NOTES

GROWER-CANNER AGREEMENTS: AN ABUSE OF MASS STANDARDIZED CONTRACTS*

THE mass standardized contract is peculiarly fitted to the needs of the large scale business enterprise.[1] Production and distribution must inevitably follow recurrent patterns if business is to function with ease and efficiency. By use of a printing-press contract tailored to the particular needs of the business in which it is used, many transactions can be cast into a neat mould. At one end of the production process these contracts make it possible for a company to simplify its procedure for procuring raw materials, and at the other end they make possible the orderly disposal of the company's finished product.[2]

But since standardized contracts are usually drawn with the business requirements of only the drafter in mind, they often impose a disproportionate burden on the other party.[3] The proffer of these contracts is necessarily on a

---

* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1949).

1. Only recently have Anglo-American legal scholars recognized that mass standardized contracts differ from those in which the parties have dickered over the contract terms. For the only comprehensive study of these contracts see PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937), excellently reviewed by Professor Llewellyn in 52 HARV. L. REV. 700 (1939). Studies of the judicial treatment of mass standardized contracts in the United States have done little more than suggest the problems involved. See Kessler, *Contracts of Adhesion*, 43 COL. L. REV. 629 (1943); Llewllyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704 (1931); Isaacs, *The Standardizing of Contracts*, 27 YALE L. J. 34 (1917).

2. See Professor Llewellyn's analysis of the advantages of standardized contracts: "They save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit, of keeping tabs on transactions, of knowing where one is at, of arranging orderly expectation, orderly fulfillment, orderly planning. They ease administration by concentrating the need for discretion and decision in such personnel as can be trusted to be discreet. This reduces human wear and tear, it cheapens administration, it serves the ultimate consumer." Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939).

3. French and German legal writers have offered the most perceptive analyses of this aspect of mass standardized contracts. Saleilles was the first to coin the phrase "contracts of adhesion" which has since become a popular label for these contracts. See SALEILLES, DE LA DÉCLARATION DE VOLONTÉ 229 (1901); 2 DÉMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 307–37 (1923); RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES (2d ed. 1925); RAISER, DAS RECHT DER ALLGEMEINEN GESCHÄFTSBEDINGUNGEN (1935); Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TULANE L. REV. 345 (1937).

For a moral defense of standardized contracts, contrast the following statement by Prausnitz: "In discussing the economic forces concerned, it is too often supposed that they are guided by sheer avarice. This feeling is by no means correct in the majority of cases. Often genuine and legitimate interests are sought to be protected. In the sale of take-it-or-leave-it basis, and quite often an individual vis-a-vis a large enterprise is in an economic squeeze which precludes him from shopping around for better terms. And in many cases if he did look around he would find that all competitors incorporate the same terms in their contracts.[4] The quantity, quality and price of the contracted item may be open for actual bargain. But once the contract is assented to, the weaker party may well find that he has accepted the risk of loss before delivery, has given a warranty or surrendered his right to rely on a warranty, established the company as the sole judge of quality, exempted it from liabilities resulting from such contingencies as strikes, floods, fires and transportation difficulties, limited his own remedies in case of default by the company, assented to a stiff liquidated damages provision, convenanted not to deal with the company's competitors, and, in some cases, even assumed the risk of future price fluctuation.[5]

---

goods it is not only the struggle between manufacturers, importers and the ultimate buyers of goods which contributes to the formation of individual clauses, but also the nature of the goods and the character of the particular market." PRAUSNITZ, *op. cit. supra* note 1, at 26–7.

Standardized contracts are often used by parties with equal bargaining power. In such a situation, however, there is a danger that each side will insist on the use of its own form—and that the forms will be inconsistent. Professor Fuller has set out the problem as follows: "Often the seller, instead of accepting the buyer's purchase order, or returning the buyer's 'acknowledgement' form, sends the buyer his own form, called a 'sales order.' This will be like the buyer's 'purchase order,' and will itself be 'subject to' certain terms or 'conditions' printed at the bottom or on the back. The chances that these 'conditions' in the 'sales order' will coincide with those stipulated by the buyer are, of course, negligible. . . . The result is that instead of an orderly negotiation of the terms of the sale, we have the parties engaged in a battle of forms, each jockeying for position and each attempting by whatever means he can to get the other to indicate assent to his form. . . . It is easy to see from the above account that in commercial and industrial purchasing transactions it will typically be difficult to determine (1) whether any contract was formed, and if so, (2) when, and (3) on what terms." FULLER, BASIC CONTRACT LAW 178–9 (1947). To minimize these conflicts, standard forms have been drafted by trade associations representing buyers and sellers. For example, the National Association of Purchasing Agents has worked out forms covering the sale of commodities such as coal, fuel oil, scrap iron and steel. After a study of about 500 order forms used by retail stores all over the United States, the National Retail Dry Goods Association is about to publish a Standard Order Form. In the "grey goods" market (unfinished cloth as it comes from the loom) the Worth Street Rules have standardized transactions. These rules have been adopted by thirteen trade associations, involving textile manufacturers, garment manufacturers, brokers, and purchasing agents. The rules incorporate a standard Salesnote, technical specifications covering quality definitions and tolerances, arbitration rules, and definitions of trade terms and customs. *Id.* at 178–81, 925.

4. See Kessler, *supra* note 1, at 632.

5. "Contracts of sale today are furnished on printed forms. All that is necessary is to insert a description of the subject matter, the price and terms of payment, and procure the buyer to sign. How often does the buyer know the extent of his obligations or the extremes to which the seller may resort to enforce his remedy? It is the seller whose interests are safeguarded in the printed form he produces and asks the buyer to sign." V. Valenti, Inc., v. Mascitti, 163 Misc. 287, 290, 295 N.Y. Supp. 330, 335 (1937).

The story of warranties in both sales and insurance law also provides a good illu-

The oppressive clauses of mass standardized contracts, particularly those which place the brunt of an adverse price fluctuation on the weaker party, have given rise to much friction and litigation.[6] In trying to relieve one party from the rigors of the contract, courts have generally taken a schizoid approach: they pay homage to the long accepted common law principles of contract, refusing, on the surface, to recognize the economic realities of the transaction;[7] but by the semi-covert and often tortuous technique of "interpretation" they usually manage to obtain a result which equalizes the position of the parties. The technique may be used in many ways. The court may "construe" patently clear language;[8] it may find ambiguity (which must be construed against the proponent of the contract) in unambiguous clauses;[9] or it may tussle with those

---

stration of how a large organization imposes a one-sided agreement on an individual or on an unorganized group. For a description of the problem in the law of sales, see Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930); Comment, 57 YALE L. J. 1389, 1400 (1948); Notes, 31 COL. L. REV. 1325 (1931), 23 MINN. L. REV. 784 (1939). For warranties in insurance contracts, see Patterson, *Warranties in Insurance Law*, 34 COL. L. REV. 595 (1934); Vance, *The History of the Development of the Warranty in Insurance Law*, 20 YALE L. J. 523 (1911).

6. An adverse price change is responsible for a preponderance of litigation. See Havighurst and Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932); Vold, *The Tort Aspect of Anticipatory Repudiation of Contracts*, 41 HARV. L. REV. 340 (1928). Excellent illustrations are found in *Case Studies in Business*, 2 HARV. BUS. REV. 238, 367, 496 (1924) (Harrison Steel Corporation, The Randolph Shoe and Leather Company, The American Sugar Refining Company).

7. The verbalization has usually been in the form of obeisance to the ideal of "freedom of contract." See *e.g.*, the famous dicta of Sir George Jessel: ". . . [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. . . . You have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Printing and Numerical Register Co. v. Sampson, L.R. 19 Eq. 462, 465 (1875). See Kessler, *supra* note 1, at 630–1.

Interpreting these words literally, some courts have remained unmoved by the equities of the particular case and allowed the strong bargaining party to make the most of his advantageous position. An oft-cited illustration is the case of Hollis Bros. & Co., Ltd., v. White Sea Timber Trust, Ltd. [1936 K.B.] 3 All Eng. 895 (clause, "subject to seller's making necessary chartering arrangements," held to give seller an option to deliver or not).

8. *See, e.g.*, Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928) (disclaimer of warranty held to apply only to express warranties, thus permitting recovery on an implied warranty); Austin Co. v. Tillman Co., 104 Ore. 541, 209 Pac. 131 (1922) (clause limiting buyer's right to return goods was held applicable only if the seller had delivered goods which reasonably met the contract description). For the various ways in which courts interpret requirement and output contracts so as to avoid placing the burden of a price fluctuation on the weaker party, see Havighurst & Berman, *supra* note 6. For the way in which the burden is shifted from the weaker party in certain banking transactions, see Note, *Bank Stipulations to Avoid a Presumption of Purchase in Collection Cases*, 27 COL. L. REV. 73 (1927).

9. *See, e.g.*, Raw Silk Trading Co. v. Katz & Freed, 201 App.Div. 713, 194

ambivalent tools, the doctrines of mutuality[10] and consideration.[11] If the suit is in equity the court's labors will be much simpler, for it may readily resort to the doctrine that "equity does not enforce unconscionable bargains."[12]

But courts also feel a counterbalancing pressure in some cases—particularly those involving specific performance—to uphold mass standardized contracts. In "construing" or refusing to enforce one contract, they are, in effect, tampering with all of them. If they sanction one breach, they are encouraging mass breach.[13] And when the production process of a large enterprise is dependent

N.Y.Supp. 638 (1922) (clause making credit subject to seller's discretion held not to give seller right to refuse credit by demanding cash on delivery).

10. *See, e.g.*, Weil v. Chicago Pneumatic Tool Co., 138 Ark. 534, 212 S.W. 313 (1919) (contract exempting seller from liability "for any loss of profits or damage for its failure to deliver goods ordered, or for the cancellation of this agreement" held invalid for lack of mutuality); Schlegel v. Peter Cooper's Glue Factory, 231 N.Y. 459, 132 N.E. 148 (1921) (requirements contract held unenforceable for lack of mutuality when buyer greatly increased his needs after price had taken sharp rise due to war).

11. See Notes, *Species of Inadequacy of Consideration Which Have Induced Judicial Refusal to Attach Obligation to Promises*, 27 COL. L. REV. 178 (1927), *Inequality of Bargaining Power as an Occasion for the Non-Enforcement of Bargains in which the Consideration Is Inadequate*, 27 COL. L. REV. 430 (1927).

12. *See, e.g.*, Pope Manufacturing Co. v. Gormully, 144 U.S. 224 (1891) (plaintiff was denied specific performance of contract under which defendant was granted the use of certain patents only on condition that he would not import, sell, or manufacture under other patents or ever contest any patents claimed by plaintiff).

Conversely, when faced with contracts which have made commercial sense and been commercially fair, several courts have found inapplicable the principle that a form contract should be interpreted against the party who drafted it. *See, e.g.*, Pottash v. Herman Reach & Co., 272 Fed. 658 (3d Cir. 1921) (interpretation in seller's favor of clause for forced acceptance of goods where parties obviously contracted with reference to war conditions of overseas trade which made the clause reasonable); Hogue-Kellogg, Inc., v. G. L. Webster Canning Co., 22 F.2d 384 (4th Cir. 1927) (despite Virginia statute which provided that no printed form contract was binding unless the clauses for the vendor's benefit were in type of described minimum size, the court enforced clauses which it considered fair and reasonable even though they did not comply, since it felt that the policy of the statute was that reasonable clauses were to be given effect).

13. "If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with economic arrangements of the plant, a court of equity would hesitate to assume to interfere, but the very existence of such contracts proclaims their necessity to the economic management of the factory. . . . The breach of the contract by one planter differs but in degree from a breach by all." Curtice Brothers' Co. v. Catts, 72 N.J.Eq. 831, 833-4, 66 Atl. 935, 936 (1907); Heinz Bros. v. Currie, 83 N.Y.S.2d 705 (1948).

Courts have been especially strict in enforcing standard contracts between farmers and farmer marketing cooperatives. "[Farmers] are associating themselves as authorized by the statute, like other persons, and they have signed mutual and fair agreements among themselves which will be futile unless those who have signed such agreements can be held to abide by the terms of their contracts." Tobacco Growers Co-op v. Jones, 185 N.C. 265, 277, 117 S.E. 174, 180 (1923); Washington Cranberry Growers' Ass'n v. Moore, 117 Wash. 439, 201 Pac. 773 (1921). For a compilation of these decisions, see SUMMARY OF CASES AND DECISIONS ON LEGAL PHASES OF COOPERATION (U.S. Dept. of on the performance of a standardized contract, widespread harm may result from a blind effort to protect the weaker bargaining party who is before the court.[14]

A typical transaction utilizing a mass standardized contract is that in which a canner, well in advance of the canning season, contracts to buy a farmer's entire output of a particular crop.[15] The canner is thus assured a source of supply and the farmer a ready market. Theoretically, both receive insurance against an adverse price change.[16] But since the market is usually composed of a few large buyers and many small sellers, the canner almost invariably attempts to bind the farmer while leaving as many loopholes as possible for itself should subsequent market conditions make it expedient to get out of the contract.[17] In the recent case of *Campbell Soup Company v. Wentz*,[18] the Circuit Court of Appeals for the Third Circuit decided that Campbell in drafting its contracts with farmers had been too successful in this effort.

In June, 1947, Campbell entered into a contract with George and Harry Wentz for the delivery of all the Chantenay red-cored carrots to be grown on

Ag., Bur. of Ag. Econ. 1924). For a discussion of the use of output contracts by coöperatives, see Henderson, *Coöperative Marketing Associations*, 23 Col. L. Rev. 91 (1923).

Where the strong bargaining party is the buyer, courts in granting specific performance have been influenced by the fact that contract breaches would cut down access to raw materials, making it difficult for the buyer to fulfill future contract commitments for his finished products and leaving him open to a multiplicity of law suits. *See* Thompson v. Winterbottom, 154 Md. 581, 583–4, 141 Atl. 343, 345 (1928); Friedberg v. McClary, 173 Ky. 579, 586, 191 S.W. 300, 303 (1917).

14. For a general discussion of judicial protection of contract expectations, see Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52, 62 (1936).

15. See Comment, *The Canner-Grower Contracts in Wisconsin*, 1948 Wis. L. Rev. 415 (legal implications of farmer-canner contracts). For the problems involved in output contracts generally, see Havighurst & Berman, *supra* note 6; Note, 28 Col. L. Rev. 784 (1928); 2 Williston, Sales § 464a (rev. ed. 1948).

16. But *cf.* Norton, An Economic Study of the Production of Canning Crops in New York 11 (1922): "There are advantages and disadvantages to the farmer in this method of sale. He is sure of the price, but he is in no way certain of the total returns he will receive. The profitable years, in the case of contract crops, are years when yields are good. When the yields of crops produced for the open market, such as cabbage and potatoes, are high, low prices usually prevail, but in years of low yields there is usually a compensating increase in the price. There is no such increase in the price of contract crops when the yields are low, and therefore such years are very unprofitable."

17. Two recent studies of canning contracts in Wisconsin indicate that canners consistently insert clauses which make it possible for them either to totally avoid, or at least to minimize, their contract liability if market conditions so dictate. See Kross, Grower-Canner Corn, Bean and Beet Contracts (U. of Wis. Ag. Exp. Sta. Bull. No. 482, Jan. 1949); Black & Froker, Grower-Canner Pea Contracts (U. of Wis. Ag. Exp. Sta. Bull. No. 475, Oct. 1947).

For an analysis of agricultural marketing structures and marketing methods see Nicholls, Imperfect Competition within Agricultural Industries (1941); Shepherd, Marketing Farm Products (1946).

18. 172 F.2d 80 (3d Cir. 1949).

fifteen acres of the Wentz farm during the 1947 season. This particular variety of carrot is of special value to canners because it is of uniform color throughout and has a shape which makes it easy to process. The price specified in the contract ranged from $23 to $30 per ton according to the time of delivery. The Wentzes harvested approximately 100 tons of carrots, but by early January, 1948, the contemplated time of delivery,[19] the market price had risen to over $90 per ton and Chantenay red-cored carrots were virtually unobtainable. The Wentzes told a Campbell representative that they would not deliver at the contract price. Instead, they sold 62 tons of the carrots to a neighboring farmer named Lojeski who in turn resold about 58 tons on the open market, approximately half to Campbell and the balance to other purchasers. Since the market had become tight, Campbell suspected that Lojeski was selling "contract carrots." The company immediately instituted suit against him and the Wentz brothers to enjoin further sale of the contract carrots to others and to compel specific performance of the contract. The trial court denied a motion for a preliminary injunction on the grounds that Campbell failed to establish that the carrots were "unique goods" or that this particular variety of carrot was indispensable to the continuation of its business.[20] The Third Circuit upheld the result but on different grounds.[21] It felt that the contract, a form "quite obviously drawn by skillful draftsmen with the buyer's interest in mind," was "too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[22]

The court admitted that some of the contract stipulations were not unreasonable when properly interpreted. For instance, although Campbell was made the sole judge of conformance with specifications, there was no doubt that it would be held liable if it refused carrots which were up to the required standard.[23] Nevertheless, the court felt that the general tenor of the contract was one-sided, as evidenced by provisions such as these: the carrots were to have the stalks cut off and be in clean, sanitary bags approved by Campbell; Campbell was allowed to refuse carrots in excess of twelve tons to the acre; the farmer covenanted not to sell carrots to anyone else except for the carrots

19. There was no contention that this was not a fair price at the time the contract was made. The price in canning contracts is customarily set on an open market and not by the large canners alone. Communication to the YALE LAW JOURNAL from David Rowntree, Manager, Genessee-Orleans Vegetable Growers Co-operative, dated March 30, 1949.

20. Campbell Soup Co. v. Wentz, 75 F. Supp. 952 (E.D. Pa. 1948).

21. To prevent the issue of specific performance from becoming moot before an appeal could be taken, the parties agreed that Campbell should receive all the carrots held by the defendants. In return, Campbell paid a stipulated market price of $90 per ton, $30 to defendant Wentz and the balance into the registry of the district court pending the outcome of the appeal. 172 F.2d 80, 81 n. 1 (3d Cir. 1949).

22. *Id.* at 83.

23. *Ibid.* The court analogized this provision to a promise to perform to the satisfaction of another, citing Griffin Mfg. Co. v. Boom Boiler & Welding Co., 90 F.2d 209 (6th Cir. 1937), *cert. denied,* 302 U.S. 741 (1937); Lord Co. v. Industrial Dyeing & Finishing Works, 252 Pa. 421, 97 Atl. 573 (1916).

rejected by Campbell; he also covenanted that he would not permit anyone else to grow carrots on his land; in case of breach, Campbell was to be entitled to liquidated damages fixed as $50 per acre—there was no provision for liquidated damages in the event of breach by Campbell.[24]

In addition, there was one provision in the contract which the court asserted went "too far." This relieved Campbell of the obligation to buy any carrots which it was unable to receive or handle because of any labor disturbance or "because of any circumstance beyond the control of Campbell."[25] Presumably this would have allowed Campbell to refuse carrots if there was a decline in the demand for its soups and a resulting production curtailment.[26] The farmer's principal motive in entering this contract was security against a price drop,[27] but while the contract provided a good hedge for Campbell, the farmer was left open to the very danger against which he sought to protect himself.[28]

The court, however, took pains to emphasize that Campbell's contract was not "illegal."[29] Thus it undoubtedly meant to leave the way open for Campbell to sue the Wentzes for damages for breach of contract. But Campbell will probably find this alternative highly unsatisfactory. In this particular contract, the liquidated damages provision might backfire on Campbell by limiting the measure of damages to $50 per acre or a total of $750,[30] whereas the damage

24. Although canning contract terms vary considerably with the product involved, the studies of pea, beet, corn, and bean contracts made in Wisconsin illustrate that the Campbell contract, taken as a whole, was no more severe than most others. See Kross and Black & Froker, *supra* note 17.

25. Compare the clause in many pea contracts which empowers the canner to alter the purpose of the contract radically by refusing to take the green crop and insisting that the grower deliver instead a fully ripened, dry crop at a greatly reduced price. Black & Froker, *supra* note 17, at 27.

26. The organization of the canning industry makes a production curtailment a real threat. "The vegetable canning industry appears to offer an excellent illustration of the relationship between the nature of costs and stability of output. Plant and equipment overhead represents a comparatively small part of the canner's cost. His main items of expense are wages, cans, and raw materials, all of which are variable. This being the case, he is almost certain to respond to falling prices with a sharp curtailment of output—and this will be true under conditions of competition as well as under monopoly." Hoffman, Large Scale Organization in the Food Industries 118-9 (TNEC Monograph 35, 1940).

27. The defendants made an effort at the hearing to show that the farmer was coerced by Campbell to enter into carrot contracts. But the district court judge was of the opinion that "the farmers in good faith thought that . . . if we can get a good honest contract here to purchase our products . . . we will feel a whole lot more secure. . . ." Appendix to Appellant's Brief, p. 111a, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1949).

28. In most cases, curtailment of production by Campbell would stem from a declining demand and lower prices for food products in general. Driven to the open market, the farmer would have to take the burden of the price drop.

29. 172 F.2d 80, 83 (3d Cir. 1949).

30. "If a provision is construed to be one for liquidated damages, the amount named forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount. No other or greater damages can be awarded, even though the actual

actually suffered, judged by the difference between the market price and the contract price, approximated $6,000. Viewed in a larger context, the decision is even more detrimental. As long as Campbell maintains its present contract, it will not be able to use the judicial weapons of injunction and specific performance to police the many contracts it enters into with farmers. It will have no means of forestalling a farmer's revolt; the only recourse will be a suit for damages against each farmer who breaches, a remedy markedly inadequate, even in the absence of a liquidated damages provision. Since time is of the essence due to the perishable nature of the subject matter, it may be impossible to obtain a crop elsewhere at a reasonable price or within a reasonable market area.[31] And although it may be entitled to consequential damages resulting from an inability to fulfill its sales contracts,[32] the problem of proof will be exceedingly difficult. Moreover, if the consequential damages involved are large, as they are quite likely to be in the case of an organization as big as Campbell's, the likelihood is that the farmer will be judgment proof.[33]

But the decision, while clearly a setback for Campbell, does not offer farmers the blanket invitation to breach which might be inferred from the lower court's view that these carrots, "judged by objective standards," were not unique goods.[34] Such a narrow view of equitable relief would seem to preclude specific performance of any farmer-grower contract, regardless of the fairness of its terms. But the circuit court preferred the view that the test for specific performance "was not objective"; it was enough here that the canner needed these goods to maintain the uniform appearance of its product. This ruling, in effect, admonished farmers that they will be held to any reasonable contracts they make, and threw a strong hint to canners that if they reform their contracts so as to give the farmer a fair deal, they may in the future turn to the courts for specific performance.

The *Campbell* case, therefore, illustrates one of the ways in which courts

---

loss may be greater or less." Grande v. Eagle Brewing Co., 44 R.I. 424, 427, 117 Atl. 640, 642 (1922), citing 8 R.C.L. § 127. And see 15 AM. JUR., *Damages*, § 264.

31. Most canning contracts call for delivery by the farmer of the crop to the canner's factory. Any but large canners probably lack the field purchasing agents necessary to buy crops in other localities. *See* Curtice Brothers' Co. v. Catts, 72 N.J.Eq. 831, 833, 66 Atl. 935, 936 (1907).

32. 5 WILLISTON, CONTRACTS § 1347 (rev. ed. 1937).

33. Furthermore, if the consequential damages are disproportionately large in view of the profit to be made by the breaching party on the transaction, they will often be disallowed by the court. Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 79 S.W. 1052 (1904) (plaintiff denied recovery of consequential damages amounting to over $5,000 due to delay in repairs of machinery, where the repairer anticipated a profit of only $100-$200); Horne v. Midland Ry. [1873] L.R. 8 C.P. 131. See McCormick, *Damages for Breach of Contract*, 19 MINN. L. REV. 497, 507-11 (1935).

But see UNIFORM REVISED SALES ACT § 116(2)(a) which would allow the buyer consequential damages for any loss resulting from general or particular requirements and needs of which the seller at the time of contracting has reason to know.

34. 172 F.2d 80, 83 (3d Cir. 1949). See further 5 WILLISTON, CONTRACTS § 1419 (rev. ed. 1937).

influence the terms of business contracts. There are definite limitations, however, on how far the judicial process can go in correcting the abuses arising from mass standardized contracts.[35] Courts lack the business experience properly to reform these contracts as a whole. Moreover, the technique of interpretation and the doctrines of mutuality and consideration to which judges must resort in the endeavor to attain an equitable result in the individual case, are often clumsy instruments for implementing public policy.[36]

In the final analysis, the solution to the problem of eliminating the oppressive aspects of mass standardized contracts lies in curtailing the power of the stronger bargaining party at the time of the contract's formation. In some instances, principally in the field of fire insurance, legislatures have interceded and written the contract for the parties.[37] But in the farmer-canner situation, since a smaller group of people is affected by the contracts, it might prove difficult to goad a legislature into action.[38] And since statutory regulation is relatively inflexible, it is not well suited to handle the many varied situations

35. "Attempts to revise the more basic unequal distribution of coercive power among individuals which is registered in normal market prices themselves, would require remedies which courts alone would be incapable of furnishing, and inquiries for which they are not fitted." Hale, *Bargaining, Duress, and Economic Liberty*, 43 COL. L. REV. 603, 625 (1943).

36. The proposed Uniform Revised Sales Act should stock the court's arsenal with several effective weapons. In the first place, the Act consistently distinguishes between the merchant (or professional) and those who have no special knowledge of commercial usage. In the farmer-canner situation, the small farmer would probably be considered a merchant with respect to such sections as those relating to warranty of merchantability (URSA § 38) since he should have sufficient knowledge and experience to pack and label his goods properly. But with respect to other provisions of the Act, when the practice in question goes beyond his limited experience, he will not be held to the stringent standards required of merchants.

Of particular importance is URSA § 23, which would allow a court to refuse to enforce a contract which it finds unconscionable or to strike any unconscionable clause and enforce the rest of the contract. Furthermore, the court would be permitted to substitute for any stricken clause such provision as would be implied under the Act if that clause never existed. For example, if the court found that the agreement was too harsh in respect to the time for delivery, a "reasonable time" for such performance would be substituted.

37. See, *e.g.*, N.Y. INS. LAW § 168. The New York standard fire insurance form has been adopted by forty-one states. PATTERSON, CASES ON INSURANCE 768 (1947).

38. This is not to deny the proven effectiveness of farm groups as lobbyists. For succinct descriptions of farm organizations and their power, particularly on the national scene, see Griswold, FARMING AND DEMOCRACY 186 *et seq.* (1948); Wing, *Trends in National Farm Organizations*, U.S. DEPT. OF AG. YEARBOOK 941 (1940); McCune, THE FARM BLOC (1943).

Wisconsin is one of the few states which has any statutory regulations of grower-canner business relations. It requires the canner to furnish a financial statement to the Department of Agriculture, and if it is considered unsatisfactory, the canner can be required to provide a surety bond of sufficient size to insure the fulfillment of his contracts with farmers. As an alternative to posting a bond, he may file with the Department an agreement providing for the setting aside of a certain percentage of the processed produce in trust for the farmers. WIS. STAT. § 100.03 (1947).

which occur within the trade.[39] Two developments, however, offer promise that the position of farmers and canners may eventually become equated. First is the growth of farmer cooperatives. Implemented by the farmers' collective strength, these groups have been successful in various parts of the country in bargaining on the terms of contracts for such commodities as peas, beans and peaches.[40] Moreover, in *Mandeville Island Farms v. American Crystal Sugar Co.*[41] the Supreme Court opened the way for another means of protecting the farmer—Sherman Act prosecutions of large produce buyers who take advantage of market control to fix contract prices and contract terms.[42]

These developments have helped to equalize bargaining power in contract negotiations. But where litigation develops as a result of a contract which clearly reflects the superior strength of one of the parties, courts must continue to play an important role if the weaker side is to be protected. The *Campbell* case is a refreshing departure from the more usual judicial technique of misconstruing the plain words of the contract to reach a desired result.[43]

39. Note the following *caveat* by Prausnitz: "[Legislation] has a serious disadvantage. It does away with the flexibility without which only very few trades can do. It enlarges the businessman's risk and does not allow him to take measures against its increase, measures which only he can devise and which must be applied rapidly. Legislative compulsion works best where a trade has grown into a quasi-governmental function, as, *e.g.*, insurance or traffic; it is almost impossible in all other branches." PRAUSNITZ, *op. cit. supra* note 1, at 145.

40. REPORT OF THE FEDERAL TRADE COMMISSION ON AGRICULTURAL INCOME INQUIRY, PART II, 889 (1937). See SHEPHERD, *op. cit. supra* note 17, at 356 *et seq.*; SHEPHERD, AGRICULTURAL PRICE CONTROL 236 *et seq.* (1945).

41. 334 U.S. 219 (1948).

42. In the *Mandeville* case the farmer was presented with a standardized contract giving the processor rights of supervision over planting and growing and the right to reject beets if they were "not suitable in [the refiner's] judgment for the manufacture of sugar." *Id.* at 222–3. There were only three sugar refiners in the area and the last vestige of price competition in the purchase of beets was eliminated when they began computing price on the basis of the average net returns of all three, instead of the separate net returns. *Id.* at 223. The court found that the "farmers' only alternative to dealing with one of the three refiners [was] to stop growing beets." *Id.* at 240. Following the doctrine of Wickard v. Filburn, 317 U.S. 111 (1942), the court held that even though these transactions were intrastate, they affected interstate commerce and were subject to federal laws. The broad implications of this and other recent anti-trust decisions are that concentrations of power which create leverage on either the buying or selling side of the market violate Section 2 of the Sherman Act. *See* American Tobacco Co. v. United States, 328 U.S. 781, 800–1 (1946) (illegal buying power in the purchase of tobacco leaf); see also Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745 (1949).

43. In this respect the decision is paralleled by the concurring opinion of Judge Clark in Gaunt v. John Hancock Mutual Life Ins. Co., 160 F.2d 599, 603 (2d Cir. 1947). "I agree that the course of negotiations required and controlled by the insurance company was 'unpardonable,' and am willing to concur in the decision for that reason." (Applicant for life insurance had indicated that he wished policy to take effect upon successful completion of "Part B," a medical examination. He passed the exam and paid the first