Memorandum

TO:	Head Legal Counsel
FROM:	Matthew Philips
DATE:	April 5, 2012
RE:	Sarah Smith; Unenforceable Contract Claim

I. QUESTION PRESENTED

The question that we are to answer pertains to whether or not the contract that Ms. Smith signed in relation to her Temple University Bookstore purchase was an adhesion contract, and if so, we were to determine if the said adhesion contract was an unconscionable one.

II. STATEMENT OF FACTS

The facts of the case are as follows: Sarah Smith, an 18 year old freshman at Temple University, purchased a laptop computer from the newly erected technology section at the University Bookstore for $500 on September 1, 2011. Upon her purchase, Ms. Smith was prompted to sign a sales agreement that was disregarded by the sales clerk, being described as a "standard sales agreement that we have all laptop purchasers fill out". The sales agreement was wordy and contained a large amount of fine print, but after the reassurance of the sales assistant, Ms. Smith filled out the form, signed the agreement, and then purchased the computer. After using the laptop for 10 days, Ms. Smith came to the conclusion that it was too heavy for her use and decided to return the computer. Upon her attempt to return the laptop on September 10, 2011, Ms. Smith was informed that she was well within the allotted 14-day return period, but that she would be charged a 20% restocking fee as was stated in the Clause 8 of the sales agreement (the restocking fee) that Ms. Smith had signed. Seeing no other option, Ms. Smith paid the 20% restocking fee, returned her laptop, and was refunded $400. The following week,

Ms. Smith consulted the Temple Law School free Consumer Protection clinic. Upon reviewing Ms. Smith's sales agreement with the Temple University Bookstore, the clinic offered to represent Ms. Smith in a lawsuit against the bookstore. Since her acceptance, the clinic has threatened to file a lawsuit in Pennsylvania against the Temple University Bookstore on the behalf of Ms. Smith. They claim that the sales agreement that Ms. Smith signed is unenforceable because (1) the terms of the agreement are unconscionable, and (2) the contract was an adhesion contract.

III. DISCUSSION OF AUTHORITY

For our purposes, we can define an unconscionable contract as an agreement, that which by its terms, violates public policy and disrupts fair trade. The **Uniform Commercial Code (UCC) Section 2-302 (comment 1)** provides the principles that separate unconscionable contracts from enforceable contracts. The oppression of and/or unfair surprise to the weaker party in negotiations in relation to unjust terms deemed enforceable by an agreement can be ruled unconscionable. However, we find in **TERRE HAUTE COOPERAGE, INC v. BRANSCOME ET AL** that just because one provision in a legal contract is more favorable to one party than to the other does not ordinarily render it unconscionable. The unconscionable doctrine is meant to protect the weaker party in a contract from the abuse and oppression of the superior party, but not to disturb the allocation of risk in contract formation. When the superior party abuses its power to negotiate and introduces provisions to the contract that cause the weaker party unjust debt or hardship, the result is a Contract of Adhesion. The classification of contracts as either unconscionable or adhesive rests with the presiding Judge. Contracts can be considered unconscionable if they are written in unclear or ambiguous language that may hide the true meaning of the clauses from the consumer or in

some other way violate public policy or fair trade. We see in **VOCKNER v. ERICKSON** that an unconscionable contract must involve other factors than a mere imbalance and takes into account setting, purpose, and effect. Elaboration on this point reveals that gross inequality of bargaining power, together with terms unreasonably favorable to the stronger part, may confirm indications that the transaction involved elements of deceit or compulsion, or may show that the weaker party had no meaningful choice. Adhesion contracts can be deemed unenforceable if they are, in fact, unconscionable or are susceptible to another of the four contract defenses (fraud, duress, unconsciability or waiver). It is made apparent in **RORY v. CONTINENTAL INSURANCE CO. (703 N.W.2d 23)** that classification alone of a contract as adhesive is not enough to deem it unenforceable nor does it justify failure to meet its terms; one of the traditional contract defenses is required to void the contract. We can see the limitations of the doctrine of unconscionability and of claims against adhesion contracts in both the cases of **HILL v. GATEWAY** and **BROWER v. GATEWAY.** In both cases, the plaintiffs wished to sue Gateway on the terms that the arbitration clause contained in the contract shipped with their product was unconscionable and part of an adhesion contract. These were not "take it or leave it" offers and the 30-day return period was well in accord with public policy and fair trade. In both cases the court ruled in favor of the defendant. We find in **HANKS v. POWDER RIDGE RESTAURANT CORP.** that when adhesive contracts directly or implicitly violate public policy they are deemed unconscionable and that the superior power in an agreement is liable for negligence regardless of agreed upon terms. **The Restatement (second) of Conflict laws Section 187 comment b**. clarifies the courts view on adhesion contracts and define them as contracts

"that are drafted unilaterally by the dominant party and then presented on a 'take it or leave it' basis to the weaker party who has no real opportunity to bargain about its terms."

IV. CAN SARAH SMITH PREVAIL IN HER CASE AGAINST TEMPLE UNIVERSITY?

A. Smith Can Demonstrate that the Contract is Unconscionable

We believe that if there is a case brought to court against Temple University Bookstore that Ms. Smith and associates can demonstrate that the contract in question is indeed unconscionable. The **Pennsylvania Consumer Protection Statute** states that a fee charged must be reasonable. Although a restocking fee of 20% is legal within the state of Pennsylvania, we believe it can be considered as an unreasonable fee for a $500 laptop and is not a justifiable expense for the restocking of a computer that has been out of store for only 10 days and is otherwise undamaged.

We feel that Ms. Smith and associates will be able to present sufficient evidence that the oppression of her, the weaker party, greatly exceeds the implications set forth in the **Uniform Commercial Code (UCC) Section 2-302 (comment 1).** The contract in question is, in our opinion, obviously favorable to the dominant party, Temple University Bookstore, but as we have seen in our review of **TERRE HAUTE COOPERAGE, INC v. BRANSCOME ET AL** that favor being on the side of the dominant party does not alone constitute a contract as unconscionable. Therefore, Ms. Smith and associates would have to further prove the unconscionability of the contract. We believe they can. As is highlighted in **VOCKNER v. ERICKSON,** the factors that must be considered when determining the unconscionability of a contract are its setting, purpose, and effect. When determining the unconscionability of the contract in question we must consider these factors. The setting was the bookstore of the Temple

University; the university Ms. Smith was attending. If we were to compare Ms. Smith to the average 18 year old freshman at a large urban University we would find that the majority of them would trust their own university's bookstore in the same manner that she did. The purpose of the restocking fee clause, as its names suggest, was to cover the expenses of restocking a returned product. Given the limited time period (which we will revisit) we feel the purpose of the fee is deceitful, and grossly in favor of the dominant party. The effect of the adhesion contract signed by Ms. Smith was a substantial loss to the young student and an unwarranted gain by the dominant party, Temple University.

We find in **HANKS v. POWDER RIDGE** that a contract will be deemed unenforceable when it directly violates public policy. We feel it would be a stretch to claim that a lack of a reasonable return period violates public policy. Ms. Smith was not stripped of her constitutional rights in any fashion, but we do believe they can provide sufficient evidence to prove the lack of a reasonable return period to avoid the high restocking fee directly disrupts fair trade. We saw in both **HILL v. GATEWAY and BROWER v. GATEWAY** that the somewhat constricting terms of an arbitration clause were indeed enforceable as both clients were given a full 30 days to review the policy and had a reasonable time to void the sales agreement. We believe the potential plaintiff could provide that the immediate drop in the value of Ms. Smith's purchase goes against fair trade. The determination of the contract in question as an unconscionable one falls to the Judge, and we believe given the facts that a court would favor the young student.

B. Smith Can Demonstrate that the Contract is One of Adhesion

Based on careful examination of the facts of this case and the precedent established in relevant cases, we believe that Ms. Smith and associates can demonstrate that the contract in question is one of adhesion. We feel that the superior party in negotiations, Temple University Bookstore, abused its advantage in negotiations with Ms. Smith.

The contract in question was extremely wordy and lengthy and involved multiple sections of small print that were stated in not overly clear language. **The Restatement (second) of Conflict laws Section 187 comment b** following its definition of adhesion contracts as being drafted unilaterally by the dominant party that are often presented as "take it or leave it" goes on to note that these types of contracts are usually prepared in printed form and that a notable part of these preprinted forms are in extremely small print. This description of an adhesion contract accurately describes the document that Ms. Smith signed upon the purchase of her laptop. The contract is clearly unilateral, or made solely in the interest of the dominant party, Temple University. Ms. Smith and all other purchasers are subject to a restocking fee of 20%, which is the highest allowed under Pennsylvania state law **(PENNSYLVANIA CONSUMER PROTECTION STATUTE)**, immediately after the purchase**.** Furthermore, the weaker party, in our case Ms. Smith, had no room or platform to negotiate any of the terms that were presented in the preprinted contract. The offer that was made to Ms. Smith can certainly be viewed as a "take it or leave it" agreement, Clause 8 (the restocking fee) in particular. After trusting her own university's bookstore and signing the agreement, she was subject to a 20% restocking fee immediately after the completion of her purchase. Her only options from that point onward were to either take the discounted return, or keep the computer that was not suited for her needs.

Evidence that we can establish the contract in question as one of adhesion can be found in **HANKS v. POWDER RIDGE**. In this case we are presented with the clarification that adhesion contracts do not include the normal bargaining processes of ordinary contracts. Further elaboration provides that in the lack of this negotiating power the weaker party in the agreement should be offered the opportunity to procure protection at a reasonable cost. In the case of Ms. Smith, since Temple University Bookstore was not willing to provide a buyer's remorse period allowing for a full return on undamaged items, they should have at least provided negotiations to procure a buyer's remorse period that was reasonable in both length and price.

As we can see in **HILL v. GATEWAY**, for a sales assistant or telephone operator to recite lengthy and wordy contracts is impractical and not overly beneficial to either party, but to completely disregard the importance of a binding contract. It is made apparent through precedent that identifying a contract as one of adhesion does not mean it or any of its terms are invalid or unenforceable (**MEYER v. STATE FARM),** so lack of communication alone is not enough to void a contract of adhesion. The terms must in and of themselves be deemed unconscionable to deem them unenforceable.

We are certain, based upon precedent and case review that Ms. Smith can provide enough evidence to the court to identify the contract in question as one of adhesion.

C. CONCLUSION / RECOMMENDATION

Upon review of this potential case, and based upon the precedent set by prior cases, we believe that Ms. Smith and associates can prove both that the contract in question is one of adhesion and that it is in part unconscionable. The structure and implications of the contract fit the accepted

definition of one of adhesion and in the light of its setting, purpose and effect we find the contract disrupts fair trade and grossly oppresses the weaker party in the agreement, Ms. Smith. We strongly urge you to settle with Ms. Smith out of court to avoid potential monetary fees and negative publicity.