THE PROFESSIONAL PRESUMPTION: DO PROFESSIONAL EMPLOYEES REALLY HAVE EQUAL BARGAINING POWER WHEN THEY ENTER INTO EMPLOYMENT-RELATED ADHESION CONTRACTS?

*Allison E. McClure**

I. INTRODUCTION

Dr. Nasreen Shah, like all doctors in Kansas, is required to maintain primary medical malpractice insurance.[1] She is also required to have excess malpractice insurance to cover judgments that exceed the limits of her primary insurance coverage.[2] Dr. Shah obtained excess malpractice insurance from the Health Care Stabilization Fund (the Fund), a state-sanctioned excess insurance monopoly.[3] She was required to accept the insurance coverage on a take-it-or-leave-it basis.[4] If she had chosen not to accept the insurance, she would not have been permitted to practice medicine in Kansas.[5] Despite her weak position during contract negotiations, the Kansas Supreme Court held that Dr. Shah and the Fund had equal bargaining power.[6]

Dr. Shah is one of 586,000 active physicians and surgeons in the United States.[7] There are also more than 113,000 registered architects,[8]

* Associate Member, 2005–2006 *University of Cincinnati Law Review*. The author would like to thank Professors Rafael Gely and Emily Houh for their advice and support throughout the topic selection and publication processes.

1. Aves v. Shah, 906 P.2d 642, 646 (Kan. 1995).
2. *Id*.
3. *Id*. at 652.
4. *Id*.
5. *Id*.
6. *Id*.
7. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: PHYSICIANS AND SURGEONS (Feb. 27, 2004), http://www.bls.gov/oco/ocos074.htm (as of 2002). A more recent report indicates that the number may be as high as 800,000. *See* Dennis Cauchon, *Medical Miscalculation Creates Doctor Shortage*, USA TODAY, Mar. 2, 2005, *available at* http://www.usatoday.com/news/health/2005-03-02-doctor-shortage_x.htm. Carl Getto, chairman of the Council on Graduate Medical Education, argues that even more doctors will be needed in the future. "Almost everyone agrees we need more physicians . . . the debate is over how many." *Id.*
8. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: ARCHITECTS, EXCEPT LANDSCAPE AND NAVAL (Mar. 21, 2004), http://www.bls.gov/oco/ocos038.htm (as of 2002).

153,000 practicing dentists,[9] 1.5 million engineers,[10] 695,000 attorneys,[11] and millions of businesspeople in America. These employees, generally regarded by the courts as professionals,[12] enter into thousands of employment-related contracts every year. These contracts vary widely, depending on the nature of the employment and the terms contained in the documents themselves. Despite these differences, employment-related contracts entered into by professionals often share one characteristic: the parties to the contracts are deemed to have equal bargaining power simply because one of the parties is a professional.

When contractual disputes arise, courts scrutinize employment-related agreements to determine whether the parties possessed equal bargaining power. This close scrutiny is required to ensure that employers do not unfairly dominate the contract negotiation process. After applying this close scrutiny, many courts have held that unequal bargaining power is inherent in employment relationships.[13] In contrast to the close scrutiny that is usually afforded employment-related contracts, courts generally do not rigorously review contracts entered into by professional employees. Instead, many courts presume that professionals have equal bargaining power when they enter into contracts related to their employment.[14] This conclusion is often reached without any kind of

9. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: DENTISTS (Feb. 27, 2004), http://stats.bls.gov/oco/ocos072.htm (as of 2002).

10. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: ENGINEERS (July 25, 2005), http://stats.bls.gov/oco/ ocos027.htm (as of 2002).

11. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: ATTORNEYS, (Mar. 21, 2004), http://www.bls.gov/oco/ocos053.htm (as of 2002).

12. *See* Pub. Serv. Enter. Group, Inc. v. Phila. Elec. Co., 722 F. Supp 184, 198 (D.N.J. 1989) (referring to "professionals such as doctors, lawyers, and architects"); McMahon v. Anderson, Hibey & Blair, 728 A.2d 656, 657 n.3 (D.C. Ct. App. 1999) (referring to "architect, dentist, doctor, engineer, lawyer, or other professional"); Brothers v. Florence, 739 N.E.2d 733, 737 (N.Y. 2000) (recognizing that architects, engineers, lawyers, dentists, and doctors are all subject to professional malpractice).

13. *See, e.g.,* Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 265 (Mont. 2003) ("In this case the School, like most employers, is the more powerful bargaining party."); Swartz Invs., LLC v. Vion Pharm., 556 S.E.2d 460, 463 (Ga. Ct. App. 2001) (applying strict scrutiny to employment contracts because of an inherent inequality of bargaining power between employers and employees); Miller v. Safeway, Inc., 102 P.3d 282, 295 (Alaska 2004) (stating that the implied covenant of good faith and fair dealing is included in every employment contract because of the inherent inequality of bargaining power in employment contract negotiations).

14. Legislators made a similar assumption when drafting the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. § 213(a)(1) (2000); Hogan v. Allstate Ins. Co., 361 F.3d 621, 625 (11th Cir. 2005) (noting that the FLSA was designed to protect "those employees who [lack] sufficient bargaining power to secure for themselves a minimum subsistence wage"). Notably, the act exempts employees who work in a "professional" capacity. *Id*. *But see* Peter DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 166–69 (1993). DeChiara argues that professional employees do not have equal bargaining power, and therefore deserve the protections

factual analysis.

This Comment will critically examine the presumption that professionals have equal bargaining power when they enter into employment-related contracts. Part II discusses why equal bargaining power is an important facet of contract negotiation and enforceability. Part III examines both professional and non-professional equal bargaining power cases. Part IV examines the rule that professional employees always possess equal bargaining power and argues that this blanket rule can lead to unfair results. Part V asserts that courts should examine the facts of each case in order to determine whether bargaining power was, in fact, equal. Finally, Part VI concludes that justice is best served when courts conduct this case-by-case factual analysis instead of relying on the professional presumption.

II. WHY DOES EQUAL BARGAINING POWER MATTER?

Inequality of bargaining power is of central significance to contract law because it is an important characteristic of adhesion contracts and one element of unconscionability.[15] Adhesion contracts and unconscionability are closely related. Adhesion contracts are sometimes invalidated; when this occurs, the courts typically rely on the theory of unconscionability.[16] This Part, therefore, examines the role that unequal bargaining power plays in both the adhesion contract doctrine and the requirements for a contract to be deemed unconscionable.

A. The Adhesion Contract Doctrine

An adhesion contract is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[17] In other words, an adhesion contract is usually a pre-printed form

offered by the FLSA. To support his argument that professionals lack bargaining power in employment contract negotiations, he points out that professional employees lack sufficient power to resist employer demands for longer hours. He claims that the very fact that professionals work such long hours is a reflection of their unequal bargaining power when dealing with their employer. *Id*.

15. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005). *See infra* Part II.B (addressing unconscionability).

16. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172–73 (Cal. 1981); Kloss v. Edward D. Jones & Co., 54 P.3d 1, 7 (Mont. 2001); Vicksburg Partners L.P. v. Stephens, 911 So. 2d 507, 521 (Miss. 2005); Hilb, Rogal, & Hamilton Agency of Dayton, Inc. v. Reynolds, 610 N.E.2d 1102, 1107 (Ohio Ct. App. 1992); Bradley v. Harris Research, Inc., 275 F.3d 884, 892 (9th Cir. 2001).

17. *Graham*, 623 P.2d at 171 (quoting Neal v. State Farm Ins. Co., 10 Cal. Rptr. 781, 784 (Cal. Ct. App. 1961)).

contract offered to one contracting party on a "take-it-or-leave-it" basis, without affording that party a realistic opportunity to bargain for different terms. The distinctive feature of adhesion contracts is that one party's superior bargaining power allows it to dictate the terms under the contract and thus minimize its own risks.[18] The adhesion contract doctrine is now a familiar aspect of American contract jurisprudence, but this has not always been the case. A discussion of the doctrine's historical evolution and current legal significance is needed to fully understand the doctrine's importance.

1. The Doctrine's Historical Evolution

The term "adhesion contract" was originally coined as a label for a routine insurance contract practice. The term was first announced in a 1919 article by Professor Edwin W. Patterson of the University of Colorado Law School.[19] Professor Patterson used the term to describe a life insurance contract that required "delivery of the policy to the applicant" before becoming effective.[20] He noted that these contracts are "contracts of adhesion . . . drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms."[21] It was another twenty-five years before Professor Patterson's description of life insurance contracts evolved into a generally accepted doctrine.

In 1943, Yale Law School Professor Friedrich Kessler utilized Patterson's description of life insurance contracts to argue that courts should refuse to enforce unfair terms contained in adhesion contracts.[22] While finding that society benefits from the economic efficiency of adhesion contracts,[23] Professor Kessler argued that these contracts are generally used by parties with "strong bargaining power" and that the "weaker party" cannot "shop around for better terms, either because the author of the standard contract ha[s] a monopoly" or because all of its

18. Broemmer v. Abortion Servs. of Phoenix, 840 P.2d 1013, 1016 (Ariz. 1992).

19. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 35–36 (Mich. 2005) (citing Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198 (1919)).

20. *Id*. at 36.

21. *Id*.

22. *Id.* (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943)).

23. It is often argued that adhesion contracts are economically efficient because they reduce the time, and hence money, spent bargaining over terms. *See* 1 CORBIN ON CONTRACTS § 1.4 (rev. ed. 1993) ("The standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high cost of negotiations."). However, adhesion contracts arguably do not promote, but rather hinder, efficiency because adhesive contracts tend to spur litigation.

competitors use similar terms.[24] Based on this inequality of bargaining power, Professor Kessler advocated non-enforcement of unfair terms contained within "social[ly] important" adhesion contracts, such as insurance contracts.[25] Accordingly, Professors Patterson and Kessler significantly contributed to the development of the adhesion contract doctrine by creating the theory in academia.

2. The Doctrine's Modern Significance

Since its inception, the adhesion contract doctrine has assumed a significant role in modern American contract law. Although the adhesive nature of a contract is important, that factor alone is not sufficient to determine a contract's enforceability. Instead, determining whether a contract is adhesive is "the beginning and not the end of the analysis insofar as enforceability of its terms is concerned."[26] A majority of courts have held that a contract of adhesion is fully enforceable unless one of the standard contract defenses applies.[27] The defense that is most often utilized to render an adhesion contract unenforceable is unconscionability.[28]

B. Unconscionability

Although courts frequently determine whether contracts are unconscionable, very few courts have clearly defined "unconscionability." The definition most frequently cited is from an old English case, *Earl of Chesterfield v. Janssen*.[29] In that landmark decision, the court defined an unconscionable bargain as one that "no

24. *Rory*, 703 N.W.2d at 36.

25. *Id*. Kessler argued that the meaning of "freedom of contract" varied with "the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract." *Id*. Therefore, Kessler supported non-enforcement of clauses contained in form contracts, but only where the type of contract was socially important and where the drafting party enjoyed a monopoly over the socially important good or service. *Id*.

26. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981) (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976)). *See also* Kloss v. Edward D. Jones & Co., 54 P.3d 1, 7 (Mont. 2002); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 521 (Miss. 2005).

27. *Id*.

28. *Id*. *See also* Hilb, Rogal & Hamilton Agency of Dayton, Inc. v. Reynolds, 610 N.E.2d 1102, 1107 (Ohio Ct. App. 1992); Bradley v. Harris Research, Inc., 275 F.3d 884, 892 (9th Cir. 2001) (arbitration agreements, although adhesive, are valid and enforceable "absent evidence that they are unconscionable, that is 'so one-sided as to shock the conscience.'" (quoting Lagatree v. Luce, Forward, Hamilton, & Scripps, 88 Cal. Rptr. 2d 664, 679 (Cal. Ct. App. 2001))).

29. Whitney Company, Annotation, *"Unconscionability" as a Ground for Refusing Enforcement of Contract for Sale of Goods or Agreement Collateral Thereto*, 18 A.L.R.3d 1305, § 2 (2005) (citing 28 Eng. Rep. 82, 100 (1750)).

man in his senses and not under delusion would make on one hand, and no honest and fair man would accept on the other."[30]

Unconscionability was created as a defense to contract enforcement in order to counteract two general abuses. First, the defense protects the parties against procedural deficiencies in contract negotiations such as deception, refusal to bargain over contract terms, and inequality of bargaining power.[31] Second, the defense protects against unfair substantive terms that unreasonably favor the stronger contracting party.[32] Attempts to prevent these two abuses evolved into the two elements most courts require before a contract can be found unconscionable: procedural unconscionability and substantive unconscionability.[33]

1. Procedural Unconscionability

Procedural unconscionability "deals with 'procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had a meaningful choice about whether and how to enter into the transaction.'"[34] Whether a meaningful choice was possible in a particular case can only be determined by examining all of the circumstances surrounding contract formation.[35]

In many cases, the meaningfulness of the weaker party's choice is negated by unequal bargaining power.[36] Unequal bargaining power can be easily proven where a contract is adhesive. "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and drafted by a party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it.'"[37] Therefore, persuading the court that a

30. *Id*.

31. 8 WILLISTON ON CONTRACTS §18:10 (4th ed. 2005).

32. *Id*.

33. *Id*. *See also* Blue Cross Blue Shield of Ala. v. Rigas, No. 1040173, 2005 WL 217545, at *6 (Ala. Sept. 9, 2005); United Credit Corp. v. Hubbard, 905 So. 2d 1176, 1178–79 (Miss. 2004); Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 263 (Mont. 2003); Gayfer Montgomery Fair Co. v. Austin, 870 So. 2d 683, 689 (Ala. 2003); *In re* Halliburton, 80 S.W.3d 566, 571 (Tex. 2002); Little v. Auto Stiegler, Inc., 63 P.3d 979, 983 (Cal. 2003); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

34. *Rigas*, 2005 WL 2175451 at *6 (quoting 8 WILLISTON ON CONTRACTS §18:10 (4th ed. 1998)).

35. *Williams*, 350 F.2d at 449.

36. *Id*.; *Gayfer*, 870 So. 2d at 689 (noting that where one party has "overwhelming bargaining power," a contract is procedurally unconscionable); *Halliburton*, 80 S.W.3d at 571.

37. *Little*, 63 P.3d at 983; *See also Arrowhead*, 79 P.3d at 265; Flores v. Transamerica

contract is adhesive is often sufficient to satisfy the procedural unconscionability requirement.

The manner in which the contract was entered into can also be sufficient to show procedural unconscionability. In *Williams v. Walker-Thomas Furniture Co.*, the court questioned whether "each party to the contract, considering his obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract" or whether the important terms were "hidden in a maze of fine print" or shielded by deception.[38] Other courts, following *Williams*, have found that procedural unconscionability can be proven by showing a lack of knowledge or voluntariness, small print, the use of legalistic or complicated language, or a lack of opportunity to read the contract or to ask questions about its terms.[39]

According to *Williams*, when a party with weak bargaining power signs a contract without sufficient knowledge or understanding of its terms, "it is hardly likely that his consent, or even an objective manifestation of his intent, was ever given to all the terms."[40] As a result, the usual rule that the court should enforce a contract's terms without question cannot be applied.[41] Instead, the court should consider "whether the terms of the contract are so unfair that enforcement should be withheld."[42] Such an inquiry requires determining whether the procedurally unconscionable contract is also substantively unconscionable.

2. Substantive Unconscionability

Substantively unconscionable terms may vary considerably but can generally be described as unfairly one-sided.[43] Substantive unconscionability requires a court to determine whether "the [contractual] terms unfairly favor[] the drafter" and "whether the clause is within the reasonable expectations of the weaker party or is unduly oppressive to the weaker party."[44] Unlike procedural unconscionability, which focuses on the parties' bargaining power and the circumstances

Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381–82 (Cal. Ct. App. 2001).

38. *Williams*, 350 F.2d at 449.

39. United Credit Corp. v. Hubbard, 905 So. 2d 1176, 1178–79 (Miss. 2004); E. Ford, Inc. v. Taylor, 826 So. 2d 709, 714 (Miss. 2002).

40. *Williams,* 350 F.2d at 449.

41. *Id*. at 449–50.

42. *Id*. at 450.

43. Little v. Auto Stiegler, Inc., 63 P.3d 979, 984 (Cal. 2003).

44. Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 263 (Mont. 2003); *see also Williams*, 350 F.2d at 450.

surrounding the contract negotiations, substantive unconscionability is determined by examining the plain language of the document.[45] According to *Williams*, the test is not simple and cannot be applied in a rigid, mechanical fashion. Instead, courts should consider "whether the terms are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place.'"[46]

For example, in *First Federal Financial Service, Inc. v. Derrington's Chevron, Inc*., the court found that a forum selection clause was substantively unconscionable because litigating in Wisconsin would be unduly expensive and time consuming for the plaintiffs, who were California residents.[47] The court also found the term unreasonable and unconscionable because the contract was signed in California, the defendants resided in California, and the probable witnesses were located in California.[48]

The court indicated that a contract was likely substantively unconscionable based on compelling facts in *Williams v. Walker-Thomas Furniture Co*.[49] When the plaintiffs purchased household items, they signed contracts that provided that title would remain with Walker-Thomas Furniture until the contract price was paid in full.[50] In the event of failure to make one monthly payment, even the last monthly payment due, Walker-Thomas could repossess the item or items purchased.[51] The contract also contained a peculiar provision that stated that a balance remained due on all items ever purchased from Walker-Thomas until all items were paid-in-full.[52] "As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser . . . ."[53] Based on these facts, the court reversed the district court's determination that the contract was not unconscionable and remanded for further proceedings.[54]

The court found an arbitration agreement contained in a home loan substantively unconscionable in *Flores v. Transamerica Homefirst,*

45. United Credit Corp. v. Hubbard, 905 So. 2d 1176, 1179 (Miss. 2004).
46. 350 F.2d at 450 (quoting 1 CORBIN ON CONTRACTS §128 (1963)).
47. 602 N.W.2d 144, 148 (Wis. Ct. App. 1999).
48. *Id*.
49. 350 F.2d at 447.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*. at 450.

Inc.[55] The court first noted that an arbitration agreement is substantively unconscionable unless it contains a "modicum of bilaterality."[56] In other words, the doctrine of unconscionability limits a stronger party's ability to impose arbitration on a weaker party unless it accepts arbitration for itself.[57] Here, the court found insufficient bilaterality.[58] Under the agreement, the plaintiffs were required to arbitrate any controversy arising out of their loan agreement.[59] The lender, on the other hand, was permitted to rely on judicial or non-judicial foreclosure.[60] Because the mandatory arbitration provisions applied to the borrower but not the lender, the court found that the arbitration agreement was so one-sided as to be substantively unconscionable.[61]

Substantively unconscionable terms can take many forms. Courts must compare the specific contractual language against the standard practices at the time and place when the contract was formed in order to determine whether a contract is unfairly one-sided and unduly oppressive to the weaker party. Because the terms in *First Federal*, *Williams*, and *Flores* were contrary to usual practices, the courts indicated that the contracts were substantively unconscionable.

As previously mentioned, most courts require a showing of both procedural and substantive unconscionability before finding that a contract is unenforceable. Bearing in mind that substantive unconscionability must also be present, this Comment will focus on unequal bargaining power as an indication that an adhesion contract is procedurally unconscionable.

III. BARGAINING POWER CASES

When examining bargaining power in contract negotiations, courts often draw a distinction between contracts entered into by professional and non-professional employees. As discussed more fully below, whether an employee is considered a professional can have a critical impact on a finding of equal bargaining power.

However, an overview of the case law reveals that "courts have applied varying, inconsistent, and frequently conflicting methods of analysis" for determining which employees are considered

55. 113 Cal. Rptr. 2d 376, 382–83 (Cal. Ct. App. 2001).
56. *Id*. at 382.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.
61. *Id*. at 383.

professionals.[62] As noted above, courts generally recognize that doctors, dentists, lawyers, architects, and engineers are professionals.[63] When categorizing other types of employees, however, courts have been inconsistent.[64] For example, many courts consider teachers professionals.[65] But in *Arrowhead School District No. 75 v. Klyap*, discussed below, the court did not categorize teachers as professionals for an equality of bargaining power analysis.[66] Some might also consider a consultant a professional, but the court in *Kinney v. United Healthcare Services, Inc.*, also discussed below, did not so categorize the employee at issue.[67] Therefore, while the distinction between professional and non-professional employees is critical, the category employees are placed in can vary, depending on the court. Bearing in mind that placement in the "professional" category can be arbitrary, this Part will examine both professional and non-professional equal bargaining power cases.

A. Unequal Bargaining Power in Non-Professional Employment Contracts

When examining employment contracts to determine whether they are unconscionable, and therefore unenforceable, courts have often held that there is an inequality of bargaining power between an employer and employee.[68] This inequality is inherent in the employment relationship because the employer generally controls the terms of the contract, whether any negotiations occur, and whether the employee is ultimately

62. Michael J. Polelle, *Who's on First, and Who Is a Professional?*, 33 U.S.F. L. REV. 205, 212 (1999).

63. *See* Pub. Serv. Enter. Group, Inc. v. Phila. Elec. Co., 722 F. Supp 184, 198 (D.N.J. 1989); McMahon v. Anderson, Hibey & Blair, 728 A.2d 656, 657 n.3 (D.C. Ct. App. 1999); Brothers v. Florence, 739 N.E.2d 733, 737 (N.Y. 2000).

64. *See* Kuntz v. Muehler, 603 N.W.2d 43, 47 (N.D. 1999) (noting that certified financial planners are not professionals). *See also* Bottinueau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1070 (8th Cir. 1992) (stating that engineer performing soil testing to prepare for the construction of a silo is a professional); Chase Scientific Research, Inc. v. NIA Group, Inc., 749 N.E.2d 161, 167 (N.Y. App 2001) (noting that an insurance agent is not a professional); Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc., 512 N.W.2d 573, 576 (Iowa 1994) (stating that an insurance agent is a professional); Landmark Eng'g, Inc. v. Cooper, 476 S.E.2d 63, 64 (Ga. Ct. App. 1996) (noting that a land surveyor is a professional); Garden v. Frier, 602 So. 2d 1273, 1277 (Fla. 1992) (stating that a land surveyor is not a professional).

65. Gardiner Park Dev., LLC v. Matherly Land Surveying, Inc., No. 2003-CA-002017-MR, 2005 WL 991066, at *7 (Ky. Ct. App. 2005).

66. 79 P.3d 250, 262–65 (Mont. 2003).

67. 83 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 1999).

68. Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 265 (Mont. 2003).

hired.[69] In fact, many courts have held that non-professional employees have unequal bargaining power when they enter into employment-related contracts. This subpart of the Comment will explore several of these non-professional unequal bargaining power cases.

The court found an inequality of bargaining power in *Arrowhead School District No. 75*.[70] James A. Klyap Jr. signed a one-year teaching contract that included a liquidated damages clause,[71] requiring Klyap to pay twenty percent of his salary as damages if he breached his teaching contract.[72] Concerned that the district would not honor his contract, Klyap later decided to accept a position with another district.[73] The Arrowhead District attempted to enforce the liquidated damages clause and eventually sued.[74] Klyap argued that the liquidated damages clause was an unconscionable penalty.[75] To support this defense, Klyap alleged an inequality of bargaining power.[76] When deciding the bargaining power issue, the court found it critical that teachers in the Arrowhead District were not unionized.[77] The court also found that eighty teachers applied for the plaintiff's position and that a form contract with the plaintiff's salary filled in was presented during contract negotiations.[78] Finally, the court found that the liquidated damages clause was included in the contract on a take-it-or-leave-it basis.[79] Based on these facts, the court found that, "the school, like most employers, is the more powerful bargaining party."[80]

In another employment case, *Kinney v. United Healthcare Services Inc.*, the court also found unequal bargaining power.[81] In *Kinney*, the plaintiff Kathleen Kinney signed a form acknowledging that she had read an employee handbook when she began working as a consultant.[82] Contained within the employee handbook was a statement that all claims

69. *Id*.

70. *Id*.

71. *Id*. at 253–54.

72. *Id*. at 254.

73. *Id*.

74. *Id*.

75. *Id*. at 255.

76. *Id*.

77. *Id*. at 265. *See also* Leonard Bierman & Rafael Gely, *So You Want to Be a Partner at Sidley & Austin?* 40 HOUS. L. REV. 969, 984–85 (2003) ("By allowing employees to organize collectively, we place employers and employees on similar footing, at least in the sense that they can both make credible threats and commit to those threats.").

78. Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 265 (Mont. 2003).

79. *Id*.

80. *Id*.

81. 83 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 1999).

82. *Id*.

against the employer must be submitted to arbitration.[83] The arbitration provision limited the proceedings to one day, restricted the scope of discovery, and limited the employee's right to recover.[84] The provision also expressly permitted attorneys' fees to be awarded to the employer, but not to the employee.[85] Kinney later sued United Healthcare alleging various claims, including employment discrimination and breach of contract.[86] United Healthcare filed a motion to dismiss, arguing that Kinney was required to arbitrate her claims.[87] Kinney opposed the employer's motion on the grounds that the arbitration clause was unconscionable.[88] When considering procedural unconscionability, the court found oppression in the contract negotiation process arising out of an inequality of bargaining power.[89] This holding was based on Kinney's lack of an opportunity to negotiate the terms of the handbook.[90]

The court also found inequality of bargaining power in *Nyulassy v. Lockheed Martin Corp.*[91] Before the plaintiff Fred Nyulassy began working as a lab technician, he signed an agreement to arbitrate all employment-related disputes.[92] Under this agreement, the plaintiff waived all rights to pursue claims against his employer through the judicial process.[93] He later filed suit against Lockheed Martin, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, and wrongful demotion.[94] The employer filed a motion to compel arbitration. The plaintiff responded by arguing that the arbitration clause was unconscionable.[95] The court found that the plaintiff had been unemployed for three years and that he needed the job to support his family.[96] The court also found that the arbitration clause at issue was non-negotiable and that the plaintiff accepted the contract

83. *Id*. at 1325–26.

84. *Id*. at 1326. Under the arbitration agreement, employees were permitted to use interrogatories only to identify potential witnesses. Each party was limited to twenty-five document requests and two eight-hour depositions. *Id*.

85. *Id*.

86. *Id*. at 1327.

87. *Id*.

88. *Id*.

89. *Id*. at 1329.

90. *Id*. *See also* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 927 (Cal. Ct. App. 1997) (Kennard, J., concurring); Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 511 (Cal. Ct. App. 1985).

91. 16 Cal. Rptr. 3d 296, 308 (Cal. Ct. App. 2004).

92. *Id*. at 1273.

93. *Id*. at 1274.

94. *Id*. at 1271.

95. *Id*.

96. *Id*. at 1285.

because of his dire need for employment.[97] Based on these facts, the court found an "inequality of bargaining power [between] the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party."[98]

The preceding cases demonstrate that an inherent inequality of bargaining power can exist between employers and employees. Because of this inherent inequality, courts typically examine the facts in employment-related unconscionability cases to determine whether unequal bargaining power existed at the time the contract was formed. This factual analysis ensures that those employees who have signed adhesion contracts with substantively unconscionable terms can avoid enforcement if unequal bargaining power was also present.

B. Equal Bargaining Power in Employment-Related Contracts Because the Employee Is Considered a Professional

In contrast to the cases discussed above, many courts do not critically examine bargaining power in employment-related contract cases that involve professionals. Instead, many courts have held that professionals possess equal bargaining power when they enter into adhesive employment contracts. Some courts have explicitly held that contracts entered into by professionals are entitled to a lower level of scrutiny than other employment contracts. Other courts have implicitly held that a professional's employment-related contracts are not entitled to close scrutiny. This subpart of the Comment will discuss cases that demonstrate both of these approaches to professional contracts.

1. Explicitly Applying a Lower Level of Scrutiny to Professional Employment-Related Contracts

In *Martinez v. DaVita, Inc.*, the court held that a contract between a nephrologist and his practice group was entitled to a lower level of scrutiny than most employment-related contracts.[99] Dr. Carlos O. Martinez signed a covenant not to compete when he became the medical director of a renal treatment center.[100] Under the covenant, Dr. Martinez was prohibited from working at another dialysis facility within a forty mile radius of his employer for two years.[101] While still working for

97. *Id*. at 1285–86.

98. *Id*. at 1286.

99. 598 S.E.2d 334, 337–38 (Ga. Ct. App. 2004).

100. *Id*. at 335–36.

101. *Id*. at 336.

DaVita, Dr. Martinez built and began operating a dialysis facility that he thought was forty miles away from DaVita's facility; in fact, it was approximately thirty-eight miles away.[102] DaVita advised Dr. Martinez that the company intended to enforce the restrictive covenant.[103] Dr. Martinez then challenged the enforceability of the restrictive covenant, arguing that it was unreasonably broad.[104] The court noted that employment contracts that contain covenants not to compete are entitled to different levels of scrutiny, depending on the nature of the agreement.[105] According to the court, most employment-related contracts are entitled to a high level of scrutiny, while those executed in connection with the sale of a business are subject to a low level of scrutiny.[106] Employment contracts are accorded a middle level of scrutiny when entered into by professional employees.[107] Here, the court found that the agreement was a "'professional contract' in which the parties had equal bargaining power, making the covenant subject to at least the 'middle level of reduced scrutiny accorded [such] professional contracts.'"[108] Beyond noting that Dr. Martinez was a professional, the court did not discuss the factors that led to the conclusion that the parties possessed equal bargaining power.[109]

This holding was echoed in *Keeley v. Cardiovascular Surgical Associates, P.C.*[110] Dr. Samuel Keeley signed a covenant not to compete that prevented him from establishing a cardiovascular surgery center within seventy-five miles of Albany, Georgia, for two years.[111] After Dr. Keeley was terminated, he filed a declaratory judgment action

102. *Id*.

103. *Id*.

104. *Id*. at 335–36. Dr. Martinez argued that the geographic scope of the agreement was overbroad. Very little support is given for this argument. *See id*.

105. *See id*. at 337–38. *See also* Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1303 n.12 (11th Cir. 2005) ("Under Georgia law, the level of scrutiny applied to a covenant not to compete depends on whether it is ancillary to the sale of a business or ancillary to employment. . . . A third level of scrutiny applies to professional partnership agreements. Georgia courts apply intermediate scrutiny because signatory partners hold relatively equal bargaining power . . . ."); Physician Specialists in Anesthesia, P.C. v. MacNeill, 539 S.E.2d 216, 221 (Ga. Ct. App. 2000) ("Normally, restrictive covenants in professional partnership agreements are mutually advantageous to all signatories, and consideration flows equally among the contracting parties. These factors weigh in favor of . . . enforceability . . . .").

106. *Martinez*, 598 S.E.2d at 337; *Palmer & Cay, Inc.*, 404 F.3d at 1303.

107. *Martinez*, 598 S.E.2d at 338; *Palmer & Cay*, 404 F.3d at 1303 n. 12.

108. *Martinez,* 598 S.E.2d at 338 (quoting Keeley v. Cardiovascular Surgical Assoc., 510 S.E.2d 880, 885 (1999)).

109. *See id.* The court does not address the Dr. Martinez's past experiences with restrictive covenants, his knowledge of contract law, or his level of business sophistication. *See id*.

110. 510 S.E.2d 880 (Ga. Ct. App. 1999).

111. *Id*. at 882.

to have the restrictive covenant deemed unenforceable on the grounds that the agreement was vague and overbroad.[112] More specifically, Dr. Keeley argued that the seventy-five mile radius was unnecessarily large to protect his former employer.[113] He also argued that the covenant was vague because it did not specify from where the seventy-five miles was to be measured.[114] In examining these arguments, the court noted that the contract was not subject to the strict level of scrutiny applied to most employment contracts.[115] Instead, the court held that the covenant not to compete was subject to "the middle level of reduced scrutiny accorded professional contracts where the parties are considered as having equal bargaining power."[116] Again, the court did not discuss any specific facts that led it to conclude that the parties had equal bargaining power.[117]

In sum, several Georgia courts have held that covenants not to compete are entitled to a different level of scrutiny depending on the nature of the contract that contains the restrictive clause. According to these courts, most covenants not to compete are entitled to a high level of scrutiny.[118] However, where a professional is involved, the courts presume that the parties have equal bargaining power. Consequently, these courts apply a reduced level of scrutiny to professional covenants not to compete.

112. *Id*.

113. *Id*. at 885.

114. *Id*. at 884.

115. *Id*. at 885.

116. *Id*.

117. *See id.* The court does not discuss whether Dr. Keeley had signed a similar contract before, whether he had any knowledge of contract law, or whether he had any business experience that would assist him in contract negotiations. *See id*.

118. Historically, the common law provided that covenants not to compete were invalid. This prohibition was based on the notion that such agreements tend to restrain competition and, therefore, harm the interests of the public. 6A CORBIN ON CONTRACTS § 1380 (1963). The revised Restatement of Contracts preserves the common law rule, stating that covenants not to compete are unenforceable unless they are "ancillary" to a valid transaction. *See* RESTATEMENT (SECOND) OF CONTRACTS §187 (1981). Section 188 defines restraints that are ancillary to a valid transaction to include: a promise by the seller of a business not to compete with the buyer; a promise by an employee or agent not to compete with his employer or principal; and a promise by a partner not to compete with a partnership. Modern courts have become much more willing to enforce covenants not to compete as long as they are reasonable. When assessing reasonableness, these courts generally consider the scope of the covenant, the hardship imposed on the individual who is restrained, and the public interest. *See* Valley Med. Specialists v. Farber, 982 P.2d 1277 (Ariz. 1999). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)–(b).

2. Implicitly Applying a Lower Standard of Scrutiny to Professional Employment-Related Contracts

In *Aves v. Shah*, discussed briefly above, the court implicitly applied a lower level of scrutiny when examining contract negotiations between a doctor and her malpractice insurer.[119] Darcy M. Aves and her parents brought a medical malpractice action against Dr. Nasreen Shah.[120] The jury found Dr. Shah ninety percent liable and assessed more than $21 million in damages against her.[121] The Aves family then filed a garnishment action, alleging that Dr. Shah's insurer acted negligently and in bad faith by failing to settle their claim.[122] The contract between Dr. Shah and the insurer contained a term that prohibited Dr. Shah and any plaintiffs who obtain a judgment against her from suing the insurer for bad faith.[123] The plaintiffs argued that this term was unconscionable because Dr. Shah and the insurer lacked equal bargaining power.[124] As mentioned above, the insurer was a state-sanctioned monopoly.[125] Dr. Shah had no choice but to accept the contract offered by the insurer if she wanted to practice medicine in Kansas.[126] The plaintiffs also argued that the provision was unconscionable because Dr. Shah failed to understand the provision and because the provision unfairly allowed the insurer to act in bad faith.[127] Despite these arguments, the court held that the term was not unconscionable.[128] "While Dr. Shah was required to obtain excess insurance on a take it or leave it basis . . . this does not mean she was in an unequal bargaining position."[129] The court supported this holding by stating that "Dr. Shah is a doctor who should have some knowledge and experience with malpractice insurance."[130] The court did not actually discuss how long Dr. Shah had been practicing or whether she did, in fact, have experience with malpractice insurance agreements.[131]

119. Aves v. Shah, 906 P.2d 642, 652–53 (Kan. 1995), *aff'd*, 997 F.2d 762 (10th Cir. 1993).

120. *Id.* at 645.

121. *Id.*

122. *Id*. Dr. Shah, united in interest with the plaintiffs for the garnishment action, joined the plaintiffs' brief.

123. *Id*. at 649–50.

124. *Id*. at 652.

125. *Id*.

126. *Id*.

127. *Id*.

128. *Id*.

129. *Id*.

130. *Id*. at 653.

131. *See id*.

Similarly, in *Aung v. Fontenot*, the court presumed that a doctor and his employer possessed equal bargaining power.[132] In 1985, Dr. Fleur M. Aung and a co-worker entered into an exclusive agreement to provide pathology services to Charter Suburban Hospital.[133] Both doctors were later terminated under a provision in the contract that allowed them to be discharged with or without cause.[134] Dr. Aung filed suit against the hospital, alleging breach of the duty of good faith and fair dealing and various other state common law causes of action.[135] She argued that the parties lacked equal bargaining power, which incidentally triggered the employer's implied duty of good faith and fair dealing.[136] In rejecting this contention, the court found that "the doctors created a contractual relationship where the doctors provided services and the Hospital compensated them for those services."[137] The court then went on to hold that "[i]n this relationship between a health care facility and highly-educated medical professionals, we do not find the sort of unequal bargaining power that requires us to imply a duty of good faith and fair dealing."[138] The court failed to provide any factual support for the conclusion that the parties had equal bargaining power.[139]

The *Geisinger Clinic v. DiCuccio*[140] court followed the holdings in *Aves* and *Aung*. Dr. Nicholas W. DiCuccio entered into an employment contract that included a discretionary bonus provision.[141] He later challenged the enforceability of the provision on grounds that it was illusory, indefinite, and unfairly one-sided.[142] To support these claims, Dr. DiCuccio argued that the agreement failed to explain the nature and extent of Geisinger's obligations under the agreement, while clearly detailing his responsibilities.[143] The court found that the agreement was not unfairly one-sided because equal bargaining power existed at the

132. No. 05-91-00846-CV, 1992 WL 57471 (Tex. Ct. App. Mar. 24, 1992).

133. *Id*. at *1.

134. *Id*.

135. *Id*.

136. *Id*. at *4.

137. *Id*.

138. *Id*.

139. *See id.* The court does not address whether Dr. Aung had any training in the area of contract law that would justify the conclusion that her education prepared her to bargain in contract negotiations. The court also does not discuss any pervious experience with employment agreements or even how long she had been practicing when she signed the agreement. *See id*.

140. 606 A.2d 509 (Pa. Super. Ct. 1992).

141. *Id*. at 512–13.

142. *Id*.

143. *Id*. at 512.

time the contract was negotiated.[144] The court stated that "the record indicates that the employment agreement . . . [was] a product of arms-length bargaining between knowing, willing, and sophisticated business people."[145] The court did not enter any findings of fact to support its conclusion that Dr. DiCuccio was a sophisticated businessperson.[146]

Finally, the court found equal bargaining power between a businesswoman and her insurer in *McNeil v. Currie*.[147] Linda McNeil approached insurance agent Thomas Currie about obtaining liability insurance for her clothing store.[148] However, his insurance company did not accept McNeil's application for a "special Sentinel policy" on the grounds that she had not been in business for a sufficient amount of time and did not have the requisite credit rating.[149] Unaware of this rejection and her lack of coverage, McNeil continued to pay her premiums on the policy.[150] McNeil discovered that she did not have insurance coverage several months later.[151] After receiving a refund of premiums paid, McNeil was told she would be automatically considered for a "regular Sentinel policy."[152] In fact, Currie was required to submit a second application to obtain this coverage.[153] Currie failed to do so, which caused the insurer to refuse to issue her a policy.[154] Currie then sent notices for premiums McNeil allegedly owed for the "binder coverage" the insurance company had provided during the period when McNeil was seeking full coverage.[155] McNeil refused to pay these premiums and filed suit, alleging that the defendants breached the covenant of good faith and fair dealing.[156] The court noted that in order to successfully claim breach of good faith and fair dealing, plaintiffs in an insurance case must show that a special relationship existed between the insured and insurer.[157] In deciding whether this relationship exists,

144. *Id*. at 513.

145. *Id*.

146. *Id*. The court also does not discuss how long Dr. DiCuccio had been practicing or whether he had ever encountered this kind of employment agreement in the past. The court also does not mention any business transactions that would compel the conclusion that Dr. DiCuccio was a sophisticated businessperson. *See id*.

147. 830 P.2d 1241 (Mont. 1991).

148. *Id.* at 1242.

149. *Id*. at 1243.

150. *Id*.

151. *Id*.

152. *Id*.

153. *Id*.

154. *Id*.

155. *Id*.

156. *Id*. at 1244.

157. *Id*. at 1245.

courts generally examine the facts in order to determine whether the insurance company had the upper hand in settling claims, denying coverage, and paying claims.[158] The court held that "under the undisputed facts of this case, the parties are not in an inherently unequal bargaining position. McNeil, a businesswoman, approached Currie about obtaining insurance. The purchase of insurance was a business deal which she could have entered into with any insurance agent."[159] Again, the court failed to provide any facts to support its conclusion that McNeil was a sophisticated businessperson and, therefore, stood on equal footing with the insurance company.[160]

Collectively, these cases demonstrate that many courts presume equal bargaining power when professionals enter into employment-related adhesion contracts. The courts that support this rule either explicitly or implicitly apply a lower level of scrutiny to contractual disputes that involve professionals. These courts place little or no emphasis on the facts of the individual plaintiff's case. Because of this lack of a factual analysis, professionals who sign substantively unconscionable contracts may not be able to obtain relief under a claim of unconscionability because they cannot prove unequal bargaining power existed at the time the contract was negotiated.

IV. DISCUSSION

Courts offer several rationales for the rule that professionals have equal bargaining power when they enter into employment-related contracts. For example, courts often note that professionals probably have experience with the type of contract they have signed.[161] Courts also routinely cite a professional's extensive education as justification for a finding of equal bargaining power.[162] It is also commonly noted that professionals are sophisticated businesspeople who could have entered into the contract with any number of other parties.[163]

This Part will critically examine all of these rationales and discuss why they do not always support a finding of equal bargaining power.

158. *Id*.

159. *Id*.

160. *Id.* The court does not discuss how long McNeil had been in business, whether she had ever run a business before, or whether she had ever dealt with business-related insurance contracts in the past. *See id*.

161. *See, e.g,*. Aves v. Shah, 906 P.2d 642 (Kan. 1995).

162. *See, e.g.,* Aung v. Fontenot, No. 05-91-00846-CV, 1992 WL 57471, at *4 (Tex. Ct. App. Mar. 24, 1992).

163. *See, e.g.*, Geisinger Clinic v. DiCuccio, 606 A.2d 509, 513 (Pa. Super. Ct. 1992).

First, this Part will argue that professionals may not have experience with the type of contract they signed. Next, it will argue that professionals, although highly educated, may not have any training in the area of contract law. In addition, this Part will argue that professionals may not be experienced businesspeople. This Part will also argue that, even if all of these justifications are true in a given case, the professional still probably lacked the power and opportunity to bargain. This Part concludes with the argument that, as a matter of policy, courts should not presumptively hold that professionals have equal bargaining power.

A. Professionals May Lack Experience with the Type of Contract Signed

Sometimes, as in *Aves*, courts hold that professional employees have equal bargaining power because they should have experience with the kind of contract they are signing.[164] The *Aves* court concluded that Dr. Shah should have had experience with insurance contracts without actually discussing how long Dr. Shah had practiced or the extent of her insurance contract experience. The courts also failed to discuss how long the professionals had been practicing or their level of experience with the contracts at issue in *Martinez*, *Keeley*, *Aung*, *Geisinger Clinic*, and *McNeil*. Instead, these courts presumed that the professionals had the sort of knowledge and experience that justified a finding of equal bargaining power. Depending on the circumstances, this presumption may be inaccurate.

An examination of the facts might reveal that the professional in question has never encountered this kind of contract before and, therefore, does not have any actual knowledge of the types of provisions it contains. This might be the case if a professional is a very recent graduate seeking her first professional position. A professional may also lack adequate knowledge and experience, depending on the nature of his previous employment.[165] For example, the professional may have been an at-will employee in the past. Therefore, he may have never

164. *See* 906 P.2d at 642.

165. The courts in *Martinez v. DaVita, Inc.*, 598 S.E.2d 334 (Ga. Ct. App. 2004), *Keeley v. Cardiovascular Surgical Assocs.*, 510 S.E.2d 880 (Ga. Ct. App. 1999), *Aves*, 906 P.2d at 642, *Aung*, 1992 WL 57471 at *1, *Geisinger Clinic*, 606 A.2d at 509, and *McNeil v. Currie*, 830 P.2d 1241 (Mont. 1992), all fail to mention whether the plaintiff was a recent graduate or the nature of the plaintiff's past employment. Because of this lack of factual information, it is impossible to determine in these cases whether the plaintiff had knowledge or experience that would support the conclusion that equal bargaining power existed. *See id*.

experienced employment-related contract negotiations. It is also possible that, while a professional has signed employment-related contracts many times in the past, the contract she signed that led to litigation was completely different from any contract she had previously encountered.

These and other possible factual scenarios reveal that professional employees may not have experience with contract negotiations. Because of this lack of experience, it is conceivable that professional employees may not have equal bargaining power.

B. Professionals May Lack an Education in Contract Law

Some courts that find equal bargaining power when professionals enter into employment-related contracts offer the justification that professionals are highly educated. This was the rationale offered in *Aung*, where the court held that a health care facility and "highly educated" medical professionals had equal bargaining power.[166] The *Aung* court was correct in that professional employees often have several more years of schooling than other types of employees. However, the *Aung* court and others that rely on this justification fail to recognize that this additional education probably does not include any training in contract law.

Lawyers undoubtedly have at least a basic understanding of the contract negotiation process and the types of terms that should be closely examined by an attorney who is competent in the applicable area of the law. This is because all law students are required to have a basic understanding of contract law. It is unfair to assume, however, that other professionals have this same basic knowledge of contract law and its importance. Other professionals, especially doctors, dentists, architects, and engineers most likely have not taken even a basic business law course. They almost certainly have not had the opportunity to take a course that focuses on the contract negotiation process and common contractual pitfalls. Therefore, it seems unfair to assume that these professionals have the same bargaining power as attorneys.

Based on this lack of education in the area of contract law, professionals may not be any better equipped to negotiate a fair contract than many other similar types of employees. For example, architects and contractors work in related fields and often perform very similar tasks. It is likely that neither an architect nor a contractor has taken a class that covers even the basic principles of contract law. Despite this

166. *Aung*, 1992 WL 57471 at *4.

similar lack of education in this area, some courts will presumptively hold that architects have equal bargaining power because of their education, while a contractor would most likely not be held to a similar standard. Likewise, some courts hold that doctors and dentists have equal bargaining power in employment-related contract negotiations, while courts would probably not make the same assumption when nurses or dental hygienists are involved. Under the same assumption, some courts hold that businesspeople possess equal bargaining power in contract negotiations, while highly trained business secretaries may be found to have a weaker bargaining position than their employer or another contracting party.

Although professional employees are highly educated, they most likely are not well educated in the area of contract law. Nevertheless, professional employees are held to a different standard than other employees who also lack basic training in contract negotiations because of their additional years of professional schooling. A close factual examination may reveal that professionals do not have any greater knowledge of contract law than non-professional employees. This lack of education in the area of contract law could support a finding that a professional does not have equal bargaining power.

C. Professionals May Lack Business Sophistication

Finally, courts often rationalize the presumption that professionals have equal bargaining power by stating that professionals are sophisticated businesspeople. In reality, this may not always be the case.

The court asserted that Dr. DiCuccio was a sophisticated businessperson in *Geisinger Clinic*. However, the court failed to offer any evidence that Dr. DiCuccio had extensive business experience that would justify a finding of equal bargaining power.[167] There are many situations in which a professional person may not have sophisticated business skills. Many professionals who work for firms or practice groups do not deal with the business side of their profession. Because of this lack of involvement, these professionals may have very meager contract negotiation experience. A professional also may not have sophisticated business skills if she just recently entered the profession or just recently began managing her own firm or practice. These new professionals most likely have not experienced the complex business transactions and resulting contract negotiations that a seasoned

167. *Geisinger Clinic*, 606 A.2d at 513.

businessperson would understand.

These possible situations suggest that, depending on the facts, professional employees may not be sophisticated businesspeople. If professionals lack business knowledge, they may also lack the bargaining power that some courts assume they possess.

D. Professionals May Lack the Power and Opportunity to Bargain

Even if all of the rationales traditionally offered by courts are true when applied to a particular professional, the fact remains that the professional signed an adhesion contract. As Professor Kessler noted, adhesion contracts are generally used by parties with "strong bargaining power."[168] When signing these contracts, the "weaker party" cannot "shop around for better terms."[169]

A professional may have knowledge, experience, and business sophistication, and still lack power to bargain if the other contracting party has a monopoly. In *Aves*, Dr. Shah entered into a contract with a state-sanctioned insurance monopoly.[170] Because she was required to have excess malpractice insurance and the company she contracted with was the only available insurer, she had no opportunity to "shop around" for better terms. Instead, she was forced to accept the terms of the contract she was offered if she wanted to practice medicine. Her lack of ability to bargain with the insurer, who dictated all the terms under the contract, demonstrates the very definition of unequal bargaining power. In fact, Dr. Shah did not have any bargaining power at all. She, like other professionals dealing with monopolies, was offered her contract on a take-it-or-leave-it basis by a company that knew she would be forced to accept the terms if she wanted to practice in Kansas.

Even if a professional has knowledge, experience, business savvy, and no need to contract with a monopoly, he most likely still does not have the power or opportunity to bargain. This is because the other contracting party's competitors probably use similar terms and are similarly unwilling to bargain. For example, in both *Martinez* and *Keeley*, the professionals signed covenants not to compete when they began work with their medical employers.[171] In recent years, covenants

168. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 36 (Mich. 2005) (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943)).

169. *Id*.

170. Aves v. Shah, 906 P.2d 642, 652 (Kan. 1995).

171. Martinez v. DaVita, 598 S.E.2d 334, 335 (Ga. Ct. App. 2004); Keeley v. Cardiovascular Surgical Assoc., 510 S.E.2d 880, 882 (Ga. Ct. App. 1999).

not to compete have become very common in many professional fields, especially medicine.[172] Therefore, even if the doctors in those cases had chosen to seek out a different employer, that employer most likely would have also required them to sign a covenant not to compete. As a result, the doctors likely had no power or opportunity to bargain for a different, more favorable term. In addition, many consumers, like the businesswoman in *McNeil*, have experienced the frustration of realizing that insurance companies all offer similar terms. Regardless of which insurer the consumer chooses, the terms are likely the same as the insurer's competitors and offered strictly on a take-it-or-leave-it basis. McNeil and others seeking insurance, therefore, almost certainly lack the power or opportunity to bargain.

Thus, even if courts are correct when they assert that professionals have knowledge, experience, and well-honed business skills, professionals may still lack equal bargaining power. This is because a larger, systemic problem often prevents them from having the power or opportunity to bargain. Professionals may lack the ability to locate better terms because they are forced to contract with a monopoly or because the other party's competitors offer similar terms and are just as unwilling to bargain. This larger problem with the nature of adhesion contracts provides strong support for the argument that professionals do not have equal bargaining power simply because of their job titles.

E. As a Matter of Policy, Holding Professionals Always Have Equal Bargaining Power May Lead to Unfair Results

By holding that professionals have equal bargaining power in employment-related contract negotiations, courts avoid the time and expense of an intensive factual investigation. Judicial economy is a valid policy concern that properly supports many legal rules. But the time and money that is saved in professional bargaining power cases may come at a very high price for the professional. Setting aside the facts in each professional's case and presuming that parties have equal bargaining power leads to unfair results that should be avoided as a matter of policy.

As previously discussed, most courts require both procedural and

172. *See* Bio-Medical Applications of Tenn., Inc. v. Chary, No. W1999-01727-COA-R3-CV, 2000 WL 1634201, at *4 (Tenn. Ct. App. Oct. 13, 2000) (involving a physician who testified that covenants not to compete are "common practice all over the country"). *See generally* James W. Lowry, *Covenants Not to Compete in Physician Contracts*, 24 J. LEG. MED. 215 (2003); Michael R. Sullivan, *Covenants Not to Compete and Liquidated Damages Clauses Diagnosis and Treatment for Physicians*, 46 S.C. L. REV. 505, 505–06 (1995).

substantive unconscionability before holding that an adhesion contract is unenforceable.[173] When courts hold that professionals have equal bargaining power in employment-related contract negotiations, this usually means that the contract at issue is not procedurally unconscionable.[174] If a contract is not procedurally unconscionable, it can be enforced regardless of how substantively unconscionable it may be.[175] Based on this rule, employers can include extremely one-sided and oppressive terms in professional contracts, knowing that the contract will most likely be enforced. In short, the presumption that professionals have equal bargaining power creates an opportunity for those who contract with professionals to impose unfair conditions in bad faith without any repercussions.

This outcome should be avoided as a matter of policy to avoid the unfairness that can occur in cases such as *Aves*. In *Aves*, the contract at issue included a provision that Dr. Shah and her patients could not sue the defendant insurance company based on bad faith.[176] This provision provided the insurer immunity from lawsuits based on the implied obligation of good faith and fair dealing, a common law cause of action under Kansas law.[177] Although this term essentially gave the insurance company license to act unfairly and arbitrarily when settling claims, the court held that the term was not unconscionable because Dr. Shah and the insurer had equal bargaining power.[178]

After concluding that professionals have equal bargaining power when negotiating employment-related contracts, courts often rule that these contracts are not procedurally unconscionable. Because professionals often cannot prove the procedural component of unconscionability, employers are able to enforce contracts that include substantively unconscionable terms, such as terms that waive the duty of good faith. This power to enforce a contract term, no matter how substantively oppressive, is an unfair result that should be avoided as a matter of policy. This can be achieved by abandoning the presumption

173. *See* Blue Cross Blue Shield of Ala. v. Rigas, No. 1040173, 2005 WL 2175451, at *6 (Ala. Sept. 9, 2005); United Credit Corp. v. Hubbard, 905 So. 2d 1176, 1178–79 (Miss. 2004); Arrowhead Sch. Dist. No. 75 v. Klyap, 79 P.3d 250, 263 (Mont. 2003); Gayfer Montgomery Fair Co. v. Austin, 870 So. 2d 683, 689 (Ala. 2003); *In re* Halliburton, 80 S.W.3d 566, 571 (Tex. 2002); Little v. Auto Stiegler, Inc., 63 P.3d 979, 983 (Cal. 2003). *But see* Adler v. Fred Lind Manor, 103 P.3d 773, 782 (Wash. 2004) (stating that "we now hold that substantive unconscionability alone can support a finding of unconscionability").

174. *See, e.g.*, *Aves,* 906 P.2d at 652; *Arrowhead*, 79 P.3d at 265; *Gayfer*, 870 So. 2d at 689.

175. *See supra* note 174.

176. *Aves*, 906 P.2d at 652.

177. *Id*.

178. *Id*.

that professionals have equal bargaining power when negotiating employment-related adhesion contracts.

V. PROPOSED SOLUTION

Courts that presume professionals have equal bargaining power when they sign employment-related contracts rely on several justifications. These courts frequently state that professionals should have experience with contract negotiations, that professionals are better equipped to negotiate contracts than other employees because of their level of education, and that professionals are sophisticated businesspeople. However, as discussed earlier, courts all too often draw these conclusions without examining the facts to determine whether these conclusions are warranted. These courts also commonly fail to examine the professional's actual power or opportunity to bargain. This lack of factual examination can have severe consequences for professionals. Because unequal bargaining power is the main indication of procedural deficiency, professionals often cannot prove this element of unconscionability. Because they cannot prove one of the elements of unconscionability, they are powerless to avoid enforcement of the contracts they sign, no matter how one-sided and unfair.

The solution to this problem is clear: the courts that hold professionals presumptively have equal bargaining power in employment-related contract negotiations should instead examine the facts in order to determine whether the professionals do, in fact, have equal bargaining power. Many facts are critical to this analysis. For example, courts should examine how long a professional has been employed in her field and whether she has ever signed the type of contract at issue in the past. Courts should also closely scrutinize a professional's educational background to determine whether the professional has any knowledge or skills that would increase his understanding of the contract negotiation process. Courts should also consider a professional's level of business sophistication. Finally, courts should consider whether the professional was forced to contract with a monopoly and whether the professional could shop for better terms with a competitor. These and many other facts are crucial to understanding whether a professional possessed the power and opportunity to bargain when he signed an adhesive contract.

In *S.N.A. v. Hartzell Propeller, Inc.*, a federal court applying Pennsylvania law provided a model for the factual analysis that should

be conducted when contract negotiations involve a professional.[179] In *S.N.A.*, the plaintiff purchased a plane propeller from Hartzell.[180] Without this propeller, the plaintiff would not have been able to repair his plane.[181] After the propeller was installed, the plaintiff's plane crashed and he suffered a serious back injury.[182] When the plaintiff filed suit against Hartzell, he discovered that the adhesive sales contract he signed contained an exclusion of warranties and a limitation of remedies provision.[183] In response to the plaintiff's argument that the terms were unconscionable, Hartzell argued that the parties had equal bargaining power because the plaintiff was an aircraft engineer.[184] Instead of presuming that the plaintiff had equal bargaining power because he was an engineer, the court inquired into the facts that affected bargaining power. The court found that that plaintiff was a "successful, well educated man. He is a civil engineer by training and profession. . . . He is also wealthy . . . ."[185] But the court ultimately found that, although the plaintiff was well educated, he was "not necessarily any match for Hartzell."[186] At the time of the propeller sale, "he was inexperienced in negotiating contracts, particularly with respect to the purchase and sale of aircraft and aircraft parts."[187] In addition, Hartzell was the only propeller manufacturer that produced the propeller the plaintiff needed to operate his aircraft.[188] The court also noted that the plaintiff was denied any opportunity to negotiate the terms of the propeller sale.[189] The court found that all of these facts could potentially support a finding of unconscionability.[190]

S.N.A. demonstrates the importance of a factual analysis in equal bargaining power cases, even when a professional is involved. Although not an employment case, *S.N.A.* serves as a model for courts that continue to rely on the professional presumption.[191]

179. S.N.A., Inc. v. Hartzell Propeller, Inc., No. CIV. A. 95-1397, 1996 WL 283646, at **7–9 (E.D. Pa. May 29, 1996).

180. *Id*. at *2.

181. *Id*.

182. *Id*.

183. *Id*. at *6.

184. *Id*. at *7.

185. *Id*. at *8. The court also notes that the plaintiff had been the civil engineer of record for Chester County Airport since 1972. *Id*.

186. *Id*.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*.

191. *See also* Ticknor v. Choice Hotels Int'l, 265 F.3d 931, 941 (9th Cir. 2001) (noting that the Montana Supreme Court has held that unequal bargaining power may indicate unconscionability in a

VI. CONCLUSION

Countless people enter into employment-related adhesion contracts every year. Generally, courts critically examine adhesive employment contracts because inequality of bargaining power is inherent in the employment relationship. However, where employees labeled professionals are involved, some courts presume that the parties possessed equal bargaining power. This is problematic because unequal bargaining power is the main indication of procedural unconscionability. If an employee is unable prove procedural unconscionability, then the contract they signed will be enforced, even if it is substantively unconscionable.

The courts that rely on the professional presumption justify the rule by stating that professionals should have experience with contract negotiations, that professionals are better equipped to negotiate contracts than other employees because of their level of education, and that professionals are sophisticated businesspeople. However, an examination of the facts in a particular case may reveal that these justifications do not apply to the professional at issue. Even if these justifications do apply, a factual investigation could reveal that the professional lacked the power or opportunity to bargain for better terms. Because of this possibility, courts should abandon the professional presumption and conduct a thorough factual investigation in every case that involves an employment-related adhesion contract. Through this factual investigation, courts can realistically assess bargaining power and fairly determine whether a professional contract is procedurally and substantively unconscionable.

contract between two business professionals); Willow Funding Co., L.P. v. Grencom Assoc., No. CV 950146003S, 2000 WL 151236, at *15 (Conn. Super. Jan. 19, 2000) ("Regardless of the general business sophistication of the defendants they were in an unequal bargaining position" because of one party's "extensive failed bank and auction experience.").