“You Are Asking Me About Reading Things I Never Had to Read": Consumer Contracting in Historical Context

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Anne Fleming, The Rise and Fall of Unconscionability as the ‘Law of the Poor’, 102 **Geo. L. J.** 1383 (2014).

Who is best suited to police unfair terms—the market, the judiciary, or the legislature? *Williams vs. Walker-Thomas Furniture* has long been offered as a cautionary tale, but in her 2014 article, legal historian Anne Fleming takes on the standard narrative of judicial overreach and recasts the relationships among institutional actors in a reform movement.

In 1965, Judge Skelly Wright ruled that Ora Lee Williams’s contract to pay for furniture on a *pro rata* installment plan was subject to review for unconscionability—a moment of judicial activism that was later blamed for the decline and stagnation of the doctrine of unconscionability. Fleming pushes back against the standard narrative that *Williams* created a backlash against Wright’s ‘law of the poor’ – according to that simplistic story, “Judges ended up hurting the very people they were trying to help. In the face of incisive criticism, judicial enthusiasm for the doctrine of unconscionability quickly faded.” (Pp. 1387-1388.) Fleming’s argument reframes the *Williams* decision within a broader context of judicial, legislative, and popular pressure, tracing the revival of unconscionability back to the Uniform Commercial Code, enacted in Washington, D.C. in 1963. In the *Williams* case, Judge Skelly Wright announced that the UCC’s unconscionability provision in 2-302 was “declaratory of the common law” and ordered the trial court to apply the doctrine on remand. Critics have characterized the *Williams* case as a short-lived moment of “judicial enthusiasm” soon replaced by more effective legislative action. Fleming argues that consumer protective legislation was enacted not to replace judicial review of unfair terms, but to complement it. The Williams transaction was of course at the center of the litigation with Walker-Thomas furniture, but her situation was also repeatedly invoked in consumer credit policymaking deliberations. “[T]he *Williams* litigation brought together a coalition of reformers, who pressured Congress to adopt a new set of rules for policing installment sales.” (P. 1438.)

More than fifty years after *Williams vs. Walker-Thomas Furniture*, the law of unread consumer contracts is back in the spotlight. The justification for the ALI’s new Restatement project on Consumer Contracts would surely resonate with Judge Wright:

> On one side stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals. On the other side stand consumers who are informed only about some aspects of the transaction…

Indeed, Fleming’s painstaking account shows Ora Lee Williams in a dilemma that will be highly familiar for the contemporary reader: Was Williams supposed to read her contract or not? Salesmen “would fold over the contract just before presenting it to Williams with the signature line visible” and tell her to “just sign” her name. (P. 1395.) The words of the contract, hidden by the fold, began with the all-caps exhortation to “READ CONTRACT BEFORE SIGNING.” (P. 1439.) When questioned about the *pro rata* term in court, she finally grew frustrated and said, “You are asking me about reading things that I never

had to read." (Pp. 1410-11.) Anyone who has ever clicked "I agree" without clicking through to the hyperlinked Terms and Conditions (i.e., everyone) should identify with her frustration at the bait-and-switch. A contract drafted and designed to be ignored *ex ante*; the consumer who ignored it blamed *ex post.*

Williams vs. Walker-Thomas is framed, in the case and in commentary, as a conflict between an egregiously exploitative commercial actor and an unusually vulnerable individual consumer. That framing is too simplistic even for the particular case, and is certainly too simplistic for the modern consumer-firm contracting dynamic. But knowing the Walker-Thomas business model, and having a sense of Williams's experience of the transaction, it was perhaps more difficult to cling to the legal fiction of mutual assent, more urgent to acknowledge the reality of Williams's plight. In Fleming's telling, the reckoning with "the Ora Lee Williams situation" pushed lawmakers to confront the limits of the common law and look to other avenues of reform. (P. 1425.) In this moment of focus on the assent problem in consumer contracting, Fleming's insistence on zooming out—over time and across institutions—suggests a crucial context for understanding the next stage of reforms.

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