

**NO PROTECTION FOR THE ELDERLY:
THE INADEQUACY OF THE CAPACITY DOCTRINE
IN AVOIDING UNFAIR CONTRACTS INVOLVING SENIORS**

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Seniors [FN1] have long been vulnerable to entering into contracts against their best interests. A particularly egregious case in the late 1800s involved a seventy-nine-year-old farmer who, after a stroke, was paralyzed and unable to eat, walk or dress himself without help. [FN2] The farmer executed a series of deeds, distributing his 160-acre farm to various family members in exchange for their promises to support him for the remainder of his life. [FN3] While several family members deserted the farmer and sold the land deeded to them, one nephew agreed to help. [FN4] However, the nephew had a drinking problem and treated the farmer poorly. [FN5] The farmer then sought help from a neighbor, who arranged to have someone care for him, in exchange for all his "goods, . . . moneys, . . . personal property of every character, . . . [and] all the life interest reserved in [the land he had deeded to family members]." [FN6] This arrangement also failed, so the farmer was ultimately returned to his own home, where he was stricken with paralysis again and subsequently died alone. [FN7] Despite the increased availability and diverse options for long term care today, such as assisted-living facilities and nursing homes, cases involving seniors who enter into contracts to obtain care continue to *808 surface. [FN8]

The growing number of elderly in the United States creates potential for yet more settings in which seniors may enter into contracts against their best interests. The rapid aging of the American population is a prevalent issue raised in political speeches, [FN9] scientific journals, [FN10] and the media. [FN11] The Bureau of the Census estimates that as of 1990, there were ten times as many elderly Americans as in 1900. [FN12] Because of the aging of the baby boomers, by 2020, the elderly population is expected to more than double that of 1990. [FN13]

Unlike victims of consumer fraud who are afforded the protections of statutory remedies, [FN14] seniors who enter into unfair contracts have few alternatives. Most commonly, such contracts are attacked on the basis of the "capacity" doctrine that allows a person to avoid a contract if he is found to have lacked the capacity [FN15] to make the agreement. In the case of seniors, however, incapacity is often difficult to prove and represents a degrading method of protection. [FN16] An alternative is needed.

This Comment focuses on the senior who has entered into an unfair contract and who wishes to avoid it. The Comment does not specifically address the issues associated with adjudicated incompetency *809 or consumer fraud. [FN17] Rather, because these topics are closely related, they are discussed here by analogy. The Comment also does not reach the scenario where a senior seeks legal counsel prior to entering a damaging contract. However, writers on that subject have also called for changes in the law of capacity. [FN18]

This Comment first discusses the ways in which seniors are particularly vulnerable to entering into contracts against their best interests, and the settings in which seniors enter into them. Next, the Comment discusses the policies underlying the capacity doctrine, the difficulty in proving incapacity, and courts' treatment of the doctrine. The Comment then demonstrates the capacity doctrine's inadequacy in avoiding contracts entered into by seniors. Finally, the Comment suggests possible solutions, and critiques each based on administrative ease and public policy concerns.

I The Vulnerability of Seniors in Contractual Settings

Seniors, because of their physical and mental frailties, are often targeted by consumer fraud schemes. In Nevada, a group named "Say No Now," representing itself as a charity devoted to combating juvenile drug use, specifically targeted seniors because they were "perceived as lonely, trusting and more polite, [and] hence less likely to hang up before the telemarketer could make his pitch." [FN19] Among the group's victims were an eighty-three-year-old widow and an eighty-five-year-old retiree. [FN20] The organization collected more than \$915,000 in ten months

and made only one charitable contribution of forty-five dollars during that *810 time. [FN21] Such practices are punishable under the Senior Citizens Against Marketing Scams Act of 1993, [FN22] which was passed in response to an FBI investigation revealing a network of telemarketing schemes targeting the elderly. [FN23] "Some of these seniors are victimized repeatedly, losing large amounts of their hard earned savings." [FN24] The elderly are targeted for fraud more often than any other single group in the country. [FN25] One reason cited for this startling statistic is the availability and isolation of seniors resulting from their tendency to live alone more than younger people. [FN26]

These factors render seniors equally vulnerable to unfair contracts in which seniors are either pressured into unfair transactions, or volitionally enter into transactions harmful to their interests. However, only transactions rising to the level of criminal fraud are prohibited under state [FN27] and federal criminal law. [FN28] Therefore, only civil remedies under contract law are available to seniors entering into unfair contracts. Such protections include equitable defenses to enforcing otherwise valid contracts such as "duress, fraud, concealment, misrepresentation, unconscionability, mistake, impracticability, and supervening frustration." [FN29] In practice, however, these doctrines are difficult for a senior to prove without strong indicators of wrongdoing by the other party.

The difficulty in upsetting a valid contract reflects society's desire to promote autonomy in contractual settings and its reluctance to interfere in personal relationships. Because seniors often enter transactions involving family or close friends, seniors are particularly vulnerable to entering into damaging contracts that will later be upheld. [FN30] Often, these transactions involve seniors *811 who seek companionship or care. "Intervention to prevent . . . strangers from profiting from their dishonest tactics seems more supportable than intervention that deprives the [[senior] . . . of companionship even when the companion is no angel." [FN31] Historically, transactions involving seniors conveying property in exchange for long-term care were common. In one case, a ninety-six-year-old woman deeded all her property to her fifty-four-year-old husband in exchange for "'looking after and taking care of and furnishing and providing a home' for her during the rest of her life and \$100 'cash . . .'" [FN32] Less than two years later, the woman filed for divorce, alleging that her husband had abused, cursed, and beat her. [FN33]

Other areas in which seniors may be party to contracts to their detriment include: real estate transactions, [FN34] guarantee agreements, [FN35] retirement or insurance plan elections [FN36] and assignments of property interests. [FN37] In these settings, seniors are equally vulnerable and often make choices that are against their best interests.

II The Capacity Doctrine and its Evasive Standards

A frequently asserted defense to enforcement of an unfair contract involving a senior is incapacity. When it succeeds, the capacity doctrine renders a contract voidable by the party alleging incapacity. [FN38] That is, one who succeeds in proving incapacity may elect to avoid the legal consequences created by the contract *812 or extinguish the power of avoidance by ratifying the contract. [FN39] The power to avoid the contract can be exercised by the incompetent party, if the party later becomes competent, or by his legal representatives. [FN40] If the incompetent party dies, the party's administrator, executor or heirs may also avoid the contract. [FN41] Nevertheless, the power to avoid a contract may be lost if the contract is ratified via delay or affirmation. [FN42]

A. The Policies Underlying the Capacity Doctrine

The capacity doctrine, like other equity doctrines, attempts to protect the weak while preserving the freedom and security of contracts. [FN43] Those who are mentally incompetent are viewed as weak and the doctrine aims to protect them from unfair contracts. [FN44] Again, as with other equity doctrines, such protection may come at the expense of personal dignity. "[I]ndividual autonomy is its own virtue," writes one commentator, speaking of the capacity doctrine. [FN45] The underlying policy of the capacity doctrine, however, is grounded in the basic tenets of contract law. An agreement is, of course, required for a valid contract. [FN46] In fact, the "fundamental idea of a contract is that it requires the assent of two minds." [FN47] The requisite assent must be free and intelligent. [FN48] Therefore, where one party is incapable of freely assenting, there is no meeting of the minds, and no contract is *813 formed. [FN49] However, under this view of capacity, a person must, in order to gain relief, be equated to a "lunatic [who] . . . has nothing which the law recognizes as a mind" [FN50] In applying this view, a court examines the subjective intent and mental capability of the allegedly incompetent person to understand the transaction. If the person is proven to have lacked such understanding at the time of contracting, the transaction is avoided.

In contrast, another view of the capacity doctrine focuses not on the allegedly incompetent person's subjective

intent and mental capability, but the motives of the other party. Under this view, the doctrine prophylactically prevents one party from unfairly eliciting assent from a weaker party by deeming such contracts unenforceable. [FN51] Not surprisingly then, the capacity doctrine is often used to attack contracts involving seniors in conjunction with a claim of "undue influence" or fraud to set aside an otherwise enforceable contract. Even if a claim of incapacity fails, "evidence of weakness of mind, together with other circumstances, may be important in establishing that a bargain is voidable . . . for fraud or undue influence . . ." [FN52] Courts have held that "mental infirmity that falls short of that required for incompetency may nevertheless . . . combine with other circumstances showing overreaching or substantive unfairness to make a contract voidable . . ." [FN53] Using this strategy, a senior who has not met the burden of demonstrating incapacity may nonetheless be able to avoid the contract. [FN54] This strategy is frequently employed, and the capacity doctrine is often invoked in conjunction with another equitable doctrine because it is difficult to prove incapacity alone.

B. Proving Incapacity

The difficulty in proving incapacity lies, in part, in the varied standards applied by courts. Some courts have articulated the capacity standard reflecting a policy to protect the weak. Using such a standard, a person lacks capacity to contract if he is "of *814 such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence . . ." [FN55] North Dakota has codified a similar standard for incapacity, stating that "[a] person entirely without understanding has no power to make a contract of any kind," [FN56] and that the contract "of a person of unsound mind, but not entirely without understanding . . . is subject to rescission" once he has been judicially determined to be incapacitated. [FN57] However, a court applying the North Dakota statute concluded that an eighty-two-year-old woman possessed the requisite capacity to effect changes to her bank account because "even if the mind is weak or impaired or even if capacity to transact general business may be lacking," capacity may be found. [FN58] A number of cases fail to articulate a specific standard for capacity at all. [FN59] Critics have observed that even where standards are offered, the "tests are not uniform; they are fluctuating; they are vague; and they are subjective." [FN60] Furthermore, the tests often contradict one another or are internally inconsistent. [FN61]

The traditional test of capacity has been a cognitive one: "[W]hether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he is engaging and to understand its consequences and effect upon his or her rights and interests." [FN62] Modern courts have held that the capacity determination also involves a test of volition. [FN63] Under this test, incapacity exists when a person possesses the requisite understanding of the transaction but not the volition to freely choose to enter it. [FN64] Courts look to the time the agreement was made to determine whether the person possessed *815 the requisite understanding and volition to act. [FN65] Therefore, even medical evidence of mental illness may not be sufficient to prove incapacity; if the person understands the nature and consequences of the transaction, the contract will be upheld. [FN66]

The degree of incompetence must be severe in order to completely avoid the contract. A "person need not have even average mental capacity . . . to make a valid bargain . . ." [FN67] Also, the "[c]apacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances." [FN68]

Adding to the general difficulty of proving incapacity is the lack of expertise in diagnosing it. "[M]ost lawyers, judges, and doctors lack the time, expertise, and resources needed to apply any competency test with the rigor the seriousness of the question warrants." [FN69] Misdiagnoses are common. [FN70] In most cases, the determination is made by the judge based upon a fact-specific inquiry of whether the person possessed the requisite understanding of the transaction. [FN71]

While a few states have enacted statutes defining contractual capacity, [FN72] courts are usually required to make a subjective determination of capacity based largely on policy. "[M]ost of the tests and definitions are dangerously vague and contain subjective, value-laden modifiers that invite the decisionmaker to impose society's values on those whose capacity is questioned." [FN73]

C. The Application of the Capacity Doctrine by the Courts

Courts consider various factors in making subjective determinations of capacity. These factors are not conclusive, however, and may be present where the party is found to possess contractual *816 capacity. [FN74] The factors

include: the alleged incompetent party's age, cultural naivete, physical or mental impairment, education, and use of drugs or alcohol. [FN75] The use of these factors by courts reflect what some call the "status test" of capacity. [FN76] The status test "focuses on attributes that it views as negating capacity--age, history of mental illness, or dependence on others." [FN77]

Other factors considered by courts relate to the fairness of a transaction. [FN78] Such factors include the relationship of the parties and the adequacy of the consideration. [FN79] Using these factors, the capacity determination becomes an "outcome test." As such, courts determine capacity based on whether a party's decision to contract is "substantively correct." [FN80] This approach has drawn criticism. Some have argued that by considering the fairness of the transaction in determining capacity, courts are actually employing a circular test: incapacity is found when the transaction is one which a reasonably competent man would not make. [FN81]

The use of fairness in determining capacity to contract is also inconclusive. Factors such as: an absence of independent advice, a confidential relationship between parties, the presence of undue influence, fraud or secrecy, or a departure from normal transaction and inadequacy of consideration may indicate mental illness. [FN82] Nevertheless, courts may still find sufficient understanding on the part of the alleged incompetent to effectuate a valid contract. [FN83] Finally, fairness is a subjective standard that is difficult to quantify. What may appear fair to one court may differ *817 greatly from what appears fair to another. Furthermore, the degree of unfairness tolerated by courts may vary.

Some courts have explicitly held that the fairness of the transaction does play a role in determining whether the party was competent to contract. [FN84] Often, an indicator of fairness is the adequacy of consideration given in exchange for the promise made by the alleged incompetent. In *Douglas v. Ogle*, [FN85] the court held that inadequate consideration, coupled with mental weakness, required a finding of incompetence. The adequacy of consideration is particularly relevant in cases where fraud is alleged in conjunction with a claim of incapacity. [FN86]

Some courts have also considered whether a party had notice of the other person's incapacity in deciding whether to enforce a contract. [FN87] Under these cases, a contract is only voidable if the other party knows of the incompetent's lack of capacity. [FN88] Some courts have even held that a contract made with knowledge of the other party's incapacity constitutes fraud. [FN89] If the "meeting of the minds" requirement has truly been replaced with the modern objective theory of contract law, where a manifestation of assent is enough to create a binding contract, [FN90] notice necessarily plays an important role in determining capacity. Under the objective view, if the incompetent's lack of capacity is apparent, the other party would have notice of the incompetent's incapacity and the contract would necessarily fail for lack of assent. Because the capacity doctrine is based upon the notion that those who are incapable of assenting lack the capacity to form a contract, [FN91] notice is determinative of the validity of the contract.

While notice is generally not required to establish incompetence, it serves as a basis for rescission when present. [FN92] Knowledge is also relevant in determining whether restitution should *818 be awarded. [FN93] Furthermore, the knowledge requirement for contractual incapacity is implicit in explaining the per se incapacity of a person under the care of a guardian:

When . . . a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, not because he is unable, unassisted, to properly care for his property, or lacked understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. [FN94]

Whether or not fairness and notice are explicitly considered by courts, these principles are inherent in the capacity doctrine.

D. Remedies

Even if proven, the capacity doctrine often does not provide much protection. Unlike a tort claim, the incapacity defense is a doctrine of contract law that seldom provides for punitive damages. [FN95] Also, parties who prove incapacity must provide restitution to the other party upon rescission of the contract if the other party entered the contract in good faith. [FN96]

III The Inadequacy of the Capacity Doctrine in Protecting Seniors from Unfair Contracts

A. A Heavy Burden on Seniors

In cases involving a determination of capacity, the burden of proof is on the party alleging incapacity. [FN97] It is a heavy burden. "[E]veryone is presumed sane; and . . . this presumption is overcome *819 only by clear, cogent and convincing evidence." [FN98] The burden is particularly heavy for seniors who have not been adjudged incompetent for purposes of guardianship. These seniors do not easily fall into the classes intended for protection by the doctrine. "A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is . . . under guardianship, . . . an infant, . . . mentally ill or defective, or . . . intoxicated." [FN99] Seniors using the capacity doctrine usually must prove that they are mentally defective. Such an admission is humiliating and is difficult to prove.

Unlike with minors, [FN100] age alone is not conclusive of the incompetence of a senior. It serves merely as circumstantial evidence of incapacity and must be bolstered by other factors in order to invalidate a contract. [FN101] "Persons of mature age are presumed to be mentally competent; their incompetence cannot be inferred merely from old age, physical illness or defective memory." [FN102] Even if more than one of these factors is present, courts often will not find incompetence. For example, even physical illness coupled with old age may not be enough to invalidate the contract. [FN103]

In the absence of clear doctrinal guidance, cases involving the elderly are decided on individual equities alone. [FN104] "Equity is especially jealous to guard the welfare of the weaker party and transactions with childish old people are closely scrutinized." [FN105] However, fairness considerations weigh differently over time, from court to court, and across various factual scenarios. Therefore, the use of the capacity doctrine to set aside contracts involving the elderly results in disparate outcomes. In a study of cases involving elderly people whose contracts were attacked for mental incapacity, sixty-two were avoided and sixty-one were upheld. *820 [FN106] These results are consistent with this author's review of cases involving seniors alleging incapacity to invalidate a contract, where approximately half of the contracts were upheld and half were avoided. [FN107]

B. The Offensiveness of the Policies Underlying the Capacity Doctrine to Seniors

The stigma associated with being deemed incompetent is humiliating and degrading for seniors. "Americans have traditionally assumed that the greater good is usually best achieved by letting the individual do what he, as the sole arbiter, believes is in his own selfish best interests." [FN108] Proving incapacity may emotionally damage the senior whom the doctrine sought to protect. "[T]he mental health of many elderly individuals deteriorates greatly when they are denied the opportunity to make their own choices and exert control over their own lives." [FN109]

At the very least, using the capacity doctrine to protect seniors from unfair contracts smacks of paternalism. "[A] determination of incompetency--even within a limited sphere--is the ultimate denial of autonomy and personal dignity." [FN110] Seniors already struggling to maintain their independence may find that the protection afforded by the capacity doctrine comes at a price too high to bear. On the other hand, "[t]he older person's right to *821 choose should not be confused with the right to be ripped off." [FN111] An alternative is needed.

C. Inadequacy of the Capacity Doctrine

Seniors are particularly vulnerable to unfair contracts because of their physical impairments, loneliness, and limited resources. In the absence of clear fraud, duress, mistake or undue influence, the capacity doctrine is the only protection available to seniors. The doctrine, however, is not designed to protect vulnerable seniors but rather, children, the mentally ill, and alcoholics. The doctrine's subjective standards, and the fact that unlike with minors, the age of a senior is not conclusive of incapacity, add to the difficulty in using it to avoid contracts involving seniors. Finally, because those assessing capacity frequently do not have the resources to do so properly, proving incapacity is a heavy burden for a senior who has entered into an unfair contract. Even if incapacity could be proven, it would create the undesirable result of deeming a senior mentally ill, at least at the time of contracting.

IV Proposed Solutions

A. Shift the Burden of Proof

One way to increase the effectiveness of the capacity doctrine in helping seniors challenge a contract is to shift the burden of proving capacity to the non-claiming party when the contract involves a person of advanced old age. [FN112] Although the burden of proving incapacity is usually on the party asserting it, [FN113] there is precedent in the context of fraud to support a shifting of the burden to the non-claiming party where incapacity is asserted. One court has held that where fraud is claimed and evidence of incapacity is present, the burden shifts to the non-claiming party. When "badges of fraud" exist, including "[e]xtreme old age with its infirmities and the natural imminence of death," the burden shifts to the other party "to prove that the transaction was fair." [FN114]

***822** This approach focuses not on the subjective ability of the senior to assent, but on the motives of the other party. [FN115] Shifting the burden of proving capacity to the non-claiming party helps ensure that assent was not unfairly elicited from a weaker party. By shifting the burden, the non-claiming party, in a sense, is automatically put on notice that the senior may not possess contractual capacity. This comports with courts' consideration of notice as a factor in determining capacity. [FN116] Under this approach, the senior need not prove that the other party had knowledge of his incapacity or that the bargain was unfair. These factors would be presumed, with the burden placed on the non-claiming party to demonstrate otherwise.

This is not unlike the situation where a minor is a party to a contract. In most cases, children under a certain age are considered to lack capacity to form a contract. [FN117] "The power of an infant to avoid his contract does not depend upon knowledge of the other party . . . or unfairness of the bargain." [FN118] Those contracting with children assume the risk of having their contracts avoided for lack of capacity and therefore may take precautionary measures such as requiring identification proving age prior to contracting. Similarly, under this proposed solution those entering into contracts with seniors would be required to determine whether the senior possessed the capacity to contract at the time of the transaction.

Unfortunately, while verifying the age of a minor is relatively simple, determining the capacity of a senior at the time of contracting is a difficult task. The varying and subjective standards of the capacity doctrine make assessing contractual capacity difficult for lawyers and judges, [FN119] and even more so for laypeople entering contracts with seniors. Requiring such a determination may also overly deter people from contracting with seniors. This ***823** would conflict not only with the freedom to contract, but also with fair treatment of seniors.

Another criticism of this approach is that it creates the presumption that seniors lack the capacity to contract. As discussed above, even a single determination of incapacity represents an attack on a senior's dignity and ultimately may result in damage to the senior's mental health. [FN120] A general presumption of incapacity could also be devastating to all seniors. Making a blanket determination of incapacity fails to take into consideration the varying degrees of competence that may exist among seniors, and discounts the capabilities of many independent seniors.

However, if this solution were implemented in conjunction with the legislation of a uniform standard for contractual capacity for the aged, the difficulty in assessing capacity would be reduced. [FN121] Furthermore, because the burden would only be shifted in a transaction involving a person of advanced old age, [FN122] the deterrence effect of such a solution may not be so great. Similarly, the social implications of a presumption of incompetence is reduced when the presumption only exists for persons of advanced old age.

1. Legislate a Uniform Standard for Contractual Capacity

Another possible solution is to legislate a uniform standard for contractual capacity. While several states have capacity statutes in place, they are often vague and fail to define capacity. [FN123] However, setting a strict upper age limit for contracting, similar to the minimum age requirements imposed on minors, [FN124] would be impractical because the degree of competency among seniors varies. Moreover, there may be negative policy implications associated with deeming someone above a certain age to be incapacitated. Such a drastic measure might also raise equal protection concerns by seniors whose rights to contract would be severely limited. That is, identifying a specific group based on age and removing its ability to contract seems contrary to the states' mandate to provide "equal protection of the laws." [FN125]

Despite these concerns, states could still set forth a standard ***824** that incorporates the cognitive test, [FN126] the volitional test, [FN127] and one that utilizes factors that, if combined, would create a presumption of incapacity. These factors should include advanced age, medically documented physical or mental illness, knowledge by the other party of such illness or other signs of incapacity, and inadequate consideration or other signs of unfairness. If

fewer than three of the factors were present, no finding of incapacity would be required. Courts, however, would still be bound by the statutes to consider the factors in their determination of capacity.

This solution would provide a uniform capacity standard. Such uniformity would put parties on notice prior to entering any contract that the transaction could be avoided if a combination of factors were present. And, while ordinary parties may not be equipped to detect more subtle signs of incapacity, advanced age, medically documented illness and inadequate consideration are easily ascertainable.

Seniors would also benefit from a uniform standard in that they would be able to more easily avoid unfair contracts. Their burden of proving incapacity would be greatly reduced. A senior of advanced age with documented medical problems entering into a contract for inadequate consideration would have the benefit of a presumption of incapacity. If fewer than three factors were present, the senior would still be required to prove incapacity, but would have the security of knowing that the court would be bound to consider the factors in its determination of capacity.

Critics of this approach, as with the first approach, may argue that providing more objective standards for determining capacity may infringe on a senior's rights. And, as mentioned earlier, this may negatively impact the mental health of the seniors sought to be protected by the capacity doctrine. [FN128] Furthermore, legislation limiting the ability of a specific group to contract may raise Equal Protection issues.

Weaknesses in these arguments suggest that legislating a uniform standard for the contractual capacity of seniors is nevertheless a viable solution to the problems involving unfair contracts faced by seniors today. An argument that protective legislation infringes on the rights of those sought to be protected can always *825 be made. Yet legislation protecting the disabled, [FN129] children, [FN130] minorities [FN131] and the aged [FN132] is prevalent in the law. Moreover, legislation clarifying the standards for contractual capacity does not create an emotionally damaging presumption of incapacity for seniors.

Finally, because the aged have not been held to be members of a "suspect class," [FN133] only a rational relationship between the legislation and a legitimate state interest must exist in order to satisfy the Equal Protection Clause. [FN134] The proposed legislation satisfies the legitimate state interest of protecting seniors from unfair contracts. [FN135]

Conclusion

In an aging society where seniors are frequently targeted for unfair contracts, greater protection is needed. The current protection under contract law, based largely on the capacity doctrine, is inadequate to meet this demand. The doctrine's framework does not contemplate the protection of seniors without guardians. Rather, its intended beneficiaries are children, the mentally ill and alcoholics. The doctrine's varying and ambiguous standards and its heavy burden of proof render it a cumbersome and ineffective remedy for a senior seeking to avoid an unfair contract.

While this Comment's proposed solutions present the common risk of infringing on the rights of those sought to be protected, the protection they offer may outweigh this risk. A more objective standard for capacity that accounts for seniors and their unique issues is required if the capacity doctrine continues to be the primary protection for seniors in contractual settings.

Seniors are vulnerable and their numbers are growing. One day all of us will be joining their ranks. It is in all of our interests *826 to ensure greater protection against unfair contracts before that day arrives.

[FN1]. For purposes of this Comment, the term "senior" will refer to individuals who are at least 60-years-old.

[FN2]. *Dorsey v. Wolcott*, 50 N.E. 1015, 1015-16 (Ill. 1898).

[FN3]. *Id.* at 1016-17.

[FN4]. *Id.*

[FN5]. *Id.*

[FN6]. *Id.* at 1017.

[FN7]. *Id.*

[FN8]. See *Sykes v. Campbell*, 256 S.W.2d 320 (Ark. 1953); *In re Estate of Faris*, 159 N.W.2d 417 (Iowa 1968); *Bracken v. Johnson*, 249 S.W.2d 149 (Ky. 1952); *Klein v. Kent*, 95 N.W.2d 864 (Mich. 1959); *Crossman v. Reeves*, 825 P.2d 1330 (Okla. 1992).

[FN9]. See William Jefferson Clinton, State of the Union Address to Congress (Jan. 19, 1999), in *Washington Post*, Jan. 20, 1999, at A12.

[FN10]. See Gary Andrews & Michele J. Clark, *The International Year of Older Persons: Putting Aging and Research onto the Political Agenda*, 54B *J. Gerontology Series B: Psychol. Sci. & Soc. Sci.* P7 (1999).

[FN11]. See Randall Hackley, *Soon the Most Popular Hair Color May Be Gray People Are Living Longer, Causing a "Silent Revolution," Said Experts at a U.N. Conference on Aging*, *Orlando Sentinel*, Feb. 11, 1999, at A1; Sue Hale, *Task Force on Aging Forming*, *Sunday Oklahoman*, Mar. 7, 1999, at O2; Michele Himmelberg, *Workforce Is Aging, Shrinking*, *Ariz. Republic*, Mar. 3, 1999, at A1.

[FN12]. *Econ. and Statistics Admin.; Bureau of the Census, U.S. Dep't of Commerce, We the American ... Elderly* 2 (Sept. 1993).

[FN13]. *Id.* at 3.

[FN14]. See, e.g., 18 U.S.C. § 1341 (1994 & Supp. III 1998) (prohibiting mail fraud); 18 U.S.C. § 1343 (1994 & Supp. III 1998) (prohibiting wire fraud); 18 U.S.C. § 2326 (1994 & Supp. III 1998) (prohibiting telemarketing fraud).

[FN15]. The terms "capacity" and "competence" will be used interchangeably in this Comment.

[FN16]. See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 *Yale L.J.* 271 (1944); Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices--What's An Attorney to Do?: Within and Beyond the Competency Construct*, 62 *Fordham L. Rev.* 1101, 1162- 63 (1994)..

[FN17]. These topics have been addressed in other articles. See Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform* 60 *Geo. Wash. L. Rev.* 1818 (1992); Richard A. Starnes, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 *Elder L.J.* 201 (1996); Kate Gorham, *AGING; Elderly a Growing Target; More Seniors Become Prey of Criminals, Even Family*, *Boston Herald*, Mar. 2, 1999, at 3.

[FN18]. Rein, *supra* note 16, at 1135 (calling for changes in substantive rules regarding seniors' capacity to make contracts).

[FN19]. *United States v. Smith*, 133 F.3d 737, 741 (10th Cir. 1997), cert. denied, 524 U.S. 920 (1998).

[FN20]. *Id.*

[FN21]. *Id.*

[FN22]. 18 U.S.C. § 2326 (1994 & Supp. III 1998).

[FN23]. 139 *Cong. Rec.* S10,015-01, S10,016 (daily ed. July 30, 1993).

[FN24]. *Id.*

[FN25]. Starnes, *supra* note 17, at 202, 204.

[FN26]. *Id.*

[FN27]. There is a hodgepodge of state and federal laws protecting seniors from consumer fraud. *Id.* at 212.

[FN28]. See Senior Citizens Against Marketing Scams Act of 1993, 18 U.S.C. § 2326 (1994 & Supp. III 1998).

[FN29]. Robert H. Jerry, II, Insurance, Contract, and the Doctrine of Reasonable Expectations, 5 Connecticut Ins. L.J. 21, 34 (1998).

[FN30]. See *Sykes v. Campbell*, 256 S.W.2d 320 (Ark. 1953) (noting that parents contract with foster daughter and son-in-law for lifetime care); *Dorsey v. Wolcott*, 50 N.E. 1015 (Ill. 1898) (noting that farmer contracts with family and neighbors for lifelong care); *State Bank of Cologne v. Shrupp*, 375 N.W.2d 48 (Minn. Ct. App. 1985) (noting that mother agrees to guarantee loans for daughter and son-in-law); *Wenzel-Mosset v. Nickels*, 575 N.W.2d 425 (N.D. 1998) (noting that eighty-one-year-old woman adds sister-in-law and housekeeper to bank accounts).

[FN31]. Rein, *supra* note 16, at 1167.

[FN32]. *Bracken v. Johnson*, 249 S.W.2d 149 (Ky. 1952).

[FN33]. See *id.*

[FN34]. See *id.*; see also *Cundick v. Broadbent*, 383 F.2d 157 (10th Cir. 1967); *Sims v. Slovin*, 207 A.2d 597 (Del. Ch.), *aff'd*, 213 A.2d 903 (Del. 1965); *Enders v. Wesley W. Hubbard & Sons, Inc.*, 513 P.2d 992 (Idaho 1973).

[FN35]. See *Shrupp*, 375 N.W.2d 48.

[FN36]. See *Ortelere v. Teachers' Retirement Bd.*, 250 N.E.2d 460 (N.Y. 1969); *Page v. Prudential Life Ins. Co.*, 120 P.2d 527 (Wash. 1942).

[FN37]. See *King v. Davis*, 11 A. 727 (Vt. 1888).

[FN38]. See Restatement (Second) of Contracts § 12(1) (1981) [hereinafter Rest. (2D) Contracts] ("No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.").

[FN39]. *Id.* § 7. While courts are split as to whether a contract should be rendered *per se* void or merely voidable, the majority of courts have held that in most cases a contract entered into by a senior is voidable. *Hellman Commercial Trust & Sav. Bank v. Alden*, 275 P. 794 (Cal. 1929) (holding that a contract challenged on grounds of incompetency is merely voidable); E. Allan Farnsworth, *Contracts* 243 (3d ed. 1999).

[FN40]. See generally E. Allan Farnsworth & William F. Young, *Cases and Materials on Contracts* 325-36 (5th ed. 1995).

[FN41]. *Id.*

[FN42]. *Id.*

[FN43]. See Rest. (2D) Contracts, *supra* note 38, § 15 cmt. a.

[FN44]. Milton D. Green, Public Policies Underlying the Law of Mental Incompetency, 38 Mich. L. Rev. 1189, 1212 (1940); Rein, *supra* note 16, at 1102.

[FN45]. Rein, *supra* note 16, at 1164.

[FN46]. *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

[FN47]. Milton D. Green, The Operative Effect of Mental Incompetency on Agreements and Wills, 21 Tex. L. Rev. 554, 558 (1943) (quoting *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 20 (1872)); see also Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 20-21 (1981) (noting that holding a person to his agreement is a way

of taking him seriously).

[FN48]. Green, *supra* note 47, at 555.

[FN49]. *Id.*

[FN50]. *Id.* at 558.

[FN51]. Farnsworth & Young, *supra* note 40.

[FN52]. 5 Samuel Williston, *A Treatise on the Law of Contracts* § 10:8, at 301 (4th ed 1992).

[FN53]. Farnsworth, *supra* note 39, at 238 (footnote omitted).

[FN54]. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 330 (3d ed. 1970).

[FN55]. *Watson v. Alford*, 503 S.W.2d 897, 898 (Ark. 1974) (quoting *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1855)).

[FN56]. N.D. Cent. Code § 14-01-01 (1997).

[FN57]. *Id.* § 14-01-02.

[FN58]. *Wenzel-Mosset v. Nickels*, 575 N.W.2d 425, 429 (N.D. 1998).

[FN59]. See *Sims v. Slovin*, 207 A.2d 597, 601 (Del. Ch.), *aff'd*, 213 A.2d 903 (Del. 1965); *Bobst v. Highley*, 651 N.Y.S.2d 26 (N.Y. App. Div. 1996); *Hunt v. Golden*, 532 P.2d 26, 27 (Or. 1975).

[FN60]. Green, *supra* note 16, at 272.

[FN61]. Rein, *supra* note 16, at 1127.

[FN62]. 53 Am. Jur. 2D *Mentally Impaired Persons* § 156 (1996) (citation omitted).

[FN63]. See *Farnum v. Silvano* 540 N.E.2d 202, 204 (Mass. App. Ct. 1989); *Ortelere v. Teacher's Retirement Bd.*, 250 N.E.2d 460, 465 (N.Y. App. Div. 1969); *Walker v. U.S. Gen., Inc.* 916 P.2d 903, 907 (Utah 1996).

[FN64]. *Ortelere*, 250 N.E.2d at 465.

[FN65]. *Uribe v. Olson*, 601 P.2d 818, 820 (Or. Ct. App. 1979).

[FN66]. *Cundick v. Broadbent*, 383 F.2d 157, 163 (10th Cir. 1967); *Sims v. Slovin*, 207 A.2d 597, 601 (Del. Ch.), *aff'd*, 213 A.2d 903 (Del. 1965).

[FN67]. Williston, *supra* note 52, at 298.

[FN68]. Rest. (2D) *Contracts*, *supra* note 38, § 12(1); see also *Sims*, 207 A.2d at 597 (finding that while elderly man could not understand the complex legal concepts related to his contract to sell his land, he was capable of understanding the nature and effect of the sale).

[FN69]. Rein, *supra* note 16, at 1119.

[FN70]. *Id.* at 1120.

[FN71]. *Bobst v. Highley*, 651 N.Y.S.2d 26 (N.Y. App. Div. 1996).

[FN72]. See Cal. Civ. Code §§ 38, 39 (West 2000); Del. Code Ann. tit. 6 § 2705 (1998); Ga. Code Ann. § 13-3-24 (1998); Idaho Code § 32- 108 (1996); N.D. Cent. Code § 14-01-02 (1997).

[FN73]. Rein, *supra* note 17, at 1878.

[FN74]. Rest. (2D) Contracts, *supra* note 38, § 15 cmt. c.

[FN75]. *In re Estate of Gruske*, 534 N.E.2d 692, 695 (Ill. App. Ct. 1989); *Alberts v. Dunlavey*, 6 N.E.2d 26, 28 (Ohio Ct. App. 1936); *Monroe v. Shrivvers*, 162 N.E. 780, 781 (Ohio Ct. App. 1927).

[FN76]. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *Fordham L. Rev.* 1073, 1082 (1994).

[FN77]. *Id.*

[FN78]. See generally Green, *supra* note 16 (concluding that an unarticulated premise of incapacity is "fair dealing").

[FN79]. See Rest. (2D) Contracts, *supra* note 38, § 15 cmt. c (noting that factors regarding fairness suggest illness falling short of incapacity); *Calamari & Perillo*, *supra* note 54, § 8.10, at 325.

[FN80]. Margulies, *supra* note 76, at 1082.

[FN81]. Green, *supra* note 16, at 272; see also Rein, *supra* note 16, at 1119 ("It is nearly impossible to develop a test for competency or capacity that is completely noncircular either in its reasoning or application.").

[FN82]. Rest. (2D) Contracts, *supra* note 38, § 15 cmt. c.

[FN83]. *Id.*

[FN84]. *Bordner v. Kelso*, 127 N.E. 337 (Ill. 1920); *White v. Oregon Realty Exch. Inv. Co.*, 236 P. 269 (Or. 1925).

[FN85]. 85 So. 243 (Fla. 1920).

[FN86]. See *Klein v. Kent*, 95 N.W.2d 864 (Mich. 1959).

[FN87]. *Page v. Prudential Life Ins. Co.*, 120 P.2d 527 (Wash. 1942) (finding that because wife allowed husband to continue to manage insurance matters, there was no notice to the insurance company that he was incapacitated).

[FN88]. See *Ortelere v. Teachers' Retirement Bd.*, 250 N.E.2d 460 (N.Y. 1969).

[FN89]. *Hunt v. Golden*, 532 P.2d 26, 27 (Or. 1975).

[FN90]. Green, *supra* note 47, at 559.

[FN91]. See *supra* notes 43-46 and accompanying text.

[FN92]. 53 *Am. Jur.* 2D *Mentally Impaired Persons* § 164 (1996).

[FN93]. *Hunt*, 532 P.2d at 27.

[FN94]. *Hellman Commercial Trust & Sav. Bank v. Alden*, 275 P. 794, 799 (Cal. 1929). However, some states have held that a judgment of incompetency does not cause the ward to lose his capacity to contract. *Edmunds v. Equitable Sav. & Loan Ass'n*, 223 A.2d 630 (D.C. 1966).

[FN95]. *Defenbaugh & Co. v. Rogers*, 543 So.2d 1164, 1167 (Miss. 1969) (concluding that even if someone knowingly contracts with an incompetent person, punitive damages are only awarded if the conduct was intentional or reckless); see also *White v. Benkowski*, 155 N.W.2d 74, 77 (Wis. 1967).

[FN96]. *Pappert v. Sargent*, 847 P.2d 66, 69 (Alaska 1993); *Metter Banking Co. v. Millen Lumber & Supply Co.*,

382 S.E.2d 624, 628 (Ga. 1989); *Pennsylvania Co. for Banking & Trusts v. Philadelphia Title Ins. Co.*, 93 A.2d 687, 690 (Pa. 1953).

[FN97]. *Cundick v. Broadbent*, 383 F.2d 157, 160 (10th Cir. 1967).

[FN98]. *Page v. Prudential Life Ins. Co.*, 120 P.2d 527, 531 (Wash. 1942).

[FN99]. Rest. (2D) Contracts, *supra* note 38, § 12(2).

[FN100]. Usually, minors under a certain age are viewed as *per se* incapacitated to contract. See *infra* pp.115-16 and note 117.

[FN101]. *Alberts v. Dunlavey*, 6 N.E.2d 26, 28 (Ohio Ct. App. 1936); *Monroe v. Shrivvers*, 162 N.E. 780, 781 (Ohio Ct. App. 1927).

[FN102]. *In re Estate of Gruske*, 534 N.E.2d 692, 695 (Ill. App. Ct. 1989).

[FN103]. See *Cundick v. Broadbent*, 383 F.2d 157 (10th Cir. 1967); *Sims v. Slovin*, 207 A.2d 597 (Del. Ch.), *aff'd*, 213 A.2d 903 (Del. 1965); *Page v. Prudential Life Ins. Co.*, 120 P.2d 527, 531 (Wash. 1942).

[FN104]. *Maxine Boord Virtue, Restitution from the Mentally Infirm*, 26 N.Y.U. L. Rev. 291, 299 (1951).

[FN105]. *Bracken v. Johnson*, 249 S.W.2d 149 (Ky. Ct. App. 1952).

[FN106]. *Virtue*, *supra* note 104, at 298.

[FN107]. In approximately half of the cases reviewed, the contracts were upheld. See *Cundick*, 383 F.2d 157; *Sims*, 207 A.2d 597; *Enders v. Wesley W. Hubbard and Sons, Inc.*, 513 P.2d 992 (Idaho 1973); *In re Estate of Gruske*, 534 N.E.2d 692; *Rabin v. Blazas*, 537 So.2d 221, (La. Ct. App. 1988); *Klein v. Kent*, 95 N.W.2d 864 (Mich. 1959); *Stormon v. Weiss*, 65 N.W.2d 475 (N.D. 1954); *Crossman v. Reeves*, 825 P.2d 1330 (Okla. 1992); *Rixey v. Rixey*, 49 S.E. 586 (Va. 1905); *Burwell v. Burwell*, 49 S.E. 68 (Va. 1904); *Furlong v. Sanford* 12 S.E. 1048 (Va. 1891); *Page*, 120 P.2d at 531.

In the other half, the contracts were avoided. See *Edmunds v. Equitable Sav. and Loan Ass'n*, 223 A.2d 630 (D.C. 1966); *Watson v. Alford*, 503 S.W.2d 897 (Ark. 1974); *Sykes v. Campbell*, 256 S.W.2d 320 (Ark. 1953); *Hellman Commercial Trust & Sav. Bank v. Alden*, 275 P. 794 (Cal. 1929); *Dorsey v. Wolcott*, 50 N.E. 1015 (Ill. 1898); *In re Estate of Faris*, 159 N.W.2d 417 (Iowa 1968); *Bracken*, 249 S.W.2d 149; *Farnum v. Silvano*, 540 N.E.2d 202 (Mass. App. Ct. 1989); *State Bank of Cologne v. Schrupp*, 375 N.W.2d 48 (Minn. 1985); *Wenzel-Mosset v. Nickels*, 575 N.W.2d 425 (N.D. 1998); *Hunt v. Golden*, 532 P.2d 26 (Or. 1975); *King v. Davis*, 11 A. 727 (Vt. 1888).

[FN108]. *Rein*, *supra* note 16, at 1102-03.

[FN109]. *Id.* at 1836.

[FN110]. *Id.* at 1162-1163.

[FN111]. *Id.* at 1167 (quoting Marshall B. Kapp, *Medical Empowerment of the Elderly*, *Hastings Center Rep.*, July-Aug., 1989, at 5).

[FN112]. For purposes of this Comment, "advanced old age" is reached after age 75.

[FN113]. See *supra* p. 818 and note 97.

[FN114]. *Bracken v. Johnson*, 249 S.W.2d 149, 152 (Ky. 1952).

[FN115]. See *supra* p. 813 and note 51.

[FN116]. See *supra* p. 817 and note 87.

[FN117]. See Ark. Code Ann. § 9-26-101 (Michie 1998) (noting that contracts made by children aged eighteen or older may not be rescinded); Cal. Fam. Code §§ 6701, 6710, 6712 (West 1999) (noting that contracts made by minors under the age of eighteen may be disaffirmed); Idaho Code §§ 32-101, 32-103 (1998) (noting that contracts made by minors under the age of eighteen may be disaffirmed); Kan. Stat. Ann. §§ 38-101, 38-102 (1998) (noting that contracts made by minors under the age of eighteen if single or sixteen if married, may be disaffirmed).

[FN118]. Green, *supra* note 47, at 565.

[FN119]. See *supra* p. 815 and note 69.

[FN120]. See *supra* p. 820 and note 109.

[FN121]. See discussion of proposed uniform legislation *infra* Part IV.A.1.

[FN122]. See *supra* note 112.

[FN123]. See *supra* note 60 and accompanying text.

[FN124]. See *supra* note 117 and accompanying text.

[FN125]. U.S. Const. amend. XIV, § 1.

[FN126]. See *supra* note 62 and accompanying text.

[FN127]. See *supra* note 63 and accompanying text.

[FN128]. See *supra* note 109 and accompanying text.

[FN129]. Americans with Disabilities Act of 1990, 42 U.S.C. § 12212 (1994).

[FN130]. Child Protection Act of 1984, 18 U.S.C. §§ 2251 to 2255, 2516 (1994).

[FN131]. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1994).

[FN132]. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994).

[FN133]. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976).

[FN134]. *Id.*; *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); see also *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

[FN135]. See *Brown v. Bowen*, 905 F.2d 632 (2d Cir. 1990) (concluding that exemption of individuals over age 70 from receiving full social security benefits furthers legitimate state interest of Social Security system to protect the elderly).

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