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Backgrounder

BCLI Report no. 35—Unfair Contract Terms: An Interim Report

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A general principle of the law of contracts is that valid agreements should be enforced if they are freely made. This principle reflects the idea that one's word should be one's bond. The goal is to allow contracting parties to have considerable freedom in choosing how they structure their agreements. It is equally important, however, to recognize that there are limits to this principle.

This interim report focuses on a limit to the general principle of enforceability: unfair contract terms. In general, unfair terms are ones that are particularly harsh, grossly one sided, or unconscionable. Determining specifically what constitutes an unfair term however, in a general or abstract sense, is a difficult task. The mere fact that a contract term could produce a disadvantageous result for one of the parties is not an appropriate standard to use in order to determine whether a particular contract term is unfair.

Since context is most often the key to determining whether a contract term is unfair, this interim report surveys recent cases dealing with unfair contract terms in order to identify the types of contract terms that may be considered unfair. It then looks at the tools that the law currently provides to the courts to regulate unfair contract terms such as the judicial doctrines of unconscionability, inequality of bargaining power, adverse construction, fundamental breach of contract, and statutes such as the *Business Practices and Consumer Protection Act*.

While the existing rules may relieve some of the harsh consequences that result from certain unfair contract terms in certain circumstances, the report recognizes various limits of the legal framework and explores several options for reform of the law. New legislation restricting the use of unfair contract terms is considered, along with enacting legislation allowing courts a general discretion to remedy unfair contract terms, or legislation creating a standard of conduct in contracts.