ARTICLE: CRAFTING A REMEDY FOR THE NAUGHTINESS OF PROCEDURAL UNCONSCIONABILITY

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SUMMARY:
... Negotiation techniques and strategies are subject to scrutiny under the rubric of "procedural unconscionability." ... What happens, however, when a manipulation causes someone to unknowingly assume a risk that eventually operates to that actor's detriment? Is this still a responsible manipulation? If the manipulation intentionally interferes with objective decision-making and facilitates the disarming of the decision-maker, thereby rendering him or her vulnerable and disinclined to investigate the true circumstances of the risks involved, can it be said that the manipulation is a form of overreaching? If the manipulation results in a judicial determination of procedural unconscionability and actual damages have resulted, the plaintiff should be entitled to recover damages. ... In other words, the availability bias conditions the consumer to accept an assumption of risk by relying almost exclusively on information prepared by the service provider. ... When there is proof that the inducement for acceptance has a collateral consequence, such as actual damage, the interests of society mandate the need for a legal remedy. ... Applying these rules to Consequential Procedural Unconscionability, again consider a liquidated damages clause embedded in a service contract through the use of overreaching in the form of an unwarranted manipulation using the principles of BDT. ...

TEXT:
[*11] Introduction

This article discusses the consequences of inducing someone to enter into an unconscionable contractn2 and suggests that there must be limitations on behavior associated with manipulative negotiation strategies. In addition, this article proposes that when inappropriate negotiation strategies result in an unconscionable term or agreement, there should be accountability if damages can be proven. Negotiation techniques and strategies are subject to scrutiny under the rubric of "procedural unconscionability." Procedural unconscionability can be shown to have an impact on the sanctity of the contracting process. This article addresses the question of whether there is room in the law for a legal remedy for the consequences that may flow from procedural unconscionability. This issue is presented within the framework of a finding of unconscionability based on an unwarranted manipulation of cognitive biases or heuristics.n3

[*12] [*13] Contract formation reflects a substructure of trust and expectations. Contracting parties trust there will be an exchange of one thing for something else. In addition, they trust that the expectations reflected in the contract will be realized. Without this basic foundation, a meaningful socioeconomic system cannot exist or be perpetuated. Procedural unconscionability weakens the underlying foundation of the contract formation process. As a result, the legal consequences of procedural unconscionability during contract formation should be addressed through a remedy at law.

The doctrine of contractual unconscionability is dualistic in nature. Contracts that are found to be unconscionable are usually the result of overreaching during the negotiation process (procedural unconscionability) and include terms that operate to yield an unconscionable result (substantive unconscionability).n4 Substantive and procedural
unconscionability, however, operate in different arenas. Substantive unconscionability operates exclusively on the parties to a contract and does not result in actual damage. Procedural unconscionability can result in actual damage and frequently has public policy implications. This is because procedural unconscionability undermines the sanctity and meaningfulness of private promises made in the contracting process. This distinction becomes particularly pronounced in contracts for services where a [*14] "special relationship" exists. Such a "special relationship" is created when there is a direct public policy interest in the service being performed.

Most courts require evidence that both types of unconscionability are at work in order to justify judicial action:*5 however, to date, courts have only addressed the consequences of substantive unconscionability and have fashioned remedies exclusively in equity.*6

Why go beyond remedies for substantive unconscionability fashioned in equity? Consider procedural unconscionability within the context of a liquidated damages clause that operates to exculpate a contracting party from liability because it sets recoverable damages for breach of contract at an insufficient amount. Is the problem resolved by equity declaring the clause unenforceable and allowing the plaintiff to recover the full measure of economic damages? If a remedy is fashioned in tort, opening up the possibility of additional damages, is the practical effect to place the plaintiff in a better position than the plaintiff would have been in had the remedy been confined to equity? At first glance, the answer to these questions may seem to be "yes," but further consideration suggests otherwise. Indeed, where the sole remedy is in equity, it is the party that uses manipulative negotiation strategies, rather than the injured party, who is placed in an enhanced position by virtue of the limitation on a remedy at law.

The equitable remedy assumes that the dispute is solely about damages related to either faulty performance or non-performance of the underlying contract that contains an unconscionable term. In addition, the equitable approach ignores society's interest in deterring procedural unconscionability based on schemes or tactics that undermine the contracting process. Procedural unconscionability usually involves overreaching in the negotiation process, but it often also involves one party's creation of an illusion of trustworthiness to facilitate the innocent party's acceptance of the contract. When the creation of such an illusion interferes with the innocent party's understanding of contractual terms, procedural unconscionability results from an acceptance of terms that have not been mutually agreed upon. The impact of this extends beyond the immediate [*15] parties to the contract. Unconscionable contract formation is an affront to the logic of a legal system that assumes rationality in the contract-formation process and potentially undermines our system of contract enforcement as a whole.

Unconscionable conduct in the negotiation process should be deterred. Current statutory attempts to curb unconscionable activity fall short of providing the deterrence that is needed. Remedies at law, not equity, accomplish deterrence. The tort that this article proposes, Consequential Procedural Unconscionability, provides an instrument for deterrence. Without this tort, the tortfeasor has no reason to refrain from exploiting the benefits available through the use of procedurally unconscionable strategies and tactics.

For example, the practical effect of an exculpation clause or the equivalent (e.g., an insufficient liquidated damages clause) embedded in a service contract is to shift liability for misfeasance or non-performance from the service provider to the party on whose behalf the services are to be performed. Because of the consequences, extra care should be taken to assure that such clauses are not a result of abuse in the negotiation process, particularly tactics that create an illusion. The best way to prevent abuse in the negotiation process is to deter such conduct by imposing a remedy at law that provides for both consequential and punitive damages. These measures of damage are nearly available when the gravamen of the complaint sounds in contract, but are available if the claim sounds in tort. From the perspective of tort law, procedural unconscionability is a wrong that should be remedied and deterred.

Recognition of the proposed tort does not conflict with the doctrine that equity will not interfere where a remedy at law exists. Because of the dual nature of unconscionability, the proposed remedy exists in an environment separate from the environment involving substantive unconscionability. Contracts are found to be unconscionable for a multitude of reasons, most of which give emphasis to the substantive side of the dual nature of unconscionability. When a contract is found to be unconscionable because it operates to impose a penalty, equitable reformation of the provision is a suitable remedy. Similarly, when a term attempts to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition, the denial of enforcement is sufficient to eliminate the possibility of damage to the affected party. Equitable remedies speak to the impact of the unconscionability on the parties to the agreement. Equitable remedies are not designed to have a lasting impact on the repeat offender. By contrast, remedies at law [*16] transcend the circumstances of the parties involved and address the impact of the harm on interests of public policy. A remedy at
law is needed, in addition to the equitable remedies currently available, to deter the repeat offender and to preserve the sanctity of the contracting process.n7

It should be noted that judicial declarations of contractual unconscionability are not trivial judgments. Not only are such judgments rare,n8 but they come about only when the evidence of overreaching and prejudice is poignant, startling and conclusive. If a court reaches such a conclusion, the court usually negates the operation of the challenged term in order to restore the status quo. Treating procedural unconscionability as potentially actionable recognizes that overreaching can sometimes do more than disturb the balance of the relationship between the parties. A legal cause of action for procedural unconscionability would recognize that overreaching can inflict actual damage on the victim and on society’s interest in the contracting process.

The proposed tort is not intended to broadly apply to every situation involving an agreement found to be unconscionable; instead, the proposed tort should have application only when it can be shown [*17] that the negotiation process caused the complaining party unwitting harm because he or she agreed to an unconscionable term. This position reflects a desire to assure a remedy for perceived wrongs against individuals and to protect against the undermining of the contractual process through deceit in the form of manipulation.

The economic and social consequences flowing from the recognition of the new tort, Consequential Procedural Unconscionability, should be limited. As with any new tort theory, there is always concern that the recognition of a new cause of action will open the litigation floodgates, but this is not likely to occur in this case because findings of unconscionability are very rare. As explained later in this article, the posited tort requires the following very rare conditions: (1) a judicial finding that a contract term is both procedurally and substantively unconscionable; (2) evidence of actual damage; and (3) evidence that the damage is directly attributable to the act or actions found to constitute procedural unconscionability.

Scope of the Article

This article address two fundamental questions: (1) whether procedural unconscionability give rise to tort liability:n9 and (2) what is an appropriate measure of damage once such liability is established.

[*18] It is axiomatic that people should be held responsible for their own decisions; therefore, courts should be reluctant to interfere. This insistence on individual responsibility, however, is problematic because it is based upon an assumption that decision-makers are rational and aware of what they are doing. The "naughtiness" of procedural unconscionability challenges this assumption.

In most cases, unconscionability through overreaching has one primary consequence: it leads to a provision that operates in a prejudicial manner. Courts normally negate this result by a refusal to enforce the unconscionable provision. For instance, A and B, speaking Spanish, negotiate a contract. They never discuss B’s desire to have a penalty provision in the event that A fails to perform under the contract. Later, B presents A with a contract written in English. A cannot read English and is unable to discover that the contract contains a clause imposing a penalty on A in the event of nonperformance. B assures A that the contract accurately reflects the negotiation they had reached in Spanish. A fails to perform and B seeks to enforce the penalty provision.

Under this fact pattern, the consequences of B’s overreaching conduct are capable of being fully negated by a court’s refusing to enforce the penalty provision on the grounds of unconscionability. No legal consequence seems to result from the overreaching because A is not damaged.

By contrast, consider overreaching in the form of an unwarranted asymmetric manipulation of cognitive biases and heuristics that causes a party to assume a risk without having knowledge of the actual consequences that may result. Responsible manipulation of the human cognitive decision making process is permissible and very much a part of our day-to-day experience. Responsible manipulations are those that are not designed to deceive and create unwarranted illusions, but are, instead, designed to induce the manipulated parties to do no more than they would have done anyway. For example, manipulating a preference for product A over product B does not normally operate to the consumer’s detriment if the consumer is already in the market for that class of product (e.g., cosmetics, toothpaste, a new automobile). Even a manipulation that induces an unplanned discretionary purchase does no real harm.

What happens, however, when a manipulation causes someone to unknowingly assume a risk that eventually operates to that actor’s [*19] detriment? Is this still a responsible manipulation? If the manipulation intentionally interferes with objective decision-making and facilitates the disarming of the decision-maker, thereby rendering him or
her vulnerable and disinclined to investigate the true circumstances of the risks involved, can it be said that the manipulation is a form of overreaching? If the manipulation results in a judicial determination of procedural unconscionability and actual damages have resulted, the plaintiff should be entitled to recover damages.

At the core of the doctrine of unconscionability is a belief that courts, acting essentially in equity, should play a regulatory role in the relationship of parties to a contract. In contrast to this equitable regulation of the contracting relationship, consider the broad protections that exist to thwart abusive manipulation of a consumer’s decision-making processes in the arena of mass public advertising campaigns. These campaigns attempt to manipulate the consumer’s decision-making processes. Recognizing the possibility for abuse, the federal government maintains administrative authority to supervise advertising in connection with the sale of drugs, medications, food products and securities. Similarly, states supervise and control many types of consumer-related advertising campaigns. Regulatory authorities have a broad array of options available to assure that the playing field remains level, such as rule-making powers, the ability to impose fines, and the power to seek injunctions. Most of the regulatory activity focuses on intentional misconduct, such as fraud, misrepresentation and criminal activity, but there are other areas in which abuse can occur, areas that do not involve fraud or misrepresentation. Unwarranted manipulation of the contract-formation process is an example of such an area.

Part one of this article discusses the Behavioral Decision Theory ("BDT") within the context of procedural unconscionability and gives examples of how principles of BDT have been shown to facilitate unwarranted manipulation. Part two discuss the operation of the [*20] proposed tort of Consequential Procedural Unconscionability. In part three, the many issues that arise concerning damages are examined.

Part 1: Cognitive Manipulations that Suggest Procedural Unconscionability

Harmless manipulations are experienced in some form on a daily basis. Advertisers manipulate preferences for products. Politicians manipulate views about candidates for office. Newspaper editors manipulate opinions on current events. All of these forms of manipulation are harmless in the sense that they do not require the unknowing assumption of a liability.

Sometimes we accept an offer that is based on misinformation or the non-disclosure of pertinent information that, if provided, might have resulted in the rejection of the offer. When this type of manipulation damages the manipulated party, the law steps in and deters the activity. Usually, the law addresses such misconduct through regulations, judicial mandates, or criminal sanctions.

In the field of consumer protection, the regulatory approach is most apparent, but as noted in the introduction, the majority of such regulations involve intentional misconduct, such as fraud or misrepresentation. These types of manipulation are harmful both to the affected individual and to society as a whole.

Although procedural unconscionability does not involve an affirmative intention to inflict harm, it always involves some type of overreaching. This overreaching is usually in the form of conduct that takes unfair advantage of a party’s relative bargaining power or strength. Overreaching never occurs by accident. There must be a knowing, driving force advancing any scheme that can be characterized as overreaching. For this reason, procedural unconscionability always embodies an element of intent. Frequently, this element is coupled with actions that are tantamount to deceit. Cases finding procedural unconscionability typically involve fact patterns that embody a blatant scheme or plan to force acceptance of a substantively unconscionable contract term. Studies and research in the discipline of cognitive psychology suggest, however, that there may be a more subtle method of forcing the acceptance of an unconscionable contract term.

Extensive research by cognitive psychologists suggests that overreaching can be accomplished in an insidious fashion using techniques that are legitimate and well understood. These techniques identify cognitive cues that can be used to influence an individual’s decision-making ability. In addition, these techniques can be used [*21] asymmetrically to inflict actual harm on the unsuspecting. In other words, cognitive manipulations can be used to achieve an affirmatively unintended yet harmful result.n12

People sometimes make inadvisable decisions, and in the aftermath of such a decision people often ask: "What was I thinking?" In many instances, people make bad decisions because they are neglectful or are so preoccupied with a goal that they do not consider the consequences of their decision. Cognitive psychologists have examined other possible reasons for poor decision-making, challenging the assumption that when making decisions involving economic well-being, people react rationally. Extensive evidence has been uncovered that suggests the assumption of rationality is
without actual foundation. This evidence suggests that operating in the background of the decision-making process, outside of conscious awareness, are filters called "effects" and "biases" that are used to receive, evaluate and process information. It has been discovered that these effects and biases sometimes lead to systematic distortions. As a result, people sometimes make decisions that are not in their own best interest without realizing what is actually happening.n13

[*22] Cognitive psychologists believe that decision-making is a two-step process involving: (1) an interaction between a rational system that is deliberative and analytical; and (2) an experiential system that encodes how we feel about the information we receive and process. It is the second step that leads to cognitive distortions and mistakes. To encode, people use "effects" to mold or structure decision-making. These "effects" are thought to trigger cognitive "biases" used by people to perceive and utilize information.n14 It is believed that these [*23] [*24] [*25] [*26] effects and biases are powerful enough to influence the decision-making process, often without an individual’s awareness.

It is also believed that effects and biases can be manipulated to ensure a desired outcome. Professors Hanson and Kysar explain:

Advertising, promotion, and price setting all become means of altering consumer risk perceptions, regardless of mandated hazard warnings. This is what we mean by manipulation - the utilization of cognitive biases to influence peoples’ perceptions and, in turn, behavior. Again, the reluctance of earlier scholars to acknowledge the possibility of manipulation appears to stem from their allegiance to the classical model and desire to remain constructive with respect to it, even when the behavioral research indicates that a more drastic restructuring is required.n15

Marketing professionals have understood the benefits of such manipulations since the inauguration of BDT research. Indeed, these benefits account for the fact that manufacturers spend billions of dollars annually on advertising and product promotion. The manipulation of effects and biases can yield robust results when used with skill.

A. Examples of BDT Techniques Used to Manipulate

BDT based techniques consist of strategies using the principles of cognitive psychology to create an illusion of trustworthiness in order to disarm the critical decision-making capability of another. The manipulator identifies one or more cognitive properties that are likely to trigger specific biases and create illusions to serve the manipulator’s purposes. Hanson and Kysar explain the use of such a technique in the consumer context:

Consumers are subject to a host of cognitive biases which, particularly when taken together, appear to render them vulnerable to manipulation... . Consumers do exhibit systematic and predictable cognitive biases that the careful psychological researcher or the clever marketer can induce. Put differently, individual perceptions can be studied, isolated, and manipulated by those in a position to influence the individual’s perceptual context.n16

These tactics typically involve the presentation of information or the framing of the decision in such a way as to induce a belief that the [*27] risk involved is insignificant or unimportant.n17 These efforts produce an impression in the mind of the decision-maker that it is appropriate to trust the information that is being supplied by the manipulator.

For instance, Gerald Smith and Thomas Nagel.n18 noticed that it was possible for someone selling a product to take advantage of the framing effect.n19 This effect can be used to influence the decision to purchase by positioning the purchase price relative to a fixed reference point. For example, "if the explicit base price is seen as the starting point, buyers paying a higher price will view their failure to qualify for a discount as a gain denied. They will find that less objectionable than being charged a premium, which they would view as an explicit loss.”n20

In addition to the framing effect, context effects can be manipulated to the benefit of a seller:

Manufacturers may similarly increase the likelihood of purchase by carefully controlling the context in which the purchase choice is presented. For instance, the introduction of an irrelevant third option has been shown to affect the preferences that some individuals have for original options. Manufacturers seeking to capitalize on this bias need only add new "irrelevant” options designed to enhance the attractiveness of the original ones. For instance, it is folk wisdom in the restaurant industry that every dessert menu should have at least one excessively indulgent item to make the others
appear comparatively less indulgent. Similarly, manufacturers can make products appear less expensive by adding a higher-priced option to the product line. n21

[*28] The die is cast not by the purchaser, but by the seller. In other words, people can be persuaded to accept limited information from a biased source in order to make a decision about the reasonableness of a price, at least in part, because of the positioning of the information. The positioning effort by the seller has accomplished more than the persuasion of the buyer about the reasonableness of the target price; it has persuaded the buyer to accept as reasonable the frame in which the information is presented. The framing effect creates an illusion of trustworthiness.

Consider the implications of the framing effect on contract formation. Framing can be used to influence the decision-maker’s perception of whether a risk is accepted or repudiated. n22 If a clause that involves the terms of the promisor’s performance is framed in such a way that the promissee’s rejection of those terms will appear unacceptable to the decision-maker when viewed through the bias of cooperation, n23 the positioning strategy makes it more likely that the clause will be accepted.

The interplay between the effect of illusion of control n24 and the bias of overconfidence n25 also has implications on the contract formation process. A shrewd draftsman might create a term that offers the decision-maker the appearance of control by convincing the decision-maker that the term was the decision-maker’s idea in the first place. By controlling which biases are likely to be relied upon, the draftsman can structure negotiations to surreptitiously influence the possibility that the decision-maker will accept the clause with minimal thought about the consequences. n26 This systematic [*29] disarming of the decision-maker suggests the possibility of unconscionability because the conduct ensures that there will be no actual meeting of the minds about the terms governing the distribution of risk. If negotiations for this type of clause involve an undisclosed, asymmetric use of techniques designed to obscure the content of decisions, the playing field is no longer level. This situation has the potential to become harmful if the decision-maker, based on the illusion of trustworthiness, believes that there is no need to investigate further.

Donald Langevoort describes how the one-on-one sales pitch can fall prey to these strategies in the context of the relationship between the securities broker and client n27 The securities broker, motivated by a desire to win a commission, will often seek to downplay the perception of risk in a proposed investment. This can be [*30] accomplished by using sales pitches that encourage the client to believe that the securities broker is the client’s friend because “conventional social mores do not allow challenges to the credibility of information offered by a ‘friend.’ ” n28 A shrewd and BDT-savvy broker also understands that once a decision has been made, the decision-maker is likely to stick with that decision because of a psychological tendency (known as “cognitive dissonance”) to justify the decision and avoid revisiting the decision-making process. In fact, the decision-maker will even go so far as to resist information that suggests the decision was ill advised.

Imagine, for instance, a customer who has developed a relationship with a broker over the past year and followed ten recommendations. This well-trained broker never "guaranteed" any short-term results, instead stressing the high likelihood of positive returns. The broker also ensured that the customer felt significantly involved in the investment decision, that is, that the ultimate decision was the customer’s. In these circumstances, behavioral considerations may conspire against any prompt realization of overreaching by the broker.

The first reason is motivational. Having committed to both the relationship with the broker and the particular transaction, the customer is motivated to bolster these decisions, finding it ego-threatening and shameful to conclude that he or she acted on bad advice. Such an inference might also threaten other significant needs - status or friendship, for example - that the investment account serves. The natural tendency, then, is to seek non-threatening explanations for the misfortune.

Now consider the number of recommendations. Even if performance has been poor on average, simple chance dictates that some of the ten probably did well. Markets, after all, are volatile and unpredictable. Indeed, if the broker did a good job of selling even a fairly low-quality security, there can be a short-term price run-up simply because of the induced demand. So long as the customer was not on the tail end of the sales program, some positive feedback will occur. In
addition, nearly all investments are open-ended: poor performance is seldom established conclusively, since a turnaround is always possible. Investors have a well-documented tendency to hold on to losing investments too long; in fact, some customers may view poor performance as an opportunity to escalate commitment by purchasing even more of the stock at a cheaper price.

The customer thus has ample means to rationalize short-run poor performance of an individual investment as something other than the product of bad advice and bad decisions. Blaming external circumstances such as timing, market influences, or luck is also useful. Not until repeated, sustained losses gradually eliminate alternative explanations, or an investment catastrophe presents an [31] overwhelming circumstantial case, will customers finally acknowledge that bad investment decisions produced their losses. At this point, they can blame either themselves or their brokers. Only then will large numbers, particularly those with healthy levels of self-esteem - blame their brokers, terminate the account, and (if they are angry enough and sufficient sums are at stake) bring suit. [n29]

In the above example, trust coupled with the knowledge of how to use cognitive frailties resulted in an artificial understanding of the realities surrounding a decision to accept a risk.

Hanson and Kysar offer an additional example of how a disingenuous illusion of trustworthiness can creep into otherwise acceptable advertising. They present this problem within the context of a manufacturer’s relationship with a consumer. They observe that the consumer can be manipulated by cleverly designed images. In discussing the shopper’s experience at the average supermarket, Hanson and Kysar make the following observations:

The experience begins the moment one walks through the automatic doors. In that instant, one is first exposed to atmospherics, the "conscious designing of space to create certain effects in buyers." The goal, of course, is to induce in the consumer a particular state predisposed to relaxed consumption: "[Atmospheric] factors ... may be designed into or manipulated within retail spaces in order to produce emotional and, in turn, behavioral effects in consumers." This design is not mere speculative showmanship on the part of retailers. By studying psychological analyses of mood states, marketers have determined that "a mood state (either positive or negative) biases judgments of products and services in that direction." Therefore, a consumer in a positive mood "pays less attention to specifics of the message and relies more on heuristic processing." That is, by inducing the proper mood, retailers can encourage the use of heuristics, or market beliefs, in shoppers... . The use of heuristics by consumers creates an opportunity for manipulation by manufacturers... . [and] developing positive affect within consumers with respect to a particular product or a particular shopping venue can greatly enhance the perceived utility - and significantly lower the perceived risk - that those consumers attribute to the product or the shopping venue. Thus, when marketers seek to manipulate consumer "mood states," they are attempting to capitalize on the nonrational, experiential mode of information processing that consumers utilize when in affective response modes. [n31]

Once the favorable impression is created, it behooves the subducer to defuse any tendency to accept subsequent information that might dispel the illusion:

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Manufacturers might seek to take advantage of the confirmatory bias by providing consumers with any and all evidence that does not unambiguously support an opposing, negative view of the product. Because of the confirmatory bias, any such evidence will tend to be misread by the consumer as additional support for the initial product impression. This possibility of confirmation through ambiguous evidence might explain the omnipresent practice of marketing products with gee-whiz statistical data, authoritative surveys of physicians, and imposing bar graphs, all of which, upon inspection, turn out to contain nothing of informative value. After all, researchers have discovered that the more ambiguous and complex the evidence, the more that evidence seems to be susceptible to the confirmatory bias.

In a similar fashion, the confirmatory bias appears to cause lay scientists to view disconfirming evidence with an unjustifiably jaundiced eye. Any aspect of disconfirming evidence that appears capable of a less damaging, alternate
explanation will be latched onto by individuals eager to maintain their initial hypotheses. Hence, manufacturers of risky products might seek to offer "alternate" explanations for any evidence that suggests that their products are dangerous. Due to the confirmatory bias, individuals also appear to gain more conviction in their original hypotheses merely by hearing of methodological or conceptual flaws in evidence that contradicts their hypotheses. The natural strategy for manufacturers of risky products, therefore, is to identify for consumers any and all problems in evidence that is damaging to product impressions.n32

These tactics can turn perfidious. For example, consider the efforts made during the last century to convince consumers that smoking is safe, despite the package labels that describe the actual dangers involved. The most notable effort was the Joe Camel campaign, launched with the implicit design of influencing teenagers to overlook the federally mandated warning against smoking. The Joe Camel campaign sought to show teenagers how "cool" smoking was, notwithstanding the risks involved:

The new campaign that RJR established as a result was Joe Camel, described by the ad copy as a "smooth character" and the "quintessential party animal," who was "done up in a tuxedo and sunglasses, with a cigarette adangle from his pendulous lips and a bevvy of adoring (human) beauties nearby." The smooth character appears to have appealed to underage consumers. Studies published in a 1991 issue of the Journal of the American Medical Association found that Joe Camel is almost as familiar to six-year-old children as Mickey Mouse, that the campaign has enticed thousands of teens to smoke the brand, and that Camel’s popularity with twelveto seventeen-year-olds has surged.n33

[§33] In another article, n34 there is a discussion of the techniques used by the emergency response industry designed to encourage unsuspecting consumers to accept a liquidated damage clause. These clauses fix the provider’s liability at $250 in the event the provider fails to meet its commitment to call for assistance if the consumer is the victim of an accident, criminal assault, or physical incapacity requiring emergency treatment. A closer look at the promotional materials used by the emergency response industry shows that the materials likely were designed with the Behavioral Decision Theory in mind:

The promotional materials typically used by service providers are, on their face, designed to fully capture the tendency for experiential thinking about risk. A customer’s experiences are most likely going to be limited to risks involving physical debilitation, i.e., heart attack, stroke or a fall resulting in a broken bone, or the destruction or loss of property resulting from fires, water damage, or theft. Most customers have no reason to be concerned about the failure of the monitoring company to perform because the customer is not likely to have had an experience involving such a possibility. Hence, this risk remains beyond the horizon of the decision maker’s immediate concerns.

Once the customer considers the promotion and a decision is made to explore the matter further, BDT suggests that the customer will do so subject to a cascade of biases. For example, the customer can be expected to anchor to that decision. The materials are also likely to trigger the status quo bias, the status quo being safety and security.

The framing and control effects may also trigger other biases such as cognitive dissonance. The consumer has made a decision about the consumer’s condition, i.e., the consumer is now "safe" since the consumer has decided to rely on the provider. Fears of debilitation, destruction or loss of property because of fire or theft have been addressed and the consumer is not likely to want to receive information that suggests that the decision is possibly flawed or involves implications the customer has yet to consider. The customer is focused on the future and is gratified by the possibility of assistance being available when and [if] it is needed.

Since there has been no disclosure, the availability bias probably is not in play. But consider if disclosure is made. Consumers have limited information available about the risks associated with the losses resulting from debilitation, fire or theft, and have virtually no information about either the possibility or the consequences of a failure of the provider to perform. The only available data comes from the provider, usually in the form of promotional pieces. This suggests that
the availability bias, reinforced by "satisficing," will restrict the investigation to the promotional materials. In other words, the availability bias conditions the consumer to accept an assumption of risk by relying almost exclusively on information [*34] prepared by the service provider.n35

Additionally, as commentators have noticed, even a third party’s visceral properties can be used to manipulate preferences and perceptions:

For instance, Loewenstein himself notes that cookie shops often vent baking smells into shopping malls in order to trigger the visceral factor of hunger and that "distilled spirits ads opt for simple “bottle, glass, and ice’ depictions to help consumers visualize the experience.” These are but two examples of a broader phenomenon: Because Loewenstein’s theory "predicts ... that impulsive behavior will tend to occur when visceral factors such as hunger, thirst, physical pain, sexual desire or emotions are intense," one should expect marketers to emphasize those same visceral factors heavily in order to maximize impulsive (consumption) behavior. Thus, appeals for food products might attempt to emphasize hunger through vivid, close-up views of freshly baked pizza, or through free potato chip samples at grocery stores. Makers of pain relievers might seek to offer compelling metaphors of headache pain: "It felt like a jackhammer going off inside my head." And it almost goes without saying that manufacturers of virtually any product may utilize sexual desire as a visceral factor that increases impulsive consumption. These tactics have, of course, been a feature of consumer products advertising since its inception. What Loewenstein’s account of visceral factors adds to the topic, however, is an understanding that such appeals can result in behavior that is at odds with one’s preferences.n36

B. Implications for Consequential Procedural Unconscionability

Because procedural unconscionability always involves overreaching, it is important to recognize that overreaching is always by design - never by accident. As a result, procedural unconscionability is always intentional. Intent to inflict harm, however, is not necessarily required. Rather, the required state of mind is the intent to induce acceptance of a term that the tortfeasor knows will operate in a substantively unconscionable manner. In other words, implicit in procedurally unconscionable conduct is a conscious disregard for the rights of the party on whom the strategy operates. Usually, the party imposed upon is aware of the strategy and its consequences. Nevertheless, that party usually accepts the term because of unequal bargaining position. In these cases there is nothing [*35] subtle or opaque; the manipulation is out in the open, and the operation of the unconscionable term is at least perceptible.

Some strategies, such as those rooted in the principles of cognitive psychology, however, present a far more troubling form of procedural unconscionability. Manipulations can be concealed by carefully crafted fabrications that create illusions of well-being. Indeed, BDT-based strategies are designed to operate in a subtle manner that can go totally unnoticed by the party on whom the strategy is focused. As a result, the target may not be aware of the possible need to take preventive measures to counter the operation of the strategy. Moreover, such a strategy unquestionably introduces an element of surprise into the contract-formation process. This interferes with the basic elements required for contract enforcement, mutual knowledge and willing consent.

From the cognitive perspective, making decisions is no simple matter. Even when people believe that they are thinking and acting rationally when making a decision, it is possible that they may be "cognitively" fooling themselves. People make bad decisions, not because they intend to, but because they rely on shortcuts - heuristics - to assist in the decision-making process. If the heuristics are flawed, or if they are simply inappropriate given the nature of the decision, the yield is a mistake. Worse yet, the selection of a heuristic itself may be remotely manipulated. Anyone who is knowledgeable of cognitive principles and is willing to use that knowledge surreptitiously has an advantage on the decision-maker. The knowledgeable subduer is in a position to be able to unilaterally manipulate the decision, while the decision-maker mistakenly believes that he himself is in control. This is what occurs when a party to an agreement elects to use overreaching conduct during the contract formation process by deceitfully using cognitive psychology to steer the decision-maker into accepting a risk of which the decision-maker is not aware.

Summary

The principles of BDT are not without the possibility of distortion and abuse. Techniques and tactics have been developed that prey on the misuse of BDT and serve to create in the mind of the decision-maker an impression that it is
appropriate to trust the source of information supplied by the subduer. Under these circumstances, the subduer should not be allowed to assert that the offending term was accepted knowingly and willingly because, by definition, BDT strategies conceal the impact of the unconscionable term. The posited tort of [*36] Consequential Procedural Unconscionability requires the court to make a finding of procedural unconscionability based on evidence showing that techniques such as these were in fact employed during the contract-formation process and that the decision-maker sustained damage as a result.

Part 2: Consequential Procedural Unconscionability: Procedural Unconscionability as a Tort

In this part, the following three questions are addressed: (1) what are the elements of the posited tort; (2) when is there a public policy interest in avoiding overreaching during the contract-formation process; and (3) how does the posited tort fit into the framework of existing tort theory?

A. Procedural Unconscionability as a Tort

The doctrine of contractual unconscionability evolved from concerns over contracts that created unfair results, were one-sided and oppressive, produced surprise, and resulted from overreaching. The purpose of the doctrine of unconscionability is to guard against the formation of unfair contracts that "no man in his senses and not under a delusion would make on the one hand and as no honest and fair man would accept on the other."n37 In essence, the doctrine of unconscionability is a form of contract regulation.

Contractual unconscionability first appeared in the common law as a form of judicial regulation of the contractual relationship. In recent years, the concept has become codified and the scope has been greatly expanded.n38 Without exception, the relevant statutes delegate to the [*37] judiciary the task of determining, in the opinion of the court, what is or is not, as a matter of law, an unconscionable term. In other words, these statutes continue the tradition of judicial regulation.

Consequential Procedural Unconscionability, if accepted by the courts, is a logical extension of the regulatory tradition associated with the original doctrine of unconscionability.n39 The proposed tort arises when there is unconscionability in the circumstances surrounding the formation of the contract and addresses the specific conduct of parties to the contract.n40 It remedies procedural "naughtiness" that results in actual damages that are consequential, meaning damages that arise from the actions that are procedurally unconscionable, as distinguished from economic damages that arise from the operation of the contract itself. Subject to some qualification, the proposed tort imposes liability for the creation of circumstances that give rise to unconscionable contract terms. In addition, it imposes a constraint on those who attempt to manipulate a result by misleadingly creating an illusion of trustworthiness.

Consequential Procedural Unconscionability is not a tort requiring a conscious intent to do harm; instead, it requires only indifferent overreaching in support of a desire to win an unfair advantage in the contract-formation process. As an unintentional tort, it is distinguished from fraud, which requires a false representation of a material fact made intentionally and knowingly with intent to mislead the victim. The theory of contractual unconscionability assumes transparency, the unconscionable term is out in the open for all parties to see. Procedural unconscionability can take on an insidious form [*38] leading to actual damages, as in the case of a manipulation linked to the creation of an illusion. More often than not, the illusion operates as an appeal to trust. When this occurs, procedural unconscionability involves deceitful conduct giving rise to consequences best addressed at law through the posited tort of Consequential Procedural Unconscionability.

What type of unconscionable conduct is as objectionable as deceit? Consider the intentional creation of an unrealistic expectation using an opaque ingredient that insidiously operates undetected until it results in damages. For example, the asymmetric use of techniques designed to distract a party from fully appreciating the consequences of a known term or provision prevents the unsuspecting party from protecting against the provision’s consequences. If this context, the manipulation serves as a facilitator of distraction and creates a condition that can result in damage to the manipulated party. Distraction can be as damaging as the concealment of a material fact.

1. The Elements

This article argues that if each of the following elements are present, a wrong worthy of a stand-alone tort has been described:
(1) the contract contains a term that is determined by a court to be substantively unconscionable (i.e., unconscionability that impacts a party to the contract);

(2) court-determined circumstances surrounding the contract formation process demonstrate procedural unconscionability (i.e., unconscionability that impacts not only the parties to the contract, but also the public policy interest in the contracting process); and

(3) a showing of damages directly and exclusively attributable to the act or actions that the court finds constitutes procedural unconscionability.

When each of the above elements has been satisfied, a wrong has been committed that impacts not only the individual plaintiff, but, because of its insidious nature, operates against the very fabric of our economic and legal system; therefore, the imposition of legal ramifications, in addition to rescission of the unconscionable term, is required to achieve deterrence.

2. Threshold Considerations
   a. Can it Really Happen?

As a practical matter, it may be asked whether real-life situations actually happen that could give life to the tort of Consequential [*39] Procedural Unconscionability? The following scenario illustrates such a situation:

Assume that A and B are negotiating a contract, and B desires a liquidated damages clause that severely restricts A’s recovery for the actions of B. B seeks the clause for B’s own business reasons and does not want A to consider the provision for fear that A will not accept the contract. B attempts to distract A from considering the stated terms of the agreement. B is not acting with actual malice. B’s only concern is losing the benefit of the contract. To achieve his goal, B creates a negotiation stance that includes an illusion of trustworthiness predicated on A’s belief that B will perform as represented and that B will be accountable for failing to perform. While B makes no effort to hide the terms of the liquidated damages clause, B negotiates in a manner designed to draw A’s attention away from the clause. If A fully appreciated the implications of the liquidated damages clause, A could obtain insurance to make up for the difference between the contractual limitation and A’s actual damages in the event B fails to perform. Because of B’s negotiation tactics, however, A is unaware of the need to consider this possibility and accepts the terms of the contract, without taking action to protect against possible future loss. B fails to perform under the contract causing A to sustain damages, but A is barred from full recovery because of the liquidated damages clause.

Liquidated damages clauses of this type are common and for the most part are enforceable. For example, such clauses are prevalent in agreements routinely used by the emergency response monitoring industry in service contracts. [*41] Service providers insist on liquidated damages clauses to reduce expenses. The service providers usually do not bring the clause to the customer’s attention for fear of losing the contract.

Unawareness of a liquidated damages clause can result in real harm, harm that is often capable of being protected against when the consumer is informed of the clause. In situations involving fire and theft, for example, the consumer, if aware of the need, can obtain insurance from a third party to indemnify against the possibility of losses exceeding those provided for in a liquidated damages clause. [*42] In other situations, however, the possibilities for third party indemnity may not be obvious, and worse yet, may not be available. For example, contracts for personal emergency response services, designed to assure assistance in the event of illness or physical injury, often include liquidated damages clauses, but the availability of, or even the need for, insurance to cover injuries caused by such services [*40] may be problematic. In these situations, the unwitting acceptance of a liquidated damages clause could result in actual harm to the consumer of such services.

b. Are Other Remedies Already Available?
Alternative legal remedies to the proposed tort of Consequential Procedural Unconscionability do not exist. Courts have found that existing statutory schemes providing equitable relief from unconscionable contracts cannot be read to include remedies at law.n43 Other courts have found liability outside of statutory schemes for unconscionable conduct and the creation of unconscionable circumstances, but these cases have relied upon a contractual theory based on breach of fiduciary responsibility, as opposed to a tort theory based on a duty not to harm.n44

Some states have adopted legislation designed to address unfair trade practices. Typically these statutes are limited to situations involving insurance deceit and fraud. A few states have versions broad enough to encompass other unfair trade practices.n45 but the [*41] language requires judicial interpretation. Only a few courts have indicated that unconscionable contracts may come within the scope of what legislatures describe as "unfair."n46 Some courts insist that to the extent such statutes encompass unconscionable acts, the favored relief is equitable.n47 In addition, many of these statutes prescribe limited remedies and do not grant private causes of action. In general, these statutes only offer the possibility of relief at law for procedural unconscionability.n48

[*42]

B. Contracts Most Likely to Spawn Claims for Consequential Procedural Unconscionability

Not all findings of unconscionability will give rise to a subsequent claim for Consequential Procedural Unconscionability. This is because not all attempts at procedural naughtiness result in actual damages that are consequential in their nature. Consequential Procedural Unconscionability should be limited to a unique set of circumstances involving negotiation tactics that undermine the reliability of representations of trust, confidence, and expertise. Special relationship contracts are most likely to spawn a claim for Consequential Procedural Unconscionability because of the economic imperatives that make them susceptible to clauses restricting liability for malfeasance and nonfeasance.

The conditions for liability under Consequential Procedural Unconscionability should be essentially the same as those that exist in cases involving service contracts containing special relationships.n49 Special relationships contracts involve affirmative duties imposed by law, separate and apart from the promises specifically stated in the contract.n50 The existence of the special relationship is what gives rise to the exceptional duty of care, which may result in both contract and [*43] tort liability.n51 This brings into sharp focus the question of which relationships are special?

Special relationships almost universally involve agreements for personal services. A special relationship can arise because of the nature of the activity involved in the agreement or because of the language of the contract. A special relationship is said to exist when the terms of the agreement involve trust, confidence, and expertise. This is true because a special relationship includes a duty to exercise reasonable care to the contracting party "whose economic interests are likely to be affected by the way the contract is performed."n52 More often than not, this is the case when the agreement involves professional services (i.e., services that are usually subject to formal regulation to ensure that the public is protected).n53 While doctors, lawyers, architects, and engineers have been found to engage in [*44] activities that create special relationships, most commercial activities and many other types of professional services are not of a "special" character.n54

Even though special relationship determinations appear most often in regulated settings, there is no reason that the recognition of a special relationship should be limited to those situations. The special relationship doctrine is built on society’s overall concern for the importance and value of a duty of care. Conditions requiring the preservation of this duty can occur outside of the boundaries set by regulatory schemes, and courts are in the best position to assure that in such circumstances the duty of care is recognized and protected.n55

When an agreement involves a commitment for services, it is special because the agreement is not only created to ensure the performance of a bargained for promise, but to avoid consequences that the agreement itself is intended to prevent. For example, in a situation where A requires medical assistance to avoid physical harm, B’s promise to secure such assistance is special in the sense that B’s failure to perform likely will result in the very harm A was seeking to avoid by entering into the agreement with B. Allowing B to avoid the consequences of B’s failure to perform because B’s services are not "professional" fails to give recognition to society’s interest in assuring that B fills his duty to A.

Any obligation to provide services encompasses the understanding that the provider is competent, able, and trustworthy enough to [*45] complete the contract. Service providers generally wish to distinguish their abilities from those of competitors. Promotional efforts draw added attention to the service provider’s purported ability to deliver the
bargained for services. Self-promotion involves making statements about expertise and trust and, by its nature, creates the impression that the consumer can trust the service provider’s claim of superiority. Self-promotion should be a sign that a special relationship may exist.\textsuperscript{n56}

In today’s commercial environment, service providers’ attempts to restrict liability for malfeasance or nonfeasance are common. Economy of scale is often an ingredient and requires a significant volume of service contracts. Some service providers must carefully consider ways to control the cost of providing the service in order to keep the cost to consumers reasonable. Tort liability can be an expensive and unpredictable component of the overall price charged to the consumer and can also interfere with sales.

In order to control costs, some service providers insist on a liquidated damage clause fixing ultimate liability for a misfeasance or nonfeasance at a certain sum. If the sum specified in an agreement bears no rational relationship to possible actual damage, the practical effect is exculpation.\textsuperscript{n57} This is because the risk of misfeasance or nonfeasance is almost totally shifted from the performing party to the consuming party. The law will recognize the viability of such provisions when it can be shown that the consumer accepted them knowingly and willingly.\textsuperscript{n58} In addition, public policy encourages a \textsuperscript{[*46]} liberal application of this rule if it can be shown that the consumer would have been able purchase insurance against the failure to perform. The service provider, fearing loss of a contract, may choose not to remind the consumer of the need for self-protection in order to avoid suggesting that the consumer needs self-protection and to prevent adding an additional expense to the consumer’s price.

A service provider faced with the need to weigh the benefits of winning a contract against the risk associated with the disclosure of hidden costs, such as liability insurance, have an incentive to develop negotiation strategies that promote selling services without drawing attention to provisions that increase the cost to the consumer. If these negotiation strategies do not cause the consumer to assume liability for the provider’s malfeasance or nonfeasance, no harm results. When such strategies disguise the need to insure against a provider’s malfeasance or nonfeasance, however, the consumer can be damaged by actual harm. Consequential Procedural Unconscionability provides the consumer with an opportunity to be made whole under these circumstances, and it further provides an incentive for the service provider to refrain from the use of deceptive strategies.

C. An Emerging Tort Theory

If Consequential Procedural Unconscionability is to be a tort, what type of tort is it? Intentional torts\textsuperscript{59} include traditional theories\textsuperscript{60} addressing physical violations such as assault, battery, false imprisonment, trespass to chattels, trespass to real property, libel, and slander. In addition, new and evolving theories may be considered intentional torts. Many of the new torts require actual malice, such as \textsuperscript{[*47]} prima facie tort,\textsuperscript{n61} intentional infliction of emotional distress,\textsuperscript{n62} intentional interference with prospective advantage, and intentional interference with contract.\textsuperscript{n63} Bad faith or opportunistic breach of \textsuperscript{[*48]} contract,\textsuperscript{n64} and exploitation.\textsuperscript{n65} All of these new torts are situation-specific in their elements and do not involve physical violations. An \textsuperscript{[*49]} additional category of intentional torts, which includes fraud, involves the intentional concealment of material facts with the intent to harm the victim. Finally, there are unintentional torts, such as breach of confidence\textsuperscript{66} and negligence, which require only misfeasance or nonfeasance.

Consequential Procedural Unconscionability is an unintentional tort (within the framework of traditional theories\textsuperscript{67} because it does not involve a physical violation, does not require an affirmative intent to inflict harm (within the framework of evolving theories), and does not involve concealment. The proposed tort involves indifferent, opaque overreaching predicated on an illusion of trustworthiness that inflicts actual and measurable harm.\textsuperscript{n68}

\textsuperscript{[*50]} Most intentional tort theories either require a showing of harm with malice, or a showing that the harmful conduct was unjustified or of an extreme and outrageous nature.\textsuperscript{n69} Consequential Procedural \textsuperscript{[*51]} Unconscionability does not encompass any of these criteria. Nevertheless, Consequential Procedural Unconscionability has the following characteristics in common with other tort theories:

(1) it recognizes the need for a public policy that provides a remedy for harmful conduct to the unsuspecting;\textsuperscript{n70}

(2) it recognizes evolving circumstances that reflect political, economic, technological, and social changes in our society;\textsuperscript{n71}
(3) it provides a mechanism for overcoming the absence of a regulatory scheme that otherwise would protect against a posited harm;

(4) it falls within the traditional role reserved for the courts;

(5) it preserves and confirms a commitment to an underlying principle of law - in this case, the sanctity contractual commitments.

A declaration by a court that a provision is unconscionable recognizes that a contractual term is substantively one-sided, oppressive and the result of overreaching.\textsuperscript{72} When there is proof that the inducement for acceptance has a collateral consequence, such as actual damage, the interests of society mandate the need for a legal remedy. Accordingly, there is a need for the tort of Consequential Procedural Unconscionability to protect against consequences such as those that are possible in situations involving contracts with liquidated damages clauses embedded in contracts for emergency response services. The application of the proposed tort, however, should not be limited to that scenario. It has relevance in any situation involving a contract for services, in an area not otherwise regulated, when the service provider attempts to limit its liability by using an otherwise enforceable liquidated damages clause under circumstances that constitute procedural unconscionability.\textsuperscript{73}

Summary

Manipulation using BDT principles that constitutes procedural unconscionability underscores a serious public policy concern for the integrity of contractual commitments. This concern must be addressed by the common law.\textsuperscript{74} There needs to be a deterrent to a party, who is usually well-financed and sophisticated, exploiting the principles of human dynamics to gain an unfair advantage because, although there may be no affirmative intent to do actual harm, it may be an unintended consequence.

If a party to a contract is distracted from appreciating a term by an act of manipulation, it follows that the manipulated party has not knowingly and willingly evaluated and accepted the term.\textsuperscript{75} A disarmed negotiator is effectively unable to engage in meaningful negotiations and therefore is not capable of reaching a meeting of the minds, at least as to the term that is the subject of the manipulation. This can have intended and unintended results. Where the term involves an assumption of a risk, not only is the manipulated party unaware that a risk is being assumed, but the need to take protective measures is obscured.

\textsuperscript{[*53]} Consequential Procedural Unconscionability, if accepted as a stand-alone tort, is an expansion of the regulatory role of courts in the area of contract relationships; a role that traditionally has been reserved for the judiciary. The tort would ensure that the victim of an extreme form of overreaching would be afforded an opportunity to recover the full measure of damages actually incurred as result of the misbehavior associated with unconscionable conduct. In addition, it would deter conduct that undermines the contract-formation process.

Part 3: Damages

If a provision is found to operate as a penalty, or to impose an unduly oppressive condition, the response in equity alone seems sufficient to restore the status quo because the oppressed party is relieved from the effect of the substantively unconscionable provision.\textsuperscript{76} If the party seeking a declaration of unconscionability demands that the court address the consequences of procedural unconscionability, however, can the court entertain such a claim? If so, what is the proper measure of damages?\textsuperscript{77} What effect, if any, does a response in equity to the substantive operation of a suspect term have on a claim for damages?
This section explores the issues surrounding an award of damages for torts designed to address the consequences of procedural unconscionability. Consistent with the theme of this entire article, the discussion is set within the context of unwarranted manipulation using BDT.

A. Law and Equity: Is There Exclusivity?

The dual nature of the doctrine of contractual unconscionability creates the impression that the damages principles unique to equity and law are in conflict. This impression is an illusion. The general rule that an equitable remedy will not lie where there is an adequate remedy at law has no application to Consequential Procedural Unconscionability. The claim that a contract term is substantively unconscionable requires the court to consider the need to correct the [*54] substantive effect of the offending term because the operation of the term is ongoing. In contrast, a claim based on procedural unconscionability requires the court to address the legal consequences of actions that give rise to the existence of the unconscionable term. Facts describing each type of unconscionability present unique circumstances operating in separate arenas. Substantive unconscionability involves the impact of the contract on only the contracting parties. As noted at the outset of this article, equitable remedies are not likely to have a lasting impact on a repeat offender. Procedural unconscionability, on the other hand, has implications that suggest an impact reaching beyond the parties to any particular agreement. For example, a remedy at law can be structured to deter repeat offenders. An award of damages for the wrong associated with the formation and acceptance of the offending term will not serve to arrest the ongoing substantive problems created by the offending term. Conversely, actions in equity will have no impact on the need for deterrence. In other words, Consequential Procedural Unconscionability addresses those conditions that occur when the remedy in equity is insufficient.

For example, consider the fact pattern set forth earlier in this article in which A and B negotiate a contract that contains a liquidated damages clause. The clause severely restricts A’s recovery of damages for the actions of B. During the negotiations, B distracts A from the liquidated damages clause in order to keep A from fully considering the risks involved with accepting the clause. B’s negotiation stance creates an illusion of trustworthiness. B designs the negotiations to draw A’s attention away from the clause, and, as a result, A accepts the term, unaware of the need to seek insurance to cover the risk assumed by A under the liquidated damages clause.

Assume that B’s failure to perform results in damages that exceed the terms of the liquidated damage clause, and, as a result, A is unable to recover a full measure of economic damage. A seeks reformation on the ground that the terms of the contract are unconscionable. Denying A equitable relief because a remedy at law exists would ignore the ongoing operation of the offending clause which denies A any remedy at law. Furthermore, granting A consequential or even punitive damages does nothing to change the reality that the liquidated damages clause operates to deny the claim for a full measure of economic damages pursuant to the contract.

Claims for damages arising from Consequential Procedural Unconscionability exist separately from equity because Consequential Procedural Unconscionability remedies the consequences of [*55] overreaching, not the unconscionable operation of the contract. In other words, while courts may require evidence of both procedural and substantive unconscionability, each type can independently yield separate and unrelated consequences. Once this is recognized, rules can be fashioned to determine the proper measure of damages attributable to the consequences of each type of unconscionability.

B. Consequential Damages

As a general rule, contract damages are unique to each contract and they only effect the parties to the contract. The proper measure of damages for breach of contract is usually related to the value of the performance of the contract, as bargained for, independent of the circumstances of the injured party. As such, economic damages are recoverable without limitation to the extent necessary to put the injured party in the same position as if the defendant had performed. It is for this reason that contract law is said to protect against disappointed expectations: Consequential damages are permitted, but only if the terms of the contract make provision for them, and the law will not imply that the parties intended to provide for consequential damages. [*56] 

"Tort obligations are in general obligations that are imposed by law - apart from and independent of promises made and therefore apart from the manifested intention of the parties - to avoid injury to others." [*57] In other words, when tortuous conduct is involved, society has an interest in deterrence through damages:
By designating conduct as tortious, the law has made a conclusive determination that such conduct is so reprehensible or dangerous that it must be deterred through expansive liability, including punitive damages, irrespective of whatever countervailing economic consequences to the tortfeasor or society may ensue. In furtherance of this policy, the broad tort foreseeability doctrine, allowing the victim compensation for all but extraordinary injuries, and the doctrine that the tortfeasor takes the plaintiff as he finds her, are designed to assure that only in the most exceptional cases will a victim’s full compensation be denied.n81

With these conventions in mind, most jurisdictions do not allow a party suing in contract to plead a claim for damages associated with tortious conduct unless a common law duty arises totally independent from the contract.n82 Conversely, in tort actions, most courts restrict the claim for damages to property and personal injury losses, refusing to permit claims for economic loss.n83

Applying these rules to Consequential Procedural Unconscionability, again consider a liquidated damages clause embedded in a service contract through the use of overreaching in the form of an unwarranted manipulation using the principles of BDT. The overreaching conduct, in this scenario, has several consequences: (1) the dubious conduct is asymmetric and distracts the decision-maker’s attention from the term; (2) it operates to shift liability for a [57] service provider’s misfeasance or nonfeasance; and (3) the nature of the services provided suggests that the relationship is “special.”n84 If the claim is viewed to solely arise under tort principles, then consequential damages would be permissible.

What is the effect on consequential damages if, as a part of the equitable relief granted to address the substantive unconscionability of a contract term, the liquidated damages clause is modified to permit recovery of all economic damages? Again, if the consequences from the dualism of unconscionability are seen to be separate, then there should be no effect.n85 The purpose of an award of consequential damages is to deter the tortfeasor from violating the rights of others in the future.

C. Punitive Damages

Finally, should a court permit a claim for punitive damages in connection with Consequential Procedural Unconscionability? Punitive damages, whether by statutory mandate or common law tradition, are awarded to punish the offender and deter the future *[58] occurrence of conduct found to be reprehensible.n86 Thus, the following question arises: When, if ever, can procedural unconscionability be characterized as conduct that is reprehensible?

As observed earlier in this article, overreaching does not occur by accident; it requires the knowing development of a winning strategy and the conscious intention to induce the acceptance of an unconscionable term. By engaging in overreaching conduct, the actor consciously disregards the rights of others. Overreaching is always asymmetric. Consequential Procedural Unconscionability involves the type of procedural unconscionability that results in actual damage to the unsuspecting. When these characteristics of procedurally unconscionable conduct are considered, the reasonable conclusion is that an award of punitive damages is required "to punish reprehensible conduct and to deter its future occurrence.”n87

Procedural unconscionability always involves internationality to the extent that the actor is committed to winning a term that operates in a substantively unconscionable manner. Because procedural unconscionability is always asymmetric, its existence creates the possibility that its consequences will be undetected by the party on whom it acts, denying that party an opportunity to seek protection. In other words, there exists the possibility for surprise. In the example of procedural unconscionability achieved through BDT, there is an intention to induce acceptance of a substantively unconscionable term without concern for the consequences to others. Such circumstances create the basis for a societal concern for the deterrence of such conduct. Allowing an award of punitive damages would meet the need for deterrence.

Almost all states permit the recovery of punitive damages in some circumstances. A few states have legislation governing the use of punitive damages as a remedy.n88 In other states, punitive damages are *[59] governed by the common law.n89 Whatever the genesis, there is little agreement about the conditions required to factually support an award of punitive damages.

The Model Punitive Damages Act suggests liability for punitive damages if "the plaintiff has established by clear and convincing evidence that the defendant maliciously intended to cause injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury.”n90 Situations described as an intentional disregard of
the rights of others by enabling legislation and the Model Punitive Damages Act should encompass the actions to be remedied by the posited tort of Consequential Procedural Unconscionability, even if there is no specific malice involved.\textsuperscript{n91}

The majority of states that have enabling legislation permit recovery of punitive damages upon a showing of fraud, deceit, oppression, malicious conduct, or an intentional disregard for the rights or interests of others. In these states, the issues surrounding malice and the intentional disregard of the rights of others, are deemed questions to be determined by the trier of fact. Where malice is the standard to be met, most of the enabling legislation also mandates a showing of "clear and convincing" evidence.\textsuperscript{n92} Alabama defines malice to include "such circumstances that the law will imply an evil intent."\textsuperscript{n93}

In states where the common law governs punitive damages, the issue of proof is far from clear. Some states require proof of clear and \textsuperscript[*60] convincing evidence of either actual malice, or facts from which actual malice can be implied, while other states limit the required proof to evidence of actual malice, refusing to consider facts from which malice may be implied.

Cases decided in Maryland illustrate the nature of the debate. Until recently, Maryland law allowed malice to be inferred, provided that the wrongful conduct occurred before the formation of the contract and that the wrongful conduct was of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others - the very situation addressed by Consequential Procedural Unconscionability. In H & R Block, Inc. v. Testerman,\textsuperscript{n94} a negligence case, the court noted:

Despite the general tendency of the cases to require actual malice as a prerequisite to punitive damages, it is nonetheless recognized that situations may arise in which such malice can be legally inferred, i.e., cases in which the legal equivalent of actual malice may suffice... The difficulty in the Maryland cases arises in regard to factual situations in which there is no evidence of actual intent to injure or of actual malice toward the injured person, but in which the defendant’s conduct is of such an extraordinary character as possibly to be the legal equivalent of such actual intent or actual malice, sometimes described as "wanton," "reckless disregard of the rights of others," and the like...\textsuperscript{n95}

The basis of the Testerman decision is that there is a need to deter conduct amounting to actual malice, as well as conduct that imitates actual malice. In Wedeman v. City Chevrolet Co.,\textsuperscript{n96} a Maryland fraud case, the court held:

The Maryland rule on this point accords with the weight of authority elsewhere, which generally holds that to recover punitive damages in actions of deceit, an element of aggravation, evidenced by malicious, deliberate, gross or wanton conduct, sometimes called implied malice or the legal equivalent of actual malice, or legal malice, must accompany the fraud. The conclusion therefore, which we draw from the reported decisions in other jurisdictions is that while aggravated circumstances must be shown to justify an award of punitive damages in fraud cases, proof of actual malice, as defined in Maryland, is not a prerequisite.

Nor are we disposed to adopt a rule here which requires proof of actual malice to recover punitive damages in cases of fraud. It is axiomatic that in appropriate cases such damages are awarded, over and above full compensation, to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct. Punitive damages are more likely to serve their \textsuperscript[*61] deterrent purpose in a fraud case than in most other instances of tortious conduct. One who acts out of anger or hate in committing an assault, for example, is not apt to be deterred by a fear of punitive damages. Those who are tempted, however, to engage deliberately in fraudulent conduct for profit are more likely to pause and consider the consequences if made aware that they may be compelled to pay more than the actual loss sustained by the plaintiff.\textsuperscript{n97}

In Owens-Illinois v. Zenobia,\textsuperscript{n98} a products liability case, the same Maryland court abandoned the reasoning of Testerman because the Testerman decision focused on when the conduct occurred, rather than on the nature of the conduct.\textsuperscript{n99} The court explained that it feared that an award of punitive damages based on the implied malice standard would result in inconsistent jury verdicts involving similar facts.\textsuperscript{n100} Moreover, the court imposed on the plaintiff the burden of \textsuperscript[*62] establishing "by clear and convincing evidence the basis for an award of [such] damages."\textsuperscript{n101}
As applied to Consequential Procedural Unconscionability, the Zenobia arguments appear to be short sighted, giving those who recklessly disregard the rights of others no reason to refrain from such harmful conduct. Moreover, the decision does not protect the integrity of the contracting process. The Zenobia decision ignores the need, described in Wedeman, to deter malicious or reckless conduct that defeats the rights of an unsuspecting party. Furthermore, the concern about inconsistent jury verdicts has no application to Consequential Procedural Unconscionability.

As noted at the outset of this article, findings of unconscionability are very rare. This is because the elements of unconscionability are hard to establish and the overriding principles of law are stringently applied. A prior finding of unconscionability is an element of the posited tort and, as such, is consistent with the theory of collateral estoppel. This reality reduces the scope of Consequential Procedural Unconscionability to only those situations where actual damages result from acts that are already determined to be evidence of procedural unconscionability.

The only question that needs to be resolved by a jury considering a case of Consequential Procedural Unconscionability is whether actual damages exist. Concern about inconsistency is overcome by the unique elements that give rise to a claim based on Consequential Procedural Unconscionability. With respect to the Wedeman rule, consider again the example of a BDT-based strategy used to manipulate acceptance of an unconscionable term. The asymmetric nature of the manipulation is deliberate, as is the total disregard for the well-being and rights of the party being manipulated. There is no question about the manipulator’s awareness of the terms unconscionability and of the negative impact on the party accepting the term. This conduct undermines the validity of contractual relationships and has significant negative public policy implications. Therefore, punitive damages are needed to deter actors who engage in such conduct.n102

[*63]

CONCLUSION

While courts have accepted dualism in the description of contractual unconscionability, there has been no recognition of the reality that procedural and substantive unconscionability operate in different arenas and, thus, have different effects and consequences. Substantive unconscionability impacts only the parties to the contract, while procedural unconscionability impacts the parties to the contract, as well as the integrity of the entire legal system that enforces contractual promises. The tort of Consequential Procedural Unconscionability is designed to address the consequences of procedural unconscionability. Its scope is limited only to those situations where it is clear, as a matter of law, that overreaching serves to undermine the integrity of the contracting process. It provides a remedy at law that can be enforced without concern for judicial actions in equity designed to address the substantive unconscionability of a suspect contract term.

Approaching contractual unconscionability from the perspective of tort, rather than equity, will undoubtedly have implications for anyone who engages in any form of manipulation in the contract-formation process. Parties that seek to pursue their own best interests without regard for the rights of others will have to proceed with extreme caution. Professions, such as advertising and public relations, will have to take note of the implications when assisting clients in the development of campaigns or programs. Anyone providing services pursuant to contractual arrangements will have to be wary of the implications if liability is intended to be reduced by a liquidated damages clause.

The ramifications may even extend into areas not yet considered. For instance, a coherent unconscionability argument exists for the setting aside of employment agreements for CEOs when the terms can [*64] be equated with corporate waste.n103 Consequential Procedural Unconscionability suggests the beneficiary of such a contract, as well as those who engineer the contract, such as a board of directors, could encounter liability. These concerns should not be seen as a negative, however, because the posited tort would constructively ensure accountability for those who inflict damage on others through contractual manipulation and would protect the best interests of society by preserving the integrity of the contracting process.

FOOTNOTES:

n1. Of Counsel, Banks, Shapiro, Getttinger, Waldinger & Brennan, Mt. Kisco, New York, B.A. Case Western Reserve University, J.D. New York Law School. I wish to thank the Hon. Charles G. Banks for his valuable comments.
and insights as well as Hilary B. Miller, Esq. for his valuable suggestions, insights, persistent skepticism and willingness to review many drafts.

n2. In a recent article I argued that evidence of intentional manipulation of cognitive biases or heuristics could be used to support a claim of contractual unconscionability. The core of the stance is the proposition that in an appropriate setting, an unwarranted manipulation is a mitigating circumstance that should be considered when determining if a suspect term is enforceable. Paul Marrow, The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory, 22 Pace L. Rev. 27 (2001)


Because the posited tort which I call Unconscionable Manipulation is based on a prior judicial declaration that a contract term is unconscionable and therefore unenforceable or subject to judicial reform, I do not address the issue of whether a liquidated damage clause thought to be otherwise conscionable governs tortuous conduct in situations where activities create liability in both contract and tort. This issue has been dealt with only in Utah, where the state Supreme Court found the answer was "no." In DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983), the Court quoted the language of the disputed contract:

It is agreed between the parties hereto that [defendant] is not an insurer; that the payments hereinafter named are based solely on the value of the services provided for herein; that, from the nature of the services to be rendered, it is impracticable and extremely difficult to fix the actual damages, if any, which may proximately result from a failure on the part of [defendant] to perform any of its obligations hereunder; that, in case of the failure of [defendant] to perform any of its obligations hereunder, and the resulting loss to [plaintiff], [defendant’ s] liability hereunder shall be limited to a fixed sum of $ 50.00, as liquidated damages, and not as a penalty, and this liability shall be exclusive.


The Court went on to say:

The above provision contains no expression of an intent of the parties to limit defendant’s prospective liability in tort. Rather, its language applies to "obligations hereunder" and "liability hereunder." Although the clause concludes with the phrase "and this liability shall be exclusive," such language, viewed in context, does not clearly show an intent to limit noncontractual liability.

Even if this Court were to construe the contractual liquidated damages clause as an attempt to limit liability in tort as well as in contract, the enforceability of the clause would be questionable because of its lack of clarity. This Court has
indicated that it does not favor contract clauses purporting to limit or negate such liability. In Union Pacific Railroad Co. v. El Paso Natural Gas Co., 408 P.2d 910 (1965), this Court refused to enforce a very detailed and thorough exculpatory clause "against any and all liability, loss, damage [and] claims ... of whatsoever nature" to protect the plaintiff from a personal injury claim based on negligence. The Court then reiterated the rule that covenants purporting to relieve a party of his duty of due care are disfavored and sometimes declared invalid as against public policy. The Court then stated:

The majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld. But the presumption is against any such intention, and it is not achieved by inference or implication from general language such as was employed here. It will be regarded as a binding contractual obligation only when that intention is clearly and unequivocally expressed.

If it had been the intent of the parties that the defendant should indemnify the plaintiff even against the latter’s negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable.

In the present case, the language employed by the parties does not "clearly and unequivocally" express an intent to limit defendant’s tort liability. Absent such a clear expression of intent, we decline to construe the contractual liquidated damages clause in such a way as to limit liability arising outside of the contract. We hold that the present liquidated damages clause does not affect plaintiff’s right to present proof concerning the factual question of breach of duty and attendant negligence on the part of defendant and to recover reasonable damages therefore as may be shown.

Id. at 437-38 (quoting Union Pac. R.R. Co. v. El Paso Natural Gas Co., 408 P.2d 910, 914 (Utah 1965) (emphasis omitted)).


n5. But cf. discussion and cases cited infra note 9 (discussing the relationship between substantive and procedural unconscionability).

n6. In cases that turn on substantive unconscionability, courts maintain the status quo in equity either by simply declaring void the suspect clause or by dictating reform. Courts acting in equity can even adjust the consequences of a non-reprehensible act by awarding a plaintiff a full measure of general damages.

n7. Sosa v. Paulos, 924 P.2d 357 (Utah 1996), is an example of a proper concern for finding a remedy for the repeat offender. In Sosa, the defendant, an orthopedic surgeon, routinely required his patients to sign an agreement mandating the submission of any and all malpractice claims to arbitration before an arbitrator who was a board certified orthopedic surgeon. The defendant presented the agreement in question to the plaintiff moments before the operation, affording the plaintiff no time to read the document or consider its terms. The court held, "in short, because Dr. Paulos' procedurally unconscionable behavior, Ms. Sosa was unaware of the presence of an arbitration agreement when she awoke from surgery." Id. at 364.

Although the court found the contract to be unconscionable, it failed to structure a penalty that would serve as a deterrence. Dr. Paulos was not required to cease and desist from using his contract form; rather, the court left him free to continue his practice and take advantage of his patients.

n8. See U.C.C. 2-302 cmt. 1 (Revision, Nov. 2000 draft), available at www.law.upenn.edu/library/ulc/ucc2/21100.htm, which states,

Generally a finding of unconscionability requires that a court find both "procedural" and "substantive" unconscionability. Accordingly, courts also should seldom invalidate a contract, or a term of a contract [sic], that is not
substantively unconscionable solely on the basis of one party's conduct. Unconscionability is not intended to allow disturbance of allocation of risks because of superior bargaining power, and in those cases that call out for relief the conduct will often constitute an invalidating cause, such as fraud or duress. Consistent with the provisions of Section 2A-108(2) and the Uniform Consumer Credit Code (Section 5.108), however, in an appropriate case a court may invoke procedural unconscionability to invalidate a term or contract. For example, a court might invalidate a contract because of high pressure sales tactics used in a consumer buyer's home even though the conduct does not constitute fraud or duress.

n9. Not addressed in this article is the question of whether or not there should be liability for entering into a contract that is found to be unconscionable solely because it is substantively unconscionable. Such contracts are said to be unconscionable "per se." See In re Friedman, 407 N.Y.S.2d 999, 1008 (1978); State v. Bel Fior Hotel, 425 N.Y.S.2d 659, 662 (1980) (Greenblatt, J., dissenting). The case for finding such liability is not as compelling because of the absence of a finding of procedural unconscionability. Some courts have found a contract to be unconscionable solely because of substantive provisions contained in that contract. See Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (1998) (While it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable). In Maxwell v. Fidelity Services, Inc., 907 P.2d 51, 59 (Ariz. 1995), the court found that under the U.C.C. a contract term can be unconscionable on substantive grounds alone. See also Samuel Williston & Richard A. Lord, Williston on Contracts 18.10 (4th ed. 1998). Others have suggested that the relationship between the two elements should be analyzed on a sliding scale. "In determining the unconscionability of a contract, no set weight is to be given any one factor; each must be decided in its own facts. In Re Friedman, 407 N.Y.S.2d at 1008. "However, in general, it can be said that procedural and substantive unconscionability operate on a "sliding scale"; the more questionable the meaningfulness of choice, the less imbalance in contract terms should be tolerated and vice versa."

n10. It makes no difference whether the court functions under common law or by statutory directive. The standards for determining unconscionability are the same. See generally Marrow, supra note 2. As Professor Eisenberg points out, "The principle of unconscionability, developed and elaborated within the last forty years, is similarly rooted in the idea that a party who has bargained unfairly should not be able fully to enforce the resulting contract. Essentially, the highly general principle of unconscionability has givencourts a warrant to develop more specific doctrines for review of contracting behavior that involves some kind of unfair exploitation of one party by the other, as in the doctrine of unfair surprise." Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211, 212 (1995) (citations omitted).

n11. See discussion infra notes 64-68.

n12. Because this article presents procedural unconscionability within a framework of unwarranted manipulation of cognitive biases or heuristics, it is appropriate to review some of the principles of BDT and to illustrate the robust nature of the distortions that can be created. My purpose is not to provide a compendium on Behavioral Decision Theory ("BDT") and the research that supports it. Rather, the aim is to illustrate, using examples, how BDT can be used to develop strategies that do in fact manipulate the decision-making process. Manipulation via BDT is a real phenomenon that deserves recognition in the law.

n13. See Russell Korobkin and Thomas Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051, 1061-62 (2000), which states,
an early critique of the law-and-economics movement, this use of rational choice theory substitutes a definition for a normative or empirical proposition.


People interpret information using tools called biases and effects to assist with the task. Not all of these tools are rationally based and sometimes reliance on unintended and/or unwanted results. The explanation for these phenomena is rooted in three basic observations about how human beings undertake the judgment process:

1. people rely on attention and memory assuming both to be limitless and infallible;
2. the human brain makes many automatic inferences outside the range of conscious thought. This is where biases, heuristics and effect come into play; and
3. human beings rely on fixed reference points when evaluating choices and they pay more attention to changes in the status quo than to absolute values.

Jeffrey J. Rachlinski, The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters, 85 Cornell L. Rev. 739 (2000). Effects and biases serve different functions. Effects are used to mold or structure how people approach the decision making process. In other words, "effects involve the positioning of information." Marrow, supra note 2, at 58. Effects trigger biases and heuristics that people use to evaluate information. Id. at 56-58. Biases and heuristics are filters through which information is accepted, processed, and used to reach a decision. It is unclear whether people are hardwired or if their decision-making behavior is learned. See Thomas S. Ulen, The Growing Pains of Behavioral Law and Economics, 51 Vand. L. Rev. 1747, 1760-63 (1998).

n14. The list of known effects and biases is lengthy and it is being added to all the time. A partial list includes:

1. Endowment effect, See D. Kahneman, et al., Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Pol. Econ. 1325, 1330 (1990). As explained by Professor Issacharoff, The endowment effect describes the propensity of people to value what they have more dearly than they would a corresponding opportunity to acquire the same good. Thus, for example, people who own hard-to-come-by sports tickets do not part with them, although they would be disinclined to pay the same amount to acquire them afresh. The presence of an endowment effect is clearly the most robust effect identified in the experimental setting. Conceptually it is a by-product of the concept of loss aversion formulated by Kahneman and Tversky, which holds that individuals are not indifferent as between gains and losses of comparable magnitude. This insight in turn translates into a prediction that the loss of already possessed holdings would be valued as being of greater magnitude than the ability to acquire an object of nominally equal value. Beginning with a famous series of experiments in which subjects who were given a mug valued it far in excess of otherwise similarly situated subjects who were offered only the prospect of purchasing the mug, the endowment effect has proven sufficiently robust as to be an unremarkable by-product of a range of experimental designs.

The endowment effect is the most significant empirical observation from behavioral economics. It is of sufficient magnitude to merit serious consideration for attempting to predict behavior across a variety of settings. Moreover, the effect marks a serious departure from the law and economics presumptions that value is established by marginal trades
in which each party should be equally willing to pay or accept the market price. The endowment effect violates this principle by identifying a source of value that is not "source independent," meaning that the prior relation of an actor to a particular good may alter the value of the object. Accordingly, a wide variety of studies report significant disparities between the willingness to accept and the willingness to pay for comparably situated subjects, depending only on whether the subjects have to part with money as purchaser or part with a possession as seller.


2. Loss aversion. People dislike losses more than they are gratified by equivalent gains and as a result they are more willing to assume risk when considering something they already have. The determinant seems to be the positioning of the choice relative to the desire to avoid a loss. Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175, 1179 (1997).

3. Framing effect. Framing has to do with how a choice is viewed and ultimately embraced or repudiated. The framing effect is both pervasive and robust. Daniel Kahneman & Amos Tversky, Choices, Values and Frames, 39 Am. Psychologist 341, 348 (1984). It is therefore the most exploitable of all the effects. Hanson & Kysar, The Problem, supra note 3, at 684.

4. Extremeness aversion. People do not like extremes. They perceive a choice as an extreme in large part by the position of a choice relative to others. Mark Kelman, et al., Context Dependence in Legal Decision Making, 25 J. Legal Stud. 287, 288 (1996). This effect has serious implications for contract formation. If a term is positioned as an extreme it is less likely to be accepted because of the setting. Similarly, if positioned as a compromise, it is more likely that it will be accepted. Marrow, supra note 2, at 134-35.

5. Illusion of control. People prefer to believe that they are in control of risks they do not fully understand. For this reason they often perceive chance events to involve skill. In a famous experiment, students were asked to state if they were better than the average person at predicting the outcome of a flip of a coin. The subjects reported that whatever the outcome of a series of coin flips, with practice they were sure that they would improve their performance. Ellen J. Langer & June Roth, Heads I Win, Tails It’s Chance: The Illusion of Control as a Function of the Sequence of Outcomes in a Purely Chance Task, 32 J. Personality & Soc. Psychol. 951, 954 (1975).

6. Affect (heuristic). "Judgments of risk and benefit are negatively correlated... . The greater the perceived benefit, the lower the perceived risk and vice versa," Paul Slovic, Rational Actors and Rational Fools: The Influence of Affect on Judgment and Decision-Making, 6 Roger Williams U. L. Rev. 163, 180-81 (2000). Affect is thus a filter through which risk is evaluated and it has been shown that a positively-motivated decision-maker is more likely to play down risk. Id. at 180-82. As explained in Hanson & Kysar, The Problem, supra note 3, at 733:

For instance, it has been shown that providing information designed to increase the perceived benefits of various technologies can lead to a decrease in the perceived risks of those technologies. Again, findings such as this appear to explain a great deal of product advertising, particularly for notoriously harmful products such as cigarettes. By developing a positive affect around the product, manufacturers can not only bias the consumer’s interpretation of conflicting evidence but also actually decrease the consumer’s existing perception of the product’s risk.

7. Elastic justification. As explained by Hanson & Kysar, The Problem, supra note 3, at 735:

Manufacturers of risky products can capitalize on the individual’s penchant for elastic justification by ensuring that a range of possible accounts of the product’s hazards are available. As Christopher Hsee has shown, when an attribute is expressed as a range of possible values rather than as a fixed value, individuals interpret the range in favor of the outcome they are predisposed to select. Thus, if a consumer were predisposed to purchase an item that provided short-term pleasure with long-term ill-effects, the manufacturer could benefit significantly from generating controversy over the exact nature of the long-term ill-effects. By enlarging the range of possible outcomes to include more innocuous ones than those urged by, say, public health or consumer advocates, manufacturers can provide consumers with a "reason" or "justification" for ignoring the warning messages and continuing to consume the product. In this manner, elastic justification can serve as a powerful tool by which manufacturers minimize the damage caused by negative accounts of product hazards.
The list of biases and heuristics is also lengthy and expanding. People have limited capacities for understanding and processing information. This limitation is known as "bounded rationality." See Larry T. Garvin, Adequate Assurance of Performance: Of Risk, Duress, and Cognition, 69 U. Colo. L. Rev. 71, 141 (1998). This means there are "limitations of computational ability, ability to calculate consequences, ability to organize and utilize memory, and the like." Eisenberg, supra note 10, at 214. People use biases or heuristics (shortcuts) as filters to assist in the evaluation of information that they receive. Biases and heuristics fall into three broad categories: (1) those which rely on experience, (2) those which involve self-perception by others and (3) those which involve the perception of a person’ s position relative to a fixed reference point. As explained by he list of those that deal with decision-making based on experience include:


Research by cognitive psychologists has shown that the folk wisdom on hindsight is correct - past events seem more predictable than they really were. Baruch Fischhoff provided the first systematic demonstration of this phenomenon. In his study, Fischhoff gave undergraduate subjects a description of an unfamiliar, nineteenth century war between the British and the Nepalese Gurkhas. His materials consisted of a 150-word description of the conflict, including the strengths and weaknesses of each army. This description listed four possible outcomes of the conflict (British victory, Gurkha victory, stalemate with no peace settlement, and stalemate with a peace settlement). The remainder of Fischhoff’ s materials split into five different conditions. The materials either stated that one of the four possible outcomes had actually occurred or provided no information about the actual outcome. Subjects read the materials and then answered the following question: "In light of the information appearing in the passage, what was the probability of occurrence of each of the four possible outcomes ... [?]" Subjects who were told that one of the outcomes had occurred made inflated estimates of the ex ante likelihood of that outcome (as compared with subjects who were given no information about the outcome). In fact, the mean probabilities that subjects assigned to the supposed outcome of the conflict summed to 170 percent, whereas they would have summed to approximately 100 percent if knowing the outcome had not influenced the subjects. In this study, and in the replications that Fischhoff ran with other scenarios, providing subjects with an outcome increased their estimates of the likelihood of that outcome by between 6.3 and 44.0 percentage points.

Over-confidence and unrealistic over-optimism. As explained by Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175, 1183 (1997).

Unrealistic optimism and self-serving bias bear on individual risk-bearing, and hence on the role of the regulatory state, especially in the area of dangers to life and health. Even factually informed people tend to think that risks are less likely to materialize for themselves than for others. Thus there is systematic overconfidence in risk judgments, as the vast majority of people believe that they are less likely than others to be subject to automobile accidents, infection from AIDS, heart attacks, asthma, and many other health risks. In one survey, for example, 90 percent of automobile drivers considered themselves to be above-average drivers. In another survey, students asked to envision their future said that they were far less likely than their classmates to be fired from a job, to have a heart attack or get cancer, to be divorced after a few years of marriage, or to have a drinking problem.

Availability. People sometimes make judgments based on the ease with which they can recall previous events or the ease with which they can picture an event occurring in the future. To assist them, they base judgments on available experience and substitute this experience for rigorous probing. Id. at 1188.

Cognitive Dissonance. Cognitive dissonance involves the tendency of people to repudiate or marginalize information that contradicts more favorable information about oneself. As explained by Hanson & Kysar, The Problem, supra note 3, at 658, "people prefer to believe that they are intelligent and are not subjecting themselves to a substantial risk. In the face of a known risk, therefore, individuals come readily to the opinion that they themselves - unlike the average person - are relatively immune, and they hold onto these optimistic assessments tenaciously," As explained by George A. Akerlof & William T. Dickens, The Economic Consequences of Cognitive Dissonance, 72 Am. Econ. Rev. 307, 308-09 (1982),
In practice most cognitive dissonance reactions stem from peoples’ view of themselves as “smart, nice people.” Information that conflicts with this image tends to be ignored, rejected, or accommodated by changes in other beliefs... Cognitive dissonance theory would suggest that persons in dangerous jobs must decide between two conflicting cognitions. According to one cognition, ego is a smart person who would not choose to work in an unsafe place. If the worker continues to work in the dangerous job, he will try to reject the cognition that the job is dangerous.

Representativeness. Representativeness refers to a propensity to see patterns and to evaluate an event according to whether or not it resembles something else in the same class. Sunstein, id. at 1183.

Cooperation, fairness and the appearance of fairness is an example of a bias that involves self perception by others. People want others to perceive that they are cooperating and acting in a fair manner. People sometimes sacrifice their own economic self-interest in order to either be fair or to appear to be fair. As a result, people are sometimes reluctant to confront others because they are afraid they will appear to be uncooperative. The list of biases and heuristics that involve the perception of a person’s position relative to a fixed reference point include:

1. Anchoring and adjustment. People will "anchor" to an arbitrary or nonrational perception and then fail to adjust when new information is made available. If the initial reference point is skewed or inappropriate, because of anchoring people will sometimes fail to correct for their initial mistake. Sunstein id. at 1188.

2. Hind sight bias. See Rachlinsky, id. at 61.

3. Status quo bias. Preferences of a decision-maker sometimes depend on how the decision-maker perceives options relative to the status quo. If given choices between options that deviate from the status quo, people will tend to select the option that is closest to the status quo. Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 Cornell L. Rev. 608, 630-33 (1998).

All effects, biases and heuristics can be knowingly used to manipulate the decision making process. All that is required is a knowledge of the robust nature of these cognitive foibles and the creativity to mold a strategy around them. A sophisticate can select an effect for the purpose of influencing the decision-maker’s preference of one or more biases or heuristics. In other words, a decision-maker can be positioned to increase the likelihood that the final decision can be predicted without the decision-maker being aware of what is going on. There are no limitations on such strategies and they can be employed to induce decisions that have adverse consequences for the unsuspecting decision-maker.

n15. Hanson & Kysar, The Problem, supra note 3, at 637.

n16. Hanson & Kysar, The Problem, supra note 3, at 723.

n17. As stated in Hanson & Kysar, The Problem, supra note 3, at 724-25:

Once it is acknowledged that consumer risk perceptions may be affected by, for instance, the manner in which information is framed, then it becomes inevitable that manufacturers will exploit those framing effects in a way that maximizes manufacturer profits. Other things being equal, it is in the manufacturer’s interest for consumers to have the lowest estimate of product risks possible: The lower the consumer’s risk estimate, the more consumers will be willing to pay for the product, leading to greater sales and increased profits for manufacturers. Generating consumer underestimation of product risks in this manner is simply another means of cost externalization, a practice that manufacturers have every incentive to pursue. Manipulation goes further than just minimizing perceived costs, however. Manufacturers can also attempt to shape consumer views of product benefits. That is, manufacturers may also elevate consumer willingness to pay by manipulating the view that consumers have of a product’s benefits (as opposed to its costs). In either case, consumer failure to perceive product attributes accurately can lead to undesirable levels of consumption.


n22. See supra note 14.

n23. See supra note 14.


n25. See supra note 14.

n26. This can be illustrated within the context of the emergency response industry. Emergency response involves monitoring of burglar and fire alarms as well as personal response devices.

The emergency response industry is, like most other industries, competitive. Participants are in the business to make a profit. It is in the collective best interest of all service providers to reduce the cost of doing business to the lowest most efficient level in order to win broad appeal to as many consumers as possible. One way to keep costs to a minimum is to eliminate liability for negligent acts. To accomplish this goal providers could simply insist on a clause requiring complete exculpation. But this strategy might appear unreasonable and be interpreted in many jurisdictions as against public policy. By contrast, most jurisdictions permit parties to include reasonable liquidated damage provisions. Challenges that a particular liquidated damage clause is unreasonable are far easier to defend against because they are disposed of on a case-by-case basis, whereas challenges involving public policy have ubiquitous implications.

At the outset the provider has the upper hand because the provider is in a position to direct the customer’s attention to matters that the provider believes will occasion the customer to purchase equipment and/or subscribe for services. The provider is framing choices for the customer against a backdrop created by the customers known concerns and preferences. Promotional materials appear to be designed with the effect of control in mind. The customer is known to be seeking assistance because of a desire to gain control over circumstances beyond the customer’s control. The promotional materials suggest that the customer has two choices: control, as is professionally offered by the service provider, or no control. Similarly, a choice is offered between safety, security and prompt action as opposed to the possibility of catastrophic loss of life and/or property.

But unbeknownst to the customer the provider is also framing the customer’s choice about the risk associated with the provider’s nonperformance. The customer is encouraged to accept the provider as a valuable, professional, and trustworthy resource. Non-performance is not even mentioned. Against this backdrop the customer is asked to accept that it is reasonable for the customer to assume all risk (less $ 250) for the provider’s nonperformance. This strategy suggests that the provider has determined that raising the issue could scare off the customer. In fact there is no other reasonable explanation for non-disclosure. The strategy is remarkably similar to the one utilized by the securities brokers who distracts their customers from the contents of disclosure documents. Both the securities broker and the service provider appear concerned that if the issue of risk is identified, the customer will become uneasy, demur, and refuse to assume the risk... .

Disclosure after the decision to subscribe will most likely be accepted without question because of the tendency to rely on the cooperation bias. Throughout the relationship that exists prior to disclosure, the provider assures the consumer of the provider’s concern for the wellbeing of the consumer and exhibits an apparently sincere willingness to cooperate. This strategy suggests an intention to discourage the decision maker from confrontation for fear of appearing to be uncooperative. This scenario may explain why disclosure occurs at the last moment during the face-to-face meeting
with the customer. It may also explain why some providers refuse to provide copies of any agreement prior to the face to face meeting."

Marrow, supra note 2, at 172-173.

n27. Langevoort, supra note 3.

n28. Id. at 654.

n29. Id. at 659-61 (footnotes omitted).

n30. Id. at 723.

n31. Hanson & Kysar, Some Evidence, supra note 3, at 1444-45 (footnotes omitted) (emphasis omitted).

n32. Hanson & Kysar, The Problem, supra note 3, at 728 (footnotes omitted).

n33. Hanson & Kysar, Some Evidence, supra note 3, at 1481 (footnotes omitted).

n34. Marrow, supra note 2, at 90-94.

n35. Id. at 98-99 (footnotes omitted).


n38.

Equity traditionally recognized a formless defense that might bar equitable relief to the plaintiff guilty of unconscionable conduct. The defense resulted from the fact that equity judges exercised discretion to refuse relief on a variety of grounds even when the plaintiff’s claim warranted a remedy under established rules... The equity court would grant, or refuse, specific performance or an injunction. But it would not, ordinarily, strike some offending clause, or rewrite the clause to make it meet minimum standards of unconscionability, even if the plaintiff wanted the court to do so.

On the other hand, if equity unconscionability was used to deprive the plaintiff of an equitable remedy, it still left her whatever remedy she had at law. Equity unconscionability was thus a remedial doctrine; it limited remedies without abolishing or changing substantive rights.

... Code unconscionability authorizes judges to strike or limit an unconscionable clause or to refuse enforcement of the contract altogether. So where equity unconscionability operated remedially to limit remedies, Code unconscionability may operate substantively to bar the entire claim or even to write a contract never agreed upon by anyone."


n40. At least one commentator believes unconscionable conduct is tortious, but feels that the tort does not stand on its own and that damages are not in order. See Bobbs, supra note 38, at 703 ("Unconscionable conduct may also constitute a tort, but it is not a tort in itself and not grounds for the recovery of damages."). In contrast, this article attempts to illustrate that unconscionable conduct can be tortious enough to warrant a court-recognized tort giving rise to damages.


n42. Marrow, supra note 2, at 93-94.


The Florida version prohibits unconscionable acts. Section 501.204 provides:

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2001.
Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Civil remedies are limited and do not include private causes of action. Cal. Bus. & Prof. Code 17206 (West 1997). However, the courts have found that unconscionability is included within the definition of unfair trade practices and therefore subject to an injunction and a civil fine. People v. McKale, 602 P.2d 731 (Cal. 1979); People ex rel. Lockyer v. Freemont Life Ins. Co., 128 Cal. Rptr. 2d 463 (Cal. Ct. App. 2002).

The statute in Maine is quite limited. Under the Maine statute, "[a] person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he ... engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." Me. Rev. Stat. Ann. tit. 10, 1212 (West 2003).

n46. See, e.g., Cheshire, 612 A.2d 1130; Edart Truck Rental Corp. v. B. Swirsky & Co., 579 A.2d 133 (Conn. App. Ct. 1990); see also McKale, 1602 P.2d 731 (Cal. 1979); Lockyer, 128 Cal. Rptr. 2d 463.

n47. See, e.g., Nat’l Manufactured Hous. Fed’n, Inc., 370 So. 2d 1132.

n48. Arguments that existing statutes of this type should be interpreted to include a private cause of action for damages face an uphill battle. When interpreting these statutes, courts first consider legislative intent. Absent a clear expression by the legislature to the contrary, courts tend to be very reluctant to interpret legislative intent in favor of a private cause of action for damages.

n49. As explained in W. Page Keeton et. al, Prosser and Keeton on Torts 92 at 660-61 (5th ed. 1984):

The American courts have extended the tort liability for misfeasance to virtually every type of contract where defective performance may injure the promisee... The principle which seems to have emerged from the decisions in the United States is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract - which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.

Further, as noted in Rawlings v. Apodaca, 725 P.2d 525, 574-75 (Ariz. 1986):

Analysis of the cases does lead to the conclusion that a tort action for breach of the implied covenant is more often recognized where the contract creates a relationship in which the law implies special duties not imposed on other contractual relationships. These relationships are "characterized by elements of public interest, adhesion, and fiduciary responsibility." ... These types of contracts create special, partly noncommercial relationships, and when the provider of the services fails to provide the very item which was the implicit objective of the making of the contract, then contract damages are seldom adequate, and the cases have generally permitted the plaintiff to maintain an action in tort as well as in contract.

n50. "Duties of affirmative action, especially to avoid physical harm to persons and tangible things, are often imposed by law on the basis of certain factors and, especially the relationship between two parties. A contract or bargaining transaction brings into existence a relationship of one kind or another at or after the contract or bargaining transaction is made... Therefore, the breach of these affirmative duties imposed by law may coincide with an implied promise giving rise to a contract action for breach of the promissory obligation." W. Page Keeton et. al, supra note 49.

n51. See, e.g., Santulli v. Englert, Reilly & McHugh, P.C., 586 N.E.2d 1014 (N.Y. 1992); Schweizer v. Mulvehill, 93 F. Supp. 2d 376, 397-399 (S.D. N.Y. 2000), aff’d 2002 U.S. App. LEXIS 13329 (2d Cir. May 30, 2002). For there to be liability in contract, there need not always be a written agreement. Even without a written contract, the engagement of a professional establishes both a contractual relationship and a duty that is grounded in tort. The court in DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435, 436-7 (Utah 1983), noted that “[a] party who breaches his duty of due care toward another may be found liable to the other in tort, even where the relationship giving rise to such a duty originates in a
contract between the parties.” Carl S. Hawkins, Dean and Professor of Law, J. Reuben Clark Law School, Brigham Young University, recently had this to say on the subject:

The "duty" concept limits defendants’ liability to claims arising out of particular relationships and risks. In professional negligence cases, a contract with the client most often creates the relationship from which the duty of care arises. However, the defendant’s tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff’s interests. Thus, when a defendant has undertaken to give professional services gratuitously, liability may be imposed for injuries resulting from substandard conduct, even though there is no contract. [Citations omitted.]

n52. W. Page Keeton et. al, supra note 49.

n53. The concern about the public’s interest in the contract makes the delivery of professional services "special." In most instances, in exchange for a license to practice a professional activity, the provider is required to adhere to standards imposed by a governmental entity, standards that increase the duty of care. "Professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients... " Kimmell v. Schaeffer, 675 N.E.2d 450, 454 (N.Y. 1996). See Chase Scientific Research, Inc. v. NIA Group, Inc., 740 N.E.2d 1039 (Mass. App. Ct. 2001) (analyzing the meaning of "professional"); see also Sadler v. Loomis Co., 776 A.2d 25 (M.D. Ct. Spec. App. 2001) (evaluating an insurance agent or broker’s duty to advise the insured about adequacy of coverage); Schwartz v. Travelers Indem. Co. 740 N.E.2d 1039 (Mass. App. Ct. 2001) (determining that an insurance agent can be liable to an insured under special circumstances of assertion, representation, and reliance). For a general discussion of trust and the role it plays in contract formation, see G. Richard Shell, Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action, 44 Vand. L. Rev. 221 (1991)


n55. Misfeasance or nonfeasance has the same consequences for the consumer whether or not the service provider is regulated by the state. Therefore the distinction concerning professional status is, from the consumers’ perspective, of no consequence. From the perspective of the non-regulated service provider, the distinction results in a wind fall; it serves no compelling public interest and rewards the service provider by permitting her to insulate herself from liability for her own misfeasance or nonfeasance.

n56. In Batas v. Prudential Insurance Co. of America, a case involving an insurance contract, the court found that merely posting a claim of superiority on a web page was insufficient to create a special relationship. 724 N.Y.S.2d 3, 7 (N.Y. App. Div. 2001). The court went on to say that the plaintiff must plead facts establishing a "direct or affirmative effort ... to gain...trust and confidence, for example the sales efforts by a salesman or the actions of a representative." Id.

n57. Anything that creates an incentive to deliver unacceptable services is inappropriate and is in many cases deemed unethical by the professions themselves. Written agreements exculpating those who have a special relationship from the consequences of misfeasance or nonfeasance are typically held void as against public policy. Liquidated damages clauses that fix damages at an amount that is inconsequential when compared to probable loss can be seen as a form of exculpation designed to create a disincentive for providing services that are of an acceptable standard. Tessler and Son, Inc. v. Control Sec. Sys. of N. N.J., 497 A.2d 530, 532 (N.J. Super. 1985).
n58. Many states will enforce exculpation clauses
in the absence of fraud; willful and wanton conduct; legislation to the contrary; where the exculpatory clause is not contrary to the settled public policy of the State; where there is no substantial disparity in the bargaining position of the parties; and where there is nothing in the social relationship of the parties which militates against upholding the agreement.

Masciola v. Chicago Metro. Ski Council, 628 N.E. 2d 1067, 1071 (Ill. App. Ct. 1993); see also Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) ("We do not mean to say or infer that parties may not make contracts exculpating one of his negligence and providing indemnification, but it must be done knowingly and willingly as in insurance contracts made for that very purpose.") (emphasis added); cf. Shaer Shoe Corp. v. Granite State Alarm, Inc., 262 A.2d 288, 286 (N.H. 1970) (holding a clause valid that limited the amount of recovery to the amount the plaintiff paid for the services). In Florence v. Merchants Central Alarm Co., 412 N.E.2d 1317, 1318 (N.Y. 1980) (citations omitted), the court held that the "defendant was ... free to limit its liability without offering a greater liability for a greater charge, subject only to the requirement that the limitation be not obscured (as for example, a baggage check not in usual contract form ...) as to make it probable that it would escape plaintiffs’ attention." See Marrow, supra note 2, at 358, 101; Elizabeth Warren, Formal and Operative Rules Under Common Law and Code, 30 UCLA L. Rev. 898, 912-13 n.78 (1983) (stating that once the exculpation clause is set aside, the injured party is entitled to recover actual damages resulting from an omission or misfeasance).

n59. See Kenneth Vandevelde, A History of Prima Facie Tort: The General Theory of Intentional Tort, 19 Hofstra L. Rev. 447, 450 n.16 ("These torts are designated as 'classic' intentional torts because they are of ancient origin and, in modern times, are routinely categorized in texts and casebooks as intentional torts.")

n60. See supra nn.15-16 (discussing the evolution of intentional torts).

n61. Prima facie tort was first articulated in Walker v. Cronin, 107 Mass. 555, 562 (1871). Prima facie tort was developed to address situations in which an otherwise lawful act was initiated for the purpose of intentionally causing harm to another without justification. Id. The doctrine has been accepted throughout the United States. While there are some technical differences among jurisdictions, the elements of prima facie tort are generally as follows:

1. The tort requires malice as a motivation.

2. The framework for the tort includes the requirement that the wrongful infliction of harm be both intentional and not otherwise justifiable.

3. It applies to situations where the action that inflicts the economic harm is otherwise lawful.

Id.

Two approaches have developed concerning additional elements of this tort. The Restatement (Second) of Torts suggests a broad definition of the prima facie tort: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor’s conduct does not come within a traditional category of tort liability; Restatement (Second) of Torts 870 (1979). An alternate approach has been fashioned by the courts in New York. There, not only must the elements set forth in the second Restatement be shown to exist, the plaintiff must also establish three additional elements: disinterested malevolence as the defendant’s sole motivation, conduct not actionable under another theory of tort, and special damages. See Beardsley v. Kilmer, 140 N.E. 203, 206 (N.Y. 1923); Al Rascid v. News Syndicate Co., 191 N.E. 713, 714 (N.Y. 1934); Opera on Tour v. Weber, 34 N.E.2d 349 (N.Y. 1941); Am. Guild of Musical Artists v. Petrillo, 36 N.E.2d 123, 125 (N.Y. 1941); Curiano v. Souzzi, 469 N.E.2d 1324 (N.Y. 1984); Engel v. CBS, Inc., 711 N.E.2d 626 (N.Y. 1999).
n62. The tort of intentional infliction of emotional harm has evolved to address the problem of "social deceiving" and to recognize that emotional distress is as harmful as physical assault. Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42 (1982); William Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939). The Restatement (Second) of Torts 46 (1982) describes the torts as follows:

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress[.]

Note (d) explains: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

The situation specific requirements are:

1. The conduct must be extreme and outrageous.

2. There must be an intention to cause, or disregard of a substantial possibility of causing severe emotional distress.

3. There must be a causal connection between the conduct and the injury.

4. There must be severe emotional distress.

See Restatement (Second) of Torts 46 (1982).


Third parties who intentionally and improperly interferes with the performance of a contract (except a contract to marry) by inducing or otherwise causing one of the parties to the contract not to perform the contract, is subject to liability to the other parties to the contract for the resulting pecuniary loss. The elements of the tort are:

1. Existence of a contract

2. Wrongdoers knowledge of the contract

3. Wrongdoers intentional procurement of the contract breach

4. Lack of justification

5. Resulting damages

Restatement (Second) of Torts 766 (1979).

A major problem occurs when a performing party behaves contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer - a phenomenon that has come to be known as opportunist behavior. Because of the wealth transfer, parties have an incentive to avoid becoming victims of opportunism, yet whatever strategy of self-protection they choose, deterrence will be costly. Thus, for a given amount of opportunism avoided, an individual will choose the least costly method or combination of protective methods.


Willful breaches may be further subdivided into two categories: opportunistic and efficient. A breach is opportunistic if the breaching party attempts to get more than he bargained for at the expense of the non-breaching party. “The opportunistic actor creates more value for himself, but only by taking an equivalent amount or more from others.’ For example, a party who withholds payment in bad faith after the other party has performed in the hope of obtaining a reduction in the contract price is breaching opportunistically. By contrast, a breach is efficient if it makes the breaching party so much better off that she could compensate the non-breaching party for his losses and still come out ahead. For example, if a widget manufacturer, by breaching her contract with A and selling to B, can make enough to compensate A for his losses and still be better off, it would be efficient for her to breach the contract with A. If the breaching party is required to compensate the non-breaching party, the breach is Pareto efficient; if the breaching party is not required to do so, the breach is simply Kaldor-Hicks efficient. Discussions of efficient breach generally employ the Pareto understanding of efficiency because they assume the availability of expectation damages, which are designed to ensure that the non-breaching party is compensated for his losses, and I, too, will use Pareto efficiency in making my argument. Thus, the distinction between opportunistic and efficient breaches, as I have defined them, boils down to this: An opportunistic breach does not increase the size of the economic pie; the breaching party gains simply by capturing a larger share of the pie at the expense of the non-breaching party. An efficient breach, on the other hand, increases the size of the pie, allowing the breaching party more without decreasing the amount that the non-breaching party receives.


Exploitation is similar to unconscionable manipulation in that both describe an effort to use the psychological state of an actor. Exploitation is defined as a offer that:

1. Consists of an offer of benefit, never a threat;

2. which is made intentionally, knowingly or recklessly on the part of the offeror, such that it is likely to involve, implicate or take advantage of;
3. a psychologically recognized vulnerability or weakness on the part of the offeree;

4. where the vulnerability or weakness characteristically results in a significant impairment of the rational-emotional capacity of the individual;

5. that the offer actually has the effect of impairing the rational-emotional capacity of the offeree;

6. such that, but for the impairment of this capacity, the offeree would not have accepted the offer.


Hill discusses these elements within the context of surrogate parenting agreements, agreements for the voluntary sale of human organs and consensual medical experimentation agreements with prisoners. Id.


n68. Unconscionable manipulation is closest to the emerging tort of exploitation.

In at least these three ways - by modifying beliefs, by distorting values, and by interfering with the cognitive organization of reasoning - strong emotional and affective states may impede sound reasoning. This Article proposes that exploitation is the knowing manipulation of these processes. Intrapsychic coercion, compulsion and some forms of social conditioning are emotionally and cognitively destabilizing influences that may impair the ability of the actor to reason effectively. There may be other types of impediments to the rational process characteristic of exploitation, but these are the three most frequently implicated in the literature. These influences do not, however, fall under the traditional exculpatory paradigm. Exploitative offers neither render the resulting behavior involuntary or unfree, as these terms are used in the traditional paradigm, nor do they impose barriers to the actor’s knowledge of her situation, strictly speaking. Yet the obviously debilitating effects of these processes should excuse certain behavior, at least when another takes advantage of these all-too-human frailties in the deliberative process.

Hill, supra note 65, at 678-679.

Some readers may wonder if unconscionable manipulation is not a restatement of common law fraud. Common law fraud requires, among other things, the knowing concealment of a material fact. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996); Restatement (Second) of Torts 538 (1977); W. Page Keeton, et al., Prosser and Keeton on Torts 108 (5th Ed. 1984). Under my definition of consequential procedural unconscionability, there is no requirement for the knowing concealment of anything. Indeed, it is assumed that the assumption of risk has been disclosed but that the defendant, using the principles of BDT, has attempted to distract the plaintiff attention away from the disclosure.

n69.

The concept of an intentional tort was formulated by Holmes as an element of a scheme designed to accomplish a larger purpose than merely categorize case law. Holmes sought to establish a theoretical symmetry within the law, while simultaneously demonstrating that the principle underlying the symmetry was that liability was based on public policy, not personal blameworthiness.

Vandevelde, supra note 60, at 495-496.
Whatever its deficiencies as a descriptor of existing law or the reasons for its initial formulation by Holmes, the concept of an intentional tort, once proposed, had an immediate intuitive appeal to his contemporaries. Over a period of years, legal scholars came to agree that there was a distinct category of intentional torts, even if they could not initially agree on which torts fall within the category. Eventually, however, a consensus was reached that a number of formerly strict liability torts were in fact the intentional torts.

Once accepted by the academic community, the concept of intentional tort acquired an intellectual force of its own. Pollock became the first to see the implication of Holmes’ scheme: if intentional and negligent tort were in symmetry and if there were a general theory of negligent tort, then there must also be a general theory of intentional tort. Shortly after Pollock published his insight, Holmes embraced and began the theoretical elaboration of a general theory of intentional tort.

The formulation of a general theory of intentional tort coincided with the emergence of a new class of intentional economic injuries occasioned by late nineteenth century industrialism. These new forms of injury presented Holmes and other judges with the opportunity to write the general theory of intentional tort into law. In much the same way that negligence had governed recovery for new forms of physical injury, the general theory of intentional tort provided a basis for imposing liability for these new forms of economic injury.” Id; see also Savage v. Boies, 272 P.2d 349 (Ariz. 1954); Wilson v. Wilkins, 25 S.W.2d 428 (Ark. 1930); Remen v. Vitz, 198 P.2d 696 (Cal. Ct. App. 1948); Metro. Life Ins. Co. v. McCarson, 429 So 2d 1287, 1291 (Fla. Dist. Ct. App.1983); Knierim v. Izzo, 174 N.E.2d 157 (Ill. 1961); Curnett v. Wolf, 57 N.W.2d 915 (Iowa 1953).

n70. Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer. Although we recognize exceptions from these fundamental principles, no departure should be sanctioned unless there is a strong necessity therefor.


n71. See Barrows v. McMurtry Mfg. Co., 131 P. 430 (Colo. 1913); Boggs v. Duncan-Schell Furniture Co., 143 N.W. 482 (Iowa 1913).

n72. "Procedural or process unconscionability is concerned with "unfair surprise," fine print clauses, mistakes or ignorance of important facts, or other things that mean bargaining did not proceed as it should." Dobbs, supra note 38, at 706.

n73. From the perspective of any service provider, is there any way to blunt an attack based on consequential procedural unconscionability? The strategy that is most likely to succeed is an addendum to the liquidated damage clause offering an option of insurance to overcome any risk created by the clause. This approach is consistent with preventing the possibility of surprise and trickery that I have categorized as deceit having the effect of fraud. In many industries this may prove problematic, however, if there is a fear that such an offer will serve to scare the consumer from completing the contract.


n75. Relevant to this concept the Illinois Court of Appeals stated:

To be a part of the bargain, a provision limiting the defendant’s liability must, unless incorporated into the contract through prior course of dealings or trade usage, have been bargained for, brought to the purchaser’s attention or be conspicuous. If not, the seller has no reasonable expectation that the remedy was being so restricted and the restriction cannot be said to be part of the agreement of the parties. Nor does the mere fact that both parties are businessmen justify the utilization of unfair surprise to the detriment of one of the parties since the Code (UCC) specifically provides for recovery of consequential damages and an individual should be able to rely on their existence in the absence of being informed to the contrary either directly or constructively through prior course dealings or trade usage.

n76. Some courts have even gone so far as to order refunds. See Waters v. Min Ltd., 587 N.E.2d 231 (Mass. 1992).

n77. The assertion of unconscionability in this context is not a claim for expectation damages which is the nature of a claim for reliance as found in promissory estoppel. For a discussion of promissory estoppel see W. David Slawson, The Role of Reliance in Contract Damages, 76 Cornell L. Rev. 197 (1990), and see also Merex A.G. Corp. v. Fairchild Weston Sys., Inc., 29 F. 3d 821, 825-26 (2d Cir. 1994); Ward v. New York Univ., No. 99 Civ. 8733 (RCC), 2000 U.S. Dist. LEXIS 14067 (S.D.N.Y. Sept. 25, 2000).

n78. “Contract obligations are created to enforce promises which are manifestations not only of a present intention to do or not to do something, but also a commitment to the future. They are, therefore, obligations based on the manifested intention of the parties to a bargaining transaction.” Prosser and Keeton, Torts, 92 at 656 (5th ed 1984). Prosser explains, “(c)ontract obligations are imposed because of the conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.” William Prosser, Handbook of the Law of Torts, 92 at 613 (4th ed 1971).

n79. “In other words, economic losses are “disappointed economic expectations,” which are protected by contract law, rather than tort law.” Casa Clara Condo. Ass’ n, Inc. v. Charlestown & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993) (citing Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988); see also Stuart v. Coldwell Banker Commercial Group, Inc., 745 P.2d 1284 (Wash. 1987). These cases help show the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort “there must be a showing of harm above and beyond disappointed expectations. A buyer’s desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.” Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982) (citing William Prosser, Handbook of the Law of Torts, 92 at 613 (4th ed. 1971)).

An important principle of contract damages is to protect the aggrieved party’s expectation interest by putting that party in the same position as though the contract had been performed. Therefore, one must give due weight to the economic injuries of the buyer as the victim of breach, because only full compensation will put the buyer in the same position as if the seller had performed. A properly fashioned rule for consequential damages, however, will not necessarily provide full compensation for all economic loss, even if failure to recover that loss will leave the buyer in a worse position than if the contract had been performed. Other policy considerations might supply a reason for limiting such recovery.


n80. Prosser and Keeton, supra note 79 at 655

n81. Diamond & Foss, supra note 79 at 674-675.


n83. Diamond, supra note 81 at 674-677.

n84. See discussion infra Part II. B.

n85. If all claims are considered to be related to the contract, however, then rules governing "special damages" would have to be considered. In order for "special damages," i.e., damages that are of a consequential nature, to be recoverable, they have to be calculable with reasonable certainty. Would the plaintiff also be entitled to claim mental suffering as a "special damage"? Damage for mental suffering is not pecuniary in nature; therefore, it is difficult to measure with certainty. Restatement (Second) of Contracts 352 (1981). As a result, a recovery for mental suffering is generally not permitted when the claim arises from a breach of contract. There appear to be two exceptions:
1. Cases where there is bodily injury; and

2. Cases where the mental suffering is caused by intentional or wanton or reckless behavior.

Corbin on Contracts 1076 (1963). The First Restatement of Contracts links the two cases together and makes them totally dependent:

In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

Restatement (First) of Contracts 341 (1932). These exceptions reflect a concern for a public policy interest in deterrence and are consistent with my theory of liability for process unconscionability.

To appreciate a claim arising from a term held to be unconscionable, one should consider the fact pattern set forth in Part II A.2. For example, presume that the contract is for personal security; a service provider makes a promise to call for help; and the consumer is ignored or ill. If the service provider fails to summon assistance, then bodily harm could result. If the service provider fails to summon assistance, then bodily harm could result. Thus, the nature of the agreement should provide a basis for damages because it is within the contemplation of the parties when entering into the contract.


n91. Model Punitive Damages Act 5 cmt. (1996) provides:

A defendant may also be subject to a punitive award under paragraph (2) for consciously and flagrantly disregarding the rights of others. Although this test does not use an explicit term, such as "malicious," to describe the malevolent element required, the fact that the actor "just does not give a damn" about the consequences to others embodies the same type of dereliction that is found in the terms commonly used to describe the necessary scienter to support an award of punitive damages. Thus, the trier of fact may find that a punitive award is justified for a drunken driver because the individual consciously and flagrantly disregarded the rights of others, even though there was no specific malice involved.


n95. Id. at 53-54 (quoting Conklin v. Schillinger, 257 A.2d 187, 198 (Md. 1969)).


n97. Id. at 11-12 (emphasis added) (citations omitted).


n99. Id. at 650. The Zenobia court explained:

Because the Testerman-Wedeman distinction focuses on when the conduct occurred rather than on the nature of the conduct, it has no relationship to the purposes of punitive damages. Furthermore, the "arising out of contractual relations" rule formulated in Testerman and Wedeman had no support in the Maryland cases relied on in the Testerman and Wedeman opinions ... . The Testerman-Wedeman rule has led to irrational results and its application has been inconsistent. The irrational and inconsistent application of a punitive damages standard undermines the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award. Consequently we abandon the "arising out of a contract" distinction "and return to the principles relating to punitive damages which had prevailed in this State for many, many years before Testerman."

Id. (citations omitted). See also Scott v. Jenkins, 690 A.2d 1000, 1005 (Md. 1997) (stating that the unpredictable nature of the implied malice standard resulted in inconsistency that undermined the deterrent effect of punitive damages).

n100. Zenobia, 601 A.2d at 650-52. The Zenobia court further explained:

Arbitrary and inconsistent application of the standard for awarding punitive damages frustrates the dual purposes of punishment and deterrence. Implied malice as that term has been used, with its various and imprecise formulations, fosters this uncertainty. As pointed out by Professor Ellis, "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms... . Accordingly, there is little reason to believe that only deserving defendants are punished, or that fair notice of punishable conduct is provided."

Zenobia, 601 A.2d at 652 (quoting Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 52-53 (1982)).


n102. The Maryland rule, as stated in the Wedeman case, has been followed in some jurisdictions. The Supreme Judicial Court of Maine has stated:

Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied... . We emphasize that, for the purposes of assessing punitive damages, such "implied" or "legal" malice will not be established by the defendant’s mere reckless disregard of the circumstances.

Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985). See also Linthicum v. Nationwide Life Ins., 723 P.2d 675, 680 (Ariz. 1986) (holding that the determining factor as to whether punitive damages are warranted "is the wrongdoer’s intent to injure the plaintiff or his deliberate interference with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them"); accord Gurule v. Ill. Mut. Life & Cas. Co., 734 P.2d 85
(Ariz. 1987) (noting that punitive damages may be imposed if the jury could infer that the defendant acted with an evil state of mind); Brueckner v. Norwich Univ., 730 A.2d 1086, 1095-97 (Vt. 1999) (holding that the Vermont test for the malice necessary to establish liability is a showing of conduct manifesting personal ill will or circumstances evidencing personal ill will, insult, oppression or a showing of a reckless disregard for others and that indifference is usually a negligence standard and therefore not an attribute from which malice can be inferred).

n103. See Saxe v. Brady, 184 A.2d 602, 610 (Del Ch. 1962), Paul Marrow, Does the Doctrine of Contractual Unconscionability Have a Role in Executive Compensation Cases?, 75 N.Y. St. B.J. 16 (Sept. 2003).