BY SUSAN RABIN AND CHRISTOPHER Q. PHAM

Contracts of Adhesion

MOST WRITERS IN HOLLYWOOD are thrilled at a chance to get their scripts turned into movies. Most writers, however, have few meaningful choices in negotiating their movie deals. The reality is that the majority of actors, writers, and production people cannot strike a great deal with a studio. The imbalance of bargaining power and the standardization of terms result in an agreement that may be described as a contract of adhesion, which has been defined as "a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it."[1]

Uneven bargaining strength does not necessarily make a contract unconscionable. The Uniform Commercial Code generally defines "unconscionability" as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[2] Unconscionability points to negotiation as well as the terms negotiated.

Can a charge of unconscionability render a contract unenforceable? California Civil Code Section 1670.5(b) provides a court with several options: "If the court as a matter of law finds the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Under Section 1670.5(b), the contract and the circumstances surrounding its formation are to be examined: "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

Prominence and success do not guarantee fairness in negotiations. The late rock promoter and producer Bill Graham, for example, was ruled to be the adherent in signing contracts with members of the musicians' union. The American Federation of Musicians required its musicians to utilize a contract with Graham that permitted only the union to resolve disputes between the musicians and Graham. When a dispute arose, a decision was first rendered against Graham without a hearing. Later, a former union officer held a hearing that ascribed all disputed losses to Graham, who subsequently successfully appealed a trial court ruling upholding this contract.[3]

The intentions and reasonable expectations of the parties to a contract are fundamental to a review of its validity and enforceability. The court in *Graham* v. *Scissor-Tail, Inc.*, propounded that courts could limit enforcement of contracts of adhesion according to two criteria: 1) a provision of the contract does not fall within the reasonable expectations of the weaker or adhering party, or 2) "a contract of adhesion, 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.'"[4] The court held that largely due to the contract term dictating a union forum for the resolution of any disputes, Graham was subject to oppression and overreaching.[5]

Contracts of adhesion are not limited to the entertainment industry. When people travel, rent cars, and purchase insurance, for example, they accept form contracts, which can be a normal and even relatively efficient way of doing business. Some of these contracts, for example involving commercial credit and insurance, are subject to government regulation, and if they contain clauses that are unclear, unexpected, or unconscionable they will not be enforced.[6]

One-sided or adhesive contracts are very often enforceable, and unconscionability is a high threshold. Contract negotiations should be given adequate time for full disclosure and discussion of intentions, expectations, facts, assumptions, and definitions.

In one case, when a party attempted to rescind a stock repurchase agreement, the plaintiff claimed that the agreement was an adhesion contract. The court chose not to interpret the adhering party's expectations or give weight to circumstances following the making of the contract. The court held: "[H]indsight and subsequent circumstances cannot be determinative of the issue of disappointment of reasonable expectations."[7] The contract was not invalid merely for being a contract of adhesion.[8]

The trend of opinions in film industry lawsuits reflects a general emphasis on fairness and a tight hold on access to remedies. For example, when Art Buchwald challenged the net profits system of a studio, he achieved a partial victory. The trial court determined that *Coming to America*, starring Eddie Murphy, was based on Buchwald's story. His challenge to the studio's net profits system garnered invalidation of several standard contract provisions and a relatively modest award.[9] After Buchwald reached a settlement, however, the industry soon returned to familiar structures for net profit participation.

With fairness being held as a standard, court dramas involving challenges to entertainment industry contracts have often generated con-

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siderable attention and may even inspire fear in the boardrooms, but decisions often tread lightly. In *Batfilm Productions, Inc.* v. *Warner Bros., Inc.*, the court read Section 1670.5(b) as making a clear distinction between an unfair contract and an unconscionable one. "To be unconscionable, a contract must 'shock the conscience' or, as the plaintiffs alleged...it must be 'harsh, oppressive, and unduly one-sided.'"[10] In the judgment of that court: "[A] contract of adhesion is not the same as an unconscionable contract, which is no contract at all." While enforcement could be denied of any part of the contract found to be unconscionable under Section 1670.5(b), the contract as a whole and certain provisions of the net profits definition and the method of calculating interest were held not to be unconscionable.[11]

The court in *Batfilm Productions* appeared to have little empathy for the plaintiffs' charges of unfairness, particularly since the plaintiffs did not prove they could have negotiated a better deal elsewhere. The stature and experience of the plaintiffs seemed to hurt their argument, in the court's view. The court wrote: "No one is less likely to have been coerced against his will into signing a contract like the Warner Agreement than Mr. Melniker. This former general counsel and senior executive of a major motion picture studio (Metro-Goldwyn-Mayer) knew all the tricks of the trade; he knew inside and out how these contracts work, what they mean, and how they are negotiated."[12]

Care must be taken in reviewing even supposedly standard contracts. One-sided or adhesive contracts are very often enforceable, and unconscionability is a high threshold. Contract negotiations should be given adequate time for full disclosure and discussion of intentions, expectations, facts, assumptions, and definitions. Objectionable provisions must be challenged during negotiations. Writings that evidence that objections were communicated may prove valuable in a subsequent dispute. Until a writer reaches the studio's A-list, contracts must be thoroughly analyzed and negotiated. ■

[1] Graham v. Scissor-Tail, Inc., 23 Cal. 3d 807, 817 (1981).
[2] A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982). *See also* U.C.C. §2-302.
[3] Graham, 23 Cal. 3d 807.
[4] *Id.* at 820.
[5] *Id.* at 817-18.
[6] Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862 (1962).
[7] Chow v. Levi Strauss & Co., 49 Cal. App. 3d 315 (1975).
[8] *Id.* at 325.
[9] Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. 1257 (1990).
[10] Batfilm Prods., Inc. v. Warner Bros., Inc., Nos. BC 051653 and BC 051654 (Cal. App. Supp. 1994).
[11] *Id.*
[12] *Id.*

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