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Neutral Standardizing of Contracts

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Keynote Address

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We are surrounded by standardized products. Standard computer compact disks (CDs) fit into computers manufactured by HP, Apple, Dell, Lenovo, Sony, Toshiba and probably all other new computers. Standard diskettes fit into an earlier generation of computers. This compatibility between diskettes, CDs and computers is not accidental. These compatibilities are the result of the collaborative deliberations of members of a standard-setting organization. Many similar standards are the product of the collaborative efforts of members of thousands of standard-setting organizations. The Institute of Electrical Electronics Engineers ("IEEE-SA") is one of these organizations that sets standards for the manufacture and operation of computers and computer-related functions.[1] Organizations such as

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1. The IEEE-SA describes itself as follows:

> The Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA) is the leading developer of global industry standards in a broad-range of industries, including:
>
> - Power and Energy
> - Biomedical and Healthcare
> - Information Technology
> - Telecommunications
> - Transportation
> - Nanotechnology
> - Information Assurance
>
> For over a century, the IEEE-SA has offered an established standards development program that features balance, openness, due process, and consensus.

IEEE Standards Association, Overview, http://standards.ieee.org/sa/sa-view.html (last visited Feb. 7, 2008).

IEEE-SA meet with relative freedom from the constraints of the antitrust laws.[2] Many of these standard-setting organizations are multinational.[3] Suppose in New York you pick up a telephone manufactured by AT&T or any one of the one hundred or so telephone manufacturers. It is no accident that if you punch in the telephone number of someone in Kazakhstan, the phone will ring in Kazakhstan. The ringtone may be unfamiliar, but hundreds of standards developed by the telephone industry help ensure that it will ring.[4] When the person you called picks up the telephone he or she can hear your voice. Multiple internationally recognized standards assure these results. Indeed,

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JEDEC is another standard-setting committee that impacts information technology. Its home page describes the committee in the following terms:

> JEDEC is the leading developer of standards for the solid-state industry. Almost 3100 participants, appointed by some 290 companies work together in 50 JEDEC committees to meet the needs of every segment of the industry, manufacturers and consumers alike. The publications and standards that they generate are accepted throughout the world. All JEDEC standards are available online, at no charge.

JEDEC, http://www.jedec.org/ (last visited Feb. 7, 2008). Upon visiting the web site, I was invited to join.

2. There is ample literature. Among the most recent are Michael Betts, *Standardization in Information Technology Industries: Emerging Issues Under Section Two of the Sherman Antitrust Act*, 3 OKLA. J. L. & TECH. 34 (2007); Michael Betts, *Plunging into the Information Age: The Effect of Current Competition Policy on United States Science and Technology Policy*, 3 OKLA. J. L. & TECH. 33 (2007); M. Sean Royall, *Standard Setting and Exclusionary Conduct: The Role of Antitrust in Policing Unilateral Abuses of Standard-Setting Processes*, 18 ANTITRUST 44 (2004); Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393 (2004); David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913 (2003).

3. *See* NILS BRUSSON & BENGT JACOBSON AND ASSOCIATES, A WORLD OF STANDARDS (Oxford Univ. Press 2000).

4. Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488-89 (1998).

> Telephones and fax machines are classic examples of actual network goods; owning the only telephone or fax machine in the world would be of little benefit because it could not be used to communicate with anyone. The value of the telephone or fax machine one has already purchased increases with each additional purchaser, so long as all machines operate on the same standards and the network infrastructure is capable of processing all member communications reliably.

Id.

there are said to be "over 100 private and public entities involved in standard-setting in the telecommunications area."[5]

Standardization, however, is not always a product of collaborative organizational decisions. Sometimes standards are set by an early entry into the market. The so-called QWERTY keyboard is not ideal but was created by Christopher Latham Sholes, one of several inventors of the typewriter. A typewriter with the QWERTY keyboard, manufactured and marketed by the Remington Arms Company, dominated the market and became the standard. The typewriter and computer keyboards we know today, with minor variations, are clones of the original.[6] Although more efficient keyboards have been devised, no competitor of Remington or its successor market leaders ever made more than a dent in the prevalence of the QWERTY keyboard. Despite its inefficiencies, no more efficient keyboard seems likely to supplant it today.

Standards are sometimes set by the strongest of several adversaries in the market. VHS became the standard video cassette only after a bitter Darwinian marketplace battle with a competitive system marketed by Betamax.[7] Only VHS survived. A similar struggle is now in progress between Samsung, Pioneer and Sony, the backers of Blu-Ray discs, as allies against Toshiba, Intel and Microsoft, the backers of HD-DVD. Both products are hawked as replacements for the DVD.[8]

Sometimes the federal government will set a standard, as was the case with digital television.[9] However, the administration of Bill Clinton sought to remove the government from stan-

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5. Kathleen M. H. Wallman, *The Role of Government in Telecommunications Standard-Setting*, 8 COMMLAW CONSPECTUS 235, 235 n.2 (2000).

6. Sholes was the first of several inventors of a typewriter to market his invention successfully. For the history of the invention and diffusion of the standard English language keyboard developed by Sholes, see Consider QWERTY, http://home.earthlink.net/~dcrehr/whyqwert.html (last visited on Feb. 7, 2008).

7. "[M]anufacturers divided themselves into two camps: On the Betamax side were Sony, Toshiba, Sanyo, NEC, Aiwa and Pioneer. On the VHS side were JVC, Matsushita (Panasonic), Hitachi, Mitsubishi, Sharp, and Akai." Media College.com, The Betamax vs. VHS Format War, http://www.mediacollege.com/video/format/compare/betamax-vhs.html (last visited Feb. 7, 2008).

8. *See* Dan Costa, *Blue-Ray v. HD-DVD: What You Need to Know*, PC MAGAZINE ONLINE, June 28, 2006, http://www.pcmag.com/article2/0,1759,1982533,00.asp (last visited Feb. 13, 2008).

9. *See* JOEL BRINKLEY, DEFINING VISION: HOW BROADCASTERS LURED THE GOVERNMENT INTO INCITING A REVOLUTION IN TELEVISION (Harcourt & Brace Co. 1998).

dard-setting, saying that "the marketplace, not governments, should determine technical standards . . . ."[10] In the implementation of this philosophy, legislation was enacted to give preference to voluntary standards set by industry as alternatives to governmental mandatory standards.[11] Yet, current daily newspaper accounts describe the efforts of the Grocery Manufacturers Association to induce the Food and Drug Administration to set a new and arguably debased standard for what constitutes chocolate.[12]

This has been a brief review of some of the principal standard-setting mechanisms. There are others.[13]

What has any of this discussion of product standardization have to do with standard form contracts? Uncounted word-processing toner cartridges have been emptied in writing about the problems presented by standard contract forms. "Standard forms dominate both the consumer and the business environment so that only contracts that are sufficiently large, complicated, or idiosyncratic enough to justify negotiation over more than the basic terms of quantity, price, and delivery satisfy the meeting of the minds standard that underlies traditional notions of consent."[14] The drafting of standard forms by national enterprises has properly been described as "unilateral private ordering of terms imposed by the dominant party"[15] and has been denounced by a prominent scholar as the equivalent of leg-

10. Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745, 745 n.2 (1999) (quoting William J. Clinton & Albert A. Gore, Jr., *A Framework for Global Electric Commerce* § 9 (1997), *available at* http://www.itmweb.com/essay541.htm (last visited Feb. 11, 2008)).

11. *See, e.g.*, Elliott Klayman, Comment, *Standard Setting under the Consumer Product Safety Amendments of 1981—A Shift in Regulatory Philosophy*, 51 GEO. WASH. L. REV. 96 (1982).

12. Mort Rosenblum, *Chocolate Fake*, N.Y. TIMES, June 25, 2007, at A19.

13. A more thorough canvas of standard-setting mechanisms appears in Kathleen M.H. Wallman, *The Role of Government in Telecommunications Standard-Setting*, 8 COMMLAW CONSPECTUS 235 (2000).

14. Clayton P. Gillette, *Rolling Contracts As an Agency Problem*, 2004 WISC. L. REV. 679, 679.

15. Irma S. Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOYOLA L.A. L. REV. 137, 138 (2006). Another attempted classification of boilerplate terms is "terms of use," as applied to software licenses. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006).

islation by the likes of unelected credit card issuers and other firms that present standard forms to consumers on a take-it-or-leave it basis.[16] Many standard forms contain terms that are heavily weighted towards the propounder's interests.[17] Even where the standard form is not unduly weighted in favor of the propounder, like the QWERTY keyboard, the form is unlikely to adequately take into account the interests of the consumer.

Despite scholarly concentration on the topic, "[t]he problem of mass-produced contracts of adhesion was a Twentieth Century problem for contract law, which Twentieth Century contract law never really solved."[18] A twenty-first century solution is needed. The problem stems from the adversarial nature of the way those of us who write about contract law enshrine as the model of contract formation. The model assumes that adult participants in the marketplace negotiate, haggle over and formulate a contract that takes into account the interests of both parties. This type of contract formation no longer reflects the formation of the typical consumer contract. Instead, the drafter of standard form consumer contracts uses the adversarial model to produce form contracts that take into account only the inter-

16. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); *see also* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1139-42 (2006) (making the point that standard forms ought to be interpreted as if they were statutes). Slawson's proposed solution to the problem of unfair terms in consumer contracts is put forward in W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853. Another, but idiosyncratic, look at contracts as private lawmaking is David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003) (noting that only megalateral contracts–"to which thousands or millions of parties assent"–qualify as lawmaking).

17. *See, e.g.*, 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 (2006). As to unfair terms in shrinkwrap and clickwrap licensing contracts, see Annalee Newitz, *Dangerous Terms: A User's Guide to EULAS*, http://www.eff.org/wp/eula.php (last visited Feb. 11, 2008). It has been noted that businesses frequently do not enforce onerous terms against high value, honest consumers. Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006). Much the same point is made in Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

18. Charles Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOYOLA L.A. L. REV. 95, 135 (2006).

ests of the propounding party. These lawyer-drafted forms often go well beyond what the client needs or wants.[19]

Not much ink has been applied to the question of how to draft standardized form contracts entered into by consumers so that they are not loaded with terms that are unduly favorable to the drafting party. Numerous *neutral* standard forms, developed by organizations, are currently employed by business lawyers and businesses for transactions between businesses.[20] Unfortunately, consumers have not benefited from this process.

To take a more or less arcane example of neutral standard-form drafting, the International Swap and Derivatives Association ("ISDA") provides a boilerplate Master Agreement which contains the non-financial terms of the transaction. The ISDA also publishes an array of booklets containing definitions, riders, confirmation forms and a user's guide explaining the use of these documents, as well as detailing standardized variations of the Master Contract.[21] The ISDA membership of 815 institutions consists of leading financial institutions, various end-users of derivatives and premier law firms.[22] Its members come from every continent. The drafting of boilerplate terms by such a diverse group helps ensure that the concerns of most stakeholders will be taken into account. The model by which it is created is a participatory, collaborative effort by its stakeholders rather than an adversarial clash as was the clash between VHS and Betamax. Careful legal advice helps such an organization stay clear of committing antitrust violations.[23]

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19. A notorious example is the form used in *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 289 F. 693 (5th Cir. 1926), purporting to give the plaintiff perpetual rights with the option to cancel at will. It was void for want of consideration.

20. This is not surprising. Many observers have commented on the utility of standard forms. *E.g.*, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1221 (1983) (noting that standard form contracts lower administrative and transactional costs, helping to avoid damages and liability); M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 364 (1976) (stating that standard form contracts reduce the costs of transactions and promote efficiency in the conduct of trade).

21. *See* International Swaps and Derivatives Association, Inc., http://www.isda.org (last visited on Feb. 11, 2008).

22. *Id.* (click "membership") (last visited Feb. 11, 2008).

23. *See* Letter from Thomas O. Barnett, Assistant Attorney General, to Kenneth P. Ewing, Counsel for the American Trucking Associations, Inc. (Aug. 10,

In a similar collaborative effort, the North American Energy Standards Board has hammered out a document known as "General Terms and Conditions, Base Contract for Sale and Purchase of Natural Gas."[24] The North American Energy Standards Board is an organization under the aegis of ANSI–American National Standards Institute—the most important North American umbrella organization to which standard-setting committees are responsible.

It is well known that the non-financial terms of trust indentures rarely depart from boilerplate.[25] Even where negotiated terms supplement the boilerplate, standard variations have been published for adoption.[26] The use of these boilerplate terms promotes efficiency by drastically reducing transaction costs and creates a high degree of certainty.[27] Complex deals are simplified and the parties have a high degree of assurance that they know their rights and obligations and that the courts will effectuate their understanding.[28]

2006), *available at* http://www.usdoj.gov/atr/public/busreview/217742.htm (last visited Feb. 11, 2008). I am indebted to Professor Mark Patterson for this reference.

24. Calpine Corp. v. Bank of New York, 895 A.2d 880, 882 (Del. Ch. 2005), *aff'd in part, rev'd in part sub nom* Wilmington Trust Co. v. Calpine Corp., No. 602, 2005 Del. LEXIS 520 (Del. Dec. 16, 2005) (discussing the use of NAESB Standard 6.3.1). For an analysis, see Karen Goepfert, *For the Long Haul: The Suitability of the Base Contract for the Sale and Purchase of Natural Gas for Long-Term Transactions,* 27 ENERGY L.J. 583 (2006). This standard form and several others are available for purchase at American National Standards Institute eStandards Store, http://webstore.ansi.org/ansidocstore/dept.asp?dept_id=3114 (last visited Feb. 11, 2008).

25. For a brief history of the development and modifications of this boilerplate, see Committee on Trust Indentures and Indenture Trustees, ABA Section of Business Law, *Model Negotiated Covenants and Related Definitions,* 61 BUS. LAW. 1439, 1439-40 (2006).

26. *Id.*

27. *But see* Tina L. Stark, Address at the Fifth Annual Business Law Symposium, New Jersey Institute for Continuing Legal Education: Those Boilerplate Provisions at the End of the Contract-Fine Print, Big Deal (Nov. 2003) (warning against the unthinking adoption of boilerplate).

28. In *U.S. Trust Co. of New York v. Alpert*, 10 F. Supp. 2d 290, 305 (S.D.N.Y. 1998), *aff'd*, 168 F.3d 630 (2d Cir. 1999), the court referred to boilerplate Trust Indenture terms using the language:

> There is no dispute herein that the provisions of the Trusts' Indentures relating to record dates and distributions are basically standard, 'boilerplate' provisions for these instruments. Uniformity of interpretation of such provisions is essential to the efficiency of the markets. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982); *Broad v.*

Along with the collaborative model, there is the paternalistic model of crafting neutral form contracts. Best known are the standard forms published by the American Institute of Architects ("AIA"). With the possible exception of the form for the retaining of an architect, these forms are designed to take into account and balance the interests of all stakeholders. Since they have been refined and updated since 1888, the drafters have interactively taken into consideration numerous court decisions and problems that have emerged over the course of a century. Approximately one hundred AIA forms have been developed. According to one analysis, "the case for [AIA] form contracts for construction is an example of how markets, as opposed to private negotiation, can be used to determine efficient contract terms."[29] I call this the paternalistic model; the paternity of the contract is the market as perceived by the AIA.

Another model for the formulation of neutral standard form contracts is the collective bargain. Standard forms are sometimes negotiated between potentially adversary organizations. The resulting collaborative standard form is comparable to a collective bargaining agreement between labor and management. A reported case informs us that

> [t]he 1988 Hospital Agreement . . . was a standard form of Hospital Agreement for hospitals . . . within the Philadelphia region. It was negotiated by Blue Cross with a trade association known as the Delaware Valley Hospital Counsel ("DVHC"), but each hospital member of DVHC then negotiated its own separate per diem rates with Blue Cross.[30]

Rockwell Int'l Corp., 642 F.2d 929, 943 (5th Cir. 1981). I think it fair to assume that, if this court were to award these settlement proceeds to the Former Holders out of their theory of 'equity' rather than apply the directives of the language of the Indentures, it would send shock waves to the markets.

Id.

29. Surajeet Chakravarty & W. Bentley MacLeod, *On the Efficiency of Standard Form Contracts: The Case of Construction* (University of Southern California Law and Economics Working Paper Series, Paper No. 17, 2004), *available at* http://law.bepress.com/usclwps/lewps/art17 (last visited Feb. 11, 2008).

30. Taylor Hosp. Corp. v. Blue Cross of Greater Philadelphia, No. 923, 2001WL 1807882 (Pa. Com. Pl. Apr. 23, 2001).

But note that the standard form was developed by negotiation between two organizations that had relatively equal bargaining power.

Where neutral standard forms formulated by the collaborative, paternalistic or collective bargain model often employed in commercial business-to-business contexts exist, a party's attempt to introduce deviations from the standardized language generally meets great resistance. This resistance is typically fueled by inertia or suspicion that the party seeking the deviation is out to trick the resisting party.[31]

Another kind of neutral standard form for business to business transactions is the Model Agreement.[32] These vary from routine standard forms and are more likely to receive tailor-made deviations. Model Agreements are designed to simplify the work of the drafter and call attention to terms that might have been overlooked by drafters of a tailor-made agreement. (Of course, law firms that frequently deal with, say, mergers and acquisitions have their own model forms.) Still more remote from the more rigid intra business forms are bar association texts that are guides for lawyers in drafting tailor-made agreements.[33]

Consumers are notably absent from most of the standard-form drafting organizations. Judge Posner, not generally known for championing consumers, but known for his faith in marketplace competition, makes this surprising statement:

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31. *See* Omri Ben-Shahar & John Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 680-87 (2006).

> It is sometimes cheap and desirable to offer terms that differ from the default rules or the standard terms used in the market. But the proposal of new and otherwise unfamiliar terms may also raise suspicions and scare away potential counterparties. Default rules and the standard boilerplate terms may stick more than we think, and more than they should.

Id. at 687.

32. The ABA's Business Law Section has produced a number of such model agreements. *E.g.*, ABA Committee on Negotiated Acquisitions, Model Joint Venture Agreement with Commentary (2006); ABA Committee on Negotiated Acquisitions, Model Asset Purchase Agreement with Commentary (2001).

33. *E.g.*, The ABA's Committee on Negotiated Acquisitions, The M & A Process: A Practical Guide for the Business Lawyer (2005). A more thorough canvas of non-profit organizations that draft form contracts can be found in Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate,* 104 MICH. L. REV. 1075 (2006).

> [F]orm contracts used in transactions with consumers tend to be one-sided because they are drafted by firms, trade associations, or professional associations, which want such contracts to be slanted in their favor. . . . To my suggestion that form contracts used in consumer transactions tend to be one-sided it may be objected that competition can be relied upon to yield the optimal form. But that is doubtful.[34]

After making these remarks, he proceeds to defend what to some is indefensible—the use by firms of "bad," that is consumer-unfriendly, form contracts.[35]

What can be done to assure that a standard take-it-or-leave-it form to which a consumer must adhere takes into account the consumer's interests? One answer might be consumer protection legislation. At times such legislation dictates that a contract must contain certain terms. Insurance legislation is one illustration of legislation that mandates certain terms for protection of the consumer.

For example, New York's insurance law requires that life insurance policies "shall contain in substance the following provisions, or provisions which the superintendent deems to be more favorable to policyholders."[36] Similar statutes have been enacted in many other States.[37] These provisions include such insured-friendly terms as a thirty-one-day grace period[38] and a two-year incontestable clause,[39] and insurer-friendly terms such as a strict integration clause.[40] The insured may not waive or contract away terms that are for the protection of the insured under this statute and its cognate statutes in other states.[41] Thus, such statutes compel partial form requirements. They

34. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1585-86 (2005).

35. *Id.*

36. N.Y. INS. LAW § 3203(a) (McKinney 2007).

37. LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 17.12 (3d ed. 2005) [hereinafter "COUCH"].

38. N.Y. INS. LAW § 3203(a)(1).

39. *Id.* § 3203(a)(3).

40. *Id.* § 3203(a)(4).

41. COUCH, *supra* note 37, at § 19:1; H.D. Warren, *Theory of Waiver as Applicable Where Provisions of Policy or Acts of Insurer Are Inconsistent with Statutory Requirements*, 9 A.L.R.2d 1436. The National Association of Insurance Commissioners ("NAIC") has developed some uniformity of state standards for policy provisions. Most recently, the NAIC was instrumental in creating a standard-setting organization, the Interstate Insurance Product Regulatory Commission ("IIPRC").

dictate particular provisions to be included in the policy unless more favorable terms are offered to the insured. Indeed, if the policy does not expressly contain a mandated term, it is nonetheless integrated into the contract. "Existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and, together with settled judicial constructions thereof, become a part of the contract as much as if they were actually incorporated therein."[42] Despite the mandating of several terms of an insurance policy, such legislation is uncommon and possibly incomplete as no standard insurance policy is mandated or suggested. This also helps explain the enormous percentage of cases concerning the interpretation of insurance policies that bulk-up the advance sheets.

Legislation can determine the content of a standard form. Whether such legislation would be wise is another question. Jeremy Bentham proposed that for each species of contract, "let a distinct species of paper be provided."[43] Thus "farm lease paper" would be a different legislated form than "house lease paper" and "lodging-lease paper," etc.[44] The use of these forms would be mandatory, a requirement which would be widely publicized by the state. Each would contain an essay on the law governing the kind of transaction for which it was drafted.[45]

The New York legislature has done this in a small way as to a relatively non-controversial context—powers of attorney. The legislature in 1948 created a statutory short form power of attorney and also twelve sections of the law defining and construing the contents of the statutory short form.[46] For example, if the principal checks off on the form that he or she authorizes

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By an interstate compact among thirty states, it began in 2007 to undertake standard setting for various insurance products.

42. COUCH, *supra* note 37, at § 19:1.

43. Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form,* 43 FORDHAM L. REV. 39, 51 (1974) (citing JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk 4, ch. 3, § 2 (1843)).

44. *Id.* (citing BENTHAM, *supra* note 43).

45. *Id.* (citing BENTHAM, *supra* note 43).

46. Currently the statutory form is found in New York Real Property Law section 5-1501. N.Y. REAL PROP. LAW § 5-1501 (McKinney 2007). It was enacted by the Laws of 1948 c. 422, at the suggestion of the New York Law Revision Commission. The report urging enactment was written by Professor Richard R. Powell of Columbia. N.Y. Leg. Doc. 65(L) (1946). He found a precedent for such legisla-

the agent to engage in "real estate transactions," current General Obligations Law section 5-1502A describes in detail the kinds of transactions which the agent may bind the principal.[47] Eleven other articles do the same for other tasks the agent has been authorized to perform.[48]

In more controversial areas, such as the landlord-tenant relationship, the content of a software license or of the rental of an automobile, one may question whether a legislature is an apt entity for the creation of mandated or suggested standard forms. There are reasons to think that it may not be the ideal organ for this purpose. For one thing, legislatures are intensely political. For example, if a legislature were to propose or mandate the terms of a residential lease, it could very well be heavily skewed towards the terms propounded for lobbyists for landlords or for tenants. In addition, legislatures are very much under the control of the powers of inertia. Once a form has been legislated, it will often be exceedingly difficult to rectify mistakes or to update the form to take into account changes to which the market would react.

Attempts to protect consumers in the drafting of standard forms have varied. Close to a consumer transaction is the purchase of residential real estate. In some states, buyers and sellers are routinely represented by counsel. However, in many states, residential property is routinely contracted to be sold without the assistance of counsel. Procedures vary from state to state. In New York, lawyers are almost always involved in the preparation of the contract and they also preside over the closing.[49] We are told that in North Carolina, "[t]he majority of residential sales contracts are written by real estate agents using standard forms provided by the North Carolina Association of Realtors. These 'fill in the blanks' forms were developed by

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tion in what is now New York Real Property Law section 254, which had defined certain terms used in deeds of conveyance. N.Y. REAL PROP. LAW § 254.

47. N.Y. GEN. OBLIG. LAW § 5-1502A.

48. N.Y. GEN. OBLIG. LAW §§ 5-1502B(4)-5-1502L.

49. In New York, brokers are deterred from participating in the drafting of contracts by Judiciary Law section 484, with respect to the unauthorized practice of law, and New York Real Property Law section 41-c, with respect to revocation and suspension of licenses. *See* Formal Opinion No. 96-F11, 1996 N.Y. Op. Att'y Gen. 46 (1966).

attorneys and comply with our [North Carolina] state laws."[50] While in North Carolina the contracts are typically prepared by real estate brokers using standard forms, the closing is routinely handled by lawyers.[51] Thus, whether one looks to the New York paradigm or the North Carolina system, the home buyer and seller receive the protection of lawyers or lawyer-drafted forms that are intended to take into account the interests of buyers and sellers.

The California Association of Realtors "develops and publishes standard forms and publications for use and reference by the real estate industry."[52] Another organization, the Air Commercial Real Estate Association ("AIR"), also publishes forms for use in California. The Association states that "[o]ver 40 different contract forms published by AIR are distinguished by the fact that they are continually refined and updated by a team of brokers, real estate attorneys, property managers and other commercial real estate professionals."[53] If this statement is accurate we will once again see neutral contract forms standardized by a group in which most stakeholders are represented. Tenants are not among those represented. Residential tenants are comparable to the consumers in that they are not routinely represented in the organizations that develop standard real estate transaction standardized forms.

Colorado gets further than most states. Standard real estate forms are approved by the Colorado Real Estate Commission, a state licensing and regulatory agency. Approved contract forms are posted on the internet. According to the Commission's web site, parties and their attorneys are permitted to draft variations from the standard forms, but brokers

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50. Janet Wickell, *Typical Real Estate Closing Procedures in North Carolina,* http://homebuying.about.com/od/escrowandclosing/a/nc_closings.htm (last visited Feb. 11, 2008).

51. *Id.*

52. Manderville v. PCG & S Group, Inc., 55 Cal. Rptr. 3d 59, 63 (2007) (quoting 2 Miller & Starr, Cal.Real Estate § 4:62, pp 201-02 (3d ed. 2000)); *see also* Tyquiengco v. California Ass'n of Realtors, A106730, 2005 Cal. App. Unpub. LEXIS 6104 (Cal. Ct. App. July 15, 2005) (noting, "CAR is a trade association of real estate brokers in this state. It drafts, prints and distributes to its brokers a preprinted 'California Residential Purchase Agreement and Joint Escrow Instructions' form").

53. AIR Commercial Real Estate Association, *About WinAir Forms 2.0,* http://www.airea.com/FORMS/AboutWinAIRForms.aspx (last visited Feb. 11, 2008).

cannot deviate from the approved forms and cannot assist the parties in drafting contracts except by using the approved forms.[54]

Courts can sometimes do justice for a consumer who has adhered to a standard-form contract that reeks with an unjust term. There are doctrines, such as unconscionability and *contra proferenten*, that may be applied. Court relief, however, is sporadic, costly and difficult to predict. In the words of the New Jersey Law Revision Commission,

> [t]he doctrines of 'unconscionability' and 'contract of adhesion' restrict a court's ability to handle the diversity of standard form contract terms by creating simplistic legal categories that do not reflect commercial reality. A court's ability to deal with problems posed by standard form contracts is restricted by common law doctrines.[55]

The bottom line of this excursion into standards and standard-form contracts is that consumers have little to say about the content of the standard forms to which they adhere, and government help is sporadic at best. There is limited governmental protection as to the content of those forms. Consumer protection organizations have not, to the best of my knowledge, intervened in the drafting of form contracts, although they have lobbied for legislative protections, sometimes successfully. Courts and administrative agencies have pitched in to help consumers. Nevertheless, the drafters of standard forms have very little to restrain their despotic powers to dictate all but the central aspects of mass-market transactions.

Is there a solution? I will propose a partial resolution of the consumer's plight. In an address to the Association of the Bar of the City of New York, Benjamin Cardozo, then New York's Chief Judge, proposed the establishment of a Ministry of Justice.[56] The opening paragraph of the address was a plea for leg-

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54. Department of Regulatory Agencies: Division of Real Estate, http://www.dora.state.co.us/real-estate/consumer/contracts.htm (last visited Feb. 11, 2008).

55. New Jersey Law Revision Commission, *Final Report Relating to Standard Form Contracts* (October 1998) http://www.lawrev.state.nj.us/index/alphapage1.htm (last visited Oct. 11, 2007).

56. Benjamin N. Cardozo, *A Ministry of Justice*, 45 HARV. L. REV. 113 (1921), *reprinted in* BENJAMIN N. CARDOZO, LAW AND LITERATURE 41 (1931) [hereinafter CARDOZO, LAW AND LITERATURE].

islative improvement of the law. Indeed, the entire lecture was centered on legislation. Legislators needed to act "without expert or responsible or disinterested or systematic advice."[57] A ministry of justice would fill in these gaps.

The address helped spawn two institutions—the American Law Institute and the New York Law Revision Commission.[58] I will focus on the first, the American Law Institute ("ALI"). While Cardozo's initial plea was for help by legislation, the ALI instead focused on the improvement of the common law by restating it.[59] Cardozo, who was the ALI's initial vice-president, approved of the goal of restating the common law. He did this by signing onto the first annual report that described what became the methodology of the Restatements[60] and in his address to the third annual meeting of the ALI.[61] Both the report and the address demonstrate Cardozo's flexibility. He had suggested improvement of the law by legislation, but settled for improvement by the Restatements. The ALI's flexibility is shown by its later work on legislation, such as the Uniform Commercial Code and the Model Codes.[62] My proposal is simply that the ALI take its hand at the drafting of commonly used standard forms for consumer transactions after receiving input from all stakeholders involved in the transaction-type. The ALI is a unique and flexible organization. It can bring together business leaders and consumer activists and their lawyers for a collaborative effort to craft hard-headed but fair standard forms.

Would firms adopt the standard forms promulgated by the ALI or any other impartial organization? What incentive would

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57. *Id.* at 42.

58. In *Simpson v. Loehmmann*, 234 N.E.2d 669 (N.Y. 1967), the court noted the relationship between Cardozo's address and the foundation of the Law Revision Commission.

59. The arguments that led to the ALI's rejection of legislation are discussed in G. Edward White, *The American Law Institute an the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 12-13 (1997).

60. ALI, *1923 Report of the Committee on the Establishment of a Permanent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute* (1923), *reprinted in* ALI, THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 1 (1973). Cardozo was one of the Report's reporters, along with Joseph H. Beale, William Draper Lewis and Samuel Williston. *Id* at vii.

61. CARDOZO, LAW AND LITERATURE, *supra* note 56, at 121.

62. Speculation at the motives behind the ALI's incursion into legislation is provided in White, *supra* note 59, at 46.

they have to adopt a form contract that lessens their power to dictate the terms of the contract? From the consumer's point of view, an ALI approved form would act like the Good Housekeeping "Seal of Approval" or the Underwriter's Laboratories certification. "These are just a few examples of the ratings organizations that operate in the economy today—all of which emerged to fill an informational need and survive on the basis of their reputations."[63] The consumer will be assured that the form is of high quality and their interests have been taken into account.[64] From the point of view of the firm that propounds the form, an ALI endorsed form would have reputational benefits. Just as firms seek, at some cost, to obtain the certification from Good Housekeeping or Underwriter's Laboratory, they may be impelled by competitive pressures to utilize and advertise their use of an ALI form. Adoption of such forms will help avoid state requirements that could vary from state to state and would help to forestall lawsuits.[65] Moreover, if Avis trumpets its adoption of an ALI form, will Hertz be far behind?[66]

63. *Id.*

64. Harold Furchtgott-Roth, Robert W. Hahn & Anne Layne-Farrar, *The Law and Economics of Regulating Ratings Firms*, 3 J. COMPETITION L. & ECON. 49, 82 n.156 (2007).

65. Similar concerns have impelled various business groups to seek federal regulation of such things as hazardous flames from cigarette lighters. Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007 at 1.

66. When this article was substantially completed, a somewhat similar proposal was published by Samuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law* (Sep. 2007), *available at* http://ssrn.com/abstract=1015736 (last visited Feb. 11, 2008). Becher proposes a new entity to approve or disapprove of contract forms, in some instances backed up by law. In an earlier paper it was suggested that a limited number of forms be subjected to an administrative pre-approval process. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005).