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COMMERCIAL NORMS AND THE FINE ART OF THE SMALL CON

Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

*Douglas G. Baird**

The standard battle-of-the-forms story, often rehearsed in the classroom, is one in which merchants try to take advantage of their contracting opposites. A seller wants to escape the obligations that come with implied terms and seeks to disclaim them in its acknowledgment form. Its buyers do not realize they have been had until after the goods fail. Only then do they read the seller's form and discover that they are without remedy. Conspicuously absent in Dan Keating's fine article, however, is any evidence that supports this story.¹ Some of his merchants talk about putting favorable terms in their forms, but only as a way of counteracting the effect of another form. Nothing suggests a Darwinian struggle in which each seeks to take advantage of another.

There are several explanations. It is possible that the battle goes on, but Keating failed to find it. The large corporations in his sample are unlikely to be victims of forms and are unlikely to have general counsel that admit to using forms to their benefit. Alternatively, evidence may be missing because existing law does its job, more or less. When both parties are even modestly sophisticated, most courts employ some version of a knockout rule. And, by the time the dust settles, we end up with the Code's default rules.² Under section 2-207, courts do not take what forms say seriously. If courts do not take forms seriously, we should not expect the parties to either. If, however, we create a regime in which we allow parties to opt out of default rules easily, the battle may become important.

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1. See Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000).

2. See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (10th Cir. 1984). One should be careful not to overclaim here. As White & Summers point out, there is no way to interpret section 2-207 as preventing one party, on some occasions, from imposing terms on the other that do not work to their mutual benefit. See 1 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3, at 31 (4th ed. 1995).

We should, however, take seriously the possibility that Keating found no evidence because the battle of the forms and related activities are not important vehicles for those inclined to advantage-taking. If the risk that merchants will use forms to their advantage is small, we should, as we talk about revising section 2-207, focus more of our attention on the way legal rules can help parties shape terms in ways that work to their mutual benefit.³ The less we think that advantage-taking is a problem, the more we will be able to provide a set of rules that enable parties to customize terms. Trading one concern off against another is inevitable. Indeed, the failure of section 2-207 stems in large measure from the drafters trying to make one section do too much work.⁴

In these comments, I identify the terrain on which the battle of the forms operates and suggest that, once we take the motivations of those inclined to mischief into account, we should be wary of focusing too much on parties taking advantage of each other with forms. The problem likely exists in some measure and ensuring against the worst abuses is prudent, but we need to keep the problem in perspective.

You make more money by selling people things that they do not need than you do by pretending to give them what they want and then taking it away in fine print. Harold Hill in *The Music Man* made his money by persuading a town that it needed a boy's band. He did not seek out places where people already wanted to buy seventy-six trombones and then proceed to sell them defective ones. A vision of commercial law that worries excessively about the ability of parties to sneak terms past each other distracts us from the things that matter.

I. THE TERRAIN ON WHICH THE BATTLE OF THE FORMS IS FOUGHT

It is a commonplace that legal rules do not operate in a vacuum. To understand the effects of a battle-of-the-forms rule, we first need to identify the forces that already are at work. There are two important forces that limit the mischief that might be done through the use of forms: the constraints that norms impose and the constraints of legal sanctions outside of commercial law, such as those for fraud and misrepresentation.

3. For an examination of how such diversity might work in the consumer context, see George L. Priest, *A Theory of Consumer Product Warranty*, 90 *YALE L.J.* 1297 (1981).

4. See Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 *VA. L. REV.* 1217 (1982).

A. *The Force of Commercial Norms*

Commercial law rules affect only those who are around for the long term. Those interested in making a quick killing are likely to be out of the jurisdiction or judgment-proof by the time people catch up with them.⁵ Once a person leaves the jurisdiction or is judgment-proof, causes of action do not matter. Rules governing the battle of the forms matter only when the person who wins the battle remains on the scene.

Those who are in business for any length of time, however, must worry about their reputations. The cases in which legal sanctions matter are those in which reputational forces are necessarily also at work.⁶ Moreover, parties are most likely to invest in their reputations in environments where the other party fears advantage-taking. An experience in my own life brought this lesson home to me.

Many years ago, towards the end of his life, my father wanted to give my mother a piece of jewelry on her birthday. An emerald and diamond pin he saw in a Tiffany's catalogue caught his eye, and he clipped out the picture and sent it to Norm, a jeweler with whom he previously had done business. Norm made a similar pin for a price that, while less than Tiffany's, was hardly insubstantial, and my father entrusted it to me for safekeeping.

I had never been impressed with Norm. Norm had a small and somewhat seedy shop, and much of his business was in wholeselling items such as tasteless pins in the shape of an American flag with semi-precious red, white, and blue stones. Moreover, the opportunity for advantage-taking was nontrivial. My father was in search of a deal. He wanted a pin like the one from Tiffany's, but for less. Additionally, he was quite ill and did not know much about jewelry. He was not in a position to cast a sharp eye on the transaction.

Because of my doubts (and because I interpreted my father's charge to care for the pin broadly), I took it to a well-known jeweler on North Michigan Avenue in Chicago. This jeweler examined the pin closely and, after some study, shook his head and told me he had bad news. Emeralds were a very soft stone and mounting them this way was extremely tricky. Unfortunately (but not surprisingly), two of the emeralds had fractured while being mounted. He handed me a magnifying glass and invited me to see for myself. I thought I saw what he was talking about, but was not sure. The jeweler suggested that I return the pin and ask to have the emeralds replaced.

5. From the time of Charles Ponzi to the present day, con artists are usually broke by the time they can be brought to court. See *Cunningham v. Brown*, 265 U.S. 1 (1924).

6. This observation, of course, is not new. The *locus classicus* in this literature remains Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

At that moment, I had little hope that Norm would replace the stones. The flaws were invisible or nearly so. I was not sure I could persuade Norm that the fractures were there. Moreover, the price my father paid and the problems with the mount might be connected with each other. We acquired the pin at a favorable price, *because* the quality was not first-rate. We should not have thought that the pin from Norm would be comparable to one from Tiffany's. I said as much to the Michigan Avenue jeweler, more or less expecting him to agree and suggest, with some condescension, that, in the future, we should rely on upscale jewelers like him. His response, however, was nothing of the sort. A dark look came over him, as if I had impugned his entire profession. "Your jeweler *will* replace the stones. I am not talking about the design or the quality of the stones. The emeralds have fractures in them. It doesn't matter what you paid. A jeweler would never knowingly let such a pin leave his store. Never."

I did not have to explain to Norm why I was returning the pin. Before I said anything, Norm examined the pin. After a few moments, he stopped, took what seemed a long time to collect his thoughts, and then began to talk. He owed me an apology. He had let my father down. The emeralds had fractures in them, and the pin should never have left the shop. The fault, he told me, was entirely his. He had not personally inspected the pin. This had been his practice for decades, but of late he had started to delegate too much business to his sons. They weren't ready. Then he asked for my mother's birthday. He needed to find new stones and wanted to be sure the pin was ready in time.

Like other merchants, jewelers are constrained by powerful norms. Norm's shop was seedy, because he was largely in the wholesale business. The jeweler on North Michigan Avenue had a fancy shop and a reputation. All Norm had was his reputation. Jewelers have to care intensely about their reputations precisely because their goods are hard to assess. The same force that made us vulnerable (our inability to judge the pin on our own) also made it much more important for Norm to build a reputation that is put at risk if commercial norms are broken.

We need to assess default rules such as the implied warranty of merchantability against this backdrop. It might have been possible to bring an action against Norm if he refused to replace the emeralds. The pin, after all, did not pass without objection in the trade.⁷ But the same norm that gave rise to the legal right made it unnecessary. For all I knew, Norm had a form that disclaimed the implied warranty of merchantability, but such a disclaimer was irrelevant as long as reputational forces ensured that he would make amends if his goods did not pass in his trade.

7. See U.C.C. § 2-314(2)(a) (1999).

In addition to the need to preserve a reputation for fair dealing, other forces are at work. Among the most important are criminal sanctions. A jeweler in Norm's position could, in theory, have provided us with fake stones and escaped detection most of the time. Similarly, he could have provided stones that weighed less or were of a different grade than he represented. These forms of advantage-taking, however, rely on affirmative misrepresentations that give rise to criminal sanctions.⁸ It takes only one customer to get a second opinion for the entire business to unravel.

Apart from criminal sanctions, other legal rules constrain those who are tempted to engage in affirmative misrepresentations. A seller cannot make a set of representations during the course of selling a product and then seek to escape legal liability by adding terms in forms. Rules governing false advertising and fraud prevent such deliberate misconduct.⁹ Moreover, representations that become part of the basis of the bargain are express warranties under U.C.C. section 2-313, and cannot be disclaimed. Similarly, limitations on liability for personal injury from consumer goods cannot easily be evaded either.¹⁰

Rules governing forms matter only if the contracting party is around long enough to be subject to the legal process, but not constrained by norms. Moreover, the advantage-taking must fall short of deliberate misrepresentations that trigger other legal regimes. The advantage-taking at which battle-of-the-forms rules have to be aimed must fall into the gap between these forces. The game that is being played is a "small con." One sells substandard products or services and escapes responsibility when things go badly through the fine print. One makes money, not by making a big lie, but by appearing to offer one thing, while actually being obliged to supply something far less. We focus on this sort of advantage-taking in the next part.

II. PRINCIPLES OF THE SMALL CON

The advantage-taking of concern to us is analogous to an unscrupulous seller offering insurance to the unsophisticated. The limitations on coverage in the fine print are not contrary to what the seller represented, but in the aggregate they insulate the insurer from liability in the cases that matter. Most people who buy insurance never file any claims. They are none the wiser. The few that make claims dis-

8. See, e.g., N.Y. PENAL LAW § 190.20 (McKinney 1999).

9. See, e.g., N.Y. GEN. BUS. LAW § 350-a (1988 & Supp. 2000).

10. Among other things, it is presumptively unconscionable under U.C.C. § 2-719(3). As White and Summers have put it, "we suspect that whenever a consumer's blood is spilled, even wild horses could not stop a sympathetic court from plowing through the most artfully drafted and conspicuously printed disclaimer clause . . ." 1 WHITE & SUMMERS, *supra* note 2, § 12-12, at 681. In such a world, unscrupulous sellers are not going to count on language in forms to protect them.

cover that they are not covered, but they think it their bad luck to have suffered a misfortune that was beyond the coverage of the policy. They also disappear.

Misbehavior of this sort undoubtedly exists in the sale of goods. The question, however, is whether it arises often enough such that curbing such abuse should be our primary objective. One way to approach this question is to look at the motivations of those inclined to mischief.¹¹ We are concerned about the advantage-taking that is too small to be stopped by reputational forces and too venial to fall within criminal and regulatory sanctions.

A. *The Willie Sutton Principle*

Our legal system embodies a general reluctance to review a transaction to assess the fairness of the price at which goods are sold. Consumers may, on occasion, be able to argue that the terms of a transaction are substantively unconscionable.¹² Merchants may have a remedy under the antitrust laws if a seller has acquired its monopoly position illegitimately. In the main, however, parties are free to sell their goods at whatever price they please.¹³

I can sell a necklace for \$15,000, even if others sell virtually the same piece for \$10,000. I can sell a laptop computer for the same price as my competitors and not disclose that my disk drive is cheaper, my chips are slower, and my housing is less sturdy. I can charge \$5 a fifth for my standard brand of vodka and \$10 for the premium brand, even if they come from the same tap. Our unwillingness to review these transactions undoubtedly gives some people the ability to take advantage of others.

We tolerate this state of affairs because the game is not worth the candle. Allowing review of the price charged after the fact is not that much different from price regulation. We have little confidence that the government will be able to control prices effectively. As a conceptual matter, this principle suggests we should be reluctant to make it hard for parties to opt out of default terms. We need to explain why regulation of terms is different from price regulation.

Courts and legislatures may be no more able to identify the type of warranty that should accompany a good than they can identify the price at which goods can be sold. A seller might try to take advantage

11. The idea that we can use the practices of swindlers as a lens to examine commercial behavior begins with ARTHUR ALLEN LEFF, *SWINDLING AND SELLING* (1976).

12. See, e.g., *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964). White and Summers, however, report that, of late, even these cases have "dwindled to a trickle." 1 WHITE & SUMMERS, *supra* note 2, § 4-5, at 223.

13. Again, one wants to be careful not to overclaim. Courts sometimes do take action when they perceive an exchange to be gravely one-sided. See James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1649-55 (1981).

of me by selling me a laptop computer with components that are not as good as that of a competitor's. Alternatively, this seller might try to sell the same computer, but with less favorable warranty terms and more limited remedies. A coherent approach to the battle of the forms and similar problems has to be able to explain why we need to worry about the second case, but not the first.¹⁴

The freedom that a seller has to vary the price and quality of the goods brings an additional puzzle. We have to explain why someone who wants to take advantage of others plays games with warranties (and the remedies that are available in the event of breach), rather than price. The law does nothing to prevent someone from taking a product that is not so well made (even though it is not so bad as to violate implied warranties or give rise to any other contract remedy) and charge as much as the market will bear. Given this freedom, sellers may often discover that they gain little by disclaiming warranties and limiting damages. When it is easy to take advantage of buyers without violating any warranties or breaking any promises, remedies for breach are not so important.

For most goods, the chance of defects that give rise to warranty actions and the like is low. The "insurance" that implied terms provide is only a small part of the total package. With few goods is it likely to be worth even ten percent of the price of the goods. A seller intent on taking advantage of buyers should have many better ways of short-changing buyers other than playing with forms. Goods that are fungible are easy to inspect and, hence, the implied warranty matters little. For complex goods such as computers, it is easy to use low quality materials (such as slower chips) and shave costs in this way, rather than try to use forms. In more competitive markets, buyers may be sensitive to chip speeds, but they are likely to ask about warranties as well and, as we have seen, affirmative misrepresentations about these independently trigger legal liability. The Code's default terms are an insurance policy that is tied to the sale of something else worth ten times as much. For sellers inclined to mischief, the stakes involved with default terms are an order of magnitude smaller than the goods themselves. They are not likely to invest their energy here.

Even when warranties matter, it does not follow that badly motivated sellers seek to avoid them. Quite the contrary. Just as an unscrupulous seller can provide second-rate (but merchantable) goods at a premium price, the same seller can provide a second-rate warranty (often called a "service contract") at a premium price.¹⁵ Once one is committed to the idea that we are not going to assess whether the

14. The idea here — that a warranty can be treated as another product attribute — is a familiar one. See Arthur Allen Leff, *Contract As Thing*, 19 AM. U. L. REV. 131 (1970).

15. See Alan Schwartz & Louis Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983).

price being charged is appropriate given the service that is being rendered, the law is limited in what it can do.

Legal rules can make buyers' lives easier by requiring various provisions to be conspicuous. Buyers benefit when competing sellers highlight their own terms. But it is hard for legal rules to do more. In any event, the potential for abuse with warranties in many markets is not so much that sellers will disclaim them, but rather that they will offer them, charge too much, and limit them in ways that are hard to regulate. General rules governing forms in contracting are not well suited to dealing with such problems.

Once when veteran bank robber Willie Sutton was arrested, a reporter asked why he robbed banks. Willie told him, "That's where the money is." If one wants to take advantage of people and profit by it, one naturally looks to arenas that promise the most in the way of profits. The battle of the forms may not be such a venue. We can return to my experience with Norm.

If Norm had been inclined towards sharp practices, he had many chances to take advantage of us without disclaiming legal obligations. The pin was custom-made. My father had no benchmark other than the Tiffany's price to assess whether Norm was charging a fair price. If Norm were inclined to take advantage of my father, he simply could have charged more for it. Alternatively, he could have used cheaper stones or lower quality mounts. These avenues would not have put his reputation at risk to nearly the same extent.

B. *Roping the Mark*

"Big cons" are confidence games in which a single individual is separated from a lot of money. They depend crucially on finding rich people willing to enter schemes that are illicit in one way or another.¹⁶ Small cons, in contrast, often focus on the weak and the poor. One gets rich by cheating many people a little bit at a time. Disclosure rules can make this harder. We can curtail some of the abuse with regulations that force disclosures. The Truth-in-Lending Act requires that the annual percentage rate be disclosed.¹⁷ The Magnuson-Moss Warranty Act requires warranty disclaimers to be made conspicuously.¹⁸ We also regulate the way goods are packaged and labeled.¹⁹

16. See W.T. BRANNON, "YELLOW KID" WEIL 293-94 (1948).

17. 15 U.S.C. § 1632 (1994).

18. 15 U.S.C. §§ 2301-2312 (1994).

19. See, e.g., N.Y. GEN. BUS. LAW § 392-d (McKinney 1996). Yellow Kid Weil's moniker came from his practice of selling gold-plated watches and cheap jewelry for large amounts using the story that he was trying to unload stolen goods. See DAVID W. MAURER, *THE BIG CON: THE STORY OF THE CONFIDENCE MAN AND THE CONFIDENCE GAME* 274 (1940). Weil credited a large part of his success in this venture to the absence of legal rules that prevented manufacturers from stamping any thing they pleased on watches and jewelry.

In such a world, a successful con artist has to identify a discrete set of people who are vulnerable. Marketing goods to the whole does not allow one to do this. An unscrupulous seller has a hard time taking advantage of the ignorant if they are buying the same goods in the same marketplace as Fortune 500 companies. It is sometimes thought that consumers are worse off when they buy in a mass market and are forced to take terms on a take-it-or-leave-it basis.²⁰ In many cases, exactly the opposite is true. Unsophisticated consumers are often better off in a market in which no one can bargain for special terms than in a market where everyone can. I am more likely to enjoy terms that are mutually beneficial when I buy a computer with terms that the manufacturer imposes on everyone, including large companies, than when I and every other customer can dicker with the same manufacturer individually. Hence, sellers inclined to mischief in the terms they use are not likely to enter markets where they deal with a broad array of potential buyers on identical terms.

Far more promising are arenas in which gullible buyers can be separated from savvy ones. General rules governing the use of pre-printed terms do little with respect to places where abuse is likely and too much where it is not. The legal rules that curb misbehavior most effectively are often ones that regulate discrete markets. Misleading statements made in connection with the sale of insurance is subject to special criminal sanctions.²¹ Consumer credit is closely regulated.²² We are much more likely to be successful if we regulate door-to-door sales practices by insisting on cooling-off periods for such sales.²³ We may be better off banning cross-collateralization clauses as unfair trade practices than we would be allowing individual buyers to assert that such clauses are substantively unconscionable.²⁴

C. *Cooling Out the Mark*

The key to playing any con game is ensuring that the deception lasts long enough. A large part of the swindler's craft lies in his ability to do this. It is known as "cooling out the mark."²⁵ When one is engaged in a less-than-honorable transaction in the marketplace and is

See BRANNON, *supra* note 16, at 9. Later in life, he boasted that he was in some measure responsible for many of these laws. See *id.* at 295.

20. See Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

21. See, e.g., N.Y. PENAL LAW § 176.05 (McKinney 1999).

22. See, e.g., 16 C.F.R. §§ 444.1-444.5 (2000).

23. See, e.g., 16 C.F.R. § 429.1 (2000).

24. The unconscionability holdings of cases like *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), are made largely unnecessary by 16 C.F.R. §§ 444.1-444.5.

25. See LEFF, *supra* note 11, at 87, 100, 154 & 160; MAURER, *supra* note 19, at 279.

subject to legal action, keeping marks happy is especially important. The best cons are the ones in which the marks never know that they have been swindled.²⁶ It is not as hard as it might seem. People want to believe that they have received a good deal. They do not want to think that they have been duped. Even when they know they have been cheated, they do not want others to know and are reluctant to invoke whatever legal rights they have on that account.

To return to the example of the emerald pin, let us assume that we have a jeweler with bad motives. In addition to, or instead of, using inferior stones and other tactics that do not violate any implied terms, this jeweler wants to profit by selling jewels with fractures in them. Such a jeweler can rely in the first place upon most buyers never checking the goods out. Among other things, buyers as a general matter believe in their own powers of judgment.²⁷ The spouse that receives the pin as a birthday gift is unlikely to have suspicions either. Even when buyers have suspicions, the unscrupulous often can allay them, especially with respect to details (such as nearly invisible fractures) that require expertise.

The worst-case scenario may be one in which a third party enters the picture unexpectedly, such as an over-eager lawyer-academic possessed of a strong sense of filial obligation, a large amount of suspicion, and plenty of free time. Even in this case, however, the unscrupulous need not rely on legal niceties. In such cases, they may be better off fixing (or pretending to fix) the defect, rather than insisting that they do not have to.

Buyers invoke their rights under implied terms such as the warranty of merchantability only if they know that their goods are defective. If there are express promises, disclaimers of off-the-rack terms are irrelevant. If the buyer never notices the defect, the implied warranty does the buyer no good. Even if the buyer learns about the defect, the warranty again matters only if the seller insists on holding the buyer to the preprinted forms. To win the battle of the forms, the unscrupulous must ultimately be willing to invoke defenses such as disclaimers and remedy limitations in open court. Con men, however, rarely want to do this and in any event cannot count on success, quite apart from the letter of the law.

The latest attempt to replace section 2-207 seems to take these concerns into account. On its face, it does seem to focus on advantage-taking. If terms in material accompanying a product contradict

26. Indeed, it is often hard to convince a mark that he has been "knocked" (i.e., cheated). See MAURER, *supra* note 19, at 285. As Maurer explains, "[i]f the insideman handles the blow-off properly, the mark hardly knows that he has been fleeced. No good insideman wants any trouble with a mark. He wants him to lose his money the 'easy way' rather than the 'hard way'" *Id.* at 157.

27. See *id.* at 133.

the terms of the parties' agreement or materially alter the contract to the detriment of the buyer, they do not bind the buyer. Moreover, the terms that accompany the goods become part of the contract only several weeks after the buyer receives the goods. Before that time, buyers can return the goods at the seller's expense. These provisions, however, are likely to interfere little with sellers who want to depart from default terms in ways that are mutually beneficial. We know that the risk that a buyer will ship the goods back is trivial and the limitations on what terms become part of the contract, if sensibly interpreted, should not affect sellers trying to craft terms that are mutually beneficial. We may end up with a provision that, in substance, allows merchants to customize terms.

III. CONCLUSION

Attempts to regulate the battle of the forms focus on the wrong place, an arena in which there is relatively less profit for the unscrupulous, and the wrong mechanism, a cause of action for money damages by those who often do not even know they have been cheated. To be sure, some can get the better of others with forms, but those who seek to profit at the expense of others are not likely to focus their efforts here.

Richard Sears of Sears-Roebuck fame grew rich by selling catalogue goods with money-back guarantees. One of his popular products was the Heidelberg Belt, an electrical device that was buckled around the waist. If the belts did not cure their impotency, buyers were free to return them. Only three ever did. As Sears observed toward the end of his life, "[h]onesty is the best policy. I know. I've tried it both ways."²⁸

28. DONALD R. KATZ, *THE BIG STORE: INSIDE THE CRISIS AND REVOLUTION AT SEARS 9-10* (1987).