

**YOU CAN'T HAVE A BIGGER PIE, WITHOUT A BIGGER PAN;**

**THE FORCES BEHIND INTEGRATIVE BARGAINING**

**By Joseph Brick**



## ABSTRACT

Integrative bargaining is a highly effective means of negotiating an agreement. However, it is also an underutilized method. Although there has been a recent focus on the topic in the past thirty years, the factors which deem it beneficial are still little understood. What this paper attempts to set forth is an explanation of why integrative bargaining is a successful and desirable method of negotiating. With a better understanding of why integrative bargaining is effective, negotiators may be better able to utilize this method to its full potential. This paper culminates with a suggestion on how to best exploit this new understanding.

Research up to this point has suggested that integrative bargaining is desirable due to the increasing the pie rationale. The contention set forth in this paper is that there are alternative factors driving integrative bargaining. Exploration of this theory begins with an analysis of whether integrative bargaining is driven by the interjection of equity principals into what was traditionally a law driven enterprise, that of negotiation. It is argued that the stability of contract which results from an earlier application of equitable principals in the negotiating process is just as crucial to integrative bargaining as the desire to increase the pie.

With this conclusion, it becomes apparent that solutions which encourage integrative bargaining will result in more stable contracts. The increased stability rationale holds true even where there is no increase in the fixed sum negotiation. Integrative bargaining is thus shown to be desirable in all cases. To encourage the stability of contract, this paper concludes with the suggestions that mandatory disclosure laws be adopted to help encourage the use of integrative bargaining.

## INTRODUCTION

Who doesn't dread purchasing a new car? Aside from the aversion to spend money, which most people feel, there is also the growing anxiety which buyers feel when they contemplate the haggling which will inevitably ensue. Distributive bargaining, also known as positional bargaining, is a negotiating process in which the parties view the resources as limited and therefore try to exploit the other party to gain by their loss.<sup>1</sup> This hard-nose style is bound to leave a bad taste in any negotiator's mouth.

There is however another way, which is gaining support. Integrative bargaining is the process by which the negotiating parties focus on interests and not positions, gathering information to find a mutually beneficial solution.<sup>2</sup> The resulting solution often "expands the pie" allowing greater gains by both parties.<sup>3</sup> Greater benefits for both parties are generally attributed with the attractiveness of this method.<sup>4</sup>

Integrative bargaining is not being driven by the sole desire to "expand the pie". Indeed, most parties do not even fathom a larger pie upon commencement of negotiations.<sup>5</sup> Overlooked in the analysis of integrative bargaining are the notions of equity and the resultant stability that an earlier application of equity affords both of the negotiating parties. This paper suggests that these overlooked factors, in addition to the "expansion of the pie" concept are compelling the trend toward integrative bargaining.

---

<sup>1</sup> Daniel R. Krause et al., *Bargaining Stances and Outcomes in Buyer-Seller Negotiation: Experimental Results*, J. Supply Chain Mgmt. 4, available at 2006 WLNR 14956499.

<sup>2</sup> *Id.* at 6-7.

<sup>3</sup> Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In*, 70-71 (2d ed. 1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 58-59.

By understanding what forces are driving the influx of integrative bargaining into the negotiating process, we will be better able to adapt to this new process and adopt policies which will foster problem solving, the integrative bargaining way. In this paper, we will first review the established rationale of integrative bargaining. Then, as negotiations inevitably lead to contracts, we will explore the role equity plays in them. The destabilizing forces of post formation application of equity principals to contracts will then be considered in the stability section. Both the stability and equity principals analyzed in the previous contract sections will then be applied to realm of negotiations. This note will conclude with an evaluation of the driving forces behind integrative bargaining and suggestions which will foster such a transition.

### **Why Negotiators Want to Get to Yes?**

In what has been described as a landmark text in the field of Negotiation, *Getting to Yes* offers a unique prospective on the merits of integrative bargaining.<sup>6</sup> Through its many illustrations, the value of integrative bargaining over distributive bargaining becomes vividly apparent. One such example encompassed in the text was that of the orange.<sup>7</sup> The story goes something like this; two sisters are fighting over an orange.<sup>8</sup> The mother in a solemnest act, splits the orange down the middle awarding each daughter one half of the orange.<sup>9</sup> In first light, this seems like an equitable remedy.<sup>10</sup> This is distributive bargaining.<sup>11</sup> However, if the mother

---

<sup>6</sup> Valerie A. Sanchez, *Back To The Future of ADR: Negotiating Justice and Human Needs*, 18 OHSJDR 669, 693-94 (2003).

<sup>7</sup> Fisher, et al., *supra* note 3, at 56-57.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

had inquired as to the specific interest each of her daughters maintained in the orange, both daughters may have been able to realize even greater benefits.<sup>12</sup> There is a genuine possibility that one daughter wanted the orange peel to use in her baking, and the other daughter wanted the fruit.<sup>13</sup> Listening to interest and not positions in order to “enlarge the pie” or benefit to both parties is the crux of integrative bargaining.<sup>14</sup> Enlarging the pie is also the main motivating factor which *Getting to Yes* cites for the use of Integrative bargaining.<sup>15</sup> But what if there exist other benefits which are at least equally compelling, if not more?

One of the problems plaguing negotiators in their attempts to engage in integrative bargaining is that many parties do not fathom a larger pie but instead holdfast in their positional bargaining.<sup>16</sup> The fact that negotiators can pass over the “enlarging the pie” benefit is a symptom of an incomplete theory. The deficiency of the theory is highlighted by the simple question, should integrative bargaining be used in instances where there would be no enlarging of the pie? For instance, where an insurance company is liable to an automobile owner for the cost of repair for his recently vandalized car. There are very few, if any, realistic ways to “enlarge the pie” in this simple reimbursement contract. However, there are other reasons to use integrative bargaining. These reasons will be explored later in this note. To better understand the motivating factors behind integrative bargaining, an exploration of the finished negotiation, the contract, is necessary.

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 56-60.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 59.

## Equity in Contracts

The only time a court will disturb the stability of a contract, and the bargained for exchange, is in the name of equity.<sup>17</sup> Reverence for the contract is highlighted by the Latin term *Pacta Sunt Servanda* which means, agreements must be kept.<sup>18</sup> Indeed, parties are generally left to order their affairs as they deem fit.<sup>19</sup> To understand the role of equity in negotiations we must first delineate the extent to which equity already has permeated the law of contracts. In pursuit of that goal, the following is a brief summary of the various roles equity has taken in the realm of contracts.

Equitable concerns have shaped various areas of contract law. From formation, with concepts such as equitable estoppel, to equitable remedies the influence has been substantial. In this section we will focus on the equitable defenses to contract formation. In each section explored below, the law deems certain contracts as void or voidable due to some equitable concern. This is a destabilizing force which allows parties to invalidate their contracts in the name of equity.

Duress is a defense to contract enforcement and in certain conditions, contract formation.<sup>20</sup> The exact definition of duress varies among jurisdictions but all courts concur on the core meaning.<sup>21</sup> Williston defines duress by setting forth three elements that need to be satisfied. They are, “[1] the making of an improper threat, [2] that induces the victim’s assent to

---

<sup>17</sup> See *Bledsoe v. Watson*, 106 Cal. Rptr. 2d. 197, 198 (Cal. Ct. App. 1973).

<sup>18</sup> Black’s Law Dictionary 1140 (8th ed. 2004).

<sup>19</sup> 17 Am. Jur. 2d. *Contracts* §277 (2004).

<sup>20</sup> Williston on Contracts, Fourth Edition § 71:4 (1999), citing Restatement (Second) of Contracts §§ 174, 175 (1981).

<sup>21</sup> *Id.*

the coercing party's proposal, [3] and the absence of alternatives available to the victim.”<sup>22</sup> A contract which was formed with the assent of a victim of an improper threat, who had no other alternatives at the time, is voidable by that party.<sup>23</sup>

The premise of this defense is based on equitable concerns. Duress voids contracts on the theory that a person whom is threatened into assent is not really agreeing to the contract terms.<sup>24</sup> Although this is a technical contract formation problem, in cases where the contract is merely voidable due to a threat, there is an equitable element involved.<sup>25</sup> The crux of the defense of duress is that it would not be fair to enforce a contract against a party who never validly assented to the terms.<sup>26</sup> This is one example of courts applying equitable remedies to facially valid contracts to ensure fairness in the agreements of parties.

Although done in the name of equity, it is easy to see that the court's after the fact invalidation of a contract leads to instability. The court is in fact substituting the judge's own notions of fairness for the agreement reached by the parties. However, the court's perspective is far removed from the time of contract formation. Whether the stability of contracts should be sacrificed for a post hoc application of equity is explored in a subsequent section.

Unconscionability is the definitive example of a contract defense based on equity.<sup>27</sup> Although the law of contracts shies away from paternalism, the courts have refused to enforce what they deem unconscionable agreements.<sup>28</sup> Unconscionable agreements are defined as those which “no promisor with any sense, and not under a delusion, would make, and that no honest

---

<sup>22</sup> *Id.* at 439.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See generally* Williston on Contracts (Fourth) §§ 71:1-4 (1999).

<sup>26</sup> *Id.*

<sup>27</sup> *See* Williston on Contracts (Fourth) § 18:1 (1999).

<sup>28</sup> *Id.*

and fair promisee would accept.”<sup>29</sup> The courts readily examine the context of the negotiations, the respective bargaining power of the parties, and the bargain itself to determine if the agreement reaches such an inequity that can be classified as unconscionable.<sup>30</sup> A finding of Unconscionability may result in a reformation of the contract or provision or an invalidation of the contract as a whole.<sup>31</sup>

Unconscionability is a question of law.<sup>32</sup> Thus the court will determine whether the bargain is unconscionable according to its own ideas of fairness. The “shocks the conscience” standard, which is used by the courts in evaluating agreements, by its very nature involves the injection of a subjective opinion of the court.<sup>33</sup> Employing this doctrine, the court hopes to relieve the weaker party from the burden of an unconscionable agreement in the name of equity. However, it is important to note that this is another situation whereby the post-formation application of equity results in instability.

The Uniform Commercial Code (UCC) also contains equitable facets. Already discussed, was the doctrine of Unconscionability. The UCC has adopted this doctrine among its provisions.<sup>34</sup> In addition, and on a far grander scale, the UCC implies a requirement of good faith and fair dealings into every contract for the sale of goods.<sup>35</sup> These equitable principles allow courts to invalidate or modify contracts which are unfair. Much like the general common law contract defenses discussed above, the application of equity in the UCC comes at a time well

---

<sup>29</sup> Black’s Law Dictionary 75 (8th ed. 2004).

<sup>30</sup> 17 Am. Jur. 2d *Contracts* §277 (2004).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at § 278.

<sup>33</sup> *Id.* at §279.

<sup>34</sup> 17 Am. Jur. 2d. *Contracts* §277 (2004).

<sup>35</sup> U.C.C. § 1-102 (2000).

past formation.<sup>36</sup> Delaying the invalidation of the contracts due to equitable concerns to this later time is the very essence of instability.

### **Equity in Negotiation**

Courts often look to the equitable aspects of contract formation such as the bargaining power of each negotiator in order to determine whether or not the contract itself is equitable.<sup>37</sup> If it is, the normal law of contracts applies. If not, a more equitable remedy is applied which may dissolve the contract or alter it to some extent.<sup>38</sup> Is the injection of equity into the negotiating process, a preemptive measure which will take the equitable power of the courts out of the judge's hands and put it into the negotiating parties? If so, is the reallocation of equity to the contracting parties a desirable effect? Are the resultant contracts more stable for the parties, thereby reinforcing the principles of law in contracts? The answers to these questions are explored in this section.

Agreements to negotiate in good faith strike the first time reader as an oxymoron. However, on closer inspection the agreements provide an additional ready-made cause of action against a contracting party who is later found to have violated the agreement. Various jurisdictions have taken differing views on the validity of such agreements to negotiate in good faith.<sup>39</sup> Delaware law has found such agreements unenforceable as they are merely "agreements

---

<sup>36</sup> 67 Am. Jur. 2d. *Sales* §10 (2003).

<sup>37</sup> 17 Am. Jur. 2d. *Contracts* §277 (2004).

<sup>38</sup> *Id.*

<sup>39</sup> *See* *Venture Associates Corp. v. Zenity Data Systems Corp.*, 987 F.2d 429, 433 (7th cir. 1993); *Avents Environmental Science USA LP. v. Scotts Co.*, 383 F. Supp. 2d 488, 511 (S.D.N.Y. 2005).

to agree.”<sup>40</sup> Contrast this with the law of contracts which reads an obligation of good faith and fair dealing into every agreement.<sup>41</sup> The disparity between the two is what creates instability in contract law. The lack of equity principals in negotiations leaves unscrupulous negotiators free to form inequitable contracts. These contracts lack the requirements of good faith and fair dealings and are thus left open to subsequent attack. But if equity principals are applied during the negotiation process, the source of instability disappears. Stability can be accomplished by the application of integrative bargaining to all contract negotiations.

The question of whether integrative bargaining is an equitable solution must now be addressed. An equitable solution would be one that is just, or consistent with justice.<sup>42</sup> For integrative bargaining to be effective, the parties must exchange information.<sup>43</sup> The exchange of information is crucial because it allows the parties to discover and focus on the opponent’s interests and not merely their positions.<sup>44</sup> With more information, the parties are more likely to be well informed and are therefore on a more equal footing. This equal bargaining power will inevitably result in more fair and just agreements.

The question then becomes whether this addition of equity to the negotiating process, will preemptively remove the equitable power from the court’s hands and place it, instead, within the hands of the negotiating parties? This note argues that the contracts formed by integrative bargaining are more stable and less likely to be challenged in the courts of law. If this hypothesis proves true, fewer courts will see the agreements by which individuals order their affairs. The resulting stability will increase certainty in business, reduce economic waste, and benefit the

---

<sup>40</sup> *Avents Environmental Science USA LP. V. Scotts Co.*, 383 F. Supp. 2d 488, 511(S.D.N.Y. 2005).

<sup>41</sup> Williston on Contracts (Fourth) § 63:22 (2002.)

<sup>42</sup> Black’s Law Dictionary 578 (8th ed. 2004).

<sup>43</sup> Fisher, et al., *supra* note 3, at 40-44.

<sup>44</sup> *Id.*

judiciary with lighter case loads. All are desirable effects, creating more stability for contracting parties thereby reinforcing the principals of contract law explored in more detail below.

### **Stability in contracts**

Stability in contract is more important than a proper rule of law.<sup>45</sup> This principal was recognized by the founders in Article 1 Section 10 of the United States Constitution when they provided “No state shall...pass any...law impairing the obligations of contracts”.<sup>46</sup> To understand the role of stability in negotiations, it is important to understand how prevalent stability concerns are in contract law and how they have shaped that area.

One such area is the sale of goods. The Uniform Commercial Code (UCC) addresses the concern of stability in agreements as they apply to the sale of goods. In the UCC’s statement of purpose, it expressly states that “[t]his act shall be liberally construed and applied to promote its underlying purposes and policies.”<sup>47</sup> The underlying purposes are defined as “ to simplify, clarify and modernize the law governing commercial transactions” and “ to make uniform the law among the various jurisdictions.”<sup>48</sup> Both of these purposes clearly effectuate stability.

The parole evidence rule is the quintessential contract stability provision. Where the parties adopt a writing as their final and complete expression of their respective agreement, the contract is said to be fully integrated.<sup>49</sup> This fully integrated agreement is the whole contract.<sup>50</sup> The parole evidence rule is a complete bar to extrinsic evidence to prove the terms of the fully

---

<sup>45</sup> Maxton Builders, Inc. v. Lo Galbo, 68 N.Y.2d 373, 382 (1986) (citing *Matter of Eckart*, 39 N.Y. 2d. 493, 500 (1976)).

<sup>46</sup> U.S. Const. art. I, § 10.

<sup>47</sup> U.C.C. § 1-103 (2000).

<sup>48</sup> U.C.C. § 1-102 (2000).

<sup>49</sup> Williston on Contracts (Fourth) § 33:1 (1999).

<sup>50</sup> *Id.*

integrated contract.<sup>51</sup> The name aside, the rule is not one of evidence because the integrated agreement is not advanced as evidence to prove the existence of a contract but is actually the contract itself.<sup>52</sup> The justification for the rule is that of contract stability.<sup>53</sup> The definite terms of a written agreement must be honored over the contemporaneous or preceding agreements which any party may advance to attack a contract which later becomes unfavorable.<sup>54</sup> The Supreme Court of Arkansas has stated that “the stability of our economic transaction and the contract law upon which they are founded demand strict application of the parol evidence rule.”<sup>55</sup>

Stability is the reason people contract. As illustrated above, stability is a major concern in the arena of contracts. In the ensuing sections of this paper, keep in mind the stability aspect of contractually ordered relations.

### **Stability in Negotiation**

The essence of negotiation is to lead to an agreement which is accepted and binding on both sides. The stability of the agreements reached is paramount. Without stability, the whole negotiating process would be nothing more than an exercise in futility. The law of contracts has long favored stability, even to the detriment of equity.<sup>56</sup> However, what if both stability and equity were possible in the same agreement? As this section explores, agreements can be both equitable and stable. Success is merely a matter of when the equitable principals are applied, whether the application of equity is post hoc or, as this note favors, preemptive.

---

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 33:3 (1999).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* § 33:1 (1999).

<sup>55</sup> *Farmers Co-op. Ass’n v. Garrison*, 454 S.W.2d 644, 648 (Ark. 1970).

<sup>56</sup> *Maxton Builders, Inc. v. Lo Galbo*, 68 N.Y.2d 373 (1986).

Looking back to the example of the “equitable orange”, a lesson of stability in negotiation is imbedded within the fruit. Suppose for a moment, that the mother, after dividing the orange equally between her daughters, left the room. Keep in mind that both daughters perceived their individual need for the entire orange.<sup>57</sup> The chance that the older, larger daughter would snatch the other half from her little sister is high. Putting this situation in the context of contracts, the chance of the contract being breached by one party is relatively high.

But what if the mother would have employed integrative bargaining? As illustrated above, the pie for both sisters would have increased, each meeting their respective needs.<sup>58</sup> However, there was an additional bonus to the new agreement. Both sisters having satisfied their needs are less likely to breach the contract after the mother leaves the room. This is the stability which can be derived from an earlier application of integrative bargaining to the negotiating process. The resultant stability is the additional factor driving the application of integrative bargaining.

Recall the car insurance example from above. This example contains no possibility of additional benefits such as “expanding the pie”, which would justify the use of integrative bargaining. *Getting to Yes* teaches us not to focus on positions of the parties but instead to focus on the parties’ interests.<sup>59</sup> In our example, the position of the insurance company is that they would like to pay as little as possible, and the position of the insured is that he would like to receive the cost of repair. Application of integrative bargaining process involves the exchange of information.<sup>60</sup> This exchange allows the parties to learn of the opposition’s interest and not

---

<sup>57</sup> Fisher, et al., *supra* note 3, at 56-57.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 40.

<sup>60</sup> *Id.* at 40-44.

merely their positions.<sup>61</sup> Here, the interests are essentially the positions, and therefore, this example does not allow us to enlarge the pie.

But through the exchange of information we may learn that the car was damaged when parked on Maple Avenue during the evening of October thirty-first. This fact may have been easily attained by review of the insurance claim filed by the claimant. However, the insured may go on to inform the insurance company that the location is around the block from a nightclub which has a rowdy Halloween party every year. Although parking in that location is not contrary to the policy's terms, the insurance company may use that information to modify their contract with the insured. The insurance company may propose that if the insured would avoid parking in that location on Halloween, and in return they would agree not to raise his insurance premiums. Neither party would receive a larger slice under this agreement. However, it may be a more equitable remedy, allowing the insurance company to avoid future losses at the same time the insured is able to protect his interest in his previously bargained for premium. An earlier application of equity, such as this, will in turn create a more stable contract. Both parties having protected their respective interest are far less likely to breach. Equity and stability were the motivating factors in the use of integrative bargaining in this example.

The benefits of a more equitable, stable contract would seem to be enough to encourage the use of integrative bargaining in all negotiations. However, integrative bargaining remains a negotiator's option. This voluntary nature hinders the prospective benefits. Not only can a negotiator choose to ignore this method, but also his choice may inhibit the use of integrative

---

<sup>61</sup> *Id.*

bargaining by his opponent.<sup>62</sup> The question then becomes, how can we foster the use of integrative bargaining?

### **Compelling Integrative Bargaining**

The retroactive injection of equity into contracts by the judiciary creates uncertainty for the contracting parties. After the merger of law and equity, a contracting party can no longer rely with full certainty on the validity of their contract. The judicial application of equitable principals comes at a time far removed from the original negotiation. This time gap allows for changed circumstances, differing interpretations, and other sources of ambiguities. The courts engage in mere conjecture as to whether the actual intent of the parties is reflected in a later judicially altered or nullified contract.

This source of instability is intolerable when one considers the main point of contracting. Parties should be free to order their affairs.<sup>63</sup> This liberty is in direct conflict with the judicially imposed paternal fairness.<sup>64</sup> What is needed is a way that contracting parties remain free but have the information needed to order their affairs in an equitable way. Integrative bargaining is as close as the world has come to this end. However, the problem is that there is no mandatory disclosure. The lack of compulsion leaves the contracts ripe for a judicial pillage in the name of fairness. One solution which would retard this onslaught is the adoption of mandatory disclosure laws. With these laws in place, the parties would be once again free to order their affairs. No longer would a contracting party have to fear future invalidation or modification. The stability

---

<sup>62</sup> *Id.* at 107-108.

<sup>63</sup> 17 Am. Jur. 2d *Contracts* §277 (2004).

<sup>64</sup> Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763-64 (1983).

this would create would surely help the markets. The economic waste caused by soured deals would decrease as less and less contracts were invalidated. Negotiations no longer would be a battle of wills and would thereby proceed more rapidly.

Litigation resources, the time and money expended in taking an action in front of a court, would be removed from contract contests and be used to ensure full disclosure. The shift of resources would reduce the issues at trial and generally create a more efficient system. The court would no longer be retroactively interpreting the conditions of contract formation but would be ruling on current matters of whether one party had relevant material and if so whether they failed to disclose it. These simplified issues would be easily decided by courts. The party's intent to such matters is irrelevant. The whole proceeding is reduced to a binary question; did the party have the information sought?

The court load could be further mitigated by the use of Alternative Dispute Resolution methods. Disclosure disputes would be an area ripe for mediation and arbitration, relieving the courts of a significant amount of civil litigation. Use of these methods would also avoid the often confrontational court room setting and preserve the relationships between the contracting parties.<sup>65</sup>

Mandatory disclosure laws provide benefits to the negotiating party who chooses to disclose the relevant information. A disclosing party avoids the costs of litigation, forms contracts more efficiently, and creates goodwill with his contracting parties. The potential costs of arbitration or litigation would encourage the parties to disclose the information. In contrast, the current state of the law encourages the parties to keep their cards close and take their chances that the resulting contract may someday be found invalid. The gamble pays off even if the

---

<sup>65</sup> Jennifer Boggs, *For Good Collaboration, Be Prepared For Failure*, 17 *Bioworld Today* Volume 195 (2006) available at 2006 WLNR 17545555.

contract is later found invalid as long as the party obtained a benefit by that later time.

Considering the time value of money, this possibility would be easier than one would think.

Notwithstanding the preceding discussion, the court's equitable powers should not be diminished in any way. However, there should be a strong presumption that any contract formed by a negotiation subject to the mandatory disclosure laws is valid. The presumption is needed to protect the intent of the parties at time of contracting.

Where to begin? Mandatory disclosure laws could be first introduced to areas affecting consumer negotiations. The law of sales already provides protectionist policies in regards to non-commercial consumers.<sup>66</sup> For instance, a mandatory disclosure law could read "Manufacturers and dealers must disclose to consumers prior to sale, the manufacturing price of any automobile, the margin of profit charged, and the window price." Unlike my recent two day negotiation for the purchase of a car, a negotiation under this proposed mandatory disclosure law would be expedited. Prior to the sale, the manufacture would, by law, be compelled to disclose their asking price (optimal price), their cost of production (close to their reservation point), and their profit margin which would constitute the settlement zone.<sup>67</sup> A consumer would not waste the negotiator's time demanding a price below the manufacturer's reservation point. The settlement zone would be immediately apparent. The consumer would instantly know whether they could afford the car and could negotiate accordingly. The resultant negotiation would be manifestly equitable. With all the information available to the consumer, any contract formed would be fair and a true reflection of the intent of the parties.

---

<sup>66</sup> See generally U.C.C. (2000).

<sup>67</sup> See generally Nicholas Herman et. al., *Legal Counseling and Negotiating: a Practical Approach* (Lexis 2001).

If the consumer did not believe the information disclosed, he would have a real choice: either seek the true information or not negotiate with the dealer. To seek the true information, the consumer would be able to rely on any mediation or arbitration allowed under local law or seek redress in a court of law. This process would be quick and easy. If the litigation would take too long or not be economically viable when considering the cost of the item, the consumer would be free to not involve himself in the process. This choice, to walk away, is not available to consumers currently. Currently the wronged consumers still have to expend time and money to litigate a contract which was inequitably formed. The resultant economic waste is the cost of inequitably formed contracts. Once applied to consumer negotiations, the mandatory disclosure laws could be expanded to encompass all areas of negotiation and contracting.

## CONCLUSION

Far from being driven by the sole desire to “expand the pie”, integrative bargaining is successful due to multiple factors. Overlooked in the analysis of integrative bargaining are the notions of equity and the resultant stability that flows from the earlier application of equity. These previously unnoticed factors, in addition to the “expansion of the pie” theory are compelling the trend toward integrative bargaining.

With this new understanding, integrative bargaining can be honed into an even more effective tool. Mandatory disclosure laws are just one way in which the benefits of integrative bargaining can be encouraged. Once widespread, the use of integrative bargaining, through its attributes, will ease judicial caseloads, create more equitable contracts, and encourage business through stability. These benefits are what will create the bigger pan so that the “expand the pie” concept will rise to its full potential.