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UNCONSCIONABILITY IN CONTRACTS BETWEEN MERCHANTS

by
Jane P. Mallor*

THE doctrine of unconscionability¹ has played a role in Anglo-American contract law since at least the eighteenth century.² In the past twenty years, however, the doctrine has enjoyed an ascendancy that could scarcely have been dreamed of by the chancellors in equity who first employed the doctrine.³ Its codification in section 2-302 of the Uniform Commercial Code of almost all states,⁴ and its adoption and application by courts in a wide variety of cases outside the scope of the Uniform Commercial Code,⁵ have brought unconscionability into the forefront of modern American contract law.

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1. "Unconscionability is the rubric under which the judiciary may refuse to enforce unfair or oppressive contracts in the absence of fraud or illegality." *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 810 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982). Although almost all courts and commentators agree that unconscionability is a concept incapable of precise definition, some courts have offered working definitions. The Supreme Court defined unconscionability as a bargain that "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750)). One of the most frequently encountered formulations of unconscionability comes from the opinion in the landmark case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), in which the court described unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* at 449.

2. See Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 937-38 (1969); Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143, 1144 (1968).

3. Unconscionability originated in courts of equity primarily as a defense to specific performance. Harrington, *Unconscionability Under the Uniform Commercial Code*, 10 S. TEX. L.J. 203, 204 (1968); Note, *Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts*, 35 HASTINGS L.J. 161, 162-63 (1983) [hereinafter Note, *Unconscionability Redefined*]; Note, *supra* note 2, at 1144. For a discussion of the use of unconscionability to deny equitable relief see E. FARNSWORTH, *CONTRACTS* § 4.27 (1982). Unconscionability was also available at law, but was rarely applied. *Id.* § 4.27, at 306; Spanogle, *supra* note 2, at 938.

4. California did not adopt § 2-302 as part of its Uniform Commercial Code, but the California legislature enacted an unconscionability statute that is applicable to all contracts, not just those covered by the U.C.C. CAL. CIV. CODE § 1670.5 (West 1985).

5. See *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So. 2d 865, 869 (Fla. Dist. Ct. App. 1981) (class action by condominium unit owners to avoid recreational lease); *German-town Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 491 A.2d 138, 147-48 (1985) (unconscionability applied to confession of judgment form and notes); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (unconscionability provision closely paralleling § 2-302 of the

The primary use of unconscionability has been to rescue from hard bargains those who are grossly disadvantaged in their dealings with sharp, or at least more sophisticated, traders.⁶ In equity, courts extended this solicitude to particular classes of people who were deemed to be easily duped, such as widows, orphans, farmers, sailors on leave, and the weakminded.⁷ In modern cases, consumers, particularly low income consumers, have been the most frequent beneficiaries of the doctrine of unconscionability.⁸ Although unconscionability is applied most often and most aggressively to protect consumers, the doctrine is by no means applicable only to consumers. Because unconscionability operates as a general circumscription on contracts both within and outside the UCC,⁹ the mere fact that a contract is formed between two commercial parties does not insulate that contract from judicial intervention on the ground of unconscionability.¹⁰ A number of those who have successfully invoked unconscionability have been businesspeople,¹¹ or, in the vernacular of the Code, merchants.¹²

U.C.C.). For a discussion of the expansion of the concept of unconscionability beyond sales of goods see Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 808-12 (1969).

6. Note, *supra* note 2, at 1144-45.

7. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 531-33 (1967). Professor Leff referred to these classes of persons as "presumptive sillies." *Id.* at 532.

8. See, e.g., *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 810 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982) (unconscionability rules developed in consumer cases based on buyer's lack of sophistication, unfamiliarity with consequences of contract terms, and need for goods or services; these considerations absent when neither party is a consumer); see also Ellinghaus, *supra* note 5, at 762 n.21 (judicial trend toward regarding the contracts of low income consumers as sui generis); *id.* at 768-73 (discussing use of unconscionability to prevent exploitation of the underprivileged); Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 39 (1981) (consumers may be modern class of "presumptive sillies"; warns against sweeping generalizations about consumers).

9. One commentator referred to unconscionability as "an all-purpose weapon against contract problems." Spanogle, *supra* note 2, at 931.

10. *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 409 (1980); see E. FARNSWORTH, *supra* note 3, § 4.28, at 313-14. An early draft of the section that later became § 2-302 specifically mentioned merchants, although it did so to create more rigorous standards for merchants. For a discussion of the 1943 draft, which provided that merchants who signed unconscionable form contracts were bound by the contract terms even if they had not read them, so long as they had had the opportunity to read them, see Leff, *supra* note 7, at 492, 507 n.78. Nonmerchants, on the other hand, were not bound to such contracts unless they had actually read them. This distinction between merchants and nonmerchants was abandoned without explanation in the 1944 draft. *Id.* at 493, 507 n.78.

11. See, e.g., *Langemeier v. National Oats Co.*, 775 F.2d 975, 976-77 (8th Cir. 1985) (popcorn grower); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144, 148 (1971) (service station operator); *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 121 N.H. 344, 430 A.2d 638, 640 (1981) (commercial weaving business). One commentator noted that the majority of the cases cited as illustrations in the official comments to § 2-302 involve transactions between merchants. Goldberg, *Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors*, 58 WASH. L. REV. 343, 348 (1983).

12. The U.C.C. defines "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." U.C.C. § 2-104(1) (1977).

The term "merchant" in this Article indicates a person or entity engaged in any kind of business, and is not limited to those who produce and sell goods. To borrow the Code's term,

Opinions quite commonly assert a virtual presumption against unconscionability in contracts between merchants¹³ or rebuff a merchant's claim of unconscionability with the most perfunctory of explanations.¹⁴ Even in opinions in which courts expend more energy explaining their unconscionability determinations, a great deal of variation exists in the courts' attention to such factual matters as the parties' individual characteristics and bargaining power¹⁵ as well as in the level of proof the courts require to sustain a claim of unconscionability.¹⁶ At the other extreme, cases exist in which courts demand "superconscionability"¹⁷ in various commercial settings.¹⁸ These cases make little sense if one views all contracts between merchants as meriting the same unconscionability analysis. While it is clear that some forms of unconscionability that occur in merchant-to-consumer transactions probably could not occur in many merchant-to-merchant transactions, it is equally clear that a principled application of the doctrine of unconscionability to merchant cases requires that courts take into account the characteristics of the parties, the details of the transaction, and the type of unconscionability alleged.

Although commentators have "lavished more ink" on unconscionability than on any other single section of the Code,¹⁹ surprisingly little scholarly attention has focused on the task of articulating standards for unconscionability determinations in contracts between merchants.²⁰ This situation

any "professional in business," regardless of the nature of the business, is, for the purposes of this Article, a merchant. See *id.* comment 2.

13. See, e.g., *Phillips Mach. Co. v. LeBlond, Inc.*, 494 F. Supp. 318, 323 (N.D. Okla. 1980); *All-States Leasing Co. v. Top Hat Lounge, Inc.*, 198 Mont. 1, 649 P.2d 1250, 1253 (1982).

14. See, e.g., *M & W. Dev., Inc. v. El Paso Water Co.*, 6 Kan. App. 2d 735, 634 P.2d 166, 170 (1981).

15. Compare *BGW Assocs. v. Valley Broadcasting Co.*, 532 F. Supp. 1112, 1114 (S.D.N.Y. 1981) (decision partially based on parties' individual characteristics) and *Johnson v. John Deere Co.*, 306 N.W.2d 231, 238 (S.D. 1981) (same) with *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1209-10 (7th Cir. 1985) (no consideration of details of parties' characteristics or bargaining process in explaining unconscionability determination) and *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or. App. 131, 683 P.2d 95, 104 (1984) (same).

16. Compare *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982) (proof of unequal bargaining power alone insufficient; plaintiff failed to show unfair surprise) and *Gordon v. Crown Cent. Petroleum Corp.*, 423 F. Supp. 58, 62 (N.D. Ga. 1976) (plaintiff must show that defendant exerted unusually strong bargaining power), *aff'd*, 564 F.2d 413 (5th Cir. 1977) with *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 824-25, 623 P.2d 165, 176, 171 Cal. Rptr. 604, 615 (1981) (en banc) (court should closely scrutinize contract provisions that strongly indicate overreaching by dominant party).

17. Superconscionability means taking affirmative steps to communicate and explain a contract or a provision of a contract. See *Leff, supra* note 7, at 493.

18. E.g., *Langemeier v. National Oats Co.*, 775 F.2d 975, 977 (8th Cir. 1985); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 490, 186 Cal. Rptr. 114, 124 (1982).

19. E. FARNSWORTH, *supra* note 3, § 4.28, at 307. The commentary on unconscionability is too vast to cite every article devoted to the topic. Some of the leading articles are *Elinghaus, supra* note 5; *Fort, Understanding Unconscionability: Defining the Principle*, 9 *LOY. U. CHI. L.J.* 765 (1978); *Hillman, supra* note 8; *Leff, supra* note 7; *Murray, Unconscionability: Unconscionability*, 31 *U. PITT. L. REV.* 1 (1969); *Spanogle, supra* note 2.

20. Relatively few articles deal with unconscionability in a commercial context. For general discussions of unconscionability in particular merchant-to-merchant cases or particular contracting contexts in which both parties are merchants see *Goldberg, supra* note 11; *Jordan,*

prompted one writer to comment that "[i]f unconscionability is still in its formative stages, the doctrine is pre-embryonic with respect to merchant-to-merchant transactions."²¹ The purpose of this Article is to suggest an analytical approach to unconscionability problems that arise in contracts between merchants. The first part of this Article reviews the purposes and contours of the doctrine of unconscionability and describes forms of contracting behavior that courts have held to be unconscionable in consumer transactions. A summary of courts' treatment of unconscionability claims in contracts between merchants follows. Finally, this Article proposes standards that courts can apply to increase the consistency and fairness of results in future merchant-to-merchant cases.

I. THE DOCTRINE OF UNCONSCIONABILITY

A. *The Development of Unconscionability*

The doctrine of unconscionability is part of the general family of contract doctrines that is concerned with policing the reality of a party's consent and the social desirability of the resulting bargain. Long before the concept of unconscionability became widely used at law, courts created devices to curb abuses in the bargaining process, such as fraud and misrepresentation, duress, and undue influence. These abuses not only involved wrongful conduct, but they also negated the existence of the most fundamental element of a contract: consent. Courts also exercised the power to withhold enforcement of a contract when some public policy relating to the substance of the parties' contract outweighed the public interest in freedom of contract.²²

Classical contract law defined courts' roles in policing contracts relatively narrowly, however. Because of its emphasis on certainty and freedom to contract,²³ classical contract law refrained from overt consideration of the fairness of a contract unless one of the recognized abuses was present or unless a court found that the enforcement of the contract would violate public policy.²⁴ When the facts of a case failed to establish all of the elements of one of these abuses, courts normally enforced the contract, reciting their "optimistic creed"²⁵ that the contract represented the will of people who bargained with each other by choice and from positions of relative economic

Unconscionability at the Gas Station, 62 MINN. L. REV. 813 (1978); Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 217-18, 224-26 (1986); Note, *Unconscionability Redefined*, *supra* note 3; Note, *Unconscionable Business Contracts: A Doctrine Gone Awry*, 70 YALE L.J. 453 (1961) [hereinafter Note, *Unconscionable Business Contracts*].

21. Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 779 (1982).

22. E. FARNSWORTH, *supra* note 3, § 5.1, at 325-26.

23. At least one commentator disapproved of the view that "legal certainty and 'sound principles' of contract law should not be sacrificed to dictates of justice or social desirability." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943).

24. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982).

25. Kessler, *supra* note 23, at 630-31.

equality.²⁶

The rise of the standardized form contract exploded the presumptions of equal bargaining power and free will in contracting. Widespread contracting through standardized forms benefited enterprises and society as a whole by reducing the costs of production and distribution.²⁷ The form contract, however, created the possibility for increasingly powerful enterprises to allocate to the seller maximum advantage and minimum risk through the use of contracts drafted in complex, legalistic language that often obfuscated the contents of the documents.²⁸

Form contracts present opportunities for overreaching that make it unfair to presume that a person's signature on a contract indicates consent. Such contracts might give the appearance of mutual consent, but they totally lack agreement in any realistic sense of the word. As a practical matter, few people read form contracts.²⁹ Even if a person wants to read a form contract, he may not be afforded the time to read it. If he is permitted the time to read it, he may not have the education or business experience to be able to understand the language used in the contract or the likely legal effect of such language. If he understands the language and effect of the contract, he may not notice terms written in fine print or printed in unexpected places on the document.³⁰ Even if he reads and understands the contract perfectly, he may not have any ability to negotiate for its terms and may enter the contract because he has no alternative.

Under traditional contract doctrines, of course, a person was normally bound by what he signed, and his failure to read did not vitiate his consent.³¹ The duty to read eroded, however, as people were increasingly inundated with the written word.³² Moreover, the growing gulf of bargaining power between the typical buyer and the typical seller and the prevalence of terms standardized across entire industries created a situation in which classical contract law's presumption of free will became untenable.³³

The initial legal response to the standardized forms phenomenon was an attempt to avoid unfair results by using existing, technical devices such as

26. *Id.*

27. *Id.* at 631.

28. See *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 490, 186 Cal. Rptr. 114, 125 (1982) (length and obtuseness of most form contracts suggest that they are designed to dissuade buyer from reading them).

29. For a discussion of the realities of form contracting and the resulting changes in the duty to read see Murray, *supra* note 21, at 739.

30. See E. FARNSWORTH, *supra* note 3, § 4.26, at 294.

31. See RESTATEMENT OF CONTRACTS § 70 (1932).

32. One commentator has suggested that relying on print as a means of communicating and allocating risk is unconscionable. Ellinghaus, *supra* note 5, at 765.

33. Kessler, *supra* note 23, at 640.

Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.

interpreting ambiguous language against the drafter or striking a contract for lack of mutuality or failure of consideration.³⁴ This approach not only distorted contract precedents, it also exacerbated consent problems in form contracts by encouraging draftsmen to try again with even more detailed contract language.³⁵ In addition, the traditional policing doctrines of fraud, duress, and undue influence proved to be insufficiently flexible to apply to the types of overreaching made possible by form contracts.³⁶

The drafters of the sales article of the Code, critical of the way in which courts had manipulated technical devices to avoid unfair results,³⁷ presented the doctrine of unconscionability as a way of rectifying abuses of bargaining power in form contracts and in other contracts for the sale of goods.³⁸ The UCC provision specifically granted courts the power to determine whether contracts were unconscionable and to modify or withhold enforcement from such contracts.³⁹ The courts took several years to begin using the doctrine of unconscionability aggressively,⁴⁰ but the doctrine now has been litigated in literally hundreds of cases. The common law of a number of states has embraced,⁴¹ and the *Restatement (Second) of Contracts* has included, the power to rewrite or strike contracts for unconscionability.⁴²

B. *The Meaning of Unconscionability*

Neither the Code nor the *Restatement (Second) of Contracts* contains a definition of the term "unconscionable."⁴³ The drafters chose instead to provide the most general of guidance and to permit courts and commenta-

34. Spanogle, *supra* note 2, at 934-35; Note, *supra* note 2, at 1144.

35. Spanogle, *supra* note 2, at 934-35.

36. Fort, *supra* note 19, at 766-67. *But see* Hillman, *supra* note 8, at 17 (contending that almost all unconscionability cases involving bargaining misconduct can and should be decided under traditional legal doctrines).

37. *See* U.C.C. § 2-302 comment 1 (1977).

38. Fort, *supra* note 19, at 767; Note, *Unconscionability Redefined*, *supra* note 3, at 161-63; Note, *supra* note 2, at 1145. The language of the 1943 draft of the Code's unconscionability section was limited to unconscionable *form* contracts. This limitation was later abandoned, and § 2-302 became at least potentially applicable to individually drafted contracts. Leff, *supra* note 7, at 493. As a practical matter, the broadened scope of the section probably does not make much difference, because almost all of the unconscionability cases concern form contracts. Note, *Unconscionability Redefined*, *supra* note 3, at 163 n.17. One writer has estimated that 99% of modern contracts are form contracts. Murray, *supra* note 21, at 739.

39. U.C.C. § 2-302 (1977). This section provides as follows:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

40. *See* Harrington, *supra* note 3, at 205.

41. *See* sources cited *supra* note 5.

42. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

43. The lack of clearly defined elements has been seen variously as a virtue and a vice. Compare Note, *Contracts—Developing Concepts of Unconscionability*, 80 W. VA. L. REV. 87, 88-89 (1977) (virtue) with Leff, *supra* note 7, at 488-89 (vice).

tors to flesh out the concept more fully. Equity cases that employed the doctrine of unconscionability did not help to develop workable standards for the application of the doctrine because the principle was poorly defined in equity.⁴⁴

The comments to section 2-302 sketch at least a rough outline of the concept of unconscionability.⁴⁵ The comments indicate, for example, that unconscionability is not designed to disturb the allocation of risks because of superior bargaining power.⁴⁶ Thus, the mere existence of a disparity of bargaining power between the parties is insufficient for a finding of unconscionability.⁴⁷ The comments further state that the determination of unconscionability must take into account the general commercial background and the needs of the particular trade at issue.⁴⁸ Clearly, unconscionability is to be a fact-based determination; a clause that is unconscionable in one context might be permissible in another. The comments to section 2-302 also state that unconscionability exists when a contract is so one-sided⁴⁹ as to be unconscionable,⁵⁰ and that the principle behind unconscionability is to prevent unfair surprise and oppression.⁵¹

Unfair surprise and oppression describe the categories of contracting deficiencies that attract a finding of unconscionability. Both of these terms imply flawed consent. "Unfair surprise" indicates that some unexpected term has been sprung on a party unfairly,⁵² a state of affairs that negates the existence of knowing consent.⁵³ Unfair surprise is akin to deception in that it implies a situation in which a drafting party has concealed hard terms in fine print, under misleading headings, or in unexpected places in the contract.⁵⁴ In some cases, a drafting party may have to take affirmative steps to disclose hard terms to a buyer in order to avoid unfair surprise.⁵⁵

44. See Spanogle, *supra* note 2, at 937-38.

45. Professors White and Summers condemn the test for unconscionability stated in the comments to § 2-302 as useless. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 4-3, at 151 (2d ed. 1980).

46. U.C.C. § 2-302 comment 1 (1977).

47. See also RESTATEMENT (SECOND) OF CONTRACTS § 208 comment d (1979) ("A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.").

48. U.C.C. § 2-302 comment 1 (1977).

49. One-sidedness generally means overall imbalance in the parties' rights and duties. This imbalance suggests that the "whole pie" drafting style is an invitation to a finding of unconscionability. For a discussion of overall imbalance cases see Ellinghaus, *supra* note 5, at 777-86.

50. For a discussion of the point in the drafting history of § 2-302 in which unconscionability came to be "defined in terms of itself" see Leff, *supra* note 7, at 498-99.

51. U.C.C. § 2-302 comment 1 (1977).

52. One commentator refers to this type of unconscionability as a problem of unexpected terms. Murray, *supra* note 21, at 776.

53. *Id.*; see also Spanogle, *supra* note 2, at 943 (unfair surprise implies a form of deception).

54. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394, 400-01 (1980).

55. Courts impose this duty to disclose when some demonstrated impairment in the buyer's ability to read and understand the contract exists. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144, 148 (1971) (complaining party who had little education

The word "oppression"⁵⁶ indicates either a situation in which a contract term works great hardship on a party or one in which a stronger party is able to oppress a weaker one by imposing unfavorable terms on him. The gravamen of oppression is not that the weaker party did not know what he was signing, but that he had no realistic choice about the terms.⁵⁷ Oppression implies the absence of voluntary consent. Courts may find oppression when one party has exploited the other party's necessitous circumstances to drive too hard a bargain.⁵⁸ Oppression may exist in the classic contract of adhesion, in which one party dictates the terms of a contract on a take-it-or-leave-it basis.⁵⁹ Courts might also find oppression in high pressure tactics or in a bargaining situation fraught with haste or pressure.⁶⁰

One court described unconscionability as a "genus, of which there is more than one species."⁶¹ Most judges and commentators agree that an unconscionability determination involves the evaluation of two distinct but interrelated matters: how the parties arrived at the terms, and the justifiability of the terms themselves. The first aspect of unconscionability has to do with the issue of voluntary and knowing assent.⁶² This aspect, termed the procedural aspect of unconscionability, focuses on facts that relate to the bargaining, or nonbargaining, process.⁶³ Given its concern for reality of consent, the procedural aspect of unconscionability overlaps with the traditional contract doctrines regarding formation of a contract and those that police agreements for fraud, duress, and the like.⁶⁴

The second aspect of unconscionability concerns the fairness of the terms themselves. This aspect, which is often referred to as substantive unconscionability,⁶⁵ bears some similarity to the exercise of courts' traditional

presented with complex contract). For a discussion of the duty to disclose see Hillman, *supra* note 8, at 10-15.

56. One commentator has criticized the word "oppression" as being "perfectly ambiguous" because it can refer to either the effect of a contract or the process by which the contract was formed. Leff, *supra* note 7, at 499.

57. See Murray, *supra* note 21, at 777-78. The author suggests that the essence of this type of unconscionability is lack of choice. *Id.* at 777.

58. See the facts presented in *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966) (bankrupt had obligation to borrow from only one source, but that source retained power to refuse to lend). See Eisenberg, *supra* note 24, at 754-63. The author terms this kind of case a "distress" case and suggests that society's moral order may support the position that the treatment of a necessitous person as simply an economic object is wrong. *Id.* at 756. Taking advantage of financial distress to drive a hard bargain would not be duress under prevailing principles of economic duress, unless the financial distress were caused by one's own wrongful act. *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928 (7th Cir. 1983).

59. *E.g.* *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 925, 702 P.2d 503, 511, 216 Cal. Rptr. 345, 353 (1985); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 87 (1960).

60. *Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 491 A.2d 138, 144 (1985).

61. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 871 (E.D. Pa. 1966).

62. Murray, *supra* note 21, at 776-77.

63. Leff, *supra* note 7, at 489-508, 533-37.

64. See Ellinghaus, *supra* note 5, at 763-64; Hillman, *supra* note 8, at 7.

65. Leff, *supra* note 7, at 509-28, 537-41. The author's identification of the two dimensions of unconscionability has been cited by almost all subsequent writers in the field, as well as by some courts. See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486-88, 186 Cal. Rptr. 114,

power to withhold enforcement from contracts that violate public policy.⁶⁶ Delimiting the concept of substantive unconscionability is difficult because almost any term in a contract is at least potentially harsh.⁶⁷ Courts have found substantive unconscionability most frequently in various types of risk shifting or "remedy meddling" provisions that are commercially unreasonable under a given set of facts.⁶⁸ In some cases, courts have found excessive prices to be substantive unconscionability.⁶⁹

Procedural and substantive unconscionability usually go hand in hand. The concept of unfair surprise implies the coexistence of procedural and substantive unfairness.⁷⁰ A contract might present a term in fine print, for example, and not be unfairly surprising.⁷¹ If the parties expected the term in that type of contract, the term would not be surprising, and, if the term were necessary to protect the drafting party's legitimate interests, it would not be unfair. Oppression also connotes substantive as well as procedural unfairness. Disparity of bargaining power becomes oppressive only when one of the parties obtains an unfair term through its bargaining advantage.

In almost all cases in which courts have found unconscionability, elements of both procedural and substantive unfairness have existed.⁷² Courts require no set ratio of procedural to substantive unconscionability; they usually use a loose sliding scale.⁷³ A court might find unconscionable a contract with a fairly mild defect in the bargaining process if the terms agreed upon were extremely unreasonable. Similarly, a court can find unconscionable a contract procured through grossly unfair means or presenting a serious deficiency in voluntary consent even though the substantive advantage given to the other party is fairly mild. Rare cases exist, however, in which a court labels a contract unconscionable even when no defect in knowing or voluntary consent has occurred.⁷⁴

121-23 (1982); *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 409-11 (1980).

66. See Fort, *supra* note 19, at 771-78.

67. Leff, *supra* note 7, at 540.

68. J. WHITE & R. SUMMERS, *supra* note 45, § 4-6.

69. *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886, 889 (1964); *Toker v. Westerman*, 113 N.J. Super. 452, 274 A.2d 78, 80 (Dist. Ct. 1970); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967). One commentator maintains that all unconscionability is essentially a matter of price. Absent illegality, some price exists at which no term would be unconscionable. Note, *Unconscionable Business Contracts*, *supra* note 20, at 456.

70. Spanogle, *supra* note 2, at 944.

71. See *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1042 (Utah 1985); see also Spanogle, *supra* note 2, at 943-44 (example of fine print clause in security agreement that provided for creditor's right to repossess goods).

72. Spanogle, *supra* note 2, at 932.

73. Note, *supra* note 43, at 104, 111.

74. *E.g.*, *All-States Leasing Co. v. Top Hat Lounge*, 649 P.2d 1250, 1251 (Mont. 1982) (contract provisions waiving right to jury trial and right to counterclaim unconscionable as a matter of law); see Spanogle, *supra* note 2, at 948. Courts often consider the excessive price cases to be pure substantive unconscionability cases. See *supra* note 69.

II. UNCONSCIONABILITY BETWEEN MERCHANTS: THE CASE LAW

The cases involving unconscionability between merchants involve challenges to all types of contract clauses, ranging from risk allocation and remedy meddling provisions to arbitration clauses and termination of distributorship provisions. Few of the provisions challenged in these cases have been so overbearing that they have been termed unconscionable *per se*.⁷⁵ As is true in the cases dealing with unconscionability in consumer transactions, the major determination for a court to make is whether the provision was unconscionable in the particular setting involved.

The outcome of a merchant-to-merchant unconscionability case depends greatly on two factors: the complaining party's ability to represent his interests in the transaction, or bargaining capability,⁷⁶ and the amount of choice that he had regarding the terms of the contract and the party with whom he dealt. It is helpful to view the merchant cases along a continuum ranging from the cases in which both parties had high bargaining capability and opportunity to choose, to those in which the complaining party was demonstrably disadvantaged in its bargaining capability and had little or no opportunity to choose. The possibility of a finding of unconscionability diminishes as the complaining party's bargaining capability and the amount of real bargaining increase. In the middle of the continuum are cases in which people with high bargaining capability enter contracts that are essentially nonnegotiable. The decisions in this group are less predictable. At the other extreme of the continuum, in cases in which the complaining parties are deficient in their bargaining capability and have little opportunity to choose, findings of unconscionability are much more feasible.⁷⁷

A. *Capable Parties with Opportunity to Choose*

Those most likely to lose an unconscionability argument are those who actively bargained for a contract or who had the opportunity to bargain and were not disadvantaged in any significant way in the bargaining process. In *Bowlin's, Inc. v. Ramsey Oil Co.*,⁷⁸ for example, a contract between Bowlin's, a company operating ten retail outlets, and its gasoline supplier provided that Bowlin's waived any claim of a shortage in delivery not made within a

75. *But see* *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433, 440 (W. Va. 1976) (ten-day cancellation agreement available only to Ashland unconscionable on its face); *Trinkle v. Schumacher Co.*, 100 Wis. 2d 13, 301 N.W.2d 255, 259 (Ct. App. 1980) (contract term that provides neither a minimum nor an adequate remedy unconscionable).

76. The term "bargaining capability" means personal characteristics of the complaining party that enable it to represent its interests effectively. For example, education, business experience, understanding of legal matters, reading ability, and representation by counsel would be relevant to a determination of a party's bargaining capability. Bargaining capability relates to the person's ability to understand the terms offered by the other party and to articulate his own position and needs. Bargaining power, on the other hand, refers to a party's ability to effectuate changes in the terms that are offered.

77. Neat classifications are not always possible, however, because courts do not consistently provide relevant information about the parties or the bargaining process.

78. 99 N.M. 660, 662 P.2d 661 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983).

two-day period after that delivery. Bowlin's auditing department discovered that shortages in deliveries to one of its stations over a fifteen-month-period amounted to some \$70,000 worth of gasoline.

When Bowlin's sued to collect the money it had overpaid, the trial court held that the two-day notice provision was unconscionable.⁷⁹ The New Mexico Court of Appeals disagreed, stating that the contract was one between two "experienced and sophisticated business concerns."⁸⁰ The court emphasized that Bowlin's sold gasoline products supplied by a number of other companies, and that Bowlin's had not shown that it had been unable to find another supplier with whom it could have negotiated other terms.⁸¹ The fact that the executive vice president of Bowlin's was fully aware of the two-day provision, and that he understood what the provision meant further persuaded the court.⁸² In fact, Bowlin's management had established specific procedures for verifying deliveries so that it could report shortages within two days.⁸³ Bowlin's argued that the two-day notice provision was one-sided because it shifted the entire risk to the buyer if a claim of shortage were not made in two days, but the court rejected this argument because the short notice term served a commercially reasonable purpose.⁸⁴ Despite the fact that the two-day notice provision worked a significant hardship on the buyer, the facts failed to suggest any form of deficiency in the contracting process or in the contract itself.

It would be tempting to conclude that Bowlin's and other companies of equal or greater size lose their unconscionability claims because they are big companies. Certainly, corporate giants dealing with other corporate giants should assume that a deal, no matter how unfortunate its outcome, will not be held unconscionable.⁸⁵ This result, however, occurs primarily because the way large business concerns form contracts does not lend itself to a finding of unconscionability; the size of the company has little to do with the determination.

Skilled negotiators who have considerable business experience and detailed knowledge of the subject matter of the transaction are likely to have negotiated a contract between two large businesses. A large company will have ready access to counsel, which it will not hesitate to use. Thus, the bargaining capability of a big business is likely to be high. A large company is also likely to have maximum choice. The company would be likely to hammer out its deals through extensive actual bargaining in which each party has the time and opportunity to present its position. Such a party's ability to abort negotiations and to shop around for its needs is likely to

79. *Id.* at 662, 662 P.2d at 665.

80. *Id.* at 668, 662 P.2d at 669 (quoting the trial court's findings).

81. *Id.* at 666-67, 662 P.2d at 667-68.

82. *Id.* at 668, 662 P.2d at 669.

83. *Id.* at 669, 662 P.2d at 670.

84. *Id.* at 668, 662 P.2d at 668-69.

85. *Kerr-McGee Corp. v. Northern Utils., Inc.*, 673 F.2d 323, 329-30 (10th Cir.), *cert. denied*, 459 U.S. 989 (1982); *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572, 579 (D.D.C. 1974), *rev'd*, 572 F.2d 852 (D.C. Cir. 1975); *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520, 524-25 (S.D.N.Y. 1974).

deter bargaining abuses. Thus, the size of the complaining party's business is predictive of the outcome of an unconscionability claim, but only because large size implies high bargaining capability and choice.

High capability and choice can also occur in cases in which the complaining party is a smaller company, even when a significant disparity of size exists between the two parties to the contract. When the party claiming unconscionability is characterized as being sophisticated, knowledgeable, or experienced in commercial matters and that party actually had the opportunity to codetermine terms, courts are unlikely to find that the contract that party entered was unconscionable.⁸⁶ The essence of these cases is that the complaining party had both the ability to represent its interests effectively in the bargaining process⁸⁷ and a choice about terms or parties with whom to deal.⁸⁸ Another way of expressing this idea is that the facts presented in the high capability and choice cases virtually negate the existence of the forms of unconscionability that occur in other settings.

In some cases, however, courts' characterization of the parties as capable people who had the opportunity to choose is questionable. In *Smith v. Price's Creameries, Inc.*,⁸⁹ for example, the Smiths, a married couple, contracted to act as a wholesale distributor of the defendant's products. They paid \$72,000 to the prior distributor and borrowed \$26,000 for working capital. The contract between the Smiths and Price's provided for termination at will by either party upon thirty days' notice. It also contained an ancillary covenant not to compete that restricted the Smiths' right to compete for a period of two years. According to the Smiths, Price's representative told them that the distributorship would continue.

Six months after the Smiths took over the business, Price's gave notice to

86. See *Bernina Distribs., Inc. v. Bernina Sewing Machs. Co.*, 646 F.2d 434, 440 (10th Cir. 1981); *Gelderman & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 576 (8th Cir. 1975); *BGW Assocs. v. Valley Broadcasting Co.*, 532 F. Supp. 1112, 1114 (S.D.N.Y. 1982); *Phillips Mach. Co. v. LeBlond, Inc.*, 494 F. Supp. 318, 324 (N.D. Okla. 1980); *Amerifirst Fed. Sav. & Loan Ass'n v. Cohen*, 454 So. 2d 626, 627 (Fla. Dist. Ct. App. 1984); *Neal v. Lacob*, 31 Ill. App. 3d 137, 334 N.E.2d 435, 440 (1975); *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654, 657 (1973); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390, 393 (1970); *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1048 (Utah 1985).

87. Several courts have pointed out that counsel or other experienced negotiators represented the complaining party throughout the contract negotiation process. *Kerr-McGee Corp. v. Northern Utils., Inc.*, 673 F.2d 323, 330 (10th Cir. 1982); *Bernina Distribs., Inc. v. Bernina Sewing Machs. Co.*, 646 F.2d 434, 440 (10th Cir. 1981); *Computerized Radiological Servs. v. Syntax Corp.*, 595 F. Supp. 1495, 1510 (E.D.N.Y. 1984). In a few cases lawyers have wholly or partially owned the complaining parties. *BGW Assocs., Inc. v. Valley Broadcasting Co.*, 532 F. Supp. 1112, 1113 (S.D.N.Y. 1982); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390, 393 (1970).

88. See, e.g., *United States v. Bedford Assocs.*, 657 F.2d 1300, 1313 (2d Cir. 1981) (complaining party sophisticated in business matters and able to negotiate other changes in contract), *cert. denied*, 456 U.S. 914 (1982); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 420 (5th Cir. 1980) (contract product of extensive negotiation, no gross disproportion of bargaining power, and no lack of competition among sellers on warranties); *Hydraform Prods. Corp. v. American Steel & Aluminum Corp.*, 498 A.2d 339, 344 (N.H. 1985) (complaining party had access to competitors and had dealt with them before).

89. 98 N.M. 541, 650 P.2d 825 (1982).

terminate. The Smiths brought suit against Price's, alleging that the termination was wrongful. They asserted that the termination provision was unconscionable. The New Mexico Supreme Court rejected their argument on the grounds that the provision was clearly worded and the Smiths were aware of the provision, but did not attempt to renegotiate it.⁹⁰ The court stated that Mr. Smith's background and experience had given him a working knowledge of the subject matter of the contract.⁹¹ The court emphasized the fact that the Smiths were neither rushed into signing the contract nor deprived of the opportunity to examine it or have an attorney examine it.⁹² The court stated that even if the Smiths had believed Price's representation that their distributorship would continue, such a representation would not be fraud or misrepresentation because of the clear wording of the contract.⁹³ The court concluded that each party is presumed to know what he signs, and that it is not the province of a court to alter or amend contracts that parties freely enter.⁹⁴

This case has several troubling aspects. First, the court's characterization of the Smiths as parties who were capable of representing their interests in this transaction seems dubious. Mr. Smith's education and background indicate that he was intellectually capable of reading and understanding contracts, but whether he had the background and experience to understand what the termination clause meant in terms of the future of his considerable investment is unclear. Second, treating the Smiths' failure to attempt to negotiate as the equivalent of choice seems incorrect. The Smiths' failure to try to negotiate does not mean that the contract was negotiable. The Smiths' failure to get legal counsel and to negotiate seems more likely to indicate that the Smiths were unsophisticated businesspeople who were over-awed by the printed contract or knew they could not change it, rather than that they exercised some form of choice.

B. Capable Parties with Little Opportunity to Choose

The fact that a party is capable of representing his interests effectively bears on the issue of knowing consent. A commercial party with a decent education, sophisticated business knowledge, and extensive contracting experience is capable of reading a contract, understanding or inquiring into the meaning of the words used, and appreciating the legal effect of the contract. Thus, the fact that a party is highly capable should probably preclude the unfair surprise species of unconscionability. The fact that a party is highly capable does not, however, mean that he has choice. A party may be perfectly able to read and understand a contract without having an opportunity to codetermine terms. Thus, although the fact that the parties are highly

90. *Id.* at 544, 650 P.2d at 828.

91. *Id.* Mr. Smith was a 28-year-old college educated man who had previous work experience as an employee of a finance company, as an insurance salesman, and as a police officer. The opinion provides no details about Mrs. Smith.

92. *Id.*

93. *Id.*

94. *Id.* at 545, 650 P.2d at 829.

capable would tend to negate the unfair surprise species of unconscionability,⁹⁵ the possibility for the oppression species of unconscionability should still exist. The case law indicates, however, a great deal of variation in the form of unconscionability that courts are willing to consider in this group of cases.

In one line of cases the courts appear to treat clearly stated and understood terms as being dispositive on the issue of unconscionability. In *Zapatha v. Dairy Mart, Inc.*,⁹⁶ another franchise termination case, the plaintiff was a high school graduate who had one year of college and who had been recently discharged from a managerial job. When Dairy Mart presented the contract to him, its representative read the contract to him and advised him to take it to an attorney, but also informed him that the contract was nonnegotiable. When Dairy Mart gave notice to terminate the plaintiff's franchise pursuant to the contract, Zapatha brought suit, claiming that the termination provision was unconscionable.

The Supreme Court of Massachusetts upheld the contract primarily on the ground that no unfair surprise existed.⁹⁷ The court emphasized that the contract was not in fine print, that the representative pointed out the termination clause to Zapatha, and that Zapatha had the opportunity to have the contract reviewed by an attorney.⁹⁸ The court stated its belief that a person with Zapatha's business experience should not have been unfairly surprised.⁹⁹ The court further concluded that the contract was not oppressive because Dairy Mart was obligated to repurchase Zapatha's equipment and inventory upon termination.¹⁰⁰ The plaintiff had not shown, according to the court, that the termination clause was not reasonably related to Dairy Mart's needs.¹⁰¹

The holding in *Zapatha* and other cases that follow a similar approach¹⁰²

95. *But see* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975). In this case the court held that the owner of a fertilizer plant was unfairly surprised by an unconscionable insurance policy. The court did not recite any facts regarding the insured's sophistication in insurance matters, so whether this is a capable party case or an unsophisticated party case is unclear. Insurance contracts might be unique in this regard, because few people read and understand insurance policies.

96. 381 Mass. 284, 408 N.E.2d 1370 (1980).

97. *Id.* at 293, 408 N.E.2d at 1376-77.

98. *Id.* at 294, 408 N.E.2d at 1377.

99. *Id.*

100. *Id.* at 295, 408 N.E.2d at 1377. This court apparently interpreted oppressive to refer to harsh results rather than to nonbargaining.

101. *Id.* The court's allocation of the burden of proof seems curious. Although the court in *Zapatha* did not find any procedural unconscionability, the burden of proving commercial reasonableness of terms should be allocated to the party who seeks to enforce the term in a case in which procedural unconscionability existed. This party has the best information about his own commercial needs. *See also* Geldermann & Co. v. Lane Processing, Inc., 527 F.2d 571, 576 (8th Cir. 1975) (party seeking to uphold term must show provision bears some reasonable relationship to risks and needs of business).

102. *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982); *Smith v. Central Soya of Athens, Inc.*, 604 F. Supp. 518, 527 (E.D.N.C. 1985); *Blalock Mach. & Equip. Co. v. Iowa Mfg. Co.*, 576 F. Supp. 774, 779 (N.D. Ga. 1983); *RJM Sales & Mktg., Inc. v. Banfi Prods. Corp.*, 546 F. Supp. 1368, 1375 (D. Minn. 1982); *Johnson v. John Deere Co.*, 306 N.W.2d 231, 236-38 (S.D. 1981).

disregards the possibility that an experienced party presented with a non-negotiable contract can be victimized by lack of choice. These cases appear to take the position that lack of choice short of economic duress should not be a ground for a finding of unconscionability.¹⁰³ This approach permits a party to insulate its contract from judicial interference by drafting it in extremely clear language and presenting it in a superconscionable manner.¹⁰⁴

Not all of the cases in the high capability, low choice category ignore or reject the possibility of oppression-type unconscionability, however. In *Pittsfield Weaving Co. v. Grove Textiles, Inc.*¹⁰⁵ the plaintiff, who was in the weaving business, bought yarn from the defendant. The contract contained an arbitration clause and provided for a limited number of days in which the plaintiff could make a claim for obvious or latent defects. The yarn proved to be defective, and the plaintiff filed suit for breach of warranty. The defendant moved to dismiss pursuant to the arbitration clause.

In finding the contract to be unconscionable, the New Hampshire Supreme Court emphasized the fact that the arbitration clause was both standard in the industry and nonnegotiable.¹⁰⁶ Goods would not be shipped without the contract. Pittsfield Weaving, in fact, had tried to negotiate against the arbitration clause with other sellers, but had had no success.¹⁰⁷ Nothing in the opinion suggests any procedural unconscionability of the unfair surprise variety.

This case clearly demonstrates that under some facts courts will find a contract unconscionable because of oppression or lack of choice, even when a knowledgeable party understood the terms at the time of contracting.¹⁰⁸ Significantly, the notice of defect clause in the *Pittsfield Weaving* contract worked an extreme hardship on the buyer and may have shifted more risk to the buyer than was needed to protect the seller's interests.¹⁰⁹ This fact indicates that among merchants in the high capability, little choice category, a significant substantive advantage that the drafting party arrogates can tip the balance toward unconscionability.¹¹⁰

A few cases exist in which courts have found contracts between two commercial parties to be unconscionable without any discussion of the existence

103. *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982); *Johnson v. John Deere Co.*, 306 N.W.2d 231, 236-38 (S.D. 1981).

104. For a discussion of drafting techniques that avoid procedural unconscionability see Note, *Unconscionability Redefined*, *supra* note 3, at 184-88.

105. 121 N.H. 344, 430 A.2d 638 (1981).

106. *Id.* at 348, 430 A.2d at 640.

107. *Id.*

108. *Accord Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 824, 623 P.2d 165, 176, 171 Cal. Rptr. 604, 615 (1981) (en banc); *Allen v. Michigan Bell Tel. Co.*, 18 Mich. App. 632, 171 N.W.2d 689, 692 (1969).

109. The buyer would not discover some latent defects until after processing, in which case the buyer would have waived its rights to damages under the short notice clause. *Pittsfield Weaving*, 121 N.H. at 347, 430 A.2d at 640.

110. *Accord Fairfield Lease Corp. v. Umberto*, 7 U.C.C. Rep. Serv. (Callaghan) 1181 (N.Y. Civ. Ct. 1970).

of procedural unconscionability.¹¹¹ In *Trinkle v. Schumacher Co.*¹¹² the plaintiff, who was in the drapery business, ordered fabric from the defendant. The invoice delivered to the buyer stated conspicuously that the seller would allow no claims after the buyer cut the goods. After the fabric was cut the buyer discovered a defect that he could not have discovered before the fabric was processed. The buyer brought suit for breach of warranty.

The Wisconsin Court of Appeals concluded that the contract was unconscionable despite the fact that both parties were commercially experienced and had previously engaged in occasional business dealings with each other.¹¹³ The court acknowledged that unconscionability rarely exists in commercial settings that involve equal bargaining power.¹¹⁴ In this instance, however, the fact that the clause deprived the buyer of all remedies, even though the warranty of fitness for a particular purpose clearly had been breached, convinced the court that unconscionability existed.¹¹⁵ The clause operated to shift the risk of latent defects to the buyer; such a shift apparently was too much to impose on even a sophisticated buyer in the absence of real bargaining and agreement.

C. *Unsophisticated Parties with Little Opportunity to Choose*

At the extreme of the continuum of merchant cases are those cases involving relatively unsophisticated businesspersons dealing in a context in which they have little or no ability to select among suppliers or little or no ability to codetermine terms of an agreement. Thinking of such businesses as "merchants in name only"¹¹⁶ is tempting, but while they are guppies in the ocean of commerce, those businesspersons are not necessarily inexperienced. They may be extremely experienced in their fields, but totally lacking in experience and sophistication in the matters involved in a particular transaction,¹¹⁷ or they may be operating under some real handicap such as illiteracy¹¹⁸ or lack of education.¹¹⁹

Most of the cases in this group involve the unfair surprise form of uncon-

111. See *Ashland Oil, Inc. v. Donahue*, 195 W. Va. 463, 223 S.E.2d 433, 438-40 (1976); *Trinkle v. Schumacher Co.*, 100 Wis. 2d 13, 301 N.W.2d 255, 258-59 (Ct. App. 1980). Some liberties have been taken in the classification of these cases as high capability or low choice cases, since the courts did not ground their opinions on either basis. The cases have been labeled as high capability cases because the cases did not indicate that the complaining parties were particularly deficient in their bargaining capabilities. The low choice label was applied because the facts of the cases indicated that the contract terms were likely imposed rather than negotiated.

112. 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980).

113. *Id.* at 18-19, 301 N.W.2d at 256.

114. *Id.* at 19, 301 N.W.2d at 259.

115. *Id.*

116. Murray, *supra* note 21, at 778; see *Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 491 A.2d 138, 146 n.5 (1985). "Modern courts recognize that the signer may be theoretically and technically a merchant but functionally a consumer in terms of education, business acumen, and experience." *Id.*

117. See, e.g., *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489-90, 186 Cal. Rptr. 114, 124 (1982).

118. See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976).

119. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144, 145-46 (1971).

scionability. This unconscionability sometimes is found in confusing contract language or format.¹²⁰ In other cases the bargaining process is flawed by more overt instances of procedural unfairness. The case of *Industrialease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*,¹²¹ for example, presented procedural flaws that had the flavor of fraud, duress, and undue influence, but fell short of all of those doctrines.

In *Industrialease* the defendant R.M.E. was a small corporation, wholly owned by Max and Irene Gross, that owned and operated a picnic ground. R.M.E. contracted to lease equipment from the plaintiff for nonpollutant burning. Initially, Gross signed a lease agreement that contained an express warranty. After he had spent money installing improvements on his property that were needed for the use of the leased equipment, the plaintiff presented him with a second contract, saying that the lease he had signed before was no good and that new papers had to be signed so that the deal could go forward. The plaintiff also told Gross that the new papers were like the other papers he had signed, except that a different company's name appeared at the top.¹²² Gross signed the second lease, apparently without reading it. The second lease was substantially different from the first, containing, among other different terms, an unqualified disclaimer of warranties. The equipment proved to be defective, and R.M.E. stopped making rental payments. The plaintiff sued R.M.E. for the balance of rent payments due under the lease, almost \$18,000, and R.M.E. defended on the ground that the plaintiff had breached its warranty.

According to the court, the case contained elements of both procedural and substantive unconscionability.¹²³ The court found that the disclaimer should not be enforced because the contracting process was tainted by a pervasive atmosphere of haste and pressure.¹²⁴ R.M.E., which had depended heavily on the plaintiff to design and build equipment for it, was not informed until the beginning of its business season that it had to execute a new contract to ensure delivery of the needed product.¹²⁵ The substantive unfairness consisted of the one-sidedness that would have resulted if R.M.E. had to pay all the lease payments for equipment that did not work at all.¹²⁶

Several other cases have presented a combination of unfair surprise and

120. See, e.g., *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 411 (1980); *Jutta's Inc. v. Fireco Equip. Co.*, 150 N.J. Super. 301, 375 A.2d 687, 690-91 (Super. Ct. App. Div. 1977); cf. *Capital Assocs., Inc. v. Hudgens*, 455 So. 2d 651, 654 (Fla. Dist. Ct. App. 1984) (fine print, term on reverse side, defendant an uncounseled layman; case remanded for hearing to determine commercial setting, purpose, and effect). The classification of the *Frank's* and *Jutta's* cases is somewhat arbitrary, because the courts provided no details about the parties. The fact pattern indicated that the parties were uncounseled and inexperienced in the transactions in question.

121. 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977).

122. *Id.* at 484, 396 N.Y.S.2d at 428.

123. *Id.* at 489, 396 N.Y.S.2d at 431.

124. *Id.*, 396 N.Y.S.2d at 432.

125. *Id.* at 490, 396 N.Y.S.2d at 432.

126. *Id.* The court admitted considering facts occurring after the contract formation in making this determination. *Id.*

oppression. In *Hanson v. Funk Seeds International*¹²⁷ a farmer was permitted to escape limited warranty and limitation of remedy clauses, which were printed on a delivery receipt and on bags of seed the farmer had purchased.¹²⁸ Emphasizing the one-sidedness of leaving the buyer without a remedy, the court noted that the plaintiff, like most farmers, was not in a position to bargain for favorable contract terms, nor to test the seed.¹²⁹

Unconscionable oppression, as in a contract of adhesion, was present in *Rozeboom v. Northwestern Bell Telephone Co.*,¹³⁰ one of the host of cases in which parties have challenged exculpatory clauses and limitation of remedy clauses contained in Yellow Pages advertising contracts.¹³¹ Rozeboom, the sole proprietor of an electrical contracting business that he operated out of his home, contracted for an advertisement in the Yellow Pages. The contract provided that the telephone company's liability for any errors in listing or omitting advertisements could be limited to the cost of the advertisement. Rozeboom's ad was omitted from the directory, and he sued for \$25,000 of business losses that allegedly resulted from this omission. The court found the contract unconscionable because Rozeboom, an individual dealing with a monopoly, had no ability to bargain for terms.¹³² The deficiency in the contract was not that it was a product of unequal bargaining power, but that the defendant had used its monopoly status to impose a contract that left Rozeboom no remedy for the breach.¹³³

One interesting line of unsophisticated merchant cases imposes a duty to disclose hard terms to commercial parties who are disadvantaged in the bargaining process. The first case to articulate this duty was *Weaver v. American Oil Co.*,¹³⁴ a case in which a complicated form contract containing a hold-harmless clause was held unconscionable because it was presented

127. 373 N.W.2d 30 (S.D. 1985).

128. Some conflict about whether farmers are merchants exists among cases. Compare *Gray v. Kirkland*, 550 S.W.2d 410, 412 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (farmer selling his own crops is a merchant) with *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555, 556-57 (1965) (farmer selling his own crops is not a merchant). If the UCC standard in comment 1 to § 2-104 of a "professional in business" rather than a "casual seller" is used, a farmer who regularly sells his own crops or farm products would seem to be a merchant for purposes of evaluating the unconscionability of his contracts. See 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-104:37 (3d ed. 1981). A reviewing court, however, must consider all the facts that relate to a particular party's bargaining capability and choice, and must not reason by classification.

129. 373 N.W.2d at 35.

130. 358 N.W.2d 241 (S.D. 1984).

131. Courts have decided almost all of the cases in favor of the telephone companies. For an exhaustive list of cases see the authorities cited in *Rozeboom*, 358 N.W.2d at 247-48. *Contra Allen v. Michigan Bell Tel. Co.*, 18 Mich. App. 632, 171 N.W.2d 689 (1969); *Discount Fabric House, Inc. v. Wisconsin Tel. Co.*, 111 Wis. 2d 587, 345 N.W.2d 417 (1984); cf. *Albuquerque Tire Co. v. Mountain States Tel. & Tel. Co.*, 102 N.M. 445, 697 P.2d 128 (1985) (analyzing contract as a contract of adhesion, but affirming summary judgment against customer because customer did not prove inability to negotiate for removal of offending clause).

132. 358 N.W.2d at 245.

133. *Id.* at 245-46. Contracts presented on a take-it-or-leave-it basis are not necessarily unconscionable. Courts will not hold a commercially reasonable term, that is justified by some legitimate need of a party, unconscionable even if bargaining on that point was not possible. See *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 198 N.W.2d 57, 61 (1972).

134. 257 Ind. 458, 276 N.E.2d 144 (1971).

without explanation to a high school dropout who depended on the continuation of the business relationship for his living.¹³⁵ More recently, *Johnson v. Mobil Oil Corp.*,¹³⁶ a case in which the complaining party was illiterate, expressed the idea that a person seeking to enforce a harsh contract term against an "uncounseled layman" must take affirmative steps to explain the term.¹³⁷ Despite the fact that Mobil did not know of Johnson's illiteracy at the time of contracting, and Johnson alleged no unfair bargaining tactics, the court held that a consequential damages exclusion in the contract was unconscionable because Mobil had not obtained Johnson's voluntary, knowing consent.¹³⁸

Three recent cases have extended this duty to disclose to commercial parties who are not inherently disadvantaged in their bargaining capability, but who are what Professor Melvin Eisenberg might call "transactionally incapacitated."¹³⁹ Transactionally incapacitated means that the party has sufficient education, sophistication, and experience to represent himself in ordinary transactions, but not in the particular transaction in question.¹⁴⁰ All three of these cases involved farmers. In *Martin v. Joseph Harris Co.*¹⁴¹ the plaintiffs were commercial farmers who challenged a disclaimer of warranties in their purchase of cabbage seed. The plaintiff in *A & M Produce Co. v. FMC Corp.*¹⁴² was a farming company owned by a lifelong farmer who had no previous experience growing tomatoes commercially. In *A & M Produce* the plaintiff challenged the disclaimer of warranty and disclaimer of consequential damages contained in a form contract for the purchase of tomato-growing equipment from the defendant. In both cases the courts emphasized the disparity in the buyers' and sellers' economic strengths, the buyers' lack of experience and choice in the transactions, the harshness of the offending terms, and the inclusion of the offending provisions in form contracts.¹⁴³ Both courts concluded that the sellers had the obligation to show that the buyers had knowledge of the term.¹⁴⁴

The third case presented some significant differences. In *Langemeier v.*

135. 276 N.E.2d at 148.

136. 415 F. Supp. 264 (E.D. Mich. 1976).

137. *Id.* at 269.

138. *Id.* In contracts that are basically nonnegotiable, the value of disclosure of terms is questionable. If Mobil had read and explained the contract to Johnson, but refused to make changes in the form, would the contract be enforceable, or merely unconscionable on a different ground?

139. Eisenberg, *supra* note 24, at 763-73.

140. *Id.*

141. 767 F.2d 296 (6th Cir. 1985).

142. 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982). See generally Note, *Unconscionability Redefined*, *supra* note 3 (analyzes *A & M*).

143. *Martin*, 767 F.2d at 300-31; *A & M*, 135 Cal. App. 3d at 490-93, 186 Cal. Rptr. at 124-26.

144. *Martin*, 767 F.2d at 301; *A & M*, 135 Cal. App. 3d at 490-93, 186 Cal. Rptr. at 124-26; cf. *Mallory v. Conida Warehouses, Inc.*, 134 Mich. App. 28, 350 N.W.2d 825 (1984) (growers buying light red kidney beans were experienced in buying, but not with legal terms of law of warranty; disclaimer and limitation of remedy ineffective because not conspicuous; trial court's finding of unconscionability not clearly erroneous).

*National Oats Co.*¹⁴⁵ an agronomist and agricultural financier who was a novice at growing popcorn entered into a contract to buy popcorn seed from and sell the popcorn to National Oats. Included in the contract was a clause that permitted National Oats to reject popcorn that contained defects, including damage due to freezing weather. National Oats represented to Langemeier that the popcorn would reach maturity in ninety-nine days. National Oats, however, did not volunteer the information that the popcorn needed an additional twenty days beyond maturity to field-dry. With National Oats's approval, Langemeier planted the crop in late May. Freezing weather in September and October badly damaged the crop. National Oats rejected the crop, and Langemeier sued for damages.

The Court of Appeals for the Eighth Circuit upheld the trial court's ruling that the contract was unconscionable because National Oats' defective disclosure concerning the growing time unfairly distorted the bargaining transaction.¹⁴⁶ This case represents a significant expansion of the *Weaver-Johnson* duty to disclose, because it imposes a duty on a contracting party to disclose not only the terms contained in the contract, but also facts about the nature of the complaining party's business venture that one would expect the complaining party to know.¹⁴⁷

III. PROPOSED FRAMEWORK FOR EVALUATING UNCONSCIONABILITY CLAIMS IN CONTRACTS BETWEEN MERCHANTS

A. *Consideration of Policies*

A good starting point for formulating a sensible approach to unconscionability problems occurring between merchants is an examination of the countervailing policies that exist in these cases. The enforcement of private bargains is normally in the public interest. Reliable enforcement of private agreements is important to the smooth functioning of the economy because it permits people to plan effectively for the future and encourages them to extend credit to others.¹⁴⁸ Enforcement also facilitates the peace-keeping function of the law by discouraging people from resorting to violent self-help to remedy the breach of a contract.¹⁴⁹ Any contract avoidance device, be it traditional or modern, creates some dissonance with these policies. Nevertheless, courts will refuse to enforce private agreements in some instances. Courts refuse enforcement of private agreements either because the way in which the agreement was reached casts serious doubt on the existence of

145. 775 F.2d 975 (8th Cir. 1985).

146. *Id.* at 976.

147. The case contained no allegation that National Oats knew that Langemeier was ignorant of the 20-day drying down period. The person Langemeier hired to farm the popcorn was experienced in growing popcorn. In addition, evidence showed that, based on a 50-year average, Langemeier's planting date was early enough to permit the crop to grow and mature before harvest except for the unanticipated bad weather. *Id.* at 978 (Fagg, J., dissenting).

148. Eisenberg, *supra* note 24, at 744-46; see also E. FARNSWORTH, *supra* note 3, § 5.1, at 325.

149. See Eisenberg, *supra* note 24, at 744.

voluntary consent or because the contracting process or the contract itself violates other important social commitments.

In the case of unconscionability, both substantive and administrative reasons justify interference with private contracts. The substantive justification for interference is to ensure that contracts are the products of mutual consent rather than of subtle and varied forms of unfairness made possible by widespread form contracting and disparity of bargaining power. The administrative justification is that permitting courts to evaluate the fairness of contracts directly discourages them from twisting other doctrines to avoid unfairness.¹⁵⁰

In merchant-to-merchant transactions the importance of reliable enforcement of contracts, or certainty, and predictability of contract law are heightened.¹⁵¹ Merchant-to-merchant contracts are likely to have economic implications for others besides the parties to the contracts. Employees, customers further down the distributional chain, consumers, and shareholders, for example, could all suffer indirect harm from an unremedied breach of contract. Contracts between merchants are likely to involve more money than typical consumer transactions, so that contracts breached in such a context are more likely to result in litigation, implicating judicial resources. The fairness rationales underlying the doctrine of unconscionability, however, apply with equal force to at least some, if not all, merchant-to-merchant transactions. A principled application of unconscionability must strike a balance between the need for fairness and the need for certainty.

B. Standards for Applying Unconscionability to Merchants

The problem with applying unconscionability in merchant-to-merchant transactions is the belief that the optimistic assumptions of classical contract law are accurate in contracts between merchants: that in the merchant-to-merchant contract experienced, knowledgeable parties deal on an equal basis, with each party having the ability to codetermine contract terms and to shop around for more suitable deals. If all merchant-to-merchant transactions really fitted this model, the policies that support certainty and predictability would be overwhelming. The application of unconscionability would strike at the heart of freedom of contract in an unprincipled perversion of the purposes of the doctrine. As one court put it, unconscionability was not designed to "relieve an experienced merchant of the misfortune occasioned by his own poor business practices."¹⁵²

Not to be overlooked, however, is that business experience and knowledge varies as much among merchants as among consumers. Certainly the alarming rate at which small businesses fail rebuts the presumption that all busi-

150. See *supra* notes 34-37 and accompanying text.

151. Murray, *supra* note 21, at 778-79; see *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486-87, 186 Cal. Rptr. 114, 122 (1982).

152. *Argo Welded Prods., Inc. v. J.T. Ryerson Steel & Sons, Inc.*, 528 F. Supp. 583, 593 (E.D. Pa. 1981).

nesspeople are knowledgeable, competent, and experienced.¹⁵³ In addition, while form contracting may not be as nearly universal among merchants as it is in consumer transactions, it is still prevalent in the business world. Form contracts can create the very same assent and choice problems among merchants as they create among consumers. To expect that all business people read form contracts any more frequently or understand them any better than consumers do is unrealistic.¹⁵⁴ Equally unrealistic is to expect that a businessperson will be represented by counsel on every contract he signs. Unconscionability should, then, be available to some merchants in some bargaining situations.

A review of the case law indicates that courts are aware that unconscionability should not be used to shield a capable party who has made a conscious gamble from risks he assumed.¹⁵⁵ In cases in which capable parties have actually bargained or had the opportunity to bargain, courts should not intervene. One caveat, however, is that courts should use care in characterizing a party as capable of representing his interests in a bargaining situation. Courts should not presume that all commercial parties possess this ability.

In cases involving capable commercial parties the unfair surprise form of unconscionability should not be recognized. The policy that favors certainty in contracts between merchants should justify the imposition of the duty to read on commercially sophisticated parties. A determination of whether a party is capable should be based on facts such as the complaining party's education, opportunity for representation by counsel, familiarity and prior experience with the type of transaction at hand, and commercial experience.

In cases involving capable parties presented with nonnegotiable contracts, however, a finding of unconscionability in the form of oppression should be at least a possibility. The law cannot reasonably presume that every term, or even every contract, will be negotiable. If every contract had to be negotiable, business enterprises would lose the benefits that form contracts provide.¹⁵⁶ Nonbargaining has significance only insofar as it permits a party to gain an unfair, that is, commercially unreasonable, end.

The fact that a contract, or a term in a contract, is nonnegotiable should not normally militate for a finding of unconscionability. A commercial party who has been offered some opportunity, as opposed to a necessity, on a take-it-or-leave-it basis presumably calculates that accepting the offer on the offeror's terms is more advantageous than foregoing the deal. Thus, the accepting party has some degree of choice. A different situation exists, however, when a party is in distress or is dealing with a monopoly or oligopoly regarding some goods or service that it must have.¹⁵⁷ Even then, a finding of

153. See Note, *Unconscionable Business Contracts*, *supra* note 20, at 458.

154. See Murray, *supra* note 21, at 778.

155. See *supra* notes 78-94 and accompanying text.

156. See *supra* note 27 and accompanying text.

157. For discussion of distress as a circumstance under which the normal bargain theory is not justified see Eisenberg, *supra* note 24, at 754-63.

oppression depends on the court's determination that the clause or contract in question was not justified by the risks undertaken by the drafting party.

Courts should apply a somewhat looser standard to commercial parties who are demonstrably disadvantaged in their bargaining capability and who are given little practical ability to codetermine terms. Courts should look for facts that would indicate that the complaining party was a "sheep keeping company with wolves."¹⁵⁸ Facts such as lack of education, lack of business experience, lack of contracting experience in transactions of similar magnitude, and dependancy on the drafting party would be relevant to show that a party was unsophisticated. In this group of cases assumptions about a commercial party's ability to understand and negotiate for terms fall apart. Unfair surprise should be as much a possibility for an unsophisticated commercial party as it is for a consumer. The unsophisticated commercial party is likely to be an uncounseled layman who probably has no greater experience with the transaction at hand than does a typical consumer, but who is usually playing for much higher stakes.

One of the most difficult questions surrounding unconscionability is whether superconscionability will insulate a contract from judicial interference. If a drafting party takes affirmative steps to explain a contract verbally and the complaining party evidences understanding and consent, can a clause in the contract be unconscionable? The answer depends on whether unconscionability is only about notifying the complaining party of "the sad state of his rights . . . at the outset."¹⁵⁹ Courts apparently want to be able to evaluate the fairness of a bargain apart from questions of consent.¹⁶⁰ Thus, permitting the courts to do so would prevent the distortion of other doctrines. Furthermore, a term may logically be unconscionable because of oppression or gross substantive unfairness even though the complaining party has been fully informed of the terms of the contract. Superconscionability, therefore, should insulate the contract only from a finding of unconscionability of the unfair surprise variety.¹⁶¹

C. *Increasing the Predictability of Unconscionability Decisions*

Given the importance of predictability in commercial transactions, courts must do what they can to clarify the grounds for the decisions they reach in unconscionability cases between merchants. Unconscionability is not a highly predictable doctrine even with the fullest exposition of the facts of a case. A review of the merchant cases indicates that courts are less likely to explain themselves in merchant unconscionability cases than in consumer cases. When courts fail to provide relevant details that bear on the parties' capabilities and the type of bargaining that occurred in the contract, however, the precedential value of a case is difficult to evaluate. In a case between two large companies that had negotiated extensively for a contract, for

158. *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 308, 263 A.2d 390, 393 (1970).

159. *J. WHITE & R. SUMMERS*, *supra* note 45, § 4-7, at 165-66.

160. *See Spanogle*, *supra* note 2, at 954-55.

161. *See Murray*, *supra* note 21, at 777.

example, a court's exposition of the relevant facts and its explanation that it rejected a claim of unconscionability because the parties were sophisticated businesspeople who actually negotiated for the contract would promote predictability. Bare citations of the presumption that unconscionability will not apply in commercial settings or of other cases previously upholding similar clauses are not very informative.¹⁶²

Courts would also further predictability by analyzing a case according to the doctrine that performs the desired policing function, but that yields the most predictable results.¹⁶³ If a case can be analyzed under common law doctrines of offer and acceptance, for example, the court's treatment of the case as an offer and acceptance problem is preferable to treatment of the case as an unconscionability problem.¹⁶⁴

IV. CONCLUSION

Although consumers have been the primary beneficiaries of the doctrine of unconscionability, the case law reveals an increasing tendency to recognize that commercial parties can be victimized by the same types of bargaining unfairness that stimulated the rebirth and expansion of unconscionability. Indeed, the authors of a major treatise on commercial law comment that most of the recent developments of interest in the law of unconscionability have centered around commercial parties.¹⁶⁵ The danger is that courts will withhold the doctrine from deserving commercial parties or apply the doctrine in an unprincipled way to relieve capable merchants from the hard effects of contracts for which they bargained. A principled application of unconscionability must differentiate between the situation in which capable parties bargain for a term and the situation in which an unfair term is imposed on an unsophisticated commercial party.

162. *Compare Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1209-10 (7th Cir. 1985) (only stated that district court upheld termination clause and cited a prior 7th Cir. case upholding termination clause) with *Gelderman & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 575-76 (8th Cir. 1975) (full exposition of facts concerning bargaining capability and bargaining process).

163. For an argument that courts can and should use common law formation, policing, and disclosure devices to resolve most of the cases of procedural abuse that are today addressed under the rubric of unconscionability see Hillman, *supra* note 8, at 19-23.

164. *Id.* The court in *Hanson v. Funk Seeds Int'l*, 373 N.W.2d 30 (S.D. 1985), for example, could have resolved the case without resort to unconscionability by using common law formation doctrines.

165. J. WHITE & R. SUMMERS, *supra* note 45, § 4-2, at 149-50.