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Bargains on the Red-eye: New Light on Contract Theory

Geoffrey P. Miller¹

Abstract: Recent research has shown that large companies select New York law and New York courts to govern disputes under commercial contracts. Because these parties make choice-of-law and forum selection decisions before conflicts arise, there is reason to believe that their preference for New York reflects an effort to select efficient terms. This paper compares New York's contract law with that of its most natural competitor, California. It turns out that New York strictly enforces bargains and displays little tolerance for efforts to rewrite deals ex post. California, in contrast, is more willing to reform contracts for reasons of fairness, equity, morality or public policy. The revealed preferences of sophisticated parties support arguments by Schwartz, Scott and others that formalistic rules offer superior value for the interpretation and enforcement of commercial contracts.

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Table of Contents

- I. Introduction
- II. General Approach
- III. Formation
 - A. Preliminary Negotiations
 - B. Consideration
- IV. Validity
 - A. Duress
 - B. Unconscionability
 - C. Public Policy
 - 1. In General
 - 2. Exculpatory Clauses
 - 3. Noncompete Clauses
 - 4. Wrongful Discharge
 - D. Statute of Frauds
 - E. Mistake
- V. Parol Evidence
- VI. Choice of Law and Forum
 - A. Choice-of-Law Clauses
 - B. Forum Selection Clauses
- VII. The Adjudicatory Process
 - A. Waivers of Jury Trial
 - B. Attorneys Fees
 - C. Arbitration
 - D. Class Action Waivers
- VIII. Extra-Contractual Liabilities
- IX. Conclusion

I. Introduction

Recent work in contract theory, epitomized by an influential article by Alan Schwartz and Robert Scott,² suggests that business entities benefit from formal rather than contextual rules of contract law.³ Such firms are better off, according to this theory, when courts interpret contracts according to their terms and do not attempt to substitute their own concepts of reasonableness or fair dealing for bargains actually struck.⁴

This theoretical work challenges conventional views in contract scholarship that favor looser, more contextual approaches.⁵ But does it accurately describe the real world? Lisa Bernstein's important studies of internal industry dispute resolution practices find that private arbitration tribunals employ bright-line rules which deviate, in some respects, from the more nuanced approach that would apply if the disputing parties brought their controversy before a court.⁶ Bernstein's work suggests that industry actors,

² See Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale Law Journal* 541 (2003). For other work by these authors identifying advantages to a formalistic approach, see Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 *Colum. L. Rev.* 1641 (2003); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 *Nw. U. L. Rev.* 847, 864-65 (2000); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 *J. Legal Stud.* 271, 316-18 (1992). For a critique, see James W. Bowers, *Murphy's Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 *Rutgers L. Rev.* 587 (2005) (arguing, contra Schwartz and Scott, that many commercial parties would favor a contextualist approach).

³ For discussion of the "new formalism" in contract theory, see Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 *Colum. L. Rev.* 496, 496-501 (2004) (distinguishing between "formalistic" and "substantive" approaches); David Charny, *The New Formalism in Contract*, 66 *U. Chi. L. Rev.* 842 (1999). The current debate in contract theory roughly tracks the longstanding disagreement between the two giants of traditional contract scholarship, Samuel Williston (who advocated a formalistic approach) and Arthur Corbin (who supported a more contextual analysis).

⁴ In a study that complements the Schwartz-Scott theory, Avery Katz argues that formalistic rules may be useful for commercial parties which tend to be repeat players or have good (and relatively symmetric) information about the costs and benefits of performance. Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 *Colum. L. Rev.* 496 (2004). Katz, however, does not take a position on which style of contract law is more efficient, preferring instead to let the contracting parties themselves make this decision in the context of individual transactions.

⁵ See Katz, *supra* note __, at 498 ("or the past one hundred years or so the historical trend across the board has been to water down such formal doctrines in favor of a more all-things-considered analysis of what the parties may have meant in the individual case").

⁶ See Lisa Bernstein, *Commercial Law In The Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 *Mich. L. Rev.* 1724 (2001); Lisa Bernstein, *Merchant Law in a Merchant*

when given the freedom to devise their own procedures, opt for a system of rules much like that predicted in Schwartz and Scott's theory.

The present paper offers a more general test of the proposition that formal rules are efficient means for governing commercial contracts. It draws on Eisenberg and Miller's empirical study of dispute resolution clauses in major transactions.⁷ Nearly half of the contracts in Eisenberg and Miller's sample chose New York law to govern disputes, and nearly half of the contracts that contained forum selection clauses opted for New York state or federal courts. California, on the other hand, was distinctly unpopular with the parties represented in Eisenberg and Miller's study. Many fewer contracts opted for California law or a California forum than would be expected given the size and commercial importance of that state.

This contrast between California and New York has implications for contract theory. Since choice-of-law and forum selection clauses are negotiated *ex ante*, they likely represent efforts by the contracting parties to maximize the joint value of the undertaking. And because the contracts in the Eisenberg-Miller study were, by definition, important to the financial results of large corporations,⁸ it can be presumed that they received scrutiny from well-qualified attorneys. Accordingly, there is reason to believe that, compared with California, New York may provide the more efficient regime

Court: Rethinking The Code's Search For Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 132-33 (1992).

⁷ See Theodore Eisenberg and Geoffrey Miller, The Flight to New York, An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts, __ Cardozo Law Review __ (forthcoming 2009) (finding that parties to contracts included as exhibits to SEC reports strongly preferred New York law and forum); Theodore Eisenberg and Geoffrey Miller, Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, 59 Vanderbilt Law Review 1975 (2006) (finding that parties to corporate mergers prefer New York law over all states other than Delaware).

⁸ The sample was taken from Form 8K reports, which are filed in connection with material events in the financial affairs of reporting companies.

for interpreting and enforcing commercial agreements.⁹ Analysis of the relevant differences between the two states' contract law could then provide information on optimal contract rules.

This paper performs such an analysis. It compares New York and California across a range of contract law issues. As would be expected, the laws are similar in broad outline. Each state respects freedom of contract and each recognizes other social and moral objectives which occasionally trump private agreements. Each state's law grows out of dialectic process in which competing values are reconciled in different settings. Yet a closer analysis reveals substantial differences in tone and substance. New York and California are close siblings – children of the common law and a shared legal and political tradition. But they are far from identical twins.

The differences between New York and California contract law turn out to align with the formalist/contextualist distinction in contract theory. New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of interpretation. California, on the other hand, is more willing to reform or reject contracts in the service of morality or public policy; it places less emphasis on the written agreement of the parties and seeks instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity and substantial justice.

⁹ This observation is in line with Katz's argument that sophisticated parties have the ability, by choice of law and forum and other strategies, to select the level of formalism that maximizes the value of their transactions. See Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 *Colum. L. Rev.* 496 (2004).

Both approaches to contract law are commendable. Both serve important social goals and employ sophisticated and well-reasoned doctrines in the service of those ends. This article takes no position on whether one is better than the other. What is clear, however, is that contracting parties do take a position on this question. The testimony of the marketplace – the verdict of thousands of sophisticated parties whose incentives are to maximize the value of contract terms – is that New York’s formalistic rules win out over California’s contextualist approach. As predicted by theory, sophisticated parties prefer formalistic rules of contract law.¹⁰

II. General Approach

¹⁰ The results of the present study are not conclusive. They depend, in part, on the reliability of Eisenberg and Miller’s empirical analysis. Perhaps the contracts in their sample are not representative of commercial contracts generally, either because the time period under study (six months) was insufficient to generate reliable results, because the SEC-reporting firms in the sample are not representative of commercial firms generally, or for other reasons. Further, Eisenberg and Miller’s finding that commercial parties prefer New York law and forum is not tantamount to a conclusion that they do so out of concern to maximize the joint value of the contract. Network effects, agency costs, or bargaining problems could conceivably explain the data in the Eisenberg-Miller study without implying that the observed terms are efficient. These theories are discussed at length in Theodore Eisenberg & Geoffrey Miller, *The Flight to New York, An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, __ *Cardozo Law Review* __ (forthcoming 2009). Firms may select New York law and forum because of effective marketing and branding rather than any fundamental benefits offered by that state. See Theodore Eisenberg & Geoffrey Miller, *The Market for Contracts*, __ *Cardozo Law Review* __ (forthcoming 2009). Perhaps the contract provisions observed in Eisenberg’s and Miller’s data are simply boilerplate, reflecting nothing more than adherence to convention by people who give little or no thought to the consequences (for treatments of boilerplate, see, e.g., Omri Ben-Shahar, ed., *Boilerplate: The Foundation of Market Contracts* (2007); Omri Ben-Shahar, *Forward: Freedom from Contract*, 2004 *Wis. L. Rev.* 261, 263 (2004); Omri Ben-Shahar, *Forward: Freedom from Contract*, 2004 *Wis. L. Rev.* 261, 263 (2004); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 *Emory L.J.* 929 (2004); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 *Mich. L. Rev.* 983, 1030 (2006)). If accurate, these observations would affect the relevance of the present study to the question of formalism versus contextualism in contract law (although the comparison between New York and California would still be of interest). However, as one of the authors of the Eisenberg-Miller study, I believe it is robust to such criticisms.

Both New York and California recognize freedom of contract as fundamental¹¹ although limited, at times, by other values.¹² As between the two states, however, New York gives more weight to contractual freedom. In the absence of severe inequality of bargaining power, New York courts almost never upset private arrangements no matter how inequitable they may appear *ex post*.¹³ New York's tenderness for freedom of contract expresses itself, at times, in a seemingly atavistic pleasure in imposing the consequences of bad bargains.¹⁴ Thus, we are told that New York courts may not "alter the contract to reflect . . . personal notions of fairness and equity,"¹⁵ or reform a transaction to accomplish "notions of abstract justice or moral obligation."¹⁶ Nor will morally objectionable behavior by a counterparty excuse performance or confer rights of recovery on the victim, at least where the conduct is not so egregious as to be unconscionable.¹⁷ And New York's reverence for freedom of contract is not waning; if

¹¹ California: See, e.g., *Fries v. Save Mart Supermarkets, Inc.*, 2007 WL 3151609 (Cal. App. 2007) (characterizing value of freedom of contract as "fundamental"). The California legislature, likewise, has declared that "[i]t is the public policy of the state and fundamental to the commerce and economic development of the state to enable and facilitate freedom of contract by the parties to commercial real property leases." Calif. Civ. Code § 1995.270.

New York: New York courts are, if anything even more enthusiastic, sometimes speaking as if freedom of contract were the only relevant concern. See, e.g., *Bird v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 87 (N.Y. 1918) ("[t]he inquiry for us is how far the parties to this contract intended us to go. The causes within their contemplation are the only causes that concern us.").

¹² See, e.g., *Zomba Recording LLC v. Williams*, 15 Misc.3d 1118(A), 839 N.Y.S.2d 438 (Table) (N.Y. Sup. 2007).

¹³ *Janian v. Barnes*, 294 A.D.2d 787 (3rd Dept. 2002) (prudence or fairness of a contract is not the subject of judicial scrutiny in the absence of fraud or unconscionability); *Dafnos v. Hayes*, 264 A.D.2d 305 (3rd Dept. 1999) (same).

¹⁴ *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 695, 636 N.Y.S.2d 734, 660 N.E.2d 415 (N.Y. 1995).

¹⁵ *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570, 780 N.E.2d 166 (N.Y. 2002).

¹⁶ *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355, 385 N.E.2d 1280 (N.Y. 1978).

¹⁷ *Jordan Panel Systems Corp. v. Turner Const. Co.*, 45 A.D.3d 165, 198, 841 N.Y.S.2d 561 (1st Dept. 2007) (even though the defendant's actions left "much to be desired" and would probably have led to a different result under principles of equity jurisprudence, "we did not write those rules of engagement, and we are not empowered either to ignore or rewrite them.")

anything, the courts of that state are becoming even more inclined than heretofore to defer to private agreements.¹⁸

California courts rarely trumpet the virtues of holding parties to the consequences of foolish bargains. California's allegiance to freedom of contract, moreover, is frequently tempered with concern for other values – providing compensation for harm,¹⁹ facilitating job mobility,²⁰ protecting parties against extortionate damages,²¹ preventing “inequitable or unequal exchanges,”²² ensuring access to a civil jury,²³ protecting policyholders injured by uninsured motorists²⁴ – even safeguarding the legislature's choice of venue for litigation.²⁵ Unlike New York, California does not sharply distinguish between consumer and commercial contracts, thus subjecting even business-to-business contracts to potential invalidation or reform on ground of fairness, equity, or substantial justice.²⁶ Backing this complex structure of agreement-trumping policies is a strong norm in California against waiver of rules implicating the public interest.²⁷

¹⁸ See, e.g., *Zarsky v. Law Office of Maury B. Josephson*, 14 Misc.3d 1207(A), 831 N.Y.S.2d 363 (Table) (N.Y.City Civ.Ct. 2006).

¹⁹ See *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 754 n.5, 161 P.3d 1095 (Cal. 2007).

²⁰ See *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708, 713, 61 Cal.Rptr.3d 818 (4th Dist. 2007) (recognizing that freedom of contract is an “important principle” but striking down a contract on the ground that it impermissibly interfered with employee job mobility).

²¹ See Cal. Civ. Code § 3358 (“[e]xcept as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.”)

²² See, e.g., *Rich & Whillock, Inc. v. Ashton Development, Inc.*, 157 Cal.App.3d 1154, 204 Cal.Rptr. 86 (4th Dist. 1984) (“[o]n the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.”)

²³ See *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th 944, 116 P.3d 479 (Cal. 2005).

²⁴ *Daun v. USAA Cas. Ins. Co.*, 125 Cal.App.4th 599, 23 Cal.Rptr.3d 44 (4th Dist. 2005).

²⁵ See *Arntz Builders v. Superior Court*, 122 Cal.App.4th 1195, 19 Cal.Rptr.3d 346 (1st Dist. 2004).

²⁶ California courts, for example, are willing to invalidate commercial contracts on unconscionability grounds, even when severe inequality of bargaining power does not appear to be present. See notes ___-___ and accompany text, *infra*.

²⁷ See Cal. Civ. Code § 3513 (“[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”).

III. Formation

A. Preliminary Negotiations

California and New York articulate generally similar rules on contract formation.²⁸ Both states require more than mere participation in contract negotiations in order to establish a legal obligation.²⁹ Agreements to agree are not enforceable in either state. Behind this similarity, however, lurk subtle differences.

One of these differences concerns the contractual obligation to negotiate in good faith. The New York Court of Appeals recognized such an obligation in *American Broadcasting Companies, Inc. v. Wolf*.³⁰ Sports caster Warner Wolf's contract with ABC required him to "enter into good faith negotiations . . . for the extension of this agreement on mutually agreeable terms." All the judges of the New York Court of Appeals agreed that this language obligated Wolf to bargain in good faith for the extension of his contract. Although a broad reading of the *Wolf* case could gut the traditional rule against agreements to agree, the case has not had a broad impact. The reason is that New York courts have strictly limited its application. The obligation to negotiate in good faith applies only when the parties use definite language indicating a present intent to be

²⁸ For interesting analyses of the policy issues surrounding the imposition of liability for actions or statements made in preliminary negotiations, see Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-contractual Misrepresentations*, 33 Val. U. L. Rev. 485, 534 (1999); Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 Virginia Law Review 101 (1999).

²⁹ See, e.g., *Kruse v. Bank of America*, 202 Cal.App.3d 38, 59, 248 Cal.Rptr. 217 (1st Dept. 1988) (preliminary negotiations or agreements for future negotiations do not create binding obligations.); *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F.Supp. 491, 497 (S.D.N.Y. 1987) (New York seeks to avoid "trapping parties in surprise contractual obligations that they never intended.")

³⁰ 52 N.Y.2d 394, 420 N.E.2d 363 (N.Y. 1981).

bound;³¹ and the subject of negotiation must be both specific and backed by ascertainable indications of intent regarding the anticipated outcome of the process.³²

Recent California cases also recognize an obligation to negotiate in good faith. In *Copeland v. Baskin Robbins U.S.A.*,³³ the parties agreed that the plaintiff would acquire a manufacturing plant from the defendant and further agreed that the defendant would purchase product from the plant at a price to be negotiated. After protracted discussions the defendant announced that it was terminating negotiations. The California Court of Appeal, in a case of first impression, held that the complaint set forth a cause of action for damages for breach of a promise to negotiate in good faith.³⁴ Although *Copeland* appears similar to the *Wolf* case, it is potentially broader in scope. The parties in *Copeland* did not manifest an unequivocal intent to negotiate in good faith and the contract lacked specific indications of the parties' expectations regarding the outcome of negotiations. California law thus arguably imposes risks of being inadvertently caught up in contractual obligations that are not present under New York law.

California and New York also differ in the reasons given for imposing liability for preliminary negotiations. California cases tend to emphasize the lack of agreement among the parties on a material term of the contract when they refuse to recognize contractual obligations based on preliminary negotiations.³⁵ New York cases, in contrast, focus more on the form of the purported agreement. Even if the key terms are agreed to, New York courts will resist enforcing a contract if the parties intended to embody their

³¹ See *Teachers Ins. and Annuity Ass'n v. Tribune Co.*, 670 F.Supp. 491 (S.D.N.Y. 1987).

³² See *L-3 Communications Corp. v. OSI Systems, Inc.*, 2004 WL 42276 (S.D.N.Y. 2004).

³³ 96 Cal.App.4th 1251, 1255, 117 Cal.Rptr.2d 875 (2nd Dist. 2002).

³⁴ The *Copeland* decision has been followed by a number of other decisions. See, e.g., *Coachella Valley Water Dist. v. Imperial Irr. Dist.*, 2007 WL 2822766 (4th Dist. 2007).

³⁵ See, e.g., *Rochlis v. Walt Disney Co.*, 19 Cal.App.4th 201 (1993).

agreement in a written form which was never executed.³⁶ The New York cases reflect a significant emphasis, not nearly as pronounced in California, on the importance of a definitive written agreement for determining the intent of the parties.

New York and California also differ in their willingness to use promissory estoppel to impose liability for pre-contractual negotiations.³⁷ In *Baird v. Gimbel Brothers, Inc.*,³⁸ a well-known New York case, a general contractor obtained a contract in reliance on a subcontractor's bid which was withdrawn prior to acceptance. The New York Court of Appeals rejected the contractor's claim against the subcontractor: the parties had made no binding agreement and a theory of promissory estoppel could not fix the defect. Several New York decisions have subsequently endorsed the idea of promissory estoppel liability for subcontractor bids,³⁹ but as yet New York has not definitively rejected the rule of the *Gimbel* case.⁴⁰ Even when New York courts use promissory estoppel to impose liability for preliminary negotiations, moreover, the doctrine is hedged by limitations and qualifications. The promise on which the estoppel

³⁶ See, e.g., *1130 President St. Corp. v. Bolton Realty Corp.*, 300 N.Y. 63, 68, 89 N.E.2d 16 (N.Y. 1949) (phrase "Make up drawing", which required further negotiations on the renovations plaintiff desired, rendered contract unenforceable); *Chatterjee Fund Management, L.P. v. Dimensional Media Associates*, 260 A.D.2d 159, 687 N.Y.S.2d 364 (1st Dept. 1999) (even if the parties agree to all essential terms, contract was not enforceable so long as the agreement has not been finalized with a sufficient manifestation of consent to the entire package.); *Jordan Panel Systems Corp. v. Turner Const. Co.*, 45 A.D.3d 165, 841 N.Y.S.2d 561 (1st Dept. 2007); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir. 1984) ("when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent.").

³⁷ For a historical analysis focusing on the leading cases, see Alfred S. Konefsky, *Freedom And Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. Cin. L. Rev. 1169 (1997).

³⁸ 64 F.2d 344 (2d Cir. 1933).

³⁹ See, e.g., *Bunkoff General Contractors, Inc. v. Dunham Elec., Inc.*, 300 A.D.2d 976, 753 N.Y.S.2d 156 (App. Div. 2002).

⁴⁰ See *LAHR Const. Corp. v. J. Kozel & Son, Inc.*, 168 Misc.2d 759, 762, 640 N.Y.S.2d 957 (N.Y.Sup. 1996) (expressing doubts that the state has repudiated the rule and describing New York's adoption of promissory estoppel principles as "tentative"); Arthur B. Schwartz, *The Second Circuit "Estopped": There Is No Promissory Estoppel In New York*, 19 Cardozo L. Rev. 1201 (1997).

is based must be clear and unambiguous⁴¹ and cannot be established solely by course of conduct⁴² or vague reassurances.⁴³ Promissory estoppel is unavailable in New York when the evidence shows that the parties intended not to be bound until the execution of a written document.⁴⁴ Integration or merger clauses stipulating that the written document is the complete agreement of the parties will ordinarily preclude the use of promissory estoppel.⁴⁵ The injury to the party claiming estoppel must be so severe as to be considered unconscionable.⁴⁶ All the elements of a promissory estoppel claim must be specifically pleaded.⁴⁷ Overall, New York offers only a limited and grudging acceptance of the promissory estoppel theory as a means for imposing liability for preliminary negotiations.

California is more receptive to promissory estoppel claims. In the leading case, *Drennan v. Star Paving Co.*,⁴⁸ the California Supreme Court reached a result directly contrary to *Baird v. Gimbel*, holding that promissory estoppel could substitute for consideration in situations where a contractor reasonably relied on a subcontractor's bid.⁴⁹ Subsequent California decisions have generalized this principle to other situations

⁴¹ See *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 795 N.Y.S.2d 68 (App. Div. 2005) (rejecting promissory estoppel claim for lack of a clear and unambiguous promise).

⁴² *Southern Federal Sav. and Loan Ass'n of Georgia v. 21-26 East 105th Street Associates*, 145 B.R. 375, 383, R.I.C.O. Bus. Disp. Guide (CCH) P 7945 (S.D. N.Y. 1991), aff'd, 978 F.2d 706 (2d Cir. 1992).

⁴³ See *Kelly v. Chase Manhattan Bank*, 717 F. Supp. 227, 236 (S.D.N.Y. 1989).

⁴⁴ See, e.g., *Jordan Panel Systems, Corp. v. Turner Const. Co.*, 45 A.D.3d 165, 841 N.Y.S.2d 561 (App. Div. 2007) (no reliance recognized when defendant explicitly disclaimed an intent to be bound prior to signing of formal contract); *Wiscovitch Associates, Ltd. v. Philip Morris Companies, Inc.*, 193 A.D.2d 542, 598 N.Y.S.2d 193 (App. Div. 1993); *Telecom Intern. America, Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189, 205 (S.D.N.Y. 1999).

⁴⁵ See *Gebbia v. Toronto-Dominion Bank*, 306 A.D.2d 37, 762 N.Y.S.2d 38 (App. Div. 2003).

⁴⁶ See *Spier v. Southgate Owners Corp.*, 39 A.D.3d 277, 833 N.Y.S.2d 459 (App. Div. 2007) (rejecting estoppel claim because injury was not unconscionable); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 301 (2d Cir. 1996); *Zucker v. Katz*, 708 F. Supp. 525 (S.D. N.Y. 1989).

⁴⁷ See *Glenesk v. Guidance Realty Corp.*, 36 A.D.2d 852, 321 N.Y.S.2d 685 (2d Dept. 1971); *Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72 (S.D.N.Y. 1978).

⁴⁸ See *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

⁴⁹ The disagreement between the California and New York courts has provoked extensive scholarly commentary. See, e.g., J. Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv.L.Rev. 678, 680-81,

in which reasonable reliance substitutes for a defect in contract formation. To be sure, California also limits the scope of promissory estoppel: there must be a clear and unambiguous promise⁵⁰ rather than vague assurances;⁵¹ the promisor must reasonably expect the statement to induce reliance;⁵² the plaintiff must actually rely on the promise;⁵³ the plaintiff must incur damage stemming from the reliance;⁵⁴ and all the elements must be pleaded.⁵⁵ Nevertheless it is clear that promissory estoppel will be available to enforce promises in California in situations where it will not be available in New York. Unconscionable injury is not usually required, for example, and the presence of a written agreement poses less of an obstacle to recognition of the theory. The California approach, in contrast to New York's, seeks to impose a principle of fairness and morality in business conduct⁵⁶ even at the expense of increasing the risk that parties will be trapped in unanticipated contractual obligations.

B. Consideration

692-94, 700-01 (1984); C. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 *Colum L.Rev.* 52, 63-64 (1981); F. Kessler & E. Fine, *Culpa In Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv.L.Rev.* 401, 422-24 (1964); Alfred Kofesky, *Freedom And Interdependence In Twentieth-Century Contract Law: Traynor And Hand And Promissory Estoppel*, 65 *U. Cin. L. Rev.* 1169 (1997).

⁵⁰ See *California Cancer Specialists Medical Group, Inc. v. Health Net of California, Inc.*, 2006 WL 2468069 (Cal. App. 2006); *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal.2d 719, 79 Cal.Rptr. 319 (Cal. 1969).

⁵¹ See *Goines v. Wilkes*, 2007 WL 1040979 (2d Dist. 2007).

⁵² See *Poway Royal Mobilehome Owners Assn. v. City of Poway*, 149 Cal.App.4th 1460, 1470-1471, 149 Cal.App.4th 1460, 58 Cal.Rptr.3d 153 (4th Dist. 2007).

⁵³ See *Millbrae Serra Sanitrium, Inc. v. State*, 2008 WL 903091 (4th Dist. 2008).

⁵⁴ See *Massey v. Los Angeles Unified School Dist.*, 2008 WL 570792 (2nd Dist. 2008).

⁵⁵ See *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 48, 275 Cal.Rptr. 17 (1st Dist. 1990).

⁵⁶ The purpose of the device, in California, is fundamentally moral: following the Restatement (Second) of Contracts, the California courts see the doctrine as a means to prevent "injustice," *Poway Royal Mobilehome Owners Assn. v. City of Poway*, 149 Cal.App.4th 1460, 1470-1471 (4th Dist. 2007), preserve "equity," *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 6, 587 P.2d 1136, 151 Cal.Rptr. 323 (Cal. 1978), and do "right and justice," *Toscano v. Greene Music*, 124 Cal.App.4th 685, 21 Cal.Rptr.3d 732 (4th Dist. 2004). See Restatement (Second) of Contracts § 90(1): "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Both New York and California recognize the doctrine of consideration: in general, parties are not bound unless something of value is exchanged. Neither state insists on equivalence in value: any benefit to the promisor or detriment to the promisee will do.⁵⁷

Again, however, a closer investigation reveals differences. New York adheres to traditional rules under which past consideration or moral obligation do not qualify.⁵⁸ On the other hand, New York allows greater flexibility when a written instrument is involved. Recitals of “value received” are nearly conclusive evidence of consideration.⁵⁹ And the New York legislature has dispensed with the consideration requirement altogether for certain documents which appear frequently in business transactions. Promises based on past consideration or antecedent obligation, unenforceable if made orally, are binding if in writing and signed by the responsible party.⁶⁰ So are modifications or releases,⁶¹ irrevocable assignments,⁶² firm offers,⁶³ rewards for return of lost property,⁶⁴ and certain promises by grantors of interests in real property.⁶⁵

⁵⁷ New York: see, e.g., *Laham v. Chambi*, 299 A.D.2d 151 (1st Dept. 2002) (adequacy of consideration is not the proper subject of judicial scrutiny so long as some benefit was received); *Rooney v. Tyson*, 91 N.Y.2d 685, 697 N.E.2d 571, 674 N.Y.S.2d 616 (N.Y. 1998) (same); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (N.Y. 1982) (same).

California: see, e.g., *Melican v. Regents of University of California*, 151 Cal.App.4th 168, 176-177, 59 Cal.Rptr.3d 672 (4th Dist. 2007) (same); *A.J. Industries, Inc. v. Ver Halen*, 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383 (2nd Dist. 1977) (same); *Bank of California v. Connolly*, 36 Cal.App.3d 350, 369, 111 Cal.Rptr. 468, n7 (4th Dist. 1973) (same).

⁵⁸ See *Ripley v. International Rys. of Cent. Am.*, 8 N.Y.2d 430, 441, 209 N.Y.S.2d 289, 171 N.E.2d 443 (N.Y. 1960) (promise to do what one is under a legal obligation to do is not consideration); *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (N.Y. 1895) (same); *IBM Credit Fin. Corp. v. Mazda Motor Mfg. [USA] Corp.*, 152 A.D.2d 451, 453, 542 N.Y.S.2d 649 (1st Dept. 1989) (same).

⁵⁹ See *Formica Const. Co., Inc. v. Mills*, 9 Misc.3d 398, 801 N.Y.S.2d 713 (N.Y. City Civ. Ct. 2005).

⁶⁰ See N.Y. Gen. Obl. Law § 5-1105 (“A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.”) See *First Nat. City Bank v. Valentine*, 61 Misc.2d 554, 306 N.Y.S.2d 227 (N.Y. Sup. 1969). The new promise must be in writing; an antecedent debt is not sufficient consideration for an oral promise. *Beitner v. Becker*, 34 A.D.3d 406, 824 N.Y.S.2d 155 (2nd Dept. 2006).

⁶¹ See N.Y. Gen. Obl. Law § 5-1103 (“An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security

California recognizes a moral element in consideration to a greater extent than New York. The traditional rules have been modified to enforce promises based on antecedent debts or obligations discharged in bankruptcy or barred by the statute of frauds or a statute of limitations.⁶⁶ Conversely, value that would otherwise qualify as consideration does not support a contract if it is “contrary to good morals.”⁶⁷ California also will not grant specific performance if the breaching party has not received “adequate consideration,” or if the contract is “not, as to him, just and reasonable.”⁶⁸ Consideration here means more than the consideration to support a simple contract; the value conferred must be “fair and adequate.”⁶⁹

interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.”) Oral modifications or releases do require consideration. *Matter of Maurer v. Erdheim*, 292 A.D.2d 455, 738 N.Y.S.2d 885 (2nd Dept. 2002); *Federal Deposit Ins. Corp. v. Hyer*, 66 A.D.2d 521, 528-529, 413 N.Y.S.2d 939 (2nd Dept. 1979).

⁶² See N.Y. Gen. Obl. Law § 5-1107 (“[a]n assignment shall not be denied the effect of irrevocably transferring the assignor’s rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent.”)

⁶³ See N.Y. Gen. Obl. Law § 5-1109 (except for merchant transactions under the UCC, “when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability.”)

⁶⁴ See N.Y. Gen. Obl. Law § 5-1113 (“A promise to pay a reward for return of lost or mislaid property is not unenforceable because of absence of consideration if the promise was made in writing or the promisor caused it to be published.”)

⁶⁵ See N.Y. Gen. Obl. Law § 5-1115 (“A promise or warranty by the grantor in a deed or conveyance of an estate or interest in real property and acknowledged or proved in the manner prescribed by law to entitle it to be recorded shall not be denied effect because of the absence of consideration, if no consideration was intended.”) Among other things, this statute provides a means for recognizing that people often grant property to beneficiaries as gifts. See *Moczan v. Moczan*, 135 A.D.2d 692, 522 N.Y.S.2d 591 (2nd Dept. 1987).

⁶⁶ See Cal. Civ. Code § 1616 (“An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.”).

⁶⁷ Cal. Civ. Code § 1607.

⁶⁸ Cal. Civ. Code § 3391 (specific performance is not available unless the defendant “received an adequate consideration for the contract”.)

⁶⁹ *Trup v. Manock*, 2008 WL 889425 (4th Dist. 2008). Presumably, the purpose of this rule is the desire, based on moral principles, to protect parties against demands for specific relief where the cost of performance, to the breaching party, far exceeds the benefit of performance to the nonbreaching party.

On the other hand, California does not go as far as New York when it comes to recognizing the special status of written instruments. Written recitals of consideration are given presumptive weight⁷⁰ but are never conclusive.⁷¹ Irrevocable options and firm offers,⁷² contract modifications,⁷³ and other signed commitments enforceable in New York without consideration appear to require consideration under all circumstances in California. Overall, as compared with New York, California's rules on consideration offer somewhat less certainty to commercial parties that their contracts will be enforced as written.

IV. Validity

I now turn to an analysis of specific doctrines that may be employed to challenge the validity of contracts otherwise proper in form and substance: duress, unconscionability, public policy, statute of frauds, and mistake.

A. Duress

New York courts recognize duress as a defense to the enforcement of a contract but impose significant limitations on its use. The threat must be credible and its execution must inflict harm which is both irreparable⁷⁴ and of such magnitude that the victim is effectively deprived of free will.⁷⁵ Mere financial pressure, even if

⁷⁰ Cal. Civ. Code § 1614 (“A written instrument is presumptive evidence of a consideration.”)

⁷¹ Cal. Evid. Code § 622 (“The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; *but this rule does not apply to the recital of a consideration.*”) (emphasis added).

⁷² See *City of Orange v. San Diego County Employees Retirement Assn.*, 103 Cal.App.4th 45, 126 Cal.Rptr.2d 405 (2nd Dist. 2002) (irrevocable option).

⁷³ See *Krobitzsch v. Middleton*, 72 Cal.App.2d 804, 165 P.2d 729 (1st Dist. 1946). Cal. Civ. Code § 1698(a), providing that “[a] contract in writing may be modified by a contract in writing,” might be read to dispense with a requirement of new consideration for written modifications, especially since § 1698(c) specifically requires consideration for oral modifications of written contracts. The cases, however, does not appear to have endorsed this view.

⁷⁴ *Friends Lumber Inc. v. Cornell Development Corp.*, 243 A.D.2d 886 (3rd Dept. 1997).

⁷⁵ See *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 272 N.E.2d 533 (N.Y. 1971); *805 Third Ave. Co.*, 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 448 N.E.2d 445 (N.Y. 1983).

“relentless,”⁷⁶ is not enough; nor is duress present if the party experiencing the pressure has available means for response.⁷⁷ The threat, moreover, must be intrinsically wrongful:⁷⁸ a contract is not subject to challenge if the threatened action is something that the alleged wrongdoer was legally entitled to do.⁷⁹ Even if an agreement is procured by duress, moreover, the victim must act promptly to repudiate it or suffer an inference of ratification;⁸⁰ New York courts are not receptive to arguments that it is unfair to force a victim to elect promptly between accepting the benefit of contract procured through duress, however inadequate, or incurring the risk and expense of challenging the conditions under which the contract was made.⁸¹

California also recognizes a defense of duress.⁸² As in New York, the threat must be wrongful. Thus, a good faith threat to exercise legal rights is not duress in California even if the party is mistaken about his entitlements.⁸³ Also, as in New York, the party

⁷⁶ See *Morad v. Morad*, 27 A.D.3d 626, 812 N.Y.S.2d 126 (2nd Dept. 2006); *Beutel v. Beutel*, 55 N.Y.2d 957, 958, 449 N.Y.S.2d 180, 434 N.E.2d 249 (N.Y. 1982).

⁷⁷ See *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130-131, 324 N.Y.S.2d 22, 272 N.E.2d 533 (N.Y. 1971); *Finserv Computer Corp. v. Bibliographic Retrieval Services, Inc.*, 125 A.D.2d 765, 767, 509 N.Y.S.2d 187 (3rd Dept. 1986).

⁷⁸ See *Stewart M. Muller Constr. Co. v. New York Telephone Co.*, 40 N.Y.2d 955, 956, 390 N.Y.S.2d 817, 359 N.E.2d 328 (N.Y. 1976). For example, a party acts wrongfully by threatening to withhold performance of clear contractual obligation. See, e.g., *Friends Lumber Inc. v. Cornell Development Corp.*, 243 A.D.2d 886 (3rd Dept. 1997); *Sosnoff v. Carter*, 165 A.D.2d 486 (1st Dept. 1991).

⁷⁹ See *Philips South Beach LLC v. ZC Specialty Ins. Co.*, 17 Misc.3d 1109(A), 851 N.Y.S.2d 60 (N.Y. Sup. 2007); *Marine Midland Bank v. Hallman’s Budget Rent-A-Car of Rochester*, 204 A.D.2d 1007, 1008, 613 N.Y.S.2d 92 (4th Dept. 1994) (pursuit of a legal right does not constitute economic duress).

⁸⁰ E.g., *Cosh v. Cosh*, 45 A.D.3d 798, 847 N.Y.S.2d 136 (2nd Dept. 2007); *Stoerchle v. Stoerchle*, 101 A.D.2d 831, 832, 475 N.Y.S.2d 489 (2nd Dept. 1984); *Wachovia Securities, LLC v. Joseph*, 14 Misc.3d 1228(A), 836 N.Y.S.2d 496 (N.Y. Sup. 2007).

⁸¹ See *EEOC v. American Express Pub. Corp.*, 681 F Supp 216, 219 (S.D.N.Y. 1988) (“the fact that a party faces a difficult choice-between additional benefits or pursuing his [or her] legal rights-does not alone indicate lack of free will.”).

⁸² See Cal. Civ.Code § 1567.

⁸³ See *London Homes, Inc. v. Korn*, 234 Cal.App.2d 233, 240, 44 Cal.Rptr. 262 (4th Dist. 1965) (party did not impose duress when it asserted an erroneous claim of contract rights); *River Bank America v. Diller*, 38 Cal.App.4th 1400, 1424-1425, 45 Cal.Rptr.2d 790 (1st Dist. 1995).

must do more than merely inflict economic⁸⁴ or social pressure.⁸⁵ But in several respects California is more receptive than New York to claims of duress. Loss of free will is apparently not required; it is sufficient that the threat be “sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract.”⁸⁶ California, moreover, recognizes certain duress-like defenses not found in New York.⁸⁷ A contract may be invalidated if procured by “menace,” including threats of violence or injury to reputation.⁸⁸ Also available as a ground for upsetting a contract is “undue influence” – “taking an unfair advantage of another's weakness of mind; or . . . taking a grossly oppressive and unfair advantage of another's necessities or distress.”⁸⁹ Although menace or undue influence are unlikely to be a ground for avoiding many business contracts, they, together with the state’s softer requirements for duress, represent a wild-card in California jurisprudence that parties may seek to use in order to avoid performing on losing deals.

B. Unconscionability

Both New York and California refuse to enforce contract terms deemed to be unconscionable,⁹⁰ and do so on similar grounds.⁹¹ There are, however, significant

⁸⁴ See, e.g., *Doherty v. Regev*, 2002 WL 1904435 (2nd Dist. 2002) (party’s testimony that he felt “compelled” to execute an instrument held insufficient).

⁸⁵ So, for example, the threat to publish politically embarrassing information may not be sufficient. See *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal.App.3d 1058, 1077-1081, 267 Cal.Rptr. 457 (6th Dist. 1990).

⁸⁶ *CrossTalk Productions, Inc. v. Jacobson*, 65 Cal.App.4th 631, 644, 76 Cal.Rptr.2d 615 (2nd Dist. 1998).

⁸⁷ Cal. Civ. Code § 1567.

⁸⁸ Cal. Civ. Code § 1570.

⁸⁹ Cal. Civ. Code § 1575.

⁹⁰ New York’s law on unconscionability is largely judge-made. See, e.g., *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 (N.Y. 1988) (leading case setting forth the basic rules). California’s approach is embodied in a statute, Cal. Civ. Code § § 1670.5(a) (“[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the

differences of nuance and application – differences that reduce certainty of contract enforcement in California as compared with New York.

New York’s standards for unconscionability are demanding. A determination of unconscionability generally requires a showing that the transaction was both procedurally and substantively unconscionable when made.⁹² For a contract to be deemed procedurally unconscionable, a court must find that the complaining party was deprived of “meaningful choice.”⁹³ This means more than mere inequality of bargaining power or that the contract term was offered on a “take it or leave it” basis. The complaining party must establish a lack of fundamental fairness in the contracting process, evidenced by a combination of factors such as marked differences in sophistication,⁹⁴ “gross disparity” of bargaining power,⁹⁵ “fine print” clauses hidden in a written contract,⁹⁶ the vulnerability of the party seeking relief from the contract,⁹⁷ or “high pressure” sales practices.⁹⁸ New

contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”)

⁹¹ The similarity is not accidental. Both state’s unconscionability doctrines are outgrowths of Uniform Commercial Code’s unconscionability rule. See Cal. Civ. Code § 1670.5 (enacting U.C.C. § 2-302); Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 537 N.Y.S.2d 787, 534 N.E.2d 824, 828 (N.Y. 1988) (citing U.C.C. § 2-302).

⁹² Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 (N.Y. 1988), Rosiny v. Schmidt, 185 A.D.2d 727 (1st Dept 1992); Wachovia Securities, LLC v. Joseph, 14 Misc.3d 1228(A), 836 N.Y.S.2d 496 (Table) (N.Y.Sup. 2007). In “extreme” or “exceptional” cases, New York may dispense with the requirement of procedural unconscionability, see State v. Wolowitz, 96 A.D.2d 47, 468 N.Y.S.2d 131, 145 (2nd Dept. 1983) (“[w]hile there may be extreme cases where a contractual term is so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the contract formation process such cases are the exception.”); Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824, 829 (N.Y. 1988) (“There have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.” (citations omitted)).

⁹³ See Matter of State of New York v. Avco Fin. Serv., 50 N.Y.2d 383, 389, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (N.Y. 1980), quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (“an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party”).

⁹⁴ See Suffolk Laundry Services, Inc., v. Redux Corp., 238 A.D.2d 577, 579 (2nd Dept. 1997).

⁹⁵ Blake v. Biscardi, 62 A.D.2d 975, 977 (2nd Dept. 1978).

⁹⁶ Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 11, 537 N.Y.S.2d 787, 534 N.E.2d 824 (N.Y. 1988).

⁹⁷ For example, the New York legislature has enacted special legislation designed to protect sellers of structured settlements on the theory that these individuals may be particularly vulnerable to sharp

York is even stricter when it comes to substantive unconscionability. The complaining party must show that the terms are “grossly unreasonable,”⁹⁹ “exceptional,” or “oppressive,”¹⁰⁰ – so deleterious that “no man in his senses and not under delusion” would agree to them.¹⁰¹ Even terms that appear objectively unfair can pass muster under New York’s approach; in one case the court found no unconscionability in a retainer agreement which awarded a lawyer firm \$40 million for five months work following years of litigation which was fully compensated on an hourly basis.¹⁰² Given the stringency of its unconscionability rule, New York decisions recognize that the doctrine of unconscionability has little or no application to commercial contracts between business entities or sophisticated parties.¹⁰³

California also requires a showing of both procedural and substantive unconscionability.¹⁰⁴ Yet these requirements are interpreted differently than in New

practices. See *Settlement Funding of N.Y., LLC v. Solivan*, 8 Misc.3d 1006(A), 801 N.Y.S.2d 781 (N.Y. Sup. 2005).

⁹⁸ *Matter of Friedman*, 64 A.D.2d 70, 85 (2nd Dept. 1978).

⁹⁹ *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 11, 537 N.Y.S.2d 787, 534 N.E.2d 824 (N.Y. 1988).

¹⁰⁰ *Lawrence v. Miller*, 48 A.D.3d 1, 853 N.Y.S.2d 1 (1st Dept. 2007) (“oppression”).

¹⁰¹ *Lawrence v. Miller*, 48 A.D.3d 1, 853 N.Y.S.2d 1 (1st Dept. 2007).

¹⁰² See, e.g., *Lawrence v. Miller*, 48 A.D.3d 1, 853 N.Y.S.2d 1 (1st Dept. 2007).

¹⁰³ See *Gillman v. Chase Manhattan Bank*, 135 A.D.2d 488, 491 (2nd Dept. 1987), *aff’d*, 73 N.Y.2d 1 (1988), quoting *Equitable Lumber Corp. v. I.P.A. Development Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (N.Y. 1976) (“the doctrine of unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm’s length with relative equality of bargaining power . . . apparently the doctrine is primarily a means with which to protect the commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company.”); *Chrysler Credit Corp. v. Kosal*, 132 A.D.2d 686, 686, 518 N.Y.S.2d 162 (2nd Dept. 1987) (unconscionability presumed not to apply to commercial transactions among sophisticated business entities); *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 636 N.Y.S.2d 734 (N.Y. 1995) (absent countervailing public policy concerns, New York courts will not relieve sophisticated parties of the consequences of their bargain); *In re Chateaugay Corp.*, 162 B.R. 949, 960 (Bankr. S.D.N.Y. 1994) (it is “extremely rare for a court to find an unconscionable limitation on consequential damages in a contract between experienced businessmen arising in a commercial setting”); *Reznor v. J. Artist Mgmt., Inc.*, 365 F.Supp.2d 565, 577 (S.D.N.Y. 2005) (“courts have rarely found a clause to be unconscionable in contracts involving two commercial entities, a situation in which negotiation is presumed possible”); *Scotts Co., LLC v. Ace Indem. Ins. Co.*, 18 Misc.3d 1139(A), 2007 WL 4954442 (Table) (N.Y. Sup. 2007) (same).

¹⁰⁴ *Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal. 2000).

York. As to procedural unconscionability, California cases sometimes indicate that “no-bargaining” contracts of adhesion are a prerequisite;¹⁰⁵ but in practice the doctrine is employed in contexts where bargaining appears to have been possible¹⁰⁶ as well as in cases of unilateral mistake.¹⁰⁷ As to substantive unconscionability, California decisions suggest that the level of unfairness necessary to invalidate a contract term need not be extreme or outrageous; it is enough if the terms are “overly harsh.”¹⁰⁸ Unlike New York, California courts find substantive unconscionability in contracts which are one-sided, whether or not overly harsh.¹⁰⁹ Also unlike New York, California does not limit the doctrine of unconscionability to contracts between consumers and businesses;¹¹⁰ any party, even a sophisticated business entity,¹¹¹ can obtain relief,¹¹² especially if the substantive terms complained of are onerous.¹¹³

¹⁰⁵ *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817-819, 171 Cal.Rptr. 604 (Cal. 1981) (“[u]nconscionability analysis begins with an inquiry into whether the contract is one of adhesion.”).

¹⁰⁶ See, e.g., *Woodside Homes of Cal., Inc. v. Superior Court*, 107 Cal.App.4th 723, 727, 132 Cal.Rptr.2d 35 (4th Dist. 2003) (action by home buyers against developer); *Buchwald v. Paramount Pictures Corp.*, 1990 WL 357611 (Cal.Super. 1990) (contract between noted humorist and movie studio).

¹⁰⁷ See, e.g., *Donovan v. RRL Corp.*, 26 Cal.4th 261, 27 P.3d 702 (Cal. 2001) (relieving car dealership of consequences of error in advertised price term); *M. F. Kemper Const. Co. v. City of Los Angeles*, 37 Cal.2d 696, 235 P.2d 7 (Cal. 1951) (relieving contractor of consequences of mistaken bid).

¹⁰⁸ *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892 (Cal. 2003); *Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal. 2000).

¹⁰⁹ See *Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal. 2000) (rejecting as unconscionable a clause requiring mandatory arbitration of an employee’s claims against an employer but not an employer’s claims against an employee); *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal.Rptr. 146 (4th Dist. 1980) (rejecting a clause entitling physician, but not patient, to obtain a second arbitration). California courts even reject facially neutral clauses found to be overly one-sided in practice. See *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892 (Cal. 2003) (rejecting a clause which allowed either party to appeal an arbitration award of more than \$50,000).

¹¹⁰ See Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 *Hastings L.J.* 459, 500–01 (1995) (arguing that “California courts have “been unduly indulgent of merchant-like parties claiming unconscionability” and referring to the state’s jurisprudence on this point as “notorious”).

¹¹¹ See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) (“sophistication of a party, alone, cannot defeat a procedural unconscionability claim.”).

¹¹² See, e.g., *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122–26 (4th Dist. 1982) (small business); *Donovan v. RRL Corp.* 26 Cal.4th 261, 27 P.3d 702 (Cal. 2001) (auto dealer); *M. F. Kemper*

These differences are not merely theoretical. California and New York courts have reached widely different results in challenges to arbitration clauses and class action waivers – matters discussed below.¹¹⁴ The differences between the states are also manifested in ordinary commercial disputes. In *A & M Produce Company v. FMC Corporation*,¹¹⁵ a California case, a farming company challenged the enforceability of disclaimers of warranty and consequential damages in a sales contract with an agricultural equipment manufacturer. Even though the buyer was a commercial entity which had alternate sellers available and ample opportunity to read the conspicuous disclaimers, the court held that the terms were unconscionable: “experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms, and . . . even large business entities may have *relatively* little bargaining power.”¹¹⁶ *Cayuga Harvester, Inc. v. Allis-Chalmers Corporation*,¹¹⁷ a New York case, involved a similar challenge to a clause excluding consequential damages in the sale of agricultural equipment.¹¹⁸ Here the outcome was different. Noting that the contract was “unquestionably commercial,” and that alternative sellers were available, the court denied the unconscionability claim and held the buyer to the consequence of its bargain.¹¹⁹

Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7 (Cal. 1951) (contractor); Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981) (music promoter and producer).

¹¹³ Cf. Woodside Homes of Cal., Inc. v. Superior Court, 107 Cal.App.4th 723, 727, 132 Cal.Rptr.2d 35 (4th Dist. 2003) (necessary showing of procedural unconscionability diminishes if contract is significantly unfair as a matter of substance).

¹¹⁴ See text accompany notes __-__, *infra*.

¹¹⁵ 135 Cal.App.3d 473, 186 Cal.Rptr. 114 (4th Dist. 1982).

¹¹⁶ 186 Cal. Rptr. at 124 (citations omitted and emphasis supplied). For a critique, see Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459, 513–24 (1995).

¹¹⁷ 95 A.D.2d 5, 465 N.Y.S.2d 606 (4th Dept. 1983).

¹¹⁸ 465 N.Y.S.2d at 609, 616.

¹¹⁹ 465 N.Y.S.2d at 617.

A similar contrast can be found in two cases from the entertainment industry. In *Graham v. Scissor-Tail, Inc.*,¹²⁰ a California court found a contract clause to be unconscionable even though the complaining party was a prominent music promoter who had signed numerous contracts of the same type and was aware of their provisions.¹²¹ In *Reznor v. J. Artist Management, Inc.*,¹²² a New York case, the court refused to invalidate a contract between a struggling rock musician and his longtime manager, even though the musician arguably had much less bargaining power than the promoter in the California case,¹²³ on the ground that as a participant in a commercial venture he had the power to negotiate over the terms.¹²⁴

C. Public Policy

Both New York and California refuse to enforce contracts that are deemed to violate public policy. Again, however, underneath the surface similarity are important differences. I first examine general public policy questions and then turn to the specific issues of exculpatory clauses, covenants not to compete, and wrongful discharge claims. Reserved for later is the treatment of arbitration clauses and class action waivers.¹²⁵

1. In General

New York only rarely trumps private agreements on public policy grounds. In part, New York's resistance to public policy arguments is based on the state's commitment to freedom of contract, which is inevitably frustrated when public policy is

¹²⁰ 28 Cal.3d 807, 623 P.2d 165 (Cal. 1981).

¹²¹ See Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 *Hastings L.J.* 459, 506 (1995).

¹²² 365 F.Supp.2d 565 (S.D.N.Y. 2005).

¹²³ Although he subsequently became a major star as lead singer in the band Nine Inch Nails, the plaintiff (Michael Trent Reznor) had been a struggling artist when he signed the contract. 365 F.Supp.2d at 569.

¹²⁴ 365 F.Supp.2d at 577 (“courts have rarely found a clause to be unconscionable in contracts involving two commercial entities, a situation in which negotiation is presumed possible.”).

¹²⁵ See notes ___-___ and accompanying text, *infra*.

the basis for denying enforcement.¹²⁶ In addition, New York courts display an understandable suspicion of litigants who seek to avoid complying with their promises on the ground that keeping their word would impair public rights:¹²⁷ “efforts to use [public policy] as a sword for personal gain rather than a shield for the public good should not be countenanced.”¹²⁸

New York cases in which public policy trumps private agreement tend to involve specific statutory norms: laws against gambling,¹²⁹ usury,¹³⁰ insurance contracts benefiting parties without an insurable interest,¹³¹ contracts for the unauthorized practice of law,¹³² contracts based on bribery,¹³³ and illegal agreements to split professional fees.¹³⁴ Where a statutory norm is absent, the public policy sword usually serves traditional moral values: New York courts, for example, will not enforce contracts for sex¹³⁵ or promises to divorce.¹³⁶ New York generally turns a deaf ear to broader policies

¹²⁶ See notes ___-___ and accompanying text, *supra*.

¹²⁷ See *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 389 N.Y.S.2d 565, 358 N.E.2d 258 (N.Y. 1976), quoting *Baltimore & Ohio Ry. Co. v. Voigt*, 176 U.S. 498 (1900) (“the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare.”)

¹²⁸ *Charlebois v. J.M. Weller Associates*, 72 N.Y.2d 587, 595, 535 N.Y.S.2d 356, 531 N.E.2d 1288 (N.Y. 1988).

¹²⁹ NY Gen. Obl. Law §§ 5-401, 5-411, 5-413, 5-115, 5-117, 5-119, 5-121, 5-123.

¹³⁰ NY Gen. Obl. Law § 5-511.

¹³¹ See N.Y. Insurance Law § 3205(b)(2) (insurable interest required for life insurance policies).

¹³² See *Spivak v. Sachs*, 16 N.Y.2d 163, 168, 263 N.Y.S.2d 953, 211 N.E.2d 329 (N.Y. 1965).

¹³³ See *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 199 N.Y.S.2d 483, 166 N.E.2d 494 (N.Y. 1960).

¹³⁴ See *Matter of Ungar v. Matarazzo Blumberg & Assocs.*, 260 A.D.2d 485, 688 N.Y.S.2d 588 (2nd Dept. 1999) (legal fee); *LoMagno v. Koh*, 246 A.D.2d 579, 667 N.Y.S.2d 280 (2nd Dept. 1998) (medical fee); *United Calendar Mfg. Corp. v. Huang*, 94 A.D.2d 176, 463 N.Y.S.2d 497 (2nd Dept. 1983) (medical fee).

¹³⁵ See *Anonymous v. Anonymous*, 293 A.D.2d 406, 740 N.Y.S.2d 341 (1st Dept. 2002); *Rose v. Elias*, 177 A.D.2d 415, 415-416, 576 N.Y.S.2d 257 (1st Dept. 1991); *Kastil v. Carro*, 145 A.D.2d 388, 389, 536 N.Y.S.2d 63 (1st Dept. 1988), *lv. dismissed* 74 N.Y.2d 650, 542 N.Y.S.2d 519, 540 N.E.2d 714 (1989).

¹³⁶ See *McCall v. Frampton*, 81 A.D.2d 607, 608, 438 N.Y.S.2d 11 (2nd Dept. 1981).

such as protecting consumers,¹³⁷ ensuring racial sensitivity,¹³⁸ or guarding against “forfeitures.”¹³⁹ Only occasionally do New York judges use public policy as a more general equitable tool for protecting the interests of vulnerable parties,¹⁴⁰ and in such cases they apply the relevant policies sparingly.¹⁴¹

¹³⁷ See, e.g., *Slayko v. Security Mut. Ins. Co.*, 98 N.Y.2d 289, 774 N.E.2d 208 (N.Y. 2002) (New York public policy does not require insurance companies to provide coverage for risks that policyholders would reasonably expect to be included).

¹³⁸ See *New York State Correctional Officers and Police Benev. Ass’n, Inc. v. State*, 94 N.Y.2d 321, 726 N.E.2d 462 (N.Y. 1999) (refusing to upset arbitration award reinstating police officer who displayed Nazi flag outside his home on Hitler’s birthday).

¹³⁹ The equitable distaste for forfeitures can be employed to deny enforcement of contract terms that deprive parties of substantial rights due to technical violations (more on this below). See notes ___-___ and accompanying text, *infra*. New York has occasionally employed the equitable hostility to forfeitures for this purpose. See, e.g., *J. N. A. Realty Corp. v. Cross Bay Chelsea*, 42 N.Y.2d 392, 397-398, 397 N.Y.S.2d 958, 960-961, 366 N.E.2d 1313 (N.Y. 1977). But the trend of recent New York cases has been to enforce forfeitures in the absence of some other grounds for invalidity, such as unconscionability. See *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 389 N.E.2d 113 (N.Y. 1979) (approving provision under which tenant forfeited possessory rights upon failing to tender rent payments for two months; because “there is no claim of fraud or exploitive overreaching on the part of the plaintiff in compelling performance of its bargained-for right, the agreement of the parties must be enforced in accordance with its terms.”). Ironically, the distaste of forfeitures has been converted, in some New York cases, into a reason for not using public policy reasons to deprive parties of contractual rights. See *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 589 N.Y.S.2d 396, 603 N.E.2d 246 (N.Y. 1992) (rejecting public policy claim, in part, on the ground that “forfeitures by operation of law are disfavored”).

¹⁴⁰ New York will not enforce clauses that impose on a subcontractor the risk of nonpayment or delay in payment to the general contractor. *West-Fair Electric Contractors v. Aetna Casualty & Surety Co.*, 87 N.Y.2d 148, 661 N.E.2d 967 (N.Y. 1995). But cf. *Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 859 N.E.2d 498 (N.Y. 2006) (policy against “pay-if-paid” construction contracts was not fundamental enough to override parties’ choice of Florida law, even though Florida did not enforce such a policy). Another example of New York’s use of public policy to accomplish general social objectives is the rule against automobile lease clauses denying coverage for accidents involving unlicensed drives of the insured’s vehicle in situations where the insured had no reason to believe that the driver was unlicensed. See *Conte v. Aprea*, 23 A.D.3d 225, 803 N.Y.S.2d 557 N.Y.A.D. (1st Dept. 2005).

¹⁴¹ Thus, the mere fact that a contract or its consideration violates state law is not, in itself, enough to invalidate its enforcement. If the violation is merely technical, the contract may be enforced notwithstanding the illegality. See *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 589 N.Y.S.2d 396, 603 N.E.2d 246 (N.Y. 1992) (“If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy . . . the right to recover will not be denied.”); *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 604 N.Y.S.2d 900, 624 N.E.2d 995 (N.Y. 1993); *Wowaka & Sons, Inc. v. Pardell*, 242 A.D.2d 1, 672 N.Y.S.2d 358 (2nd Dept. 1998); cf., *Abramovitz v. Kew Realty Equities, Inc.*, 180 A.D.2d 568, 580 N.Y.S.2d 269, (1st Dept), *lv. denied*, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632 (1992) (applying equitable principles to permit recovery on criminally usurious loan). Contracts among co-habiting partners are enforceable, even if the couple is sexually intimate, so long as the sex is not the consideration for the contract. *Morone v. Morone*, 50 N.Y.2d 481, 486, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (N.Y. 1980). Contracts that violate the rule against procuring an insurance policy without an insurable interest will be enforced after the statutory contestability period expires. *New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 535 N.E.2d 270 (N.Y. 1989).

California courts enforce many of the same policies as those recognized under New York law, including norms against wagering contracts,¹⁴² contracts for sex,¹⁴³ and fee-splitting agreements among attorneys.¹⁴⁴ Also like New York, specific statutes in California establish overriding policies: prohibiting harassment and discrimination in employment,¹⁴⁵ protecting clients of dating services,¹⁴⁶ prohibiting deficiency judgments in purchase-money mortgages,¹⁴⁷ and indemnifying employees for expenditures necessarily incurred within the scope of employment,¹⁴⁸ for example. Unlike New York, however, California recognizes very broad authority to reject contracts on grounds of general unfairness. Consideration for a contract is illegal if it is “contrary to good morals.”¹⁴⁹ California courts have power to reject contracts which tend to “undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel.”¹⁵⁰ And because public values are implicated, California looks with disfavor at attempts to waive these norms.¹⁵¹

The breadth of California’s public policy rule is mitigated by the recognition of the risks associated with such an ill-defined power. Thus we find admonitions that “it is

¹⁴² See, e.g., *Kelly v. First Astri Corp.* 72 Cal.App.4th 462, 84 Cal.Rptr.2d 810 (4th Dist. 1999).

¹⁴³ California, however, is somewhat more willing to enforce contracts among co-habiting parties. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (Cal. 1976).

¹⁴⁴ See *Chambers v. Kay*, 106 Cal.Rptr.2d 702 (1st Dist. 2001).

¹⁴⁵ Cal. Gov. Code § 12940.

¹⁴⁶ See *Duffens v. Valenti* 161 Cal.App.4th 434, 74 Cal.Rptr.3d 311 (4th Dist. 2008).

¹⁴⁷ Cal. Code of Civ. Pro. § 580b.

¹⁴⁸ See Cal. Labor Code § 2802.

¹⁴⁹ Cal. Civ. Code § 1667.

¹⁵⁰ *Noble v. City of Palo Alto*, 89 Cal.App. 47, 51, 264 P. 529 (Cal. 1928).

¹⁵¹ See Cal. Civ.Code § 3513 (“Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”); *DeBerard Properties, Ltd. v. Lim*, 20 Cal.4th 659, 663, 976 P.2d 843 (Cal. 1999) (a party may waive a statutory provision only if the statute does not prohibit doing so; the statute’s public benefit is merely incidental to its main purpose; and waiver does not seriously compromise any public purpose fostered by the statute); *Edwards v. Arthur Andersen LLP*, 47 Cal.Rptr.3d 788 (2nd Dist. 2006) (waivers of employer indemnity for necessary expenses not permitted); *County of Riverside v. Superior Court*, 27 Cal.4th 793, 804-806, 118 Cal.Rptr.2d 167, 42 P.3d 1034 (Cal. 2002) (statutory rights of employees not waivable); *Covino v. Governing Board*, 76 Cal.App.3d 314, 322, 142 Cal.Rptr. 812 (1st Dist. 1977) (teacher’s right to probationary status held unwaivable).

exactly because of this subjective, amorphous definition [of the public good] and the variations in human response to the same facts, depending upon the philosophical or psychological perceptions of those involved, that courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts.”¹⁵² California courts also limit the impact of public policy by exercising equitable authority to accomplish effective justice when a contract provision is found to be illegal on public policy grounds.¹⁵³ Courts in that state may award a remedy when serious moral turpitude is not involved,¹⁵⁴ the defendant is more at fault or would be unjustly enriched if the contract is invalidated, or the public interest would not be compromised by enforcement.¹⁵⁵ Nevertheless, the breadth of the public policy doctrine impairs the certainty and predictability of contractual enforcement in California relative to that which obtains in New York.

2. Exculpatory Clauses

New York and California both recognize the ability of parties to limit their liability by contract. But in important respects New York is more permissive. California law thus creates greater uncertainty in the enforcement of private agreements limiting liability.

Subject to the general rules on unconscionability and good faith, parties under New York law enjoy broad authority to distribute the risks and rewards of their undertaking. New York courts almost never employ their equitable power to prevent

¹⁵² Moran v. Harris, 131 Cal.App.3d 913, 919, 182 Cal.Rptr. 519 (4th Dist. 1982).

¹⁵³ See Dunkin v. Boskey, 82 Cal.App.4th 171, 196-197, 98 Cal.Rptr.2d 44 (1st Dist. 2000); Arya Group, Inc. v. Cher, 77 Cal.App.4th 610, 614-615, 91 Cal.Rptr.2d 815 (2nd Dist. 2000); Cho v. Chi, 2002 WL 454302 (4th Dist. 2002).

¹⁵⁴ Dias v. Houston, 154 Cal.App.2d 279, 281-282, 315 P.2d 885 (3rd Dist. 1957).

¹⁵⁵ See Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal.2d 199, 218-219, 45 Cal.Rptr. 878 (Cal. 1965).

“forfeitures” as a tool for reforming private bargains which turn out poorly for a party, or which result in onerous outcomes because the party has failed to comply with some condition or requirement.¹⁵⁶ Accordingly, parties may, within limits, agree to clauses exculpating liability due to fault. New York does not recognize waivers of liability for gross negligence or intentional misconduct,¹⁵⁷ but waivers of liability for simple negligence among parties not in a fiduciary relationship are generally enforced so long as they are clearly articulated. Parties may also place ceilings on damages¹⁵⁸ or preclude damages altogether.¹⁵⁹ Exceptions to this permissive regime are specific and usually based on statute.¹⁶⁰ New York is also receptive to settlements of disputes, and will enforce releases of claims absent a strong showing of fraud, illegality, duress or mutual mistake.¹⁶¹

California law allows parties to waive or limit legal rights by contract, but it imposes greater obstacles in the path of doing so. As in New York, waivers of gross negligence or intentional misconduct are not allowed.¹⁶² But, more than New York,

¹⁵⁶ See notes ___-___ and accompanying text, *supra*.

¹⁵⁷ See *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 553, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (N.Y. 1992); *Rector v. Calamus Group, Inc.*, 17 A.D.3d 960, 961, 794 N.Y.S.2d 470 (3rd Dept. 2005); *Peluso v. Tauscher Cronacher Professional Engineers*, 270 A.D.2d 325, 704 N.Y.S.2d 289 (2nd Dept. 2000).

¹⁵⁸ See *Schietinger v. Tauscher Cronacher Professional Engineers, P.C.*, 40 A.D.3d 954, 838 N.Y.S.2d 95 (2nd Dept. 2007); *Alleyne v. Four Seasons Hotel*, 2001 WL 135770 (S.D.N.Y. 2001).

¹⁵⁹ Thus in commercial leases, it is permissible under New York law to limit the tenant’s remedies for bad faith withholding of consent to actions for declaratory or equitable relief. *Gladliz, Inc. v. Castiron Court Corp.*, 177 Misc.2d 392, 677 N.Y.S.2d 662 (N.Y. Sup. 1998).

¹⁶⁰ Thus, New York invalidates clauses waiving negligence liability for landlords, NY Gen. Obl. Law § 5-321, caterers and catering establishments, NY Gen. Obl. Law § 5-322, construction or demolition contractors, building service or maintenance contractors, NY Gen. Obl. Law § 5-323, pools, gyms, and places of recreation, and agreements to indemnify architects and other professionals for defects in maps, designs, plans and specifications. N.Y. Gen. Obl. Law § 5-324

¹⁶¹ See, e.g., *Young v. Williams*, 47 A.D.3d 1084, 850 N.Y.S.2d 262 (3rd Dept. 2008); *Scotts Co., LLC v. Ace Indem. Ins. Co.*, 18 Misc.3d 1139(A), 2008 WL 518062 (Table) (N.Y. Sup. 2008); *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148, 461 N.E.2d 285 (N.Y. 1984).

¹⁶² See Calif. Civil Code § 1668 (“[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law”); *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 161 P.3d 1095 (Cal. 2007) (invalidating agreement disclaiming liability

California also disfavors clauses that waive liability for simple negligence. Such clauses are strictly construed because of the “harsh results” that they impose;¹⁶³ liability for “active negligence” is not waived absent clear and specific language.¹⁶⁴ Even if a clause covers simple negligence, moreover, it may be challenged in situations extending beyond those recognized in New York. *Tunkl v. Regents of the University of California*,¹⁶⁵ the leading case, announced that any “exculpatory clause which affects the public interest cannot stand.”¹⁶⁶ The *Tunkl* court declined to define the “public interest,” contenting itself with vague standards summarizing prior decisions.¹⁶⁷ The court, however, left little doubt as to the breadth of the concept: in rejecting a hospital’s disclaimer of negligence liability, it observed that

“the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. We cannot lightly accept a sought immunity from careless failure to provide the hospital service upon which many must depend. Even if the hospital’s doors are open only to those in a specialized

for “even minimal standard of care”); *Neubauer v Goldfarb*, 108 Cal.App.4th 47, 133 Cal. Rptr. 2d 218 (2nd Dist. 2003); *Cohen v. Kite Hill Cmty. Ass’n*, 142 Cal.App.3d 642, 191 Cal. Rptr. 209, 216 (4th Dept. 1983); *People v. Tufunga*, 21 Cal.4th 935, 90 Cal.Rptr.2d 143 (Cal. 1999).

¹⁶³ See, e.g., *Westlye v. Look Sports, Inc.*, 17 Cal.App.4th 1715, 1731, 22 Cal.Rptr.2d 781 (3rd Dist. 1993) (because of harsh results, liability-limiting agreements are strictly construed); *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.*, 195 Cal.Rptr. 90, 147 Cal.App.3d 309, 318 (2nd Dist. 1983) (release of negligence liability must be “clear, explicit, and comprehensible in each of its essential details”); *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 594, 271 P.2d 122 (Cal. 1954) (law does not look favorably on attempts to waive negligence liability).

¹⁶⁴ See *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 933, 218 Cal.Rptr. 839 (4th Dist. 1985) (agreement which seeks to limit generally without mentioning negligence shields a party only for passive negligence.).

¹⁶⁵ 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (Cal. 1963).

¹⁶⁶ 60 Cal.2d at 98.

¹⁶⁷ For example, indicia of situations where waivers of simple negligence would violate the public interest include the circumstances that “the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk,” that the “service is one which each member of the public, presently or potentially, may find essential to him,” and that the party granting the release “faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another’s negligence.” 60 Cal.2d at 101.

category, the hospital cannot claim isolated immunity in the interdependent community of our time. It, too, is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.”¹⁶⁸

Based on this language, many contracting parties, with the exercise of a little creativity, may frame complaints presenting non-frivolous arguments for avoiding an exculpatory clause purporting to disclaim liability for negligent acts.

California, like New York, adopts a generally favorable stance to releases of claims once a dispute has arisen, enforcing them liberally in the absence of duress, illegality, or other defenses to the enforcement of a simple contract.¹⁶⁹ In some respects, however, California law is less favorable to enforcement of litigation releases. Section 1542 of the Civil Code provides a limiting rule of construction for releases in debtor-creditor contracts, under which a “general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”¹⁷⁰ Although § 1542 can be waived, is not always strictly enforced,¹⁷¹ and arguably simply restates the law that would apply in any event,¹⁷² it remains a potential snare for the unwary.

3. Noncompete Clauses

¹⁶⁸ 60 Cal.2d at 104.

¹⁶⁹ See, e.g., *Perez v. Uline, Inc.*, 157 Cal.App.4th 953, 68 Cal.Rptr.3d 872, 876 (4th Dist. 2007) (duress is available to invalidate a release only as a “last resort”).

¹⁷⁰ Cal. Civ. Code § 1542.

¹⁷¹ See, e.g., *Perez v. Uline, Inc.*, 157 Cal.App.4th 953, 68 Cal.Rptr.3d 872 (4th Dist. 2007) (upholding general release despite lack of explicit waiver).

¹⁷² Cf. *Westlye v. Look Sports, Inc.*, 17 Cal. 1715, 1731, 22 Cal.Rptr.2d 781 (3rd Dist. 1993) (it must “appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm”).

Both New York and California place limits on covenants not to compete and related clauses, but California is significantly more willing to reject agreements on this ground.

Under New York law, covenants not to compete are not per se invalid. Instead, a noncompete clause is enforced to the extent that “it is reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.”¹⁷³ California, in contrast, treats noncompete and related clauses with extreme disfavor. Section 16600 of the California Civil Code provides that “[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”¹⁷⁴ This statute thus appears to impose a virtual per se ban on noncompete clauses,¹⁷⁵ and some courts have viewed it as such,¹⁷⁶ although others would recognize a reasonableness standard with an associated balancing test.¹⁷⁷ In any event it is clear that the statute reflects an unusually strong public policy of the state,¹⁷⁸ and that restraints on

¹⁷³ See *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677, 353 N.E.2d 590 (N.Y. 1976); *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (N.Y. 1999).

¹⁷⁴ Cal. Civ. Code § 16600.

¹⁷⁵ The same policy works to invalidate agreements not to solicit employees. See *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708, 713, 61 Cal.Rptr.3d 818 (4th Dist. 2007).

¹⁷⁶ See, e.g., *Edwards v. Arthur Andersen LLP*, 47 Cal.Rptr.3d 788, 800 (2nd Dist. 2006) (“[i]n our view, section 16600 prohibits noncompetition agreements between employers and employees even where the restriction is narrowly drawn and leaves a substantial portion of the market available for the employee.”).

¹⁷⁷ See *General Commercial Packaging v. TPS Package Engineering, Inc.*, 126 F.3d 1131, 1134 (9th Cir. 1997) (noncompetition agreement valid under § 16600 if the restriction is limited in scope and leaves a substantial portion of the market available to the employee).

¹⁷⁸ See *Kelton v. Stravinski*, 138 Cal.App.4th 941, 946, 41 Cal.Rptr.3d 877 (5th Dist. 2006); *KGB, Inc. v. Giannoulas*, 104 Cal.App.3d 844, 848, 164 Cal.Rptr. 571 (4th Dist. 1980); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal.App.3d 668, 673, 97 Cal.Rptr. 811 (1st Dist. 1971); *Scott v. Snelling and Snelling, Inc.*, 732 F.Supp. 1034, 1042 (N.D.Cal. 1990).

competition, valid under the law of New York, would face a serious threat of being invalidated if subjected to California's public policy.¹⁷⁹

4. Wrongful Discharge

Both California and New York assume that, unless specifically agreed otherwise, contracts for employment are at-will and terminable by either party at any time.¹⁸⁰ But while New York rigorously enforces this principle, California recognizes exceptions based on public policy that, at times, threaten to swallow the rule. The consequence is that employment contracts in New York are somewhat more predictable than in its sister state.¹⁸¹

New York's approach to employment contracts is illustrated in a 2003 decision by the Court of Appeals, *Horn v. New York Times*.¹⁸² The plaintiff, an in-house physician, alleged that she was fired for resisting efforts by human relations managers to discover privileged medical information. Even accepting these allegations as true, the court held that the plaintiff had not made out a claim for wrongful discharge. The court refused to

¹⁷⁹ See Michael J. Garrison & John T. Wendt, The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach, 45 Am. Bus. L.J. 107, 120 (2008) (the state's restrictive policy on covenants not to compete is "vigorously protected" by the California courts).

¹⁸⁰ New York: *Horn v. New York Times*, 100 N.Y.2d 85, 790 N.E.2d 753 (2003); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

California: Cal. Labor Code § 2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other"); *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 100 Cal.Rptr.2d 352 (Cal. 2000) (California provides a "strong" presumption of at-will employment); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 677, 254 Cal.Rptr. 211 (Cal. 1988) ("[w]e begin by acknowledging the fundamental principle of freedom of contract: employer and employee are free to agree to a contract terminable at will or subject to limitations").

¹⁸¹ Contracts of employment are the only category of agreement in Eisenberg and Miller's data where California law and forum were chosen more often than New York. See Eisenberg & Miller, *supra* note ___, at ___. The evidence might support an inference that sophisticated contracting parties prefer the more California's protective over the strong norm of at-will employment found in New York. However, the frequent use of California law in employment agreements in the Eisenberg-Miller data might be due to the fact that many of the companies reporting employment agreements are in the high-tech sector, where contracts with senior managers are arguably more often material to a firm's financial results, coupled with the fact that if the employer and employee are both in California, the courts of that state would probably refuse to honor a choice-of-law or forum selection clause opting into some other state.

¹⁸² 100 N.Y.2d 85, 790 N.E.2d 753 (N.Y. 2003).

recognize a claim of retaliatory termination¹⁸³ and declined the plaintiff's request to use the covenant of good faith and fair dealing to provide a remedy in an at-will relationship.¹⁸⁴ The *Horn* case acknowledged only two exceptions to the at-will rule: situations where the employer's handbook or other literature promised not to terminate the employee except for cause¹⁸⁵ and cases of legal employment implicating the rules of professional responsibility.¹⁸⁶

California's approach is significantly less protective of the at-will presumption. In *Foley v. Interactive Data Corp.*¹⁸⁷ the Supreme Court set forth liberal rules for implying a non at-will employment relationship in the absence of express contract. Among the "totality of the circumstances" deemed relevant are the "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged."¹⁸⁸ Because of the open-textured nature of this test and the fact that a disgruntled employee can almost always point to some behavior by the employer or its agents purporting to assure continuation of employment, the *Foley* case is a fruitful source of complaints for wrongful discharge which, even if ultimately unsuccessful, enhance the employee's bargaining leverage in disputes with former employers.

¹⁸³ Murphy v American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (N.Y. 1983).

¹⁸⁴ 58 N.Y.2d at 304-05.

¹⁸⁵ Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (N.Y. 1982).

¹⁸⁶ Wieder v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105 (N.Y. 1992).

¹⁸⁷ 47 Cal.3d 654, 254 Cal.Rptr. 211 (Cal. 1988). See also *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 100 Cal.Rptr.2d 352 (Cal. 2000).

¹⁸⁸ 47 Cal.3d at 680.

California also recognizes, as New York does not,¹⁸⁹ a tort action for discharge in violation of public policy. “Public policy,” in this context, is a broad and flexible concept. California decisions indicate that the policy must be delineated in either constitutional or statutory provisions, “public” in the sense that it inures to the benefit of the public, well established at the time of the discharge, and substantial and fundamental.”¹⁹⁰ Under this definition, plaintiffs may survive a motion to dismiss by alleging they suffered adverse employment action for refusing to commit a crime,¹⁹¹ reporting corporate misconduct,¹⁹² or otherwise acting in furtherance of the public interest.¹⁹³

D. Statute of Frauds

Both New York and California recognize and enforce versions of the statute of frauds.¹⁹⁴ But New York, with its strong preference for written agreements, is more stringent in enforcing the statute’s requirements.

New York courts enforce the statute of frauds with a view towards ensuring that only genuine agreements are subject to enforcement.¹⁹⁵ Contracts otherwise barred can

¹⁸⁹ See *Horn v. New York Times*, 100 N.Y.2d 85, 790 N.E.2d 753 (N.Y. 2003) (“We have consistently declined to create a common-law tort of wrongful or abusive discharge, or to recognize a covenant of good faith and fair dealing to imply terms grounded in a conception of public policy into employment contracts, as the dissent would have us do, and we again decline to do so.”); *Lobosco V. New York Telephone Company/NYNEX*, 96 N.Y.2d 312, 727 N.Y.S.2d 383, 751 N.E.2d 462 (N.Y. 2001).

¹⁹⁰ *Stevenson v. Superior Court*, 16 Cal.4th 880, 894, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (Cal. 1997); *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1256, 32 Cal.Rptr.2d 223, 876 P.2d 1022 (Cal. 1994).

¹⁹¹ See *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 164 Cal.Rptr. 839 (Cal. 1980).

¹⁹² See *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1374 (9th Cir. 1984).

¹⁹³ California’s rules on covenants not to compete also provide an avenue for recovery in wrongful termination cases. In California, an employer cannot condition the renewal of an employment agreement on the employee signing an unenforceable covenant not to compete; if the employment is not renewed after the employee refuses such a demand, the employee may obtain damages for wrongful discharge. See *D’sa v. Playhut, Inc.*, 85 Cal.App.4th 927, 929, 102 Cal.Rptr.2d 495 (2nd Dist. 2001).

¹⁹⁴ The statute of frauds is a rule of evidence which requires proof of a written document or documents as a condition for the enforcement of certain types of contracts. See N.Y. Gen. Obl. Law §§ 5-701 (general contracts), 5-703 (real estate contracts); Cal. Civ. Code § 1624.

¹⁹⁵ See *Sonnenschein v. Douglas Elliman-Gibbons & Ives*, 274 A.D.2d 244, 713 N.Y.S.2d 9 (1st Dept. 2000), affirmed, 96 N.Y.2d 369, 729 N.Y.S.2d 62, 753 N.E.2d 857 (N.Y. 2001).

only rarely be salvaged. The doctrine of part performance is available for real estate contracts,¹⁹⁶ but only where the performance in question “unequivocally” refers to the agreement,¹⁹⁷ the complaining party detrimentally relies on the defendant’s actions,¹⁹⁸ and failure to enforce the contract would result in an unconscionable injury.¹⁹⁹ Outside the real estate context, part performance is not available.²⁰⁰ Promissory estoppel can defeat the statute,²⁰¹ but only where the defendant makes a clear and unambiguous promise on which the plaintiff reasonably relies and enforcing the statute would work an unconscionable injury.²⁰² Claims in quantum meruit have been allowed where the plaintiff has conferred a benefit on the defendant by performing an agreement subject to the statute.²⁰³ Some recent decisions suggest, however, that quantum meruit claims are categorically unavailable if the effect of recognizing them is to circumvent the statute.²⁰⁴

¹⁹⁶ See N.Y. Gen. Obl. Law § 5-703(4) (“[n]othing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.”).

¹⁹⁷ See *Burns v. McCormick*, 233 N.Y. 230, 232, 135 N.E. 273 (N.Y. 1922); *Woolley v. Stewart*, 222 N.Y., 222 N.Y. 347, 351, 118 N.E. 847 (N.Y. 1918). Part performance unequivocally refers to the agreement, in New York, only in extreme cases: the actions in question must be “unintelligible or at least extraordinary” under any other explanation. *Anostario v. Vicinanzo*, 59 N.Y.2d 662, 664, 450 N.E.2d 215 (1983).

¹⁹⁸ See *Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group PLC*, 93 N.Y.2d 229, 237, 711 N.E.2d 953 (N.Y. 1999).

¹⁹⁹ E.g., *Lowinger v. Lowinger*, 233 A.D.2d 236, 650 N.Y.S.2d 532 (1st Dept. 1996).

²⁰⁰ The New York Court of Appeals has specifically refused to recognize the doctrine of part performance in other contexts, see *Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group PLC*, 93 N.Y.2d 229, 711 N.E.2d 953, 956 n.1 (N.Y. 1999), a comment which is generally seen as denying the application of part performance to other types of agreement. See *Sea Trade Co. Ltd. v. FleetBoston Financial Corp.*, 2004 WL 2029399 (S.D.N.Y. 2004); *Spencer Trask Software & Info. Servs. LLC v. RPost Int’l Ltd.*, 2003 WL 169801 (S.D.N.Y. 2003); *Pevner, Inc. v. Ensler*, 309 A.D.2d 722, 722, 766 N.Y.S.2d 183 (1st Dept. 2003); *Valentino v. Davis*, 270 A.D.2d 635, 636, 703 N.Y.S.2d 609, 611 (3rd Dept. 2000).

²⁰¹ See, e.g., *Pearce v. Manhattan Ensemble Theater, Inc.*, 528 F.Supp.2d 175 (S.D.N.Y. 2007).

²⁰² See, e.g., *Pacesetter Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 913 F.Supp. 174 (W.D.N.Y. 1996); *Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 736 N.Y.S.2d 737 (3rd Dept. 2002).

²⁰³ See *Farash v. Sykes Datatronics, Inc.*, 59 N.Y.2d 500, 503, 465 N.Y.S.2d 917 (N.Y. 1983).

²⁰⁴ See *Meyers Associates, L.P. v. Conolog Corp.*, 19 Misc.3d 1104(A), 2008 WL 711702 (Table) (N.Y. Sup. 2008); *Sugerman v. MCY Music World, Inc.*, 158 F.Supp.2d 316 (S.D.N.Y. 2001); *American-European Art Associates, Inc. v. Trend Galleries, Inc.*, 227 A.D.2d 170, 170, 641 N.Y.S.2d 835 (1st Dept. 1996) (“plaintiffs may not utilize a quantum meruit theory of recovery to circumvent the Statute of Frauds”). These decisions do not clearly distinguish the prior Court of Appeals decision in *Farash v. Sykes Datatronics*, supra, but perhaps can be reconciled on the theory that a plaintiff may make out a claim for

Attempts to avoid the statute by recasting the claim as a tort action are unavailing. No action for fraud will lie if proof of the unenforceable contract is essential to establish an element of the claim.²⁰⁵

California is more receptive to efforts at avoiding the statute, especially where the result is perceived as unfair. The policy of the statute, as articulated by California courts, is to prevent fraud.²⁰⁶ This leads to an uncharitable attitude on the part of some judges who doubt the statute's effectiveness at achieving that goal,²⁰⁷ and who worry that the statute itself might be used as a shield for fraud.²⁰⁸ In a notable opinion from 1964, the California Supreme Court, pointing to these concerns, endorsed calls for a "restricted application of the statute of frauds, if not its total abolition"²⁰⁹ – a sentiment that has been echoed in subsequent California cases.²¹⁰

California's grudging attitude toward the statute of frauds is mirrored in a receptive approach to strategies for avoiding it. Unlike New York, California recognizes part performance as a means for salvaging all contracts which would otherwise fall within the statute – not just real estate contracts.²¹¹ California cases also appear more

unjust enrichment to the extent that the claim is not based on the unenforceable contract. See, e.g., *RTC Properties, Inc. v. Bio Resources, Ltd.*, 295 A.D.2d 285, 744 N.Y.S.2d 173 (1st Dept. 2002).

²⁰⁵ See, e.g., *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., Inc.*, 614 F.2d 832 (2d Cir. 1980) (claims for fraud held barred); *Nelson Bagel Bakery Co., Inc. v. Moshcorn Realty Corp.*, 289 A.D.2d 69, 734 N.Y.S.2d 134 (1st Dept. 2001) (same); *Weitz v. Smith*, 231 A.D.2d 518, 647 N.Y.S.2d 236 (2nd Dept. 1996) (same).

²⁰⁶ See *Sterling v. Taylor*, 55 Cal.Rptr.3d 116, 40 Cal.4th 757, 152 P.3d 420 (Cal. 2007).

²⁰⁷ See *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal.2d 834, 838, 389 P.2d 133, 136 (Cal. 1964).

²⁰⁸ See, e.g., *Juran v. Epstein*, 28 Cal.Rptr.2d 588, 23 Cal.App.4th 882 (4th Dist. 1994); *Seymour v. Oelrichs*, 106 P. 88, 94-95 (Cal. 1909) ("[t]he right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed.").

²⁰⁹ *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal.2d 834, 838 n.3, 389 P.2d 133, 136 n.3 (Cal. 1964) (Tobriner, J.).

²¹⁰ See, e.g., *Sterling v. Taylor*, 6 Cal.Rptr.3d 836, 844 (2nd Dist. 2003) (suggesting that statute of frauds has "fallen into disfavor" in California, although since the statute remains in effect courts must enforce it); *Estate of Housley*, 56 Cal.App.4th 342, 65 Cal.Rptr.2d 628 (4th Dist. 1997) (same).

²¹¹ See, e.g., *In re Marriage of Benson*, 36 Cal.4th 1096, 116 P.3d 1152 (Cal. 2005) (general statute of frauds is subject to exception for part performance) (dictum).

generous in their application of the part performance rule's requirement that the behavior in question unequivocally refer to the contract; they do not insist that the conduct in question be compatible with no other explanation. California courts are also receptive to the use of promissory estoppel as a basis for avoiding the statute.²¹² Even in the absence of detrimental reliance, they may allow enforcement of a contract under a promissory estoppel theory if failing to do so would result in unjust enrichment to the counterparty.²¹³ California, unlike New York, may also permit fraud actions based on contracts which are otherwise unenforceable under the statute.²¹⁴

E. Mistake

Both California and New York recognize that parties may avoid performing contractual obligations upon suitable showing of mistake. As between the two, however, New York is less willing to relieve parties of their commitments on this basis.

Consistent with its general philosophy of holding parties to their bargains, New York law allows rescission or reformation on the basis of mutual mistake of law only in limited circumstances. The mistake must have been present at the time of contract,²¹⁵ must be mutual²¹⁶ and substantial,²¹⁷ must be shown by clear and convincing evidence,²¹⁸

²¹² See Philip H. Wile, Kathleen Cordova-Lyon and Claude D. Rohwer, Estoppel to Avoid the California Statute of Frauds, 35 McGeorge L.Rev. 319 (2004) (arguing, however, the California promissory estoppel cases should be interpreted so as to avoid a de facto repeal of the statute of frauds).

²¹³ James G. Freeman & Associates, Inc. v. Tanner, 128 Cal.Rptr. 109, 56 Cal.App.3d (1st Dist. 1976) (declining to apply statute of frauds where result would be unjust enrichment); Estate of Housley 56 Cal.App.4th 342, 65 Cal.Rptr.2d 628 (Cal.App. 1997).

²¹⁴ Levin v. Knight, 780 F.2d 786 (9th Cir. 1986) (approving fraud action based on misrepresentation in connection with unenforceable contract); Tenzer v. Superscope, Inc., 216 Cal.Rptr. 130, 39 Cal.3d 18, 702 P.2d 212 (Cal. 1985).

²¹⁵ See Schultz v. Hourihan, 238 A.D.2d 818 (3rd Dept.1997).

²¹⁶ See, e.g., Marsh v. Labella, 2008 WL 920988 (N.Y. Sup. 2008).

²¹⁷ Brauer v. Central Trust Co., 77 A.D.2d 239, 243 (4th Dept.1980), lv. den. 52 N.Y.2d 703 (1981) ("where a mistake in contracting is both mutual and substantial, there is an absence of the requisite meeting of the minds' to the contract, and the relief will be provided in the form of rescission.")

²¹⁸ See Lacoparra v. Bellino, 296 A.D.2d 480 (2nd Dept.2002); Nash v. Kornblum, 12 N.Y.2d 42, 46, 234 N.Y.S.2d 697, 186 N.E.2d 551 (N.Y. 1962).

and must not be one that the party should have known about at the time he entered into the contract.²¹⁹ Parties may also be relieved of contractual obligation because of mutual mistake of law,²²⁰ but here the requirements are even more stringent: the mistake must be accompanied by “fraud or inequitable, unfair or deceptive behavior.”²²¹ Rescission or reformation based on unilateral, as opposed to mutual, mistake is uncommon in New York;²²² the proponent must establish and enforcing the contract as written would be unconscionable²²³ or result in unjust enrichment of one party at the expense of the other²²⁴ and the parties can be returned to the status quo ante without prejudice.²²⁵ In any case of mistake, if reformation is sought, the party seeking relief must establish “exactly what was really agreed upon the parties.”²²⁶

California follows the same general rules, but is more receptive to pleas for relief from unwanted bargains. Instead of emphasizing the importance of respecting the parties’ written agreement, California courts focus on the statutory requirement of mutual consent.²²⁷ The necessity that the parties agree to the same thing at the same time²²⁸

²¹⁹ See *Jossel v. Meyers*, 212 A.D.2d 55, 57, 629 N.Y.S.2d 9 (1st Dept. 1995); *Barrett v. Huff*, 6 AD3d 1164 (4th Dept. 2004); *Goldberg v. Colonial Life Ins. Co. of America*, 284 App.Div. 678 (2nd Dept. 1954).

²²⁰ NY CPLR § 3005 (“[w]hen relief against a mistake is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact.”).

²²¹ *Greene v. Smith*, 160 N.Y. 533 (N.Y. 1899); *Trotter v. Brevoort*, 60 App.Div. 562 (2nd Dept. 1901).

²²² See *Cox v. Lehman Brothers, Inc.*, 15 A.D.3d 239, 790 N.Y.S.2d 16 (1st Dept. 2005).

²²³ See *Morey v. Sings*, 174 A.D.2d 870 (3rd Dept. 1991).

²²⁴ *Weissman v. Bondy & Schloss*, 230 A.D.2d 465, 469, 660 N.Y.S.2d 115 (1st Dept. 1997).

²²⁵ *Broadway-111th St. Assoc. v. Morris*, 160 A.D.2d 182, 184-185, 553 N.Y.S.2d 153 (1st Dept. 1990).

²²⁶ *Chimart Associates v. Paul*, 66 N.Y.2d 570, 574, 498 N.Y.S.2d 344 (N.Y. 1986).

²²⁷ See Cal. Civ. Code §§ 1580, 1550, 1565.

²²⁸ See Cal. Civ. Code § 1580 (“Consent is not mutual, unless the parties agree upon the same thing in the same sense.”); *Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th 793, 811, 71 Cal.Rptr.2d 265 (2nd Dist. 1998).

makes it relatively easy for parties to frame claims for relief under this theory.²²⁹ California courts do not emphasize the restrictions that limit the availability of mutual mistake under New York law, such as the lack of fault on the part of the party seeking relief or the need for clear and convincing evidence to establish the claim. California is also more generous in offering relief based on unilateral mistake; the supplicant must show that the counterparty knew of or suspected the error, but the elements of unconscionability or unjust enrichment are not required unless the counterparty's fault cannot be shown.²³⁰ Proof of mistake is also facilitated, in California, by the state's acceptance of extrinsic evidence on the question.²³¹ Reformation is liberally available in California if mistake is shown, provided that the changed terms do not affect substantial rights of third parties.²³²

V. Parol Evidence

Both California and New York administer a parol evidence rule.²³³ Both states recognize that if a contract is “integrated” – that is, if it expresses the full and complete

²²⁹ They must, however, plead objective facts tending to negate the element of consent; mere allegations of subjective mistake will not do. *Alexander v. Codemasters Group Limited*, 104 Cal.App.4th 129, 127 Cal.Rptr.2d 145 (5th Dist. 1976).

²³⁰ See Cal. Civ. Code § 1577 (“Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in . . . an unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or . . . [b]elief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.”); *Donovan v. RRL Corp.*, 26 Cal.4th 261, 27 P.3d 702 (Cal. 2001) (granting relief in case of unilateral mistake, despite the fact that the counterparty did not know of or suspect the mistake, when enforcement would be unconscionable).

²³¹ See Cal. Code Civ. Proc., § 1856(e), (g); *Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 343, 83 P.3d 497 (Cal. 2004).

²³² Cal. Civ. Code § 3399 (“[w]hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.”); *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524, 41 P.3d 46, 117 Cal.Rptr.2d 220 (Cal. 2002).

²³³ The parol evidence rule is a principle for identifying the information that will be admitted to prove the meaning of a contract. For an interesting economic analysis of the parol evidence rule, seeing it as an efficient means for smoking out information from better-informed parties, see Albert H. Choi, *Integrating an Agreement to Induce Information Disclosure* (working paper on file with the author).

agreement of the parties – then evidence from outside the four corners of the contract may not be considered.²³⁴ Both accept that a contract is integrated if the language of the agreement is clear and unambiguous.

Beyond these uncontroversial propositions, the states diverge. New York, consistent with its preference for written agreements and contractual clarity, employs a “hard” parol evidence rule²³⁵ under which the court decides whether the contract is ambiguous from an analysis of the document itself.²³⁶ If the court concludes that the contract terms are unambiguous they do not consider extrinsic evidence bearing on the parties’ intent.²³⁷ Resort to extrinsic evidence is appropriate only if the agreement is subject to more than one interpretation.²³⁸ If the parties wish even greater protection against extra-contractual information being used to interpret their agreement, they are free to adopt merger or integration clauses,²³⁹ which are accorded nearly conclusive deference by the New York courts.²⁴⁰

²³⁴ See generally 2 E. Allen Farnsworth, *Contracts* § 7.3 (1990). If the contract is final but does not express the complete agreement of the parties, it is partially integrated and the court may allow extrinsic evidence to the extent it is consistent with the written terms.

²³⁵ The distinction between “hard” and “soft” rules is from Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 *U. Penn. L. Rev.* 533, 560 (1998).

²³⁶ See, e.g., *Morgan Stanley High Yield Securities, Inc. v. Seven Circle Gaming Corp.*, 269 *F. Supp. 2d* 206 (S.D.N.Y. 2003).

²³⁷ See *W.W.W. Associates v. Giancontieri*, 77 *N.Y.2d* 157, 566 *N.E.2d* 639, 642 (N.Y. 1990); *Chimart Assocs. v. Paul*, 66 *N.Y.2d* 570, 498 *N.Y.S.2d* 344, 489 *N.E.2d* 231 (1986); *Crane Co. v. Coltec Indus., Inc.*, 171 *F.3d* 733, 737 (2d Cir. 1999); *Katz v. American Mayflower Life Ins. Co. of New York*, 788 *N.Y.S.2d* 15 (1st Dept. 2004).

²³⁸ See, e.g., *CV Holdings v. Artisan Advisors*, 9 *A.D.3d* 654, 656, 780 *N.Y.S.2d* 425 (3d Dept. 2004); *Besicorp Group v. Enowitz*, 235 *A.D.2d* 761, 763, 652 *N.Y.S.2d* 366 (3d Dept. 1997).

²³⁹ Merger clauses provide that all prior agreements and understandings between the parties related to the transaction are merged into the final contract. The effect of merger clauses is to exclude any claims based on precontractual negotiations or understandings between the parties. Integration clauses provide that the written contract reflects the full and complete understanding of the parties. Integration clauses have a similar effect and purpose as merger clauses, but their scope is larger: they apply to all extra-contractual evidence of the parties’ intent, not merely prior agreements or understandings. An example of a typical merger/integration clause would provide, for example, “this Agreement contains the entire understanding between the parties and supersedes any prior understanding and agreements between them respecting the subject matter hereof. There are no representations, agreements, arrangements or

California, in contrast, uses a “soft” parol evidence rule.²⁴¹ Under a soft rule a lack of ambiguity in the explicit contractual language is not controlling. Instead, the court provisionally examines extrinsic evidence bearing on the threshold question of whether the contract is ambiguous.²⁴² If after such an investigation the contract is found to be unambiguous, the rule then excludes all extrinsic evidence, including the evidence considered at the threshold stage. If, however, the extrinsic evidence reveals ambiguity, then the court may consider all such extrinsic evidence as may be relevant to interpreting the contract. The parties can, of course, include merger or integration clauses in their contracts in an attempt to shore up the parol evidence rule; but while these are afforded substantial respect under California law,²⁴³ they are not conclusive²⁴⁴ but rather

understandings, oral or written, between the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein.” For discussion of the drafting considerations pertinent to such clauses, see Brad S. Karp, *The Litigation Angle In Drafting Commercial Agreements*, PLI, *Drafting Corporate Agreements 2004-2005* (December, 2004 - January, 2005).

²⁴⁰ See *Norman Bobrow & Co., Inc. v. Loft Realty Co.*, 577 N.Y.S.2d 36, 36, 178 A.D.2d 175 (1st Dept. 1991) (“[p]arol evidence is not admissible to vary the terms of a written contract containing a merger clause.”); *Balzano v. Lublin*, 162 A.D.2d 252, 556 N.Y.S.2d 610, 611 (1st Dept. 1990) (same); *Jones v. Trice*, 202 A.D.2d 394, 608 N.Y.S.2d 688 (2nd Dept. 1994); *Oppman v. IRMC Holdings, Inc.*, 14 Misc.3d 1219(A), (Sup. Ct., New York Co. 2007); *Cornhusker Farms, Inc. v. Hunts Point Coop. Market, Inc.*, 2 A.D.3d 201, 203-204 (1st Dept. 2003); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997) (“[o]rdinarily, a merger clause provision indicates that the subject agreement is completely integrated, and parol evidence is precluded from altering or interpreting the agreement.”); *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 745 N.E.2d 1006, 1009 (N.Y. 2001) (“[t]he purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence The merger clause accomplishes this purpose by evincing the parties’ intent that the agreement “is to be considered a completely integrated writing.”).

²⁴¹ See Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contract Interpretation*, 146 U. Pa. L.Rev. 533, 539–40 & 540 n.15 (1998) (“soft” parol evidence rule has been the law in California since the 1960s).

²⁴² See *Winet v. Price*, 4 Cal.App.4th 1159, 1165, 6 Cal.Rptr.2d 554 (4th Dist. 1992); Alan Schwartz & Robert E. Scott, *Contract Theory And The Limits Of Contract Law*, 113 Yale L.J. 541 (2003).

²⁴³ *Banco Do Brasil, S. A. v. Latian, Inc.*, 234 Cal.App.3d 973, 285 Cal. Rptr. 870, 887 (2d Dist. 1991) (“obviously, the presence of an “integration” clause will be very persuasive”).

²⁴⁴ See, e.g., *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 36–37 (2d Cir. 2002) (merger and integration clauses are recognized by California courts but the presence of merger clauses is not dispositive); *Enrico Farms, Inc. v. H. J. Heinz Co.*, 629 F.2d 1304, 1306 (9th Cir. 1980) (presence of merger clauses “not necessarily conclusive”).

considered along with other evidence of contract integration.²⁴⁵ Even if an integration clause is present and respected as regards the original terms of the contract, moreover, California recognizes relatively easy modification by course of dealing among the parties.²⁴⁶

VI. Choice of Law and Forum

Both New York and California recognize wide latitude in the parties to determine the law applicable to their agreements and the forum in which disputes will be resolved.²⁴⁷ As between the two, however, New York is substantially more receptive to party autonomy.

A. Choice-of-Law Clauses

New York and California both endorse versions of the Restatement (Second) of Conflict of Laws rule on choice-of-law clauses.²⁴⁸ The Restatement adopts “a strong

²⁴⁵ *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859 (9th Cir. 1995) (integration clause is “but one factor” in the analysis); *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 135 Cal. Rptr.2d 505, 512, 109 Cal.App.4th 944 (4th Dist. 2003) (“court must consider the writing itself, including whether the written agreement appears to be complete on its face; whether the agreement contains an integration clause; whether the alleged parol understanding on the subject matter at issue might naturally be made as a separate agreement; and the circumstances at the time of the writing.”); *Mobil Oil Corp. v. Rossi*, 138 Cal.App.3d 256, 187 Cal. Rptr. 845, 851–52 (4th Dist. 1982) (factors include the “language and completeness of the written agreement and whether it contains an integration clause, the terms of the alleged oral agreement and whether they contradict those in the writing, whether the oral agreement might naturally be made as a separate agreement, and whether the jury might be misled by the introduction of the parole testimony.”).

²⁴⁶ See, e.g., *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App.4th 1020, 1038, 135 Cal.Rptr.2d 736 (4th Dist. 2003) (“[w]here the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties’ modification setting aside the written provisions will be implied.”)

²⁴⁷ A number of recent studies emphasize the importance of contractual choice-of-law clauses in modern business transactions. See Larry E. Ribstein & Erin Ann O’Hara, *Corporations and The Market for Law*, 2008 U. Ill. L. Rev. 661 (2008); Erin Ann O’Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice-of-law*, 53 Vand. L. Rev. 1551 (2000); William J. Woodward, Jr., *Contractual Choice-of-law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697, 698-700 (2001) (discussing different states’ laws that are designed to attract different businesses and persons). Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice-of-law*, 19 Del. J. Corp. L. 999, 1003-04 (1994).

²⁴⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1996). See *ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1065 (9th Cir. 2005) (California courts apply the Restatement approach for contractual choice-of-law provisions); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1117 (Cal. 2005) (same);

policy favoring enforcement” of such provisions²⁴⁹ and recommends that choice-of-law clauses be respected unless the state has no “substantial relationship” with the transaction and there is no reasonable basis for the parties’ choice, or application of the chosen law would be contrary to a fundamental policy of a state with a materially greater interest in the issue and whose law would apply absent the clause.²⁵⁰ Behind this surface agreement, however, substantial differences can be discerned as between the states: New York, overall, is more willing to respect contractual choice.

New York courts regularly enforce choice-of-law provisions, especially in commercial contracts.²⁵¹ As regards public policy, New York recognizes only limited circumstances in which choice-of-law clauses will be rejected:²⁵² “those rare cases”²⁵³ where applying the parties’ choice would be “truly obnoxious”²⁵⁴ or “deeply abhorrent”²⁵⁵ to fundamental New York policy. Accordingly, the party seeking to show a violation of public policy to defeat a choice-of-law clause bears a “heavy burden” of proof.²⁵⁶ Applying the law must “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common

Hartford Fire Ins. Co. v. Orient Overseas Containers Lines Ltd., 230 F.3d 549, 556 (2d Cir. 2000) (“[a]bsent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction.”).

²⁴⁹ Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 834 P.2d 1148, 1151 (Cal. 1992).

²⁵⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(b) (1996).

²⁵¹ See, e.g., Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154, 654 N.E.2d 95, 100, 630 N.Y.S.2d 274, 279 (N.Y. 1995) (explicit and unambiguous choice of law “must be given effect”).

²⁵² For rare cases where courts in New York refused to respect choice-of-law clauses on grounds of public policy, see North American Bank, Ltd. v. Schulman, 123 Misc.2d 516, 474 N.Y.S.2d 383, 386–87 (N.Y. Co. Ct. 1984) (usury); Production Resource Group, L.L.C. v. Oberman, No. 03 Civ. 5366, 2003 WL 22350939, at *9–*10 (S.D.N.Y. 2003) (covenant not to compete); Caribbean Wholesales & Serv. Corp. v. US JVC Corp., 855 F.Supp. 627, 633 (S.D.N.Y. 1994) (declining to enforce New York choice-of-law clause due to Puerto Rico’s policy of disregarding choice of law clauses in distribution agreements); Triad Financial Establishment v. Tumpane Co., 611 F.Supp. 157, 162–63 (N.D.N.Y. 1985) (rejecting parties’ choice-of-law clause and applying Saudi Arabian law due to Saudi policies to prevent corruption in military contracts).

²⁵³ Hamilton v. Accu-Tek, 47 F.Supp.2d 330, 337 (E.D.N.Y. 1999).

²⁵⁴ Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 612 N.E.2d 277, 285 (N.Y. 1993).

²⁵⁵ Hamilton v. Accu-Tek, 47 F.Supp.2d 330, 337 (E.D.N.Y. 1999).

²⁵⁶ Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 688 (N.Y. 1985).

weal.”²⁵⁷ The Court of Appeals offers only three examples of state policies fundamental enough to defeat choice-or-law clauses, all involving state anti-discrimination or human rights norms.²⁵⁸ New York courts, moreover, generally look to the policy of only New York when considering whether to reject a choice of New York law; conflicting policies of other jurisdictions that might trump the application of the parties’ chosen law will not be considered.²⁵⁹ This effectively gives an iron-clad assurance if New York law is selected, since New York courts are very unlikely to find that New York public policy is violated by the application of New York law. Conversely, if the parties have selected the law of some other state, New York courts are loath to upset that decision even if substantive terms of the contract does contravene New York policy.²⁶⁰

Provisions selecting New York law in commercial contracts receive even greater respect. A New York statute provides that parties to any contract worth at least \$250,000 “may agree that the law of this state shall govern their rights and duties in whole or in

²⁵⁷ Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 612 N.E.2d 277, 284 (1993) (quoting Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198, 202 (N.Y. 1918).

²⁵⁸ Welsbach Elec. Corp. v. MasTec North America, Inc., 7 N.Y.3d 624, 859 N.E.2d 498, 501 (N.Y. 2006).

²⁵⁹ See Barkanic v. General Admin. of Civil Aviation of the People’s Republic of China, 923 F.2d 957 (2d Cir. 1991) (“[W]e do not believe that New York courts would consider the public policies of jurisdictions other than New York in choice of law decisions.”); Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d Cir. 1987) (New York honors choice of law clauses “so long as fundamental policies of New York are not thereby violated.”); Home Ins. Co. v. Appleton Papers, Inc., No. 99 Civ. 3169, 2002 WL 22024, at *6 (S.D.N.Y. 2002) (“New York courts consider only New York public policy when making choice of law decisions, not the public policies of other jurisdictions.”); Hugh O’Kane Elec. Co., LLC v. MasTec North America, Inc., 797 N.Y.S.2d 45, 46, 19 A.D.3d 126 (1st Dept. 2005) (New York courts enforce choice-of-law clauses so long as they does not violate “a fundamental public policy of New York.”) There is some contrary authority, however—i.e., some cases in which New York courts have looked to public policies other than that of New York itself—though typically only in unreported federal district-level cases. See, e.g., Caribbean Wholesales and Serv. Corp. v. US JVC Corp., No. 93 CIV. 8197, 1996 WL 140251, at *3 (S.D.N.Y. 1996) (considering public policies of Puerto Rico in declining to enforce New York choice-of-law clause); Prod. Res. Group, L.L.C. v. Patriot Sci. Corp., No. 03 Civ. 5366, 2003 WL 22350939, at *9–*10 (S.D.N.Y. 2003) (considering public policy of California in declining to enforce New York choice-of-law clause).

²⁶⁰ See Welsbach Elec. Corp. v. MasTec North America, Inc., 7 N.Y.3d 624, 859 N.E.2d 498 (N.Y. 2006) (New York’s policy against “pay-if-paid” construction contracts was not so fundamental that it overrode parties’ choice of Florida law to govern construction subcontract).

part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.”²⁶¹ Thus, for qualifying commercial contracts, New York courts will respect choice-of-law provisions even if the parties or the transaction have no connections with the state. Such contracts, moreover, appear to be completely immune even from attack based on public policy considerations – or at least considerations that are implicitly overridden by the choice-of-law statute.²⁶²

California is substantially less permissive towards choice-of-law clauses. The state has not enacted an analog to New York’s rule for large commercial contracts; thus choice-of-law provisions in all contracts, even among sophisticated parties, are subject to potential attack on the grounds they lack contacts with the state or violate important public policies. Moreover, as we have seen already, compared with New York, California uses expansive notions of public policy to reject contractual terms on grounds of public policy;²⁶³ these arguments are available for choice-of-law clauses as for other contractual terms.²⁶⁴ Thus, choice-of-law clauses may be invalidated whenever

²⁶¹ N.Y. Gen. Oblig. Law § 5-1401. For discussion, see Theodore Eisenberg and Geoffrey Miller, *The Market for Contracts*, __ *Cardozo Law Review* __ (forthcoming).

²⁶² See *Lehman Bros. Commercial Corp. v. Minmetals Int’l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 136 (S.D.N.Y. 2000); *Supply & Building Co. v. Estee Lauder Int’l, Inc.*, No. 95 Civ. 8136, 2000 WL 223838, at *3 (S.D.N.Y. 2000); *Philips Credit Corp. v. Regent Health Group, Inc.*, 953 F. Supp. 482, 502 (S.D.N.Y. 1997) (§ 5-1401 mandates that a choice-of-law provision shall be given binding effect if the statutes terms are satisfied).

²⁶³ See text accompanying notes __-__, *supra*.

²⁶⁴ Compare *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal. Rptr. 2d 699 (1st Dist. 2001) (California public policy applies whenever enforcement of choice-of-law clause causes “substantial legal rights [to be] significantly impaired”); *Hall v. Superior Court*, 150 Cal.App.3d 411, 197 Cal. Rptr. 757, 761–63 (4th Dist. 1983) (California’s policy in regulating securities prevented enforcing Nevada choice-of-law provision); with *Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 859 N.E.2d 498, 500–01 (N.Y. 2006) (New York policy against enforcing “pay-if-paid” subcontractor provisions did not prevent enforcement of Florida choice-of-law clause); *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 612 N.E.2d 277, 284–85 (N.Y. 1993) (stressing limited nature of New York’s public policy exception, which is reserved for foreign law that are “truly obnoxious” and “violated some fundamental principle of justice”); *Hamilton v. Accu-Tek*, 47 F.Supp.2d 330, 337 (E.D.N.Y. 1999) (public policy exception in New York is reserved for “rare cases” in which choice of a foreign jurisdiction’s law would be “deeply abhorrent” from the point of view of fundamental New York policy.).

“substantial legal rights” would be “significantly impaired”²⁶⁵ or “substantially diminished.”²⁶⁶ As a result, there are no “bright line rules”²⁶⁷ for applying the public policy doctrine to choice-of-law clauses. Further, California, unlike New York, is willing to look to the public policies of any state whose law would apply in the absence of the choice-of-law clause, even when California law is selected.²⁶⁸

California’s approach to choice-of-law clauses is illustrated by *Application Group, Inc. v. Hunter Group, Inc.*,²⁶⁹ a 1998 case from the First District Court of Appeals. A California corporation recruited and hired an employee of a Maryland competitor in clear violation of a covenant not to compete. In a declaratory judgment action brought by the employee and her new employer, claiming that the covenant violated California public policy, the former employer argued that it was valid under the law of Maryland, which had been selected in the prior employment contract. Applying California’s choice-of-law jurisprudence, the appellate court recognized that Maryland had a substantial relationship to the parties and the transaction and that there was a reasonable basis selecting Maryland law.²⁷⁰ But citing to the importance of California’s policy favoring free competition in employment relationships, the court held that California had a materially greater interest in applying its law to the dispute, and further

²⁶⁵ *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (1st Dist. 2001).

²⁶⁶ *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, 736 (1st Dist. 2005).

²⁶⁷ *Discover Bank v. Superior Court*, 36 Cal.Rptr.3d 456, 460 (2nd Dist. 2005) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt.g (1996) (“[w]e are not aware of any bright-line rules for determining what is and what is not contrary to a fundamental policy of California.”)).

²⁶⁸ See *Discover Bank v. Superior Court*, 36 Cal.Rptr.3d 456 (2nd Dist. 2005) (“Technically, the inquiry is not whether there is a conflict with a fundamental policy of *California*, but whether there is a conflict with a fundamental policy of the state whose law would apply under Restatement section 188 in the absence of a contractual choice of law.”); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1152 n.4 (Cal. 1992) (clarifying that California will look to the public policy of foreign states in applying Restatement approach).

²⁶⁹ 61 Cal.App.4th 881, 72 Cal.Rptr.2d 73 (1st Dist. 1998).

²⁷⁰ *Id.* at 899.

that California's interests would be the more seriously impaired if its policy were subordinated to the policy of Maryland. Hence the court rejected the choice-of-law clause, applied California law, and invalidated the noncompete clause. Cases such as *Application Group* do not appear in New York jurisprudence.

B. Forum Selection Clauses

Consistently with the general trend in state and federal courts,²⁷¹ both New York and California respect and enforce forum selection clauses. As between the two, however, New York is more willing to defer to party autonomy.

The general law in New York is that forum selection clauses will not be set aside unless enforcement would be "so gravely difficult and inconvenient that challenging party would, for all practical purposes, be deprived of his or her day in court."²⁷² New York courts will deny enforcement to forum selection clauses only in unusual contexts, as where the clause is manifestly unreasonable and not prominently disclosed in the contract.²⁷³ They give short shrift to arguments that the contracts are adhesive, that the complaining party lacked bargaining power, or that the disputed clause was never brought to the party's attention.²⁷⁴

²⁷¹ The leading case is *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (upholding forum selection clause in cruise line contract, a classic consumer contract of adhesion). See also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

²⁷² *Fidelity & Deposit Co. of Maryland v. Altman*, 209 A.D.2d 195, 618 N.Y.S.2d 286 (1st Dept. 1994), quoting *British W. Indies Guar. Trust Co. v. Banque Internationale*, 172 A.D.2d 234, 567 N.Y.S.2d 731 (1st Dept. 1991).

²⁷³ See *Oxman v. Amoroso*, 172 Misc.2d 773, 659 N.Y.S.2d 963 (N.Y. City Ct. 1997) (invalidating forum selection clause in contract for au pair services performed in New York which required suits to be brought in Utah); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp.2d 348 (S.D.N.Y. 2002) (denying enforcement to forum selection clauses in insurance contracts for Holocaust victims, issued between 1920 and 1945, which specified various European locations for adjudication of disputes).

²⁷⁴ *Fidelity & Deposit Co. of Maryland v. Altman*, 209 A.D.2d 195, 618 N.Y.S.2d 286 (1st Dept. 1994).

Commercial contracts receive even greater respect in New York. Part of the law adopted in 1984 requires New York courts to enforce a forum selection clause if the parties agree to submit to the jurisdiction of New York courts and choose New York law to govern their contract.²⁷⁵ To ensure that this rule only applies to commercial contracts, the legislation applies only to contracts for a value of more than one million dollars.²⁷⁶ Supplementing this provision, New York waives the otherwise-applicable requirement that a foreign corporation must have minimum contacts with the state in order to bring suit in New York,²⁷⁷ and also precludes dismissal of such cases on *forum non conveniens* grounds.²⁷⁸

California courts enforce forum selection clauses in the absence of a showing the enforcement of such a clause would be unreasonable.²⁷⁹ They impose a “heavy burden” on parties seeking to escape such clauses.²⁸⁰ On the other hand, California precedent suggests that “take it or leave it” clauses may be closely scrutinized.²⁸¹ California courts also display a willingness to reject forum selection clauses which work to deprive

²⁷⁵ N.Y. Gen. Oblig. § 5-1402.

²⁷⁶ Id.

²⁷⁷ See N.Y. General Obligation Law § 5-1402, waiving provisions of N.Y. Bus. Corp. Law § 1314(b).

²⁷⁸ N.Y.C.P.L.R. Rule 327(b) (“notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.”).

²⁷⁹ *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 495-96, 131 Cal.Rptr. 374, 551 P.2d 1206 (Cal. 1976). “Unreasonable,” in this context, means more than inconvenience and expense. *Id.* at 496; *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (1st Dist. 2001).

²⁸⁰ *Miller-Leigh LLC v. Henson*, 62 Cal.Rptr.3d 83, 152 Cal.App.4th 1143 (3rd Dist. 2007).

²⁸¹ See *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 496, 131 Cal.Rptr. 374, 551 P.2d 1206 (Cal. 1976) (endorsing forum selection clauses where the contract was “entered into freely and voluntarily by parties who have negotiated at arm’s length.”) Later cases, however, have not upheld forum selection clauses in contracts of adhesion. See, e.g., *Net2Phone, Inc. v. Superior Court*, 109 Cal.App.4th 583, 135 Cal.Rptr.2d 14 (2nd Dist. 2003) (fact clause was in take-it-or-leave-it consumer contract did not preclude enforcement); *Intershop Communications AG v. Superior Court*, 104 Cal.App.4th 191, 201, 127 Cal.Rptr.2d 847 (1st Dist. 2002).

litigants of substantial rights.²⁸² Overall, California judges have greater flexibility than their peers in New York to reject forum choices freely-negotiated among the contracting parties.

VII. The Adjudicatory Process

I now compare New York and California law on attempts by private parties to control aspects of the adjudicatory process by means of ex ante contractual agreements: waivers of jury trial; provisions allocating liability for attorneys' fees; mandatory arbitration clauses; and class action waivers.

A. Waivers of Jury Trial

New York courts enforce and respect waivers of jury trials in the absence of fraud, oppression, or overreaching.²⁸³ Even without an explicit jury waiver, New York courts vigorously enforce implied waivers, as where the parties to a contract agree to binding arbitration.²⁸⁴ California is less receptive to jury waivers. A Supreme Court case from 2005 held that pre-dispute contractual waivers of jury trial are unenforceable under the state constitution,²⁸⁵ and California courts interpose limits on the ability of parties to waive jury rights de facto by agreeing to mandatory arbitration clauses.²⁸⁶

B. Attorneys' Fees

²⁸² See text accompanying notes __-__, *infra*.

²⁸³ See *Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.*, 174 A.D.2d 963, 571 N.Y.S.2d 650 (3rd Dept. 1991) (contract provisions waiving a jury trial are generally valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party); *Fordham University v. Manufacturers Hanover Trust Co.*, 145 A.D.2d 332, 534 N.Y.S.2d 993 (1st Dept. 1988). Jury waivers are not permitted for suits for personal injury or property damages in residential leases. New York Real Property Law § 259-c.

²⁸⁴ See notes __-__ and accompanying text, *infra*. New York courts developed the doctrine on jury waivers beginning in the 1920s and decided most of the early cases. See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers Of Constitutional Rights*, Law and Contemporary Problems (Winter/Spring 2004).

²⁸⁵ *Grafton Partners LP v. Superior Court*, 9 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004), rev. granted by 88 P.3d 24 (Cal. 2004).

²⁸⁶ See notes __-__ and accompanying text, *infra*.

Both New York and California apply the “American Rule” that each party to litigation pays his or her own attorney.²⁸⁷ The two states differ, however, in the degree to which they will respect contractual modifications of the rule. As between them, New York is more willing to respect the parties’ voluntary choices in commercial transactions.

New York, to be sure, is not entirely receptive to private fee arrangements. A statute requires that if a consumer contract imposes liability for attorneys’ fees, the counterparty is also liable for fees to the same extent, regardless of whether the contract imposes such a liability.²⁸⁸ In other respects, however, parties in New York are generally free to adopt “loser-pays” rules, “one-way” requiring only one of the contracting parties to pay the other’s fees, or any other system they like, subject only to the general rules regarding enforcement of contracts.²⁸⁹

The rule is different in California. There, contracts containing one-way fee shifting provisions in contract cases are reformed by statute to award of fees to the prevailing party regardless of the nature of the parties.²⁹⁰ Unlike New York, therefore,

²⁸⁷ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

²⁸⁸ NY Gen. Obl. Law § 5-327(2) (“Whenever a consumer contract provides that the creditor, seller or lessor may recover attorney’s fees and expenses incurred as the result of a breach of any contractual obligation by the debtor, buyer or lessee, it shall be implied that the creditor, seller or lessor shall pay the attorney’s fees and expenses of the debtor, buyer or lessee incurred as the result of a breach of any contractual obligation by the creditor, seller or lessor, or in the successful defense of any action arising out of the contract commenced by the creditor, seller or lessor. Any limitations on attorney’s fees recoverable by the creditor, seller or lessor shall also be applicable to attorney’s fees recoverable by the debtor, buyer or lessee under this section. Any waiver of this section shall be void as against public policy.”)

²⁸⁹ See *Chapel v. Mitchell*, 84 N.Y.2d 345, 348-349, 642 N.E.2d 1082, 618 N.Y.S.2d 626 (N.Y. 1994) (“[a]ttorney’s fees are incidents of litigation and a prevailing party may not collect them unless an award of such fees is authorized by an *agreement between the parties*, statute, or court rule”) (emphasis supplied); *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491, 548 N.E.2d 903, 549 N.Y.S.2d 365 (N.Y. 1989); *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 503 N.E.2d 681, 511 N.Y.S.2d 216 (N.Y. 1986); *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21-22, 389 N.E.2d 1080, 416 N.Y.S.2d 559 (N.Y. 1979).

²⁹⁰ Cal. Civ. Code § 1717(a) (“[i]n any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.”). This policy of this statute is that “equitable considerations must

California extends its contract-trumping attorneys fee rule to *all* contracts, not just specified consumer contracts. Moreover, California’s statute, which is non-waivable, has been broadly interpreted to apply to actions that “involve” a contract, even if not directly framed as actions for breach.²⁹¹

C. Arbitration Clauses

Both New York and California respect and enforce pre-dispute mandatory arbitration clauses. As between the two, however, New York is more deferential to the parties’ choices.²⁹²

New York is positively disposed towards arbitration as a means for resolving disputes. This attitude is not unqualified: New York purports to prohibit mandatory arbitration clauses in contracts for the sale or consumer goods²⁹³ and services²⁹⁴ (although this rule may be unenforceable for contracts affecting interstate commerce).²⁹⁵ In other respects, however, and especially in the case of commercial agreements, New York is among the national leaders in endorsing and enforcing arbitration agreements. New York

prevail over both the bargaining power of the parties and the technical rules of contractual construction.” *PLCM Group v. Drexler*, 22 Cal.4th 1084, 1091, 95 Cal.Rptr.2d 198 (Cal. 2000), quoting *International Industries, Inc. v. Olen*, 21 Cal.3d 218, 224, 145 Cal.Rptr. 691, 577 P.2d 1031 (1978).

²⁹¹ See *Dell Merk, Inc. v. Franzia*, 132 Cal.App.4th 443, 455, 33 Cal.Rptr.3d 694 (3d Dist. 2005); *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, 96 Cal.App.4th 598, 604-05 117 Cal.Rptr.2d 390 (2d Dist. 2002). The statute does not extend, however, to tort actions arising out of contract. *Reynolds Metals Co. v. Alperon*, 25 Cal.3d 124, 129, 158 Cal.Rptr. 125 (Cal. 1979); *Excess Electronixx v. Heger Realty Corp.*, 64 Cal.App.4th 698, 709, 75 Cal.Rptr.2d 376 (1st Dist. 1998).

²⁹² Arbitration clauses are important in commercial dealings, especially when international parties are involved, although they are used surprisingly infrequently in business-to-business contracts involving large public companies. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 *DePaul L. Rev.* 335 (2007).

²⁹³ New York Gen. Bus. Law § 399-c(2)(a) (“[n]o written contract for the sale or purchase of consumer goods ... to which a consumer is a party, shall contain a mandatory arbitration clause.”)

²⁹⁴ The term “consumer goods” includes “services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer.” *Id.* § 399-c(1)(b).

²⁹⁵ See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (Federal Arbitration Act controls the issue of the enforcement of arbitration agreements in which the subject matter would have an effect on interstate commerce).

was the first American state to legalize pre-dispute arbitration clauses;²⁹⁶ its arbitration act, adopted in 1920, was the model for the Federal Arbitration Act of 1925.²⁹⁷ Its courts have also long encouraged arbitration,²⁹⁸ viewing the procedure as offering a speedy, flexible, inexpensive and sophisticated means for resolving disputes.²⁹⁹ Arbitration clauses are enforceable in New York even if a party alleges fraud in the underlying contract, unless the fraud is so pervasive as to constitute a “grand scheme” of which the arbitration agreement is a part.³⁰⁰ Alleged violations of public policy rarely defeat arbitration clauses in New York,³⁰¹ and only for compelling reasons³⁰² such as the need to protect the integrity of criminal investigations,³⁰³ to administer state antitrust law,³⁰⁴ to manage insurance company insolvencies,³⁰⁵ or to maintain judicial scrutiny over tenure

²⁹⁶ For background, see Theodore Eisenberg and Geoffrey P. Miller, *The Market for Contracts*, ___ *Cardozo Law Review* ___ (forthcoming).

²⁹⁷ See *id.*

²⁹⁸ See *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42, 47 (N.Y. 1973); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 48, 689 N.E.2d 884, 889 (N.Y. 1997) (New York courts have “long promoted” liberal enforcement of agreements to arbitrate).

²⁹⁹ See, e.g., *Sablosky v. Edward S. Gordon Co., Inc.*, 73 N.Y.2d 133, 138, 535 N.E.2d 643 (N.Y. 1989) (“[a]rbitrators customarily have an expertise over a particular subject matter and are able to offer parties a relatively expeditious and inexpensive forum to resolve their disputes”); See *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42, 47 (N.Y. 1973) (“speed and finality”).

³⁰⁰ *Amoroso v. Metropolitan Life Ins. Co.*, 2008 WL 1724002 (Table) (N.Y. Sup. 2008); *Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd.*, 21 A.D.3d 887, 889, 800 N.Y.S.2d 754 (2nd Dept. 2005).

³⁰¹ See *United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York*, 1 N.Y.3d 72, 769 N.Y.S.2d 451, 801 N.E.2d 827 (N.Y. 2003) (public policy exception is “extremely narrow”).

³⁰² See *Port Jefferson Station Teachers Ass’n v. Brookhaven-Comsewogue Union Free School District*, 45 N.Y.2d 898, 899, 411 N.Y.S.2d 1, 2, 383 N.E.2d 553, 554 (N.Y. 1978) (when an arbitration agreement is invalidated on policy grounds, it is nearly always because an important constitutional or statutory duty or responsibility is involved); *Associated Teachers of Huntington, Inc. v. Board of Education, Union Free School, Dist. No. 3, Town of Huntington*, 33 N.Y.2d 229, 235, 351 N.Y.S.2d 670, 675, 306 N.E.2d 791, 795 (N.Y. 1973) (issue must be “interlaced with strong public policy considerations”).

³⁰³ See *City of New York v. Uniformed Fire Officers Ass’n, Local 854, IAFF, AFL-CIO*, 95 N.Y.2d 273, 716 N.Y.S.2d 353, 739 N.E.2d 719 (N.Y. 2000) (enforcing arbitration clause could interfere with the ability of state officials to conduct a criminal investigation).

³⁰⁴ *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223 (N.Y. 1968).

³⁰⁵ *Corcoran v. Ardra Insurance Co.*, 77 N.Y.2d 225, 566 N.Y.S.2d 575, 567 N.E.2d 969 (N.Y. 1990), cert. denied, 500 U.S. 953 (1991).

decisions for public school teachers.³⁰⁶ Parties in New York are free to devise their own arbitration procedures, may contract for enhanced judicial review of arbitral awards,³⁰⁷ and may adopt hybrids that combine elements of arbitration and litigation.³⁰⁸ Mutuality of remedy is not required: a contract may require only one of the parties to arbitrate a dispute.³⁰⁹ New York also strictly limits judicial review of awards in the absence of agreements expanding such review,³¹⁰ requiring confirmation unless an award violates a “strong public policy,” is “totally irrational,” or “clearly exceeds a specifically enumerated limitation on the arbitrator’s power³¹¹ – a standard that may be even more deferential than the “manifest disregard” rule under the Federal Arbitration Act.³¹²

California courts, like their New York peers, endorse arbitration³¹³ and recognize its advantages as a speedy and expeditious means to resolve disputes.³¹⁴ Nonetheless

³⁰⁶ *Candor Central School District v. Candor Teachers Ass’n*, 42 N.Y.2d 266, 397 N.Y.S.2d 737, 366 N.E.2d 826 (N.Y. 1977); *Cohoes City School District v. Cohoes Teachers Ass’n*, 40 N.Y.2d 774, 390 N.Y.S.2d 53, 358 N.E.2d 878 (N.Y. 1976).

³⁰⁷ *Nab Const. Corp. v. Metropolitan Transp. Authority by New York City Transit Authority*, 180 A.D.2d 436, 579 N.Y.S.2d 375 (1st Dept. 1992).

³⁰⁸ See *Instructional Television Corp. v. National Broadcasting Co.*, 45 A.D.2d 1004, 357 N.Y.S.2d 915 (2d Dept. 1974) (upholding arbitration solely of questions of fact, leaving application of law for judicial determination).

³⁰⁹ *Sablosky v. S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513, 535 N.E.2d 643 (1989).

³¹⁰ See, e.g., *County of Nassau v. Sheriff’s Officers Ass’n, Inc.* 294 A.D.2d 31, 743 N.Y.S.2d 503 (2d Dept. 2002) (refusing to upset an award favoring policeman who had engaged in patently offensive, racially provocative public conduct).

³¹¹ *Matter of Town of Callicoon v. Civil Serv. Employees Assoc., Inc.*, 70 N.Y.2d 907, 909, 524 N.Y.S.2d 389, 519 N.E.2d 300 (N.Y. 1987).

³¹² See *Wien & Malkin LLP v. Helmsley-Spear, Inc.* 12 A.D.3d 65, 783 N.Y.S.2d 339 (1st Dept. 2004) (court first upheld an award under New York’s standard for judicial review, but then, applying the federal standard, rejected it on the ground that the arbitrators exhibited “manifest disregard” of the law).

³¹³ See, e.g., *Blake v. Ecker*, 93 Cal.App.4th 728, 741, 113 Cal.Rptr.2d 422 (2d Dist. 2001) (recognizing “strong public policy in favor of arbitration agreements”).

³¹⁴ See Cal. Code Civ. Pro. § 1281 (“[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”) California’s state tracks the language of the Federal Arbitration Act, 9 U.S.C. § 2, providing that arbitration agreements are “arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”). On the California courts’ sense of the virtues of arbitration, see, e.g., *Vandenberg v. Superior Court*, 21 Cal.4th 815, 830, 88 Cal.Rptr.2d 366, 982 P.2d 229 (Cal. 1999); *Adajar v. RWR Homes, Inc.*, 160 Cal.App.4th 563, 73 Cal.Rptr.3d 17, 21 (4th Dist. 2008).

arbitration agreements face significant obstacles.³¹⁵ Public policy provides a fruitful avenue for challenging arbitration agreements in California. Judicial-type procedures are required for arbitrations involving non-waivable rights; these procedures include discovery, written findings, remedies that would be available outside arbitration, and protection against forum costs.³¹⁶ Party-crafted procedures and limitations of remedy which fail to afford the requisite procedural rights will be struck down.³¹⁷ Arbitration clauses are also frequently invalidated in California on grounds of unconscionability. Clauses contained in contracts of adhesion are suspect, even if the party contesting enforcement knew of the terms at the time of contract³¹⁸ and enjoyed protections such as a cooling-off period.³¹⁹ In contrast with New York, California rejects agreements deemed to lack mutuality if the result is to disadvantage the weaker party.³²⁰ Even

³¹⁵ Many of the rules hostile to arbitration described in this paragraph are potentially vulnerable to challenge on grounds of pre-emption under the Federal Arbitration Act. See *Southland Corp. v. Keating*, 465 U.S. 1 (1985) (FAA held to preempt California rule prohibiting arbitration of claims under state franchise statute). As yet, however, the federal courts have not definitively addressed this matter. Cf. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (upholding anti-arbitration rule of California against pre-emption challenge on the ground that the parties had opted for the application of California law).

³¹⁶ See *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 102-103, 99 Cal.Rptr.2d 745 (Cal. 2000); *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.4th 638, 9 Cal.Rptr.3d 422 (6th Dist. 2004).

³¹⁷ See *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 103, 99 Cal.Rptr.2d 745 (Cal. 2000) (arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees); *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal.App.4th 1156, 18 Cal.Rptr.3d 142 (3rd Dist. 2004) (right to disqualify an arbitrator).

³¹⁸ See *Kinney v. United HealthCare Services, Inc.*, 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348 (4th Dist. 1999).

³¹⁹ See *Gentry v. Superior Court*, 42 Cal.4th 443, 165 P.3d 556 (Cal. 2007).

³²⁰ See *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 120, 6 P.3d 669 (Cal. 2000) (“an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences.”). Many California cases are in accord. See, e.g., *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071, 63 P.3d 979 (Cal. 2003); *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.4th 638, 9 Cal.Rptr.3d 422 (6th Dist. 2004); *O’Hare v. Municipal Resource Consultants*, 107 Cal.App.4th 267, 273-79, 132 Cal.Rptr.2d 116 (2nd Dist. 2003).

clauses neutral on their face may be invalidated if their effect would be one-sided.³²¹

California courts are also ill-disposed toward attempts by parties to “home-make” procedures in arbitration, at least when the assistance of the judiciary is required; thus clauses providing for enhanced judicial review of arbitral awards may not be respected.³²²

While the foregoing rules have primarily been developed in the employment context, they appear transferable to other settings, especially where important statutory or common-law rights are involved.³²³

D. Class Action Waivers

Waivers of aggregate dispute resolution (class actions and class-wide arbitration) are closely interwoven with the issues concerning enforcement of arbitration agreements discussed in the previous section. The reason is that arbitration clauses can also operate as de facto waivers of aggregate dispute resolution. However, the issues are conceptually distinct insofar as arbitration agreements occur in many situations where aggregate treatment is not feasible and aggregate dispute resolution waivers can be included in contracts without an arbitration clause.³²⁴ New York and California adopt different approaches to such waivers. In New York they are presumptively valid and regularly

³²¹ See *Saika v. Gold*, 49 Cal.App.4th 1074, 56 Cal.Rptr.2d 922 (4th Dist. 1996) (invalidating provision that allowed either party to reject an arbitration award of \$25,000 or greater and obtain trial de novo in court, on ground that the clause would only serve the interests of the health care provider).

³²² See *Crowell v. Downey Community Hospital Foundation*, 95 Cal.App.4th 730, 115 Cal.Rptr.2d 810 (2nd Dist. 2002); *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 45 Cal.App.4th 631, 53 Cal.Rptr.2d 50 (4th Dist. 1996).

³²³ But see *Greenbriar Homes Communities, Inc. v. Superior Court*, 117 Cal.App.4th 337, 11 Cal.Rptr.3d 371 (3rd Dist. 2004) (upholding arbitration clause that required consumers to share forum costs).

³²⁴ For general treatment of the issues, and a discussion of class-wide arbitration, see Jean R. Sternlight & Elizabeth J. Jensen, *Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67-SPG Law & Contemp. Probs. 75 (2004); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000). For an empirical study providing evidence that companies use arbitration clauses in order to thwart consumer class actions, see Theodore Eisenberg, Geoffrey P. Miller, and Emily L. Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* (manuscript on file with the author).

enforced against claims that they are unconscionable or violate public policy.³²⁵

California, in contrast, generally invalidates these clauses on grounds of public policy or unconscionability.³²⁶

VIII. Extra-Contractual Liabilities

Litigants who face difficulties prevailing on contract theories, or who seek damages greater than those available for breach, often frame their actions under some non-contractual theory – tort (fraud in the inducement, negligent misrepresentation, conversion), quasi-contract (unjust enrichment), equitable remedies (constructive trust or quantum meruit), or statutory rights (e.g., unfair business practice laws).³²⁷ Both New York and California resist attempts to substitute a tort regime for contract remedies, but New York is the more consistent in requiring litigants to seek remedies under contract law.

New York courts regularly rebuff attempts to couch contract and contract-related actions as torts or equitable remedies, requiring that some legal duty separate from the

³²⁵ See *Ranieri v. Bell Atlantic Mobile*, 304 A.D.2d 353, 354, 759 N.Y.S.2d 448, 449 (1st Dept. 2003) (“given the strong public policy favoring arbitration, and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions, such as contained in the Agreements, is neither unconscionable nor violative of public policy”) (citations omitted); *Flynn v. Labor Ready, Inc.*, 193 Misc. 2d 721, 751 N.Y.S.2d 722 (N.Y. Sup. 2002) (“[t]he fact that a class action lawsuit, as plaintiffs contemplate, may be a less costly alternative to arbitration (which is generally less costly than litigation) does not alter the binding effect of the valid arbitration clause”); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dept. 1998).

³²⁶ See *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005) (class action waiver unenforceable under California law); *Gentry v. Superior Court*, 42 Cal.4th 443, 165 P.3d 556 (Cal. 2007) (class arbitration waivers in employment agreements could not be enforced if class arbitration would be significantly more effective way of vindicating rights); *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal. Rptr. 2d 699 (1st Dist. 2001) (rejecting choice-of-law and forum selection clauses that would have precluded class action treatment under California consumer protection law); *Aral v. Earthlink, Inc.*, 134 Cal.App.4th 544, 36 Cal.Rptr.3d 229 (2nd Dist. 2005) (class action waiver invalidated as unconscionable); *Lee v. AT & T Wireless Services, Inc.*, 2006 WL 1452936 (2nd Dist. 2006) (same); *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728 (1st Dist. 2005) (same); *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 61 Cal.Rptr.3d 344 (1st Dist. 2007) (same).

³²⁷ For a general analysis focusing on the tort of promissory fraud, see Kevin E. Davis, *Promissory Fraud: A Cost-Benefit Analysis*, 2004 *Wis. L. Rev.* 535 (2004).

contract must be infringed before extra-contractual relief will be granted.³²⁸ New York rejects contract-based claims of unjust enrichment, either for failed preliminary negotiations³²⁹ or breach of an executed contract.³³⁰ Employees claiming that their employers tortiously interfered with contractual relations are summarily shown the door.³³¹ New York courts sometimes recognize claims for fraud in the inducement,³³² but require more than the allegation that the defendant did not intend to perform his promises.³³³ Although the line between allegations that merely duplicate contract claims and those that set forth a separate cause of action is sometimes thin, it appears that the

³²⁸ See *Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (N.Y. 1987); *Megarix Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 568 N.Y.S.2d 581 (1st Dept. 1991).

³²⁹ See *Chatterjee Fund Management, L.P. v. Dimensional Media Associates*, 260 A.D.2d 159, 687 N.Y.S.2d 364 (1st Dept. 1999).

³³⁰ *Clark-Fitzpatrick v. Long Island Rail Road Co.*, 521 N.Y.S.2d 653, 70 N.Y.2d 382, 389 (N.Y. 1987) (“[W]here the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which covers the dispute between the parties”, a party may not maintain an action in both quasi-contract and breach of contract); *Cooper, Bamundo, Hecht, & Longworth, LLP v. Kuczinski*, 14 A.D.3d 644, 14 A.D.3d 644 (2nd Dept. 2005).

³³¹ *Negron v. JP Morgan Chase/Chase Manhattan Bank*, 14 A.D.3d 673, 789 N.Y.S.2d 257 (2d Dept. 2005).

³³² *Dalessio v. Kressler*, 6 A.D.3d 57 (2nd Dept. 2004); *Smalley v. Dreyfus Corp.*, 40 A.D.3d 99, 832 N.Y.S.2d 157 (1st Dept. 2007) (fraud-in-the-inducement claims may lie even though contract claims would be barred).

³³³ *Coppola v. Applied Elec. Corp.*, 288 A.D.2d 41, 42 (1st Dept. 2001); *Modell’s N.Y. Inc. v. Noodle Kidoodle, Inc.*, 242 A.D.2d 248, 249-50 (1st Dept. 1997) (“mere ... allegations that the contracting parties did not intend to meet their contractual obligations” insufficient to state claim for fraud in the inducement); *Chase v. United Hosp.*, 60 A.D.2d 558, 559 (1st Dept. 1977) (allegation that defendant never intended to honor contractual promise held insufficient to make out a claim of fraud in the inducement); *CBW Finance Corp. v. Computer Consoles, Inc.*, 122 A.D.2d 10, 504 N.Y.S.2d 179 (2nd Dept. 1986) (promises to develop a new computer system held subject to contract law rather than fraud concepts); *Rockefeller University v. Tishman Const. Corp. of New York*, 240 A.D.2d 341, 659 N.Y.S.2d 460 (1st Dept. 1997) (holding that a building owner’s fraudulent misrepresentation claims against a construction company were duplicative of the owner’s breach of contract cause of action, so as to warrant dismissal of the fraud claims, where identical contractual benefit-of-the-bargain recovery was sought); *Rong Rong Jiang v. Tan*, 11 A.D.3d 373, 783 N.Y.S.2d 557N.Y.A.D. (1st Dept. 2004) (action for breach of contract cannot be converted into one for fraud by merely alleging that the contracting party did not intend to satisfy a contractual obligation); *Steinberg v. DiGeronimo*, 255 A.D.2d 204, 680 N.Y.S.2d 93 (1st Dept. 1998); *Egan v. New York Care Plus Ins. Co. Inc.*, 277 A.D.2d 652, 716 N.Y.S.2d 430 (3rd Dept. 2000); *Page v. Muze, Inc.*, 270 A.D.2d 401, 705 N.Y.S.2d 383 (2nd Dept. 2000); *Morgan v. A.O. Smith Corp.*, 265 A.D.2d 536, 697 N.Y.S.2d 152 (2nd Dept. 1999); *Alamo Contract Builders, Inc. v. CTF Hotel Co.*, 242 A.D.2d 643, 663 N.Y.S.2d 42 (2nd Dept. 1997); *Weitz v. Smith*, 231 A.D.2d 518, 647 N.Y.S.2d 236 (2d Dept. 1996); *Rocco v. Town of Smithtown*, 229 A.D.2d 1034, 645 N.Y.S.2d 187 (4th Dept. 1996).

New York courts require the plaintiff both seek different relief³³⁴ and make specific factual allegations separate from those associated with the contract.³³⁵ New York also generally accepts contractual limitations of fraud liability, including clauses that disclaim reliance on statements or representations not contained in the written agreement.³³⁶ Even in the absence of a no-reliance clause, moreover, a New York court might well dismiss claims of fraud if the alleged misrepresentation is contrary to the terms of the express contract, on the theory that plaintiff could not prove justifiable reliance in such a circumstance.³³⁷

California law is more receptive to the alchemy of transmuting contract claims into torts. The general rule is that a tort claim can be made out if “the breach is accompanied by a traditional common law tort, such as fraud or conversion; the means used to breach the contract are tortious, involving deceit or undue coercion; or one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.”³³⁸ While this formulation appears forbidding, it does not forbid actions for fraud in the inducement that overlap contract claims.³³⁹ In *Linza v. Diamond*

³³⁴ *Rockefeller University v. Tishman Const. Corp. of New York*, 240 A.D.2d 341, 659 N.Y.S.2d 460 (1st Dept. 1997) (tort claim rejected where contractual benefit-of-the-bargain recovery was sought).

³³⁵ *Gotham Boxing Inc. v. Finkel*, 18 Misc.3d 1114(A), 2008 WL 104155 (Table) (N.Y.Sup. 2008) (summarizing cases).

³³⁶ See *Stanley v. Bray Terminals, Inc.*, 197 F.R.D. 224 (N.D.N.Y. 2000); *Dallas Aerospace, Inc v CIS Air Corp*, 2002 WL 31453789 (S.D.N.Y. 2002).

³³⁷ *Stone v. Schulz*, 231 A.D.2d 707, 707-708, 647 N.Y.S.2d 822 (App. Div. 1996); *Matter of North Hills Off. Serv. v. Bevona*, 222 A.D.2d 245, 635 N.Y.S.2d 16 (1st Dept. 1995), lv. denied 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661; *Pinney v. Beckwith*, 202 A.D.2d 767, 768-769, 608 N.Y.S.2d 738 (App. Div. 1994).

³³⁸ *Erlich v. Menezes*, 21 Cal.4th 543, 553-554, 87 Cal.Rptr.2d 886, 981 P.2d 978 (Cal. 1999).

³³⁹ For decisions allowing such overlapping claims, see, e.g., *Baker v. Superior Court*, 150 Cal.App.3d 140, 197 Cal.Rptr. 480 (4th Dist. 1983); *Symcox v. Zuk*, 221 Cal.App.2d 383, 389-390, 34 Cal.Rptr. 462 (2nd Dist. 1963); *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal.App.3d 101, 137, 135 Cal.Rptr. 802 (4th Dist. 1977).

Center, Inc.,³⁴⁰ for example, a California court upheld a fraud claim based on allegations that the defendant, plaintiff's employer, had promised a bonus without intending to pay it. The same court found that punitive damages were available under the tort claim, even though they would be barred in an action for breach of contract, if the defendant acted with the requisite degree of fault. California is also receptive to other non-contractual remedies. It judges do not enforce a cause of action for negligent breach of contract,³⁴¹ yet they recognize that parties to a contract have a duty to perform their obligations with reasonable care, skill, expedience and faithfulness.³⁴² Accordingly, the "same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts."³⁴³ While a negligence claim may not survive if it merely replicates allegations of contractual breach, it may succeed if the plaintiff is able to include relevant allegations that are not fairly encompassed in the contract claim. California is also receptive to claims of unjust enrichment associated with breaches of contract: there does not appear to be any general prohibition against awarding damages for unjust enrichment in a contract case, so long as the requirements for that remedy are otherwise met.³⁴⁴

IX. Conclusion

New York's contract jurisprudence is formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage. The job of the

³⁴⁰ 2005 WL 3560800 (1st Dist. 2005).

³⁴¹ *Erlich v. Menezes*, 21 Cal.4th 543, 551, 552, 87 Cal.Rptr.2d 886, 981 P.2d 978 (Cal. 1999).

³⁴² *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764, 774, 69 Cal.Rptr.2d 466 (2nd Dist. 1997); *Allred v. Bekins Wide World Van Services*, 120 Cal.Rptr. 31245 Cal.App.3d 984, 989 (1st Dist. 1975) (moving services); *Moreno v. Sanchez*, 131 Cal.Rptr.2d 684, 106 Cal.App.4th 1415, 1427 (2nd Dist. 2003) (home inspection services); *Roscoe Moss Co. v. Jenkins*, 130 P.2d 477, 55 Cal.App.2d 369, 376 (2nd Dist. 1942) (well drilling).

³⁴³ *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764, 774, 69 Cal.Rptr.2d 466 (2nd Dist. 1997).

³⁴⁴ Cf. *Dinosaur Development, Inc. v. White*, 216 Cal.App.3d 1310, 1315, 265 Cal.Rptr. 525 (1st Dist. 1989); *First Nationwide Savings v. Perry*, 11 Cal.App.4th 1657, 1663, 15 Cal.Rptr.2d 173 (6th Dist. 1992) (policy considerations determine whether unjust enrichment is available); *California Emergency Physicians Medical Group v. PacifiCare of California*, 111 Cal.App.4th 1127, 4 Cal.Rptr.3d 583 (4th Dist. 2003).

courts is not to intrude into the contractual relationship but rather to enforce the deal the parties actually struck. To this end New York courts place a high value on clarity and predictability, especially in commercial contracts: contracts are enforced as written, not reformed or rejected to satisfy ideas of fairness or equity. Doctrines such as promissory estoppel and unjust enrichment are disfavored. Tort actions that duplicate claims a breach of contract claim are rejected in favor of the contract remedies.

California law is different in spirit, nuance, and detail. California judges are more concerned with defining relationships among the parties on the basis of fairness, equity, and the public interest. California courts are more willing to impose obligations on the basis of preliminary negotiations, to reject bargains deemed unfair to one of the parties, to repudiate contracts on grounds of duress, unconscionability or mistake, to consider evidence on contractual meaning from outside the four corners of the document, and to ignore the parties' choices of law or forum, waivers of jury trial, allocations of attorneys' fees, agreements to arbitrate disputes, and waivers of aggregate dispute resolution. Extra-contractual liabilities based on tort theories are more available in California than in New York. Overall, California administers a regime of contract law that, compared with New York, places greater emphasis on context, morality and fairness and gives less importance to the written agreement of the parties. The purpose of this paper has been to identify these differences and to suggest that the demonstrated preference of sophisticated contracting parties for the more formalistic New York approach may provide evidence on basic questions of contract theory.