

8-2015

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In and Out—Contract Doctrines in Action

DANIELLE KIE HART*

This Article was written to test a hypothesis, namely, that it is easy to get into a contract but very difficult to get out of one. After reviewing case law from the Seventh and Ninth Circuits, contract law in action suggests that reality may be slightly different from theory. That is, the data from the cases show that it may not be so easy to get into a contract in practice, but it is extremely difficult to get out of one. Pacta sunt servanda seems to be alive and well in twenty-first century contract law. Perhaps the more significant finding from the cases, however, is that the party with more bargaining power tends to get the outcome that it wants in a given case, regardless of its preferred outcome. The implications of this finding are unsettling to say the least, in large part because it is so difficult to get out of a contract once it is formed. More specifically, misuse of unequal bargaining power by the stronger party during formation of the contract will likely go unchecked, the weaker party will be locked into whatever bargain is made, and the stronger party will get to keep even “ill-gotten gains,” so to speak, because the contract and all of its terms (both reasonable and unreasonable) will be binding. Any solution to the problems confronting contract law, therefore, will have to address bargaining power directly and effectively, which is by no means an easy task as the Home Affordable Mortgage Program reveals. Nevertheless, this task is one worth undertaking given that any discussion of contract law is, at least in part, also a discussion of contract law’s place within the American legal system and that system’s role in helping us to live up to our individual and collective aspirations.

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INTRODUCTION

It is very easy to enter into a contract but extremely difficult to get out of one. I have said as much in several different places.¹ If asked prior to researching and writing this paper, I would have said that this *easy in/difficult out* structure of contract law was an established part of the contract law canon. After searching for some time, however, I discovered that no one besides me has actually come out and made this claim explicitly. I primarily blame Charles Knapp for this omission, because so much of his work has informed mine.

Charles Knapp is a professor of contract law,² which means that he teaches, writes, and thinks about the law of contracts; and he has devoted himself to this role for the past fifty years. Countless students have passed through Professor Knapp's classroom and he has produced a prodigious as well as influential body of scholarship. Knapp's work sometimes focuses on specific doctrines, like unconscionability³ and promissory estoppel.⁴ But in other instances, he has turned his attention to understanding and analyzing the evolution of contract law and its implications for modern society.⁵ Regardless of the content, his work is always firmly grounded in contract law doctrines and case law.⁶ Armed with this knowledge of what the courts are *actually* doing, Knapp has

1. See, e.g., Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 202–16 (2009) [hereinafter Hart, *Formation*]; Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 9–21 (2011) [hereinafter Hart, *Reality*].

2. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 761 (2002).

3. See, e.g., Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 610 (2009).

4. See, e.g., Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1192 (1998).

5. See, e.g., Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 97 (2006–2007); Knapp, *supra* note 2, at 762–64.

6. See, e.g., Knapp, *supra* note 4, at 1193–1203; Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L. J. 553, 555–61 (2012).

consistently, and often presciently, identified troubling trends and problematic issues that call for careful attention, like the ever-increasing deference courts give to the drafters of contracts and the vanishing requirement of mutual assent.⁷ Through it all, his concern for the effect that contract law in action has on the weaker contracting party is evident and purposeful.⁸

If imitation is the best form of flattery, then this Article should do the trick because in this piece I plan to shamelessly copy Knapp, both in terms of substance and format. In terms of substance, I, like him, will evaluate the state of contract law, concentrating here on contract law in the twenty-first century. In terms of format, I will use the Dickensian scheme from *A Christmas Carol*, which Knapp has employed so well in at least a couple of his articles.⁹

Thus, Part I will look at where contract law has been by examining Knapp's work, focusing particularly on his assertions that contract law defers too much to the document itself and to the drafters of contracts.¹⁰ He argues, in essence, that because contract law privileges written agreements, drafters of contracts can (and do) include a lot of one-sided terms into their contracts, and then end up getting to keep them because contract law makes those agreements binding.¹¹ Implicit in these assertions is the claim that contracts are very easy to get into but extremely difficult to get out of.

Part II will then analyze case law from trial and appellate courts in the states within the jurisdiction of the Seventh and Ninth Circuits to determine whether the *easy in/difficult out* claim is accurate. The data from the case law reveal two significant findings. First, the data indicate that part of the *easy in/difficult out* hypothesis may not be true. Specifically, it may not be so easy to get into a contract—a contract was *not* actually formed in more than half of the reviewed cases. That said, the other part of the hypothesis, namely, that, once in, it is extremely difficult to get out of a contract is solidly supported by the reviewed cases. The second significant finding from the data is that the party with more bargaining power generally gets the outcome that it wants in a given case, whether the preferred outcome is that a contract was formed or not formed, or a duty was discharged or not discharged. Home loan modifications are used as a specific and problematic example of this phenomenon. In light of the data collected in Part II, Part III will examine the future of contract law by considering the implications of a

7. See, e.g., Knapp, *supra* note 5, at 102–04, 112–14; Knapp, *supra* note 2, at 770–76.

8. See Knapp, *supra* note 5, at 119–35 (arguing that contract law for individual contracts is inadequate and making specific suggestions to remedy it).

9. See, e.g., Knapp, *supra* note 2, at 790; Charles L. Knapp, *The Promise of the Future—And Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 951–52 (1984).

10. See, e.g., Knapp, *supra* note 5, at 102–04, 112–14.

11. See, e.g., *id.* at 102–04, 112–14.

contracting reality that may privilege parties with more bargaining power and which definitely locks people into their contracts.

I. EASY IN/DIFFICULT OUT—THE THEORY

To be fair, Knapp does not come right out and say that it is easy to get into a contract but very hard to get out of one—though he has come close. For example, in an early article, he discussed a trend in the cases that suggested a greater willingness by courts to impose contractual liability, even where offer and acceptance were not easily identifiable, by relying instead on the parties' "intention to be bound."¹² He has also noted on different occasions that there is a distinct "judicial disinclination to allow equitable defenses,"¹³ like unconscionability,¹⁴ which of course means that it is much harder for a party who no longer wants to perform to avoid having to do so.

By and large, this *easy in/difficult out* claim that I take from his work is more implicit than explicit in Knapp's writing. Knapp has consistently questioned, for example, whether the doctrine of mutual assent is still viable in contract law.¹⁵ In fact, he has argued that mutual assent is either non-existent, as in the case of blanket unilateral contract modifications,¹⁶ or simply meaningless, as in the case of "rolling contracts."¹⁷ Since mutual assent is still recognized as one of two elements necessary to form a valid contract,¹⁸ it necessarily follows that making mutual assent easier to establish makes it easier to get into a contract.

Knapp's concerns about mutual assent are brought into particularly sharp focus in the context of his discussions of adhesion contracts in both actual and virtual reality.¹⁹ Briefly, an adhesion contract is a contract usually characterized by a standard form drafted by the party with more bargaining power (the stronger party) and presented to the other (weaker) party on a take-it-or-leave-it basis, with certain exceptions for things like price, quantity, and time and place of delivery.²⁰ According to Knapp, adhesion contracts epitomize contract law's deference to both the contract document itself and the drafters of such contracts.²¹

Given this combination of factors—a standard form drafted by the stronger contracting party on a take-it-or-leave-it basis—two things

12. Knapp, *supra* note 9, at 938.

13. Knapp, *supra* note 2, at 767.

14. See Knapp, *supra* note 5, at 102.

15. Knapp, *supra* note 6, at 561–62.

16. Knapp, *supra* note 5, at 114.

17. *Id.* at 112. "Rolling contracts" are contracting situations in which buyers of goods or services have reason to know that additional terms will be forthcoming.

18. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

19. See, e.g., Knapp, *supra* note 5, at 111–13; Knapp, *supra* note 2, at 769–70, 775.

20. Knapp, *supra* note 2, at 769–70.

21. See Knapp, *supra* note 5, at 100–04; Knapp, *supra* note 2, at 767, 775–76.

happen. First, the weaker (or adhering) party typically has no real say *or* choice with respect to the terms that end up in the contract.²² Second, and as a direct result of the first point, the drafters of these contracts include more and more one-sided terms in the agreement, that is, terms that favor them in any contract dispute whether at the negotiation or litigation stage. Knapp singles out mandatory arbitration, choice of forum, and choice of law provisions as particularly worrisome contract terms.²³ Arbitration provisions remove the contract case out of court altogether.²⁴ But should the case manage to get into court, choice of forum clauses force potential litigants to litigate the case in forums usually inconvenient to them, while choice of law terms generally ensure that the law used to decide the case will be more favorable to the drafting party.²⁵

To further complicate matters, Knapp reminds us that under existing contract law, the drafters of these adhesive documents not only get to include the terms that they want in the agreements, they generally get to keep them because of the deference contract law gives to the document. Knapp focuses here on doctrines, rules, and clauses like the “duty to read,”²⁶ the “plain meaning rule” to contract interpretation,²⁷ the “four corners” approach to the parol evidence rule,²⁸ and no oral modification clauses.²⁹

Together all of these legal devices—the evisceration of the element of mutual assent, the deference that contract law pays to both the drafters of contracts and the documents themselves, and the judicial disinclination to permit equitable defenses—essentially ensure that anyone who signs (or otherwise assents to) a written contract will be bound by that contract

22. Knapp, *supra* note 2, at 770.

23. Knapp, *supra* note 5, at 116–18.

24. Knapp, *supra* note 2, at 775; Knapp, *supra* note 5, at 117–18.

25. Knapp, *supra* note 2, at 775; Knapp, *supra* note 5, at 116–17.

26. *See, e.g.,* Rossi v. Douglas, 100 A.2d 3, 7 (1953) (stating “it is well established that . . . one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature”). The duty to read applies even in the absence of a signature. *See* JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.41, at 342 (6th ed. 2009); Knapp, *supra* note 2, at 767; Knapp, *supra* note 5, at 102. For a more recent endorsement of the duty to read, see Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1060 (S.D. Ind. 2000).

27. *See* E. ALLAN FARNSWORTH, CONTRACTS § 7.12, at 476 (3d ed. 1999) (“The essence of a plain meaning rule is that there are some instances in which the meaning of language, when taken in context, is so clear that evidence of prior negotiations cannot be used in its interpretation.”); *see also* Knapp, *supra* note 2, at 767.

28. The four corners rule is one under which a court looks only at the writing itself to determine its level of integration. FARNSWORTH, *supra* note 27, at 477; JEFFREY FERRIELL & MICHAEL NAVIN UNDERSTANDING CONTRACTS § 6.05[B][3], at 346 (2014). *See* Knapp, *supra* note 2, at 767.

29. A “no oral modification clause” is a clause included in a contract for the specific purpose of precluding oral modifications to the agreement. FARNSWORTH, *supra* note 27, at 449. *See* Knapp, *supra* note 5, at 101.

and all of its terms.³⁰ In short, it is very easy to get into a contract but very hard to get out of one.

Knapp, of course, is not alone in implying that the *easy in/difficult out* paradigm exists in contract law. Professor Nancy Kim makes very similar arguments in the context of online contracts like browse-wrap and click-wrap agreements.³¹ She argues, for example, that because online contracts are adhesive and digital in form, it is almost costless to the drafters to include more and more one-sided terms in the agreements.³² In fact, they consistently do so because the practice imposes virtually no reputational costs.³³ Kim also argues that the drafters of online contracts not only get to include the terms that they want in these contracts, they also get to keep them.³⁴ This is primarily because the version of blanket assent that courts employ with online contracts satisfies the mutual assent element of contract formation.³⁵ Courts have thus used online blanket assent to conclude that the non-drafting party has assented to *all* of the terms of the online contract *and* to uphold the validity of these contracts.³⁶

Knapp and Kim's approaches to contract formation are consistent with the Restatement (Second) of Contracts and Article 2 of the Uniform Commercial Code. According to the Restatement (Second) of Contracts, "[a] contract is a promise or a set of promises for the breach of which the law gives a remedy[.]"³⁷ In other words, a contract is a contract if the law says it is. And under both the Restatement and Article 2, forming a contract definitely looks easy. Both "Article 2 and the Restatement (Second) of Contracts recognize that a contract can be formed by words or conduct and even if the exact moment of mutual assent cannot be identified or is delayed, and the contract lacks material terms."³⁸

Finally, while there is not a lot of empirical work on the issue, the work that does exist supports the claim that it is very difficult to get out

30. Knapp, *supra* note 2, at 767; Knapp, *supra* note 5, at 102.

31. See NANCY S. KIM, WRAP CONTRACTS 39-43 (2013).

32. *Id.* at 58.

33. *Id.* at 51.

34. *Id.* at 61-62.

35. "Blanket assent" means that the party assenting to the online contract is presumed to have actually assented to all of the bargained-for terms in the contract and given her blanket assent to any terms that are not unreasonable or indecent. *Id.* at 62-63. The problem is that courts have held that "notice of notice," where the browsing party is simply shown a hyperlink that would take her to the terms of the contract if clicked on, is enough to signify consent. Therefore, a valid contract would be formed through the online version of blanket assent. *Id.* at 130, 134.

36. *Id.* at 35-43, 62-69.

37. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

38. Hart, *Formation*, *supra* note 1, at 203 (citations omitted).

of a contract.³⁹ Putting everything together therefore supports the supposition that it is easy to get into a contract but difficult to get out of one, at least in theory.

II. CONTRACT LAW IN PRACTICE—THE CASES

While there is clearly support for the *easy in/difficult out* theory, it remains an open question whether the theory holds true in practice. This Part of the Article, therefore, tests this theory in contract law cases from the Seventh and Ninth Circuits. Part A sets forth the methods used to collect the cases for the Article. Part B then lays out the data in a series of tables and reports the results. The data reveal that: (1) it may not be as easy to get into a contract as the theory might otherwise suggest; (2) it is, however, extremely difficult to get out of a contract; and (3) the party with more bargaining power generally gets the outcome that it wants regardless of what might be its preferred outcome in a given case (for example, whether a contract was formed, or whether a duty was discharged).

Part C uses home loan modifications to explore the phenomenon suggested by the cases, namely, that contract law may privilege the party with more bargaining power. As it turns out, the stronger party (here the banks), did get the outcome that they wanted more often than not, for example, no home loan modifications. This was the case both before and after Congress enacted the Home Affordable Mortgage Program (“HAMP”) in 2009. One reason for this result seems to be a rigid adherence by courts, even in the face of contrary regulations, to upholding freedom of contract. Part D concludes by arguing that freedom of contract is a myth, one that has potentially devastating consequences for weaker contracting parties.

A. METHODS

The *easy in* part of the theory that I ascribe primarily to Knapp centers on Knapp’s critique of mutual assent. Though there is some dispute,⁴⁰ mutual assent is still *ordinarily* formed via offer and

39. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097 (2006) (“Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found.”); Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463–64 (2005) (“[I]n only nine of the eighty-eight [duress] cases [examined] did the court decide the matter in favor of the duress claim”). Of those nine cases, an appellate court affirmed a lower court’s finding of duress in only two cases. *Id.*

40. See Shawn J. Bayern, *Offer and Acceptance in Modern Contract Law: A Needless Concept*, 103 CALIF. L. REV. 67, 68 (2015) (criticizing the offer-and-acceptance paradigm in modern contracting practice).

acceptance.⁴¹ In addition, the judicial disinclination to allow people to get out of their contracts is premised on whether defenses, equitable or otherwise, are successful. To test the *easy in/difficult out* theory, therefore, the case law research for this Article focuses on specific contract law doctrines.

A total of 189 trial and appellate cases from the federal and state courts within the jurisdiction of the Seventh and Ninth Circuits were collected for this Article.⁴² The doctrines surveyed include: offer, acceptance, modification, duress, and impracticability of performance.⁴³ The research was conducted in the following four steps:

(1) *Selecting the Jurisdictions.* The Ninth Circuit was selected because it is the largest of the thirteen courts of appeal and therefore likely to generate more contracts cases than other circuits. It also has a reputation for being consumer friendly.⁴⁴ The Seventh Circuit was selected primarily because of its association with the Law and Economics approach and its reputation for being less consumer friendly.⁴⁵

(2) *The Searches.* Each search was conducted on Lexis using the timeline of January 1, 2000 through March 1, 2014 applying the jurisdictional filters and search terms specified below:

41. See RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (1981); see also CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL § 1.2, at 4 (6th ed. 2006) (“Realizing that one may not be able to find a specific offer and acceptance in every contract relationship that comes into existence, it is nonetheless easier to approach the concept of contract formation by focusing upon the basic elements involved in the offer and acceptance interchange.”).

42. See Appendix 1 for a complete list of the cases.

43. Offer and acceptance were selected because together they form mutual assent. Mutual assent is one of two elements necessary to form a valid contract. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981). Offer and acceptance were therefore selected because they specifically focus on contract formation. Duress and impracticability of performance were selected because they are both contract defenses that would justify nonperformance of a contract. That is, either doctrine would enable a party to get out of a contract. Duress was selected because it is triggered by bargaining misbehavior that resulted in contract formation. Impracticability of performance, in contrast, is triggered by changed circumstances occurring after contract formation that adversely affect one party’s ability to perform the contract. Modification was selected because it straddles formation and performance—it is both an out and an in. More specifically, a modification permits a party to get out of performing a contract duty by substituting a modified obligation for the original duty. But a modification is itself a contract that generally must satisfy the contract formation requirements and, therefore, presents a separate opportunity to form a contract. Thus, to get out of a contract duty one must first get into a new contract.

44. See, e.g., Mark Walsh, *A Sixth Sense: The 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, 98 A.B.A. J. 15, 15 (2012) (noting that “Conservatives decry the 9th Circuit’s perceived liberal bent”); see also Josh Schwartz, *‘Liberal’ Reputation Precedes 9th Circuit Court*, N.Y. TIMES (Apr. 24, 2010), <http://www.nytimes.com/2010/04/25/us/25sf ninth.html>.

45. Cf. Ian Millhiser, *Marriage Equality Supporters Just Won the Lottery in A Federal Appeals Court*, THINKPROGRESS.ORG (Aug. 26, 2014, 9:43 AM), <http://thinkprogress.org/justice/2014/08/26/3475687/marriage-equality-supporters-just-won-the-lottery-in-a-federal-appeal-court/> (“The United States Court of Appeals for the Seventh Circuit is a very conservative court.”).

(a) *Jurisdictional Filters.*

- (i) Seventh Circuit—Jurisdiction: Seventh Circuit, Illinois, Indiana, Wisconsin.
- (ii) Ninth Circuit—Jurisdiction: Ninth Circuit, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.

(b) *Search Terms.*

- (i) Offer: (“an offer” near/2 exist!) or (“constitute an offer”);
- (ii) Acceptance: (unequiv! near/3 accept!) or (valid near/3 accept!);⁴⁶
- (iii) Modification: contract and modif! /s valid! or modif! /s form!;⁴⁷
- (iv) Duress: duress /p contract and avoid! /p enforce!; and
- (v) Impracticability of Performance: (impract! near/25 perform!) and (perform! near /25 contract).

(3) *Screening the Cases.* The searches pulled up a lot of cases—1076 for the Seventh Circuit and 3088 for the Ninth Circuit. Each case was screened to make sure that it was on point, meaning, that the case actually addressed the contract law doctrine being surveyed and decided some part of the case based on that doctrine. Only cases that were on point were selected for substantive review.

46. By confining the key words to “offer” and “acceptance” in the searches conducted for this article, it is entirely possible that the searches missed many paradigmatic *easy in* cases where the issue is not whether an offer was made or accepted but whether a party manifested assent. Assent in the context of a browse-wrap contract would be a prototypical example of this kind of case. *See generally* KIM, *supra* note 31, at 34–43, 62–69, 130, 134. I made the decision to focus on offer and acceptance for two reasons. First, I wanted to study specific contract law doctrines to see how the courts are using them. Second, I wanted to test whether the *easy in* theory could be established outside of the prototypical cases that involve questions of mutual assent more generally.

47. The original modification searches yielded a large number of cases. As a result, I used a random number generator to generate 100 random numbers from within the original total yield, i.e., between 1 and 756 (for the Seventh Circuit) and between 1 and 2181 (for the Ninth Circuit). I then put the random numbers generated into chronological order, sorted the cases on Lexis from oldest to newest, and screened the cases in that order. The random numbers generated for the Seventh Circuit in chronological order are: 2, 9, 24, 26, 30, 35, 50, 54, 70, 80, 87, 93, 98, 101, 114, 121, 125, 140, 145, 146, 150, 152, 167, 169, 174, 181, 184, 188, 193, 196, 210, 217, 229, 233, 237, 238, 261, 273, 294, 301, 307, 309, 313, 315, 316, 325, 332, 337, 346, 352, 376, 390, 391, 394, 401, 403, 415, 417, 419, 449, 451, 458, 465, 482, 487, 491, 495, 502, 508, 523, 529, 531, 556, 561, 565, 566, 567, 570, 588, 602, 605, 608, 624, 635, 636, 642, 657, 666, 676, 686, 687, 702, 703, 708, 721, 731, 737, 741, 746, 755. The random numbers generated for the Ninth Circuit in chronological order are: 2, 8, 17, 32, 58, 68, 70, 75, 84, 101, 154, 169, 180, 189, 196, 207, 222, 259, 269, 282, 301, 320, 322, 340, 367, 399, 468, 499, 531, 581, 620, 623, 631, 683, 719, 724, 752, 771, 786, 800, 864, 866, 909, 912, 921, 930, 937, 969, 1063, 1067, 1069, 1086, 1117, 1154, 1155, 1162, 1169, 1200, 1215, 1229, 1256, 1260, 1287, 1302, 1304, 1318, 1322, 1372, 1426, 1462, 1483, 1502, 1548, 1562, 1574, 1608, 1699, 1740, 1762, 1831, 1853, 1865, 1872, 1874, 1926, 1927, 1980, 1999, 2033, 2049, 2052, 2067, 2078, 2087, 2104, 2122, 2157, 2168, 2169, 2173. Screening in this fashion only yielded 3 cases for the Seventh Circuit and 5 cases for the Ninth Circuit. I therefore re-sorted the cases on Lexis based on relevance and kept the first 22 and 20 cases, respectively, that addressed/discussed modification in detail for a total of 25 modification cases in each circuit. Substantive review of the cases then yielded the numbers listed in Appendix I. The random number generator I used is here: <http://www.randomnumberpicker.com/advanced-random-number-generator>.

(4) *Substantive Review of the Cases.* Each of the selected cases was read to ensure, first, that it did in fact address and decide the contract law doctrine at issue.⁴⁸ On occasion, the substantive review of a case revealed that the case decided an issue involving more than one doctrine, for example, both offer and acceptance. In this situation, the case was selected for both doctrines. It also happened on occasion that a case being reviewed for one doctrine, for example offer, actually focused more on another doctrine, like acceptance. In these circumstances, the case was added to the selected cases for the other doctrine notwithstanding that the case did not appear in the search conducted for that doctrine.

Therefore, in the end the case screening and review process captured a total of 87 cases for the Seventh Circuit and 102 cases for the Ninth Circuit.⁴⁹ Table 1 provides a summary of the captured cases in each circuit by substantive category.

TABLE 1: SUMMARY OF CAPTURED CASES BY SUBSTANTIVE CATEGORY⁵⁰

Claim Category	7th Circuit	9th Circuit
Real Property	21	44
Employment	10	12
Sale of Goods	9	8
Insurance	7	3
Construction	3	1
Credit Cards	1	2
Torts/Personal Injury	0	6
Software/IP	0	5
Family	2	0
Arbitration	1	0
Miscellaneous Services	14	11
Other	19	10
Totals	87	102

To be clear, the goal of this project was not to collect *all of* the cases in the Seventh and Ninth Circuits associated with the doctrines being surveyed. Rather, the goal of the project was to define a large enough sample in which all of the captured cases are on point (i.e., they are cases that actually decide issues associated with the doctrines surveyed). Collectively, therefore, all of the cases included in this Article provide a

48. “Deciding” the contract law doctrine includes motions to dismiss and motions for summary judgment that were granted with no subsequent negative appellate history and/or affirmed on appeal. Though rare, cases that *decided* the contract law issue as a matter of law on a motion to dismiss or on summary judgment that was ultimately reversed were also included, as were cases that went to final judgment.

49. See Appendix 1 for a list of all the cases by circuits and doctrines.

50. See Appendix 2 for a list of all the cases in Table 1.

snapshot of how contract law doctrine is being decided and shaped in two different circuits in the twenty-first century.

Finally, all captured cases were mined for certain pieces of data, including, but not limited to: the subject matter of the case (i.e., real property, insurance, employment, etc.); the procedural posture (i.e., a motion for summary judgment, appeal from a final judgment, etc.); which party raised the doctrine and for what purpose (i.e., to rescind a contract, to discharge performance, establish a contract, etc.); and which party prevailed with respect to the doctrine (i.e., which party got the outcome it wanted in the case).

I also identified which party was stronger and which was weaker in terms of relative bargaining power. To make this assessment, I looked for conventional indicia of bargaining power.⁵¹ These include property ownership, whether one or both parties were represented by third parties, whether one or both parties were repeat players, which party drafted the contract, indications of financial stability or insecurity, technical or other expertise, and whether the parties were individuals or institutions (i.e., associations, unions, business entities, government entities, etc.).⁵² If it was not clear from the facts of the case which party had more bargaining power compared to the other, I did not assign a designation to the parties at all. The mined data will be referenced as needed in the discussion that follows.

B. *PACTA SUNT SERVANDA*⁵³

The data collected for this Article are summarized in the following series of tables. The first two tables focus explicitly on the data addressing the *easy in/difficult out* theory.

Table 2 aggregates the data for all of the contract formation cases, which includes offer, acceptance and modification, by circuit.⁵⁴ Table 2 reveals that the courts in the two circuits are split. The *easy in* part of the theory seems to be an accurate representation of what happens in the Seventh Circuit but not in the Ninth Circuit. Specifically, courts in the Seventh Circuit ruled that a contract *was formed* in fifty-eight percent of the cases and not formed in the other forty-two percent, whereas courts in the Ninth Circuit ruled that a contract *was formed* in only twenty-seven percent of the cases and *not formed* in the other seventy-three percent. When the data for both circuits are aggregated, however, the

51. See, e.g., Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Mo. L. REV. 493, 522–24 (2010).

52. *Id.*

53. This Latin phrase means “all promises must be kept.” JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 53[A], at 220 (5th ed. 2011).

54. See *supra* note 43. Because a modification is itself a new contract, meaning it generally has to satisfy the contract formation elements, this doctrine was “counted” in Table 2.

cases indicate that a contract *was formed* forty-three percent of the time but *not formed* fifty-six percent of the time.⁵⁵

The best that can be said about the *easy in* part of the theory, therefore, is that the data is inconclusive. The data do not clearly support a finding that it is particularly easy to get into a contract.

TABLE 2: EASY IN?⁵⁶

	7th Circuit Totals	7th Circuit Contract Formed	7th Circuit Contract Not Formed	9th Circuit Totals	9th Circuit Contract Formed	9th Circuit Contract Not Formed
Offer	14	9	5	15	2	13
Acceptance	29	16	13	24	11	13
Modification	22	13	9	23	4	19
Totals	65	39	26	62	17	45
		(60%)	(40%)		(27%)	(73%)

That said, the opposite appears to be true for the *difficult out* part of the *easy in/difficult out* theory. Table 3 aggregates the data for all of the contract defenses that enable a party to get out of a contract⁵⁷ by circuit. The data indicate that courts in both circuits do not let parties out of their contracts very often.

More specifically, duress and impracticability were *not* successful in getting the contracting party that raised the claim out of its contract duty in a single one of the captured cases in the Seventh Circuit. Parties fared much better in the modification context, with the courts finding that a modification was valid in fifty-nine percent of the cases (that is, the original contract duty was replaced by a modified duty).⁵⁸ All told, however, the courts in the Seventh Circuit did *not* let parties out of their contracts in seventy percent of the cases.⁵⁹

55. The percentage totals in the text were calculated by adding the cases in each circuit that resulted in contract formation, for example, and then dividing those totals by the total number of formation cases. The equation would thus look like this: (38 cases (7th Circuit) + 17 cases (9th Circuit)) ÷ 127 (the total number of formation cases in each circuit) = 43%. A similar equation was used to determine the percentage total for cases that resulted in no contract being formed.

56. See Appendix 3 for a list of all the cases in Table 2.

57. Those defenses are duress, impracticability, and modification. See *supra* note 43. Table 3 also includes modifications because, if a contract is modified, then the original contract duty is essentially discharged.

58. To calculate the percentage in the text, the number of cases in which a modification was found to exist (thereby discharging the original performance) was divided by the total number of modification cases in the Seventh Circuit. Thus the equation would be: 13 (cases where modification was found to exist) ÷ 22 (total modification cases) = 59%.

59. See *infra* Table 3.

Perhaps surprisingly, given its activist image,⁶⁰ the Ninth Circuit numbers paint a very similar picture. Duress and impracticability failed to get parties out of their contracts in ninety-four percent and seventy-five percent of the cases, respectively. And unlike the Seventh Circuit, parties in the Ninth Circuit were unsuccessful in modifying their contracts in eighty-three percent of the cases.⁶¹ Taken together, therefore, courts in the Ninth Circuit did *not* let parties out of their contracts in eighty-one percent of the cases.⁶²

When the data from both circuits are aggregated, the cases indicate that a party got out of its contract twenty-two percent of the time but was locked into its contract seventy-eight percent of the time.⁶³ It seems safe to say, therefore, that the data support the theory that it is very difficult to get out of a contract.

TABLE 3: DIFFICULT OUT⁶⁴

	7th Circuit Totals	7th Circuit Performance Discharged	7th Circuit Performance Not Discharged	9th Circuit Totals	9th Circuit Performance Discharged	9th Circuit Performance Not Discharged
Duress	10	0	10	16	1	15
Impracticability	12	0	12	24	6	18
Modification	22	13	9	23	4	19
Totals	44	13 (30%)	31 (70%)	63	11 (17%)	52 (83%)

In sum, the cases captured for this Article do not completely validate the *easy in/difficult out* theory. *Easy in* appears debatable; *difficult out* seems to be established. The equivocal nature of this finding could be a function of the sample size—a total of 189 cases were collected, but only from the federal and state courts within the jurisdiction of two of the thirteen federal circuit courts of appeals.

The finding could also be a function of the “type of case” captured for this Article, in the sense that the cases collected here were ones that were litigated in court (as opposed to being removed via an arbitration clause) with the opinions made available on Lexis. It seems clear that arbitration clauses pull a lot of cases out of court. More specifically,

60. See *supra* text accompanying note 44.

61. To calculate the percentage in the text, the number of cases in which a modification was *not* found to exist and the original performance thereby *not* discharged by the total number of modification cases in the Ninth Circuit. Thus the equation would be: 19 (cases where modification was found *not* to exist) ÷ 23 (total modification cases) = 83%.

62. See *infra* Table 3.

63. The percentage totals representing the averages in the text were calculated by adding the cases in each circuit that resulted in the contract not being discharged, for example, and then dividing those totals by the total number of contract defense cases. The equation would thus look like this: 31 cases (7th Cir.) + 52 cases (9th Cir.) ÷ 107 (the total number of contract defense cases in each Circuit) = 78%.

64. See Appendix 4 for a list of all the cases in Table 3.

unconscionability cases were collected for a different project. Those cases indicate all of the following: (1) between 2011 and 2014 (after *AT&T Mobility LLC v. Concepcion*⁶⁵ was decided), there were forty-one unconscionability cases litigated in the Ninth Circuit; (2) all but two of those cases involved the enforceability of arbitration clauses; and (3) of the thirty-nine arbitration clause cases, the courts in the Ninth Circuit enforced the arbitration clauses against an unconscionability challenge in twenty-eight (seventy-two percent) of those cases.⁶⁶ In addition, under arbitration's separability doctrine, challenges to the validity of the contract itself are also determined by the arbitrator.⁶⁷ This means that arbitration would keep many duress and impracticability cases, for example, from being litigated in court. There is simply no way of knowing what impact this siphoning off of contract law cases has on either the development of the common law of contract in general or the *easy in/difficult out* theory in particular.

The data could also reflect a contract theory different from the *easy in/difficult out* model suggested in Part I—one that posits instead that contracts should not be entered into lightly, but, once entered into, should be binding on the parties. This alternative theory is premised on the idea that the elements of contract formation in general, such as offer and acceptance, should serve cautionary and channeling functions that encourage contracting parties to deliberate before entering into a contract and signify in a legally recognizable way their intent to enter a contract that is legally binding.⁶⁸

Finally, the inconclusive nature of the data with respect to the *easy in* part of the *easy in/difficult out* theory may very well signal that *how* a contract is, or should be, formed in the twenty-first century is in flux.⁶⁹ But even with the inconclusive data and assuming that this last proposition is true, there is no denying that contracts are still being formed and that, once formed, parties are generally going to be held to their contracts. Thus, the time-honored principle of *pacta sunt servanda* seems to be alive and well.

65. 131 S. Ct. 1740 (2011).

66. See Appendix 5.

67. See generally *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (articulating the separability doctrine for the first time).

68. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941); see also Curtis Bridgeman, *Default Rules in Private and Public Law: Default Rules in Economic Relationships: Contract Law: Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 687 (2006); KIM, *supra* note 31.

69. See generally Bayern, *supra* note 40 (arguing that the antiquated concepts of offer and acceptance are just ill-suited to how contracts are or should be formed in the twenty-first century); see also KIM, *supra* note 31.

C. STRONGER VERSUS WEAKER PARTIES

The finding that parties will be bound to their contracts is consistent with other contract law studies.⁷⁰ But additional data from the captured cases add a potential twist to this story. Recall that all of the captured cases were mined for certain pieces of data including which party prevailed with respect to the doctrine (i.e., which party got the outcome it wanted in the case),⁷¹ and, where possible, which party was stronger than the other in terms of relative bargaining power.⁷² These additional data points are summarized for each circuit in Tables 4 and 5.

For example, the first line in Table 4 indicates that with respect to offers in the Seventh Circuit, the stronger party got the outcome that it wanted in seven of the fourteen offer cases, regardless of whether that outcome was for the court to find that an offer was made or not. In contrast, the weaker party only prevailed in three of the fourteen cases. No designation was made regarding the parties' relative bargaining power in the four remaining cases. Table 4 lays out the data in this pattern for each of the other four doctrines surveyed for this Article. The Table then aggregates the data by providing both the raw number totals for each party and the average number of times (represented by a percentage) each party got the outcome it wanted overall. Based on the data, the stronger party in the Seventh Circuit cases prevailed fifty percent of the time, whereas the weaker party only prevailed twenty-eight percent of the time.⁷³

Table 5 aggregates and lays out the data in identical fashion for the Ninth Circuit. The stronger party fared better in the Ninth Circuit than in the Seventh Circuit, prevailing fifty-nine percent of the time compared to the weaker party, which prevailed only twenty percent of the time.

70. See DiMatteo & Rich, *supra* note 39; Giesel, *supra* note 39.

71. Recall also that the cases selected for this article only include cases that "decided" the contract law doctrine at issue. "Deciding" the contract law doctrine thus includes motions to dismiss and motions for summary judgment that were granted with no subsequent negative appellate history and/or affirmed on appeal. Though rare, cases that *decided* the contract law issue as a matter of law on a motion to dismiss or on summary judgment that was ultimately reversed were also included as were cases that went to final judgment. The prevailing party, therefore, is literally the party who prevailed in court under the circumstances just described.

72. See *supra* Part II.A.

73. This value was calculated by: 7 offer cases + 13 acceptance cases + 11 modification cases + 8 duress cases + 5 impracticability cases = 44 ÷ 87 (total number of captured cases for the 7th Circuit) = 50%.

TABLE 4: PREVAILING PARTIES BY DOCTRINE—SEVENTH CIRCUIT⁷⁴

	Number of			
	Cases	Stronger Party	Weaker Party	Undesignated
Offer	14	7	3	4
Acceptance	29	13	10	6
Modification	22	11	7	4
Duress	10	8	1	1
Impracticability	12	5	3	4
Totals	87	44	24	19
		(50%)	(28%)	(22%)

TABLE 5: PREVAILING PARTIES BY DOCTRINE—NINTH CIRCUIT⁷⁵

	Number of			
	Cases	Stronger Party	Weaker Party	Undesignated
Offer	15	9	3	3
Acceptance	24	10	6	8
Modification	23	16	4	3
Duress	16	12	1	3
Impracticability	24	13	6	5
Totals	102	60	20	22
		(59%)	(20%)	(21%)

When all of the cases are combined (see Table 6 below), the stronger party prevailed fifty-five percent of the time, and the weaker party prevailed twenty-three percent of the time.⁷⁶ It was not possible to determine which party was stronger or weaker in terms of relative bargaining power in the remaining twenty-two percent of the cases. The data therefore suggest that the stronger contracting party tends to get the outcome that it wants most of the time, regardless of the doctrine at issue, and generally, the position it takes with respect to the doctrine.⁷⁷ In other words, the stronger party prevailed regardless if it wanted a contract to be formed or not, or whether it wanted a contract duty discharged or not. Home loan modifications are a particularly problematic example of this phenomenon and are analyzed in the next part.

74. See Appendix 6 for a list of all the cases in Table 4.

75. See Appendix 7 for a list of all the cases in Table 5.

76. See Appendices 6 & 7.

77. The exceptions would be duress and home loan modifications. The stronger party rarely, if ever, raised duress in the cases captured for this article. In fact, this only occurred once in a Seventh Circuit duress case. See *Putz v. Allie*, 785 N.E.2d 577, 579 (Ind. Ct. App. 2003) (plaintiff was designated the stronger contracting party in a family cohabitation dissolution case because he was the jewelry store owner and the defendant worked in the plaintiff's store for no pay during their eleven-year relationship). In the home loan modification context, the stronger party, the bank or lender, always opposed the modification.

TABLE 6: PREVAILING PARTIES AGGREGATED⁷⁸

	Total Number			
	of Cases	Stronger Party	Weaker Party	Undesignated
Totals	189	104 (55%)	43 (23%)	42 (22%)

1. Home Loan Modifications—A Case Study

Modifications were included in this case study because they are implicated in both parts of the *easy in/difficult out* theory analyzed in Part II.B. This is because a modification is both an out and an in. A contract modification is therefore an interesting doctrine because it overlaps with both formation and performance. More specifically, a modification permits a party to get out of performing a contract duty by substituting a modified obligation for the original contract duty.⁷⁹ But a modification is itself a contract that generally must satisfy the contract formation requirements⁸⁰ and, therefore, presents a separate opportunity to form a contract. Thus, to get out of a contract duty one must first get into a new contract.

Needless to say, to get into a new contract, the other party to the original contract has to consent, because the parties in a modification context are already bound by an existing contract. In all likelihood, only one of the parties wants or needs to modify a contract's duty or duties.⁸¹ But whether the party that wants or needs to modify its duty will be let out of the original contract is entirely dependent on whether the other contracting party will agree to a modification. Consequently, this space between the existing contract and the possibility of a new one is fraught with the *potential* for abuse of power.⁸²

78. See Appendices 6 & 7.

79. See, e.g., *Leavitt v. John Hancock Life Ins. Co.*, No. 04-C-7451, 2007 U.S. Dist. LEXIS 13004, at *24 (N.D. Ill. Feb. 23, 2007).

80. *Id.*

81. If both parties wanted or needed to modify their original duties at the same time or risk breaching the original contract, it seems reasonable to think that the parties would simply agree to either modify their contract or walk away from the original one.

82. The potential for abuse of power in a modification context is mutual. It could come from the party requesting the modification in the form of the classic "hold-up game," which is the situation where one party to a contract refuses to perform under circumstances that make it difficult, or even impossible, for the other party to arrange a substitute performance, unless the other party agrees to provide additional consideration. See *Angel v. Murray*, 322 A.2d 630, 635 (R.I. 1974) (discussing hold up game). Or it could come from the non-requesting party who wants to insist on the original contract duty, regardless of the circumstances prompting the request for a modification. See Deborah L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 187–88 (discussing alternative interpretation of the *Alaska Packers' Association v. Domenico* modification case); Meredith Miller, *Revisiting Austin v. Loral: A Study in Economic Duress, Contract Modification and Framing*, 2 HASTINGS BUS. L.J. 357, 359 (2006) (discussing alternative interpretation of the *Austin v. Loral* modification case). It should go without saying, however, that just because the potential to abuse one's bargaining power

Consent is one of the conventional hallmarks of the contract law system, because parties are not bound by a contract unless they consent to it in the first place.⁸³ Contractual liability in other words has to be voluntarily assumed.⁸⁴ It is by insisting on voluntary agreement (i.e., consent by the parties), therefore, that contract law gives effect to the parties' individual liberty and freedom, that is, to their ostensibly private decision to assume liability via a contract (or not) without interference from the State.⁸⁵ And, as we have seen, a contract voluntarily entered into will be binding on the parties according to its terms.⁸⁶ One proposition follows from the other—contract law makes contracts binding *because* they are premised on the belief that contracts are voluntarily entered into.⁸⁷ This then is freedom of contract.⁸⁸ Under this theory, one could therefore argue that courts police modifications using various contract doctrines to make sure that the decision to enter into the modification was freely made.

Cases in the Ninth Circuit seem to support the foregoing proposition. Courts have held, for example, that an enforceable home loan modification did not exist because the lender did not make a promise to modify the loan,⁸⁹ there was no meeting of the minds with respect to essential terms of the modification,⁹⁰ or the purported modification lacked consideration⁹¹ or was barred by the Statute of Frauds.⁹² Courts reached these holdings even where homeowners alleged that their lenders acted egregiously.

In 2006, Duane and Beverly Mulville obtained two loans from Wells Fargo totaling \$1.5 million, both of which were secured by a mortgage on

exists, it does not mean that such power is or *will be* abused by one of the contracting parties. But to not acknowledge the potential for abuse denies its existence.

83. See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 479 (1988).

84. See, e.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 PA. L. REV. 1235, 1247 (1998); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286 (1990).

85. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 408 (1979); Feinman, *supra* note 84, at 1286; Jay M. Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1543 (1987).

86. See *supra* Part II.B.; see also Singer, *supra* note 83, at 479.

87. For a more complete discussion and critique of all of the assumptions contract law makes to justify making contracts binding, see generally Hart, *Reality*, *supra* note 1.

88. See Samuel Williston, *Freedom of Contract*, 6 CORNELL L. REV. 365, 373 (1921); see also Singer, *supra* note 69, at 479.

89. *Graybill v. Wells Fargo Bank*, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *39-40 (N.D. Cal. Mar. 12, 2013).

90. *Barinaga v. JP Morgan Chase & Co.*, 749 F. Supp. 2d 1164, 1168 (D. Or. 2010).

91. *Id.* at 1174; *Graybill v. Wells Fargo Bank*, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *41 (N.D. Cal. Mar. 12, 2013).

92. See *Womack v. Bank of Am.*, No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909, at *4 (Ariz. Ct. App. Nov. 20, 2007); *Ahmed v. Wells Fargo Bank*, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055, at *7-13 (Ct. App. Oct. 24, 2011); *Mulville v. Wells Fargo Bank*, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285, at *13-18 (Ct. App. Nov. 14, 2012); *Toneman v. U.S. Bank*, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240, at *18-21 (C.D. Cal. Feb. 22, 2013).

their home.⁹³ Shortly thereafter, the Mulvilles experienced financial difficulties and defaulted on both loans.⁹⁴ As a result, they sought a modification from the bank to avoid foreclosure.⁹⁵ The homeowners alleged that Wells Fargo demanded an initial \$5000 payment to begin the modification process.⁹⁶ Over the course of a year they were asked to submit and resubmit documents that had already been submitted to the bank.⁹⁷ After about a year in, they were told that Wells Fargo could begin to modify their loan if they paid an additional \$30,000.⁹⁸ They were then allegedly told that if they settled the second of the two loans that “Wells Fargo would permanently modify the first loan so that [the borrowers] could meet their monthly payments.”⁹⁹ Wells Fargo did not put this promise in writing.¹⁰⁰ The homeowners settled the second loan but were then informed by Wells Fargo that their payment to settle the second loan indicated that they had too much cash and were therefore not candidates for a permanent modification of the first loan.¹⁰¹ The homeowners alleged that they would never have settled the second loan if they were not promised a modification of the first, because they struggled to come up with the cash to do so and were facing severe tax consequences as a result.¹⁰² Wells Fargo denied promising a permanent modification.¹⁰³

The Mulvilles sued Wells Fargo for, among other things, breach of contract, based on their claim that the bank orally agreed to modify their first loan, that is, to let them out of their original contract.¹⁰⁴ The court held that even assuming that the bank agreed to modify their loan, the bank’s oral promise to modify the Mulvilles’ home loan was barred by the Statute of Frauds.¹⁰⁵

The Mulvilles’ tale of financial distress and their subsequent default on their mortgage were not unique. It played itself out all across the country.¹⁰⁶ In a story well known by now, the housing market in the

93. *Mulville*, 2012 Cal. App. Unpub. LEXIS 8285, at *3.

94. *Id.* at *2.

95. *Id.*

96. *Id.* at *3.

97. *Id.*

98. *Id.* at *4.

99. *Id.* at *4.

100. *Id.* at *5.

101. *Id.* at *4.

102. *Id.* at *5–6.

103. *Id.* at *4–5.

104. *Id.* at *13.

105. *Id.* at *13–16.

106. See, e.g., CAPITAL AREA ASSET BUILDERS ET AL., SUBPRIME MORTGAGE LENDING IN THE DISTRICT OF COLUMBIA: A STUDY FOR THE DEPARTMENT OF INSURANCE, SECURITIES AND BANKING I, 7, 10, 14–15 (2008), http://www.trfund.com/wp-content/uploads/2013/07/Subprime_Lending_Study_6_20_08_DC.pdf (discussing the foreclosure crisis in the District of Columbia); THE REINVESTMENT FUND FOR THE BALT. HOMEOWNERSHIP PRES. COAL., MORTGAGE FORECLOSURE FILINGS IN MARYLAND 6, 26, 34 (2008),

United States started to implode in 2007.¹⁰⁷ In 2008, Congress passed the Emergency Stabilization Act,¹⁰⁸ which included the Troubled Asset Relief Program (“TARP”).¹⁰⁹ TARP required the Secretary of the Treasury to implement a plan designed to minimize home foreclosures.¹¹⁰ Pursuant to this authority, the U.S. Treasury Department created the Making Home Affordable Program (“MHAP”), part of which included the creation and implementation of HAMP.¹¹¹ HAMP, which was introduced on February 19, 2009,¹¹² is a program designed to implement a residential loan modification process¹¹³ pursuant to directives issued by the Treasury Department.¹¹⁴

The Secretary of the Treasury set aside \$50 billion of TARP funds to incentivize lenders to refinance mortgages with more favorable interest rates, term of payment extensions, and principal reductions, thereby allowing homeowners to avoid foreclosure.¹¹⁵ While participation in HAMP was voluntary,¹¹⁶ the Secretary of Treasury was nevertheless able to negotiate Service Participation Agreements (“SPAs”) with many of the major bank servicers in the United States.¹¹⁷ Pursuant to the SPAs, the “servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program.”¹¹⁸ But more than that, the SPAs explicitly stated that loan servicers “shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other

<http://www.trfund.com/wp-content/uploads/2013/07/MarylandForeclosure.pdf> (discussing the foreclosure crisis in Maryland).

107. Sumit Agarwal, et al., *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program* 6–7 (FRB of Chi., Working Paper No. 2013-27, Kreisman Working Paper Series in Hous. Law and Policy No. 7, Dec. 18, 2008), available at <http://ssrn.com/abstract=2369419>.

108. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

109. *Id.* tit. I, §§ 101–136, 122 Stat. at 3767–3800.

110. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012).

111. *McGann v. PNC Bank*, No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *3–4 (N.D. Ill. Mar. 29, 2013).

112. Agarwal et al., *supra* note 107, at 7.

113. *Id.*

114. *Wigod*, 673 F.3d. at 556; see U.S. DEP’T. OF THE TREASURY SUPPLEMENTAL DIRECTIVE NO. 09-01: INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM (2009), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf [hereinafter SUPPLEMENTAL DIRECTIVE NO. 09-01]; see also U.S. DEP’T. OF THE TREASURY, SUPPLEMENTAL DIRECTIVE NO. 10-01: HOME AFFORDABLE MODIFICATION PROGRAM—PROGRAM UPDATE AND RESOLUTION OF ACTIVE TRIAL MODIFICATIONS (2010), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1001.pdf [hereinafter SUPPLEMENTAL DIRECTIVE NO. 10-01].

115. *Wigod*, 673 F.3d at 556; *Morales v. Chase Home Fin. LLC*, No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *3–4 (N.D. Cal. Apr. 11, 2011); Agarwal et al., *supra* note 107, at 18.

116. Agarwal et al., *supra* note 107, at 9.

117. *Id.* One case puts the number of SPAs negotiated by the Secretary of the Treasury in the dozens. See *Wigod*, 673 F.3d. at 556.

118. *Wigod*, 673 F.3d. at 556.

communications . . . issued by the Treasury.”¹¹⁹ In exchange, loan servicers would receive monetary incentives in excess of their normal compensation for servicing a loan.¹²⁰ According to one court, Wells Fargo, which signed an SPA, was eligible to receive over \$2.75 billion in taxpayer funds for participating in HAMP.¹²¹

Very briefly, the HAMP loan modification process takes place in two broad stages. In the first stage, the servicer determines whether the homeowner is eligible for a HAMP modification. The servicer gathers information from the homeowner to make sure that the homeowner satisfies certain threshold requirements¹²² and financial eligibility requirements.¹²³ The servicer then applies a Net Present Value (“NPV”) test to determine

whether the modified mortgage’s value to the servicer would be greater than the return on the mortgage if unmodified. . . . If the NPV result was negative—that is, the value of the modified mortgage would be lower than the servicer’s expected return after foreclosure—the servicer was not obliged to offer a modification. *If the NPV was positive, however, the Treasury directives said that “the servicer MUST offer the modification.”*¹²⁴

If the homeowner qualifies for a HAMP modification in stage one, the second stage involves the actual loan modification process starting with the servicer implementing a Trial Period Plan (“TPP”) using new loan repayment terms.¹²⁵ The TPP generally lasts six months or so.¹²⁶

119. *Id.*

120. Agarwal et al., *supra* note 107, at 8.

121. Graybill v. Wells Fargo Bank, N.A., No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *5 (N.D. Cal. Mar. 12, 2013) (“Under the terms of the SPA, Wells Fargo was eligible to receive \$2,873,000,000 in taxpayer funds.”); see McGann v. PNC Bank, No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *3-4 (N.D. Ill. Mar. 29, 2013) (“In connection with the SPA, PNC received \$58,300,000 in incentive payments in exchange for modifying mortgage obligations of eligible homeowners to prevent and reduce foreclosures.”).

122. The threshold requirements include: a loan secured by the borrower’s primary residence with an origination date of on or before January 1, 2009; mortgage payments of more than thirty-one percent of the borrower’s monthly income; and a current unpaid principal balance of no more than \$729,750 for a one-unit home. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012); Agarwal et al., *supra* note 107, at 7.

123. Wigod, 673 F.3d. at 556; Morales v. Chase Home Fin. LLC, No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *4 (N.D. Cal. Apr. 11, 2011); see SUPPLEMENTAL DIRECTIVE 09-01, *supra* note 114, at 2-4.

124. Wigod, 673 F.3d at 557 (emphasis added)(internal citations omitted); Morales, 2011 U.S. Dist. LEXIS 49698, at *4; see also SUPPLEMENTAL DIRECTIVE No. 09-01, *supra* note 114, at 4 (“If the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed “positive” and the servicer MUST offer the modification.”).

125. Prior to Supplemental Directive No. 09-01, a loan servicer could initiate a Trial Payment Plan based on a homeowner’s undocumented representations about her finances. After Supplemental Directive No. 10-01, which was issued on January 28, 2010, a homeowner is required to provide documentation before a servicer can implement a TPP. Wigod, 673 F.3d at 557; SUPPLEMENTAL DIRECTIVE No. 09-01, *supra* note 114, at 5; SUPPLEMENTAL DIRECTIVE No. 10-01, *supra* note 114, at 1-2.

After the trial period, if the homeowner complies with all of the terms of the TPP agreement, including making all payments and providing all required documentation, *and* if all of the homeowner's representations remain true and correct, then the servicer is required under the HAMP guidelines to offer the homeowner a permanent modification.¹²⁷

Significantly, because of the financial incentives loan servicers were to receive, loan servicers were *required* via HAMP's "must offer" language to offer homeowners a modification if the homeowners satisfied the HAMP prerequisites. More specifically, "[w]hen [a lender] received public tax dollars under [TARP], it agreed to offer TPP's and loan modifications under HAMP according to [regulations] . . . issued by the Department of the Treasury."¹²⁸ Thus, "if the lender fails to do so [i.e., offer the permanent modification], the borrower may sue the lender, under state law, for breach of contract of the trial modification plan, among other causes of action."¹²⁹

In short, Congress via HAMP changed the traditional common law rules for a valid modification. In the specific context of residential home loan modifications, Congress created a new two-stage process that, if satisfied, *replaced* the requirement of *actual* consent with *constructive* consent to the modification on the part of loan servicers. The foregoing interpretation is consistent with HAMP guidelines and directives *and* with a reading of TPPs that gives effect to all of the language contained in them.¹³⁰

That said, many courts in both the Seventh and Ninth Circuits have refused to acknowledge loan modifications based on the idea of constructive consent. They have held instead that homeowners failed to establish that they were entitled to a HAMP modification. More specifically, there were a total of four HAMP modification cases in the Seventh Circuit. The loan servicers prevailed in three of the cases (seventy-five percent), with the court ruling that there was no modification or agreement to modify the homeowner's mortgages.¹³¹ The homeowner prevailed in one case (twenty-five percent), with the Seventh Circuit holding that the homeowner sufficiently alleged that the loan servicer

126. See Agarwal et al., *supra* note 107, at 8; see also Wigod, 673 F.3d at 557 (noting TPPs last three or more months).

127. Wigod, 673 F.3d at 558; SUPPLEMENTAL DIRECTIVE No. 09-01, *supra* note 114, at 4 ("If the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed 'positive' and the servicer MUST offer the modification."); cf. McGann v. PNC Bank, No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *4 (N.D. Ill. Mar. 29, 2013).

128. Goodman v. Wells Fargo Bank, No. B243614, 2014 Cal. App. Unpub. LEXIS 789, at *23 (Ct. App. Jan. 30, 2014) (citation omitted).

129. *Id.* (citation omitted).

130. See Wigod, 673 F.3d 547; Goodman, 2014 Cal. App. Unpub. LEXIS 789.

131. Avevedo v. CitiMortgage, Inc., No. 11-C4877, 2012 U.S. Dist. LEXIS 106461 (N.D. Ill. July 25, 2012); McGann, 2013 U.S. Dist. LEXIS 46484; Baehl v. Bank of Am., N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445 (S.D. Ind. Mar. 25, 2013).

breached a contract *to offer* her a permanent modification to survive a motion to dismiss.¹³²

There were a total of eight HAMP modification cases in the Ninth Circuit. The loan servicers prevailed in six of the cases (meaning, in seventy-five percent, there was no modification or agreement to modify),¹³³ and the homeowners prevailed in the other two (that is, twenty-five percent of claims of breach of contract to modify loans survived dismissal and demurrer).¹³⁴

The courts used a variety of methods to reconcile HAMP's "must offer" requirement with their reluctance to acknowledge a modification lacking the actual consent of the loan servicers, including interpreting HAMP and TPP language very restrictively. Thus, for example, courts interpreted HAMP as requiring only that participating loan servicers *consider* eligible home loans for modification but not *obligating* servicers to actually modify eligible loans.¹³⁵

Courts also agreed with loan servicers' determinations that all of the conditions required for a HAMP modification were not satisfied, and, therefore, a modification was properly denied. The loan servicers often took the position that the homeowners were not eligible for and/or did not qualify for a HAMP modification.¹³⁶ Granted, if all of the conditions were not satisfied, the homeowners were not entitled to a HAMP modification. This determination of non-eligibility, however, was usually hotly contested by the homeowners¹³⁷ and often in the context of defending

132. *Wigod*, 673 F.3d 547.

133. *Juarez v. Suntrust Mortg., Inc.*, No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850 (E.D. Cal. May 13, 2013); *Graybill v. Wells Fargo Bank, N.A.*, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322 (N.D. Cal. Mar. 12, 2013); *Soin v. Fannie Mae*, No. Civ. 2:12-634, 2012 U.S. Dist. LEXIS 51824 (E.D. Cal. Apr. 12, 2012); *Morales v. Chase Home Fin., LLC*, No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698 (N.D. Cal. Apr. 11, 2011); *Nungaray v. Litton Loan Servicing, LP*, 135 Cal. Rptr. 3d 442 (Ct. App. 2011); *Mulville v. Wells Fargo Bank, N.A.*, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285 (Ct. App. Nov. 14, 2012).

134. *Barroso v. Ocwen Loan Servicing, LLC*, 146 Cal. Rptr. 3d 90 (Ct. App. 2012); *Goodman*, 2014 Cal. App. Unpub. LEXIS 789.

135. *See, e.g., Morales*, 2011 U.S. Dist. LEXIS 49698, at *17-18, *22 (citing cases); *Mulville*, 2012 Cal. App. Unpub. LEXIS 8285, at *9.

136. *See infra* text accompanying notes 142-49.

137. *See Soin*, 2012 U.S. Dist. LEXIS 51824, at *4-6 (denying plaintiffs' motion for preliminary injunction where defendant did not execute TTP associated with plaintiffs' loan and return it to them); *Avevedo v. CitiMortgage, Inc.*, No. 11-C-4877, 2012 U.S. Dist. LEXIS 106461, at *2-4 (N.D. Ill. July 25, 2012) (granting defendant's motion to dismiss breach of contract claim where defendant did not execute TTP associated with plaintiffs' loan and return it to them); *Graybill*, 2013 U.S. Dist. LEXIS 34322, at *14-18 (dismissing homeowners' breach of contract claim without prejudice despite expert's determination that there were significant errors in the loan servicer's NPV calculations disqualifying them from HAMP eligibility); *Baehl v. Bank of Am., N.A.*, No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445, at *2-5 (S.D. Ind. Mar. 29, 2013) (seeking motion to dismiss homeowner's claim where loan servicer asserted that homeowners failed to provide all documents requested); *Goodman*, 2014 Cal. App. Unpub. LEXIS 789, at *2-8 (appealing demurrer in favor of defendant where loan

against a motion to dismiss brought by the loan servicers¹³⁸ where all facts are supposed to be construed in the light most favorable to the non-moving party.¹³⁹

In particularly troubling examples, loan servicers also claimed that the homeowner was not entitled to a HAMP modification because the homeowner never received either an executed copy of the TPP¹⁴⁰ or the permanent modification agreement¹⁴¹ from the loan servicer. Of course the reason the homeowner never received an executed copy of either of these documents was because the loan servicer never executed and sent them. But here again, courts have been willing to accept this argument as *an independent basis* upon which to uphold the loan servicers' decisions to deny the HAMP modification. One court held, for example, that even if the homeowner was *eligible* for a HAMP modification, the fact that the homeowner did not get an executed copy of the permanent modification from the loan servicer meant that the homeowner was not *entitled* to the modification.¹⁴²

Loan servicers appear to rely on specific language in the TPP to make the above argument. The language in the TPP basically says that the TPP does not modify the homeowner's loan documents unless and until the homeowner receives a fully executed copy of the modification agreement.¹⁴³ Based on this language in the TPP, loan servicers essentially escape their "must offer" requirement by arguing that it is within their sole discretion to decide whether to send homeowners an executed copy of the TPP and/or permanent modification agreement.¹⁴⁴ Interpreting the TPP in this fashion does several things: it nullifies other express provisions of the TPP;¹⁴⁵ it gives the loan servicers *unbridled* discretion to decide if and when its obligations will arise; *and* it makes the offer contained in the TPP via the "must offer" requirement¹⁴⁶ illusory.¹⁴⁷ Unfortunately, none

servicer claimed that homeowners failed to provide all documents requested, a claim the homeowners denied).

138. See *Avevedo*, 2012 U.S. Dist. LEXIS 106461, at *5-6; *Graybill*, 2013 U.S. Dist. LEXIS 34322, at *27; *Baehl*, 2013 U.S. Dist. LEXIS 46445, at *6.

139. See, e.g., *Baehl*, 2013 U.S. Dist. LEXIS 46445, at *6.

140. *Soin*, 2012 U.S. Dist. LEXIS 51824, at *14-15; *Avevedo*, 2012 U.S. Dist. LEXIS 106461, at *7-9; *McGann v. PNC Bank, N.A.*, No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *17 (N.D. Ill. Mar. 29, 2013).

141. *Morales v. Chase Home Fin.*, No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *18 (N.D. Cal. Apr. 11, 2011); *Nungaray v. Litton Loan Servicing, LP*, 135 Cal. Rptr. 3d 442, 447 (Ct. App. 2011).

142. See *Morales*, 2011 U.S. Dist. LEXIS 49698, at *18.

143. See, e.g., *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562-63 (7th Cir. 2012).

144. *Id.* at 563.

145. *Id.* The bank's interpretation of § 2 of the TPP would nullify the bank's obligation under § 3 of the TPP to send the homeowner a Modification Agreement if the homeowner complied with all of the requirements of the TPP and if her representations remained true and correct at the end of the TPP period. *Id.*

146. See *supra* text accompanying notes 124-27.

of these troubling consequences deter loan servicers from making these arguments or the courts from agreeing with them.

Finally, loan servicers also use contract doctrines to justify denying homeowners HAMP modifications. They argued, for example, that the TPP is not an offer, that there is no consideration for a permanent modification, and that the terms of any purported permanent modification are not clear and definite enough to constitute an enforceable agreement.¹⁴⁸ Sometimes courts agree with them. One court held, for example, that while there was consideration for the TPP, there was none for a permanent modification.¹⁴⁹ Another held that the TPP did not constitute an offer.¹⁵⁰ And still another court, after concluding that no offer to modify the loan existed because the homeowner did not receive an executed copy of the TPP from the lender, held that sending the loan servicer the homeowner's executed copy of the TPP did not amount to a counteroffer that was accepted by the servicer when it accepted all eight payments made by the homeowner.¹⁵¹ The result in these cases, of course, is that no modification exists despite the sometimes herculean efforts of homeowners to comply with the demands made by their loan servicers.¹⁵²

D. THE MYTH OF FREEDOM OF CONTRACT

At the end of the day, the stronger party (the banks) got the outcomes that they wanted more often than not (i.e., no home loan modifications) *both before and after* HAMP.¹⁵³ That is, the stronger contracting party tended to prevail despite the fact that Congress created

147. *Wigod*, 673 F.3d at 563; *accord* *Goodman v. Wells Fargo Bank, N.A.*, No. B243614, 2014 Cal. App. Unpub. LEXIS 789, at *27–29 (Ct. App. Jan. 30, 2014) (citing *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883 (9th Cir. 2013)); *see also* *Barroso v. Ocwen Loan Servicing, LLC*, 146 Cal. Rptr. 3d 90, 99 (Ct. App. 2012).

148. *See Wigod*, 673 F.3d at 561–66 (rejecting all of the loan servicer's contract doctrine arguments); *accord Goodman*, 2014 Cal. App. Unpub. LEXIS 789, at *35–42.

149. *Morales v. Chase Home Fin., LLC*, No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *12 (N.D. Cal. Apr. 11, 2011).

150. *Baehl v. Bank of Am., N.A.*, No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445, at *31 (S.D. Ind. Mar. 29, 2013).

151. *McGann v. PNC Bank, N.A.*, No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *19–20 (N.D. Ill. Mar. 29, 2013).

152. *See, e.g., Mulville v. Wells Fargo Bank, N.A.*, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285 (Ct. App. Nov. 14, 2012); *Graybill v. Wells Fargo Bank, N.A.*, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322 (N.D. Cal. Mar. 12, 2013).

153. *See supra* text accompanying notes 133–36 (discussing the number of HAMP modification cases). There were a total of thirteen home loan modification cases in the Ninth Circuit five of which were non-HAMP cases. The banks prevailed in all five of these cases. *See Toneman v. U.S. Bank*, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240 (C.D. Cal. Feb. 22, 2013); *Evans v. Aurora Loan Servs., LLC*, No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410 (D. Nev. June 18, 2010); *Barinaga v. JP Morgan Chase & Co.*, 749 F. Supp. 2d 1164 (D. Or. 2010); *Womack v. Bank of Am., N.A.*, No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909 (Ct. App. Nov. 20, 2007); *Ahmed v. Wells Fargo Bank, N.A.*, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055 (Ct. App. Oct. 24, 2011).

“constructive consent” via HAMP in a specific effort to make home loan modifications easier for homeowners to obtain. The question is, why?

A short answer to the question could be that courts simply adhere to an idealized notion of freedom of contract.¹⁵⁴ HAMP, because it legislatively mandates “constructive consent,” is state-sponsored interference in transactions that are supposed to be voluntarily entered into by private parties without any state intrusion. Courts thus resort to contract law doctrines, even in the HAMP context, because they seem to be convinced that *real* consent needs to exist between the parties; and the only way to be sure that *real* consent exists is to make sure that tried and tested contract law doctrines, like offer, acceptance, and consideration, are satisfied. HAMP, therefore, disrupts freedom of contract.

The problem is that freedom of contract does not really exist. I have made this argument at length elsewhere, but will briefly touch on it here.¹⁵⁵ First, freedom of contract is premised on the idea that contracts are consensual agreements between private parties when in reality all contracts are inherently coercive.¹⁵⁶ If coercion at its most basic means that a threat induces parties to enter into a contract,¹⁵⁷ then all contracts are coerced, because the law entitles each party to withhold from the other everything that she owns. Coercion thus exists *every time* a party agrees to enter into a contract to avoid the consequences of the other party’s threat. Consider the following illustration of the mutual coercion present in every contract. If an employer agrees to pay an employee to avoid the threat that the employee will withhold his labor, the employer’s decision to enter into the contract is coerced. Similarly, if the employee agrees to work for the employer to avoid the threat that the employer will withhold his money, the employee’s decision to enter into the contract is coerced. Every contract is thus the product of mutual coercion, and not voluntary agreement.¹⁵⁸

Second, freedom of contract does not actually exist because it presumes that contractual obligations are and can only be voluntarily assumed, that is, without any interference from the State.¹⁵⁹ This presumption is also incorrect. A contract is a contract if the law provides a remedy for its breach.¹⁶⁰ In other words, a contract is a contract if the law (i.e., the State) says it is, meaning that the State through its courts

154. *See supra* text accompanying notes 85–90.

155. *See, e.g.*, Hart, *Reality*, *supra* note 1.

156. *Id.* at 39–45.

157. *Id.* at 41 (citation omitted).

158. *Id.* at 39–41.

159. *See supra* text accompanying notes 85–90; *see also* Hila Keren, *The Libertarian/Neoliberal Catch-22: Between a Market Society and a Vulnerable State* 2 (Nov. 17, 2014) (unpublished manuscript) (on file with author).

160. *See* RESTATEMENT (SECOND) OF CONTRACTS §1 (1981).

determines that the formation elements are satisfied and there are no defenses to its enforcement.¹⁶¹

Finally, freedom of contract does not really exist if we mean that it applies to everyone equally. Professor Hila Keren argues that freedom of contract includes at least three different aspects of freedom—the freedom to have a contract, the freedom to negotiate the terms of a contract, and the freedom *from* contracts and contract law—all of which reflect the perspective of the stronger contracting party.¹⁶²

Stronger contracting parties, Keren argues, enjoy the freedom to choose whether to contract and with whom (the freedom to have a contract), and to choose the terms of the contract (the freedom to negotiate terms).¹⁶³ For example, if a bank decides to modify one homeowner's loan but not another's, the bank is simply exercising its autonomy and using its protected liberties, neither of which should be interfered with, especially not by the State.¹⁶⁴ Stronger contracting parties can also stipulate that contract law will not govern their contracts as they sometimes do when dealing with another strong contracting party (the freedom from contract).¹⁶⁵

Weaker contracting parties do not have similar freedoms. If the loan servicer denies the homeowners a modification of their home loan, *even if they are eligible for the modification*, or the property owner refuses to lease her property to the single mother, the rejected applicant has no freedom of contract whatsoever. Indeed, they are precluded from entering the contractual arena entirely and there is nothing they can do about it.¹⁶⁶ It also seems abundantly clear that weaker contracting parties cannot negotiate the terms of their contracts. Consumers, for example, routinely agree to long, complicated contracts that they cannot understand, negotiate, or change.¹⁶⁷ And, in modern society, just about everything one needs or wants must be obtained via a contract.¹⁶⁸ Weaker parties, therefore, have no freedom *from* contract; they cannot opt out.

In reality, therefore, freedom of contract just does not exist. It is a myth, one that we cling to with potentially adverse, if not devastating, consequences for weaker contracting parties. What to make of and do with all of this is taken up in the next Part.

161. See *supra* Part III.B; see Hart, *Reality*, *supra* note 1, at 45–47.

162. Keren, *supra* note 159, at 3–7.

163. *Id.* at 3.

164. *Id.* at 3–4.

165. *Id.* at 4; see also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001).

166. Keren, *supra* note 159, at 4.

167. *Id.* at 5; see also KIM, *supra* note 31, at 35–43, 62–69.

168. Keren, *supra* note 159, at 6; KIM, *supra* note 31, at 4.

III. WHOSE CONTRACT LAW IS IT ANYWAY?

Part III of this Article can be summed up as follows: It is not clear from the captured cases how easy it is to get into a contract. The cases do point to the possibility, however, that the stronger contracting party tends to get the outcome that it wants in contract disputes. So, the stronger contracting party may well influence whether a contract is formed to begin with. But once formed, the cases suggest that it is very difficult to get out of a contract.

Assuming all of the foregoing statements are true, do they signal a problem? Society obviously needs some kind of system to facilitate the transfer of resources from one party to another; contracts and contract law is that system. We can also probably assume that many, perhaps even most, contracts function in the sense that both contracting parties get something that they want from the contract and then walk away once that contract is performed.

But consider a problematic contract. A problematic contract is defined here to mean a contract obtained through misuse of unequal bargaining power that results in a bad bargain for the weaker party.¹⁶⁹ It is important to note that the problematic contract is not confined to consumers—it affects businesses as well¹⁷⁰—or to standard forms.¹⁷¹ The reach of this type of contract is therefore much broader than is currently being conceptualized.¹⁷²

The question then becomes whether contract law addresses this kind of problematic contract effectively, which brings us full circle. Contract law is not set up in a way that effectively addresses these kinds of contracts because of the structural feature discussed above: once formed, it is very difficult to get out of the contract. The result is that the misuse of unequal bargaining power by the stronger party during the formation of the contract will likely go unchecked, and the weaker party will be locked into the bad bargain. The stronger party will get to keep its ill-

169. Absent the misuse of bargaining power and a bad bargain, contract law does not recognize the contract as problematic. See Hart, *Formation*, *supra* note 1, at 178–82.

170. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (alleging that contracts signed by merchants with American Express violated antitrust laws). There, the Supreme Court held that the Federal Arbitration Act did not permit courts to invalidate the class action waiver in the American Express contracts on the ground that the plaintiffs' cost of individually arbitrating a federal statutory claim exceeded the potential recovery. *Id.*

171. See, e.g., *Krilich v. Am. Nat'l Bank & Trust Co.*, 778 N.E.2d 1153, 1163 (Ill. App. Ct. 2002). In *Krilich*, a real estate developer raised economic duress to get out of a contract. The court held that duress could not be established because the developer was a sophisticated party who was represented by counsel throughout the contracting process. *Id.*

172. See, e.g., KIM, *supra* note 31 (focusing on consumers); MARGARET JANE RADIN, *BOILERPLATE* (2013) (focusing on consumers and boilerplate in standard forms).

gotten gains because the contract and all of its terms (both reasonable and unreasonable) will be binding.¹⁷³

So, is there really a problem here? The short answer is, yes. There is a problem when contract law enables people with more bargaining power to misuse their bargaining power with impunity.¹⁷⁴ Indeed, the fact that contracts are generally going to be binding¹⁷⁵ could conceivably give the stronger contracting party license (if not perverse incentive) to impose even more onerous, one-sided terms in the contract.¹⁷⁶ Unfortunately, this is precisely what Kim argues that the drafters of online contracts already do.¹⁷⁷ The frequency with which this misuse of bargaining power occurs will most likely be largely undetected because a significant number of these cases will be resolved in arbitration proceedings through mandatory arbitration clauses inserted into contracts by the stronger contracting party.¹⁷⁸

Any solution to the problems confronting contract law, therefore, will have to address bargaining power directly and effectively, which is no small task. Indeed, HAMP was a specific effort by Congress to temper the banks' unequal bargaining power by mandating constructive consent on the part of the banks if the HAMP requirements were met.¹⁷⁹ But HAMP was not very successful¹⁸⁰ at least in part because courts are so wedded to a freedom of contract ideal that does not exist¹⁸¹ that they fail to abide by the HAMP regulations that depart from that ideal.

Thus, the first step to effectively address the misuse of bargaining power imbalances in contract law is perhaps an unexpected one. More specifically, the frame from within which contract law is analyzed and understood can and must be shifted from individual autonomy and liberty, which are the underpinnings of freedom of contract, to equality.¹⁸² Elsewhere I have written:

173. See, e.g., Danielle Kie Hart, *Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 NEV. L.J. 54, 63–65 (2012); see also Knapp, *supra* note 5, at 115, 121.

174. Again, it should go without saying that just because the potential to abuse one's bargaining power exists does not mean that such power is or will be abused by the stronger contracting party. But to not acknowledge the potential for abuse denies its existence.

175. See *supra* Part II; see also Hart, *Formation*, *supra* note 1, at Part III.

176. See Hart, *Formation*, *supra* note 1, at 217.

177. See Kim, *supra* note 31, at 51, 72–73, and see ch. 5 generally; see also Knapp, *supra* note 5, at 110–13.

178. See *supra* text accompanying notes 67–70.

179. See *supra* text accompanying notes 108–32.

180. See Agarwal et al., *supra* note 107, at 3–6.

181. See *supra* text accompanying notes 85–90.

182. I plan to develop this argument in detail in my forthcoming book, DANIELLE KIE HART, *FROM CONTRACT TO STATUS, THE STORY OF CONTRACT LAW & INEQUALITY* (forthcoming 2017); see also Keren, *supra* note 159, at 3 (arguing that the way to dismantle the dominant neoliberal model of freedom of contract is to “create a strong and compelling counter-narrative that both establishes a robust egalitarian freedom of contract and recognizes the State’s duty to secure all aspects of such freedom”).

At its most basic level, a “frame” is a tool that enables people to make sense of the world around them. But the process of framing is an active one because the purpose of framing is to fashion specific and ultimately shared understandings of the world that not only legitimate the meaning(s) proffered but also the response(s) to those meanings.¹⁸³

Shifting the frame of analysis is not an insignificant thing to do, because “by influencing what people think and how they think about it[,] the frames we choose to use can help shape reality.”¹⁸⁴ More specifically, such a shift will enable if not require judges, advocates, and parties to examine the use or misuse of bargaining power in a given contracting situation. It will also allow what is possible within the institution of contract law to be re-imagined by judges (and legislatures), advocates, contract law scholars, and, hopefully, the public. Some of this re-imagining would be internal to contract law and might include shifting the burden of proof with respect to doctrines like unconscionability¹⁸⁵ and duress to the party accused of misusing its bargaining power. It might also include new, more robust interpretations of existing contract doctrines, like good faith and unconscionability,¹⁸⁶ to name just two.¹⁸⁷

Within this new frame of understanding, individual parties (including businesses) will more readily be able to get out of unfair contracts. More systemically, and assuming collective action like class actions is possible, a business or perhaps even an entire industry might reform its practices; and legislatures may be more inclined to act to curb abuses of bargaining power.

In short, the frame that governs the analysis dictates what constitutes a legitimate response to a problem and what can be imagined in terms of solutions to that problem. Consequently, shifting to an equality frame for contract law is the necessary first step to enable contract law to be reimagined in ways that not only reflect reality, but also help us to live up to our own aspirations individually and collectively.

183. Danielle Kie Hart, *Revealing Privilege—Why Bother?*, 42 WASH. U. J.L. & POL’Y 131, 135–36 (2013).

184. *Id.* at 136.

185. *See, e.g.*, Knapp, *supra* note 5, at 128; KIM, *supra* note 31, at 203–10.

186. *See, e.g.*, Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2015 BYU L. REV. (forthcoming 2015) (advocating an interpretation and application of unconscionability that acknowledges its roots in conscience and the emotions generally as well as the expressive function of judicial decisions to shape behavior by market actors with the goal of fostering self-restraint in market transactions).

187. *See generally* Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (advocating judicial use of the doctrine of good faith as a device to eliminate racial subordination); Amy J. Schmitz, *Confronting ADR Agreements’ Contract/No Contract Conundrum With Good Faith*, 56 DEPAUL L. REV. 55 (2006) (advocating for the use of the doctrine of good faith to fill in gaps in ADR agreements).

CONCLUSION

Unequal bargaining power exists. The vast majority of contracts, therefore, will have a stronger and a weaker party. Consequently, when and how bargaining power is deployed in contract settings is something that contract law needs to consider carefully, especially since *pacta sunt servanda* seems to be alive and well in the contract law system.¹⁸⁸ That said, I do not think that “fixing” contract law by figuring out how to better address unequal bargaining power will cure any social problems. The task of re-imagining contract law, however, is still one well worth undertaking. This is because I agree with Knapp when he says that when we discuss contract law, what we are really talking about (at least in important part) is the place of contract law within the American legal system, and that system’s role in protecting the life, liberty, and pursuit of happiness of its people.¹⁸⁹

188. *See supra* Part III.B.

189. Knapp, *supra* note 5, at 135.

Appendix 1: All Captured Cases

Table: Summary of Captured Cases

	7th Circuit Original Search	7th Circuit Screened Cases	7th Circuit Added Cases	9th Circuit Original Search	9th Circuit Screened Cases	9th Circuit Added Cases
Offer	98	14	-	143	15	-
Acceptance	142	29	-	450	24	-
Modification	756	21	1	2181	21	2
Duress	39	10	-	191	16	-
Impracticability	41	11	1	123	24	0
Totals	1076	87		3088	100	2

7th Circuit Cases

Offer

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
2. Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002).
3. Cohen Dev. Co. v. JMJ Props. Inc., 317 F.3d 729 (7th Cir. 2003).
4. *In re* Pre-Press Graphics Co., 310 B.R. 893 (Bankr. N.D. Ill. 2004).
5. Vill. of S. Elgin v. Waste Mgmt., Inc., 810 N.E.2d 658 (Ill. App. Ct. 2004).
6. Bennett v. Broderick, 858 N.E.2d 1044 (Ind. Ct. App. 2006).
7. Knight v. Kadish, No. 1:05-CV-0077TAB-RLY, 2007 U.S. Dist. LEXIS 47133 (S.D. Ind. June 28, 2007).
8. Ind. Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359 (Ind. Ct. App. 2008).
9. L.B. Foster Co. v. Tie & Track Sys. Inc., No. 07 C 3692, 2009 U.S. Dist. LEXIS 26962 (N.D. Ill. Mar. 31, 2009).
10. Jada Toys, Inc. v. Chi. Imp., Inc., No. 07 C 699, 2009 U.S. Dist. LEXIS 85443 (N.D. Ill. Sept. 18, 2009).
11. Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.* Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897 (7th Cir. 2011).
12. Carroll v. Stryker Corp., 670 F. Supp. 2d 891 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010).

13. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11 CV 2463, 2012 U.S. Dist. LEXIS 30477 (N.D. Ill. Mar. 7, 2012).
14. U.S. CFTC v. Tunney & Assocs., No. 13 CV 2919, 2013 U.S. Dist. LEXIS 123124 (N.D. Ill. Aug. 21, 2013).

Acceptance

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
2. Falconbridge U.S., Inc. v. Bank One Ill., N.A., 227 F.3d 928 (7th Cir. 2000).
3. McGrath v. Aon Re, Inc., No. 99C2727, 2000 U.S. Dist. LEXIS 12618 (N.D. Ill. Aug. 23, 2000).
4. Compton Unified Sch. Dist. v. Universal Constr. Maint. Integration Co., B144260, 2002 Cal. App. Unpub. LEXIS 4696 (Jan. 22, 2002).
5. Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002).
6. R.R. Donnelley & Sons Co. v. Jet Messenger Serv., 2003 U.S. Dist. LEXIS 25421 (N.D. Ill. May 24, 2003).
7. Bennett v. Truttman, H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004).
8. Tickanen v. Harris & Harris, Ltd., 461 F. Supp. 2d 863 (E.D. Wis. 2006).
9. Bennett v. Broderick, 858 N.E.2d 1044 (Ind. Ct. App. 2006).
10. Finnin v. Bob Lindsay, Inc., 852 N.E.2d 446 (Ill. App. Ct. 2006).
11. Taake v. Cnty. of Monroe, No. 06-579-GPM, 2007 U.S. Dist. LEXIS 17106 (S.D. Ill. Mar. 9, 2007), *vacated on other grounds*, 530 F.3d 538 (7th Cir. 2008).
12. United States *ex rel.* Countryside Indus. v. Integrated Constr. Tech. Corp., No. 07CV2633, 2007 U.S. Dist. LEXIS 76008 (N.D. Ill. Sept. 28, 2007).
13. Estate of Mueller v. Karns, 873 N.E.2d 652 (Ind. Ct. App. 2007).
14. 737 N. Mich. Ave. Investors LLC v. Neiman Marcus Grp., Inc., No. 06C6379, 2007 U.S. Dist. LEXIS 26079 (N.D. Ill. Apr. 5, 2007).
15. Knight v. Kadish, 1:05-cv-0077-TAB-RLY, 2007 U.S. Dist. LEXIS 47133 (S.D. Ind. June 28, 2007).
16. Ind. BMV v. Ash, Inc., 895 N.E.2d 359 (Ind. Ct. App. 2008).
17. Jada Toys, Inc. v. Chi. Import, Inc., No. 07C699, 2009 U.S. Dist. LEXIS 85443 (N.D. Ill. Sept. 18, 2009).
18. L.B. Foster Co. v. Tie & Track Sys., No. 07C3692, 2009 U.S. Dist. LEXIS 26962 (N.D. Ill. Mar. 31, 2009).
19. Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co. of N. Am., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.* 665 F.3d 897 (7th Cir. 2011).

20. Carroll v. Stryker Corp., 670 F. Supp. 2d 891 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010).
21. Sys. Dev. Integration, LLC v. Computer Scis. Corp., 739 F. Supp. 2d 1063 (N.D. Ill.2010).
22. Catapult Commc'n Corp. v. Foster, No. 06C6112, 2010 U.S. Dist. LEXIS 94922 (N.D. Ill. Sept. 13, 2010).
23. Fiduciary Real Estate Dev., Inc. v. Goodavage, 808 N.W.2d 742 (Wis. Ct. App. 2011).
24. Stopka v. Am. Family Mut. Ins. Co., No. 10C6034, 2011 U.S. Dist. LEXIS 113713 (N.D. Ill. Sept. 22, 2011).
25. Bear Dev., LLC v. City of Kenosha, 822 F. Supp. 2d 865 (E.D. Wis. 2011).
26. Van Tassell v. United Mktg. Group, LLC, 795 F. Supp. 2d 770 (N.D. Ill. 2011).
27. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11CV2463, 2012 U.S. Dist. LEXIS 30477 (N.D. Ill. Mar. 7, 2012).
28. U.S. CFTC v. Tunney & Assocs., P.C., No. 13cv2919, 2013 U.S. Dist. LEXIS 123124 (N.D. Ill. Aug. 21, 2013).
29. Mitchell v. Mitchell, Nos. 2-13-0303 & 2-13-0363, cons., 2013 Ill. App. Unpub. LEXIS 2619 (App. Ct. Nov. 20, 2013).

Modification

1. DiMizio v. Romo, 756 N.E.2d 1018 (Ind. Ct. App. 2001).
2. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289 (7th Cir. 2002).
3. Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751 (Ind. Ct. App. 2002).
4. Carnes Co. v. Stone Creek Mech., Inc., 412 F.3d 845 (7th Cir. 2005).
5. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154 (Ind. 2005).
6. AT&T Corp. v. Douglas-Hanson Co., No. 05-C-266-S, 2005 U.S. Dist. LEXIS 24801 (W.D. Wis. Oct. 21, 2005).
7. Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, 290 Wis.2d 264, 714 N.W.2d 530 (2006).
8. Grogg v. Universal Underwriters Ins. Co., No. 1:05-CV-415 TS, 2006 U.S. Dist. LEXIS 51662 (N.D. Ind. July 13, 2006).
9. Fritsch v. Premier Investors, LLC, 2006 WI App 130, 294 Wis.2d 699, 717 N.W.2d 854 (2006).
10. Leavitt v. John Hancock Life Ins. Co., No. 04 C 7451, 2007 U.S. Dist. LEXIS 13004, (N.D. Ill. Feb. 23, 2007).
11. Zusy v. Int'l Med. Group, Inc., 500 F. Supp. 2d 1087 (S.D. Ind. 2007).
12. Ind. Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359 (Ind. Ct. App. 2008).

13. Hal Wagner Studios, Inc. v. Elliott, No. 09-CV-0031-MJR, 2009 U.S. Dist. LEXIS 8892 (S.D. Ill. Feb. 19, 2009).
14. Genzyme Corp. v. Disc. Drugs Wis., Inc., No. 08 C 5151, 2010 U.S. Dist. LEXIS 18356 (N.D. Ill. Feb. 26, 2010).
15. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012).
16. Urban Sites of Chi., LLC v. Crown Castle USA, 979 N.E.2d 480 (Ill. App. Ct. 2012).
17. Acevedo v. CitiMortgage, Inc., No. 11 C 4877, 2012 U.S. Dist. LEXIS 106461 (N.D. Ill. July 25, 2012).
18. Silverado Group, LLC v. Ed's Towing, Inc., No. 2-12-0629, 2012 IL App (2d) 120629-U (Dec. 24, 2012) (LEXIS).
19. Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 U.S. Dist. LEXIS 28074 (N.D. Ill. Feb. 26, 2013).
20. McGann v. PNC Bank, N.A., No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484 (N.D. Ill. Mar. 29, 2013).
21. Baehl v. Bank of America, N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445 (S.D. Ind. Mar. 29, 2013).
22. Large v. Mobile Tool Int'l, Inc., 724 F.3d 766 (7th Cir. 2013).

Duress

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
2. Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000).
3. Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153 (Ill. App. Ct. 2002).
4. Putz v. Allie, 785 N.E.2d 577 (Ind. Ct. App. 2003).
5. McBride v. St. Anthony Messenger Magazine, No. 2:02-CV-0237-JDT-WTL, 2003 U.S. Dist. LEXIS 6449 (S.D. Ind. Feb. 6, 2003).
6. *In re* Pre-Press Graphics Co., 310 B.R. 905 (Bankr. N.D. Ill. 2004).
7. Cozen O'Connor, P.C. v. Asperger Caraher LLC, No. 05 C 5624, 2006 U.S. Dist. LEXIS 81112 (N.D. Ill. Nov. 6, 2006).
8. United States v. Fletcher, No. 06 C 6056, 2008 U.S. Dist. LEXIS 3555 (N.D. Ill. Jan. 15, 2008), *aff'd*, 562 F.3d 839 (7th Cir. 2009).
9. ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961 (N.D. Ill. 2010).
10. Jackson v. Payday Fin., LLC, No. 11 C 9288, 2012 U.S. Dist. LEXIS 94095 (N.D. Ill. July 9, 2012), *rev'd on other grounds*, 764 F.3d 765 (7th Cir. 2014).

Impracticability of Performance

1. Contempo Design, Inc. v. Chi. & Ne. Ill. Dist. Council of Carpenters, 226 F.3d 535 (7th Cir. 2000).

2. Days Inn of Am., Inc. v. Patel, 88 F. Supp. 2d 928 (C.D. Ill. 2000).
3. Sub-Zero Freezer Co. v. Cunard Line Ltd., No. 01-C-0664-C, 2002 U.S. Dist. LEXIS 27142 (W.D. Wis. Mar. 12, 2002).
4. Indeck Energy Servs., Inc. v. NRG Energy, Inc., No. 03 C 2265, 2004 U.S. Dist. LEXIS 18830 (N.D. Ill. Sept. 17, 2004).
5. Exelon Generation Co. v. Gen. Atomics Techs. Corp., 559 F. Supp. 2d 892 (N.D. Ill. 2008).
6. Ner Tamid Congregation of N. Town v. Krivoruchko, No. 08 C 1261, 2009 U.S. Dist. LEXIS 58318 (N.D. Ill. July 9, 2009).
7. Brenner v. Greenberg, No. 08 C 826, 2010 U.S. Dist. LEXIS 120614 (N.D. Ill. Nov. 15, 2010).
8. Prospect Enters., L.L.C. v. Ruff, No. 10-1026, 2011 U.S. Dist. LEXIS 74099 (C.D. Ill. July 11, 2011).
9. Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc., No. 09 C 4963, 2011 U.S. Dist. LEXIS 21258 (N.D. Ill. Mar. 3, 2011).
10. Lawrence Crawford Ass'n v. Conversource, Inc., No. 5-11-0061, 2012 Ill. App. Unpub. LEXIS 1966 (Aug. 15, 2012).
11. Howard Johnson Int'l, Inc. v. M.D.I, LLC, No. 11 C 2593, 2012 U.S. Dist. LEXIS 151223 (N.D. Ill. Oct. 19, 2012).
12. BRC Rubber & Plastics v. Cont'l Carbon Co., 949 F. Supp. 2d 862 (N.D. Ind. 2013).

9th Circuit Cases

Offer

1. Saluteen-Maschersky v. Countrywide Funding Corp., 22 P.3d 804 (Wash. Ct. App. 2001).
2. Sarafa v. PC Quote, Inc., No. D036652, 2001 Cal. App. Unpub. LEXIS 1229 (Nov. 28, 2001).
3. Donovan v. RRL Corp., 27 P.3d 702 (Cal. 2001).
4. Zanakis-Pico v. Cutter Dodge, Inc., 47 P.3d 1222 (Haw. 2002).
5. Williams Bros. Construction, L.L.C. v. Baltrusch Inc., 2004 Mont. Dist. LEXIS 3042 (2004).
6. Andrus v. Wash. Dep't of Transp., 117 P.3d 1152 (Wash. Ct. App. 2005).
7. Lexington Precision Corp. v. Autoliv Inc., No. 2 CA-CV 2005-0187, 2006 Ariz. App. Unpub. LEXIS 434 (2006).
8. Amber Chem., Inc. v. Reilly Indus., Inc., No. 106CV06090OWWSMS, 2007 U.S. Dist. LEXIS 14451 (E.D. Cal. 2007).
9. S.J. Amoroso Constr. Co. v. Exec. Risk Indem., Inc., No. C 06-2572 SBA, 2009 U.S. Dist. LEXIS 116080 (N.D. Cal. Dec. 11, 2009).
10. Rubio v. Capital One Bank, 613 F.3d 1195 (9th Cir. 2010).

11. *Laguerre v. Nev. Sys. of Higher Educ.*, No. 3:10-CV-452-ECR-VPC, 2010 U.S. Dist. LEXIS 131100 (D. Nev. Dec. 9, 2010).
12. *Holland v. BP Am., Inc.*, No. CIV S-11-0580-KJM, 2012 U.S. Dist. LEXIS 30204 (E.D. Cal. Mar. 6, 2012).
13. *Ashbey v. Archstone Prop. Mgmt.*, No. SACV 12-0009 DOC, 2012 U.S. Dist. LEXIS 53108 (C.D. Cal. Apr. 13, 2012).
14. *Frezza v. Google Inc.*, 2013 U.S. Dist. LEXIS 57462 (N.D. Cal. Apr. 22, 2013).
15. *Cheren v. Compass Bank*, No. CV-12-00206-PHX-JAT, 2013 U.S. Dist. LEXIS 118804 (D. Ariz. Aug. 20, 2013).

Acceptance

1. *Hoseth v. Masonic Temple Ass'n*, No. 19842-1-III, 2001 Wash. App. LEXIS 2156 (Sept. 27, 2001).
2. *Gray v. Stewart*, 119 Cal. Rptr. 2d 217 (Ct. App. 2002).
3. *Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657 (Alaska 2002), *remanded by* *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333 (Alaska 2009).
4. *Leon v. Sharp Health Care*, D040042, 2003 Cal. App. Unpub. LEXIS 4910 (May 20, 2003).
5. *WMW L.L.C. v. Winton*, B162872, 2004 Cal. App. Unpub. LEXIS 1590 (Feb. 23, 2004).
6. *Bennett v. Truttman*, H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004).
7. *Ken Hood Constr. Co. v. Pac. Coast Constr., Inc.*, 120 P.3d 6 (Or. Ct. App. 2005).
8. *Johnston v. Moreli*, F046348, 2006 Cal. App. Unpub. LEXIS 4920 (June 8, 2006).
9. *Earls v. Corning*, 143 P.3d 243 (Or. Ct. App. 2006).
10. *Beretta v. Tucson Trap & Skeet Club*, 2 CA-CV 2007-0009, 2007 Ariz. App. Unpub. LEXIS 1260 (Aug. 16, 2007).
11. *Gabriel v. Ailing House Pest Control, Inc.*, H029300, 2007 Cal. App. Unpub. LEXIS 3454 (Apr. 30, 2007).
12. *Veith v. Xterra Wetsuits, L.L.C.*, 183 P.3d 334 (Wash. Ct. App. 2008).
13. *Shikwan Sung v. Hamilton*, 676 F. Supp. 2d 990 (D. Haw. 2009).
14. *Attachmate Corp. v. Health Net, Inc.*, No. C09-1161 MJP, 2010 U.S. Dist. LEXIS 114445 (W.D. Wash. Oct. 26, 2010).
15. *Castle v. Imagine Audio Video, L.L.C.*, 1 CA-CV 10-0427, 2011 Ariz. App. Unpub. LEXIS 781 (May 24, 2011).
16. *Fuller v. Monogram Real Estate*, G044514, 2011 Cal. App. Unpub. LEXIS 9647 (Dec. 19, 2011).

17. Lietz v. Hansen Law Offices, PSC, 271 P.3d 899 (Wash. Ct. App. 2011).
18. Gardenias v. Candreva, B223556, 2011 Cal. App. Unpub. LEXIS 1884 (Mar. 14, 2011).
19. Nascimento v. Wells Fargo Bank, NA, 2:11-CV-1049 JCM (GWF), 2012 U.S. Dist. LEXIS 160301 (D. Nev. Nov. 8, 2012).
20. Sea Hawk Seafoods, Inc. v. City of Valdez, 282 P.3d 359 (Alaska 2012).
21. Mills v. Budil, No. 41586-1-II, 2012 Wash. App. LEXIS 739 (Mar. 27, 2012).
22. Duncan v. Lifelock, Inc., 1 CA-CV 12-0546, 2013 Ariz. App. Unpub. LEXIS 744 (July 2, 2013).
23. Arreola v. Napole, B239467, 2013 Cal. App. Unpub. LEXIS 7346 (Oct. 15, 2013).
24. DC Media Capital v. Imagine Fulfillment Servs., B239081, 2013 Cal. App. Unpub. LEXIS 6256 (Aug. 30, 2013).

Modification

1. Smith v. Solo Watersports, Inc., No. 49064-8-I, 2002 Wash. App. LEXIS 1811 (July 29, 2002).
2. Shea v. Household Bank (SB), 129 Cal. Rptr. 2d 387 (Ct. App. 2003).
3. Gillani Consulting Inc. v. Daewoo Heavy Indus. Am. Corp., No. C05-0823-JCC, 2006 U.S. Dist. LEXIS 88704 (W.D. Wash. Dec. 7, 2006), *aff'd*, 300 F. App'x 466 (9th. Cir. 2008).
4. Wessa v. Watermark Paddlesports, Inc., No. C06-5156 FDB, 2006 U.S. Dist. LEXIS 51757 (W.D. Wash. July 28, 2006).
5. Dragt v. Dragt/DeTray, LLC, 161 P.3d 473 (Wash. Ct. App. 2007).
6. Womack v. Bank of Am., No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909 (Nov. 20, 2007).
7. Flores v. Jewels Mktg. & Agribusiness, No. CIV F 07-334 AWI WMW, 2007 U.S. Dist. LEXIS 53127 (E.D. Cal. July 6, 2007).
8. Evans v. Aurora Loan Servs., No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410 (D. Nev. June 18, 2010).
9. Barinaga v. JP Morgan Chase & Co., 749 F. Supp. 2d 1164 (D. Or. 2010).
10. Sociedad Aeronautica De, Santander S.A. v. Weber, No. CV 09-103-M-DWM, 2010 U.S. Dist. LEXIS 71349 (D. Mont. July 14, 2010).
11. Morales v. Chase Home Fin., No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698 (N.D. Cal. Apr. 11, 2011).
12. FDIC v. First Am. Title Ins. Co., No. SACV 10-0713 DOC (MLGx), 2011 U.S. Dist. LEXIS 94842 (C.D. Cal. Aug. 24, 2011).

13. Ahmed v. Wells Fargo Bank, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055 (Oct. 24, 2011).
14. AAA Constr. of Missoula v. Choice Land Corp., 264 P.3d 709 (Mont. 2011).
15. Nungaray v. Litton Loan Servicing, LP, 135 Cal. Rptr. 3d 442 (Ct. App. 2011), *modified by* No. B230580, 2011 Cal. App. LEXIS 1504 (Dec. 1, 2011).
16. Soin v. Fannie Mae, 2012 U.S. Dist. LEXIS 51824 (E.D. Cal. Apr. 12, 2012)
17. Barroso v. Ocwen Loan Servicing, LLC, 146 Cal. Rptr. 3d 90 (Ct. App. 2012).
18. Mulville v. Wells Fargo Bank, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285 (Nov. 14, 2012).
19. Juarez v. Suntrust Mortg., No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850 (E.D. Cal. May 13, 2013).
20. Toneman v. U.S. Bank, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240 (C.D. Cal. Feb. 22, 2013).
21. Graybill v. Wells Fargo Bank, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322 (N.D. Cal. Mar. 12, 2013).
22. Dragicevich v. Chase Home Fin., No. CV 12-8192 ABC (MANx), 2013 U.S. Dist. LEXIS 112208 (C.D. Cal. July 8, 2013).
23. Goodman v. Wells Fargo Bank, No. B243614, 2014 Cal. App. Unpub. LEXIS 789 (Jan. 30, 2014).

Duress

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2. Yemen v. Countrywide Home Loans, Inc., No. B144230, 2002 Cal. App. Unpub. LEXIS 2181 (Apr. 11, 2002).
3. Dodi v. Am. Online, Inc., No. B158161, 2003 Cal. App. Unpub. LEXIS 4085 (Apr. 24, 2003).
4. Flower v. Pep Boys, No. D040667, 2003 Cal. App. Unpub. LEXIS 8095 (Aug. 26, 2003).
5. Smith v. Rosenberg, No. E034199, 2004 Cal. App. Unpub. LEXIS 6189 (June 29, 2004).
6. Namdar v. Koop, No. G032726, 2005 Cal. App. Unpub. LEXIS 2087 (Mar. 8, 2005).
7. S & W Seed Co. v. Mut. Serv. Cas. Ins. Co., No. F043771, 2005 Cal. App. Unpub. LEXIS 11723 (Dec. 20, 2005).
8. Goodman v. Lothrop, 151 P.3d 818 (Idaho 2007).
9. Perez v. Uline, Inc., 68 Cal. Rptr. 3d 872 (Ct. App. 2007).

10. Murray v. United Servs. Auto. Ass'n, No. A117596, 2008 Cal. App. Unpub. LEXIS 7864 (Sept. 15, 2008).
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12. *In re* Moonlight Basin Ranch LP, No. 09-62327-11, 2010 Bankr. LEXIS 2198 (Bankr. Dist. Mont. June 25, 2010).
13. Steinman v. Malamed, 111 Cal. Rptr. 3d 304 (Ct. App. 2010).
14. Chan v. Lund, 116 Cal. Rptr. 3d 122 (Ct. App. 2010).
15. Mortensen v. First Am. Title Co., No. 2:11-CV-0063-EJL, 2013 U.S. Dist. LEXIS 43797 (D. Idaho Mar. 25, 2013).
16. Scooter's Pals Rescue v. Cnty. of Placer, No. 2:12-cv-01736-TLN-KLN, 2013 U.S. Dist. LEXIS 157819 (E.D. Cal. Nov. 1, 2013).

Impracticability of Performance

1. Gravel Express, Inc. v. Meadow Valley Contrs., Nos. 98-17066 & 98-17227, 2000 U.S. App. LEXIS (9th Cir. June 30, 2000).
2. Cape-France Enters v. *In re* Estate of Peed, 29 P.3d 1011 (Mont. 2001).
3. Peoplesoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp. 2d 1116 (N.D. Cal. 2002).
4. Ploegman v. Burlington N. & Santa Fe Ry. Co., 112 Wash. App. 1001 (2002).
5. Evans v. Spokane, 112 Wash. App. 1059 (2002).
6. Carsh v. Chaparral Pines, L.L.C., No. 2 CA-CV 2002-0175, 2003 Ariz. App. Unpub. LEXIS 59 (Aug. 4, 2003).
7. OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214 (D. Haw. 2003).
8. Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Envtl. Sys., No. CIV. 98-0316-E-BLW, 2004 U.S. Dist. LEXIS 24460 (D. Idaho Oct. 29, 2004).
9. Nielsen Bros. v. Solid Trading, Ltd., No. 52535-2-I, 2004 Wash. App. LEXIS 2769 (Nov. 15, 2004).
10. Landover Corp. v. Bellevue Master, LLC, 2006 U.S. Dist. LEXIS 1845 (W.D. Wash. Jan. 6, 2006), *aff'd*, 252 F. App'x 800 (9th Cir. 2007).
11. Dalkilic v. Titan Corp., 516 F. Supp. 2d 1177 (S.D. Cal. 2007).
12. United States v. Pflueger, No. CR 10-00631-02 LEK, 2007 U.S. Dist. LEXIS 46784 (D. Haw. June 27, 2007).
13. Coll. of the Sequoias Farm v. White Gold Ass'n, No. 1:07-CV-00014 AWINEW, 2007 U.S. Dist. LEXIS 49315 (E.D. Cal. July 6, 2007).
14. Manay v. Academic Exch., No. C07-5071 RBL, 2008 U.S. Dist. LEXIS 30531 (W.D. Wash. Mar. 25, 2008).

15. Portland Gen. Elec. Co. v. City of Glendale, 2009 U.S. Dist. LEXIS 68112 (D. Or. May 22, 2009), *report and recommendation adopted in part, rejected in part*, No. CIV.05-1321-PK, 2009 U.S. Dist. LEXIS 61083 (D. Or. July 15, 2009).
16. Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga, 96 Cal. Rptr. 813 (Ct. App. 2009).
17. Wells Fargo Bank, N.A. v. Ash Org., No. 09-CV-188-MO, 2010 U.S. Dist. LEXIS 66542 (D. Or. July 1, 2010).
18. Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-CV-0017-RRB, 2010 U.S. Dist. LEXIS 92132 (D. Alaska Sept. 2, 2010).
19. Max Baer Prods., Ltd. v. Riverwood Partners, LLC, No. 309-CV-00512-RCJRAM, 2010 U.S. Dist. LEXIS 100325 (D. Nev. Sept. 17, 2010).
20. M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX-NVW, 2011 U.S. Dist. LEXIS 130638 (D. Ariz. Nov. 9, 2011).
21. Bean v. BAC Home Loans Servicing, L.P., No. 11-CV-553-PHX-GMS, 2012 U.S. Dist. LEXIS 476 (D. Ariz. Jan. 3, 2012).
22. Reader v. BAC Home Loan Servicing LP, No. CV 11-02461-PHX-FJM, 2012 U.S. Dist. LEXIS 4899 (D. Ariz. Jan. 17, 2012), *aff'd in part, vacated in part, remanded sub nom*, 582 F. App'x 719 (9th Cir. 2014).
23. Babcock v. ING Life Ins. & Annuity Co., No. 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035 (E.D. Wash. Jan. 2, 2013).
24. Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC, No. 11-CV-5973-RBL, 2013 U.S. Dist. LEXIS 85776 (W.D. Wash. June 18, 2013).

Appendix 2: Summary of Captured Cases by Substantive Category

7th Circuit Cases

Real Property (21)

1. Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153 (Ill. App. Ct. 2002).
2. Cohen Dev. Co. v. JMJ Props. Inc., 317 F.3d 729 (7th Cir. 2003).
3. Bennett v. Truttman, H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004).
4. Bennett v. Broderick, 858 N.E.2d 1044 (Ind. Ct. App. 2006).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.
5. Fritsch v. Premier Investors, LLC, 2006 WI App 130, 294 Wis.2d 699, 717 N.W.2d 854 (2006).
6. Taake v. Cnty. of Monroe, No. 06-579-GPM, 2007 U.S. Dist. LEXIS 17106 (S.D. Ill. Mar. 9, 2007), *vacated on other grounds*, 530 F.3d 538 (7th Cir. 2008).
7. Knight v. Kadish, 1:05-cv-0077-TAB-RLY, 2007 U.S. Dist. LEXIS 47133 (S.D. Ind. June 28, 2007).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.
8. Ash, Inc., 895 N.E.2d 359 (Ind. Ct. App. 2008).
 - a. This case was counted in offer, acceptance and modification, because it addressed all three doctrines.
9. Ner Tamid Congregation of N. Town v. Krivoruchko, No. 08 C 1261, 2009 U.S. Dist. LEXIS 58318 (N.D. Ill. July 9, 2009).
10. Fiduciary Real Estate Dev., Inc. v. Goodavage, 808 N.W.2d 742 (Wis. Ct. App. 2011).
11. Prospect Enters., L.L.C. v. Ruff, No. 10-1026, 2011 U.S. Dist. LEXIS 74099 (C.D. Ill. July 11, 2011).
12. Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc., No. 09 C 4963, 2011 U.S. Dist. LEXIS 21258 (N.D. Ill. Mar. 3, 2011).
13. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012).
14. Urban Sites of Chi., LLC v. Crown Castle USA, 979 N.E.2d 480 (Ill. App. Ct. 2012).
15. Acevedo v. CitiMortgage, Inc., No. 11 C 4877, 2012 U.S. Dist. LEXIS 106461 (N.D. Ill. July 25, 2012).
16. McGann v. PNC Bank, N.A., No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484 (N.D. Ill. Mar. 29, 2013).
17. Baehl v. Bank of America, N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445 (S.D. Ind. Mar. 29, 2013).

Employment (10)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
 - a. This case was counted in offer, acceptance and duress, because it addressed all three doctrines.
2. McGrath v. Aon Re, Inc., No. 99C2727, 2000 U.S. Dist. LEXIS 12618 (N.D. Ill. Aug. 23, 2000).
3. Contempo Design, Inc. v. Chic. & Ne. Ill. Dist. Council of Carpenters, 226 F.3d 535 (7th Cir. 2000).
4. *In re* Pre-Press Graphics Co., 310 B.R. 893 (Bankr. N.D. Ill. 2004).
5. Zusy v. Int'l Med. Group, Inc., 500 F. Supp. 2d 1087 (S.D. Ind. 2007).
6. Hal Wagner Studios, Inc. v. Elliott, No. 09-CV-0031-MJR, 2009 U.S. Dist. LEXIS 8892 (S.D. Ill. Feb. 19, 2009).
7. Carroll v. Stryker Corp., 670 F. Supp. 2d 891 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.

Sale of Goods (9)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
2. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289 (7th Cir. 2002).
3. Indeck Energy Servs., Inc. v. NRG Energy, Inc., No. 03 C 2265, 2004 U.S. Dist. LEXIS 18830 (N.D. Ill. Sept. 17, 2004).
4. Carnes Co. v. Stone Creek Mech., Inc., 412 F.3d 845 (7th Cir. 2005).
5. Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, 290 Wis.2d 264, 714 N.W.2d 530 (2006).
6. Exelon Generation Co. v. Gen. Atomics Techs. Corp., 559 F. Supp. 2d 892 (N.D. Ill. 2008).
7. Jada Toys, Inc. v. Chi. Imp., Inc., No. 07 C 699, 2009 U.S. Dist. LEXIS 85443 (N.D. Ill. Sept. 18, 2009).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.
8. Silverado Group, LLC v. Ed's Towing, Inc., No. 2-12-0629, 2012 IL App (2d) LEXIS 120629-U (Dec. 24, 2012).
9. BRC Rubber & Plastics v. Cont'l Carbon Co., 949 F. Supp. 2d 862 (N.D. Ind. 2013).

Insurance (7)

1. Leavitt v. John Hancock Life Ins. Co., No. 04 C 7451, 2007 U.S. Dist. LEXIS 13004 (N.D. Ill. Feb. 23, 2007).

2. Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.*, Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897 (7th Cir. 2011).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.
3. Stopka v. Am. Family Mut. Ins. Co., No. 10C6034, 2011 U.S. Dist. LEXIS 113713 (N.D. Ill. Sept. 22, 2011).
4. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11CV2463, 2012 U.S. Dist. LEXIS 30477 (N.D. Ill. Mar. 7, 2012).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.
5. Large v. Mobile Tool Int'l, Inc., 724 F.3d 766 (7th Cir. 2013).

Construction (3)

1. Compton Unified Sch. Dist. v. Universal Constr. Maint. Integration Co., B144260, 2002 Cal. App. Unpub. LEXIS 4696 (Jan. 22, 2002).
2. L.B. Foster Co. v. Tie & Track Sys., No. 07C3692, 2009 U.S. Dist. LEXIS 26962 (N.D. Ill. Mar. 31, 2009).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.

Credit Cards (1)

1. Tickanen v. Harris & Harris, Ltd., 461 F. Supp. 2d 863 (E.D. Wis. 2006).

Family (2)

1. Putz v. Allie, 785 N.E.2d 577 (Ind. Ct. App. 2003).
2. Mitchell v. Mitchell, Nos. 2-13-0303 & 2-13-0363, cons., 2013 Ill. App. Unpub. LEXIS 2619 (Nov. 20, 2013).

Arbitration (1)

1. 737 N. Mich. Ave. Investors LLC v. Neiman Marcus Grp., Inc., No. 06C6379, 2007 U.S. Dist. LEXIS 26079 (N.D. Ill. Apr. 5, 2007).

Miscellaneous Services (14)

1. Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002) (customer service agreement/phone contract).

- a. This case was counted in both offer and acceptance, because it addressed both doctrines.
2. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751 (Ind. Ct. App. 2002) (rehabilitation services).
 3. *McBride v. St. Anthony Messenger Magazine*, No. 2:02-CV-0237-JDT-WTL, 2003 U.S. Dist. LEXIS 6449 (S.D. Ind. Feb. 6, 2003) (sale of subscriptions).
 4. *R.R. Donnelley & Sons Co. v. Jet Messenger Serv.*, 2003 U.S. Dist. LEXIS 25421 (N.D. Ill. May 24, 2003) (services contract).
 5. *In re Pre-Press Graphics Co.*, 310 B.R. 905 (Bankr. N.D. Ill. 2004) (printing/publishing contract).
 6. *Vill. of S. Elgin v. Waste Mgmt., Inc.*, 810 N.E.2d 658 (Ill. App. Ct. 2004) (waste disposal/landfill contract).
 7. *AT&T Corp. v. Douglas-Hanson Co.*, No. 05-C-266-S, 2005 U.S. Dist. LEXIS 24801 (W.D. Wis. Oct. 21, 2005) (install special computer cable).
 8. *United States ex rel. Countryside Indus. v. Integrated Constr. Tech. Corp.*, No. 07CV2633, 2007 U.S. Dist. LEXIS 76008 (N.D. Ill. Sept. 28, 2007) (landscaping subcontract).
 9. *Estate of Mueller v. Karns*, 873 N.E.2d 652 (Ind. Ct. App. 2007) (consulting contract/negotiate mining rights).
 10. *Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, 739 F. Supp. 2d 1063 (N.D. Ill. 2010) (technology).
 11. *Bear Dev., LLC v. City of Kenosha*, 822 F. Supp. 2d 865 (E.D. Wis. 2011) (environmental remediation).
 12. *Van Tassell v. United Mktg. Group, LLC*, 795 F. Supp. 2d 770 (N.D. Ill. 2011) (online marketing contracts).
 13. *Jackson v. Payday Fin., LLC*, No. 11 C 9288, 2012 U.S. Dist. LEXIS 94095, (N.D. Ill. July 9, 2012), *rev'd on other grounds*, 764 F.3d 765 (7th Cir. 2014) (pay day loan).

Other (19)

1. *Falconbridge U.S., Inc. v. Bank One Ill., N.A.*, 227 F.3d 928 (7th Cir. 2000) (bankruptcy/Article 9 priority).
2. *Rissman v. Rissman*, 213 F.3d 381 (7th Cir. 2000) (stock purchase agreement).
3. *Days Inn of Am., Inc. v. Patel*, 88 F. Supp. 2d 928 (C.D. Ill. 2000) (franchise agreement).
4. *DiMizio v. Romo*, 756 N.E.2d 1018 (Ind. Ct. App. 2001) (sale of pizza business).
5. *Sub-Zero Freezer Co. v. Cunard Line Ltd.*, No. 01-C-0664-C, 2002 U.S. Dist. LEXIS 27142 (W.D. Wis. Mar. 12, 2002) (cruise ship bookings).

6. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154 (Ind. 2005) (guarantee).
7. Finnin v. Bob Lindsay, Inc., 852 N.E.2d 446 (Ill. App. Ct. 2006) (sale of car dealership).
8. Grogg v. Universal Underwriters Ins. Co., No. 1:05-CV-415 TS, 2006 U.S. Dist. LEXIS 51662 (N.D. Ind. July 13, 2006) (rental car/insurance/personal injury contract).
9. Cozen O'Connor, P.C. v. Asperger Caraher LLC, No. 05 C 5624, 2006 U.S. Dist. LEXIS 81112 (N.D. Ill. Nov. 6, 2006) (partnership dissolution agreement).
10. United States v. Fletcher, No. 06 C 6056, 2008 U.S. Dist. LEXIS 3555 (N.D. Ill. Jan. 15, 2008), *aff'd*, 562 F.3d 839 (7th Cir. 2009) (tax refund).
11. Catapult Commc'n Corp. v. Foster, No. 06C6112, 2010 U.S. Dist. LEXIS 94922 (N.D. Ill. Sept. 13, 2010) (indemnity agreement).
12. Genzyme Corp. v. Disc. Drugs Wis., Inc., No. 08 C 5151, 2010 U.S. Dist. LEXIS 18356 (N.D. Ill. Feb. 26, 2010) (drug rebate program).
13. Brenner v. Greenberg, No. 08 C 826, 2010 U.S. Dist. LEXIS 120614 (N.D. Ill. Nov. 15, 2010) (settlement and release).
14. ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961 (N.D. Ill. 2010) (sanctioning fees).
15. Lawrence Crawford Ass'n v. Conversource, Inc., No. 5-11-0061, 2012 Ill. App. Unpub. LEXIS 1966 (Aug. 15, 2012) (equipment lease).
16. Howard Johnson Int'l, Inc. v. M.D.I, LLC, No. 11 C 2593, 2012 U.S. Dist. LEXIS 151223 (N.D. Ill. Oct. 19, 2012) (Howard Johnson license agreement).
17. Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 U.S. Dist. LEXIS 28074 (N.D. Ill. Feb. 26, 2013) (overdraft fees).
18. U.S. CFTC v. Tunney & Assocs., No. 13 CV 2919, 2013 U.S. Dist. LEXIS 123124 (N.D. Ill. Aug. 21, 2013) (tolling agreement).
 - a. This case was counted in both offer and acceptance, because it addressed both doctrines.

9th Circuit Cases

Real Property (44)

1. Saluteen-Maschersky v. Countrywide Funding Corp., 22 P.3d 804 (Wash. Ct. App. 2001).
2. Cape-France Enters v. In re Estate of Peed, 29 P.3d 1011 (Mont. 2001).
3. Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co., 45 P.3d 657 (Alaska 2002), *remanded by*, Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333 (Alaska 2009).
4. Evans v. Spokane, 112 Wash. App. 1059 (2002).

5. WMW L.L.C. v. Winton, B162872, 2004 Cal. App. Unpub. LEXIS 1590 (Feb. 23, 2004).
6. Bennett v. Truttman, H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004).
7. Nielsen Bros. v. Solid Trading, Ltd., No. 52535-2-I, 2004 Wash. App. LEXIS 2769 (Nov. 15, 2004).
8. Ken Hood Constr. Co. v. Pac. Coast Constr., Inc., 120 P.3d 6 (Or. Ct. App. 2005).
9. Namdar v. Koop, No. G032726, 2005 Cal. App. Unpub. LEXIS 2087 (Mar. 8, 2005).
10. Johnston v. Moreli, F046348, 2006 Cal. App. Unpub. LEXIS 4920 (June 8, 2006).
11. Earls v. Corning, 143 P.3d 243 (Or. Ct. App. 2006).
12. Dragt v. Dragt/DeTray, LLC, 161 P.3d 473 (Wash. Ct. App. 2007).
13. Womack v. Bank of Am., No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909 (Nov. 20, 2007).
14. Goodman v. Lothrop, 151 P.3d 818 (Idaho 2007).
15. Landover Corp. v. Bellevue Master, LLC, 2006 U.S. Dist. LEXIS 1845 (W.D. Wash. Jan. 6, 2006), *aff'd*, 252 F. App'x 800 (9th Cir. 2007).
16. Shikwan Sung v. Hamilton, 676 F. Supp. 2d 990 (D. Haw. 2009).
17. Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga, 96 Cal.Rptr. 813 (Ct. App. 2009).
18. Evans v. Aurora Loan Servs., No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410 (D. Nev. June 18, 2010).
19. Barinaga v. JP Morgan Chase & Co., 749 F. Supp. 2d 1164 (D. Or. 2010).
20. Chan v. Lund, 116 Cal.Rptr.3d 122 (Ct. App. 2010).
21. Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-CV-0017-RRB, 2010 U.S. Dist. LEXIS 92132 (D. Alaska Sept. 2, 2010).
22. Max Baer Prods., Ltd. v. Riverwood Partners, LLC, No. 309-CV-00512-RCJRAM, 2010 U.S. Dist. LEXIS 100325 (D. Nev. Sept. 17, 2010).
23. Wells Fargo Bank, N.A. v. Ash Org., No. 09-CV-188-MO, 2010 U.S. Dist. LEXIS 66542 (D. Or. July 1, 2010).
24. Morales v. Chase Home Fin., No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698 (N.D. Cal. Apr. 11, 2011).
25. FDIC v. First Am. Title Ins. Co., No. SACV 10-0713 DOC (MLGx), 2011 U.S. Dist. LEXIS 94842 (C.D. Cal. Aug. 24, 2011).
26. Ahmed v. Wells Fargo Bank, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055 (Oct. 24, 2011).
27. M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX-NVW, 2011 U.S. Dist. LEXIS 130638 (D. Ariz. Nov. 9, 2011).

28. Nungaray v. Litton Loan Servicing, LP, 135 Cal.Rptr.3d 442 (Ct. App. 2011), *modified by*, No. B230580, 2011 Cal. App. LEXIS 1504 (Dec. 1, 2011).
29. Fuller v. Monogram Real Estate, G044514, 2011 Cal. App. Unpub. LEXIS 9647 (Dec. 19, 2011).
30. Bean v. BAC Home Loans Servicing, L.P., No. 11-CV-553-PHX-GMS, 2012 U.S. Dist. LEXIS 476 (D. Ariz. Jan. 3, 2012).
31. Reader v. BAC Home Loan Servicing LP, No. CV 11-02461-PHX-FJM, 2012 U.S. Dist. LEXIS 4899 (D. Ariz. Jan. 17, 2012), *aff'd in part, vacated in part, remanded sub nom*, 582 F. App'x 719 (9th Cir. 2014).
32. Sojin v. Fannie Mae, 2012 U.S. Dist. LEXIS 51824 (E.D. Cal. Apr. 12, 2012)
33. Nascimento v. Wells Fargo Bank, NA, 2:11-CV-1049 JCM (GWF), 2012 U.S. Dist. LEXIS 160301 (D. Nev. Nov. 8, 2012).
34. Barroso v. Ocwen Loan Servicing, LLC, 146 Cal.Rptr.3d 90 (Ct. App. 2012).
35. Mulville v. Wells Fargo Bank, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285 (Nov. 14, 2012).
36. Sea Hawk Seafoods, Inc. v. City of Valdez, 282 P.3d 359 (Alaska 2012).
37. Mills v. Budil, No. 41586-1-II, 2012 Wash. App. LEXIS 739 (Mar. 27, 2012).
38. Juarez v. Suntrust Mortg., No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850 (E.D. Cal. May 13, 2013).
39. Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC, No. 11-CV-5973-RBL, 2013 U.S. Dist. LEXIS 85776 (W.D. Wash. June 18, 2013).
40. Toneman v. U.S. Bank, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240 (C.D. Cal. Feb. 22, 2013).
41. Graybill v. Wells Fargo Bank, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322 (N.D. Cal. Mar. 12, 2013).
42. Dragicevich v. Chase Home Fin., No. CV 12-8192 ABC (MANx), 2013 U.S. Dist. LEXIS 112208 (C.D. Cal. July 8, 2013).
43. Cheren v. Compass Bank, No. CV-12-00206-PHX-JAT, 2013 U.S. Dist. LEXIS 118804 (D. Ariz. Aug. 20, 2013).
44. Goodman v. Wells Fargo Bank, No. B243614, 2014 Cal. App. Unpub. LEXIS 789 (Jan. 30, 2014).

Employment (12)

1. Yemen v. Countrywide Home Loans, Inc., No. B144230, 2002 Cal. App. Unpub. LEXIS 2181 (Apr. 11, 2002).

2. Dodi v. Am. Online, Inc., No. B158161, 2003 Cal. App. Unpub. LEXIS 4085 (Apr. 24, 2003).
3. Andrus v. Wash. Dep't of Transp., 117 P.3d 1152 (Wash. Ct. App. 2005).
4. Beretta v. Tucson Trap & Skeet Club, 2 CA-CV 2007-0009, 2007 Ariz. App. Unpub. LEXIS 1260 (Aug. 16, 2007).
5. Perez v. Uline, Inc., 68 Cal.Rptr.3d 872 (Ct. App. 2007).
6. Dalkilic v. Titan Corp., 516 F. Supp. 2d 1177 (S.D. Cal. 2007).
7. Murray v. United Servs. Auto. Ass'n, No. A117596, 2008 Cal. App. Unpub. LEXIS 7864 (Sept. 15, 2008).
8. Insitu, Inc. v. Kent, No. CV-08-3067-EFS, 2009 U.S. Dist. LEXIS 61190 (E.D. Wash. June 17, 2009), *aff'd*, 388 F. App'x 745 (9th Cir. 2010).
9. Laguerre v. Nev. Sys. of Higher Educ., No. 3:10-CV-452-ECR-VPC, 2010 U.S. Dist. LEXIS 131100 (D. Nev. Dec. 9, 2010).
10. Lietz v. Hansen Law Offices, PSC, 271 P.3d 899 (Wash. Ct. App. 2011).
11. Ashbey v. Archstone Prop. Mgmt., No. SACV 12-0009 DOC, 2012 U.S. Dist. LEXIS 53108 (C.D. Cal. Apr. 13, 2012).
12. Duncan v. Lifelock, Inc., 1 CA-CV 12-0546, 2013 Ariz. App. Unpub. LEXIS 744 (July 2, 2013).

Sale of Goods (8)

1. Donovan v. RRL Corp., 27 P.3d 702 (Cal. 2001).
2. Zanakis-Pico v. Cutter Dodge, Inc., 47 P.3d 1222 (Haw. 2002).
3. Flower v. Pep Boys, No. D040667, 2003 Cal. App. Unpub. LEXIS 8095 (Aug. 26, 2003).
4. Williams Bros. Construction, L.L.C. v. Baltrusch Inc., 2004 Mont. Dist. LEXIS 3042 (2004).
5. Lexington Precision Corp. v. Autoliv Inc., No. 2 CA-CV 2005-0187, 2006 Ariz. App. Unpub. LEXIS 434 (2006).
6. Amber Chem., Inc. v. Reilly Indus., Inc., No. 106CV06090OWWSMS, 2007 U.S. Dist. LEXIS 14451 (E.D. Cal. 2007).
7. Coll. of the Sequoias Farm v. White Gold Ass'n, No. 1:07-CV-00014 AWINEW, 2007 U.S. Dist. LEXIS 49315 (E.D. Cal. July 6, 2007).
8. Sociedad Aeronautica De, Santander S.A. v. Weber, No. CV 09-103-M-DWM, 2010 U.S. Dist. LEXIS 71349 (D. Mont. July 14, 2010).

Insurance (3)

1. Morrow v. Am. Int'l Grp., No. B144474, 2002 Cal. App. Unpub. LEXIS 3120 (Mar. 13, 2002).

2. S & W Seed Co. v. Mut. Serv. Cas. Ins. Co., No. F043771, 2005 Cal. App. Unpub. LEXIS 11723 (Dec. 20, 2005).
3. S.J. Amoroso Constr. Co. v. Exec. Risk Indem., Inc., No. C 06-2572 SBA, 2009 U.S. Dist. LEXIS 116080 (N.D. Cal. Dec. 11, 2009).

Construction (1)

1. AAA Constr. of Missoula v. Choice Land Corp., 264 P.3d 709 (Mont. 2011).

Credit Cards (2)

1. Shea v. Household Bank (SB), 129 Cal.Rptr.2d 387 (Ct. App. 2003).
2. Rubio v. Capital One Bank, 613 F.3d 1195 (9th Cir. 2010).

Torts/Personal Injury (6)

1. Gray v. Stewart, 119 Cal.Rptr.2d 217 (Ct. App. 2002).
2. Ploegman v. Burlington N. & Santa Fe Ry. Co., 112 Wash. App. 1001 (2002).
3. Leon v. Sharp Health Care, D040042, 2003 Cal. App. Unpub. LEXIS 4910 (May 20, 2003).
4. Veith v. Xterra Wetsuits, L.L.C., 183 P.3d 334 (Wash. Ct. App. 2008).
5. Gardenias v. Candreva, B223556, 2011 Cal. App. Unpub. LEXIS 1884 (Mar. 14, 2011).
6. Arreola v. Napole, B239467, 2013 Cal. App. Unpub. LEXIS 7346 (Oct. 15, 2013).

Software/IP (5)

1. Sarafa v. PC Quote, Inc., No. D036652, 2001 Cal. App. Unpub. LEXIS 1229 (Nov. 28, 2001).
2. Peoplesoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp. 2d 1116 (N.D. Cal. 2002).
3. Gillani Consulting Inc. v. Daewoo Heavy Indus. Am. Corp., No. C05-0823-JCC, 2006 U.S. Dist. LEXIS 88704 (W.D. Wash. Dec. 7, 2006), *aff'd*, 300 F. App'x 466 (9th Cir. 2008).
4. Wessa v. Watermark Paddlesports, Inc., No. C06-5156 FDB, 2006 U.S. Dist. LEXIS 51757 (W.D. Wash. July 28, 2006).
5. Attachmate Corp. v. Health Net, Inc., No. C09-1161 MJP, 2010 U.S. Dist. LEXIS 114445 (W.D. Wash. Oct. 26, 2010).

Miscellaneous Services (11)

1. Hoseth v. Masonic Temple Ass'n, No. 19842-1-III, 2001 Wash. App. LEXIS 2156 (Sept. 27, 2001) (catering).
2. Carsh v. Chaparral Pines, L.L.C., No. 2 CA-CV 2002-0175, 2003 Ariz. App. Unpub. LEXIS 59 (2003) (golf membership).
3. OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214 (D. Haw. 2003) (contract to host a conference).
4. Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Env'tl. Sys., No. CIV. 98-0316-E-BLW, 2004 U.S. Dist. LEXIS 24460 (D. Idaho Oct. 29, 2004) (remediate radioactive waste).
5. Gabriel v. Ailing House Pest Control, Inc., H029300, 2007 Cal. App. Unpub. LEXIS 3454 (Apr. 30, 2007) (settlement of pest control contract).
6. Manay v. Academic Exch., No. C07-5071 RBL, 2008 U.S. Dist. LEXIS 30531 (W.D. Wash. Mar. 25, 2008) (foreign exchange student contracts).
7. Portland Gen. Elec. Co. v. City of Glendale, 2009 U.S. Dist. LEXIS 68112 (D. Or. May 22, 2009), *report and recommendation adopted in part, rejected in part*, No. CIV.05-1321-PK, 2009 U.S. Dist. LEXIS 61083 (D. Or. July 15, 2009) (power sale and exchange contract).
8. Castle v. Imagine Audio Video, L.L.C., 1 CA-CV 10-0427, 2011 Ariz. App. Unpub. LEXIS 781 (May 24, 2011) (installation contract).
9. Holland v. BP Am., Inc., No. CIV S-11-0580-KJM, 2012 U.S. Dist. LEXIS 30204 (E.D. Cal. Mar. 6, 2012) (service contract to devise solution to oil spill).
10. Frezza v. Google Inc., 2013 U.S. Dist. LEXIS 57462 (N.D. Cal. Apr. 22, 2013) (online business advertising).
11. DC Media Capital v. Imagine Fulfillment Servs., B239081, 2013 Cal. App. Unpub. LEXIS 6256 (Aug. 30, 2013) (fulfillment contract).

Other (10)

24. Gravel Express, Inc. v. Meadow Valley Contrs., 232 F.3d 894 (9th Cir. Ariz. June 30, 2000) (bankruptcy—turnover payments).
25. Smith v. Solo Watersports, Inc., No. 49064-8-I, 2002 Wash. App. LEXIS 1811 (July 29, 2002) (commercial loan/promissory note).
26. Smith v. Rosenberg, No. E034199, 2004 Cal. App. Unpub. LEXIS 6189 (June 29, 2004) (malpractice).
27. Flores v. Jewels Mktg. & Agribusiness, No. CIV F 07-334 AWI WMW, 2007 U.S. Dist. LEXIS 53127 (E.D. Cal. July 6, 2007) (market-grower agreement).

28. *United States v. Pflueger*, No. CR 10-00631-02 LEK, 2007 U.S. Dist. LEXIS 46784 (D. Haw. June 27, 2007) (consent decree re environmental clean-up).
29. *In re Moonlight Basin Ranch LP*, No. 09-62327-11, 2010 Bankr. LEXIS 2198 (Bankr. Dist. Mont. June 25, 2010) (business re-financing).
30. *Steinman v. Malamed*, 111 Cal. Rptr.3d 304 (Ct. App. 2010) (breach of fiduciary duty—settlement agreement).
31. *Babcock v. ING Life Ins. & Annuity Co.*, No. 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035 (E.D. Wash. Jan. 2, 2013) (structured settlement).
32. *Mortensen v. First Am. Title Co.*, No. 2:11-CV-0063-EJL, 2013 U.S. Dist. LEXIS 43797 (D. Idaho Mar. 25, 2013) (breach of fiduciary duty; property settlement agreement).
33. *Scooter's Pals Rescue v. Cnty. of Placer*, No. 2:12-cv-01736-TLN-KLN, 2013 U.S. Dist. LEXIS 157819 (E.D. Cal. Nov. 1, 2013) (validity of relinquishment).

Appendix 3: Easy In

7th Circuit Cases

Offer (Total Cases = 14)

•Contract Formed (9)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1059-60 (S.D. Ind. 2000).
2. Boomer v. AT&T Corp., 309 F.3d 404, 414-415 (7th Cir. 2002).
3. *In re* Pre-Press Graphics Co., 310 B.R. 893, 899 (Bankr. N.D. Ill. 2004).
4. Bennett v. Broderick, 858 N.E.2d 1044, 1049 (Ind. Ct. App. 2006).
5. Knight v. Kadish, No. 1:05-CV-0077TAB-RLY, 2007 U.S. Dist. LEXIS 47133, at *12 (S.D. Ind. June 28, 2007).
6. Ind. Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359, 366 (Ind. Ct. App. 2008).
7. Jada Toys, Inc. v. Chi. Imp., Inc., No. 07 C 699, 2009 U.S. Dist. LEXIS 85443, at *18-19 (N.D. Ill. Sept. 18, 2009).
8. Carroll v. Stryker Corp., 670 F. Supp. 2d 891, 898 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010).
9. U.S. CFTC v. Tunney & Assocs., No. 13 CV 2919, 2013 U.S. Dist. LEXIS 123124, at *7 (N.D. Ill. Aug. 21, 2013).

•Contract Not Formed (5)

1. Cohen Dev. Co. v. JMJ Props. Inc., 317 F.3d 729, 736 (7th Cir. 2003).
2. Vill. of S. Elgin v. Waste Mgmt., Inc., 810 N.E.2d 658, 671 (Ill. App. Ct. 2004).
3. L.B. Foster Co. v. Tie & Track Sys. Inc., No. 07 C 3692, 2009 U.S. Dist. LEXIS 26962, at *11-12 (N.D. Ill. Mar. 31, 2009).
4. **Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.*, Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897, 902 (7th Cir. 2011).**
5. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11 CV 2463, 2012 U.S. Dist. LEXIS 30477, at *27 (N.D. Ill. Mar. 7, 2012).

Acceptance (Total Cases = 29)

•Contract Formed (16)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1060 (S.D. Ind. 2000).
2. Falconbridge U.S., Inc. v. Bank One Ill., N.A., 227 F.3d 928, 933 (7th Cir. 2000).
3. Boomer v. AT&T Corp., 309 F.3d 404, 415 (7th Cir. 2002).

4. *Bennett v. Truttman*, Ho24877, 2004 Cal. App. Unpub. LEXIS 1648, at *20 (Feb. 24, 2004).
5. *Tickanen v. Harris & Harris, Ltd.*, 461 F. Supp. 2d 863, 869 (E.D. Wis. 2006).
6. *Bennett v. Broderick*, 858 N.E.2d 1044, 1049 (Ind. Ct. App. 2006).
7. *737 N. Mich. Ave. Investors LLC v. Neiman Marcus Grp., Inc.*, No. 06C6379, 2007 U.S. Dist. LEXIS 26079, at *10 (N.D. Ill. Apr. 5, 2007).
8. *Knight v. Kadish*, 1:05-cv-0077-TAB-RLY, 2007 U.S. Dist. LEXIS 47133, at *16 (S.D. Ind. June 28, 2007).
9. *Ind. BMV v. Ash, Inc.*, 895 N.E.2d 359, 366 (Ind. Ct. App. 2008).
10. *Jada Toys, Inc. v. Chi. Import, Inc.*, No. 07C699, 2009 U.S. Dist. LEXIS 85443, at *19 (N.D. Ill. Sept. 18, 2009).
11. *Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co. of N. Am.*, No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.*, *Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp.*, 665 F.3d 897, 904 (7th Cir. 2011).
12. *Carroll v. Stryker Corp.*, 670 F. Supp. 2d 891 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675, 683-84 (7th Cir. 2010).
13. *Stopka v. Am. Family Mut. Ins. Co.*, No. 10C6034, 2011 U.S. Dist. LEXIS 113713, at *8 (N.D. Ill. Sept. 22, 2011).
14. *Bear Dev., LLC v. City of Kenosha*, 822 F. Supp. 2d 865, 871 (E.D. Wis. 2011).
15. *U.S. CFTC v. Tunney & Assocs., P.C.*, No. 13cv2919, 2013 U.S. Dist. LEXIS 123124, at *8 (N.D. Ill. Aug. 21, 2013).
16. *Mitchell v. Mitchell*, Nos. 2-13-0303 & 2-13-0363, cons., 2013 Ill. App. Unpub. LEXIS 2619, at ¶ 35 (Nov. 20, 2013).

•Contract Not Formed (13)

1. *McGrath v. Aon Re, Inc.*, No. 99C2727, 2000 U.S. Dist. LEXIS 12618, at *9 (N.D. Ill. Aug. 23, 2000).
2. *Compton Unified Sch. Dist. v. Universal Constr. Maint. Integration Co.*, B144260, 2002 Cal. App. Unpub. LEXIS 4696, at *16 (Jan. 22, 2002).
3. *R.R. Donnelley & Sons Co. v. Jet Messenger Serv.*, 2003 U.S. Dist. LEXIS 25421, at *16 (N.D. Ill. May 24, 2003).
4. *Finnin v. Bob Lindsay, Inc.*, 852 N.E.2d 446, 550 (Ill. App. Ct. 2006).
5. *Taake v. Cnty. of Monroe*, No. 06-579-GPM, 2007 U.S. Dist. LEXIS 17106, at *6 (S.D. Ill. Mar. 9, 2007), *vacated on other grounds*, 530 F.3d 538 (7th Cir. 2008).
6. *United States ex rel. Countryside Indus. v. Integrated Constr. Tech. Corp.*, No. 07CV2633, 2007 U.S. Dist. LEXIS 76008, at *11-12 (N.D. Ill. Sept. 28, 2007).

7. Estate of Mueller v. Karns, 873 N.E.2d 652, 658 (Ind. Ct. App. 2007).
8. L.B. Foster Co. v. Tie & Track Sys., No. 07C3692, 2009 U.S. Dist. LEXIS 26962, at *15-16 (N.D. Ill. Mar. 31, 2009).
9. Sys. Dev. Integration, LLC v. Computer Scis. Corp., 739 F. Supp. 2d 1063, 1081 (N.D. Ill.2010).
10. Catapult Commc'n Corp. v. Foster, No. 06C6112, 2010 U.S. Dist. LEXIS 94922, at *16 (N.D. Ill. Sept. 13, 2010).
11. Fiduciary Real Estate Dev., Inc. v. Goodavage, 2011 Wisc. App. LEXIS 1023, at ¶ 8 (Dec. 22, 2011).
12. Van Tassell v. United Mktg. Group, LLC, 795 F. Supp. 2d 770, 789 (N.D. Ill. 2011).
13. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11CV2463, 2012 U.S. Dist. LEXIS 30477, at *30 (N.D. Ill. Mar. 7, 2012).

Modification (Total Cases = 22)

•**Contract Formed (13)**

1. DiMizio v. Romo, 756 N.E.2d 1018, 1023 (Ind. Ct. App. 2001).
2. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 298 (7th Cir. 2002).
3. Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751, 759 (Ind. Ct. App. 2002).
4. Carnes Co. v. Stone Creek Mech., Inc., 412 F.3d 845, 853 (7th Cir. 2005).
5. Royster-Clark, Inc. v. Olsen's Mill, Inc., N.W.2d 530, 542 (Wis. 2006).
6. Fritsch v. Premier Investors, LLC, No. 2006AP103-FT, 2006 Wisc. App. LEXIS 252, at *10 (May 26, 2006).
7. Ind. Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359, 366 (Ind. Ct. App. 2008).
8. Hal Wagner Studios, Inc. v. Elliott, No. 09-CV-0031-MJR, 2009 U.S. Dist. LEXIS 8892, at *29 (S.D. Ill. Feb. 19, 2009).
9. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 562 (7th Cir. 2012).
10. Urban Sites of Chi., LLC v. Crown Castle USA, 979 N.E.2d 480, 492 (Ill. App. Ct. 2012).
11. Silverado Group, LLC v. Ed's Towing, Inc., No. 2-12-0629, 2012 IL App (2d) 120629-U, at ¶ 32 (Dec. 24, 2012) (LEXIS).
12. Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 U.S. Dist. LEXIS 28074, at *12 (N.D. Ill. Feb. 26, 2013).
13. Large v. Mobile Tool Int'l, Inc., 724 F.3d 766, 773 (7th Cir. 2013).

•**Contract Not Formed (9)**

1. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 161 (Ind. 2005).
2. AT&T Corp. v. Douglas-Hanson Co., No. 05-C-266-S, 2005 U.S. Dist. LEXIS 24801, at *13 (W.D. Wis. Oct. 21, 2005).

3. Grogg v. Universal Underwriters Ins. Co., No. 1:05-CV-415 TS, 2006 U.S. Dist. LEXIS 51662, at *15 (N.D. Ind. July 13, 2006).
4. Leavitt v. John Hancock Life Ins. Co., No. 04 C 7451, 2007 U.S. Dist. LEXIS 13004, at *31 (N.D. Ill. Feb. 23, 2007).
5. Zusy v. Int'l Med. Group, Inc., 500 F. Supp. 2d 1087, 1093 (S.D. Ind. 2007).
6. Genzyme Corp. v. Disc. Drugs Wis., Inc., No. 08 C 5151, 2010 U.S. Dist. LEXIS 18356, at *14 (N.D. Ill. Feb. 26, 2010).
7. Acevedo v. CitiMortgage, Inc., No. 11 C 4877, 2012 U.S. Dist. LEXIS 106461, at *19 (N.D. Ill. July 25, 2012).
8. McGann v. PNC Bank, N.A., No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *18 (N.D. Ill. Mar. 29, 2013).
9. Baehl v. Bank of America, N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445, at *17 (S.D. Ind. Mar. 29, 2013).

9th Circuit Cases

Offer (Total Cases = 15)

•Contract Formed (2)

1. Donovan v. RRL Corp., 27 P.3d 702, 713 (Cal. 2001).
2. Williams Bros. Construction, L.L.C. v. Baltrusch Inc., 2004 Mont. Dist. LEXIS 3042, at ¶ 25 (2004).

•Contract Not Formed (13)

1. Saluteen-Maschersky v. Countrywide Funding Corp., 22 P.3d 804, 855 (Wash. Ct. App. 2001).
2. Sarafa v. PC Quote, Inc., No. D036652, 2001 Cal. App. Unpub. LEXIS 1229, at *29 (Nov. 28, 2001).
3. Zanakis-Pico v. Cutter Dodge, Inc., 47 P.3d 1222, 1237 (Haw. 2002).
4. Andrus v. Wash. Dep't of Transp., 117 P.3d 1152, 1154 (Wash. Ct. App. 2005).
5. Lexington Precision Corp. v. Autoliv Inc., No. 2 CA-CV 2005-0187, 2006 Ariz. App. Unpub. LEXIS 434, at ¶ 26 (2006).
6. Amber Chem., Inc. v. Reilly Indus., Inc., No. 106CV06090OWWSMS, 2007 U.S. Dist. LEXIS 14451, at *14 (E.D. Cal. 2007).
7. S.J. Amoroso Constr. Co. v. Exec. Risk Indem., Inc., No. C 06-2572 SBA, 2009 U.S. Dist. LEXIS 116080, at *29 (N.D. Cal. Dec. 11, 2009).
8. Rubio v. Capital One Bank, 613 F.3d 1195, 1205 (9th Cir. 2010).
9. Laguerre v. Nev. Sys. of Higher Educ., No. 3:10-CV-452-ECR-VPC, 2010 U.S. Dist. LEXIS 131100, at *9-10 (D. Nev. Dec. 9, 2010).
10. Holland v. BP Am., Inc., No. CIV S-11-0580-KJM, 2012 U.S. Dist. LEXIS 30204, at *17-18 (E.D. Cal. Mar. 6, 2012).

11. Ashbey v. Archstone Prop. Mgmt., No. SACV 12-0009 DOC, 2012 U.S. Dist. LEXIS 53108, at *18 (C.D. Cal. Apr. 13, 2012).
12. Frezza v. Google Inc., 2013 U.S. Dist. LEXIS 57462, at *10 (N.D. Cal. Apr. 22, 2013).
13. Cheren v. Compass Bank, No. CV-12-00206-PHX-JAT, 2013 U.S. Dist. LEXIS 118804, at *11 (D. Ariz. Aug. 20, 2013).

Acceptance (Total Cases = 24)

•Contract Formed (11)

1. Gray v. Stewart, 119 Cal. Rptr. 2d 217, 220 (Ct. App. 2002).
2. Leon v. Sharp Health Care, D040042, 2003 Cal. App. Unpub. LEXIS 4910, at *8 (May 20, 2003).
3. Bennett v. Truttman, H024877, 2004 Cal. App. Unpub. LEXIS 1648, at *23 (Feb. 24, 2004).
4. Ken Hood Constr. Co. v. Pac. Coast Constr., Inc., 120 P.3d 6, 12 (Or. Ct. App. 2005).
5. Earls v. Corning, 143 P.3d 243, 247 (Or. Ct. App. 2006).
6. Gabriel v. Ailing House Pest Control, Inc., H029300, 2007 Cal. App. Unpub. LEXIS 3454, at *16 (Apr. 30, 2007).
7. Attachmate Corp. v. Health Net, Inc., No. C09-1161 MJP, 2010 U.S. Dist. LEXIS 114445, at *8 (W.D. Wash. Oct. 26, 2010).
8. Lietz v. Hansen Law Offices, PSC, 271 P.3d 899, 908 (Wash. Ct. App. 2011).
9. Gardenias v. Candreva, B223556, 2011 Cal. App. Unpub. LEXIS 1884, at *9-10 (Mar. 14, 2011).
10. Mills v. Budil, No. 41586-1-II, 2012 Wash. App. LEXIS 739, at *12 (Mar. 27, 2012).
11. DC Media Capital v. Imagine Fulfillment Servs., B239081, 2013 Cal. App. Unpub. LEXIS 6256, at *11 (Aug. 30, 2013).

•Contract Not Formed (13)

1. Hoseth v. Masonic Temple Ass'n, No. 19842-1-III, 2001 Wash. App. LEXIS 2156, at *7 (Sept. 27, 2001).
2. Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co., 45 P. 3d 657, 665 (Alaska 2002), *remanded by*, Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333 (Alaska 2009).
3. WMW L.L.C. v. Winton, B162872, 2004 Cal. App. Unpub. LEXIS 1590, at *22 (Feb. 23, 2004).
4. Johnston v. Moreli, F046348, 2006 Cal. App. Unpub. LEXIS 4920, at *23 (June 8, 2006).
5. Beretta v. Tucson Trap & Skeet Club, 2 CA-CV 2007-0009, 2007 Ariz. App. Unpub. LEXIS 1260, at *10 (Aug. 16, 2007).

6. Veith v. Xterra Wetsuits, L.L.C., 183 P.3d 334, 366-67 (Wash. Ct. App. 2008).
7. Shikwan Sung v. Hamilton, 676 F. Supp. 2d 990, 1003 (D. Haw. 2009).
8. Castle v. Imagine Audio Video, L.L.C., 1 CA-CV 10-0427, 2011 Ariz. App. Unpub. LEXIS 781, at *18 (May 24, 2011).
9. Fuller v. Monogram Real Estate, G044514, 2011 Cal. App. Unpub. LEXIS 9647, at *6 (Dec. 19, 2011).
10. Nascimento v. Wells Fargo Bank, NA, 2:11-CV-1049 JCM (GWF), 2012 U.S. Dist. LEXIS 160301, at *6 (D. Nev. Nov. 8, 2012).
11. Sea Hawk Seafoods, Inc. v. City of Valdez, 282 P.3d 359 (Alaska 2012).
12. Duncan v. Lifelock, Inc., 1 CA-CV 12-0546, 2013 Ariz. App. Unpub. LEXIS 744, at *8 (July 2, 2013).
13. Arreola v. Napole, B239467, 2013 Cal. App. Unpub. LEXIS 7346, at *15 (Oct. 15, 2013).

Modification (Total Cases = 23)

•**Contract Formed (4)**

1. Flores v. Jewels Mktg. & Agribusiness, No. CIV F 07-334 AWI WMW, 2007 U.S. Dist. LEXIS 53127, at *25 (E.D. Cal. July 6, 2007).
2. Sociedad Aeronautica De, Santander S.A. v. Weber, No. CV 09-103-M-DWM, 2010 U.S. Dist. LEXIS 71349, at *5 (D. Mont. July 14, 2010).
3. Barroso v. Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1013 (2012).
4. Goodman v. Wells Fargo Bank, No. B243614, 2014 Cal. App. Unpub. LEXIS 789, at *39-40 (Jan. 30, 2014).

•**Contract Not Formed (19)**

1. Smith v. Solo Watersports, Inc., No. 49064-8-I, 2002 Wash. App. LEXIS 1811, at *12 (July 29, 2002).
2. Shea v. Household Bank (SB), 129 Cal. Rptr. 2d 387, 389 (Ct. App. 2003).
3. Gillani Consulting Inc. v. Daewoo Heavy Indus. Am. Corp., No. C05-0823-JCC, 2006 U.S. Dist. LEXIS 88704, at *22 (W.D. Wash. Dec. 7, 2006), *aff'd* 300 F. App'x 466 (9th. Cir. 2008).
4. Wessa v. Watermark Paddlesports, Inc., No. C06-5156 FDB, 2006 U.S. Dist. LEXIS 51757, at *7 (W.D. Wash. July 28, 2006).
5. Dragt v. Dragt/DeTray, LLC, 161 P.3d 473, 480 (Wash. Ct. App. 2007).
6. Womack v. Bank of Am., No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909, at *15 (Nov. 20, 2007).

7. Evans v. Aurora Loan Servs., No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410, at *11 (D. Nev. June 18, 2010).
8. Barinaga v. JP Morgan Chase & Co., 749 F. Supp. 2d 1164, 1177 (D. Or. 2010).
9. Morales v. Chase Home Fin., No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *18 (N.D. Cal. Apr. 11, 2011).
10. FDIC v. First Am. Title Ins. Co., No. SACV 10-0713 DOC (MLGx), 2011 U.S. Dist. LEXIS 94842, at *21 (C.D. Cal. Aug. 24, 2011).
11. Ahmed v. Wells Fargo Bank, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055, at *11-12 (Oct. 24, 2011).
12. AAA Constr. of Missoula v. Choice Land Corp., 264 P.3d 709, 714 (Mont. 2011).
13. Nungaray v. Litton Loan Servicing, LP, 135 Cal.Rptr.3d 442, 447 (Ct. App. 2011), *modified by*, No. B230580, 2011 Cal. App. LEXIS 1504 (Dec. 1, 2011).
14. Soin v. Fannie Mae, 2012 U.S. Dist. LEXIS 51824, at *15 (E.D. Cal. Apr. 12, 2012).
15. Mulville v. Wells Fargo Bank, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285, at *17 (Nov. 14, 2012).
16. Juarez v. Suntrust Mortg., No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850, at *46 (E.D. Cal. May 13, 2013).
17. Toneman v. U.S. Bank, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240, at *20-21 (C.D. Cal. Feb. 22, 2013).
18. Graybill v. Wells Fargo Bank, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *39-40 (N.D. Cal. Mar. 12, 2013).
19. Dragicevich v. Chase Home Fin., No. CV 12-8192 ABC (MANx), 2013 U.S. Dist. LEXIS 112208, at *8 (C.D. Cal. July 8, 2013).

Appendix 4: Difficult Out

7th Circuit Cases

Duress (Total Cases = 10)

•Performance Discharged (0)

•Performance Not Discharged (10)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1062 (S.D. Ind. 2000).
2. Rissman v. Rissman, 213 F.3d 381, 387 (7th Cir. 2000).
3. Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153, 1163 (Ill. App. Ct. 2002).
4. Putz v. Allie, 785 N.E.2d 577, 582 (Ind. Ct. App. 2003).
5. McBride v. St. Anthony Messenger Magazine, No. 2:02-CV-0237-JDT-WTL, 2003 U.S. Dist. LEXIS 6449, at *21-22 (S.D. Ind. Feb. 6, 2003).
6. *In re* Pre-Press Graphics Co., 310 B.R. 905, 919 (Bankr. N.D. Ill. 2004).
7. Cozen O'Connor, P.C. v. Asperger Caraher LLC, No. 05 C 5624, 2006 U.S. Dist. LEXIS 81112, at *22 (N.D. Ill. Nov. 6, 2006).
8. United States v. Fletcher, No. 06 C 6056, 2008 U.S. Dist. LEXIS 3555, at *33-34 (N.D. Ill. Jan. 15, 2008), *aff'd*, 562 F.3d 839 (7th Cir. 2009).
9. ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961, 974 (N.D. Ill. 2010).
10. Jackson v. Payday Fin., LLC, No. 11 C 9288, 2012 U.S. Dist. LEXIS 94095, at *8-9 (N.D. Ill. July 9, 2012), *rev'd and remanded on other grounds*, 764 F.3d 765 (7th Cir. 2014).

Impracticability (Total Cases = 12)

•Performance Discharged (0)

•Performance Not Discharged (12)

1. Contempo Design, Inc. v. Chi. & Ne. Ill. Dist. Council of Carpenters, 226 F.3d 535, 546 (7th Cir. 2000).
2. Days Inn of Am., Inc. v. Patel, 88 F. Supp. 2d 928, 933-34 (C.D. Ill. 2000).
3. Sub-Zero Freezer Co. v. Cunard Line Ltd., No. 01-C-0664-C, 2002 U.S. Dist. LEXIS 27142, at *16 (W.D. Wis. Mar. 12, 2002).
4. Indeck Energy Servs., Inc. v. NRG Energy, Inc., No. 03 C 2265, 2004 U.S. Dist. LEXIS 18830, at *36-37 (N.D. Ill. Sept. 16, 2004).
5. Exelon Generation Co. v. Gen. Atomics Techs. Corp., 559 F. Supp. 2d 892, 904 (N.D. Ill. 2008).

6. Ner Tamid Congregation of N. Town v. Krivoruchko, No. 08 C 1261, 2009 U.S. Dist. LEXIS 58318, at *59 (N.D. Ill. July 9, 2009).
7. Brenner v. Greenberg, No. 08 C 826, 2010 U.S. Dist. LEXIS 120614, at *17-19 (N.D. Ill. Nov. 15, 2010).
8. Prospect Enters., L.L.C. v. Ruff, No. 10-1026, 2011 U.S. Dist. LEXIS 74099, at *19 (C.D. Ill. July 11, 2011).
9. Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc., No. 09 C 4963, 2011 U.S. Dist. LEXIS 21258, at *15 (N.D. Ill. Mar. 3, 2011).
10. Lawrence Crawford Ass'n v. Conversource, Inc., No. 5-11-0061, 2012 Ill. App. Unpub. LEXIS 1966, at *14 (Aug. 15, 2012).
11. Howard Johnson Int'l, Inc. v. M.D.I, LLC, No. 11 C 2593, 2012 U.S. Dist. LEXIS 151223, at *9 (N.D. Ill. Oct. 19, 2012).
12. BRC Rubber & Plastics v. Cont'l Carbon Co., 949 F. Supp. 2d 862, 877 (N.D. Ind. 2013).

Modification (Total Cases =22)

•**Performance Discharged (13)**

1. DiMizio v. Romo, 756 N.E.2d 1018, 1025 (Ind. Ct. App. 2001).
2. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 298 (7th Cir. 2002).
3. Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751, 758-59 (Ind. Ct. App. 2002).
4. Carnes Co. v. Stone Creek Mech., Inc., 412 F.3d 845, 853 (7th Cir. 2005).
5. Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, 290 Wis.2d 264, 283, 714 N.W.2d 530, 540 (2006).
6. Fritsch v. Premier Investors, LLC, 2006 WI App 130, 294 Wis.2d 699, 717 N.W.2d 854 (2006).
7. Ind. Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359, 366 (Ind. Ct. App. 2008).
8. Hal Wagner Studios, Inc. v. Elliott, No. 09-CV-0031-MJR, 2009 U.S. Dist. LEXIS 8892, at *21-23 (S.D. Ill. Feb. 19, 2009).
9. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 561-66 (7th Cir. 2012).
10. Urban Sites of Chi., LLC v. Crown Castle USA, 979 N.E.2d 480, 493, 496 (Ill. App. Ct. 2012)
11. Silverado Group, LLC v. Ed's Towing, Inc., No. 2-12-0629, 2012 IL App (2d). 120629-U, at *33 (Dec. 24, 2012) (LEXIS).
12. Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 U.S. Dist. LEXIS 28074, at *30-31 (N.D. Ill. Feb. 26, 2013).
13. Large v. Mobile Tool Int'l, Inc., 724 F.3d 766, 772 (7th Cir. 2013).

•**Performance Not Discharged (9)**

1. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 161 (Ind. 2005).

2. AT&T Corp. v. Douglas-Hanson Co., No. 05-C-266-S, 2005 U.S. Dist. LEXIS 24801, at *11 (W.D. Wis. Oct. 21, 2005).
3. Grogg v. Universal Underwriters Ins. Co., No. 1:05-CV-415 TS, 2006 U.S. Dist. LEXIS 51662, at *15 (N.D. Ind. July 13, 2006).
4. Leavitt v. John Hancock Life Ins. Co., No. 04 C 7451, 2007 U.S. Dist. LEXIS 13004, at *27, 31 (N.D. Ill. Feb. 23, 2007).
5. Zusy v. Int'l Med. Group, Inc., 500 F. Supp. 2d 1087, 1095, 1097 (S.D. Ind. 2007).
6. Genzyme Corp. v. Disc. Drugs Wis., Inc., No. 08 C 5151, 2010 U.S. Dist. LEXIS 18356, at *13-14 (N.D. Ill. Feb. 26, 2010).
7. Acevedo v. CitiMortgage, Inc., No. 11 C 4877, 2012 U.S. Dist. LEXIS 106461, at *18-19 (N.D. Ill. July 25, 2012).
8. McGann v. PNC Bank, N.A., No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *18 (N.D. Ill. Mar. 29, 2013).
9. Baehl v. Bank of America, N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445, at *32-33 (S.D. Ind. Mar. 29, 2013).

9th Circuit Cases

Duress (Total Cases = 16)

•Performance Discharged (1)

1. Flower v. Pep Boys, No. D040667, 2003 Cal. App. Unpub. LEXIS 8095, at *31 (Aug. 26, 2003).

•Performance Not Discharged (15)

1. Morrow v. Am. Int'l Grp., No. B144474, 2002 Cal. App. Unpub. LEXIS 3120, at *35 (Mar. 13, 2002).
2. Yemen v. Countrywide Home Loans, Inc., No. B144230, 2002 Cal. App. Unpub. LEXIS 2181, at *24 (Apr. 11, 2002).
3. Dodi v. Am. Online, Inc., No. B158161, 2003 Cal. App. Unpub. LEXIS 4085, at *16-17 (Apr. 24, 2003).
4. Smith v. Rosenberg, No. E034199, 2004 Cal. App. Unpub. LEXIS 6189, at *18 (June 29, 2004).
5. Namdar v. Koop, No. G032726, 2005 Cal. App. Unpub. LEXIS 2087, at *32 (Mar. 8, 2005).
6. S & W Seed Co. v. Mut. Serv. Cas. Ins. Co., No. F043771, 2005 Cal. App. Unpub. LEXIS 11723, at *20-21 (Dec. 20, 2005).
7. Goodman v. Lothrop, 151 P.3d 818, 823 (Idaho 2007).
8. Perez v. Uline, Inc., 68 Cal. Rptr. 3d 872, 876-77 (Ct. App. 2007).
9. Murray v. United Servs. Auto. Ass'n, No. A117596, 2008 Cal. App. Unpub. LEXIS 7864, at *16 (Sept. 15, 2008).

10. *In situ, Inc. v. Kent*, No. CV-08-3067-EFS, 2009 U.S. Dist. LEXIS 61190, at *13 (E.D. Wash. June 17, 2009), *aff'd*, 388 F. App'x 745 (9th Cir. 2010).
11. *In re Moonlight Basin Ranch LP*, No. 09-62327-11, 2010 Bankr. LEXIS 2198, at *107 (Bankr. Dist. Mont. June 25, 2010).
12. *Steinman v. Malamed*, 111 Cal. Rptr. 3d 304, 310 (Ct. App. 2010).
13. *Chan v. Lund*, 116 Cal. Rptr. 3d 122, 135 (Ct. App. 2010).
14. *Mortensen v. First Am. Title Co.*, No. 2:11-CV-0063-EJL, 2013 U.S. Dist. LEXIS 43797, at *24 (D. Idaho Mar. 25, 2013).
15. *Scooter's Pals Rescue v. Cnty. of Placer*, No. 2:12-cv-01736-TLN-KLN, 2013 U.S. Dist. LEXIS 157819, at *15 (E.D. Cal. Nov. 1, 2013).

Impracticability (Total Cases = 24)

•Performance Discharged (6)

1. *Cape-France Enters v. In re Estate of Peed*, 29 P.3d 1011, 1016 (Mont. 2001).
2. *Ploegman v. Burlington N. & Santa Fe Ry. Co.*, 112 Wash. App. 1001, at *3 (2002).
3. *Evans v. Spokane*, 112 Wash. App. 1059, at *7 (2002).
4. *United States v. Pflueger*, No. CR 10-00631-02 LEK, 2007 U.S. Dist. LEXIS 46784, at *9 (D. Haw. June 27, 2007).
5. *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 96 Cal. Rptr. 3d 813, 843 (Ct. App. 2009).
6. *Babcock v. ING Life Ins. & Annuity Co.*, No. 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035, at *21 (E.D. Wash. Jan. 2, 2013).

•Performance Not Discharged (18)

1. *Gravel Express, Inc. v. Meadow Valley Contrs.*, 2000 U.S. App. LEXIS 15720, at *8 (9th Cir. Ariz. June 30, 2000).
2. *Peoplesoft U.S.A., Inc. v. Softeck, Inc.*, 227 F. Supp. 2d 1116, 1120 (N.D. Cal. 2002).
3. *Carsh v. Chaparral Pines, L.L.C.*, No. 2 CA-CV 2002-0175, 2003 Ariz. App. Unpub. LEXIS 59, at *13 (2003).
4. *OWBR LLC v. Clear Channel Communs., Inc.*, 266 F. Supp. 2d 1214, 1225 (D. Haw. 2003).
5. *Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Envtl. Sys.*, No. CIV. 98-0316-E-BLW, 2004 U.S. Dist. LEXIS 24460, at *92 (D. Idaho Oct. 29, 2004).
6. *Nielsen Bros. v. Solid Trading, Ltd.*, No. 52535-2-I, 2004 Wash. App. LEXIS 2769, at *11 (Nov. 15, 2004).

7. Landover Corp. v. Bellevue Master, LLC, 2006 U.S. Dist. LEXIS 1845, at *43-44 (W.D. Wash. Jan. 6, 2006), *aff'd*, 252 F. App'x 800 (9th Cir. 2007).
8. Dalkilic v. Titan Corp., 516 F. Supp. 2d 1177, 1197-98 (S.D. Cal. 2007).
9. Coll. of the Sequoias Farm v. White Gold Ass'n, No. 1:07-CV-00014 AWINEW, 2007 U.S. Dist. LEXIS 49315, at *43 (E.D. Cal. July 6, 2007).
10. Manay v. Academic Exch., No. C07-5071 RBL, 2008 U.S. Dist. LEXIS 30531, at *17 (W.D. Wash. Mar. 25, 2008).
11. Portland Gen. Elec. Co. v. City of Glendale, 2009 U.S. Dist. LEXIS 68112, at *52 (D. Or. May 22, 2009), *report and recommendation adopted in part, rejected in part*, No. CIV.05-1321-PK, 2009 U.S. Dist. LEXIS 61083 (D. Or. July 15, 2009).
12. Wells Fargo Bank, N.A. v. Ash Org., No. 09-CV-188-MO, 2010 U.S. Dist. LEXIS 66542, at *18-19 (D. Or. July 1, 2010).
13. Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-CV-0017-RRB, 2010 U.S. Dist. LEXIS 92132, at *7 (D. Ala. Sept. 2, 2010).
14. Max Baer Prods., Ltd. v. Riverwood Partners, LLC, No. 309-CV-00512-RCJRAM, 2010 U.S. Dist. LEXIS 100325, at *10 (D. Nev. Sept. 17, 2010).
15. M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX-NVW, 2011 U.S. Dist. LEXIS 130638, at *20 (D. Ariz. Nov. 9, 2011).
16. Bean v. BAC Home Loans Servicing, L.P., No. 11-CV-553-PHX-GMS, 2012 U.S. Dist. LEXIS 476, at *14 (D. Ariz. Jan. 3, 2012).
17. Reader v. BAC Home Loan Servicing LP, No. CV 11-02461-PHX-FJM, 2012 U.S. Dist. LEXIS 4899, at *13 (D. Ariz. Jan. 17, 2012), *aff'd in part, vacated in part, remanded sub nom*, 582 F. App'x 719 (9th Cir. 2014).
18. Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC, No. 11-CV-5973-RBL, 2013 U.S. Dist. LEXIS 85776, at *34 (W.D. Wash. June 18, 2013).

Modification (Total Cases = 23)

•Performance Discharged (4)

1. Flores v. Jewels Mktg. & Agribusiness, No. CIV F 07-334 AWI WMW, 2007 U.S. Dist. LEXIS 53127, at *7 (E.D. Cal. July 6, 2007).
2. Sociedad Aeronautica De, Santander S.A. v. Weber, No. CV 09-103-M-DWM, 2010 U.S. Dist. LEXIS 71349, at *5 (D. Mont. July 14, 2010).
3. Barroso v. Ocwen Loan Servicing, LLC, 146 Cal. Rptr. 3d 90, 98 (Ct. App. 2012).

4. Goodman v. Wells Fargo Bank, No. B243614, 2014 Cal. App. Unpub. LEXIS 789, at *45 (Jan. 30, 2014).

•Performance Not Discharged (19)

1. Smith v. Solo Watersports, Inc., No. 49064-8-I, 2002 Wash. App. LEXIS 1811, at *12-13 (July 29, 2002).
2. Shea v. Household Bank (SB), 129 Cal. Rptr. 2d 387, 389 (Ct. App. 2003).
3. Gillani Consulting Inc. v. Daewoo Heavy Indus. Am. Corp., No. C05-0823-JCC, 2006 U.S. Dist. LEXIS 88704, at *22 (W.D. Wash. Dec. 7, 2006), *aff'd* 300 F. App'x 466 (9th. Cir. 2008).
4. Wessa v. Watermark Paddlesports, Inc., No. C06-5156 FDB, 2006 U.S. Dist. LEXIS 51757, at *8-9 (W.D. Wash. July 28, 2006).
5. Dragt v. Dragt/DeTray, LLC, 161 P.3d 473, 480 (Wash. Ct. App. 2007).
6. Womack v. Bank of Am., No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909, at *9 (Nov. 20, 2007).
7. Evans v. Aurora Loan Servs., No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410, at *11 (D. Nev. June 18, 2010).
8. Barinaga v. JP Morgan Chase & Co., 749 F. Supp. 2d 1164, 1174 (D. Or. 2010).
9. Morales v. Chase Home Fin., No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *17 (N.D. Cal. Apr. 11, 2011).
10. FDIC v. First Am. Title Ins. Co., No. SACV 10-0713 DOC (MLGx), 2011 U.S. Dist. LEXIS 94842, at *21 (C.D. Cal. Aug. 24, 2011).
11. Ahmed v. Wells Fargo Bank, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055, at *11 (Oct. 24, 2011).
12. AAA Constr. of Missoula v. Choice Land Corp., 264 P.3d 709, 714 (Mont. 2011).
13. Nungaray v. Litton Loan Servicing, LP, 135 Cal. Rptr. 3d 442, 447 (Ct. App. 2011), *modified by* No. B230580, 2011 Cal. App. LEXIS 1504 (Dec. 1, 2011).
14. Soin v. Fannie Mae, 2012 U.S. Dist. LEXIS 51824, at *15 (E.D. Cal. Apr. 12, 2012).
15. Mulville v. Wells Fargo Bank, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285, at *15 (Nov. 14, 2012).
16. Juarez v. Suntrust Mortg., No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850, at *45-46 (E.D. Cal. May 13, 2013).
17. Toneman v. U.S. Bank, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240, at *20-21 (C.D. Cal. Feb. 22, 2013).
18. Graybill v. Wells Fargo Bank, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *42 (N.D. Cal. Mar. 12, 2013).
19. Dragicevich v. Chase Home Fin., No. CV 12-8192 ABC (MANx), 2013 U.S. Dist. LEXIS 112208, at *10-11 (C.D. Cal. July 8, 2013).

Appendix 5: Unconscionability

Re: The Lexis/Nexis Search

Search Terms: Unconscionability: (“Unconscionability” near/25 contract) and (avoid! near/25 enforce!)

Search Filters: The search was conducted on Lexis using the timeline of January 1, 2011 through March 1, 2014, and the following filters: Jurisdiction: 9th Circuit, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.

Arbitration Clause Cases—Clause Enforceable

1. Coup v. Scottsdale Plaza Resort, LLC, 823 F. Supp. 2d 931, 955 (D. Ariz. 2011).
2. Grabowski v. C.H. Robinson Co., 817 F. Supp. 2d 1159, 1179 (S.D. Cal. 2011).
3. L & M Creations, Inc. v. CRC Info. Sys., No. 2:10-cv-00685-GMN-GWF, 2011 U.S. Dist. LEXIS 36269, at *20 (D. Nev. Mar. 23, 2011).
4. Koffler Elec. Mech. Apparatus Repair, Inc. v. Wärtsilä N. Am., Inc., No. C-11-0052 EMC, 2011 U.S. Dist. LEXIS 34851, at *22 (N.D. Cal. Mar. 24, 2011).
5. Baltazar v. Forever 21, Inc., 150 Cal. Rptr. 3d 845, 860 (Ct. App. 2012), *review granted*, 296 P.3d 974 (Cal. 2013).
6. Luchini v. Carmax, Inc., No. CV F 12-0417 LJO DLB, 2012 U.S. Dist. LEXIS 102198, at *32-34 (E.D. Cal. July 23, 2012).
7. Stacy v. Brinker Rest. Corp., No. 1:12-cv-00851-LJO-BAM, 2012 U.S. Dist. LEXIS 150345, at *31-32 (E.D. Cal. Oct. 16, 2012).
8. Kilgore v. KeyBank, N.A., 673 F.3d 947, 964 (9th Cir. 2012).
9. Rosendahl v. Bridgepoint Educ., Inc., 2012 U.S. Dist. LEXIS 26139, at *30 (S.D. Cal. Feb. 28, 2012).
10. Morvant v. P.F. Chang’s China Bistro, Inc., 870 F. Supp. 2d 831, 841 (N.D. Cal. 2012).
11. Lara v. Onsite Health, Inc., 896 F. Supp. 2d 831, 848 (N.D. Cal. 2012).
12. Reid v. Optumhealth Care Solutions, Inc., No. 3:12-cv-00747-ST, 2012 U.S. Dist. LEXIS 184214, at *22 (D. Or. Oct. 11, 2012).
13. Vasquez v. Greene Motors, Inc., 154 Cal. Rptr. 3d 778, 798 (Ct. App. 2013), *review granted*, 302 P.3d 573 (Cal. 2013).
14. Flores v. West Covina Auto Grp, LLC, 151 Cal. Rptr. 3d 481, 499-500 (Ct. App. 2013), *review granted*, 297 P.3d 884 (Cal. 2013).
15. Leos v. Darden Rests., Inc., 158 Cal. Rptr. 3d 384, 390 (Ct. App. 2013), *review granted*, 307 P.3d 878 (Cal. 2013).

16. Bigler v. Harker Sch., 153 Cal. Rptr. 3d 78, 86-87 (Ct. App. 2013).
17. King v. Hausfeld, No. C-13-0237 EMC, 2013 U.S. Dist. LEXIS 51116, at *54 (N.D. Cal. Apr. 9, 2013).
18. Serpa v. Cal. Sur. Investigations, Inc., 155 Cal. Rptr. 3d 506, 518 (Ct. App. 2013).
19. McIntosh v. Adventist Health/West St. Hosp., No. C 12-05589 PJH, 2013 U.S. Dist. LEXIS 34328, at *25 (N.D. Cal. Mar. 12, 2013).
20. Mercado v. Doctors Med. Ctr. of Modesto, Inc., No. F064478, 2013 Cal. App. LEXIS 5303, at *25 (July 26, 2013).
21. Nibler v. Monex Deposit Co., No. G046511, 2013 Cal. App. Unpub. LEXIS 3363, at *17 (May 13, 2013).
22. Uptown Drug Co. v. CVS Caremark Corp., 962 F. Supp. 2d 1172, 1183 (N.D. Cal. 2013).
23. Brown v. Auto. Club of S. Cal., No. B241995, 2013 Cal. App. Unpub. LEXIS 5410, at *8-9 (July 31, 2013).
24. Peng v. First Republic Bank, 162 Cal. Rptr.3d 545, 554 (Ct. App. 2013).
25. Fimby-Christensen v. 24 Hour Fitness USA, Inc., Case No. 5:13-cv-01007-EJD, 2013 U.S. Dist. LEXIS 166647, at *11 (N.D. Cal. Nov. 22, 2013).
26. Montes v. San Joaquin Cmty. Hosp., No. 1:13-cv-01722-AWT-JLT, 2014 U.S. Dist. LEXIS 11252, at *43 (E.D. Cal. Jan. 28, 2014).
27. Brookdale Inn & Spa v. Certain Underwriters at Lloyds, London, Case No.: 5:13-CV-02559-EJD, 2014 U.S. Dist. LEXIS 4008, at *18 (N.D. Cal. Jan. 13, 2014).
28. Briede v. 24 Hour Fitness, USA, Inc., Civil No. 10-649-HA, 2010 U.S. Dist. LEXIS 112563, at *9 (D. Or. Oct. 21, 2010).

Arbitration Clause Cases—Clause Not Enforceable

1. Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19, 22 (Ct. App. 2011), *review granted*, 272 P.3d 976 (Cal. 2012).
2. Andrade v. Superior Court, No. H034960, 2011 Cal. App. LEXIS 3508, at *1 (May 10, 2011).
3. Kanbar v. O'Melveny & Myers, 849 F. Supp. 2d 902, 910 (N.D. Cal. 2011).
4. Zullo v. Superior Court, 127 Cal. Rptr. 3d 461, 468 (Ct. App. 2011).
5. Goodridge v. KDF Auto. Group, Inc., 147 Cal. Rptr. 3d 16, 32 (Ct. App. 2012), *review granted*, 290 P.3d 1116 (Cal. 2012).
6. Mayers v. Volt Mgmt. Corp., 137 Cal. Rptr. 3d 657, 660 (Ct. App. 2012), *review granted*, 278 P.3d 1167 (Cal. 2012).
7. Samaniego v. Empire Today, LLC, 140 Cal. Rptr. 3d 492, 495 (Ct. App. 2012).

8. Vargas v. SAI Monrovia B, Inc., 157 Cal. Rptr. 3d 742, 751 (Ct. App. 2013), *review granted*, 304 P.3d 1082 (Cal. 2013).
9. Natalini v. Import Motors, Inc., 153 Cal. Rptr. 3d 224, 234 (Ct. App. 2013), *review granted*, 299 P.3d 700 (Cal. 2013).
10. Vega v. Frandeli Grp. LLC, No. G047847, 2013 Cal. App. Unpub. LEXIS 7464, at *1 (Oct. 17, 2013).
11. Quinonez v. Empire Today, No. A134448, 2013 Cal. App. Unpub. LEXIS 2053, at *17-18 (Mar. 22, 2013).

Non-Arbitration Clause Cases

1. Matson v. Dean, No. B234024, 2012 Cal. App. Unpub. LEXIS 6288 (Aug. 28, 2012).
2. Potter v. GE Capital, No. C13-1129RAJ, 2014 U.S. Dist. LEXIS 13289 (W.D. Wash. Feb. 3, 2014).

Appendix 6: Prevailing Parties by Doctrine—7th Circuit

Offer (Total Cases = 14)

•Stronger Party (7)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1057-60 (S.D. Ind. 2000) (**AerChem**; corporation, employer, drafted the contract; Flynn: employee; Flynn argued no offer—Court held offer established).
2. Boomer v. AT&T Corp., 309 F.3d 404, 408-409, 414, 416 (7th Cir. 2002) (**AT&T**; giant telecommunication provider; Boomer: customer; Boomer argued no offer—Court held offer established).
3. Jada Toys, Inc. v. Chi. Imp., Inc., No. 07 C 699, 2009 U.S. Dist. LEXIS 85443, at *4, *6, *13-14, *18-21 (N.D. Ill. Sept. 18, 2009) (**Jada Toys**; large manufacturer, contracts were Jada Toys' invoices; Chicago Imports: toy seller; Jada Toys argued offer—Court held offer established).
4. Carroll v. Stryker Corp., 670 F. Supp. 2d 891, 894, 897-898 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010) (**Stryker Corp**: corporation, employer, drafted contract; Carroll: employee; Stryker Corp. argued offer—Court held offer established).
5. Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd sub nom.* Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897 (7th Cir. 2011). (**Life Insurance Co.**; insurance company, drafted policy; National Production Workers Union Insurance Trust: trust jointly set up by large union and employers with collective bargaining agreements with union; Workers Union argued offer—Court held no offer was established).
6. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11 CV 2463, 2012 U.S. Dist. LEXIS 30477, at *1, *2-3, *20, *27 (N.D. Ill. Mar. 7, 2012) (**Companion Ins. Co.**: insurance company, drafted policy; Claire's Stores: national retailer; Claire's argued offer—Court held no offer established).
7. U.S. CFTC v. Tunney & Assocs., No. 13 CV 2919, 2013 U.S. Dist. LEXIS 123124, at *2, *6, *8 (N.D. Ill. Aug. 21, 2013) (**US Commodity Futures Trading Commission**: federal agency; Tunney & Associates: CPA firm; Tunney argued no offer—Court held offer established).

•Weaker Party (3)

1. *In re* Pre-Press Graphics Co., 310 B.R. 893, 895-896, 898-899 (Bankr. N.D. Ill. 2004) (**David Azarla**: employee; Pre-Press Graphics:

- corporation; employer; Azarla argued offer— Court held offer established).
2. *Bennett v. Broderick*, 858 N.E.2d 1044, 1046, 1048-1049 (Ind. Ct. App. 2006) (**Brian Bennett**: lessee; Carole Broderick: lessor; Broderick argued no offer— Court held offer established).
 3. *Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 362, 365-366 (Ind. Ct. App. 2008) (**Ash, Inc.**; landlord, property owner; Indiana BMV: state agency; Indiana BMV argued no offer— Court held offer established).

•Undesignated (4)

1. *Cohen Dev. Co. v. JMJ Props. Inc.*, 317 F.3d 729 (7th Cir. 2003) (both parties are corporations, both are land developers).
2. *Vill. of S. Elgin v. Waste Mgmt., Inc.*, 810 N.E.2d 658 (Ill. App. Ct. 2004) (a City versus a large corporation and large landowner).
3. *Knight v. Kadish*, No. 1:05-CV-0077TAB-RLY, 2007 U.S. Dist. LEXIS 47133 (S.D. Ind. June 28, 2007) (both parties in business, both represented by attorneys).
4. *L.B. Foster Co. v. Tie & Track Sys. Inc.*, No. 07 C 3692, 2009 U.S. Dist. LEXIS 26962 (N.D. Ill. Mar. 31, 2009) (not enough information about each company).

Acceptance (Total Cases = 29)

•Stronger Party (13)

1. *Flynn v. AerChem, Inc.*, 102 F. Supp. 2d 1055, 1057-60 (S.D. Ind. 2000) (**AerChem**; corporation, employer, drafted the contract; Flynn: employee; Flynn argued no acceptance— Court held acceptance was established).
2. *McGrath v. Aon Re, Inc.*, No. 99C2727, 2000 U.S. Dist. LEXIS 12618, at *1-3, *6-7 (N.D. Ill. Aug. 23, 2000) (**Aon**: corporation, employer; Thomas McGrath: employee; McGrath argued acceptance— Court held no acceptance established).
3. *Boomer v. AT&T Corp.*, 309 F.3d 404, 408-409, 414-415 (7th Cir. 2002) (**AT&T**; giant telecommunication provider; Boomer: customer; Boomer argued no acceptance— Court held acceptance established).
4. *Tickanen v. Harris & Harris, Ltd.*, 461 F. Supp. 2d 863, 865-867 (E.D. Wis. 2006) (**Harris & Harris**: assignee of credit card issuers; Helen Tickanen et al: credit card holders; Tickanen argued no acceptance— Court held acceptance established).
5. *Taake v. Cnty. of Monroe*, No. 06-579-GPM, 2007 U.S. Dist. LEXIS 17106, at *1-3, *5 (S.D. Ill. Mar. 9, 2007), *vacated on other grounds*,

- 530 F.3d 538 (7th Cir. 2008) (**County of Monroe**: county in Illinois, property owner; Gene Taake: individual, buyer; Taake argued acceptance— Court held no acceptance established).
6. Jada Toys, Inc. v. Chi. Import, Inc., No. 07C699, 2009 U.S. Dist. LEXIS 85443, at *4, *6, *13-14, *18-21 (N.D. Ill. Sept. 18, 2009) (**Jada Toys**; large manufacturer, contracts were Jada Toys' invoices; Chicago Imports: toy seller; Jada Toys argued acceptance— Court held acceptance established).
 7. Nat'l Prod. Workers Union Ins. Trust v. Life Ins. Co. of N. Am., No. 05-cv-5415, 2010 U.S. Dist. LEXIS 29582 (N.D. Ill. Mar. 29, 2010), *aff'd*, 665 F.3d 897 (7th Cir. 2011) (**Life Insurance Co.**; insurance company, drafted policy; National Production Workers Union Insurance Trust: trust jointly set up by large union and employers with collective bargaining agreements with union; Workers Union argued acceptance— Court held no acceptance established).
 8. Carroll v. Stryker Corp., 670 F. Supp. 2d 891, 894, 897-898 (W.D. Wis. 2009), *aff'd*, 658 F.3d 675 (7th Cir. 2010) (**Stryker Corp.**: corporation, employer, drafted contract; Carroll: employee; Stryker Corp. argued acceptance— Court held acceptance established).
 9. Sys. Dev. Integration, LLC v. Computer Scis. Corp., 739 F. Supp. 2d 1063, 1070-1071, 1080-1081 (N.D. Ill. 2010) (**Computer Science Corp.**: general contractor, technical expertise; System Development Integration: subcontractor, technical expertise; System Development argued acceptance— Court held no acceptance established).
 10. Catapult Commc'n Corp. v. Foster, No. 06C6112, 2010 U.S. Dist. LEXIS 94922, at *2, *8, *16 (N.D. Ill. Sept. 13, 2010) (**Catapult Communication Corp.**: corporation, employer; Lewis Foster: employee; Foster argued acceptance— Court held no acceptance established).
 11. Fiduciary Real Estate Dev., Inc. v. Goodavage, 2011 Wisc. App. LEXIS 1023 at *1, 4-6 (Dec. 22, 2011) (**Fiduciary Real Estate Dev.**: corporation, lessor; Diana Goodavage: tenant; Goodavage argued acceptance— Court held no acceptance established).
 12. Claire's Stores, Inc. v. Companion Life Ins. Co., No. 11 CV 2463, 2012 U.S. Dist. LEXIS 30477, at *1-3, *20, *27 (N.D. Ill. Mar. 7, 2012) (**Companion Ins. Co.**: insurance company, drafted policy; Claire's Stores: national retailer; Claire's argued acceptance— Court held no acceptance established).
 13. U.S. CFTC v. Tunney & Assocs., No. 13 CV 2919, 2013 U.S. Dist. LEXIS 123124, at *2, *7-8 (N.D. Ill. Aug. 21, 2013) (**US Commodity Futures Trading Commission**: federal agency; Tunney & Associates: CPA firm; Tunney argued no acceptance— Court held acceptance established).

•Weaker Party (10)

1. Compton Unified Sch. Dist. v. Universal Constr. Maint. Integration Co., B144260, 2002 Cal. App. Unpub. LEXIS 4696, at *2, *15-16 (Jan. 22, 2002) (**Universal Construction**: general contractor; Compton Unified: public school system, public works owner; Compton Unified argued acceptance—Court held no acceptance established).
2. R.R. Donnelley & Sons Co. v. Jet Messenger Serv., 2003 U.S. Dist. LEXIS 25421, at *1-3, *14-16 (N.D. Ill. May 24, 2003) (**Jet Messenger**: for-hire courier service; R.R. Donnelly: larger company, management services provider, developed system; RR Donnelly argued acceptance—Court held no acceptance established).
3. Bennett v. Broderick, 858 N.E.2d 1044, 1046, 1048-1049 (Ind. Ct. App. 2006) (**Brian Bennet**: tenant; Carole Broderick: property owner, landlord, provided lease agreement; Broderick argued no acceptance—Court held acceptance established).
4. U.S. *ex rel.* Countryside Indus. v. Integrated Constr. Tech. Corp., No. 07CV2633, 2007 U.S. Dist. LEXIS 76008, at *2-4, *7-8, *11 (N.D. Ill. Sept. 28, 2007) (**Countryside Indus**: landscaping subcontractor; Integrated Constr.: joint venture, general contractors; Countryside argued acceptance—Court held no acceptance established).
5. 737 N. Mich. Ave. Investors LLC v. Neiman Marcus Grp., Inc., No. 06C6379, 2007 U.S. Dist. LEXIS 26079, at *1-2, *9-10 (N.D. Ill. Apr. 5, 2007) (**Neiman Marcus**: national retailer, tenant; 737 N. Mich. Ave Investors: property owner, landlord, sole member of LLC is Aetna Life Ins. Co.; 737 Investors argued no acceptance—Court held acceptance established).
6. Ind. BMV v. Ash, Inc., 895 N.E.2d 359, 362, 365-366 (Ind. Ct. App. 2008) (**Ash, Inc.**; landlord, property owner; Indiana BMV: state agency; Indiana BMV argued no acceptance—Court held acceptance established).
7. Stopka v. Am. Family Mut. Ins. Co., No. 10C6034, 2011 U.S. Dist. LEXIS 113713, at *2-3, *7-8 (N.D. Ill. Sept. 22, 2011) (**Stopkas**: husband and wife, homeowners; American Family: insurance company; Stopkas argued acceptance—Court held acceptance established).
8. Bear Dev., LLC v. City of Kenosha, 822 F. Supp. 2d 865, 867, 870-871 (E.D. Wis. 2011) (**Bear Development**: developer; City of Kenosha & Redevelopment Authority: land owner, drafted contract, government entity; Bear Development argued acceptance—Court held acceptance established).
9. Van Tassell v. United Mktg. Group, LLC, 795 F. Supp. 2d 770, 773, 777-778 (N.D. Ill. 2011) (**Carole Van Tassell et al**: online

shoppers/consumers; United Marketing, Pikes Peak Direct Marketing, et al: online retailers and marketers; Van Tassell argue no acceptance— Court held no acceptance established).

10. *Mitchell v. Mitchell*, Nos. 2-13-0303 & 2-13-0363, cons., 2013 Ill. App. Unpub. LEXIS 2619, at ¶ 4, ¶ 27, ¶ 35 (Nov. 20, 2013) (**Mary Mitchell**: wife, worked part-time during marriage, unemployed; Curt Mitchell: managing director, portfolio director, partner for an investment firm; Curt Mitchell argued no acceptance— Court held acceptance established).

•Undesignated (6)

1. *Falconbridge U.S., Inc. v. Bank One Ill., N.A.*, 227 F.3d 928 (7th Cir. 2000) (mining company versus a bank).
2. *Bennett v. Truttman*, No. H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004) (buyers and sellers are both husband and wife).
3. *Finnin v. Bob Lindsay, Inc.*, 852 N.E.2d 446 (Ill. App. Ct. 2006) (both parties represented by attorneys, Bob Lindsay is a car dealership and corporation but buyers have the money to buy the car dealership).
4. *Estate of Mueller v. Karns*, 873 N.E.2d 652 (Ind. Ct. App. 2007) (Estate: property owner versus Karns: expertise).
5. *Knight v. Kadish*, No. 1:05-cv-0077-TAB-RLY, 2007 U.S. Dist. LEXIS 47133 (S.D. Ind. June 28, 2007) (Kadish owns property but both are individuals, both in business, both represented by attorneys).
6. *L.B. Foster Co. v. Tie & Track Sys.*, No. 07C3692, 2009 U.S. Dist. LEXIS 26962 (N.D. Ill. Mar. 31, 2009) (both are companies, not a lot of facts about either).

Modification (Total Cases = 22)

•Stronger Party (11)

1. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 754, 758-759 (Ind. Ct. App. 2002) (**Legacy Healthcare**: cross-claim plaintiff, owner/operator of 10+ nursing homes; Sunshine Rehab Services: cross-claim defendant, rehab service provider; Legacy argued modification valid— Court held modification valid).
2. *Carnes Co. v. Stone Creek Mech., Inc.*, 412 F.3d 845, 848, 850-853 (7th Cir. 2005) (**Carnes Co.**: HVAC manufacturer, technical expertise re goods being sold, invoices were basis of contract; Stone Creek: mechanical contractor; Stone Creek argued modification not valid— Court held modification valid).
3. *Sees v. Bank One, Ind., N.A.*, 839 N.E.2d 154, 155-156, 161 (Ind. 2005) (**Bank One**: national bank; John Sees: guarantor; Sees argued modification valid— Court held modification not valid).

4. Leavitt v. John Hancock Life Ins. Co., No. 04 C 7451, 2007 U.S. Dist. LEXIS 13004, at *1, *16, *27, *31 (N.D. Ill. Feb. 23, 2007). (**John Hancock**: life insurance company, drafted policy; Carol Leavitt: third-party beneficiary; Leavitt argued modification valid—Court held modification not valid).
5. Zusy v. Int'l Med. Group, Inc., 500 F. Supp. 2d 1087, 1089, 1091, 1093 (S.D. Ind. 2007) (**International Media Group**: employer, corporation; Jonathan Zusy: employee, vice president, general counsel; Zusy argued modification valid—Court held modification not valid).
6. Hal Wagner Studios, Inc. v. Elliott, No. 09-CV-0031-MJR, 2009 U.S. Dist. LEXIS 8892, at *1, *4, *21-29 (S.D. Ill. Feb. 19, 2009). (**Hal Wagner**: corporation, employer; Kris Elliot: employee; Elliot argued modification not valid—Court held modification valid).
7. Genzyme Corp. v. Disc. Drugs Wis., Inc., No. 08 C 5151, 2010 U.S. Dist. LEXIS 18356, at *1-2, *10, *14 (N.D. Ill. Feb. 26, 2010) (**Abbot Labs**: third-party defendant, large pharmaceutical manufacturer and marketer; Discount Drugs Wisconsin: third party plaintiff; drug store; Abbot Labs argued modification not valid—Court held modification not valid).
8. Acevedo v. CitiMortgage, Inc., No. 11 C 4877, 2012 U.S. Dist. LEXIS 106461, at *1-2, *5-6, *18-19 (N.D. Ill. July 25, 2012) (**CitiMortgage**: large mortgage company, lender; Hector Acevedo & Juanita Bermudez: homeowners/borrowers; CitiMortgage argued no breach of contract to modify loan—Court held no breach of contract, no agreement to modify).
9. Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 U.S. Dist. LEXIS 28074, at *1-3, *16 (N.D. Ill. Feb. 26, 2013). (**TCF National Bank**: national bank; Cindy Williams: account holder; TCF moved to compel arbitration—Court granted motion to compel arbitration after finding valid contract modification that included arbitration clause).
10. McGann v. PNC Bank, N.A., No. 11-CV-06894, 2013 U.S. Dist. LEXIS 46484, at *1-2, *5, *14, *17-18 (N.D. Ill. Mar. 29, 2013). (**PNC Bank**: bank/lender; Virginia McGann: homeowner/borrower; PNC Bank argued no breach of contract to modify loan—Court held no breach of contract, no agreement to modify).
11. Baehl v. Bank of America, N.A., No. 3:12-cv-00029-RLY-WGH, 2013 U.S. Dist. LEXIS 46445, at *1-2, *28, *33 (S.D. Ind. Mar. 29, 2013) (**Bank of America**: national bank/lender; Michael & Jerri Baehl: homeowners/borrowers; Baehls argued breach of contract to modify loan—Court held no breach of contract, no agreement to modify).

•Weaker Party (7)

1. *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 291-292, 294, 298 (7th Cir. 2002) (**Cloud Corp.**: toy seller; Hasbro, Inc.: really large toy manufacturer; Cloud Corp. argued modification valid—Court held modification valid).
2. *AT&T Corp. v. Douglas-Hanson Co.*, No. 05-C-266-S, 2005 U.S. Dist. LEXIS 24801, at *1-2, *11 (W.D. Wis. Oct. 21, 2005) (**Douglas-Hanson Co.**: customer; AT&T: large telecommunications provider; AT&T argued modification valid—Court held modification not valid).
3. *Grogg v. Universal Underwriters Ins. Co.*, No. 1:05-CV-415 TS, 2006 U.S. Dist. LEXIS 51662, at *1-2, *10-11 (N.D. Ind. July 13, 2006). (**Lisa Grogg et al.**: injured parties; Auto Owners Ins. Co.: intervening defendant, insurance company; Auto Owners argued modification valid—Court held modification not valid).
4. *Fritsch v. Premier Investors, LLC*, 2006 Wisc. App. LEXIS 452, at *1-2, *4, *5-6 (May 23, 2006) (**John & Judith Fritsch**: husband and wife, buyers; Premier Investors: company, seller, property owner; Premier argued modification not valid—Court held modification valid).
5. *Ind. BMV v. Ash, Inc.*, 895 N.E.2d 359, 362, 366 (Ind. Ct. App. 2008) (**Ash, Inc.**: landlord, property owner; Indiana BMV: state agency; Indiana BMV argued modification not valid—Court held modification valid).
6. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 554, 560, 565 (7th Cir. 2012) (**Lori Wigod**: homeowner/borrower; Wells Fargo: national bank, lender; Wells Fargo argued breach of contract to offer permanent modification—Court held sufficient breach of contract alleged to survive motion to dismiss).
7. *Silverado Group, LLC v. Ed's Towing, Inc.*, No. 2-12-0629, 2012 IL App (2d) 120629-U, ¶ 2, ¶¶ 4-5 (Dec. 24, 2012) (LEXIS) (**Ed's Towing**: buyer; Silverado Group: assignee of Chicago Leasing Corp., property owner, drafted contract; Ed's Towing argued modification valid—Court held modification valid).

•Undesignated (4)

1. *DiMizio v. Romo*, 756 N.E.2d 1018 (Ind. Ct. App. 2001) (both parties are husband and wife, both own pizza restaurants).
2. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 714 N.W.2d 530 (Wis. 2006) (both parties are corporations, not enough facts on either).
3. *Urban Sites of Chi., LLC v. Crown Castle USA*, 979 N.E.2d 480 (Ill. App. Ct. 2012) (not enough facts).
4. *Large v. Mobile Tool Int'l, Inc.*, 724 F.3d 766 (7th Cir. 2013) (both parties are companies, not enough facts on either).

Duress (Total Cases = 10)

•Stronger Party (8)

1. Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1057-1058, 1061-1062 (S.D. Ind. 2000) **AerChem**; corporation, employer, drafted the contract; Flynn: employee; Flynn argued duress— Court held duress not established).
2. Rissman v. Rissman, 213 F.3d 381, 382, 385-87 (7th Cir. 2000) (**Owen Rissman**: majority shareholder; Arnold Rissman: minority shareholder; Arnold Rissman argued duress— Court held duress not established).
3. McBride v. St. Anthony Messenger Magazine, No. 2:02-CV-0237-JDT-WTL, 2003 U.S. Dist. LEXIS 6449, at *3, *20-22 (S.D. Ind. Feb. 6, 2003). **St. Anthony**: businesses, magazine publisher; John & Laurie McBride: husband and wife, magazine solicitors; McBrides argued duress— Court held duress not established).
4. *In re* Pre-Press Graphics Co., 310 B.R. 905, 909, 916, 919 (Bankr. N.D. Ill. 2004) (**Pre-Press Graphics**: corporation; employer; David Azarla: employee; Azarla argued duress— Court held duress not established).
5. Cozen O'Connor, P.C. v. Asperger Caraher LLC, No. 05 C 5624, 2006 U.S. Dist. LEXIS 81112, at *4-6, *19-22 (N.D. Ill. Nov. 6, 2006). (**Cozen O'Connor**: still in existence law firm, got some of Asperger's clients; Asperger Caraher: dissolved law firm; Asperger Caraher argued duress— Court held duress not established).
6. United States v. Fletcher, No. 06 C 6056, 2008 U.S. Dist. LEXIS 3555, at *1-2, *9-10, *31-33 (N.D. Ill. Jan. 15, 2008), *aff'd*, 562 F.3d 839 (7th Cir. 2009). (**United States/IRS**: federal government agency; Michael & Cynthia Fletcher: husband/wife, taxpayers, wife is partner at accounting firm; Fletchers argued duress— Court held duress not established).
7. ChampionsWorld LLC v. U.S. Soccer Fed'n, Inc., 726 F. Supp. 2d 961, 964, 973-974 (N.D. Ill. 2010). (**U.S. Soccer Federation**: governing body and professional soccer league; Championsworld: business, sponsored pro soccer events; Champions World argued duress— Court held duress not established).
8. Jackson v. Payday Fin., LLC, No. 11 C 9288, 2012 U.S. Dist. LEXIS 94095, at *1-4, *8 (N.D. Ill. July 9, 2012), *rev'd and remanded on other grounds*, 764 F.3d 765 (7th Cir. 2014) (**Payday**: one of many companies owned by individual defendant Martin Webb; Jackson et al: 3 Illinois consumers; Webb argued duress— Court held duress not established).

•Weaker Party (1)

1. Putz v. Allie, 785 N.E.2d 577 (Ind. Ct. App. 2003) (**Allie**: girlfriend, worked in plaintiff's store for no pay during 11 year relationship; Putz: boyfriend, jewelry store owner; Putz argued duress—Court held duress not established).

•Undesignated (1)

1. Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153 (Ill. App. Ct. 2002) (counterclaim parties: Krilich and Bongi Development Corp, Bongi is real estate developer but Krilich is part of joint venture involving a lot of land).

Impracticability (Total Cases = 12)

•Stronger Party (5)

1. Days Inn of Am., Inc. v. Patel, 88 F. Supp. 2d 928, 930, 933-934 (C.D. Ill. 2000) (**Days Inn**: national hotel chain, franchisor; Ishwaral Patel: franchisee; Patel argued impracticability—Court held impracticability not established).
2. Brenner v. Greenberg, No. 08 C 826, 2010 U.S. Dist. LEXIS 120614, at *1-3, *17 (N.D. Ill. Nov. 15, 2010) (**Greenberg & Weber**: defendants, property owner and developer; Steven Brenner: developer; Brenner argued impracticability—Court held impracticability not established).
3. Prospect Enters., L.L.C. v. Ruff, No. 10-1026, 2011 U.S. Dist. LEXIS 74099, at *1-5, *16, *19 (C.D. Ill. July 11, 2011). (**Prospect Enterprises**: condo development owner; Donald & Annette Ruff: husband/wife, buyers; Ruffs argued impracticability—Court held impracticability not established).
4. Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc., No. 09 C 4963, 2011 U.S. Dist. LEXIS 21258, at *1-2, *5, *12, *14-15 (N.D. Ill. Mar. 3, 2011) (**Bank of America**: large national bank, lender; Shelbourne Development Group: borrower; Shelbourne argued impracticability—Court held impracticability not established).
5. Howard Johnson Int'l, Inc. v. M.D.I, LLC, No. 11 C 2593, 2012 U.S. Dist. LEXIS 151223, at *1-3, *7, *8-9 (N.D. Ill. Oct. 19, 2012) (**Howard Johnson**: national hotel chain, licensor; M.D.I: licensee; M.D.I. argued impracticability—Court held impracticability not established).

•Weaker Party (3)

1. *Contempo Design, Inc. v. Chic. & Ne. Ill. Dist. Council of Carpenters*, 226 F.3d 535, 540, 545-546 (7th Cir. 2000) (**Contempo Designs**: business that employs carpenters; Chicago Carpenters: carpenters' union; Chicago Carpenters argued impracticability—Court held impracticability not established).
2. *Ner Tamid Congregation of N. Town v. Krivoruchko*, No. 08 C 1261, 2009 U.S. Dist. LEXIS 58318, *1-2, *27, *49, *59 (N.D. Ill. July 9, 2009) (**Ner Tamid**: non-profit organization; Igor Krivoruchko: real estate developer, lots of fact re his holdings and expertise; Krivoruchko argued impracticability—Court held impracticability not established).
3. *BRC Rubber & Plastics v. Cont'l Carbon Co.*, 949 F. Supp. 2d 862, 864, 875, 877 (N.D. Ind. 2013) (**BRC Rubber**: rubber and plastic products manufacturer, buyer of carbon black, "small customer"; Continental Carbon: manufacturer of carbon black, seller, large supplier; Continental Carbon argued impracticability—Court held impracticability not established).

•Undesignated (4)

1. *Sub-Zero Freezer Co. v. Cunard Line Ltd.*, No. 01-C-0664-C, 2002 U.S. Dist. LEXIS 27142 (W.D. Wis. Mar. 12, 2002). (both large corporations).
2. *Indeck Energy Servs., Inc. v. NRG Energy, Inc.*, No. 03 C 2265, 2004 U.S. Dist. LEXIS 18830 (N.D. Ill. Sept. 17, 2004) (both parties are corporations, not a lot of facts on either).
3. *Exelon Generation Co. v. Gen. Atomics Techs. Corp.*, 559 F. Supp. 2d 892 (N.D. Ill. 2008) (both parties are corporations, not a lot of facts on either).
4. *Lawrence Crawford Ass'n v. Conversource, Inc.*, No. 5-11-0061, 2012 Ill. App. Unpub. LEXIS 1966 (Aug. 15, 2012) (not enough facts re either party).

Appendix 7: Prevailing Parties by Doctrine—9th Circuit

Offer (Total Cases = 15)

•Stronger Party (9)

1. Saluteen-Maschersky v. Countrywide Funding Corp., 22 P.3d 804, 805-07 (Wash. Ct. App. 2001) (**Countrywide**: mortgage company; Peter Saluteen-Maschersky: borrower; Saluteen-Maschersky argued offer—Court held offer not established).
2. Sarafa v. PC Quote, Inc., No. D036652, 2001 Cal. App. Unpub. LEXIS 1229, at *1, *17, *29 (Nov. 28, 2001) (**PC Quote**: internet provider re financial market data, corporation; Anthony Sarafa: computer software developer; PC Quote argued no offer—Court held offer not established).
3. Zanakis-Pico v. Cutter Dodge, Inc., 47 P.3d 1222, 1226, 1236 (Haw. 2002) (**Cutter Dodge**: corporation, car dealership; Zanakis-Pico: customers; Zanakis-Pico argued offer—Court held offer not established).
4. Andrus v. Wash. Dep't of Transp., 117 P.3d 1152, 1153-54 (Wash. Ct. App. 2005) (**Washington Dept. of Transportation**: state agency, employer; Scott Andrus: employee; Andrus argued offer—Court held offer not established).
5. Rubio v. Capital One Bank, 613 F.3d 1195, 1198, 1205 (9th Cir. 2010) (**Capital One**: bank-card issuer; Raquel Rubio: card-holder; Rubio argued offer—Court held offer not established).
6. Laguerre v. Nev. Sys. of Higher Educ., No. 3:10-CV-452-ECR-VPC, 2010 U.S. Dist. LEXIS 131100, at *1-2, *9-10 (D. Nev. Dec. 9, 2010) (**Nevada System**: state agency, employer; Jowel Laguerre: employee; Laguerre argued offer—Court held offer not established).
7. Holland v. BP Am., Inc., No. CIV S-11-0580-KJM, 2012 U.S. Dist. LEXIS 30204, at *1, *16, *18 (E.D. Cal. Mar. 6, 2012) (**BP America**: very big, international oil company; Scott Holland: individual that responded to an ad to devise a solution to oil spill; Holland argued offer—Court held offer not established).
8. Frezza v. Google Inc., No. 5:12-CV-00237-RMW, 2013 U.S. Dist. LEXIS 57462, at *2, *8, *10 (N.D. Cal. Apr. 22, 2013) (**Google**: giant internet service provider, etc.; Rachel Frezza & Mauro Rodriguez: merchants, Google customers; Frezza argued offer—Court held offer not established).
9. Cheren v. Compass Bank, No. CV-12-00206-PHX-JAT, 2013 U.S. Dist. LEXIS 118804, at *1-2, *11 (D. Ariz. Aug. 20, 2013) (**Compass Bank**: bank, lender; David & Catherine Cheren: husband/wife,

homeowners, borrowers; Cherens argued offer— Court held offer not established).

•Weaker Party (3)

1. *Donovan v. RRL Corp.*, 27 P.3d 702, 706, 818-20 (Cal. 2001) (**Brian Donovan**: buyer; RRL Corp: corporation, car dealer; Donovan argued offer— Court held offer established).
2. *S.J. Amoroso Constr. Co. v. Exec. Risk Indem., Inc.*, No. C 06-2572 SBA, 2009 U.S. Dist. LEXIS 116080, at *2, *26 (N.D. Cal. Dec. 11, 2009) (**S.J. Amoroso**: construction company; Executive Risk: insurance company; Amoroso argued no acceptance— Court held acceptance not established).
3. *Ashbey v. Archstone Prop. Mgmt.*, No. SACV 12-0009 DOC, 2012 U.S. Dist. LEXIS 53108, at *1, *16 (C.D. Cal. Apr. 13, 2012) (**Michael Ashbey**: employee; Archstone: property management company, employer; Archstone argued acceptance— Court held acceptance not established).

•Undesignated (3)

1. *Williams Bros. Construction, L.L.C. v. Baltrusch Inc.*, No. DV-01-101, 2004 Mont. Dist. LEXIS 3042 (2004) (both business entities but not enough facts to determine).
2. *Lexington Precision Corp. v. Autoliv Inc.*, No. 2 CA-CV 2005-0187, 2006 Ariz. App. Unpub. LEXIS 434 (2006) (both corporations but not enough facts to determine).
3. *Amber Chem., Inc. v. Reilly Indus., Inc.*, No. 106CV06090OWWSMS, 2007 U.S. Dist. LEXIS 14451 (E.D. Cal. 2007) (both corporations but not enough facts to determine).

Acceptance (Total Cases = 24)

•Stronger Party (10)

1. *Hoseth v. Masonic Temple Ass'n*, No. 19842-1-III, 2001 Wash. App. LEXIS 2156, at*2, *7 (Sept. 27, 2001) (**Masonic Temple**: association, hired caterer; Sharon Hoseth: individual, caterer; Masonic Temple argued no acceptance— Court held acceptance not established).
2. *Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 662, 665-66 (Alaska 2002), *remanded sub nom*, *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333 (Alaska 2009) (**Alyeska**: oil company; Sea Hawk Seafoods: (plaintiff) financially struggling food processor; Valdez argued acceptance— Court held acceptance not established).
3. *Ken Hood Constr. Co. v. Pac. Coast Constr., Inc.*, 120 P.3d 6, 7-8 (Or. Ct. App. 2005) (**Pacific Coast**: cross-claim plaintiff, general

- contractor, more experience in field; Fong Holdings: cross-claim defendant, owner, developer with no experience prior to purchase of this property; Pacific Coast argued acceptance—Court held acceptance established).
4. Beretta v. Tucson Trap & Skeet Club, No. 2 CA-CV 2007-0009, 2007 Ariz. App. Unpub. LEXIS 1260, at *1-2, *7 (Aug. 16, 2007) (**Tucson Trap**: business entity, employer; Dianna Beretta: employee; Beretta argued acceptance—Court held acceptance not established).
 5. Veith v. Xterra Wetsuits, L.L.C., 183 P.3d 334, 335-36 (Wash. Ct. App. 2008) (**UnclePDog**: defendant, distributor; Cristi Veith: consumer; Veith argued acceptance—Court held acceptance not established).
 6. Attachmate Corp. v. Health Net, Inc., No. C09-1161 MJP, 2010 U.S. Dist. LEXIS 114445, at *2, *8 (W.D. Wash. Oct. 26, 2010) (**Attachmate**: software manufacturer and distributor, expertise, drafted the EULA; Health Net: software buyer; Health Net argued no acceptance—Court held acceptance was established).
 7. Fuller v. Monogram Real Estate, No. G044514, 2011 Cal. App. Unpub. LEXIS 9647, at *1, *13 (Dec. 19, 2011) (**Monogram Real Estate**: company that acquires real estate; Jerry Fuller: property owner, developer; Fuller argued acceptance—Court held acceptance not established).
 8. Nascimento v. Wells Fargo Bank, NA, No. 2:11-CV-1049 JCM (GWF), 2012 U.S. Dist. LEXIS 160301, at *1, *6 (D. Nev. Nov. 8, 2012) (**Wells Fargo**: large, national bank, lender; Joseph Nascimento: borrower; Wells Fargo argued no acceptance—Court held acceptance not established).
 9. Sea Hawk Seafoods, Inc. v. City of Valdez, 282 P.3d 359, 362, 364-65 (Alaska 2012) (**City of Valdez**: City; Sea Hawk Seafoods: owner of seafood processing facility; Sea Hawk argued acceptance—Court held acceptance not established).
 10. Duncan v. Lifelock, Inc., No. 1 CA-CV 12-0546, 2013 Ariz. App. Unpub. LEXIS 744, at *1, *8 (July 2, 2013) (**Lifelock**: corporation, employer; Neal Duncan: employee; Duncan argued acceptance—Court held no acceptance).

•Weaker Party (6)

1. Leon v. Sharp Health Care, No. D040042, 2003 Cal. App. Unpub. LEXIS 4910, at *1, *4, *8 (May 20, 2003) (**Melvina & Rafael Leon**: injured parties; Sharp Health Care & Employee: company; Sharp Health argued no acceptance—Court held acceptance established).
2. WMW L.L.C. v. Winton, No. B162872, 2004 Cal. App. Unpub. LEXIS 1590 (Feb. 23, 2004) (**Zelda Winton**: owner of property, seller;

- WMW: buyer, business entity, business owners are lawyers; WMW argued acceptance—Court held acceptance not established).
3. *Gabriel v. Ailing House Pest Control, Inc.*, No. H029300, 2007 Cal. App. Unpub. LEXIS 3454, at *2, *4, *16 (Apr. 30, 2007) (**Larry Gabriel**: homeowner, customer; Ailing House: pest control business; Ailing House argued acceptance—Court held acceptance not established).
 4. *Castle v. Imagine Audio Video, L.L.C.*, No. 1 CA-CV 10-0427, 2011 Ariz. App. Unpub. LEXIS 781, at *2, *15, *18 (May 24, 2011) (**Marshal & Luanne Castle**: husband/wife, customer; Imagine Audio: business, technical expertise; Castles argued no acceptance—Court held acceptance not established).
 5. *Lietz v. Hansen Law Offices, PSC*, 271 P.3d 899, 902, 907 (Wash. Ct. App. 2011) (Paul Lietz: employee; Hansen Law Offices: employer, lawyers; Lietz argued acceptance—Court held acceptance established).
 6. *Arreola v. Napole*, No. B239467, 2013 Cal. App. Unpub. LEXIS 7346, at *2, *9, *17 (Oct. 15, 2013) (**Maria Arreola**: injured party; World Express Tech: defendant, employer of driver that injured Arreola; Arreola argued no acceptance—Court held acceptance not established).

•Undesignated (8)

1. *Gray v. Stewart*, 119 Cal. Rptr. 2d 217 (Ct. App. 2002) (one individual versus a husband and wife, both sides represented by counsel).
2. *Bennett v. Truttman*, No. H024877, 2004 Cal. App. Unpub. LEXIS 1648 (Feb. 24, 2004) (both parties are husband and wife, one owns the property, one has money to purchase it, both represented by agents).
3. *Johnston v. Moreli*, No. F046348, 2006 Cal. App. Unpub. LEXIS 4920 (June 8, 2006) (two trusts, various business entities—broker has expertise, sellers own a shopping center).
4. *Earls v. Corning*, 143 P.3d 243 (Or. Ct. App. 2006) (decedent was elderly woman who owned property, defendants were husband and wife, not enough facts to determine).
5. *Shikwan Sung v. Hamilton*, 676 F. Supp. 2d 990 (D. Haw. 2009) (defendants are a large property owner and business, but plaintiff has \$2.9 million to purchase).
6. *Gardenias v. Candreva*, No. B223556, 2011 Cal. App. Unpub. LEXIS 1884 (Cal. Ct. App. Mar. 14, 2011) (two individuals both represented by attorneys).

7. Mills v. Budil, No. 41586-1-II, 2012 Wash. App. LEXIS 739 (Mar. 27, 2012) (Budil is owner, but Mills is represented by son who is in business and participated in drafting the agreement).
8. DC Media Capital v. Imagine Fulfillment Servs., No. B239081, 2013 Cal. App. Unpub. LEXIS 6256 (Aug. 30, 2013) (both companies, not enough facts to determine).

Modification (Total Cases = 23)

•**Stronger Party (16)**

1. Smith v. Solo Watersports, Inc., No. 49064-8-I, 2002 Wash. App. LEXIS 1811, at *2, *11 (July 29, 2002) (**William Smith**: lender (lent money to defendant start-ups); Solo Watersports: start-up; Solo argued modification valid—Court held modification not valid).
2. Wessa v. Watermark Paddlesports, Inc., No. C06-5156 FDB, 2006 U.S. Dist. LEXIS 51757, at *1, *6-7 (W.D. Wash. July 28, 2006) (**Watermark**: corporation, patent buyer; Scott & Kim Wessa: husband/wife, patent seller; Wessas argued modification valid—Court held modification not valid).
3. Womack v. Bank of Am., No. 1 CA-CV 07-0141, 2007 Ariz. App. Unpub. LEXIS 909, at *1, *11, *15 (Nov. 20, 2007) (**Bank of America**: large, national bank, lender; Thomas & Deborah Womack: husband/wife, borrowers; Womacks argued modification valid—Court held modification not valid).
4. Flores v. Jewels Mktg. & Agribusiness, No. CIV F 07-334 AWI WMW, 2007 U.S. Dist. LEXIS 53127, at *2-3, *25 (E.D. Cal. July 6, 2007) (**Jewel Marketing**: bigger company, marketer, sellers; Joe Flores & M&G Farms: growers; Flores argued modification not valid—Court held modification valid).
5. Evans v. Aurora Loan Servs., No. 2:09-cv-02401-RLH-LRL, 2010 U.S. Dist. LEXIS 63410 12, at *1, *12-13 (D. Nev. June 18, 2010) (**Aurora Loan**: lender; Michael Evans: homeowner, borrower; Evans argued bank acted in bad faith with respect to his modification process—Court held modification not established).
6. Barinaga v. JP Morgan Chase & Co., 749 F. Supp. 2d 1164, 1168 (D. Or. 2010) (**JP Morgan**: big national bank, lender; Kristin Barinaga: homeowner, borrower; Barinaga argued modification valid—Court held modification not valid).
7. Morales v. Chase Home Fin., No. C 10-02068 JSW, 2011 U.S. Dist. LEXIS 49698, at *5, *12, *17 (N.D. Cal. Apr. 11, 2011) (**Chase & JP Morgan**: home loan servicer and big national bank, lender; Herminia Morales: homeowner, borrower; Morales argued breach of contract).

- for loan modification—Court held no breach of contract, no agreement to modify).
8. FDIC v. First Am. Title Ins. Co., No. SACV 10-0713 DOC (MLGx), 2011 U.S. Dist. LEXIS 94842, at *1, *10-11 (C.D. Cal. Aug. 24, 2011) (**FDIC:** federal government agency; First American: title insurance company; First American argued modification valid—Court held modification not valid).
 9. Ahmed v. Wells Fargo Bank, No. B227388, 2011 Cal. App. Unpub. LEXIS 8055, at *2-3, *11 (Oct. 24, 2011) (**Wells Fargo:** big national bank, lender; Khaleda Ahmed: homeowner, borrower; Ahmed argued modification valid—Court held modification not valid).
 10. Nungaray v. Litton Loan Servicing, LP, 135 Cal. Rptr. 3d 442, 444, 447 (Ct. App. 2011) (subsequent history omitted) (**Litton Loan & Bank of America:** loan servicing company, big national bank, lender; Ruben & Dora Nungaray: husband/wife, homeowners, borrowers; Nungarays argued breach of contract to offer modification—Court held no breach of contract, no agreement to modify).
 11. Soin v. Fannie Mae, No. CIV. 2:12-634 WBS, 2012 U.S. Dist. LEXIS 51824, at *1, *15 (E.D. Cal. Apr. 12, 2012) (**Fannie Mae & Suntrust Mortgage:** mortgage company, federal mortgage association, lenders; Romesh & Alma Soin: husband/wife, homeowners, borrowers; Soins argued breach of contract to offer modification—Court held no breach of contract, no agreement to modify).
 12. Mulville v. Wells Fargo Bank, No. B237831, 2012 Cal. App. Unpub. LEXIS 8285, at *2, *29 (Nov. 14, 2012) (**Wells Fargo:** big national bank; Duane & Beverly Mulville: husband/wife, homeowners, borrowers; Mulvilles argued modification valid—Court held modification not valid).
 13. Juarez v. Suntrust Mortg., No. CV F 13-0485 LJO SAB, 2013 U.S. Dist. LEXIS 67850, at *2, *42, *46 (E.D. Cal. May 13, 2013) (**Suntrust:** mortgage company, lender; Adan and Roas Juarez: husband/wife, homeowners, borrowers; Juarezes argued breach of contract to provide a modification—Court held no breach of contract, no agreement to modify).
 14. Toneman v. U.S. Bank, No. CV 12-09369-MMM (MRWx), 2013 U.S. Dist. LEXIS 84240, at *7, *19-20 (C.D. Cal. Feb. 22, 2013) (**US Bank as Trustee & Wells Fargo Bank:** big national banks, lenders; David & Kelly Toneman: husband/wife, homeowners, borrowers; Tonemans argued modification valid—Court held modification not valid).
 15. Graybill v. Wells Fargo Bank, No. C 12-05802 LB, 2013 U.S. Dist. LEXIS 34322, at *2, *31, *37-39 (N.D. Cal. Mar. 12, 2013) (**Wells Fargo:** big national bank, lender; John & Patricia Graybill: husband/wife, homeowners, borrowers; Graybills argued breach of

contract to offer modification— Court held no breach of contract, no agreement to modify).

16. *Dragicevich v. Chase Home Fin.*, No. CV 12-8192 ABC (MANx), 2013 U.S. Dist. LEXIS 112208, at *2, *4, *11 (C.D. Cal. July 8, 2013) (**Chase**: loan servicer, lender; Vera Dragicevich: homeowner, borrower; Chase argued no modification— Court held no modification).

•Weaker Party (4)

1. *Shea v. Household Bank (SB)*, 129 Cal. Rptr. 2d 387, 388, 390 (Ct. App. 2003) (**James Shea**: credit card holder; Household Bank: credit card issuer; Household Bank argued valid modification— Court held modification not valid).
2. *AAA Constr. of Missoula v. Choice Land Corp.*, 264 P.3d 709, 712, 714 (Mont. 2011) (**AAA Construction**: subcontractor; Wayne Company: defendant, general contractor, control of property and project; Wayne Company argued modification valid— Court held modification not valid).
3. *Barroso v. Ocwen Loan Servicing, LLC*, 146 Cal. Rptr. 3d 90 (Ct. App. 2012) (**Divinia Barroso**: homeowner, borrower; Ocwen Loan: loan servicer, lender; Barroso argued modification valid— Court held modification claim survives motion to dismiss).
4. *Goodman v. Wells Fargo Bank*, No. B243614, 2014 Cal. App. Unpub. LEXIS 789, at *2, *16-17 (Jan. 30, 2014) (**Coby Goodman**: homeowner, borrower; Wells Fargo: big national bank; Goodman argued breach of contract to provide modification— Court held breach of contract claim survives motion to dismiss).

•Undesignated (3)

1. *Gillani Consulting Inc. v. Daewoo Heavy Indus. Am. Corp.*, No. C05-0823-JCC, 2006 U.S. Dist. LEXIS 88704 (W.D. Wash. Dec. 7, 2006), *aff'd*, 300 F. App'x 466 (9th. Cir. 2008) (both parties are corporations, both have expertise).
2. *Dragt v. Dragt/DeTray, LLC*, 161 P.3d 473 (Wash. Ct. App. 2007) (landowner versus technical expertise and money).
3. *Sociedad Aeronautica De, Santander S.A. v. Weber*, No. CV 09-103-M-DWM, 2010 U.S. Dist. LEXIS 71349 (D. Mont. July 14, 2010) (no facts regarding the parties).

Duress (Total Cases = 16)

•Stronger Party (12)

1. *Morrow v. Am. Int'l Grp.*, No. B144474, 2002 Cal. App. Unpub. LEXIS 3120, at *1-2, *24-25 (Mar. 13, 2002) (**American**: four

- companies + one insurance company; Morrow: law firm; Morrow argued duress—Court held duress not established).
2. *Yemen v. Countrywide Home Loans, Inc.*, No. B144230, 2002 Cal. App. Unpub. LEXIS 2181, at *1, *4-5 (Apr. 11, 2002) (**Countrywide**: corporation, employer; Yemen: employee; Yemen argued duress—Court held duress not established).
 3. *Dodi v. Am. Online, Inc.*, No. B158161, 2003 Cal. App. Unpub. LEXIS 4085, at *2, *12, *17 (Apr. 24, 2003) (**AOL**: corporation, employer; Dodi: female, employee; Dodi argued duress—Court held duress not established).
 4. *Smith v. Rosenberg*, No. E034199, 2004 Cal. App. Unpub. LEXIS 6189, at *1-2, *12, *18 (June 29, 2004) (**Nathan Rosenberg et al**: lawyer & firm; Kathleen Smith: client; Smith argued duress—Court held duress not established).
 5. *Namdar v. Koop*, No. G032726, 2005 Cal. App. Unpub. LEXIS 2087, at *1-2, *30, *32 (Mar. 8, 2005) (**Koop & Leventhal**: trustor, trustee, note holder; Namdar: property owner, borrower, in financial trouble; Namdar argued duress—Court held duress not established).
 6. *S & W Seed Co. v. Mut. Serv. Cas. Ins. Co.*, No. F043771, 2005 Cal. App. Unpub. LEXIS 11723, at *1-3 (Dec. 20, 2005) (**Mutual Casualty**: insurance company; S&W Seed: farmers; S&W argued duress—Court held duress not established).
 7. *Perez v. Uline, Inc.*, 68 Cal. Rptr. 3d 872, 873, 876-77 (Ct. App. 2007) (**Uline**: corporation, employer; Brian Perez: employee; Perez argued duress—Court held duress not established).
 8. *Murray v. United Servs. Auto. Ass'n*, No. A117596, 2008 Cal. App. Unpub. LEXIS 7864, at *1, *15 (Sept. 15, 2008) (**United Services**: corporation, employer; Murray/McLorg: employees; Murray argued duress—Court held duress not established).
 9. *Insitu, Inc. v. Kent*, No. CV-08-3067-EFS, 2009 U.S. Dist. LEXIS 61190, at *2, *11-12 (E.D. Wash. June 17, 2009), *aff'd*, 388 F. App'x 745 (9th Cir. 2010) (**Insitu**: corporation, employer; Kent: vice president, chief financial officer, treasurer; Kent argued duress—Court held duress not established).
 10. *Chan v. Lund*, 116 Cal. Rptr. 3d 122, 125, 133-34 (Ct. App. 2010) (**Lund et al**: husband/wife, property owners plus the tree contractor; Chan: property owner; Chan argued duress—Court held duress not established).
 11. *Mortensen v. First Am. Title Co.*, No. 2:11-CV-0063-EJL, 2013 U.S. Dist. LEXIS 43797, at *1-2, *24 (D. Idaho Mar. 25, 2013) (**First American Title**: title company; Marti Mortensen: married woman getting divorce after 25 years, husband did deals using First

American title; Mortensen argued duress— Court held duress not satisfied).

12. Scooter's Pals Rescue v. Cnty. of Placer, No. 2:12-cv-01736-TLN-KLN, 2013 U.S. Dist. LEXIS 157819, at*2, *13 (E.D. Cal. Nov. 1, 2013) (**County:** government; Scooter's: dog rescue organization; Scooter's argued duress— Court held duress not established).

•Weaker Party (1)

1. Flower v. Pep Boys, No. D040667, 2003 Cal. App. Unpub. LEXIS 8095, at *1-3 (Aug. 26, 2003) (**Flower:** individual, customer; Pep Boys: car parts & service company, seller, technical expertise; Flower argued duress— Court held duress established).

•Undesignated (3)

1. Goodman v. Lothrop, 151 P.3d 818 (Idaho 2007) (both parties are land owners, both are represented by counsel).
2. Steinman v. Malamed, 111 Cal. Rptr. 3d 304 (Ct. App. 2010) (not enough facts to designate).
3. *In re* Moonlight Basin Ranch LP, No. 09-62327-11, 2010 Bankr. LEXIS 2198 (Bankr. Dist. Mont. June 25, 2010) (both sides are big business, negotiations took months, both sides represented by counsel).

Impracticability (Total Cases = 24)

•Stronger Party (13)

1. Gravel Express, Inc. v. Meadow Valley Contrs., 232 F.3d 894, at *1 (9th Cir. 2000) (**Meadow Valley:** general contractor; Gravel Express: subcontractor; Gravel Express argued impracticability— Court held impracticability not established).
2. Evans v. Spokane, 112 Wash. App. LEXIS 2501, at *1, *6-7 (Aug. 6, 2002) (**Spokane:** County, government, buyer; Evans: family businesses, property owner, seller; Spokane argued impracticability— Court held impracticability established).
3. Carsh v. Chaparral Pines, L.L.C., No. 2 CA-CV 2002-0175, 2003 Ariz. App. Unpub. LEXIS 59, at *1-2, *11-13 (Aug. 4, 2003) (**Chaparral:** real estate developer, Harry & Gwen Carsh: husband/wife, buyers; Carshes argued impracticability— Court held impracticability not established).
4. OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214, 1215-16, 1225 (D. Haw. 2003) (**OWBR:** large property owner, part of large Hawaii hotel chain, drafted contract, contract negotiated with defendant subsidiary; Clear Channel & Subsidiary: music conference

- organizers; OWBR argued impracticability *to prevent discharge*— Court held discharge denied—impracticability not established).
5. Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Eenvtl. Sys., No. CIV. 98-0316-E-BLW, 2004 U.S. Dist. LEXIS 24460, at *7, 30 (D. Idaho Oct. 29, 2004) (**Lockheed Martin Idaho Techs:** management and operations contractor for government radioactive waste site, government backed; Lockheed Martin Advanced: hazardous waste subcontractor; Lockheed Martin Advanced argued impracticability— Court held impracticability not established).
 6. Coll. of the Sequoias Farm v. White Gold Ass'n, No. 1:07-CV-00014 AWINEW, 2007 U.S. Dist. LEXIS 49315, at *4, *35, *43 (E.D. Cal. July 6, 2007) (**White Gold:** professional associations, marketers, distributors; College of Sequoias: cotton growers; College of Sequoias argued impracticability— Court held impracticability not established).
 7. Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga, 96 Cal. Rptr. 3d 813, 823-24, 843 (Ct. App. 2009) (**Henderson Creek Properties/SPS Development/Granite:** real party in interest, property owner, developer; Habitat: conservation organization; Henderson Creek argued impracticability— Court held impracticability established).
 8. Wells Fargo Bank, N.A. v. Ash Org., No. 09-CV-188-MO, 2010 U.S. Dist. LEXIS 66542, at *3, *17-19 (D. Or. July 1, 2010) (**Wells Fargo:** big national bank; Ash: commercial loan borrower; Ash argued impracticability— Court held impracticability not established).
 9. Max Baer Prods., Ltd. v. Riverwood Partners, LLC, No. 309-CV-00512-RCJRAM, 2010 U.S. Dist. LEXIS 100325, at *1, *10 (D. Nev. Sept. 17, 2010) (**Riverwood:** property owner, seller, developer; Max Baer: buyer; Max Baer argued impracticability— Court held impracticability not established).
 10. M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX-NVW, 2011 U.S. Dist. LEXIS 130638, at *3-4, *19-21 (D. Ariz. Nov. 9, 2011) (**M&I:** bank, lender; Lawyers Title Ins: defendant, title company; Lawyers Title argued impracticability— Court held impracticability not established).
 11. Bean v. BAC Home Loans Servicing, L.P., No. 11-CV-553-PHX-GMS, 2012 U.S. Dist. LEXIS 476, at *1, *14-15 (D. Ariz. Jan. 3, 2012) (**BAC:** lender, loan servicer; Cecilia Bean: homeowner, borrower; Bean argued impracticability— Court held impracticability not established).
 12. Reader v. BAC Home Loan Servicing LP, No. CV 11-02461-PHX-FJM, 2012 U.S. Dist. LEXIS 4899, at *2, *13 (D. Ariz. Jan. 17, 2012), *aff'd in part, vacated in part, remanded sub nom*, 582 F. App'x 719

- (9th Cir. 2014) (**BAC**: lender, loan servicer; Helen Reader: homeowner, borrower; Reader argued impracticability—Court held impracticability not established).
13. Babcock v. ING Life Ins. & Annuity Co., No. 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035, at *3, *9-11 (E.D. Wash. Jan. 2, 2013) (**ING**: insurance company; Rudolph Babcock: insured; ING argued impracticability—Court held impracticability established).

•Weaker Party (6)

1. Ploegman v. Burlington N. & Santa Fe Ry. Co., 112 Wash. App. 1001, at *1-3 (Jun. 3, 2002) (**Ploegman**: family members, injured parties; Santa Fe Railway: large railroad company; Ploegman argued impracticability—Court held impracticability established).
2. Nielsen Bros. v. Solid Trading, Ltd., No. 52535-2-I, 2004 Wash. App. LEXIS 2769, at *2, *9-10 (Nov. 15, 2004) (**Nielsen Bros**: buyers; Solid Trading: property owner, seller, had attorney review document before signing; Solid Trading argued impracticability—Court held impracticability not established).
3. Dalkilic v. Titan Corp., 516 F. Supp. 2d 1177, 1180-81, 1197-98 (S.D. Cal. 2007) (**Savas Dalkilic & Tuncay Celek**: employees, Turkish interpreters; Titan Corp. & SOS International: corporations, government contractors, employers; Titan Corp. argued impracticability—Court held impracticability not established).
4. United States v. Pflueger, No. CR 10-00631-02 LEK, 2007 U.S. Dist. LEXIS 46784, at *3, *8, *13 (D. Haw. June 27, 2007) (**James Pflueger, Pflueger Properties**: business, property owner; USA & Dept of Health, State of Hawaii: government, government agency; Pflueger argued impracticability—Court held impracticability established).
5. Manay v. Academic Exch., No. C07-5071 RBL, 2008 U.S. Dist. LEXIS 30531, at *2, *15-16 (W.D. Wash. Mar. 25, 2008) (**Jorge Manay & International Travellers Assistance**: foreign student exchange company; Academic Exchange of America: U.S. based foreign student exchange company; Academic Exchange argued impracticability—Court held impracticability not established).
6. Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC, No. 11-CV-5973-RBL, 2013 U.S. Dist. LEXIS 85776, at *3, *33-34 (W.D. Wash. June 18, 2013) (**Hawks Prairie**: “small community development company”; Cabela’s: national chain; Cabela’s argued impracticability—Court held impracticability not established).

•Undesignated (5)

1. Cape-France Enters v. In re Estate of Peed, 29 P.3d 1011 (Mont. 2001) (both parties worked through same real estate agent, one is owner of property, one has money to purchase).
2. Peoplesoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp. 2d 1116 (N.D. Cal. 2002) (both parties are corporations, not enough facts to determine).
3. Landover Corp. v. Bellevue Master, LLC, 2006 U.S. Dist. LEXIS 1845 (W.D. Wash. Jan. 6, 2006), aff'd, 252 F. App'x 800 (9th Cir. 2007) (condominium developer versus Coldwell Banker, not enough facts to designate).
4. Portland Gen. Elec. Co. v. City of Glendale, 2009 U.S. Dist. LEXIS 68112 (D. Or. May 22, 2009), report and recommendation adopted in part, rejected in part, No. CIV.05-1321-PK, 2009 WL 2170507 (D. Or. July 15, 2009) (a city versus a public utility company).
5. Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-CV-0017-RRB, 2010 U.S. Dist. LEXIS 92132 (D. Ala. Sept. 2, 2010) (no facts re the companies).