

**ENFORCING UNILATERAL CONTRACT AMENDMENTS:**  
***PRESENTATION FOR***  
***THE ASSOCIATION OF CORPORATE COUNSEL***

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# Scope of Presentation

- Foundational Contract Principles
- Unilateral Amendments to Contracts
  - Analytical Principles
  - Cases
  - UDAP Concerns
  - Themes
- Recommendations



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# FOUNDATIONAL CONTRACT PRINCIPLES

# Contract Formation: The Offer

*“The manifestation of willingness to enter into a bargain[.]”*

-- Restatement 2<sup>nd</sup> of Contracts, §24.



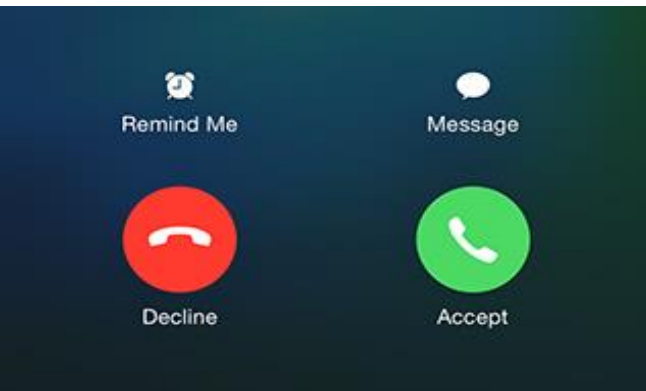
*“The offeror is the master of his offer.”*

-- Restatement 2<sup>nd</sup> of Contracts, §30,  
Comment a.

# Contract Formation: Acceptance

- To form a contract an offer must be accepted.

*See, e.g., Owens v. Wright, 161 N.C. 127, 130 (1912).*



- Acceptance can take many forms:
  - formal written or oral acceptance;
  - performance; and
  - refraining from action.

*See 1 Corbin on Contracts, §§ 3.8 & 3.12.*

# Types of Contracts

- Negotiated Contracts



- Contracts of Adhesion

# Contracts of Adhesion: Definition & Examples

- A contract of adhesion is generally a standard form contract offered on a “take it or leave it” basis. *See Melso v. Texaco, Inc.*, 532 F. Supp. 1280, 1297 (E.D. Pa. 1982).
- Examples:
  - insurance policies;
  - bank deposit agreements;
  - utility service agreements; and
  - online terms of use and privacy policies.

# Contracts of Adhesion: Enforceability

- A contract of adhesion is enforceable. *See Keating v. Superior Court*, 645 P.2d 1192, 1197 (Cal. 1982).
- However, contracts of adhesion and their terms are subjected to rejection based on:
  - lack of fairness;
    - ❖ did it fulfill reasonable expectations of the parties;
    - ❖ do the terms in question serve a legitimate purpose; and
    - ❖ does one party receive all the benefits and the other party receive only burdens; and
  - unconscionability;
    - is the contract procedural unconscionable (i.e., did the party entering the contract lack a meaningful choice); and
    - is the contract substantively unconscionable (i.e., is it “oppressive”).

See 5 Corbin on Contracts, § 24.27.



# Contracts of Adhesion: *Contra Proferentem*



*“Ambiguous contracts (particularly contracts of adhesion) are construed against the drafter.” See Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 221 (2004).*

# Unilateral Amendments: UDAP Statutes

- Federal Trade Commission Act, §5:
  - Prohibits “unfair or deceptive acts or practices in or affecting commerce” (applicable to consumer and commercial transactions).
  - The Federal Trade Commission has primary regulatory authority and there is no private right of action.
- Consumer Financial Protection Act (Dodd-Frank) §1036:
  - Prohibits “unfair, deceptive, or abusive act[s] or practice[s] . . . in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service”.
  - The Consumer Financial Protection Bureau has primary regulatory authority and there is no private right of action.
- State UDAP Statutes
  - In general, similar scope as Federal UDAP Statutes.
  - Typically enforced by State Attorney General and provide private right of action.



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# **UNILATERAL CONTRACT AMENDMENTS: Analytical Principles**

# Unilateral Amendments: Analysis

- Examples of unilateral contract amendments:
  - updated terms of service for phone/cable/online services (*e.g.*, new click through terms);
  - updated privacy policy terms (*e.g.*, updates on websites); and
  - change of terms in banking or insurance contracts (*e.g.*, updates with billing statements).
- Unilateral contract amendments are forms of contracts of adhesion, as such they should be analyzed for:
  - lack of fairness; and
  - unconscionability.
- Keep in mind other contract principles such as consideration and resolving ambiguities against drafter.

# Unilateral Amendments: Effect of Inaction (1)

9.6. Changes to Terms of Use and Assignment. Netflix may, from time to time, change these Terms of Use. Such revisions shall be effective immediately; provided however, for existing members, such revisions shall, unless otherwise stated, be effective 30 days after posting. We may assign our agreement with you to any affiliated company or to any entity that succeeds to all or substantially all of our business or assets related to the applicable Netflix service.

We may need to make changes to these Terms from time to time for many reasons. For example, we may need to reflect updates in how the Services work or changes in the law. You should look at these Terms regularly, which are posted on the Hulu Site at [hulu.com/terms](https://www.hulu.com/terms). If we make a material change to these Terms, we will notify you by posting a notice on the Hulu Site. If you are a registered user, we will also send an email to the email address you most recently provided to us prior to the material change taking effect. Any material change to these Terms will be effective automatically 30 days after the revised Terms are first posted or, for users who register or otherwise provide opt-in consent during this 30-day period, at the time of registration or consent, as applicable.

# Unilateral Amendments: Effect of Inaction (2)

## Restatement 2<sup>nd</sup> of Contracts Analysis:

- “*The offeror is the master of his offer.*” Restatement 2<sup>nd</sup> of Contracts, §30, Comment a.
- Restatement 2<sup>nd</sup> of Contracts, §69(1)(a) –(b):
  - “(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.”

# Unilateral Amendments: Effect of Inaction (3)

## Restatement of Consumer Contracts, §3(a) (Tent. Drafts)

### Analysis:

“(a) A standard contract term in a consumer contract governing an ongoing relationship is modified if:

- (1) the consumer receives a reasonable notice of the proposed modified term and a reasonable opportunity to review it;
- (2) the consumer receives a reasonable opportunity to reject the proposed modified term and continue the contractual relationship under the existing term, and a reasonable notice of this opportunity; and
- (3) the consumer either:
  - (A) manifests assent to the modified term or
  - (B) does not reject the proposed modified term and continues the contractual relationship after the expiration of the rejection period provided in the proposal.”

# Unilateral Amendments: Effect of Inaction (4)

Restatement of Consumer Contracts, §3(b) (Tent. Drafts)

Analysis:

*“(b) A consumer contract governing an ongoing relationship may provide for a reasonable procedure under which the business may propose a modification of the standard contract terms, but may not, to the detriment of the consumer, exclude the application of subsection (a), **except** that the established procedure **may replace** the reasonable opportunity to reject the proposed modified term **with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.**”*



# Unilateral Amendments: UDAP Principles (1)

- Unfairness Standard – an act or practice is unfair if the following three prongs are met:
  - It causes or is likely to cause substantial injury to the customer.
    - ❖ Usually involves monetary harm, *i.e.*, costs or fees paid by the customer as a result of the act or practice.
  - The injury is not reasonably avoidable by the customer.
    - ❖ Injury is not reasonably avoidable by if “the act or practice interferes with [the customer’s] ability to effectively make decisions or to take action to avoid injury.”
    - ❖ For example, a customer cannot reasonably avoid injury caused by an act or practice if material information is withheld from the consumer or modified after it is disclosed to the customer.
  - The injury is not outweighed by countervailing benefits to customers or to competition.
    - ❖ Countervailing benefits may include lower prices or increased access to a particular financial product that would not otherwise be available if an act or practice was prohibited.

# Unilateral Amendments: UDAP Principles (2)

- Deception Standard – an act or practice is deceptive if the following three prongs are met:
  - The act or practice involves a representation or omission that misleads or is likely to mislead the customer.
    - ❖ For purposes of determining whether an act or practice is deceptive, misleading representations or omissions may include misleading price claims or conflicting disclosures.
  - The customer's interpretation of the representation or omission is reasonable under the circumstances.
    - ❖ A customer's interpretation of or reaction to a representation or omission must be reasonable under the circumstances to be misleading.
  - The misleading representation or omission is material.
    - ❖ A representation or omission is material if it is likely to affect a customer's choice of, or conduct regarding, the product or service. Express claims made with respect to a financial product or service are presumed material.



# **UNILATERAL CONTRACT AMENDMENTS: Cases**

# Unilateral Amendments: *Martin v. Comcast* (1)

## *Martin v. Comcast*, 146 P.3d 380 (Or. App. 2006):

- Comcast updated cable service agreements via a “bill stuffer” amendment.
- Comcast claimed at trial that in Nov. 2001 it provided written notice to customers of changed policies and procedures document that was applicable to cable service.
  - The notice (in all caps) indicated among other things that a new arbitration clause had been added to the agreement and customers should carefully read the updated policies and procedures document.
  - The new policies and procedures document would become effective 30 days after notice and continued use of service would constitute acceptance of policies.
- Policies and procedures document was not introduced at trial; marketing officer testified that “new customers” would have received policies, but she did not indicate when new customers would have received policies or if it would have been provided at the time of the agreement.

# Unilateral Amendments: *Martin v. Comcast* (2)

- Trial record contained copies of later versions of the policies (which included arbitration clauses); those policies were provided to “***new and existing customers***”. However, the record did not indicate whether existing customers were notified that these subsequent policies amended the earlier service agreements entered into by existing customers.
- Key Points of Court’s Decision:
  - Inaction can serve as evidence of assent.
  - However, where there is no evidence that the customer ever received the changed policies (or whether the policies they did receive amended the original agreement), a customer’s inaction cannot serve as the basis of assent.
- Other Points Worth Noting:
  - Court faced issue of whether Federal law (Cable Television Consumer Protection Act) governed process of updating agreement to include arbitration clause.
  - Court also had to analyze application of Federal Arbitration Act to amendment process.

# Unilateral Amendments: *Douglas v. U.S. Dist. Ct.*

*Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062 (9<sup>th</sup> Cir. 2007):

- Talk America amended its service contract by posting new terms online.
- New agreement included, among other things, an arbitration clause and a class action waiver clause.
- Plaintiff received **no notice** of updated service agreement.
- **Key Points of Court's Decision:**
  - As the plaintiff received no notice of the changes to the Talk America's service agreement, he was not bound by that changed agreement. *"Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been **changed** by the other side."*
  - While plaintiff has choice of other phone carriers, that fact alone was not (under California law) sufficient to defeat a claim of procedural unconscionability.
  - Class action waivers are potentially substantively unconscionable under California law.

# Unilateral Amendments: *Plazza v. Airbnb* (1)

*Plazza v. Airbnb, Inc.*, 289 F. Supp. 537 (S.D.N.Y. 2018):

- Relevant plaintiff signed up for Airbnb account in 2009.
- 2009 Terms of Service (the “**TOS**”) did ***not*** contain an arbitration clause, however, versions of TOS since August of 2011 included an arbitration clause.
- Each version of the TOS was preceded by language in bold and all caps that encouraged account holders to read TOS carefully and noting that TOS contained important information related to legal rights and dispute resolution.
- After an update to the TOS, the first time an existing account holder signed into their account they were required to click “Agree” or “I Agree” to having their account governed by updated TOS. Beginning in 2012, above the click boxes were hyperlinks to descriptions of the changed terms and scrollable versions of the changed terms.
- Beginning in 2014, Airbnb also sent email notices regarding the modifications to the TOS. The emails providing links with explanations of the changes in the TOS.

# Unilateral Amendments: *Plazza v. Airbnb* (2)

- Airbnb records indicated that plaintiff consented to the TOS in 2009, 2012, 2014 and 2015.
- **Key Points of Court's Decision:**
  - Clickwrap agreements are generally easier to enforce than browse wrap agreements, but even browse wrap agreements are enforceable if there is reasonably conspicuous notice of their terms.
  - The court held that it did not have to reach the question of whether the TOS in question were clickwrap or browse wrap terms as they were enforceable in any case given the notifications that Airbnb had provided regarding the changes in the TOS.
  - Plaintiff's agreement to the modified TOS and continued use of Airbnb services served as evidence of assent.
  - There was no fraudulent inducement regarding the TOS as there were no fraudulent misrepresentations by Airbnb.
  - There was no procedural or substantive unconscionability with respect to the inclusion of an arbitration clause in the TOS as (a) the arbitration clause was clearly brought to the plaintiff's attention and (b) there was no substantive unconscionability simply because certain claims were exempt from arbitration (*e.g.*, IP infringement claims).



# Unilateral Amendments: *Badie v. Bank of America* (1)

*Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998):

- Bank of America sought to add an ADR provision to its consumer credit card and deposit account agreement via a bill stuffer amendment.
- The billing statement notices included the language of the ADR clause.
- The original customer agreement did not contain any provisions regarding the forum or method for resolving disputes.
- The original customer agreement did contain a clause stating that “[a]ll terms [of the agreement] are subject to **change**”.

# Unilateral Amendments: *Badie v. Bank of America* (2)

## Key Points of Court's Decision:

- The parties did not intend that the change of terms provision should allow Bank of America to add completely new terms such as an ADR clause simply by sending out a notice. The language of the original agreement only permitted changes to existing terms.
- The right to a jury trial is a fundamental right and there needs to be clear and unmistakable evidence that such right was waived – that evidence was lacking in bill stuffer amendment process.

# Unilateral Amendments: Other Cases

For cases like *Badie*, but with different results see:

- *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. Jan. 2, 2001): The court upheld a unilateral amendment imposed by a bank where the document notifying the customer of the addition of the arbitration clause began with the heading, “IMPORTANT NOTICE”.
- *Herrington v. Union Planters Bank*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000):
  - ❖ The original deposit account agreements provided that the “terms and conditions of the deposit agreements ... could be subsequently amended” upon sufficient notice, and continued use of the account constituted acceptance of the amended agreement.
  - ❖ An ADR clause was added by the bank upon notice. The court held that the plaintiffs were given sufficient notice that their agreements could be amended to include such a clause and that the plaintiffs accepted the terms of the amended agreement by continuing to use their account.

# Unilateral Amendments: UDAP Analysis

## Unfair Act or Practice Analysis:

- Does the contractual term relate to a material right of the customer, such that a unilateral amendment would be “likely to cause substantial injury to the customer”?
- Does the customer have the ability to “effectively make decisions or to take action to avoid” any monetary harm caused by the unilateral amendment?

## Deceptive Act or Practice Analysis:

- Is the applicable contractual term, and any amendment thereto, material?
- Is the customer provided notice of the unilateral amendment?
- Does the notice accurately describe unilateral amendment?



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# **UNILATERAL CONTRACT AMENDMENTS: Themes**

# Unilateral Amendments: Key Themes (1)

- Court decisions can be result driven.
- Unilateral contract amendments that include new arbitration clauses or deny class actions will incur greater scrutiny from courts.
- Courts will scrutinize amendments for their fairness.
- Lack of notice regarding a unilateral contract change will typically result in the change being unenforceable.

## Unilateral Amendments: Key Themes (2)

- Notices should describe (and provide directions for obtaining) the contract changes and should allow for sufficient time to avoid the change (*i.e.*, terminate the service or opt out of the change).
- Ambiguities in the underlying agreement or the unilateral amendment will be construed against the drafter.
- Documenting the notice process is important.
- Using “clickthrough” terms for acknowledging amendments may assist in enforcing the amendment.



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# **UNILATERAL CONTRACT AMENDMENTS: Recommendations**



# Unilateral Amendments: Recommendations (1)

- Draft original agreement to expressly allow for unilateral updates, amendments or additions to agreement. Follow contract process for amending the agreement.
- Provide sufficient period (*e.g.*, 30 to 60 days) between date of notice and effective date of amendment.
- Allow customer ability to either terminate the service with minimal or no cost or opt of the change.
- Notice should describe (or include method for obtaining) description of all materials changes to the agreement (*e.g.*, change in governing law, dispute resolution process, fees).

## Unilateral Amendments: Recommendations (2)

- Text of amended document should be provided (or made available through process such as hyperlinks).
- Use bold and large cap type at the outset of any notices to inform customer if changes are being made to the agreement.
- Consider using “click-through” terms for acknowledging amendments and contract changes.

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