CONNECTICUT JURISPRUDENCE ON E-COMMERCE CONTRACTS OF ADHESION: PAGE NOT FOUND?

By James T. Shearin and Adam S. Mocciolo*

While the rise of "e-commerce" in American (and global) society has been swift and pervasive, with online transactions coming to dominate the shopping, banking, and communication habits of consumers just about everywhere, case law has not always taken notice of this new way of doing business as consistently or quickly as the participants themselves have done. This is particularly true in the state of Connecticut. Roughly a decade and a half into the era of mass consumer participation in online life, the paucity of Connecticut case law on contractual issues specific to Internet transactions is striking. In particular, no Connecticut court has yet grappled with a claim that a standard form contract allegedly reached through the mechanical workings of a website, or a through a customer's conduct in an online store or social network, is unenforceable because the agreement is a "contract of adhesion."

In other jurisdictions, the e-commerce explosion has produced a variety of cases addressing websites' boilerplate contract terms or the increasingly unceremonious methods used to obtain consumers' assent to them. For example, federal courts in New York have found enforceable forum selection clauses reached by "clickwrap" contracts, to which consumers indicate their assent to standard terms by clicking on a button or icon displayed on a webpage along with the terms themselves,[1] as well as "browsewrap" contracts to which customers are said to assent merely by entering a certain part of a counterparty's website, without being shown the express terms of the agreements.[2] The United States

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1 TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370, 377 (S.D.N.Y. 2010) ("District courts in [the Second] Circuit have found that clickwrap agreements that require a user to accept the agreement before proceeding are 'reasonably communicated' to the user for purposes of [enforceability] analysis.").

2 Fteja v. Facebook, Inc., 841 F.Supp.2d 829 (S.D.N.Y. 2012) (Forum selection clause held enforceable where user was not shown text of terms and conditions before clicking to agree, but was prompted to visit a page where they were avail-

District Court for the District of New Jersey has held that even assuming that consumers "never received, acknowledged, or executed" a customer service agreement for satellite radio service that was made available for their review online when buying the car in which their radio was installed, the agreement was enforceable, because they "allege[d] no strong arm or deceptive tactics."[3]

Some observers, perhaps influenced by a vaguely articulated conventional wisdom that contracts offered on a take-it-or-leave-it basis are of suspect enforceability, may be surprised by the frequency with which courts have rejected that notion and upheld the challenged agreements. In fact, the almost visceral objections prompted by the colorful "contract-of-adhesion" term have rarely been borne out by cases that have truly examined the issue. Those cases have promoted a measured approach to enforcement questions, upholding the "reasonable expectations" of the weaker party as the measure of enforceability of particular terms that may overreach, without treating a lack of negotiation or a differential in negotiating power as an objection to the contract in itself. Newer decisions specific to e-commerce contracts have perhaps begun to reinforce this doctrine simply by returning to it more often than courts have had occasion to do in the past, but they have not departed from the earlier rule.

In Connecticut, however, there has been a long-standing dearth of case law dealing squarely and expressively with challenges to the enforceability of contracts of adhesion, even in "old economy" contexts. Therefore the question how courts in this state will apply the contract of adhesion doctrine in disputes in the online milieu has been doubly difficult to answer. Undoubtedly, courts will look to *FCT Electronics, LP v. Bank of America, N.A.,*[4] the most recent and one of the most thorough examinations of the adhesion

able). *But see* Hines v. Overstock.com, Inc., 668 F.Supp.2d 362 (E.D.N.Y. 2009) (forum selection clause not enforceable where "the notice that 'Entering this Site will constitute your acceptance of these Terms and Conditions' … was only available within the Terms and Conditions").

[3] Von Nessi v. XM Satellite Radio Holdings, Inc., CIV-07-2820 (PGS), 2008 WL 4447115 (D.N.J. Sept. 26, 2008).

[4] CV10-6002699, 2011 WL 4908850 (Conn. Super. Ct. Sept. 22, 2011).

doctrine, for part of the answer. *FCT Electronics* is the first Connecticut case to clearly hold that the enforceability of contracts of adhesion is governed by the reasonable expectations standard long established in other jurisdictions. *FCT Electronics* did not, however, provide much analysis of what "reasonable expectations" means. Its discussion concentrated largely on public policy and unconscionability considerations in enforceability—criteria that are not unique to contracts of adhesion.[5] Further, it did not comment on whether enforcement of "virtual" contracts will be guided by the same principles as "brick-and-mortar" agreements. On several important issues, then, Connecticut law remains relatively uncertain.

To understand these gaps in Connecticut law on adhesion contracts, it is useful to first review how the adhesion doctrine came about in general, and what it traditionally has held. With that foundation, one can then review how the law has developed in Connecticut and possibly predict how Connecticut courts will deal with on-line adhesion contracts.

"Although the term 'has acquired many significations,' the essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate."[6] The term is generally believed to have been introduced into American legal discourse by Edwin W. Patterson, in a 1919 *Harvard Law Review* article entitled "The Delivery of a Life Insurance Policy"[7] regarding the enforceability of standard form provisions in life insurance contracts that required physical delivery of a signed policy to the insured before coverage became available. Patterson surveyed a variety of approaches courts had

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[5] *See, e.g.,* Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148, 151, 840 P.2d 1013, 1016 (1992).

[6] Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353, 605 A.2d 681, 685 (1992) (internal citation omitted); *see also,* Kindred v. Second Judicial Dist. Court ex rel. County of Washoe, 116 Nev. 405, 411, 996 P.2d 903, 907 (2000) ("An adhesion contract is a 'standardized contract form offered to consumers of goods and services essentially on a "take it or leave it" basis, without affording the consumer a realistic opportunity to bargain.'").

[7] 33 HARV. L. REV. 198 (1919).

taken to the enforceability of such provisions in situations in which would-be insureds died before their policy applications could be processed and the written policies delivered. Although he made no prescription for whether or on what basis to enforce the standard terms providing that coverage begins on delivery, he suggested importing the term "contract of adhesion" from then-contemporary French legal philosophy to describe the situation in which "[t]he contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms."[8]

The usage started to find wide currency in case law in the 1960s, exemplified by its adoption by the Supreme Court of California in *Steven v. Fidelity & Casualty Co. of New York*,[9] a case concerning the enforceability of an exclusion from a trip insurance policy purchased by an air traveler out of a vending machine. There, after purchasing the policy, the insured made substitute arrangements with a charter service for a portion of his trip because his scheduled commercial flight was canceled. When the charter plane crashed and he was killed, the insurance carrier sought to withhold payment to the beneficiary, relying on a provision in the policy that limited coverage for substitute travel only to land transportation arranged by the original air carrier. The limiting language was not visible or knowable to the purchaser until after the purchase was made and the document obtained from the machine. The *Steven* court, reasoning that such a limitation was "unexpected," held that therefore "the exclusionary clause of the contract should not be enforced in the absence of plain and clear notification to the public."[10] Reviewing case law from other jurisdictions, the court noted that "some legal authorities [had begun to] categorize the instant contract and comparable agreements under the term 'contract of adhesion' to give it a more definite place in the law and to emphasize the need for the strict judicial scrutiny of its terms."[11]

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8 *Id*. at 222.
9 58 Cal. 2d 862, 882, 377 P.2d 284 (1962).
10 *Id*. at 883.
11 *Id*. at 882.

Later cases made more explicit the requirements that to be enforceable, particular terms of an adhesion contract must be within the reasonable expectations of the adhering party,[12] and clarified that the expectations to be assessed are generally those of a reasonable, objective, "average" person.[13] Some cases also added that "[a]n additional principle of the law of adhesion contracts is that even a term clearly stated may be unenforceable if it is so unconscionable that its enforcement would be contrary to public policy,"[14] but the more thorough of these observed that the unconscionability criterion is really a limitation applied to all contracts, and therefore not a distinguishing feature of contracts of adhesion.[15] The United States Supreme Court's most recent pronouncement in the

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[12] The "reasonable expectations" criterion is essentially a mechanism for allowing the "notice" requirement to the adhering party in early cases like *Steven v. Fidelity & Casualty Co. of New York* to be satisfied constructively. It credits the adhering party with assent to not only those terms of which that party was actually aware, but those that he or she reasonably could have expected would be in the agreement. *See, e.g.,* Restatement (Second) of Contracts § 237, Comment f: "[A] party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term."; Estrin Const. Co., Inc. v. Aetna Cas. & Sur. Co., 612 S.W.2d 413, 423 (Mo. Ct. App. 1981) ("The principle of reasonable expectations as it applies to an adherent of a form contract, therefore, has validity because it removes the fiction of a negotiated assent and places the adherent in 'the typical life situation' to determine the purpose of the contract."); Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 820, n. 18, 623 P.2d 165, 172-73 (1981) ("Notice, in other words, is simply one of the factors[,] albeit an extremely significant one[,] to be weighed in assessing the reasonable expectations of the 'adhering' party.")

[13] Spychalski v. MFA Life Ins. Co., 620 S.W.2d 388, 396 (Mo. Ct. App. 1981); St. John's Episcopal Hosp. v. McAdoo, 94 Misc. 2d 967, 970, 405 N.Y.S.2d 935, 937 (Civ. Ct. 1978).

[14] Drennan v. Sec. Pac. Nat. Bank, 28 Cal. 3d 764, 775, n. 14, 621 P.2d 1318, 1324 (1981). Contemporary cases have applied this terminology somewhat inconsistently, sometimes using "unconscionable" to mean "violative of public policy," and sometimes apparently using it to describe the very "reasonable expectations" standard from which *Drennan* sought to distinguish it. *Compare* Carideo v. Dell, Inc., 520 F. Supp. 2d 1241, 1245 (W.D. Wash. 2007) ("In essence, if the Agreement is unenforceable as unconscionable, then it violates Washington's fundamental public policy."), *with* Phoenix Ins. Co. v. Rosen, 242 Ill. 2d 48, 60, 949 N.E.2d 639, 647-48 (2011) (unconscionability analysis "ask[s] whether the terms are so one-sided as to oppress or unfairly surprise an innocent party [while]… public policy analysis asks whether the contract provision at issue threatens harm to the public as a whole, including by contravening the constitution, statutes, or judicial decisions").

[15] *Graham*, 28 Cal. 3d at 819-20 ("[A] contract of adhesion is fully enforceable according to its terms…unless certain other factors are present which, under established legal rules-legislative or judicial-operate to render it otherwise. Generally speaking, there are two judicially imposed limitations on the enforcement of adhe-

contract of adhesion field, its widely discussed 2011 decision in *AT&T Mobility v. Concepcion*,[16] added an important preemption aspect to this body of law, holding that at least certain aspects of state common law on contracts of adhesion could be preempted by federal legislation.

The term "contract of adhesion" did not even come into use in Connecticut courts, however, until the 1980s, and its full meaning was not explicated until much later. It received its first passing mentions, with no meaningful explanations or citations to authority, by the Connecticut Supreme Court in *Nationwide Ins. Co. v. Gode,*[17] and by the Superior Court in *Pilagin v. Michalski*[18] and *Connecticut Bank & Trust Co. v. Katske*.[19] As late as 1986, the Superior Court, writing in *Housing Authority of the City of New Haven v. Robinson*,[20] still found it necessary to rely only on California law in providing a definition. Later that same year, however, the Appellate Court referred to standardized insurance policies as "contracts of adhesion" in which "[i]t is the duty of the insurance company seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms and not leave the insured in a condition to be misled."[21] And in 1988, the Connecticut Supreme Court, writing in *Aetna Cas. and Surety Co. v. Murphy*, began to define the term more specifically, noting that "[s]tandardized contracts of insur-

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sion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. The second[,] a principle of equity applicable to all contracts generally[,] is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable.") (emphasis added).

16 131 S.Ct. 1740 (2011). Specifically, it held that the Federal Arbitration Act pre-empted California's rule prohibiting enforcement of contracts of adhesion that entail waivers of class-wide arbitration rights. Note that the contract at issue in *Concepcion*, while undisputedly an unnegotiated agreement, was executed in person, at a "brick-and-mortar" store. Laster v. T-Mobile USA, Inc., No. 05-cv-1167 DMS (AJB), 2008 WL 5216255, *1 (S.D. Cal. Aug. 11, 2008).

17 187 Conn. 386, 404, 446 A.2d 1059 (1982) (Shea, J., dissenting).

18 CVN-8409-387, 1985 WL 263875, at *1 (Conn. Super. Ct. Feb. 14, 1985).

19 40 Conn. Sup. 560, 562, 535 A.2d 836 (1986).

20 SPNH-8403-6425-NH, 1986 WL 296369, at *2 n.1 (Conn. Super. Ct. Sept. 22, 1986).

21 Dewitt v. John Hancock Mut. Life Ins. Co., 5 Conn. App. 590, 595-96, 497 A.2d 54 (1985), quoting Boon v. Aetna Ins. Co., 40 Conn. 575, 586 (1874).

ance continue to be prime examples of contracts of adhesion, whose most salient feature is that they are not subject to the normal bargaining processes of ordinary contracts."[22]

Unfortunately, the *Aetna* decision did not clearly explain the effect such lack of negotiation has on the enforceability of the unnegotiated contracts, which prompted many vague or incomplete references to the contract of adhesion concept in the ensuing two decades. For example, courts suggested that the significance of contracts of adhesion is that they make it less equitable to enforce forfeitures arising from the contracts,[23] and that ambiguities in contracts of adhesion were to be construed against the drafters.[24] While one Superior Court opinion explicitly noted, in *obiter dictum,* that because "[c]ontracts of adhesion involve contractual provisions drafted and imposed by a party enjoying greater bargaining strength, they are … interpreted and enforced differently from an ordinary contract," it failed to cite any authority for this proposition, or to explain the supposedly different methods of interpretation or enforcement.[25] Litigants even suggested that such contracts were unenforceable entirely, although this position was never confirmed by any court.[26]

In the early years of the new millennium, the Connecticut Supreme Court returned twice to the contract of adhesion concept, but in contexts that did not prompt the Court to squarely examine the effect that the nonnegotiation of such contracts has on their enforceability. Both *Hanks v. Powder Ridge Restaurant Corp.*[27] and *Hyson v. White Water*

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[22] 206 Conn. 409, 416, 538 A.2d 219 (1988), *overruled on other grounds* by Arrowood Indemnity Co. v. King, 304 Conn. 179, 39 A.3d 712 (2012).

[23] Osiecki v. TIG Ins. Co., CV-01-0278042S, 2005 WL 895757, at *2-3 (Conn. Super. Ct. Mar. 7, 2005). Contrary to *Osiecki*'s summary, the *Aetna* court did not tie its holding that a disproportionate forfeiture would result if the insurance provision at issue there were enforced to "the fact that insurance contracts are actually contracts of adhesion."

[24] Stride v. Allstate Ins. Co., CV-93-0115903S, 1995 WL 27236, at *2 (Conn. Super. Ct. Jan. 20, 1995) ("Because this insurance contract like all insurance contracts is a contract of adhesion, with its terms unbargained for, this ambiguity must be resolved in favor of the insured.")

[25] Stonegate Construction, Inc. v. Nti, PJR-CV-02-0820682-S, 2004 WL 944397, at *3 (Conn. Super. Ct. Apr. 2, 2004).

[26] Laster v. Davis Waste Management, Inc., CV-90-0110897, 1994 WL 723068, at *2 (Conn. Super. Dec. 22, 1994) (defendant brought a special defense that "the contract is void as a contract of adhesion.").

[27] 276 Conn. 314, 328, 885 A.2d 734 (2005).

Mountain Resorts, Inc.,[28] involved personal injury claims by visitors to a ski resort who had signed unnegotiated, boilerplate liability waivers before using the resort. Although the plaintiffs argued that the waivers were unenforceable and did not bar their claims, they did so not on the grounds that the documents were contracts of adhesion, but rather that they were "exculpatory," and therefore in violation of public policy. The enforceability analysis was prompted by the substantive provisions, not by the adhesive nature of the contracts. While the courts in *Hanks* and *Hyson* did consider whether the liability waiver at issue was a contract of adhesion, they did so as one factor in a balancing test used to determine whether a particular exculpatory clause violated public policy. They did not suggest that the fact that a contract is one of adhesion has consequences other than in that particular balancing test, let alone set out any rule for the enforceability of contracts of adhesion generally.

Ultimately, it was not until 2011 that a Connecticut court set out, in this state's law, the essential principles of the majority doctrine on contracts of adhesion as they have long been recognized in other states. Writing in *FCT Electronics,* the Superior Court, relying largely on out-of-state precedent, held that to describe:

> [A] contract as adhesive in character is not to indicate its legal effect… [A] contract of adhesion is fully enforceable according to its terms …unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise…Generally speaking there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him…The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable.[29]

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[28] 265 Conn. 636, 829 A.2d 827 (2003).

[29] *FCT Electronics,* 2011 WL 4908850, at *6 (emphasis added; internal citations omitted).

In that case, the plaintiff FCT, an account holder of the defendant Bank of America, alleged that the bank had acted negligently, and had breached its contract with the plaintiff, by not following its internal procedure, protocols, and common banking practice to detect and stop a five-year scheme of embezzlement by FCT's controller.[30] The bank asserted that three provisions in the "Deposit Account Agreement and Disclosure Statement" that governed the plaintiff's accounts barred the claims. First, the agreement required the account holder to notify the bank, within thirty days of receipt of the statement, if the statement contained an unauthorized transaction. Failure to do so precluded the customer from later asserting that item against the bank. Second, failure to notify the bank within the same thirty days barred claims for any subsequent unauthorized transaction by the same person. Third, the deposit agreement set a sixty-day limit on making claims for unauthorized transactions, even if notice was otherwise timely.[31]

There was no dispute in FCT that the controller's unauthorized transactions began in late 2005 and early 2006, but were not reported to the bank until 2010. The plaintiff argued, however, that while it was given a copy of the agreement, there was no evidence that it had negotiated the terms, nor, indeed, had had the opportunity to do so. Further, the agreement did not even require the plaintiff's signature. FCT asserted that it was offensive to public policy to "foist" a sixty-page agreement on a customer in this way, with no negotiation and no signature acknowledging receipt, and then use the document to limit the bank's liability by reducing the statute of limitations for a period less than the three years allowed by Uniform Commercial Code Section 42a-4-103 for asserting a negligence claim. Citing *Hyson* and *Hanks*, it argued that the time limitations in the deposit agreement must be held invalid.[32]

The court rejected FCT's argument that the mere fact that the agreement was not negotiated, and that it sought to

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[30] *Id.*
[31] *Id.* at *3.
[32] *Id.* at *3-5.

limit the bank's liability, rendered it unenforceable. While the court readily found, relying largely on out-of-state precedent, that the unnegotiated agreement was a contract of adhesion, it did not hold that this fact alone affected enforceability. Rather, it concluded that to be unenforceable, the agreement must either be contrary to the reasonable expectations of the adhering party, or be unconscionable.[33]

The *FCT Electronics* court analyzed only the second of those possibilities, further concluding that to be held unenforceable on grounds of unconscionability, an agreement must be both procedurally unconscionable (meaning it is procured by oppression, surprise, or unequal bargaining power) and substantially unconscionable (meaning it produces overly harsh or one-sided results).[34] While it relied on out-of-state caselaw that it characterized as reflecting the conclusions of "[t]he majority of jurisdictions," it noted that "[t]his approach is consistent with Connecticut law … that contracts that violate public policy are unenforceable."[35] In the case of a contract of adhesion, procedural unconscionability is present by definition. Substantive unconscionability, however, is present only where the terms also are "so one-sided as to shock the conscience," or produce "an allocation of risks or costs which is overly harsh."[36]

The *FCT Electronics* court ultimately upheld the agreement at issue there, concluding that *Hyson* and *Hicks* were inapplicable because "the plaintiff and the defendant represent sophisticated business entities…and the nature of the risk allocation between operators of recreational facilities and the general public implicates different public policy than risk allocation between a depositor and a bank."[37] While the court noted, quoting from *Hanks* and *Tunkl v. Regents of the University of California*,[38] that the "determi-

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[33] *Id*. at *6.

[34] *Id*. at*6 (citing Van Voorhies v. Land/Home Financial Services, CV-09-5031713S, 2010 WL 3961297 (Conn. Super. Ct. Sept. 3, 2010)).

[35] *Id*. While the case did not expressly reach the question whether the unconscionability and public policy criteria for enforcement are distinct – *see* note 14 above – this comparison suggests a Connecticut court might view them as a single element.

[36] *Id*.

[37] *Id*. at *7.

[38] 60 Cal.2d 92, 98–101, 383 P.2d 441, 32 Cal.Rptr. 33 (1963).

nation of what constitutes … public [policy] must be made … against the backdrop of current societal expectations," it provided no further discussion of the first ground upon which it observed that a contract of adhesion could be found unenforceable: that its provisions were contrary to the reasonable expectations of the adhering party.[39]

So from this limited body of case law, what can we conclude about the likely application of Connecticut law to the sort of e-commerce adhesion problems that have presented themselves in other jurisdictions?

First, *FCT Electronics* has made explicit that adhesion contracts will generally be enforced according to their terms; that is, lack of negotiation is not, in and of itself, an objection to enforceability. That holding, and *FCT Electronic*'s adoption of the "reasonable expectations" standard, suggest that challenges to uniquely electronic forms of assent used to establish contracts of adhesion in the Internet age should be treated similarly under Connecticut law to the challenges to clickwrap and browsewrap contracts in courts of the Second Circuit in *TradeComet.com* and *Fteja*. So long as those forms of assent reasonably communicate that consumers are agreeing to a set of conditions, and give the consumers the opportunity to review the conditions before agreeing, the conditions should be enforceable under adhesion contract limitations, even if the consumers never actually see the consumers.

Second, *FCT Electronic*'s distinction between procedural and substantive unconscionability in adhesion contracts, and its linking of the latter to more general prior Connecticut jurisprudence regarding enforceability on grounds of public policy, suggests by extension that the enforceability of choice of law, choice of forum, and arbitration provisions contained in online adhesion contracts will largely continue to be determined by the same substantive standards of fairness as in the offline world, subject to the "new" requirement, for all contracts, that such provisions can reasonably be expected to appear at all in a given con-

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[39] *FCT Electronics,* 2011 4908850, at *7.

text. In the case of arbitration, however, this will be limited by the United States Supreme Court's holding in *Concepcion* that the Federal Arbitration Act preempts certain applications of state law that would otherwise invalidate adhesive arbitration provisions.

Third, the manner in which the "reasonable expectations" of parties to an adhesive e-commerce contract are to be ascertained remains uncertain. Not only did the *FCT Electronics* court not have occasion to elaborate on this most central tenet of the adhesion doctrine, but e-commerce by its nature is constantly creating new situations for which no expectations of a reasonable, objective person previously existed. What reasonable expectations, for example, could those who contracted with Facebook in its startup years be said to have about the privacy of their social network postings? What expectation might early local adopters of the Skype application have about the dispute resolution forum for a telephone service provided not by a utility in Connecticut, or even the United States, but in Estonia?

Finally, the fact that the *FCT Electronics* court discussed substantive unconscionability much more extensively than it discussed reasonable expectations, and its statement that *Hyson* and *Hanks* were inapplicable to the dispute before it, in part because the *FCT Electronics*' parties were "sophisticated business entities," both indicate that distinctions between supposedly sophisticated commercial parties and supposedly naïve individual consumers may remain part of the contract of adhesion deliberations in Connecticut. This is a potential point of departure from majority law in other jurisdictions, which, as *FCT Electronics* itself noted, recognize that the principle that a contract will not be enforced if it is unduly oppressive or unconscionable is "a principle of equity applicable to all contracts generally."[40] Whatever the proper place of such considerations in contract law, then, they should be kept methodologically distinct from the effect that a contract's adhesive nature has on its enforceability. Obviously, a disparity in the commercial sophisti-

[40] *Id*. at *6.

cation of the parties to a contract may often coincide with both a disparity in the respective burdens and benefits the contract affords them, and an absence of negotiation of the terms. But such a difference in sophistication does not in itself mean that the contract will go unnegotiated, nor is it the only circumstance in which an unnegotiated contract will arise. Plenty of sophisticated businesses use online banking sites, buy supplies in Internet stores, and market themselves on social media networks on the same unnegotiated terms as individual consumers use those sites. Under the traditional contract of adhesion doctrine, the former are entitled to the same protection of the reasonable expectations limits as are any fellow users, and the latter are not entitled by their status as consumers to any special substantive protection beyond that.

It is inevitable that the expanding e-commerce world will eventually bring more detailed and more varied disputes over online contracts of adhesion to Connecticut courts. By establishing long-delayed general principles of adhesion contracts in this state's law, *FCT Electronics* has provided one of the first and most important anchor points for dealing with those disputes, although significant questions still remain.

PROBATE COURT RULES OF PROCEDURE: NEW RULES FOR HEARINGS

BY CARMINE PERRI*

It was Heraclitus who said that you cannot step in the same river twice. This saying reminds us that change happens and that it is part of life. Since 2008, when Judge Paul Knierim was appointed as the Probate Court Administrator, the Probate Courts have experienced many changes. One recent change is the new *Probate Court Rules of Procedure* (herein "Rules of Procedure") which became effective July 1, 2013. This article will focus on one section of the Rules of Procedure and will highlight some of the issues practitioners may encounter as a result of the new Rules of Procedure.

I. THE PROBATE COURT: A BRIEF HISTORICAL PERSPECTIVE

Separate probate courts came into existence only after probate jurisdiction was first exercised by the General Court and then by the County Courts.[1]

Unlike the Superior Court, which is a court of general jurisdiction, "[o]ur courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute."[2] The statute regarding rules for probate practice and procedure, which was enacted in 1967, was General Statutes Section 45-4f; General Statutes Section 45-4f was transferred to General Statutes Section 45a-78 in 1991. By virtue of Public Act 13-81, Section 1, General Statutes Section 45a-78 now states:

(a) The Probate Court Administrator shall, from time to time, recommend to the judges of the Supreme Court, for adoption and promulgation pursuant to the provisions of section 51-14, uniform rules of pro-

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* Of the Hartford Bar

1 RALPH FOLSOM & GAYLE WILHELM, PROBATE JURISDICTION AND PROCEDURE IN CONNECTICUT § 2:2 (2nd ed. 2010). As one example, "This power of appointment and control [relating to conservators] remained with the county courts until 1841 and 1843, when it was transferred to the probate courts." Appeal of Johnson, 71 Conn. 590, 596, 42 A. 662 (1899)(citing 1841 P.A. c. 41 and 1843 P.A. cc. 69, 133).

2 Heiser v. Morgan Guar. Trust Co., 150 Conn. 563, 565, 192 A.2d 44 (1963).

cedure in the Probate Courts. Any rules of procedure so adopted and promulgated shall be mandatory upon all Probate Courts. To assist the Probate Court Administrator in formulating such recommendations, the Probate Court Administrator shall meet with the Probate Assembly at least annually, and may meet with members of the bar of this state and with the general public.

(b) The Probate Court Administrator shall, from time to time, publish the rules of procedure for the Probate Courts. The Probate Court Administrator may pay the expenses of publication from the fund established under section 45a-82 and shall sell the book of Probate Court rules of procedure, at a price determined by the Probate Court Administrator. The proceeds from the sales shall be added to and shall become a part of said fund.[3]

The first edition of the *Connecticut Probate Practice Book* was published in May 1974.[4] The 2000 edition of the *Connecticut Probate Practice Book,* as an example, contained the following eight rules for probate court practice and procedure:

(1) Notice on Application for Probate Proceedings and for Presentation of Claims;

(2) Probate Bonds;

(3) Conservators;

(4) Guardians ad Litem;

(5) Guardians;

(6) Accounts;

(7) Transfers of Contested Petitions for Termination of Parental Rights from Courts of Probate to the Superior Courts; and

(8) Transfers of Contested Petitions for Removal of Parent as Guardian from Courts of Probate to Superior Court for Juvenile Matters.[5]

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3 CONN. GEN. STAT. § 45a-78.

4 *Preface to* PROBATE COURT RULES OF PROCEDURE (2013).

5 FOLSOM & WILHELM, *supra* note 1, § 3:2.

As time went on, like that perpetually changing river, day to day questions that attorneys, judges, and clerks confronted were left unanswered by the *Connecticut Probate Practice Book,* which had not been comprehensively rewritten since May 1974. Additionally, practitioners who handled matters in more than one probate court called for a more uniform application of rules, especially regarding discovery and contested hearings.

Faced with a challenge, Judge Knierim, pursuant to General Statutes Section 45a-78, seized the opportunity, convened a Probate Court Rules Advisory Committee, and sought to comprehensively rewrite the Rules of Procedure.[6]

II. The New Rules For Hearings

It was not that long ago that some probate courts, and the procedure employed within them, resembled a family meeting during dinner as opposed to a court of law.

In *Prince v. Sheffield,*[7] the Court, again not that long ago, stated, "[t]he procedure in our probate courts is informal, strict rules of evidence are seldom followed, many of the probate judges are laymen, and no transcript or other record of any testimony presented is available."[8] The Probate Courts have made much progress since the Court's statements in 1969.

With the promulgation of the Rules of Procedure, the Rules have been transformed from eight rules to fifty rules divided into the following four categories: (I) General Provisions, (II) Rules for All Case Types, (III) Rules for Specific Case Types, and (IV) Rules for Hearings.

The following four sub-sections of this article will focus on specific Rules for Hearings.

A. *Conferences Before the Court*

The Rules of Procedure provide for two types of conferences before the court, status conferences, pursuant to Rules of Procedure Section 60.1, and hearing management

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[6] This writer is a member of the Probate Court Rules Advisory Committee and was assigned to the sub-committee that focuses on the Rules for Hearings.

[7] 158 Conn. 286, 259 A.2d 621 (1969).

[8] *Id.* at 293.

conferences, pursuant to Rules of Procedure Section 60.2. Whether a matter is contested determines which conference will be conducted. A contested matter is one where facts are in dispute.

Rules of Procedure Section 60.1 permits either the court or a party to request a status conference in an uncontested matter to address any issue that facilitates the progress of the matter. A status conference can be convened, as one example, when a fiduciary has not reported to the court for a period of time; during the status conference, the court can set a deadline for the filing of a final accounting or financial report. Absent an exception provided in Rule of Procedure 69, the court shall not decide any issues of law or fact during or at the conclusion of the status conference.

A hearing management conference, pursuant to Rules of Procedure Section 60.2, facilitates the movement of the matter towards trial. The hearing management conference will be conducted much like a trial management conference is conducted in the Superior Court; not coincidentally, Rules of Procedure Section 60.2 resembles Superior Court Trial Management Orders.[9] Of particular note, which is discussed in greater detail in the next sub-section, during the hearing management conference, pursuant to Rules of Procedure Section 61.1(a), a party shall obtain permission from the court to conduct discovery for all matters except the taking of depositions, which is specifically provided in General Statutes Section 52-148a.

Given the depth and breadth of issues covered in the hearing management conference, counsel is cautioned to be prepared for a substantive discussion of the matter since Rules of Procedure Section 60.2(b) permits the court, at the conclusion of the conference, to issue an order concerning any of the issues addressed in the conference. Although

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[9] The Superior Court Trial Management Orders, which also outline a list of issues to be addressed before the start of evidence, are found on the Judicial Branch Website. *See* Superior Court Standing Orders, Civil Jury Trial Management Order, http://www.jud.ct.gov/external/super/StandOrders/Civil/TMC_Order_Jury.pdf ; Superior Court Standing Orders, Civil Court Trial Management Order, http://www.jud.ct.gov/external/super/StandOrders/Civil/TMC_Order_Court.pdf.

counsel can, at least conceivably, request a second hearing management conference sometime after the first hearing management conference, the court may not grant the request for a second conference (and the client may not be pleased to incur the expense of an additional conference).

B. *Discovery in Contested Matters*

As stated above, absent the taking of a deposition pursuant to General Statutes Section 52-148a, a party must obtain permission from the court before seeking discovery from another party. For those practitioners that also practice in the Superior Court, this rule is clearly a deviation from how discovery is conducted in Superior Court. Rules of Procedure Section 61.2(a) requires a party to submit a summary to the court in support of the party's request for permission to conduct discovery. Provided the court gives a party permission to conduct discovery, Rules of Procedure Section 61.1 permits the issuance of interrogatories, requests for production, and requests for admission. The standard the court applies when determining whether to grant a party's permission to conduct discovery is "if it finds that the requested discovery appears reasonably calculated to lead to admissible evidence and would not be unduly burdensome or expensive."[10] It is unclear what a court would determine to be unduly burdensome and/or expensive so counsel may want to preemptively address both issues in the summary requesting permission from the court, pursuant to Rules of Procedure Section 61.2(a).

"The test of what is material for the purpose of discovery is broader than the test of materiality for admissibility at trial."[11] Since the discovery standard in Rules of Procedure Section 61.2(b) is modeled after the discovery standard applied in the Superior Court, specifically Practice Book Section 13-2, it is advisable to consult the annotated version of Practice Book Section 13-2 prior to any arguments on the scope of discovery.

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[10] PROBATE COURT RULES OF PROCEDURE § 61.2(b).

[11] WESLEY HORTON & KIMBERLY KNOX SUPERIOR COURT CIVIL RULES 635 (2011-2012 ed.) (Citing Sanderson v. Steve Snyder Enterprises, Inc., 196 Conn. 134, 139, 491 A.2d 389 (1985)).

Additionally, unlike in the Superior Court, a party may not issue more than twenty-five interrogatories unless otherwise permitted.[12] During the hearing management conference, however, a party may request permission to issue additional interrogatories.

For the parties responding to discovery, Rules of Procedure Section 61.7 addresses the manner in which a party shall proceed; this Section closely resembles Practice Book Section 13-7.

From a practical standpoint, counsel should be aware that Rules of Procedure Section 61.1 and Rules of Procedure Section 61.2 open the door for the possibility of two discovery conferences on the same issue: the first conference when a party seeks permission from the court and the second conference after permission is granted and after the opposing party files objections pursuant to Rules of Procedure Section 61.9.

As to Rules of Procedure Section 61.9, subsections (a) and (b) specifically set forth the requirements for objecting and the time-frame in which a party must file an objection.

Finally, Rules of Procedure Section 61.9(e) lists specific orders the court may enter after finding one or more of the grounds for objection enumerated in Rules of Procedure Sections 61.9(d)(1)-(4).

C. *Evidence in Contested Matters*

Code of Evidence Section 1-1(b) states, in pertinent part, "The Code applies to all proceedings in the superior court in which facts are in dispute are found . . . ." Since the Probate Court is not the Superior Court, the Code of Evidence does not apply. Prior to July 1, 2013, however, the rules of evidence was applied to civil commitments, pursuant to General Statutes Section 17a-498, and involuntary conservatorships, pursuant to General Statutes Section 45a-650.

Since July 1, 2013, pursuant to Rules of Procedure Section 62.1, the rules of evidence now apply in all Probate Court hearings in which facts are in dispute.[14] Although

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[12] Probate Court Rules of Procedure § 61.4.
[13] Code Of Evidence § 1-1.
[14] Probate Court Rules of Procedure § 62.1.

Rules of Procedure Section 62.1 only has two sentences, it is a rule that requires the utmost attention and review. Rules of Procedure Section 62.1 states the following: "The rules of evidence apply in all hearings in which facts are in dispute. The court may apply the rules of evidence liberally if strict adherence will cause injustice, provided the application is consistent with law and the due process rights of the parties are protected."[15]

Arguably, Rules of Procedure Section 62.1 could have had the same impact and effect if it included the first sentence only; the Code of Evidence Section 1-2(a), states:

> The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rulemaking *to the end that the truth may be ascertained and proceedings justly determined.*[16]

Although, in this writer's opinion, the second sentence of Rules of Procedure 62.1 is superfluous, it is not inconsistent with the purposes of the Code as provided in Code of Evidence Section 1-2.

Despite Rules of Procedure Section 62.1's consistency with the purposes of the Code of Evidence, it is unclear how, or under what circumstances, judges will exercise their discretion pursuant to the second sentence. It is undisputed that Probate Court judges have the difficult task of balancing the mission of the Probate Courts, "to provide an accessible and approachable forum in which those cases can be resolved quickly, economically and equitably,"[17] while also applying the Rules of Procedure. Additionally, what makes a judge's role more difficult is that oftentimes it is a *pro se* litigant who is arguing a position before the court. The following two quotes, taken from two different Appellate Court opinions, should prove helpful in assisting the court:

> It is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere

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15 PROBATE COURT RULES OF PROCEDURE § 62.1.
16 CODE OF EVIDENCE § 1-2(a)(emphasis added).
17 *Preface to* PROBATE COURT RULES OF PROCEDURE (2013).

> with the rights of other parties to construe the rules of practice liberally in favor of the pro se party.[18]
>
> While a judge trying a case in which one party is acting pro se must be careful, as always, to preserve the fairness of the trial, the adversary system is not suspended, and the judge cannot become the adviser or tactician for the pro se party.[19]

When confronting an evidentiary issue, whether it is presented to the court by a pro se litigant or not, this writer's interpretation is that the second sentence of Rules of Procedure 62.1 is not an exception to the first sentence but is rather a notification to court users that the purposes of the Code of Evidence, as provided in Code of Evidence Section 1-2, shall be followed.

D. *Enforcement*

Rule of Procedure 71 includes seven different sections on enforcement. The majority of Rule of Procedure 71 addresses contempt of court. Contempt is defined in Rules of Procedure Section 71.3 as "[a]n individual misbehaving or disobeying an order of a judge during a hearing or conference . . . ."[20] Contempt is divided into the following three sections: (1) summary criminal contempt,[21] (2) non-summary criminal contempt,[22] and (3) civil contempt.[23]

Contempt is an inherent power in all courts, including the Probate Courts. General Statutes Section 51-33 states the following: "Any court. . . may punish by fine and imprisonment any person who in its presence behaves contemptuously or in a disorderly manner; but no court or family support magistrate may impose a greater fine than one hundred dollars or a longer term of imprisonment than six months or both."[24] General Statutes Section 51-33a states the following:

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[18] Vanguard Engineering, Inc. v. Anderson, 83 Conn. App. 62, 65, 848 A.2d 545 (2004)(internal quotation marks and citations omitted).

[19] McGuire v. McGuire, 102 Conn. App. 79, 85, 924 A.2d 886 (2007)(internal quotation marks and citations omitted).

[20] PROBATE COURT RULES OF PROCEDURE § 71.3.

[21] PROBATE COURT RULES OF PROCEDURE § 71.5.

[22] PROBATE COURT RULES OF PROCEDURE § 71.6.

[23] PROBATE COURT RULES OF PROCEDURE § 71.7.

[24] CONN. GEN. STAT. § 51-33.

(a) Any person who violates the dignity and authority of any court, in its presence or so near thereto as to obstruct the administration of justice, or any officer of any court who misbehaves in the conduct of his official duties shall be guilty of contempt and shall be fined not more than five hundred dollars or imprisoned not more than six months or both.

(b) No person charged with violating this section may be tried for the violation before the same judge against whom the alleged contempt was perpetrated.[25]

Additionally, in the event an individual is served with a subpoena and fails to comply with the subpoena, the Probate Court, pursuant to Rules of Procedure Section 71.2, can issue a capias to compel the individual's attendance.

Finally, Rules of Procedure Section 71.1 will be an often cited Section since it will find itself in most, if not all, motions to remove a fiduciary.

III. Conclusion

It may be that we can never step in the same river twice, but we can at least determine how it is we navigate those waters. The new Rules for Procedure, in this writer's opinion, assist court users with navigating Connecticut's Probate Courts.

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[25] Conn. Gen. Stat. § 51-33a.