POCKET ARBITRATION![*]

In Canteen v. Charlotte Metro Credit Union*, the Supreme Court of North Carolina licensed "pocket arbitration," a term used here to describe the retroactive insertion of arbitration agreements pursuant to unilateral change-of-terms clauses. The majority's decision is flawed on three grounds. First, its reliance on a California case rests on a logical fallacy: the presence of a forum-selection clause does not necessarily permit an arbitration agreement, especially because only the former preserves the constitutional right to a jury trial. Second, the implied covenant of good faith and fair dealing should have independently invalidated the amendment for its retroactive application to pre-existing claims, and the majority's reliance on the covenant to cure illusoriness fails because CMCU's unchecked power to modify the arbitration provision renders the limitation meaningless. Third, the information asymmetries and limited consumer understanding that the majority itself acknowledges preclude the rational comparison shopping the market-forces reasoning requires. While the dissent would have better preserved jury trial rights and prevented retroactive arbitration amendments, this Recent Development concludes that only a statutory prohibition of unilateral amendments to procedural terms can resolve a deeper problem. Whether such a prohibition will become necessary remains to be seen.*

INTRODUCTION

Dale Gribble, a character on the television series *King of the Hill*, scanned the bus station until his gaze rested upon a seated commuter in a suit and sunglasses. To Dale, the man certainly *looked* like a CIA agent.[1] More promising, a briefcase lay between the man's legs, which Dale mistook as the object of his CIA-assigned handoff.[2] When Dale lurched for the briefcase, the man reacted quickly, thereby beginning a bout for possession.[3] The pas de deux continued until Dale grabbed a fistful of sand from his trousers, exclaimed "Pocket sand!" and cast the sand into his opponent's eyes.[4] Though thrown clumsily, the sand did its job. The briefcase owner stood blinded and confused, enabling Dale to wrest the briefcase from his grip and flee the station.[5]

1. *King of the Hill*: *Soldier of Misfortune* (Deedle-Dee Productions Dec. 9, 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

Dale Gribble's theatrical escape technique has both historical roots[6] and a troubling corporate successor. While companies do not carry sand, arbitration agreements and class action waivers can achieve similarly disorienting effects. Companies once buried these clauses deep in verbose boilerplate, knowing that they would go unnoticed or be misinterpreted.[7] Now, a more insidious tactic is available: armed with change-of-terms provisions that expressly permit unilateral modification by the drafter,[8] companies can add retroactive arbitration agreements and class action waivers *after* their alleged misconduct occurs. In *Canteen v. Charlotte Metro Credit Union*,[9] the Supreme Court of North Carolina missed its first opportunity to impose meaningful guardrails on this "pocket arbitration" tactic.

Canteen ruled that "modifications made pursuant to change-of-terms provisions" are valid "if the changes reasonably relate to subjects discussed and reasonably anticipated in the original agreement."[10] As applied to plaintiff Pamela Phillips,[11] Charlotte Metro Credit Union's arbitration amendment was reasonably related to the original contract's forum-selection clause and governing-law provision to render the amendment binding and enforceable.[12] While change-of-terms provisions are necessary in some contexts,[13] *Canteen*'s particular holding and supporting analysis diminish the constitutional right to a jury trial and worsen power asymmetries between corporations and

6. *See* IBERIAN SWORDPLAY: DOMINGO LUIS GODINHO'S ART OF FENCING pt. 7, ch. 7 (Tim Rivera trans., Freelance Acad. Press 2017) (1599) ("When (perhaps by your disgrace) you have enemies that at times are waiting for you . . . , make use of a trick: in the right pocket, bring a little bit of sand, the finest that you can find. When they begin drawing, take the sand and scatter it at the eyes."); SERGE MOL, CLASSIC WEAPONRY OF JAPAN: SPECIAL WEAPONS AND TACTICS OF THE MARTIAL ARTS 124 (2003) (describing *metsubushi*, the practice of keeping sand and dust in eggshells to blind opponents).

7. *See, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446 (2002). Even if consumers read standard-form contracts before accepting them, empirical research shows that consumers do not understand what they have read. *E.g.*, Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 45 (2015) (finding that only forty-three percent of readers realized they had entered into an arbitration agreement after reading a clear arbitration agreement).

8. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608 (2010); *see* Canteen v. Charlotte Metro Credit Union, 386 N.C. 18, 19, 900 S.E.2d 890, 892 (2024).

9. 386 N.C. 18, 900 S.E.2d 890 (2024).

10. *Id.* at 26, 900 S.E.2d at 896.

11. "Latoya Canteen is a party to the underlying class action. However, the Credit Union's Motion to Stay Action and Compel Arbitration only challenged Phillips's right to join the class action without arbitration, and as such, Canteen is not a party to the current appeal." *Id.* at 19 n.2, 900 S.E.2d at 892 n.2.

12. *Id.* at 26, 900 S.E.2d at 896–97.

13. *See infra* text accompanying notes 60–62.

consumers.[14] Counterintuitively, these costs come without ascertainable economic benefits to the state, as this Recent Development will ultimately conclude.[15]

This Recent Development proceeds in four parts: Part I provides *Canteen*'s relevant background. After Part II sketches *Canteen*'s holding and reasoning, Part III analyzes the shortcomings in the majority's analysis, echoing many of the contentions in Justice Riggs's dissent. Finally, Part IV demonstrates how *Canteen* does little to bolster North Carolina's policy in favor of alternative dispute resolution and arguably worsens every other policy consideration the majority cites in support.

I. *CANTEEN*'S FACTUAL BACKGROUND

Pamela Phillips opened a checking account with Charlotte Metro Credit Union ("CMCU" or "the Credit Union") in 2014.[16] The membership agreement contained a governing-law provision specifying that the contract was "governed by . . . the laws, including applicable principles of contract law, and regulations of the state in which the credit union's main office is located."[17] In addition to designating the agreement's choice of law, the governing-law provision required the signee to bring legal action "regarding [the] [a]greement . . . in the county in which the credit union is located."[18] The agreement also contained a standard "Notice of Amendments" provision, which read:

> Except as prohibited by applicable law, [defendant] may change the terms of this Agreement. We will notify you of any change in the terms, rates, or fees as required by law. We reserve the right to waive any term in this Agreement. Any such waiver shall not affect our right to future enforcement.[19]

Phillips agreed to the contract "and opted to receive electronic statements and communications from the Credit Union."[20]

Roughly six years after Phillips opened her checking account, a class of persons filed a separate action against CMCU, alleging that the Credit Union had been "charging overdraft fees on accounts which had not been overdrawn."[21]

14. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1225–29 (1983) (describing the imbalance between firms and consumers in the era of adhesion contracts and arguing that the use of "form documents . . . imparts to firms . . . freedom from legal restraint and an ability to control relationships across a market").

15. *See infra* notes 101–02 and accompanying text.

16. *Canteen*, 386 N.C. at 19, 900 S.E.2d at 892.

17. *Id.* at 20, 900 S.E.2d at 892–93.

18. *Id.* at 20, 900 S.E.2d at 893.

19. *Id.* at 20, 900 S.E.2d at 892 (alterations in original).

20. *Id.* at 20, 900 S.E.2d at 893.

21. *See id.*

Then, presumably in an attempt to shield itself from further litigation, "the Credit Union amended its membership agreement with all members to require arbitration for certain disputes" and a waiver of the "right to file class actions."[22] Phillips and all other CMCU members first received notice of the changes in January 2021 with an email containing both the amendments and bank statements.[23]

Under the subject line "Charlotte Metro CU Online Statement and Changes to Membership and Account Agreements are Available," the January email's body contained hyperlinked phrases detailing the "Membership and Account Agreement Changes in Terms" that were to take effect on February 1, 2021.[24] One of the hyperlinked phrases, "Information about Arbitration," led to a letter with the following message:

> [The] Arbitration and Class Action Waiver provision will become effective on February 1, 2021. You do have until February 10, 2021 [sic] to exercise your right to opt-out of this provision (instructions on how to opt-out are included in the attached provision). However, if you don't opt out of this provision, then your continued use or maintenance of your Charlotte Metro account will act as your consent to this new provision.[25]

The arbitration agreement attached to this letter reiterated Phillips's opportunity to opt out of the provision "within 30 days of the opening of [her] account or the mailing of this notice, whichever is sooner."[26]

The thirty-day window expired.[27] On March 25, 2021, Phillips filed a class action complaint in Mecklenburg County Superior Court against CMCU for charging overdraft fees on accounts she had not overdrawn.[28] In response, CMCU filed a motion to stay and compel arbitration pursuant to the arbitration agreement it added months earlier.[29] The trial court denied the motion on three grounds: (1) the "arbitration provision was inserted by CMCU without Ms. Phillips's actual assent, knowledge, or notice"; (2) the "plain language" of the notice-of-amendments provision did not permit "CMCU to unilaterally 'add' a wholly new arbitration provision" and claim Phillips's silence amounted to assent; and (3) even if the Credit Union were able to add new provisions, that "ability was restricted by the duty of good faith and fair dealing."[30]

22. *Id.*
23. *Id.*
24. *Id.* at 20, 21, 900 S.E.2d at 893.
25. *Id.* at 20–21, 900 S.E.2d at 893.
26. *Id.* at 21, 900 S.E.2d at 893.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 21, 35, 900 S.E.2d at 893, 902.

CMCU appealed, and the North Carolina Court of Appeals "reversed the trial court's determination."[31] The dissent, however, argued that the amendment "violated the implied covenant of good faith and fair dealing and rendered the contract illusory."[32]

Phillips appealed to the Supreme Court of North Carolina, which granted cert to "address[] the boundaries of a party's ability to include a change-of-terms provision and then unilaterally amend a contract pursuant to that provision."[33]

II. *CANTEEN*'S HOLDING AND REASONING

The Supreme Court of North Carolina held that "the Arbitration Amendment was an enforceable amendment to the original contract"[34] for three reasons: (1) CMCU's arbitration amendment conformed with the implied covenant of good faith and fair dealing; (2) the contract was not illusory because North Carolina contract law provided a meaningful limitation on the promisor's performance; and (3) because Phillips had assented to the original notice-of-amendments provision, she did not have to assent to the amended provision. This Part will discuss each in turn.

A. *The Implied Covenant of Good Faith and Fair Dealing*

The implied covenant of good faith and fair dealing is the principle that parties to a contract will not "do anything which injures the right of the other to receive the benefits of the agreement."[35] Change-of-terms provisions may implicate the implied covenant of good faith and fair dealing because such provisions allow a party to "modify the original 'benefits of the agreement.'"[36]

The *Canteen* court relied on the California Court of Appeals' decision in *Badie v. Bank of America*,[37] which held that amendments to a contract must relate

31. *Id.* at 21, 900 S.E.2d at 893.

32. *Id.* at 22, 900 S.E.2d at 894.

33. *Id.*

34. *Id.* at 22, 900 S.E.2d at 893–94.

35. *Id.* at 23, 900 S.E.2d at 895 (quoting Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)).

36. *Id.*

37. 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998). Also persuasive to the majority was the North Carolina Court of Appeals's decision in *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 593 S.E.2d 424 (2004), wherein the court applied Arizona law to conclude that the unilateral amendment fell outside the original contract's universe of terms for the same reasons articulated in *Badie*. *Canteen*, 386 N.C. at 24–25, 900 S.E.2d at 894–95 ("[B]ecause the original agreement 'made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum [to resolve disputes] . . . ,' the arbitration clause 'did not fall within the same universe of subject included in the original agreement . . . .'" (quoting *Sears Roebuck & Co.*, 163 N.C. App. at 208, 222, 593 S.E.2d at 426, 434)).

to the original agreement's universe of terms[38] to comply with the covenant of good faith and fair dealing,[39] as such amendments are "within the reasonable contemplation of the parties at the time of contract formation."[40] The logic here is straightforward. When parties enter into a contract, they agree to bear certain costs in exchange for certain benefits. Contractual amendments that stray too far from the original terms essentially rewrite the parties' fundamental bargain and rebalance their costs and benefits. Such changes, according to the universe-of-terms test, would not have been within the parties' reasonable contemplation when they entered the original agreement, so their addition would violate the duty of good faith.

Similar to the facts in *Canteen*, *Badie* involved the addition of an arbitration agreement pursuant to a change-of-terms provision. Unlike CMCU's original contract with Phillips, however, the original contract in *Badie* did not "include *any provision* regarding the method or forum for resolving dispute."[41] Accordingly, the *Badie* court found the arbitration amendment outside the original contract's "universe of terms" and, therefore, in violation of the implied covenant of good faith and fair dealing.[42]

Canteen adopted *Badie*'s universe-of-terms rule, holding that modifications comport "with the covenant of good faith and fair dealing if the changes reasonably relate to subjects discussed and reasonably anticipated in the original agreement."[43] In applying this principle to Phillips's case, however, *Canteen* extended the rule. The majority interpreted *Badie* to "suggest that if the original agreement includes *any* provisions relating to forums or methods for dispute resolution, then a modification to include an arbitration agreement is within the same universe of terms and therefore permissible under a change-of-terms provision[]."[44]

Canteen's extension of *Badie*'s rule decided the case. Phillips's original contract with CMCU contained a governing-law provision, which stated that "the contract was subject to the laws of North Carolina, and that both parties agreed to bring suit 'in the county in which the credit union is located.'"[45]

38. A contract's "universe of terms" refers to the matters "concerning which . . . the parties intended to contract." *Badie*, 79 Cal. Rptr. 2d at 285, 288 (quoting CAL. CIV. CODE § 1648).

39. *Id.* at 285.

40. *Id.* at 284.

41. *Canteen*, 386 N.C. at 24, 900 S.E.2d at 895 (emphasis added) (quoting *Badie*, 79 Cal. Rptr. 2d at 283).

42. *Badie*, 79 Cal. Rptr. 2d at 283–84, 285.

43. *Canteen*, 386 N.C. at 26, 900 S.E.2d at 896.

44. *Id.* at 25, 900 S.E.2d at 896 (emphasis added) (citing *Sears Roebuck & Co.*, 163 N.C. App. at 220, 593 S.E.2d 433; and then citing *Badie*, 79 Cal. Rptr. 2d at 283–84). See Part III, *infra*, for a discussion of how the court's reasoning relies on a fallacy of the inverse and the false equivalency of disparate conditions.

45. *Canteen*, 386 N.C. at 26, 900 S.E.2d at 896–97 (citing Donelson v. Ameriprise Fin. Servs., Inc., 999 F.3d 1080, 1091 (8th Cir. 2021)).

Because "the Governing Law provision clearly contemplated the forum and method for dispute resolution" and the "Arbitration Amendment simply changed the forum in which the parties could raise certain disputes," the majority found that the arbitration amendment was "within the same universe of terms as the [original contract]."[46] As such, the amendment "did not violate the implied covenant of good faith and fair dealing."[47]

The majority argued in support of its newly adopted rule that the "nature of the modern economy" necessitates the efficiency and flexibility change-of-terms provisions provide; otherwise, companies would be forced to "cancel[] accounts and renegotiat[e] contractual terms every time modification may be required."[48] In response to the dissent's concerns over information asymmetries,[49] the majority noted that "the market provides a way for consumers to respond to policies with which they disagree. As needs arise, competitor companies can provide alternatives for consumers, forcing improvements or updates to products or services, including terms to satisfy consumers' desires."[50]

B. *Illusoriness*

The court next considered whether "permitting the unilateral Arbitration Amendment . . . would render the contract illusory."[51] A contract is illusory when the promisor "reserve[s] an unlimited right to determine the nature or extent of his performance."[52] When a contract fails to set a meaningful limitation on "the promisor's freedom of choice," one "may be supplied by law."[53]

After observing that the "Notice of Amendments provision explicitly limited its scope by stating '[e]xcept as prohibited by applicable law,'" the majority reiterated that "the implied covenant of good faith and fair dealing requires that any modifications . . . fall within the universe of terms included in the original agreement."[54] Requiring as much "serves as a sufficient 'limitation on a promisor's freedom of choice' and . . . remedies any purported issues of illusoriness which may arise from a change-of-terms clause."[55]

46. *Id.* at 26, 900 S.E.2d at 897.

47. *Id.*

48. *Id.* at 25, 900 S.E.2d at 896.

49. *See id.* at 33–34, 34 n.5, 900 S.E.2d at 901–02, 901 n.5 (Riggs, J., dissenting).

50. *Id.* at 25 n.5, 900 S.E.2d at 896 n.5 (majority opinion).

51. *Id.* at 26, 900 S.E.2d at 897.

52. *Id.* (quoting State v. Phillip Morris USA, Inc., 363 N.C. 623, 641–42, 658 S.E.2d 85, 96 (2009)).

53. *Id.* at 27, 900 S.E.2d at 897 (quoting Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 220, 593 S.E.2d 424, 433 (2004)); *see* 24 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533, 541–42 (Cal. Ct. App. 1998); Bassett v. Elec. Arts, Inc., 93 F. Supp. 3d 95, 106 (E.D.N.Y. 2015).

54. *Canteen*, 386 N.C at 27, 900 S.E.2d at 897.

55. *Id.*

C. *Mutual Assent and Consideration*

Traditional contract law doctrine dictates that "any 'alter[ation] [of] the terms of a contract must be supported by new consideration' . . . [and] consent."[56] The original contract contained a clear "Notice of Amendments" provision reserving to the Credit Union the right "to change the terms of the agreement upon notice to Phillips—not consent by Phillips."[57] When, as in *Canteen*, "parties have mutually agreed to a unilateral change-of-terms provision, said 'provision must be enforced as it is written,'"[58] and the "traditional modification analysis which requires mutual assent and consideration" does not apply to new terms insofar as they comport with the implied covenant of good faith and fair dealing.[59]

III. IN RESPONSE TO OVERSTATED MARKET NEEDS, *CANTEEN* BETRAYED *BADIE*'S REASONING BY OVEREXTENDING ITS RULE.

On its face, *Canteen* provides an inoffensive rule that is adequately tailored to the realities of modern consumer contracts. Large corporations must create contracts that bind thousands of consumers, and these contracts must operate for indefinite, but generally substantial, periods of time.[60] Banking—the industry at issue in *Canteen*—epitomizes this dynamism. Interest rates, the fluctuating creditworthiness of particular consumers, and competitor firms create variability; "modification allows the contract to keep up with changing circumstances without incurring the costs of drafting an initial contract that provides for all future contingencies."[61] The unilateral power to make modifications allows companies to implement changes without incurring the "cost[s] of securing meaningful assent from many dispersed customers" and, in turn, to avoid raising prices for consumers.[62]

Badie responded to these considerations by allowing Bank of America to change its terms related to the "bank/creditor relationship" but holding that the duty of good faith and fair dealing prevented the bank from "recaptur[ing] a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract."[63] *Canteen* also recognized that the implied covenant of good faith and fair dealing

56. *Id.* at 22, 900 S.E.2d at 894 (alterations in original) (quoting Wheeler v. Wheeler, 299 N.C. 633, 637, 263 S.E.2d 763, 765 (1980)).

57. *Id.* at 28, 900 S.E.2d at 898.

58. *Id.* at 23, 900 S.E.2d at 894 (quoting Home Owners' Loan Corp. v. Ford, 212 N.C. 324, 327, 193 S.E. 279, 280 (1937)).

59. *Id.*

60. Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 17 (2010).

61. *Id.*

62. *Id.* at 18.

63. Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 284, 287 (Cal. Ct. App. 1998).

limits the unilateral modification of contracts, but the majority's analysis of the covenant leaves the change-of-terms provision "materially unrestrained."[64]

Canteen distinguished *Badie* on the grounds that the original contract did not have a forum-selection clause,[65] but the language in the *Badie* opinion makes it clear that a forum-selection clause would have been immaterial.[66] The *Badie* court writes, "[A]bsent a *clear* agreement to submit disputes to arbitration or some other form of ADR, we cannot infer that that [sic] the right to a jury trial has been waived."[67] So, while forum-selection clauses select a particular *judicial* forum, they do not "clearly and unambiguously show that the party has agreed to resolve disputes in a forum *other than* the judicial one."[68] *Canteen* fails to account for the leap between forum selection and arbitration: "Because the Arbitration Amendment *simply changed the forum* in which the parties could raise certain disputes, we find that it was within the same universe of terms as the [forum-selection clause]."[69]

The majority fails to contemplate two other ways in which the implied covenant of good faith and fair dealing might have invalidated the amendment. First, by requiring Phillips to arbitrate her existing claims rather than join a class of persons who suffered identical harms (likely around the same time), the arbitration amendment applied retroactively to harms suffered before its addition.[70] Pretend CMCU had increased the interest rate attached to Phillips's account and then applied that rate to the existing balance. In such a situation, "[a]pplication of the changed rate to existing balances is an attempt to retake an opportunity that the card issuer gave up under the original contract" and, as such, "is a prime example of the lack of good faith."[71] The dissent cites the current draft of the *Restatement of the Law of Consumer Contracts* to the same

64. *Canteen*, 386 N.C. at 29, 900 S.E.2d at 899 (Riggs, J., dissenting).

65. *See id.* at 24, 900 S.E.2d at 895 (majority opinion).

66. In addition to drawing a distinction without a difference (explored above), the majority's logic relies on a fallacy of the inverse: Define P as any provision contemplating forums or disputes and Q as an arbitration agreement falling within the original contract's universe of terms. $\neg P \rightarrow \neg Q$ (the rule in *Badie*); $\therefore P \rightarrow Q$ (*Canteen*'s rule).

67. *Badie*, 79 Cal. Rptr. 2d at 290 (emphasis added). *Accord Canteen*, 386 N.C. at 35, 900 S.E.2d at 902 (Riggs, J., dissenting) ("[S]ince the right of trial by jury is highly favored, . . . waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. . . . *[I]n the absence of an express agreement or consent*, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made *against* its waiver." (quoting *In re* Gilliland, 248 N.C. 517, 522, 103 S.E.2d 807, 811 (1958))).

68. *Badie*, 79 Cal. Rptr. 2d at 289.

69. *Canteen*, 386 N.C. at 26, 900 S.E.2d at 897 (citation omitted) (emphasis added). Only the dissent acknowledged this difference. *See id.* at 37, 900 S.E.2d at 903 (Riggs, J., dissenting) ("[T]he amendment deprived [Phillips] of constitutional rights previously recognized, protected, and reserved by the original contract.").

70. *Id.* at 30, 900 S.E.2d at 899.

71. Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. STATE L. REV. 1099, 1142 (2010).

effect.[72] Yet, under the majority's logic, such a change would be foreseeable and therefore would comply with the covenant of good faith and fair dealing.

Second, the dissent argues that, under the amended contract, CMCU retained "an unlimited right to determine the nature or extent of [its] performance" of the arbitration amendment.[73] For example, CMCU could "eliminat[e] any obligation to arbitrate *its* claims while leaving the requirement that [Phillips] arbitrate *hers* intact."[74] Other jurisdictions have found arbitration agreements illusory when placed in the same contract as a unilateral change-of-terms provision for this very reason.[75]

IV. POLICY CONSIDERATIONS FAVOR THE DISSENT BUT ULTIMATELY COUNSEL AGAINST BOTH SIDES OF THE SPLIT COURT.

As mentioned previously, unilateral modifications provide a necessary means for companies to adapt to changing market conditions.[76] And *Badie*'s universe-of-terms rule provides a legitimate way to ascertain whether a change complies with the implied covenant of good faith and fair dealing. The majority's application of the rule, however, is certain to exacerbate corporation-consumer power asymmetries[77] without bolstering the market efficiencies that the decision purportedly supports.

The court acknowledges that "lay consumers may not understand every legal intricacy involved in the contractual process with companies" but reasons that "the market provides a way for consumers to respond to policies" they dislike.[78] "As needs arise, competitor companies can provide alternatives for consumers, forcing improvements or updates to products or services, including terms to satisfy consumers' desires."[79] Beyond the fact that the phrase "terms to satisfy consumers' desires" is itself a contradiction,[80] the reasoning fails even

72. *Canteen*, 386 N.C. at 33, 900 S.E.2d at 901 (citing RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 5 (A.L.I., Revised Tentative Draft No. 2, 2022)).

73. *Canteen*, 386 N.C. at 29, 900 S.E.2d at 898 (Riggs, J., dissenting) (quoting Wellington-Sears & Co. v. Dize Awning & Tent Co., 196 N.C. 748, 752, 147 S.E. 13, 15 (1929)).

74. *Id.* at 30, 900 S.E.2d at 899.

75. *See id.* at 30–32, 900 S.E.2d at 899–900 (compiling a list of cases that held an arbitration agreement illusory when placed in the same contract as a change-of-terms provision).

76. *See supra* notes 61–62 and accompanying text.

77. *See supra* note 14 and accompanying text.

78. *Canteen*, 386 N.C. at 25 n.5, 900 S.E.2d at 896 n.5.

79. *Id.* It is worth pointing out that competing businesses have zero incentive to "forc[e] improvements or updates," *id.*, if "[e]xploiting the ignorance of the vast majority of consumers" is "more lucrative . . . than competing for the smart consumers," Hillman & Rachlinski, *supra* note 7, at 443.

80. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1230 (2003) ("For a product attribute to be salient to buyers, the attribute must capture the limited attention of those buyers. But the nature of form contract terms suggests that they often will not be the focus of voluntary attention or capable of capturing attention involuntarily."); *id.* at 1244 ("[A]lthough the market should be expected to provide efficient salient contract terms to

within its own logical universe. How can a lay consumer who doesn't understand the legal intricacies of a contract search for alternatives?[81] Moreover, as Phillips's plight demonstrates, how can a lay consumer meaningfully learn of the need to search for an alternative *before* it surprises them?[82]

Assume, for the moment, that a sufficient portion of CMCU's customer base has the time and sophistication to cross-reference its terms with those of competing firms. Next, assume that those terms have an ascertainable value, one that sophisticated consumers can balance against other factors in their search for alternatives.[83] These assumptions create the preconditions for shifts in consumer behavior, but a problem remains: only an irrational consumer would switch banks. Change-of-terms provisions are ubiquitous, so why would a rational consumer take the "time and effort to decide which procedural terms match [their] preferences when the drafter has broad discretion to modify them?"[84] The other company could unilaterally amend its provisions in much the same way, leaving the consumer in no better position but having shouldered the cost of change.[85] Though absurd, the defense to this argument is that consumers could compare contracts with a critical eye on the scope of the change-of-terms provision therein.[86] Even assuming consumers can analyze such a provision, *Canteen* provides little certainty as to what monumental, bad-faith change would violate good faith.[87] Until the power to make unilateral modifications to contracts faces material limitations, the consumer would move only from the frying pan to the fire.

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the advantage of buyers as a class and sellers as a class, no such assumption about nonsalient terms is defensible.").

81. *See Canteen*, 386 N.C. at 34 n.5, 900 S.E.2d at 901 n.5 (Riggs, J., dissenting); *see also* Rakoff, *supra* note 14, at 1226 ("[F]or most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous."); *cf.* Jon D. Hanson & Douglas A Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1516 (1999) ("The available evidence indicates that smokers do not have good brand-specific risk information. . . . [H]igh tar brands of cigarettes . . . were chose by smokers more often than low-tar brands . . . ." (footnote omitted)).

82. *See Canteen*, 386 N.C. at 34 n.5, 900 S.E.2d at 901 n.5.

83. Or, assume (1) that a sufficient portion of customers pay attention to CMCU's behavior vis-à-vis its competitors and (2) that consumers could value that behavior in their choice-of-bank calculus. It does not matter. Whether consumers react to behavior or terms does not bear on the sophistication required to value and compare firms. The self-defeating logic explored in this paragraph remains.

84. Horton, *supra* note 8, at 649.

85. *See id.*

86. *See* Rakoff, *supra* note 14, at 1226 ("[M]any of the terms concern risks that . . . are unlikely to eventuate. It is notoriously difficult for most people . . . to appraise these sorts of contingencies . . . . The ideal adherent who would read, understand, and compare several forms is unheard of in the legal literature . . . .").

87. In addition, that companies can change the terms of a contract at will also demonstrates the illusion of choice at play in the opt-out procedure. *See* Horton, *supra* note 8, at 651 ("With no way to be sure that the new firm will continue to use the same procedural provisions in the future, a rational adherent would stay put.").

If the terms of a contract are merely floating possibilities, then perhaps consumers can react *en masse* to the ways companies wield their unilateral discretion.[88] In the case of *Canteen*, if consumers noticed how CMCU treated Phillips, the consumers could avoid similar treatment by switching banks. In support of its market forces argument, the majority notes how the pro-privacy browser DuckDuckGo received fifty percent more traffic than its previous peak after the National Security Administration claimed direct access to the servers of companies like Google, Microsoft, and Yahoo.[89] For these companies, market forces may adequately protect consumers in most cases. After all, watchdog organizations scrutinize Google's contracts for hints of unfairness,[90] regulators design rules based on Microsoft's actions,[91] and plaintiffs' lawyers dream of bringing companies like Yahoo to court.[92] But regional credit unions like CMCU command no such attention. Except for brief mention in legal blogs, Phillips did not make the news.[93]

In the end, Phillips's case proved exceptional because it caught the attention of then–Attorney General Josh Stein on its way to the state's highest court.[94] Perhaps due to *Canteen*'s publicity, CMCU acquiesced to Phillips

88. *Cf.* Canteen v. Charlotte Metro Credit Union, 386 N.C. 18, 25 n.5, 900 S.E.2d 890, 896 n.5 (2024) (acknowledging a lay person's limited knowledge but nonetheless arguing that consumers can influence competition by reacting to unilateral modification policies).

89. *See id.* (citing Charles Arthur, *NSA Scandal Delivers Record Numbers of Internet Users to DuckDuckGo*, GUARDIAN (July 10, 2013, at 12:25 ET), https://www.theguardian.com/world/2013/jul/10/nsa-duckduckgo-gabriel-weinberg-prism [https://perma.cc/U5MK-PJTE]).

90. John M. Simpson, *Consumer Watchdog, Privacy Rights Clearinghouse File Complaint Over Google's "Deceptive" Privacy Policy Change*, CONSUMER WATCHDOG (Dec. 19, 2016), https://consumerwatchdog.org/uncategorized/consumer-watchdog-privacy-rights-clearinghouse-file-complaint-over-googleaes-aeoedeceptiveae%C2%9D/ [https://perma.cc/2GHJ-A3B7] ("Users were not clearly informed of the significance of the changes—or 'features' as Google would have it—nor were they clearly and unambiguously given a chance to reject them.").

91. Press Release, Fed. Trade Comm'n, FTC Will Require Microsoft To Pay $20 Million over Charges It Illegally Collected Personal Information from Children Without Their Parents' Consent (June 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-will-require-microsoft-pay-20-million-over-charges-it-illegally-collected-personal-information [https://perma.cc/QG5Y-NQF7]; Renee Dudley, *Microsoft Bundling Practices Focus of Federal Antitrust Probe*, PROPUBLICA: TECH. (Dec. 26, 2024, at 05:00 ET), https://www.propublica.org/article/ftc-investigating-microsoft-antitrust-cloud-computing [https://perma.cc/3PQX-MQPM].

92. Joe Nocera, Opinion, *Lawyers' Business Model*, N.Y. TIMES, July 30, 2013, at A19 ("Like the corporations they sue, big-time plaintiffs' lawyers have a business model. Theirs requires them to constantly seek out cases that can be blown up into giant mass torts . . . to extract billions from companies.").

93. *See, e.g.*, Ty Jameson, *North Carolina Supreme Court Affirms Enforceability of Arbitration Clause Added by Amendment to Existing Account Agreement*, ELLIS & WINTERS LLP: BEST IN CLASS BLOG (May 31, 2024), https://www.elliswinters.com/classactions/north-carolina-supreme-court-affirms-enforceability-of-arbitration-clause-added-by-amendment-to-existing-account-agreement/ [https://perma.cc/9RW4-6EJD].

94. Brief by Amicus Curiae the State of North Carolina in Support of Plaintiffs-Appellants, Canteen v. Charlotte Metro Credit Union, 386 N.C. 18, 900 S.E.2d 890 (2024) (No. 10A23), 2023 WL 5606949.

joining the settlement.[95] Future consumers who face similar post hoc, unilateral amendments will not be so lucky. All things being equal, North Carolina trial courts will stay their litigation and compel arbitration under *Canteen*'s precedent. Unlike Phillips, these consumers are unlikely to receive support from North Carolina's Attorney General, not because their claims lack merit, but because *Canteen* routinized the form of injustice they will face. Therein lies the irony of the majority's reasoning. By arguing that market forces adequately protect consumer rights in a case that received outsized attention for reaching the highest court,[96] the majority abdicated the role of *all* North Carolina courts in enforcing the reasonable expectations of the contracting parties.[97]

Judicial decisions can promote transparent practices in two ways applicable to *Canteen*. First, by "signal[ing] to firms what is acceptable and unacceptable," courts "can influence or correct the market for players who are not directly involved in the specific litigation."[98] To hold that the universe-of-terms test in combination with market forces adequately protects consumer interests ignores the court's essential signaling function. Second, and most contrary to the majority's policy argument, consumers have "fewer opportunities to become informed about contractual risks or their rights" when courts uphold the imposition of an arbitration amendment.[99] That is so because arbitration agreements like CMCU's prohibit class-wide relief, "effectively bar[ring] the typically small claims that [consumers] have. From an efficiency perspective, these class-barring arbitration clauses, by substantially reducing deterrence and accountability, enable, and even encourage, [companies] to engage in profit-maximizing but welfare-reducing practices"[100] like modification.

Canteen also cites North Carolina's strong public policy in favor of settling claims by arbitration to justify its decision.[101] True, alternative dispute resolution in certain contexts can save courts money and time. But the

95. Class Action Settlement Agreement at 1, Canteen v. Charlotte Metro Credit Union, No. 21-CVS-6056 (N.C. Super. Ct. Nov. 13, 2025) ("Solely for purposes of this agreement, Defendant has agreed to waive its right to compel arbitration of Plaintiff Phillips's claims, instead resolving them through this agreement; Defendant reserves its rights to compel arbitration against, as applicable, against all other persons.").

96. *See Canteen*, 386 N.C. at 25 n.5, 900 S.E.2d at 896 n.5.

97. A court's role in enforcing this practice, of course, flows out of the assumption that the procedural terms in a contract are subject to negotiation and salient to buyers. *See infra* text accompanying notes 105–08; *see also* Horton, *supra* note 8, at 666. But procedural terms, in actuality, are neither salient nor negotiable. Because "unilateral revisions to procedural terms would be invalid under several different contract doctrines, they are entirely creatures of the statutes and cases that authorize them." *Id.* In a sense, then, *Canteen* did not abdicate responsibility; it legislated bad policy.

98. Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 89 (2023).

99. *See id.* at 89–90.

100. *See* Bar-Gill & Davis, *supra* note 60, at 14.

101. *Canteen*, 386 N.C. at 22, 900 S.E.2d at 894 (first citing Johnston Cnty. v. R.N. Rouse & Co., 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); and then citing Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984)).

calculation differs for arbitration agreements made by unilateral amendments. Now, courts must waste judicial resources to decide whether an arbitration amendment falls within the original contract's universe of terms.[102]

At first glance, then, the dissent's position preserves the fairness of company-consumer adhesion contracts and reaches the ultimately correct result. However, the dissent's reasoning illuminates a more fundamental issue latent in *Canteen*'s reasoning. Pretend that the majority struck down the arbitration agreement because, as the dissent stated, its juxtaposition with the amendment provision made it illusory.[103] Phillips would get to join the class, and CMCU would have to update its arbitration provision to ensure mutuality of obligation.[104] If the arbitration amendment failed a second time, CMCU could try again. In theory, this "feedback loop" could proceed *ad infinitum*, extinguishing whatever limited role consumers once had in consumer contracting.[105]

Professor David Horton describes this "feedback loop" as a "private conversation between drafters and the courts."[106] Horton writes:

> Even if court orders can force companies to soften procedural terms, and thus push the terms closer to reflecting adherents' informed ex ante preferences, markets, not courts, should perform this task. Judicial intrusion into this quintessentially private arena creates the risk of error (as judges may find a term unconscionable when, in fact, it mirrors most adherents' preferences), and makes the institution of contract unreliable (as neither drafters nor adherents will know whether a term is valid until after a court has spoken).[107]

Horton goes on to propose federal legislation banning unilateral amendments to procedural terms, which, in his words, would hold "firms to their promises" and "encourage adherents to shop ex ante and discipline the market for dispute resolution terms. It would also put an end to welfare-depleting and litigation-breeding amended procedural terms."[108]

102. Horton, *supra* note 8, at 658 ("[B]attles over arbitration clauses likely constitute a plurality of all contract cases . . . . [D]espite the judicial-economy rhetoric that underlies the Supreme Court's fervor for alternative dispute resolution, arbitration clauses often generate expensive and time-consuming litigation."). As Professor Horton acknowledges, it is not clear "whether the cost of this litigation outweighs the savings from funneling lawsuits outside of the judiciary." *Id.* But what better use for tax dollars is there than protecting constitutional rights and preventing companies from engaging in unfair contract practices?

103. *Canteen*, 386 N.C. at 29–30, 900 S.E.2d at 898–99 (Riggs, J., dissenting).

104. CMCU could, for example, require mutual assent and consideration for amendments to the arbitration agreement. That way, CMCU could not later "effortlessly free itself from arbitration while leaving Ms. Phillips helplessly bound." *Id.* at 30, 900 S.E.2d at 899.

105. Horton, *supra* note 8, at 611.

106. *Id.* at 657.

107. *Id.*

108. *Id.* at 665.

North Carolina might consider legislation of its own, but the possibility of wasteful meta-litigation has yet to materialize pursuant to *Canteen*'s holding—indeed, given that *Canteen* involved an issue of first impression for the Supreme Court of North Carolina, it is not clear that it will.

The dissent's position may have become untenable in the long run, but in the short term, it would have better protected the constitutional right to a jury trial and prevented CMCU—and other corporations to follow—from adding an arbitration agreement with retroactive effect. For those two reasons alone, the dissent's opinion would have been a better precedent.

CONCLUSION

Charlotte Metro Credit Union had sand in its pocket when it charged Pamela Phillips improper overdraft fees. When Pamela Phillips sought to recover those fees with representation before a jury of her peers, CMCU deployed its sand. Phillips regained sight in arbitration to which she did not provide meaningful assent. Now, *Canteen* tasks North Carolina judges with assessing consumer expectations and determining whether contractual amendments bear a reasonable relationship to the contract's original terms. For as long as that remains the case, North Carolina courts should closely scrutinize amendments with retroactive effect or constitutional implications closely. When market forces and other mechanisms are unlikely to ensure corporate accountability, the judiciary ought to intervene.

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