DISCUSSION

OLSON:

Let me start by saying that I found Randy Barnett’s comments very persuasive. In general, the divergence between one’s moral estimate of promises and what the law has historically enforced has turned out to hinge on what are effectively evidentiary considerations. The doctrine of consideration, the complexities of offer and acceptance, the requirement of a writing, are all methods by which a court can reduce the risk of being mistaken about when there was an actual promise. They raise the requirement of proof, particularly in cases where there is a high likelihood of honest error or of fraudulent claims that a promise was made. The general rule has been that if you can enable a high enough mound of evidence, you can get just about any promise enforced, except for a promise to enslave oneself, where there are historical reasons for an exception.

The difference with unconscionability is that it really puts what I call a penny in the fuse box. It means that no matter how hard you try, no matter how clear the evidence of the other side’s consent, you just cannot do it.

In many ways I agree with Professor Farnsworth that the courts are actually not as badly off as my anecdotes might suggest. Perhaps contract is alive and well, or at least recuperating on a Carnival Cruise ship. And many sports-related assumption of risk cases have gone in the right direction.

Still, I am not entirely comforted to know that individual liberty has been extinguished only in cases involving consumers and small producers. Those are important categories. It seems to me that we may want oil companies to continue giving franchises to people with a high school education rather than demanding post-graduate study. But if those with low education are given special rights to litigate the unconscionability of their franchise agreements, companies are going to draw the opposite conclusion.

Even if deals between large businesses or wealthy persons are seldom voided on grounds of unconscionability or public policy, the arguments can still give them a powerful weapon to use against each other in litigation. If such a claim does not win at trial, it can still be a way to avoid summary judgment, get more access to discovery, and thus raise the imposition value of the case. We may observe that Ivana Trump got past summary judgment when her lawyers attacked her $20-million-plus-mansion-in-Connecticut postnuptial
agreement as unconscionable. This attack gave her lawyers an important bargaining chip.

We eventually get back to Justice Grodin's critique of the oppressiveness of dealings between private parties. There is not really time to do this topic justice, so I will just pause to note one paradox: we have declared it to be socially intolerable for anyone else to inflict on a consenting adult the same sort of risks that he is perfectly willing to inflict on himself. Consider smoking, the most lethal of voluntary pastimes. Most of us agree that adults should have the right to smoke three packs a day if they wish. But it is also thought unconscionable to allow them to assume the vastly smaller risks of sidestream smoke in the workplace. People may drive fast, live on the wild side, risk life and limb in a hundred ways, so long as it is just for kicks and without a thought; but if someone pays them to do it and they sign a consent form, they are being oppressed.

One of the curious facts in the world of occupational safety and health is that the most dangerous conditions and highest injury rates occur disproportionately often in family businesses: farms, fishing boats, backyard mines and lumbering operations, and small construction outfits where the work force consists mostly or entirely of the owner and family members. People are choosing an alarming level of risk, or choosing it for their dearest family members, but there is no visible oppressor on the scene.

On insurance bad faith, finally, I would point out that the basic problem here is that we do not routinely award legal fees to the prevailing party. Most countries do, which encourages insurers to pay up promptly when they are liable on a claim. The equally welcome corollary is that fee-shifting discourages claimants from pressing dubious or exaggerated claims against insurers. It is about time we joined the rest of the world on this point.

GRODIN:

I want to focus on this Carnival Cruise case because I think it is interesting. The analysis that Professor Farnsworth offers is that the choice of law provision is efficient in that it reduces the cruise line's cost and therefore reduces the amount that people have to pay in order to take a cruise. Of course, there is no denying that proposition. The same analysis is universally available. If I am admitted to a hospital and the hospital, as a condition of admission, asks me to sign a form waiving any liability on the part of the hospital for negligence, no matter how gross, there is no question that this provision serves the economic interests of the hospital and indirectly the interests of patients: it lowers the costs of medical care. That kind of argument can be used to support not only a cruise line's choice of law provisions, but any provision in any contract. The question is,
"What do we mean by choice?" The Shutes, we can say, did not have to take a cruise. But what do we say to a person who is about to enter the hospital? That he ought to ask for forms from other hospitals to see whether he can find a hospital that will perform the operation without such a waiver or reconsider whether, after all, he needs an operation? For people who are concerned with contract as an instrument of choice, I think we have to ask ourselves what we mean by that in the real world.

And finally, one observation about the *Foley* case. With all respect, I do not read the *Seaman*’s case the way Professor Farnsworth does. I participated in the decision. I do not think that it stands broadly for the proposition that a breach of the covenant of good faith and fair dealing in the commercial context gives rise to tort remedies. Quite the contrary. The opinion contains a lot of language—most of which I suspect Professor Farnsworth would argue with—discussing why that might be inappropriate and rejecting the notion that a jury should be left to determine when a breach is an "efficient" breach.¹ The opinion suggests that breach of the covenant would be appropriate as a tort only in rather narrow circumstances, of which in California the insurance context is one. There is a footnote in *Seaman*’s suggesting that the employment context might also be appropriate for such treatment,² but *Foley* declines to accept that suggestion.³

I can understand the policy arguments for why an employer who has breached his contract with an employee, even under circumstances in which it could be said that he has done so in a manner inconsistent with the covenant of good faith and fair dealing, should not be subject to the range of remedies commonly associated with tort doctrine. On the other hand, I think it has to be recognized that the effect of the *Foley* case is that in California the only people who can now bring suit against their employers for breach of contract are people who are in the high wage brackets and whose claim is sufficient to warrant litigation. People who earn less, your Joe Boilermaker, can no more sue his employer for breach of contract as a practical matter than, in the old days, a member of the union could sue the union for oppressive conduct.

I find myself agreeing with Mr. Olson that the way out of this dilemma ideally does not lie in the direction of choosing tort remedies over contract remedies, but rather by reframing the kinds of remedies that we have for breach of contract, perhaps expanding

¹ *Seaman’s Direct Buying Serv. v. Standard Oil Co.*, 686 P.2d 1158, 1166-70 (Cal. 1984) (*passim*).
² *Id.* at 1166 n.6.
them, and almost certainly including attorney’s fees. I think that is at the very heart of the problem. And it is one of the dilemmas the courts confront in this arena.

**Farnsworth:**

I have three very quick points. The first is with respect to Mr. Olson’s remarks on franchisees. One of the things that has been left out is that legislation is far more important than this discussion would suggest. The law of franchisees in most states is dominated by legislation and that is true of the whole consumer area. So as for these stories about what courts are doing, the total impact is a lot less important than what legislatures have done, at least in the consumer area.

On the *Shute* case, I may have done some disservice to Justice Blackmun, who wrote the opinion, by giving such a short summary. What I said was essentially his argument, not mine, and I think he would have no difficulty in distinguishing the cruise line from the hospital. Many states have distinguished hospitals from other activities—notably, sky diving and stock car racing come to mind—and I wonder how Justice Grodin would deal with an exculpatory clause in one of those two kinds of activities. Most courts have said that though you do not choose the form on which you contract, you choose to engage in those activities.

As to the *Foley* case, my discussion of that case and *Seaman’s* consisted largely of a quotation from an intermediate court that interpreted it.\(^4\) Review was denied on that intermediate court case by the California Supreme Court, one judge dissenting.\(^5\) The dissenting judge, who apparently found fault with the lower court’s description of what happened, was the surviving member of the original *Seaman’s* court, Justice Mosk.\(^6\)

**Question:**

Won’t many of the legislative proposals for tort reform take the form of having the federal government act in a number of ways? My question is prompted because we have both constitutional and contract scholars on the panel. What are the preemption implications of these proposals for congressional action from both a policy and a constitutional perspective?

**Barnett:**

I refuse to answer, Senator, on the grounds that it may incriminate me. I really do not know that I have an answer except to say that I am somewhat troubled by the trend to make private law mat-

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\(^6\) *Id.*
ters a matter of federal statute, which we see, for example, in the tort reform movement. And that does not really go to the preemption question, but it does at least go to my reaction. As much as I would like to see tort law reform and contract law reform at the local level, I am troubled by federal legislation that would accomplish that purpose.

**Olson:**

Part of the answer to Randy’s qualms is that changes in jurisdiction and choice of law have unfortunately enabled states to impose their forum and law on more and more transactions that belong in part, often in predominant part, to other states. This in turn has made it far easier for states to externalize the costs and internalize the benefits of their litigation, getting money for their citizens at the expense of citizens elsewhere. The lawsuits and the redistribution of wealth are already interstate, and the reforms may have to be interstate as well, unless we can turn back the clock on jurisdiction and choice of law.

**Question:**

Mr. Olson, you present in your paper a number of outrageous, if not humorous, cases. I wonder to what extent they are typical and to what extent there were changes on appeal. This is a big country and you can always find something of an oddity. Your cases are reminiscent of those cited some years ago in the Aetna ads. I wrote to Aetna for the citations of the cases that they had. Every one, while it may have been costly for the parties, was reversed on appeal.

**Olson:**

I would not, in the first place, lightly brush aside the injustice of subjecting someone to a wrongful suit simply because it does not prevail in the end. It is cold comfort to win final vindication from a lawsuit when you may have been absolutely ruined by the cost of fighting it. Our legal system seems to congratulate itself over these cases, like a doctor who pats himself on the back for finally getting the diagnosis right although the process of taking biopsies killed the patient.

In several of the cases I cited, there were settlements. Settlements are forever, so we know money was paid. Sometimes the settlement was after a jury verdict, sometimes before. I am relying on newspaper accounts in the subway cases. I think they check out.

**Question:**

Wally Olson suggested that there really is cause for gloom after all. He suggested, I think rightly, that even if a few cases are coming
out correctly, even if a lot of cases are coming out correctly, that this is not the answer.

In extending from Justice Grodin’s remarks about the need for attorney’s fees in the case of successful plaintiffs in certain kinds of actions, does this suggest that there is a need for an expanded notion of the British rule on attorney’s fees in the case of unsuccessful plaintiffs?

GRODIN:

I think the question you raise is a legitimate one. It is one that I have been concerned with a good deal. I was on a committee of the state bar in California that was considering recommending something like the British rule, and we were on the verge of doing that until we learned that in Britain there had been what was regarded as very considerable reform to the rule. The reform was that plaintiffs in consumer actions were exempt from liability for attorney’s fees on behalf of defendants. And that made us think that there are problems with a legal situation in which someone is penalized or has to incur substantial sanctions for bringing an action which is on the verge of the law, which tests new principles of law, which is brought in good faith and so forth. And I think there probably have to be some exceptions for that.

I really am concerned, however, with the contracts situation. It seems to me that a general principle of liability for attorney’s fees for the prevailing party is not a bad principle and that one of the most egregious problems in the current situation is the case where someone can say to a party to a contract: “Yeah, go sue, maybe I owe you this money. But your lawyer is going to tell you that you have to discount it by such an extent that you cannot afford to bring the lawsuit.” And that is not conducive to liberty or justice or anything else.

OLSON:

Two more points on the representativeness of cases and on the legal system’s role in determining injury. First, the actual decided cases are just a small percentage. Most of the damage is being done in negotiations and shakedowns. Second, the injury that we do not hear enough complaints about from the trial lawyers is the injury that litigation does to the opponent, guilty or innocent. This injury is not exactly anecdotal. It tends to go on in every case—a 100 percent anecdote rate, if you please—and to be the routine and expected outcome of litigation in our courts.

QUESTION:

I have a two-part point to make to Professor Grodin and I would like a response from Professor Barnett as well. I would like to
know from Professor Grodin if he really believes that anyone has a choice in the contracts and agreements he or she makes. It seems from your remarks that you believe that the labor union member does not participate in any sort of market for labor; that a person choosing a hospital or an HMO does not really have any choice. And I wonder if you really believe that the market does not exist anywhere.

The second point that I have relates to some research, and I only know it vaguely from remarks that Professor Allen Schwartz has made at Yale. He has suggested that not every participant in a market must look at every single aspect of the choice that he or she makes in order for the market to efficiently allocate resources. In light of those findings, if you accept their validity, does not that reflect that only a few people have to choose the hospitals they enter, or the cruise ships in which they embark in order for the market to efficiently come up with the right exculpatory courses and the right allocation of costs?

GRODIN:

Well, on the first question, I certainly do think that most contracts are the product of choice in the commercial arena. I agree with Professor Farnsworth's distinction between the cruise ship and the hospital. I think that while it is possible to talk about choice among cruise ship operators with respect to choice of law provisions, I do not think that this is very meaningful. Certainly we can talk about choice about whether one goes on a cruise ship or not and I suppose it would not pain me if the rule were that if you go on a cruise ship, you are stuck with whatever choice of law provision appears on your ticket. I see a very substantial distinction between that and the hospital situation. I do not think there is much of a market—a real market—with respect to choice of hospitals and limitation of liability. I do not think it is realistic to talk about that. The question then becomes where other things fit. For example, I think that there is a lot of choice in a lot of employment relationships and very little choice in others. We have to make decisions about the operation of the labor market in general and we have to look at particular results. Efficiency is not everything. If the market produces a situation in which workers are subjected to toxicity in the workplace, then that is a lousy market and we ought to do something about it.

BARNETT:

Obviously I take a different view of the matter. I think there is far more choice in the market than Professor Grodin and people who argue this position believe. The issue for them is not really whether there is a choice or not. The issue is whether they can make
a choice-based argument against contract in order to turn the underlying support of contract on its head. They make a choice-based argument in order to bring about the death of contract, but they are not really sincere in all cases in their concern about real choice.