

³¹ The term “heightened assent” is an ad hoc invention meant to convey the proposal’s preference for classical assent inquiries. For a full discussion, see *infra* Part III.

³² *Id.*

³³ “Discreteness” is a way of describing a transaction in the smallest, least connected units

classically-minded judges who focus on assent in their change of terms analyses. But by alerting parties to their forfeiture of control over the terms of the agreement, a heightened assent rule also soothes the purported relational fairness concerns of the courts that focus on unconscionability when evaluating change of terms provisions. A heightened assent approach thus provides a principled and uniform solution for this unsettled area of contract law.

Part I of this Note explores the basic structure of alteration and modification provisions, the assent and unconscionability inquiries that courts apply to determine the validity of terms changed pursuant to those clauses, and the underlying theoretical debate that informs the assent/unconscionability judicial divide. Part II examines two cases pertaining to consumer credit contracts in order to expound upon and critique the use of assent and unconscionability inquiries in connection with change of terms provisions. Part III proposes a heightened assent rule that seeks to meet the normative goals that motivate assent and unconscionability inquiries in alteration and modification jurisprudence.

I. BACKGROUND

A. *Alterations Versus Modifications and Why the Difference Matters*

An alteration is a contractual amendment accomplished by a unilateral action, while a modification is a contractual amendment accomplished through bilateral assent.³⁵ When deciding a case involving a change of terms provision, a court's decision to construe a term added, changed, or abrogated as an alteration instead of a modification, or vice versa, often predetermines whether that court will emphasize assent to the detriment of unconscionability or unconscionability to the detriment of assent in its analysis.³⁶

possible. See Macneil, *supra* note 29, at 856.

³⁴ "Presentation" is the process of "restricting . . . expected future effects to those defined in the present, i.e., at the inception of the transaction." *Id.* at 862.

³⁵ This Note's use of the term "alteration" to describe unilateral amendments is based on the language in the RESTATEMENT (SECOND) OF CONTRACTS § 286 (1981), which prohibits the fraudulent manual alteration of a document evidencing a contract. A change of terms provision that gives one party the right to unilaterally change the agreement is similar to giving one party the right to manually alter the terms of a written document evidencing an agreement; see also RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (defining a modification).

³⁶ An explicit example of this phenomenon occurs in *Perry v. FleetBoston Fin. Corp.*, Civ. A. No. 04-507, 2004 WL 1508518 (E.D. Pa. July 6, 2004). In *Perry*, the court analyzed a new term purportedly added under a change of terms provision using a very thorough assent inquiry and eventually determined that a cardholder's assent to the change of terms provision did not confer on the bank the ability to alter the contract by adding an arbitration provision. Importantly, the court commented that "if [the cardholders] had manifested their assent by using their credit card

A party alters a contract when it exercises a right to change, add, or abrogate the terms of the agreement.³⁷ This right is provided by the terms of the contract itself or by statute.³⁸ The non-altering party is bound to the altered terms.³⁹ For example, assume that A and B enter into a contract for the regular sale of widgets over a fixed period. In the contract, the parties agree that A will pay B for the widgets within ten days of receipt. Additionally, B has the right to alter the terms of the contract that pertain to the timing of payment. Time passes. B informs A that payment is now due within five days of A's receipt of the widgets. B need not obtain A's assent to the new five day payment deadline. Here, B unilaterally altered the terms of the contract. B obtained A's permission to change the payment provision when A entered into the contract and gave B the right to change the terms.⁴⁰

A contract modification occurs when both parties agree to change, add, or abrogate particular terms in their agreement.⁴¹ Provisions that contemplate the future modification of the contract often prescribe what action, or lack of action, will constitute assent.⁴² For instance, consider

after the agreement was mailed, it would no longer be a unilateral amendment by [the bank].” *Id.* at *4 n.4. Thus, if the cardholder made one purchase with the card after receiving the notice of alteration, the alteration (termed a “unilateral amendment” by the court) would transform instantly into a proposed modification that the cardholder accepted by using the card. Under this logic, the cardholder would not be able to avoid the new term on the grounds that there was no assent; only unconscionability or other policing arguments could be used to avoid enforcement of the provision. *Id.* at *3-4. This construction may also be understood as analogous to the contemplation of ratification of an alteration made to a document evidencing a contract in the RESTATEMENT (SECOND) OF CONTRACTS § 287 (1981). *See also* Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 830-31 (S.D. Miss. 2001) (discussed *infra* Part II.C-D).

³⁷ *See, e.g.*, *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1259 (Del. Super. Ct. 2001).

³⁸ *See, e.g.*, DEL. CODE ANN. tit. 5 § 952 (1999) (creating a default rule that gives banks the ability to change any term in a credit agreement with a fifteen day opt-out provision for the consumer); R.I. GEN. LAWS § 6-26.1-11 (2003) (providing the same power to change terms and fifteen day opt-out provision as the Delaware statute). These statutes provide banks with the right to alter consumer credit agreements. *See infra* Part III for a discussion of legislative efforts to bring certainty to change of terms jurisprudence by affording certain parties the right to alter their contracts without assent scrutiny.

³⁹ Because terms that are changed or added by alteration are just like any other terms, the party (or parties) bound to such altered terms are precluded from objecting to them in the same way that they are precluded from objecting to the terms of the original agreement, barring unconscionability or some other equitable argument.

⁴⁰ This construction is exemplified in *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899-900 (Ill. App. Ct. 2003) (applying Arizona law).

⁴¹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

⁴² Sometimes a lowered assent standard for modifications comes from a statute. *See, e.g.*, ALA. CODE § 5-20-5 (1988) (“In the event any domestic lender or credit card bank desires to modify in any respect any term of the credit card account, it shall first provide at least 30 days’ prior written notice of such modification to the debtor. In providing such notice, such domestic lender or credit card bank shall advise the debtor in writing that the debtor has the option (i) to surrender the credit card whereupon the debtor shall have the right to continue to pay off the credit card account in the same manner and under the same terms and conditions as then in effect; or (ii) to hold the credit card after the 30-day period has elapsed, or to use the credit card during such period, either of which shall constitute the debtor’s consent to the modification.”).

the hypothetical from the preceding paragraph. Imagine that this time, however, the original contract did not give B the right to amend the payment terms at will. Rather, assume that the contract contained a change of terms provision that prescribed a method by which A and B could modify their agreement.⁴³ The procedure called for B to notify A of a proposed change, addition, or abrogation via mail; A would then indicate his assent to the proposal by failing to send B a notice of rejection.⁴⁴ Time passes. B proposes a new payment schedule by sending A notice via mail. A does not send B a notice of rejection. According to the terms agreed upon by both parties in the original agreement, A and B bilaterally modified their contract.⁴⁵

⁴³ A and B can always modify their agreement even if the assent method for modifications is not included in the terms of their original agreement, provided the contract is not fully performed and the modification is fair and equitable in view of circumstances not anticipated by A and B when the contract was made. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). The hypothetical modification clause here serves to predetermine what actions will suffice for assent to a modification. Without this clause, a modification would only be effective if it consisted of an offer, an acceptance, and sometimes consideration as defined at common law. *See, e.g.,* Int'l Bus. Lists, Inc. v. Am. Tel. & Tel. Co., 147 F.3d 636, 641 (7th Cir. 1998) (holding that a modification requires offer, acceptance, and consideration); *see infra* Part I.C for a discussion of the requirement of consideration to support modifications. Achieving common law offer and acceptance can be difficult when the contract has a fixed period. For instance, one party's silence is generally not sufficient for acceptance absent a course of dealing which establishes that silence means assent or a provision indicating as much in the original contract, as in the hypothetical here. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). But achieving assent to a modification in a contract without a fixed period, often referred to as an "at will" agreement, is much easier, though not certain. Because the defining characteristic of an "at will" contract is that either party can terminate it at any time for any reason, courts will construe the fact that the non-proposing party did not terminate the contract as evidence of its assent to the proposed modification. *See* Perry v. FleetBoston Fin. Corp., Civ. A. No. 04-507, 2004 WL 1508518, at *3-4 (E.D. Pa. July 6, 2004) (discussing in dicta that if credit cardholders had used their cards after receiving notice of the proposed new term, the new arbitration term would have been added to the contract as a modification because the credit agreement was at will); SouthTrust Bank v. Williams, 775 So. 2d 184, 189 (Ala. 2000) (finding change of terms provision not necessary to find assent to new term because customer "took no action that could be considered inconsistent with an assent to the arbitration provision"). This construction is firmly rooted in the classical formal tradition. *See infra* Part I.B. Nevertheless, recent unpredictable treatment of modifications which add arbitration clauses in this manner in Alabama serves to rebuff the idea that continued performance under an "at will" contract always constitutes assent to a modification proposed by the other party. *See* Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 606-07 (2002) (surveying Alabama cases reaching different results on whether party assented to proposed modification by continuing to perform an "at will" agreement).

⁴⁴ This arrangement is referred to as a "negative option." For an excellent synopsis of the history of these so-called "negative options," see Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection*, 42 UCLA L. REV. 1315 (1995).

⁴⁵ 17A AM. JUR. 2D *Contracts* § 507 (2008); *see, e.g.,* Int'l Bus. Lists, Inc., 147 F.3d at 641 (applying Illinois law). As discussed *supra* note 43, often a party seeking to enforce or avoid an allegedly altered/modified term will do so without the benefit of a procedure for alteration/modification in the original agreement. In these cases, the parties turn to common law assent standards to enforce or avoid a term allegedly created via modification.

For change of terms jurisprudence, the difference between an alteration and a modification is very important. When a court decides it is evaluating a contractual alteration made via a change of terms provision, it is much more likely to conduct a meaningful assent inquiry.⁴⁶ Conversely, when a court determines that it is dealing with a modification to a contract with a change of terms clause, it is much more apt to conduct a conclusory assent inquiry and proceed to an unconscionability evaluation.⁴⁷ Thus, ascertaining the technical difference between alterations and modifications is crucial in order to determine which evaluative scheme a court will invoke to consider terms changed, added, or abrogated under change of terms provisions. But because alterations and modifications both lead to a changed agreement,⁴⁸ the terms are often confused.⁴⁹

B. *The Mechanics of Assent and Unconscionability Inquiries*

Assent-focused courts use the following inquiries to determine whether a term added, changed, or abrogated under a change of terms provision is part of the contract: (i) whether the change of terms clause authorized unilateral amendment or a specific procedure for bilateral modification;⁵⁰ (ii) if the change of terms clause permitted unilateral alteration, whether the purported alteration is within the “universe” of terms the parties agreed were eligible for alteration at the time of formation;⁵¹ (iii) if the change of terms clause prescribed sufficient actions or non-actions to manifest assent to a proposed modification, whether the parties performed those actions or non-actions;⁵² and (iv) if modification was not accomplished according to the language of the change of terms clause, whether the parties behaved in a manner sufficient to indicate assent to a proposed modification under common law or statute.⁵³

⁴⁶ See *supra* note 36 and accompanying text.

⁴⁷ *Id.*

⁴⁸ The difference is procedural because alterations and modifications achieve the same end: they both change the terms of the contract.

⁴⁹ For instance, in *Perry*, the court refers to both an alteration and a modification as a “unilateral amendment.” *Perry v. FleetBoston Fin. Corp.*, Civ. A. No. 04-507, 2004 WL 1508518, at *3-4 (E.D. Pa. July 6, 2004).

⁵⁰ See, e.g., *Herrington v. Union Planters Bank*, 113 F. Supp. 2d 1026, 1031-32 (S.D. Miss. 2000) (holding that a modification was valid because the bank complied with notice procedures in the original agreement); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 285 (Cal. Ct. App. 1998) (evaluating a purported alteration by asking “[w]hat did the Bank’s customers consent to when they agreed that the Bank could unilaterally change the terms of their account agreements?”).

⁵¹ See, e.g., *Perry*, 2004 WL 1508518, at *4; *Badie*, 79 Cal. Rptr. 2d at 288.

⁵² See, e.g., *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 832-33 (S.D. Miss. 2001).

⁵³ See, e.g., *Badie*, 79 Cal. Rptr. 2d at 289-91 (entertaining and ultimately rejecting the notion that cardholders had waived their right to a jury trial by continuing to use their cards after

Unconscionability-focused courts typically evaluate whether the new term is procedurally and substantively unconscionable.⁵⁴ Courts only refuse to enforce a term on the basis of its unconscionability when it is both procedurally and substantively unconscionable.⁵⁵

Of course, every unconscionability inquiry is technically prefaced by a finding of assent.⁵⁶ Assent determines whether a term is part of a contract, and the unconscionability test determines whether the term is enforceable; thus the latter always follows the former.⁵⁷ But as explored *infra* in Part II.C-D via *Bank One, N.A. v. Coates*,⁵⁸ a court's thorough unconscionability inquiry is often paired with an absent or meaningless assent inquiry.⁵⁹ Assent-based courts are often guilty of the same short treatment of unconscionability.⁶⁰ Thus, reconciling the competing tendencies of assent and unconscionability is necessary if both are to exist meaningfully in all American courts.

C. *Assent-Based Courts Are Classical and Unconscionability-Based Courts Are Relational*

A principled reconciliation of the assent/unconscionability divide in change of terms cases must take into account the underlying contract theories which give rise to these opposing judicial tendencies. The division between assent-based and unconscionability-based change of terms inquiries arises from a philosophical divide over what a contract is. This underlying clash of basic contract theory means that, unfortunately, it is not enough to tell assent-based courts to conduct heartier unconscionability inquiries and to tell unconscionability-based

receiving a document purporting to alter their cardholder agreement to allow for arbitration at the will of either party).

⁵⁴ A term is procedurally unconscionable when the circumstances surrounding the bargain were unfair to one party. A term is substantively unconscionable when the actual bargain the term embodies is so unfair to one party that it shocks the conscience of the court. See 8 WILLISTON & LORD, *supra* note 13, § 18:10. Often these inquiries collapse into one another because the change of terms provision's substantive unconscionability will be evaluated based on the new term. See *Coates*, 125 F. Supp. 2d at 834-36. In other words, courts will refuse to evaluate the change of terms provision in the abstract. The substantive fairness of the clause can only be ascertained by examining how it is used. *Id.*

⁵⁵ See 8 WILLISTON & LORD, *supra* note 13, § 18:10; *Coates*, 125 F. Supp. 2d at 830-35; *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 891-97 (Ill. App. Ct. 2003).

⁵⁶ See 8 WILLISTON & LORD, *supra* note 13, § 18:10 (discussing the doctrine as applying to terms that are part of the agreement).

⁵⁷ See *id.*

⁵⁸ 125 F. Supp. 2d 819 (S.D. Miss. 2001).

⁵⁹ See, e.g., *SouthTrust Bank v. Williams*, 775 So. 2d 184, 189 (Ala. 2000); *Hutcherson*, 793 N.E.2d at 889-900; *Barille v. Sears Roebuck and Co.*, 682 N.E.2d 118, 122 (Ill. App. Ct. 1997).

⁶⁰ See, e.g., *In re Am. Express Merchs. Litig.*, No. 03 Civ. 9592, 2006 WL 662341, at *8 (S.D.N.Y. Mar. 16, 2006) (no unconscionability analysis performed after finding that assent to change of terms provision gave American Express the power to add an arbitration provision).

courts to take assent more seriously. Change of terms provisions give courts the opportunity to illuminate these opposing contract theories.

Assent-based courts focus exclusively on the moment of formation to determine whether a new term purportedly added under a change of terms provision is part of the contract.⁶¹ This tendency is rooted in classical contract theory. Classical theory, like the assent-based inquiry it supports, determines the terms of a contract by looking exclusively at the moment of its formation.⁶²

Conversely, modern unconscionability-based courts do not focus exclusively on the moment of formation to determine whether a new term added pursuant to a change of terms provision should be enforced.⁶³ This tendency stems from relational contract theory. Relational theory critiques the classical emphasis on the moment of formation and suggests that realities not evident at formation can create and void contractual terms.⁶⁴

1. Classical Contract Theory

The classical approach seeks to enhance discreteness and presentation.⁶⁵ Discreteness means defining the transaction in the smallest, least connected units possible.⁶⁶ For example, a discrete approach to employment describes the employee-employer relationship

⁶¹ See, e.g., *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (looking to the other terms of the contract to determine what the parties understood the scope of the change of terms provision to be at the time of formation); *Perry v. FleetBoston Fin. Corp.*, Civ. A. No. 04-507, 2004 WL 1508518, at *4 (E.D. Pa. July 6, 2004) (holding that the change of terms provision assented to by the cardholder at the time of formation did not confer upon the bank a right to alter the agreement to include an arbitration clause); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 285 (Cal. Ct. App. 1998) (determining whether and to what extent the “universe” of terms included in the original agreement can be altered by construing the parties’ intent at the time of formation regarding the word “terms”); *Lamb v. Emhart Corp.*, 47 F.3d 551, 559 (2d Cir. 1995) (recognizing that there must be some “ascertainable standard” present at the time of formation that defines the scope of the power conferred by the change of terms provision when unilateral alteration is permitted).

⁶² See Macneil, *Adjustment of Long-Term Economic Relations*, *supra* note 29, at 856-64.

⁶³ See, e.g., *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 830-31 (S.D. Miss. 2001) (conducting a somewhat conclusory assent analysis and an in-depth treatment of unconscionability); *SouthTrust Bank*, 775 So. 2d at 189 (deeming parties to a contract with a change of terms provision to assent to the modification without reaching the question of unconscionability because they “took no action that could be considered inconsistent with an assent”); *Hucherson*, 793 N.E.2d at 889-900 (casually scrutinizing whether arbitration provision was within the “universe” of terms subject to alteration under the change of terms clause, followed by an unconscionability inquiry evaluating the fairness of the new arbitration clause).

⁶⁴ See Macneil, *supra* note 29, at 887-89; Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 VA. L. REV. 1175, 1177-78 (1992).

⁶⁵ See Macneil, *supra* note 29, at 862-65.

⁶⁶ *Id.* at 856-59.

as a simple commodity transaction.⁶⁷ The commodity is the hour or day of work the employee provides; the employer gives consideration for an hour or day of work by way of salary. Employment is therefore a series of small hourly or daily contracts. It naturally follows that either party can decide not to enter into another contract whenever it chooses. The employee can quit. The employer can fire the employee. This is the “at will” agreement—a touchstone of classical contract theory because it is actually a series of discrete exchanges.⁶⁸

Presentation is the task of forcing all future events into one particular moment.⁶⁹ In classical contract theory, that moment is formation.⁷⁰ The moment of formation takes on an almost magical importance. Nothing after the moment of formation matters for the purposes of interpreting of the contract; all future consequences of the deal were fully determined at the time of formation.⁷¹ A prime example of a presentation technique is the classical notion of expectancy damages.⁷² To determine what a breaching party owes the non-breaching party, the court places itself at the time of formation and proceeds to determine what the non-breaching party expected from the other party’s performance in the future.

In change of terms jurisprudence, assent-based courts rely heavily on the classical concept of presentation to establish a “universe” of terms that the parties agreed, at the time of formation, would be subject to alteration in the future.⁷³

This classical approach works best for short, truly one-time deals.⁷⁴ For example, it is easy to highlight discreteness and implement presentation on a gas purchase on the New Jersey Turnpike by a Connecticut resident driving to Florida.⁷⁵ Here, discreteness is simple: the transaction is a one-time event because the driver is unlikely to return to that gas station anytime soon. Conducting presentation is also straightforward: the expectations of the parties can easily be confined to the moment the gas is pumped.⁷⁶

Critics of classical theory complain that its exclusive emphasis on ascertaining the terms of the agreement at the time of formation does not accord with parties’ actual understanding of their contractual

⁶⁷ *Id.* at 863.

⁶⁸ *Id.*

⁶⁹ *Id.* (“Presentation is a way of looking at things in which a person perceives the effect of the future on the present.”).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 864.

⁷³ See *infra* Part II.A.

⁷⁴ See Macneil, *Adjustment of Long-Term Economic Relations*, *supra* note 29, at 856-57.

⁷⁵ *Id.*

⁷⁶ *Id.* at 857.

obligations as they perform the agreement.⁷⁷ Particularly for long-term or open-ended contracts, these critics argue that the terms of a contract do not exclusively arise from the discrete exchange itself.⁷⁸ Enter the relational theorists.

2. Relational Contract Theory

Relational contract theory, made famous principally by Professor Ian Macneil in a series of articles in the 1970s and 1980s, contends that non-formation realities can create contractual terms.⁷⁹ This view rejects the classical urge to find a discrete and presentiated agreement in every contractual exchange.⁸⁰ Rather, relational theorists argue that for contracts with long-term implications, discreteness and presentiation are merely two values among many that should be used to illuminate contractual obligations. The more extended and complex an agreement is, the more it should be treated not as a single, isolated exchange occurring at a particular moment but as a sort of mini-society with its own peculiar norms.⁸¹ These norms do not arise exclusively from the promises at formation, but also from the realities outside the exchange.

For example, the relational theory understands a union/management collectively bargained agreement as a “contractual relation” that should be viewed through the norms of the mini-society of the corporation. A corporate spirit of fairness or altruism might be more important in describing the parties’ obligations than those terms which can be ascertained by looking exclusively at the moment of formation under the classical model.⁸²

Critics of relational theory point out that it is of little help for courts trying to determine the terms of an agreement.⁸³ It is one thing

⁷⁷ See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 47-48 (1980) (“The dominant role of consent in the jurisprudence of classical contract law has put intellectual barriers in the way of communicating a broader analysis of the subject than appears in that jurisprudence.”); Barnett, *supra* note 64, at 1177-78.

⁷⁸ See MACNEIL, *supra* note 77, at 47-48.

⁷⁹ See Barnett, *supra* note 64, at 1177-78.

⁸⁰ See Macneil, *supra* note 29, at 886-89.

⁸¹ The contrast between the Willistonian classical view and the Macneil relational view is akin to the differences between the theories espoused by Justices Scalia and Breyer regarding American constitutional jurisprudence. Specifically, Scalia’s “originalist” theory is analogous to the classical view and Breyer’s “Living Constitution” theory is analogous to the relational view. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998). Cf. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006).

⁸² See Macneil, *supra* note 29, at 889-90.

⁸³ This is the most compelling of Professor Barnett’s critiques of the relational theory:

It does persons who would contemplate engaging in Macneilian contractual exchanges little good to be told that “maybe legal sanctions will be used to ‘reinforce’ your

for relational theorists to contend that contracting parties construct and abide by obligations not created by and at formation, but it is another thing to ask judges to enforce these often non-specific and non-measurable obligations.⁸⁴ If, according to relational theorists, contractual obligations can arise out of the parties' evolving relationship, what criterion is a court supposed to use to determine which of these evolving obligations to enforce?

The relational model's weakness is that it does not provide a tool for courts to use to determine whether a term is part of the agreement and whether it is enforceable.⁸⁵ In contrast, the classical and, to a large degree, the neoclassical approach offer the moment of formation as the exclusive acid test to determine the terms of a contract and whether those terms are enforceable.⁸⁶ Relational contract theory's strength is its acknowledgement that factors not present at formation often control party behavior more than obligations created at the time of formation. Taken in isolation, this observation is helpful in explaining party behavior. As applied to contract litigation, however, relational theory provides few discernable rules for enforcing the non-formation realities it highlights.⁸⁷

Most change of terms cases rely on an unconscionability analysis that stems from a relational, not classical, use of unconscionability. This distinction is crucial. Unconscionability, after all, is an ancient judicial policing tool.⁸⁸ But when a modern unconscionability-based court tackles a change of terms case, it exhibits relational theory tendencies.

relationship, but maybe not. Ask us again after you exchange." Of course, a principle limiting legally enforceable contracts to those agreements to which there has been a consent to be legally bound is but a principle and like all principles, concepts or distinctions, including those that Macneil employs for his purposes, it is not without its difficulties of application. However, even the imperfect information provided by this, or any other, legal principle is preferable to no guidance whatsoever—particularly when this principle is instantiated in more specific rules that are easier to apply to specific facts, such as the doctrine of bargained-for consideration.

Barnett, *supra* note 64, at 1191.

⁸⁴ Professor Macneil himself admits that these terms created by non-formation realities are often non-specific and non-measurable. See Macneil, *supra* note 29, at 902.

⁸⁵ Barnett, *supra* note 64, at 1191-94.

⁸⁶ Even the policing doctrines present in the classical theory focus on the moment of formation. For example, classically-minded judges sometimes invoked the duty of good faith and fair dealing to prevent exploitation, but the breach of that duty was always based on an understanding that by entering into a contract in a jurisdiction whose common law recognized the duty of good faith and fair dealing, the parties assented to that duty at the time of formation. See Werner F. Ebke & James R. Griffin, *Good Faith and Fair Dealing in Commercial Lending Transactions: From Covenant to Duty and Beyond*, 49 OHIO ST. L.J. 1237, 1242 (1989) (discussing the covenant of good faith and fair dealing as an implied term created at the moment of formation).

⁸⁷ Barnett, *supra* note 64, at 1191 (footnote omitted).

⁸⁸ See 8 WILLISTON & LORD, *supra* note 13, § 18:10 (discussing the long and tumultuous history of the doctrine of unconscionability).

When a court applies an unconscionability-based analysis in a change of terms dispute, it implements relational contract theory in two ways. First, it fails to perform a meaningful assent inquiry at the threshold of its analysis. The unconscionability-based court does not seriously investigate whether and/or to what extent the adversely affected party assented to the change of terms provision (in the case of an alteration) or to the new term (in the case of a modification).⁸⁹ This shows that the court removed assent from the supreme position afforded it by classical theory and adopted a relational model which considers the parties' assent at formation to be merely one of many tools available to construe the terms of the contract. Second, the unconscionability-based court tends to scrutinize the new term added under the change of terms provision instead of the change of terms provision itself.⁹⁰ In focusing on the new or changed term, the unconscionability-based court focuses on the performance of the contract, not on its formation. This focus on performance of the contract to the exclusion of formation is a hallmark of relational theory.⁹¹

D. *Consideration: An Illuminating Truce Between the Classical and Relational Theories*

Courts' and legislatures' past and present treatment of the necessity of consideration for modifications provides hope that the classical approach (assent-focused) and the relational approach (unconscionability-focused) can reach a similar principled and pragmatic truce with regard to change of terms clauses.

While change of terms jurisprudence is relatively new, the debate over whether an exchange of consideration is necessary to create an enforceable contractual modification has a long, tumultuous history that has led to a contemporary truce. This battle over consideration as it relates to modifications reveals the strengths and weaknesses of classical and relational interpretive traditions that give rise to the assent/unconscionability dichotomy in change of terms jurisprudence.

The requirement that parties exchange consideration in order to create an enforceable modification to a contract has been hotly debated by legal scholars for over a century.⁹² The necessity of consideration to support a modification is usually cited when a court uses the "pre-existing duty rule": When a party promises to perform an action he

⁸⁹ See *supra* note 63.

⁹⁰ *Id.*

⁹¹ See Macneil, *Adjustment of Long-Term Economic Relations*, *supra* note 29, at 886-89.

⁹² 3 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:37 (4th ed. 2008).

already has a legal obligation to carry out, that promise is not consideration.⁹³ As applied in a great many situations, the pre-existing duty rule prevents parties from pressuring others into modifications with threats of non-performance.⁹⁴ The rule provides an especially convenient way for courts to decline enforcement of modifications or other agreements which appear to have been made in quasi-coercive circumstances without resorting to judicially sticky doctrines like duress and bad faith.

In other circumstances, however, the pre-existing duty rule impedes parties' voluntary efforts to modify their deal. Consider a borrower/lender relationship.⁹⁵ The borrower has trouble making payments on the loan and goes into default. Instead of suing the borrower or taking possession of a secured piece of property, the lender negotiates with the borrower and modifies their agreement. Usually, this means that the lender agrees to forego its right to exercise a vested option triggered by the borrower's default (e.g., bringing an action for breach of contract or repossessing secured property) and the borrower agrees to certain relaxed repayment terms. When the lender fails to perform according to the modification by suing or repossessing, however, the borrower may be without recourse. The lender will cite the pre-existing duty rule and insist that the new terms are ineffectual because no consideration flowed from the borrower to the lender for the modification.

Courts generally have responded to this situation by adopting a narrow view of the pre-existing duty rule. The *Restatement (Second) of Contracts* reports that courts find consideration flowing from the borrower to the lender in this situation if the borrower agreed to perform in any manner differing from the original duty, unless the new duty is

⁹³ 17 C.J.S. *Contracts* § 122 (2008) ("A promise to do something one is already obligated to do is no consideration for a contract and creates no new obligation."). *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902) is instructive here. On May 19, 1900, the Alaska Packers' Association discovered that it had a problem. The fishermen it hired were demanding a 66% to 100% increase in their agreed upon base fee. *Id.* at 101. Because this demand was made only after the Association brought the fishermen from California to frontier Alaska and the fishing season was already underway, the Association was not in a position to bargain. Accordingly, a representative of the Association signed a document agreeing to the increases. *Id.* At the end of the fishing season, the Association did not pay the additional fees and some of the fishermen brought suit for breach of contract. *Id.* In refusing to enforce the modification for increased fees, the appellate court principally relied on the "pre-existing duty rule": When a party promises to perform an action he already has a legal obligation to carry out, that promise is not consideration. *Id.* at 102-03. The modification lacked mutual consideration because the fishermen were merely agreeing to continue working, something they were already obligated to do under their contract with the Association. Accordingly, the modification was unenforceable in the same way a "contract" without consideration is unenforceable. See Deborah L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 193-97 (2000).

⁹⁴ See Threedy, *supra* note 93, at 197.

⁹⁵ This scenario is loosely based on *Betterton v. First Interstate Bank of Arizona*, N.A., 800 F.2d 732 (8th Cir. 1986) (applying Arizona law).

merely a “pretense of bargain.”⁹⁶ For instance, the borrower could agree to have payments on the loan taken directly from his paycheck, make payment in cash instead of by check, or pay earlier in the month than originally agreed. Any of these differing manners of performance would generally constitute consideration flowing from the borrower to the lender and render the modification enforceable.⁹⁷

Significantly, this logic also applies to support the finding of consideration for modifications of contracts with indefinite lengths.⁹⁸ These agreements are often characterized as “at will” because either party can terminate the contract at any time for any reason.⁹⁹ Courts find consideration to support modifications in these agreements in each party’s failure to exercise its option to terminate the deal.¹⁰⁰

But what about those modifications for which there is no new duty undertaken by one of the parties? Is a party who seeks enforcement precluded from recovery on that modification due to the pre-existing duty rule? A typical example occurs in home remodeling.¹⁰¹ A and B contract for A to excavate B’s basement. A begins work and is surprised to discover sheet rock, which is very difficult to remove. A informs B of this discovery. A and B modify their agreement by significantly raising the fee B pays A. Because A did not agree to perform in any differing manner from his original duty, the rule articulated in the *Restatement (Second) of Contracts* § 73 is inapplicable.¹⁰² Courts generally wanted to (i) acknowledge and preserve the pre-existing duty rule, and (ii) enforce modifications that appear equitable, such as the one in this home remodeling example.¹⁰³ The result is the somewhat odd rule articulated in the *Restatement (Second) of Contracts* § 89: Modifications are enforceable *without* consideration, provided that neither party has fully performed its obligation under the agreement and further provided that “the modification is fair and equitable in view of circumstances not

⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

⁹⁷ See generally 3 WILLISTON & LORD, *supra* note 91, § 7:37. Other courts have construed a debtor’s promise not to exercise his right to seek bankruptcy protection as sufficient consideration to support a modification. See, e.g., *Hanson v. McCann* 76 P. 983, 984 (Colo. App. 1904).

⁹⁸ See Brian T. Kohn, *Contracts of Convenience: Preventing Employers From Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 806-10 (2003).

⁹⁹ *Id.* at 806.

¹⁰⁰ *Id.* at 806-10; see *supra* note 43 and accompanying text.

¹⁰¹ This scenario is taken from the RESTATEMENT (SECOND) OF CONTRACTS § 89, cmt. b, illus. 1 (1981), which is based on *Watkins & Son v. Carrig*, 21 A.2d 591 (N.H. 1941).

¹⁰² Cf. *Allegheny Coll. v. Nat’l Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927) (Cardozo, J.). See generally Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005) (recounting Cardozo’s stunning ability to find consideration). Indeed, even Judge Cardozo would have trouble finding that there is consideration flowing from A to B and would thus not uphold the modification.

¹⁰³ 3 WILLISTON & LORD, *supra* note 91, § 7:37.

anticipated by the parties when the contract was made.”¹⁰⁴ The comments to § 89 instruct courts to consider “the relative financial strength of the parties, the formality with which the modification is made, the extent to which it is performed or relied on and other circumstances [that] may be relevant to show or negate imposition or unfair surprise.”¹⁰⁵

What emerges is a classical/relational dichotomy. Sometimes, courts have held to the pre-existing duty rule and developed creative, classically-based ways to find consideration. Other times, courts (and legislatures) have done away the technical consideration inquiry and instead evaluated the overall fairness of the situation.¹⁰⁶ This latter approach is similar to the relational tendency in change of terms cases to forget about the assent inquiry and instead determine whether the deal is fair.

II. ASSENT AND UNCONSCIONABILITY ANALYSES APPLIED TO ALTERATIONS AND MODIFICATIONS

In cases involving change of terms provisions, courts conduct wildly different inquiries in cases with relatively similar facts. Two consumer credit cases, *Badie v. Bank of America*¹⁰⁷ and *Bank One, N.A. v. Coates*,¹⁰⁸ highlight this judicial hurly-burly.¹⁰⁹

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). This section also goes on to allow for the enforcement of modifications without consideration when mandated by statute or “to the extent that justice requires enforcement in view of material change of position in reliance on the promise,” which seems to be an analogue to promissory estoppel. *Id.*; see 3 WILLISTON & LORD, *supra* note 91, 7:37.

¹⁰⁵ RESTATEMENT (SECOND) OF CONTRACTS § 89, cmt. b (1981). Many commentators find this remarkable. It is a naked admission that courts are inquiring into the fairness of the deal, something courts often do covertly but rarely acknowledge. See 3 WILLISTON & LORD, *supra* note 91, § 7:37. In many respects, the *Restatement (Second) of Contracts*’s formulation was a product of the Uniform Commercial Code’s (UCC’s) treatment of the same problem. *Id.* Article 2 of the U.C.C., which pertains to sales, expressly abolishes the consideration requirement and subjects the parties only to its overarching “good faith” obligation. U.C.C. § 2-209(1) (2004) (“An agreement modifying a contract within this Article needs no consideration to be binding.”); U.C.C. § 1-203 (2004) (defining the obligation of good faith). This approach is not immune from criticism, however. See Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49 (2001) (criticizing the ambiguity of the U.C.C. good faith standard as applied to modifications).

¹⁰⁶ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

¹⁰⁷ 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

¹⁰⁸ 125 F. Supp. 2d 819 (S.D. Miss. 2001).

¹⁰⁹ *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 196 (E.D.N.Y. 2004) provides an excellent summation of many post-*Badie* change of terms cases.

A. *The Assent Analysis Applied: Badie v. Bank of America*

The leading alteration case applying an assent-based inquiry into a provision allegedly added under a change of terms clause is the California case *Badie v. Bank of America*.¹¹⁰ *Badie* precludes a party with the right to alter the terms of a contract from doing so if (i) the subject of the alteration was not contemplated in the agreement and therefore was outside the universe of issues which the parties intended to be subject to alteration at the time of formation, or (ii) exercising the right to change the terms violates the covenant of good faith and fair dealing by capturing a benefit the altering party could have obtained at the time of formation.¹¹¹

In 1992, Bank of America (Bank) included an extra piece of paper in the monthly statements of some of its credit card customers.¹¹² This extra piece of paper, colloquially referred to as a “bill stuffer” and about half the size of a regular piece of paper, informed customers that a new term had been added to their cardholder agreements.¹¹³ The new term provided that, in the event of any “controversy” with the Bank, both the customer and the Bank had the option to submit the matter to arbitration or, under certain circumstances, to a court referee.¹¹⁴ The effect of this term was to allow each party to prevent the other from utilizing the courts. The Bank’s introduction of this alternative dispute resolution (ADR) clause was rather novel; while ADR was popular well before this ADR clause was challenged in the early 1990s, it appears that the Bank was the first large financial institution to add ADR to consumer banking contracts.¹¹⁵

¹¹⁰ *Id.* at 198.

¹¹¹ *Badie*, 79 Cal. Rptr. 2d at 283-85. This test assumes, of course, that the party making the alteration complies with all notice procedures required by the terms of the contract or by statute.

¹¹² *Id.* at 276-77.

¹¹³ *Id.*

¹¹⁴ The full text of the bill stuffer read:

Change of Terms Notice for BankAmericard Visa, MasterCard, Visa Gold, Gold MasterCard, and Apollo Accounts [¶] Dispute Resolution—If you or we request, any controversy with us will be decided either by arbitration or reference. Controversies involving one account, or two or more accounts with at least one common owner, will be decided by arbitration under the Commercial Arbitration Rules of the American Arbitration Association. All other controversies will be decided by a reference under California Code of Civil Procedure Section 638 and related sections. A referee who is an inactive attorney or retired judge will be appointed by the court after selection by the American Arbitration Association using its procedures for selecting arbitrators. The arbitration or reference will take the place of a trial before a judge and jury (This is a new provision for Cardmember and Apollo Account Agreements. If you continue to use your account, this new provision will apply to all past and future transactions.).

Id. at 277.

¹¹⁵ The trial court pointed out that:

While the introduction of ADR by the bank to all of its deposit account and credit card

The Bank likely had little reason to believe the incorporation of the ADR term into the cardholders' agreements was susceptible to legal challenge. First, and most importantly, the arbitration term on the bill stuffers was sent pursuant to a broad change of terms provisions in the cardholders' original agreements.¹¹⁶ Although the cardholders who received the bill stuffer and challenged the provision had agreed to different cardholder contracts, all the versions presented at trial gave the Bank the right to change any of the terms of the contract at any time, so long as the Bank gave notice of the changes if required by law.¹¹⁷ By adding the ADR provision, the Bank did not propose a modification to be accepted by the cardholder. Rather, the Bank exercised its right to alter the contract under the terms of the original cardholder agreement.¹¹⁸ Accordingly, the cardholders could not make an objection to the amendment based on a lack of an offer, acceptance, or consideration—once the cardholders agreed to their original contracts, there would be no need for their assent or any additional consideration ever again.¹¹⁹

Second, in addition to the inherent technical elegance of the alteration mechanism, this change of terms procedure was not new to the credit card industry. Apparently, credit card companies began using

customers was most certainly innovative and a first among large banks, it was not a step so unrelated to actions taken in other lines of business or other professions involving large client or customer bases, most particularly medicine and financial services. . . .

Badie v. Bank of Am., No. 944916, 1994 WL 660730, at *6 (Cal. App. Dep't Super. Ct. Aug. 18, 1994).

¹¹⁶ *Badie*, 79 Cal. Rptr. 2d at 277.

¹¹⁷ This change of terms provision was included in cardholder agreements formed in 1986, 1988, 1989 and reads:

WE MAY CHANGE OR TERMINATE ANY TERMS, CONDITIONS, SERVICES, OR FEATURES OF YOUR ACCOUNT (INCLUDING INCREASING YOUR FINANCE CHARGES) AT ANY TIME. WE MAY IMPOSE ANY CHANGE IN TERMS ON YOUR OUTSTANDING BALANCE, AS WELL AS ON SUBSEQUENT TRANSACTIONS AND BALANCES. We may also add new terms, conditions, services or features to your Account. To the extent required by law, we will notify you in advance of any change in terms by mailing a notice to you at your address as shown on our records.

Id. at 278. The "to the extent required by law" language in this clause was likely a reference to statutory notice requirements.

¹¹⁸ The court stated:

Implicit in the Bank's interpretation of [the ADR provision] is the assumption that adding the ADR clause is not really a modification at all because, by entering the original account agreements, the [cardholders] agreed ahead of time to be bound by any term the Bank might choose to impose in the future.

Id. at 280.

¹¹⁹ "Thus, the Bank argues, because it sent notice in the form of the 'bill stuffer,' it met the sole procedural requirement of the change of terms provision . . ." *Id.* at 280. The actual notice requirements are not clearly stated in the language in the original agreements or in the appellate opinion, however. *See supra* note 117 and accompanying text.

change of terms provisions as early as the 1960s, and there was no significant case in which the procedure was successfully challenged.¹²⁰

Third, in 1925 Congress passed the Federal Arbitration Act (FAA) which, as interpreted by the Supreme Court of the United States, conveyed a strong and broad policy of enforcing arbitration provisions in federal courts.¹²¹ Additionally, the California Supreme Court previously had recognized a judicial preference for arbitration clauses in California courts.¹²² The effect of these declarations was two-fold: They (i) made arbitration provisions (and by extension court referee provisions) virtually immune from unconscionability challenges; and (ii) raised significant questions about whether arbitration provisions were subject to normal assent standards.¹²³

It was no surprise then that, when a group of cardholders brought an action seeking a declaratory judgment that they were not bound by the new ADR provision, the Bank seemed to have the upper hand. The Bank's argument had technical elegance: the cardholders effectively agreed to the ADR term when they signed their cardholder agreements. But the Bank's argument was also compelling from a fairness perspective: cardholders should not be released from a non-onerous means of dispute resolution, endorsed by courts and legislatures, which they agreed to and were given notice of via an assent mechanism used in the industry for nearly thirty years.¹²⁴

¹²⁰ In *Badie*, the Bank's expert witness testified that since the dawn of the consumer credit card era in the 1960s, the inclusion of change of terms provisions in account agreements were standard industry practice. 79 Cal. Rptr. 2d at 278.

¹²¹ Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000); *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985); *Badie*, 67 Cal.Rptr. at 278.

¹²² See *Victoria v. Superior Court*, 710 P.2d 833, 838 (Cal. 1985) (“[T]he law favors contracts for arbitration between parties’” (quoting *Player v. Geo. M. Brewster & Son, Inc.*, 96 Cal. Rptr. 149, 154 (Cal. Ct. App. 1971))).

¹²³ The liberal statutory and judicial pronouncements in favor of arbitration alluded to in the preceding footnotes seem to make unconscionability attacks on arbitration provisions very difficult. See also *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886 (Ill. App. Ct. 2003) (applying Arizona law and surveying a number of federal cases that quickly dispose of unconscionability arguments). Even in a case where the U.S. Supreme Court conceded that extraordinary arbitration fees could make an arbitration clause unconscionable, the Court found that the burden of showing that such fees were exorbitant fell upon the party seeking to avoid application of the clause. *Green Tree Fin. v. Randolph*, 531 U.S. 79 (2000). Additionally, the court in *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) makes clear that the U.S. Supreme Court and other federal court decisions interpreting arbitration clauses direct federal courts to apply a somewhat different assent standard when determining whether parties agreed to an arbitration provision within the purview of the FAA. If an arbitration clause is part of an agreement that involves interstate commerce, the federal courts use a generous construction favoring a finding that the arbitration provision is part of the agreement. *Id.* at 827; see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *infra* Part II.C. The trial court in *Badie* erroneously found California law to demand an even more favorable standard for parties seeking to enforce an arbitration provision. See *infra* note 130.

¹²⁴ *Badie v. Bank of Am.*, No. 944916, 1994 WL 660730, at *2 (Cal. App. Dep't Super. Ct. Aug. 18, 1994).

After a seventeen-day trial, the court ruled in favor of the Bank and enforced the ADR term.¹²⁵ By broadly construing the word “change” in the change of term provision, the trial court found that the Bank was allowed to “add, delete, revise, replace, or modify”¹²⁶ unilaterally any term in the cardholder agreement, so long as the new term itself did not violate the implied covenant of good faith and fair dealing and was not unconscionable.¹²⁷ In light of the judicial and legislative swooning over the benefits of ADR, the new term was not susceptible to challenge on either ground.¹²⁸

The appellate court reversed in favor of the cardholders.¹²⁹ After first disposing with the notion, relied upon by the trial court, that ADR provisions somehow do not require mutual acquiescence to become binding, the court framed the case as merely a question of assent.¹³⁰ When the cardholders agreed to the change of terms provision in their original agreements, to what sort of changes to what sort of terms did they agree?¹³¹

To answer this question, the appellate court employed old-fashioned interpretative tools.¹³² Whether the Bank had the ability to introduce the ADR clause turned on what the meaning of the word “terms” was in the original agreement’s change of terms provision.¹³³

¹²⁵ *Id.* at *1.

¹²⁶ *Id.* at *2 (internal quotations omitted).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 807 (Cal. Ct. App. 1998).

¹³⁰ The trial court relied upon a line of California cases, which it construed to suggest that arbitration and judicial reference procedures provisions contained in written agreements were somewhat exempt from normal assent inquiries. *Badie*, 1994 WL 660730, at *2. Specifically, the trial court read the California Supreme Court decision *Madden v. Kaiser Found. Hosps.*, 131 Cal. Rptr. 882 (Cal. 1976), to “stand for the proposition that consent is no longer required in order for an arbitration agreement to be valid.” *Badie*, 79 Cal. Rptr. 2d at 279. The appellate court rejected this view of *Madden* and held that, regardless of judicial or legislative preferences for arbitration, a traditional assent threshold must be passed for any clause in a contract to be enforced, including arbitration provisions. *Id.* at 278 (entitling the first section of the opinion’s discussion section “California’s Public Policy Favoring ADR Is Not Operative Unless the Parties Have First Entered Into An Enforceable Agreement to Arbitrate”). The trial court’s casual view of assent is not uncommon in change of terms cases. It seems that the legal system’s acceptance of arbitration and, more generally, ADR, clouded the reality that dispute resolution terms are just like any other terms in a contract and, accordingly, are subject to normal formation inquiries. *See generally* *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) (discussed *infra* Part II.C-D).

¹³¹ *Badie*, 79 Cal. Rptr. 2d at 280.

¹³² *See id.* at 287.

¹³³ The trial court focused almost exclusively on what the word “change” meant, concluding that it implied the terms “add,” “delete,” “revise,” “replace,” or “modify.” The appellate court found this conclusion incoherent and contrary to § 1644 of the California Civil Code, which requires courts to interpret the meaning of the words of a contract by deferring to the “ordinary and popular [meaning], rather than [the words’] strictly legal meaning . . .” *Badie*, 79 Cal. Rptr. 2d at 285; CAL. CIV. CODE § 1644 (West 1985). The cardholder agreements presented at trial gave the Bank the right to “change or terminate any terms, conditions, services, or features” of the

Underlying the appellate court's analysis was the conviction that word "terms" could not have an unlimited meaning. According to the appellate court, if "terms" meant that the Bank could introduce any new provision under the sun, the Bank would be without any legal obligation, rendering the contract illusory and therefore unenforceable.¹³⁴ In other words, under the Bank's unlimited interpretation of the word "terms," its power to change the agreement would be so great as to lead to the conclusion that it had not promised anything at all. Accordingly, the contract would be unenforceable for lack of consideration.¹³⁵

Thus, in order to find a real contract, the appellate court needed to define a specific and closed "universe" of terms which, at the time the original cardholder agreements were formed, the cardholder and the Bank mutually intended to be within the authority of the Bank to change.¹³⁶ So what sort of terms did the change of terms provision manifest intent by both parties to include in this discrete "universe"?

After deciding that the change of terms provision was "reasonably susceptible" to more than one meaning and therefore qualified as "ambiguous," the appellate court resolved the ambiguity by deciding that the change of terms provision conferred upon the Bank the ability to change or terminate terms integral to a bank/creditor relationship.¹³⁷ These "integral" terms included matters contemplated in the cardholder agreement: fees, grace periods, annual percentage rates, and the like.¹³⁸ But because dispute resolution was not contemplated in the original cardholder agreement, it was outside the "universe" of "integral" terms which the Bank had the power to change or terminate.¹³⁹ Accordingly, the termination of the cardholder's right to the court system via the

cardholder accounts. *Badie*, 79 Cal. Rptr. 2d at 278. It appears that the appellate court focused on the word "terms" somewhat to the exclusion of "conditions, services, or features" because "conditions, services, or features" implied a narrower set of provisions than the word "terms." Thus, the Bank's broad reading of the change of terms provision itself depended on a broad construction of the word "terms."

¹³⁴ See *Badie*, 79 Cal. Rptr. 2d at 284-85.

¹³⁵ The appellate court's concern that the Bank did not give adequate consideration is certainly familiar. See *supra* Part I.D. Consideration seems to be the formalist's chief weapon in combating unfair terms. *Id.*

¹³⁶ See *Badie*, 79 Cal. Rptr. 2d at 285.

¹³⁷ The court stated:

A narrow interpretation of the change of terms provision, which limits its operation to matters that are integral to the Bank/creditor relationship, does not render the provision inoperative or cause it to be mere surplusage. The Bank may still invoke it to modify fees, grace periods, annual percentage rates and so forth, subject to the Bank's duty of good faith and fair dealing.

Id. at 289.

¹³⁸ *Id.*

¹³⁹ *Id.* at 287-89.

ADR provision was not effectual under the change of terms clause in the cardholder agreement.¹⁴⁰

The appellate court essentially gave four reasons for this construction of the change of terms provision. First and foremost, the appellate court relied on the rule of construction that tells courts to read seemingly broad terms as applying only to the matters for which the parties intended to contract.¹⁴¹ Here, the parties contracted for a bank/creditor relationship.¹⁴² What was the best indication of the matters intended to be encompassed by this bank/creditor relationship? The enumerated terms in the cardholder agreement.¹⁴³ Because the agreement contained only fleeting and attenuated references to dispute resolution, the right to litigate was not one of the matters the parties intended for the change of terms provision to encompass.¹⁴⁴

Second, as alluded to *supra*, the appellate court needed to find a limited universe of terms available for change or termination by the Bank to show that the Bank was fettered in some way so as to avoid a determination that the contract was illusory. To decide that only those terms “integral” to the bank/creditor relationship were subject to change or termination was sufficient to fetter the Bank and avoid an illusory contract.¹⁴⁵

Third, the appellate court found that, if it allowed the ADR provision to be made part of the contract by way of the change of terms clause, the clause would have amounted to a waiver of the right to a jury trial.¹⁴⁶ Since the ADR provision effectively serves as a waiver of the right to a jury trial and, according to the Bank, could be added to the agreement at any time under the change of term provision, the cardholder would have waived his right to a jury trial when he assented to the cardholder agreement.¹⁴⁷ California requires such a waiver to be unambiguous and unequivocal. Here, the appellate court found that the cardholder’s assent to the change of terms provision was neither an

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 287. The appellate court cited California Civil Code § 1648, which requires that “[h]owever broad may be the terms of a contract, [those terms extend] only to those things concerning which it appears that the parties intended to contract.” CAL. CIV. CODE § 1648 (West 1985).

¹⁴² The appellate court repeatedly used the term “Bank/creditor” to describe the relationship between the Bank and the cardholders. *Badie*, 79 Cal. Rptr. 2d at 289. This “Bank/creditor” label is somewhat inappropriate, however, because the cardholders only had credit card accounts with the Bank. *Id.* at 275. Accordingly, the cardholder was a debtor and the Bank was a creditor. Nevertheless, it does not seem that the appellate court’s label of “Bank/creditor” affects its determination of what terms are “integral” to what appears to be a consumer debtor/bank creditor relationship. *See id.* at 288-89.

¹⁴³ *Id.* at 287-89.

¹⁴⁴ *Id.* at 287-88.

¹⁴⁵ *Id.* at 289.

¹⁴⁶ *Id.* at 289-90.

¹⁴⁷ *Id.*

unambiguous nor an unequivocal waiver of the right to a jury trial. Because of that determination, there was no way for the court to construe the change of terms provision as authorizing the introduction of an ADR provision.¹⁴⁸

Fourth, the appellate court questioned whether the Bank's use of the change of terms provision to add an ADR term constituted a breach of the duty of good faith and fair dealing present in every agreement.¹⁴⁹ The duty of good faith and fair dealing has been described as a prohibition on seizing opportunities that only exist at the moment of formation. The appellate court mused that the imposition of ADR via the Bank's change of terms power instead of at the moment of formation might be a play to "capture opportunities [now] foregone."¹⁵⁰ In other words, if the Bank wanted to include an ADR term in the deal, it should have incorporated it into the deal at the time of formation and not via the change of terms provision.

B. *A Critique of Badie: Assent Analysis Does Not Solve All Change of Terms Problems*

Badie's weakness is its classical formalism—it depends on a mechanical assumption that contracting parties expect that the change of terms clause confers the right to alter any and all terms included in the agreement at the moment of formation. It formally defines the universe of terms subject to alteration under the change of terms provision by examining the express terms included in the contract. Specifically, (i) when parties agree to a contract with a change of terms provision, they assent to the future unilateral alteration of a discrete "universe" of terms; (ii) the parties' expectations at the time of formation define the "universe" of terms which are subject to alteration; and (iii) the best indication of the parties' expectations at the moment of formation about which terms were within the "universe" of terms subject to alteration are the enumerated terms of the contract itself.

1. The *Badie* "Universe" of Terms Subject to Alteration Can Be Expanded Easily

The *Badie* court's formal finding that the ADR terms were not within the purview of the Bank's power to change the terms of the cardholder agreement can be, and likely has been, manipulated by

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 284-85.

¹⁵⁰ *Id.* at 284 (quoting Burton, *supra* note 7, at 373, 387).

transactional lawyers. The *Badie* court premised its exclusion of the ADR alteration on the fact that dispute resolution was not mentioned in any of the enumerated terms of the contract.¹⁵¹ Thus, it seems that a drafter today could create the right to add an ADR provision on the strength of a change of terms clause by including a commonplace dispute term in the original agreement. For instance, if the cardholder agreement in *Badie* contained a provision that read “all controversies arising out of this agreement shall be resolved by litigation in the California state courts,” the holding in *Badie* would not exclude an added ADR term—dispute resolution would have been contemplated in the enumerated terms of the original agreement and, as such, part of the “universe” of terms the parties agreed would be subject to alteration under the change of terms clause. Accordingly, *Badie* incents drafters to contemplate as many terms as possible in contracts with change of terms provisions. The more terms mentioned in the original agreement, the broader and more powerful the change of terms provision becomes.

2. *Badie*'s Classical Vulnerability to Manipulation

The *Badie* decision shares its formalist vulnerability with all assent-based inquires. This is because assent-based inquires spring from a classical understanding of contract law. The classical understanding is formal because it provides easily identifiable rules for judging—its exclusive emphasis on the moment of formation gives judges an easily identifiable vantage point from which to evaluate contractual provisions. It follows, then, that transactional attorneys can produce favorable results under the classical model by manipulating the moment of formation.

This formalism is not a problem when contracting parties negotiate on an even playing field. When two parties of equal bargaining power negotiate, both will presumably attempt to manipulate the moment of formation to produce a favorable result if the contract is litigated before a classically-minded, assent-based court. The result will be a compromise that reflects both parties' actual assent at the moment of formation. But in adhesion contracts, which are purchased, not bargained for, the corporation has a transactional attorney and the consumer does not. The drafting attorney can paint the moment of formation via the express terms of the agreement to favor the corporation without the counterbalance of an opposing lawyer.

The outcome of the assent-based inquiry is often the opposite of the result in *Badie*. Other courts, employing the same assent-based

¹⁵¹ *Id.* at 286-89.

analytical framework as *Badie*, have found that the “universe” of terms subject to alteration created by the parties’ assent was large enough to encompass the purportedly altered term. As discussed *supra* in Part I.C, this assent inquiry is almost always paired with an anemic unconscionability evaluation. The result is that courts enforce terms added under change of terms provisions that the parties “assented” to as determined by an easily-manipulated assent inquiry.

C. *The Unconscionability Analysis Applied: Bank One, N.A. v. Coates*

A court’s analysis shifts from an assent-based inquiry to an unconscionability-based evaluation when it construes an amendment to a contract with a change of terms provision as a modification instead of an alteration. This short treatment of assent is exemplified in *Bank One, N.A. v. Coates*.¹⁵²

Coates implicitly holds that (i) when a party with the ability to amend a contract via a change of terms provision proposes a modification, the other party accepts that proposed modification by failing to reject the modification and continuing to perform the contract; and (ii) an unconscionability analysis in a change of terms case is applied to the new term, not the change of terms provision itself.¹⁵³

In *Coates*, Bank One (the Bank) entered into consumer credit agreements which allowed the Bank to “change or amend” any term, provided the Bank gave the cardholder fifteen days’ notice of the change if required to do so by law.¹⁵⁴ This provision can be read in two different ways. One construction is that the clause gave the Bank the right to unilaterally alter the agreement—the fifteen days’ notice requirement was merely a promise that the Bank would inform the cardholder prior to altering the terms if it was required to do so by law. The other construction is that the clause provides an assent mechanism for future modifications—when the Bank gives notice of a new proposed term, the cardholder assents to that proposed modification by failing to terminate the agreement within that fifteen-day period. The fact that the fifteen days’ notice requirement was only triggered by the existence of an applicable law seems to favor the former construction: the Bank has the right unilaterally to alter the agreement.

¹⁵² 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff’d*, Bank One, N.A. v. Coates, 34 F. App’x 964 (5th Cir. 2002).

¹⁵³ See generally *id.*

¹⁵⁴ There is no indication in the decision that either Ohio or the federal statute required that the Bank provide the fifteen days’ notification to alter or modify the contract. *Id.*

The Bank sent a letter to its credit card customers, which the *Coates* court later characterized as a “proposed modification.”¹⁵⁵ The letter informed the cardholders that, unless they notified the Bank of their “non-acceptance” within roughly five weeks after receipt of the letter, an arbitration provision would be added to their cardholder accounts.¹⁵⁶ Cardholder Clarence Coates failed to give the Bank notice of “non-acceptance” by the deadline in the letter and proceeded to challenge the validity of the added arbitration clause.¹⁵⁷

By referring to the new term as a “proposed modification,” the *Coates* court made its analysis much easier. Because the court from the beginning of the opinion construed the arbitration term as a modification of the original agreement rather than as an alteration, the only assent inquiry it thought necessary was whether the cardholder assented to the modification.¹⁵⁸ That task is much more straightforward than defining the “universe” of terms subject to alteration under a change of terms clause.¹⁵⁹

In fact, the court easily distinguished *Badie* by relying on this construction. The court seems to say, rather foggily, that *Badie* was about whether the original agreement authorized an alteration of the contract, and thus the assent-based inquiry concerning what terms were within the purview of the Bank’s alteration power was a necessary first step.¹⁶⁰ Here, the Bank was merely exercising its inherent right to propose a modification. The cardholder assented to that modification by failing to notify the Bank of “non-acceptance” by the date prescribed in the letter.¹⁶¹ There was no real controversy about whether the

¹⁵⁵ *Id.* at 826. It is worth noting that the court made this characterization in the facts section of the opinion. The determination that the letter was a proposed modification and not notice of an alteration seems to be dispositive in the court’s analysis. Further, it is not clear whether the Bank itself referred to the new terms as a “modification” or whether the court merely construed the new terms as such.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 826-27.

¹⁵⁸ See *supra* note 155; *Coates*, 125 F. Supp. 2d at 827.

¹⁵⁹ See *Badie*, 79 Cal. Rptr. 2d at 285.

¹⁶⁰ *Coates*, 125 F. Supp. 2d at 833.

¹⁶¹ “In *Badie*, however, in contrast to the situation presented [here], the court found that the original agreement did not authorize new or amended terms, and the plaintiffs were not given the option of rejecting the arbitration clause.” *Id.* at 833. This implicit conclusory determination regarding cardholder assent to the modification is among the chief problems with the end-run around the implied covenant of good faith and fair dealing sometimes presented by modifications, particularly in the consumer context. See *infra* Part II.C. Although the court gives several examples of instances where a modification was deemed assented to via an opt-out mechanism, it also included a lengthy footnote discussion of *Long v. Fidelity Water Sys., Inc.*, No. C-97-20118, 2000 WL 989914 (N.D. Cal. 2000). See *Coates*, 125 F. Supp. 2d at 832; *Id.* at 833 n.12. In *Long*, a lender sought to compel arbitration based on an arbitration provision purportedly added after the original agreement. In dicta, the *Long* court rejected the notion that an opt-out mechanism was sufficient for assent to a modification, but based its rejection of the clause on its retroactive nature, not on failure of assent to the modification. *Id.* at 833 n.12. The *Long* case is a ghost that seems to haunt the *Coates* court’s fast and loose determination that opt-out is a valid assent

cardholder assented to the modification because the *Coates* court considered the modification's opt-out assent mechanism sufficient to achieve legal acceptance of the term.¹⁶² To avoid enforcement of the modification, the cardholder would have to convince the court that the modification itself was unconscionable.¹⁶³

The *Coates* court began by establishing that, under the FAA, arbitration agreements affecting interstate commerce are subject to federal arbitration law—that is to say, federal cases interpreting arbitration clauses.¹⁶⁴ When determining whether a purported agreement to arbitrate exists, the federal cases essentially instruct the court to apply the applicable state substantive formation law, but to give weight to the federal policy favoring arbitration.¹⁶⁵ This federal policy favoring arbitration, as applied by the *Coates* court, seems to give courts the opportunity to exempt agreements to arbitrate from normal assent standards.¹⁶⁶ The *Coates* court took full advantage of that opportunity by failing to conduct any real assent inquiry.¹⁶⁷

In evaluating the cardholders' unconscionability claims, the court only considered the new arbitration term, not the change of terms clause itself.¹⁶⁸ Because arbitration is an inherently "fair" procedure in the consumer credit context, the court concluded that the arbitration term

mechanism for modifications in the consumer contract of adhesion context.

¹⁶² See *supra* note 161 and accompanying text.

¹⁶³ In a footnote, the *Coates* court dismisses the idea that the modification in question needs consideration to be binding. *Coates*, 125 F. Supp. 2d at 828 n.7. Thus, only equitable arguments like unconscionability remain for a cardholder seeking to avoid arbitration.

¹⁶⁴ *Id.* at 827.

¹⁶⁵ *Id.* (“[C]ourts generally . . . should apply ordinary state-law principals that govern the formation of contracts’ . . . but in doing so, must give ‘due regard . . . to the federal policy favoring arbitration.’” (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 257 (6th Cir. 1996))). In many ways, the *Coates* court's use of this somewhat lower assent standard is a less radical version of the *Badie* trial court's use of *Madden v. Kaiser Foundation Hospitals*, 131 Cal. Rptr. 882 (Cal. 1976), to attempt to lower the assent standard for arbitration agreements to the point where assent is no longer needed at all. See *Badie*, 79 Cal. Rptr. 2d at 279 (correcting the trial court's erroneous reading of *Madden*). Given, however, the FAA's applicability to this case:

[T]he FAA creates substantive federal law that ousts any contrary state law that targets arbitration. Only general state contract law applies to construction and enforcement of arbitration agreements. As long as the requisite nexus exists with interstate commerce, state legislation aimed specifically at perceived problems of arbitration is preempted by the FAA.

Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 759 (2004) (summarizing the current views of the U.S. Supreme Court view).

¹⁶⁶ See *supra* note 165 and accompanying text.

¹⁶⁷ *Coates*, 125 F. Supp. 2d at 828-33. The court was also likely distracted from any serious assent question by the cardholder's argument that the original credit agreement was procured via fraud. *Id.* at 829-30.

¹⁶⁸ *Id.* at 830. The court engaged in a rather conclusory discussion of the cardholders' allegation that the original agreement was unconscionable. *Id.*

was not unconscionable and granted the Bank's motion to compel arbitration.¹⁶⁹

D. *Problems with Coates*

Assent does not matter. Unconscionability might. But the new term is fair, so it will be enforced. That sums up the *Coates* court's unconscionability-based inquiry. This understanding of change of terms cases undermines the classical, assent-based foundation of contract law and endorses a version of relational contract theory through a conclusory assent treatment and reliance on a shallow unconscionability inquiry.

Specifically, the *Coates* court's failure to determine whether the cardholder assented to the new provision, either as an alteration subject to a *Badie* analysis or a modification subject to common law acceptance requirements, represents a disturbing disregard of the voluntary nature of classical contract law. Without meaningfully inquiring into what exactly a party assented to at the moment of formation, contract law moves from a system of enforcing specific promises to a system of enforcing equitable terms, regardless of whether those terms were created by an affirmative assent.¹⁷⁰

1. *Coates* Overlooks Assent

Coates does not conduct a legitimate assent inquiry. The opinion fails to either (i) treat the new term as an alteration and proceed with a *Badie* assent analysis to determine whether the new term was within the "universe" of terms subject to alteration under the change of terms provision, or (ii) consider the new term a modification and subject it to a common law acceptance inquiry. Instead, the court considers the new term a modification that the cardholder assented to by failing to follow the procedure for "rejection" imposed by the Bank and by continuing to perform the contract by using the card.¹⁷¹

The *Coates* court's fast and loose assent finding contradicts the rule of the *Restatement (Second) of Contracts* § 69, which explains that silence does not normally operate as acceptance. Though there are three potentially applicable exceptions to this rule,¹⁷² none vindicate the *Coates* court's failure to conduct an assent inquiry.

¹⁶⁹ *Id.* at 830-36.

¹⁷⁰ *See supra* Part I.C.2.

¹⁷¹ *Coates*, 125 F. Supp. 2d at 831.

¹⁷² RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981):

First, if the offeree takes the benefit of services offered for consideration and intends to accept the offer by doing so, his silence is acceptance.¹⁷³ There is no indication in the opinion that Clarence Coates used his card after he received the offer of modification; therefore he did not “take[] the benefit of” the proposed offer of a relationship with the Bank governed by an arbitration clause.¹⁷⁴

Second, if (i) the offeror gives the offeree reason to understand that assent may be manifested by silence or inaction; and (ii) the offeree, by remaining silent or failing to act, *intends* to accept the offer, his silence or inaction constitutes acceptance.¹⁷⁵ Here, the change of terms provision almost certainly conferred on the Bank a limited right to alter the terms of the contract, but the change of terms provision gave no notice to the cardholder that silence would indicate assent to proposed modifications. Nevertheless, the court relied on the change of terms alteration provision to vindicate its finding that Coates accepted the proposed modification.¹⁷⁶ The court’s logic seems to be that, since the Bank had the power to unilaterally alter the contract, there is no need to determine whether Coates assented to a modification because the Bank could have imposed the new term via the change of terms provision without his consent; any meaningful inquiry into whether Coates assented to the new term via his inaction was therefore unnecessary. The problem with this assumption is that the court fails to subject the change of terms provision to a *Badie*-like analysis to determine the exact scope of the terms eligible for alteration. It is not at all clear that the change of terms provision conferred on the Bank the right to add an arbitration clause.¹⁷⁷ But the court also relies on the notice contained in the proposed modification itself that failure to act by way of the opt-out

Acceptance by Silence Or Exercise Of Dominion.

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

¹⁷³ *Id.* § 69(1)(a).

¹⁷⁴ *See Coates*, 125 F. Supp. 2d 819 *passim*.

¹⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(b) (1981).

¹⁷⁶ *See Coates*, 125 F. Supp. 2d at 830.

¹⁷⁷ *See, e.g., Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004).

procedure would constitute assent.¹⁷⁸ While this notice may have satisfied the requirement that the offeree be given reason to understand that assent may be manifested by silence or inaction, it does not resolve the question of whether Coates, via his silence and inaction, *intended* to accept the offer. Coates claimed that he did not remember receiving the notice and therefore did not intend to accept the offer via his silence and inaction. The court, of course, was free to reject this assertion as a factual matter, but its failure to consider Coates' claim of a lack of intention to accept under the rubric of *Restatement (Second) of Contracts* § 69 manifests a dim view of the importance of assent.

Third, silence can operate as assent when, because of previous dealings or "otherwise," it is reasonable that the offeree should notify the offeror of his decision not to accept.¹⁷⁹ This rule stems from the *Restatement (Second) of Contracts* § 20 requirement that courts evaluate assent under an objective standard. If the offeree gives the impression via previous dealings or other actions that silence means assent, he has assented if he is silent regardless of his actual intention. Here, only the terms of the Bank's proposed modification purported to create a "silence means assent" standard. The change of terms clause in the original agreement, which is the only previous dealing between the parties mentioned in the opinion, did not create a "silence means assent" standard.¹⁸⁰ Accordingly, Coates never communicated anything to the Bank that could have led the Bank to believe that his silence meant assent. Thus, the *Coates* opinion fails to articulate why the prohibition of *Restatement (Second) of Contracts* § 69 on silence as an indication of acceptance is inapplicable to the modification adding the arbitration provision.

2. *Coates* Adopts a Relational View of Contract Law

The *Coates* weak assent inquiry and more in-depth unconscionability analysis reflect a relational understanding of contract law. As discussed *supra* in Part I.C.2, when a court conducts an unconscionability inquiry in a change of terms case, it does not typically consider the unconscionability of the change of terms provision itself. Rather, it considers whether the new term is unconscionable. This is a departure from the classical focus on the time of formation.¹⁸¹

¹⁷⁸ See *Coates*, 125 F. Supp. 2d at 831-32.

¹⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(c) (1981).

¹⁸⁰ See *Coates*, 125 F. Supp. 2d at 830.

¹⁸¹ See *supra* Part I.C.1.

Evaluating non-formation events in light of fairness concerns is a hallmark of relational contract theory.¹⁸² As the relational theorists make clear, the promissory acts of the parties should not be looked to exclusively when evaluating a contract. The overall propriety of the deal, which is based on a multitude of factors surrounding not just the original consensual transaction, but also the “contractual relation” between the parties, should be considered.¹⁸³

When a court focuses only on the question of unconscionability in the performance of the contract and not the question of unconscionability in the terms of the agreement at the time of formation, it adopts a relational view of contract law. Under this view, fairness trumps consent. If the classical, assent-based theory of contract law is to survive, courts must not only enforce terms because they are not unconscionable, but also because the parties actually agreed to them.

III. PROPOSAL: HEIGHTENED ASSENT

To reverse the phrase, contemporary contract law cannot live without or with change of terms provisions.¹⁸⁴ On one hand, change of terms clauses create tremendous transaction cost-reducing benefits for contracting parties.¹⁸⁵ Methods that provide for easy alteration and modification are surely efficient and are therefore necessary innovations in commercial law. On the other hand, change of terms clauses confer on one party the power essentially to move the goal posts. This unusual authority elicits unpredictable responses from courts in the form of classically-minded assent inquiries or relationally-motivated unconscionability analyses.¹⁸⁶

The courts collectively have established that they are incapable of treating change of terms provisions in a predictable manner.¹⁸⁷ Classically-minded judges cling to assent and effectively end their inquiries after they determine that the change of terms provision did or did not confer authority on one party to either alter the term in question or to obtain assent to a proposed modification by way of a lower assent standard.¹⁸⁸ Relationally-oriented courts rely on unconscionability analyses to enforce new terms not because they were assented to, but

¹⁸² See Macneil, *supra* note 29, at 902.

¹⁸³ *Id.*

¹⁸⁴ U2, *With or Without You*, on THE JOSHUA TREE (Island Records 1987).

¹⁸⁵ See *supra* note 8.

¹⁸⁶ See *supra* Part I.B-C.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

because they are fair.¹⁸⁹ Contracting parties can only guess which interpretive scheme a court will employ in the event of a dispute involving a change of terms provision.

A heightened assent rule for change of terms provisions offers a simple resolution to this judicial impasse. In order to add, change, or abrogate a contractual term on the basis of a change of terms provision, a heightened assent rule requires that the parties receive a heightened notice of, and therefore provide a heightened assent to, the change of terms provision in the original agreement. Like many previous contract law innovations, a heightened assent rule seeks to mitigate the effects of potentially oppressive terms while preserving parties' right to contract.¹⁹⁰

A. *Essential Characteristics of a Heightened Assent Rule*

A heightened rule would exhibit at least two essential characteristics.¹⁹¹ First, and most obviously, a heightened assent rule would require the change of terms provision to appear noticeably in the text. This standard could be similar to the "conspicuous" requirement for waiver of the Warranty of Merchantability under the Uniform Commercial Code (UCC)¹⁹² or the "clear and unequivocal" assent standard necessary to enforce a provision in which the first party indemnifies the second party for the second party's negligent acts.¹⁹³ The goal of this requirement is to bring the power to alter terms unilaterally or modify terms through a relaxed standard into the value of the agreement. Presumably, an offer to enter into a contract with a change of terms provision should be worth less than an identical offer

¹⁸⁹ *See id.*

¹⁹⁰ The law is full of mechanisms that seek to avoid unfair results by increasing disclosure. The heightened assent rule is qualitatively similar to many of these mechanisms. The majority of these innovations were birthed in circumstances similar to the conflicted situation in which change of terms jurisprudence finds itself. The typical story line goes something like this: A consensual private practice leads to seemingly inequitable results. Some courts enforce the private practice, others do not. Uncertainty abounds. Finally, the legislature creates a rule that vindicates the practice so long as both parties understand its legal and practical consequences via increased disclosure requirements. This is the story that led to the creation of modern American disclosure-based securities law. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223-35 (1999).

¹⁹¹ The determination of whether a heightened assent rule should be implemented via judge-made common law or via legislation is beyond the scope of this Note. Nevertheless, one implementation might be to add a heightened assent rule to a state's statute of frauds.

¹⁹² U.C.C. § 2-316(2) (2004) ("[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous . . .").

¹⁹³ *See* 8 WILLISTON & LORD, *supra* note 13, §19:19.

without a change of terms clause. Drawing contracting parties' attention to the presence of a change of terms provision would bring this reality into the market.

Second, a heightened assent rule would require that the "universe" of terms subject to alteration or modification under the change of terms provision be expressly included in the text of the change of terms provision itself. This requirement would spare courts the task of finding this "universe" based on the other terms in the contract, a task easily manipulated by drafters seeking to enlarge the scope of the change of terms provision.¹⁹⁴

B. *Satisfying Assent and Unconscionability Concerns*

Most importantly, a heightened assent rule satisfies the underlying concerns of assent-based classical analysis and the unconscionability-based relational evaluation of change of terms provisions. The assent-based court is happy because there can be no doubt as to the scope of the power conferred by the change of terms provision—the types of terms subject to alteration or modification must be expressly listed in the change of terms provision itself. The unconscionability-based court is also happy because it will likely avoid any serious unconscionability argument—the parties were given clear notice of the change of terms provision and the precise manner in which the clause could be used against them in the future.

CONCLUSION

Change of terms clauses are here to stay. But without a uniform method to determine the power conferred by these provisions, courts will continue to conduct assent inquiries to the exclusion of unconscionability analyses or unconscionability analyses to the exclusion of assent inquiries. This division between assent and unconscionability is problematic because both assent and unconscionability evaluations are necessary to vindicate the consensual foundation of contract law and to avoid the enforcement of oppressive provisions in change of terms cases. Unfortunately, the split between assent-focused courts and unconscionability-focused courts is a manifestation of the ongoing tension between classical and relational theories in contract law and is therefore unlikely to resolve itself without a legal innovation.

¹⁹⁴ See *supra* Part II.B.

Lawmakers should adopt a rule requiring heightened assent to change of terms provisions. A heightened assent rule is beneficial because it decreases information dissymmetry at the moment of formation, thereby reducing the potential for parties to use the power conferred by a change of terms clause oppressively. This solution respects the assent-based nature of classical contract law while alleviating the need for futile unconscionability analyses in change of terms cases. For the time being, however, parties with change of terms clauses must live with the uncertainty of the current divide between assent and unconscionability analyses.